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WHISTLEBLOWER RETALIATION CLAIMS

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2021 Annual SEC Whistleblower Program Report: The Numbers

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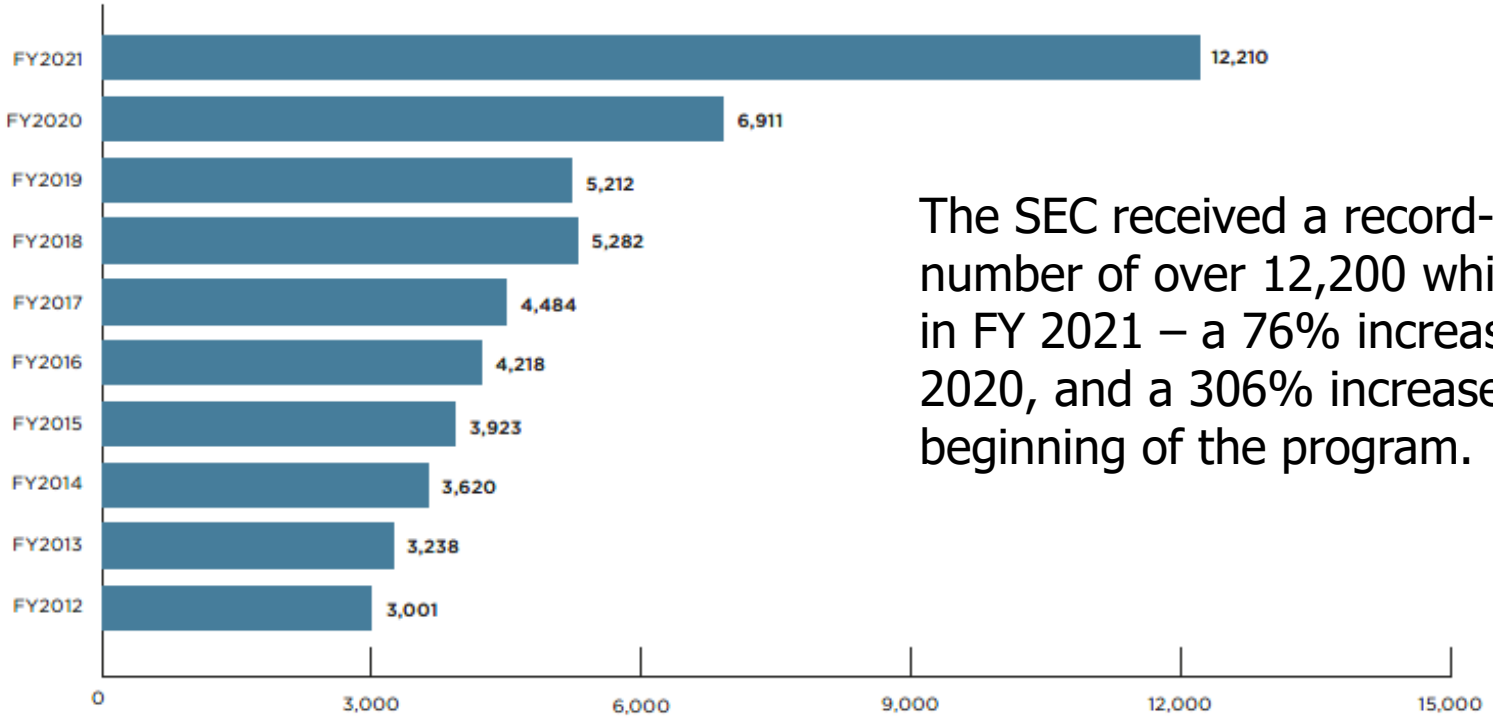
2021 Annual Whistleblower Program Report: Record-Breaking Number of Tips Received



The SEC received a record-breaking number of over 12,200 whistleblower tips in FY 2021 – a 76% increase from FY 2020, and a 306% increase since the beginning of the program.

2021 Annual SEC Whistleblower Program Report: Maturation of the Program

- Since issuing its first award in 2012 through the end of FY 2021, the SEC has awarded approximately $1.1 billion to 214 individuals.
- SEC enforcement actions from whistleblower tips have resulted in over $5 billion in total monetary sanctions, including more than $3.1 billion in disgorgement.
- Streamlining:
  - The SEC's Office of the Whistleblower processed 354 claims to Preliminary Determination or Preliminary Summary Disposition in FY 2021.
  - The Commission issued Final Orders for 318 individual award claims in FY 2021, a 61% increase from FY 2020.

2021 Annual SEC Whistleblower Program Report: The Numbers

- The pace and size of SEC whistleblower awards have increased dramatically in the last three years as the program has matured.
- In 2021, the Commission made more whistleblower awards than all other prior years combined.
  - From FY 2011- FY 2020, the Commission made approximately $562 million in whistleblower awards to 106 whistleblowers.
  - In FY 2021 alone, the Commission awarded approximately $564 million to 108 individuals.
- The Commission also made the largest awards to date in FY 2021– a $114 million award to one whistleblower in October 2020 and a combined $114 million award to two whistleblowers made in September 2021.

2021 Annual SEC Whistleblower Program Report: The Numbers

- Whistleblowers are asked to identify the nature of their complaint allegations.
- In 2021, the most common complaint categories were:
  - Manipulation (25%)
  - Corporate Disclosures and Financials (16%)
  - Offering Fraud (16%)
  - Trading and Pricing (6%)
  - Initial Coin Offerings and Cryptocurrencies (6%)
- Since the beginning of the program, Corporate Disclosures and Financials, Offering Fraud, and Manipulation have consistently ranked as the three highest allegation types reported.

2021 Annual SEC Whistleblower Program Report: Focus on Prompt Reporting

- The SEC awarded a total of $40 million to two whistleblowers in October 2021.
- $32 million awarded to one whistleblower for prompt reporting.
- Mere $8 million paid to second whistleblower.
  - SEC reasoned that the difference in award is rooted in the whistleblower's unreasonable delay in reporting.
  - "Whistleblowers may be eligible for an award when they voluntarily provide the SEC with original, **timely**, and credible information…" (SEC Press Release).

SEC Whistleblower Award Program Incentives: An Overview

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Whistleblower Award Program Incentives: An Overview

- Those providing "original information" leading to sanctions of more than $1 million will receive an award of 10%-30% of the penalty imposed.
- Qualifications for an award under the Whistleblower Rules:
  - Information must be "original";
  - Information must be provided on a voluntary basis; and
  - Information must lead to a successful enforcement action that results in a monetary award of more than $1 million.
- Reporting can be direct, anonymous, or through counsel, and reporters can benefit even if they participated in underlying conduct—so long as they are not convicted of a crime.

Whistleblower Award Program Incentives: An Overview

Individuals whose principal duties involve compliance or internal audit responsibilities—such as officers, directors, trustees, and partners who learn about misconduct through another employee's reporting—are generally excluded from award eligibility unless one of three exceptions applies:

- If an individual is engaged in conduct that interferes with an SEC investigation;
- If an individual is aware that the company is engaged in, or intends to engage in, conduct that will cause significant, long-term damages to the company or its shareholders (i.e., the exception intends to prevent a $10 million problem from becoming a $100 million problem); or
- If misconduct is reported internally and, after 120 days, an individual officer, director, or compliance professional believes that nothing has been done to correct the misconduct, that person can report the alleged violation to the SEC.

Recent Developments Regarding Non-SEC "Bounty" Programs

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Recent Developments: Commodity Futures Trading Commission Issues $200 Million Award

In October 2021, the Commodity Futures Trading Commission (CFTC) awarded $200 million to a whistleblower whose information led to the success of one direct and two related actions.

- A CFTC press release announcing the award states that to qualify for an award, there must be a "**meaningful nexus**" between the information provided and the CFTC's ability to complete its investigation.
- The whistleblower was denied a reward for the third, related action by a state regulator because the information was not shared with the state regulator.

Recent Developments: FTC Whistleblower Act of 2021 (FTCWA)

H.R. 6093, introduced on November 30, 2021, seeks to "protect whistleblowers who disclose wrongdoing at their current and former employers who fall under the jurisdiction of the Federal Trade Commission."

- The bill could incentivize whistleblowers at social media and technology companies to disclose harmful data and security practices.
- Modeled after the SEC whistleblower program, the FTCWA would allow whistleblowers to obtain a reward of 10%-30% of monetary sanctions recovered by the FTC.
  - Unlike the Dodd-Frank Act, which states that the SEC "*shall* pay an award," the FTCWA states that the FTC "*may* pay an award."
- Section 2 of the FTCWA protects whistleblowers who suffered retaliation for disclosing a potential violation of a law, rule or regulation enforced by the FTC.

Recent Developments in Whistleblower Employment Law

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Recent Developments: Impact of COVID-19 on Whistleblower Retaliation Claims

- Work-from-home environment led to an uptick in whistleblower activity.
  - Former Chief of SEC Whistleblower Program Sean McKessy: "The shift to remote work led many employees to feel alienated from their jobs and created an environment ripe for whistleblowing activity."
  - Whistleblowers may feel more comfortable and motivated to report because they aren't obligated to see colleagues in-person.
- A general trend of increased litigation surrounding the pandemic includes whistleblower suits.

Recent Developments: Modification of Legal Standard Impacting COVID-19 Whistleblower Claims

- OSHA amended a rule interpreting the OSH Act's anti-retaliation provision (Section 11(c)), raising the standard impacting COVID-19 whistleblower claims. The final rule became effective on September 3, 2021.
  - Previously, Section 11(c) was violated if a protected activity was merely a "substantial reason" for an adverse action.
  - Whistleblowers must now prove that "but for" their protected activity, they would not have suffered an adverse action.
  - The update brings the OSHA regulations in line with the Supreme Court's holdings in *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), and *Bostock v. Clay County, Georgia*, No. 17–1618, 723 F. App'x 964 (2020).

Recent Developments: New York Increases Whistleblower Protections

In October 2021, New York dramatically expanded whistleblower protections under New York Labor Law Section 740. These changes become effective on January 26, 2022.

Prior Whistleblower Protections

Must prove an **actual violation of law**, not merely suspected violations.

Amended Protections

Protects disclosure of conduct that the employee **reasonably believes** is unlawful.

Recent Developments: New York Increases Whistleblower Protections

- **Additional impact of recent amendments:**
  - Broadens categories of workers protected against retaliation by expanding the definition of "employee" to include those who are former employees and independent contractors.
  - Expands what may be considered "protected activity" entitling employees to protection from retaliation.
  - Expands prohibited retaliatory action to include those actions that "adversely impact a former employee's current or future employment," including contacting immigration authorities.
  - Expands statute of limitations and entitles aggrieved Plaintiffs to jury trials.
  - Requires employer posting of protections, rights, and obligations of employees.

Recent Developments: Stay of SOX Claims Pending Related Arbitration – *Thompson v. Tesla Motors*

- In *Thompson v. Tesla Motors*, No. 21-cv-00238, 2021 U.S. Dist. LEXIS 212374 (D. Nev. Nov. 3, 2021), the court granted the defendant's motion for a stay of the plaintiff's SOX whistleblower complaint pending completion of state court-ordered arbitration.
- Reasoning:
  - The claims in arbitration arise from the same facts and circumstances underlying the SOX complaint.
  - The reasoning in the arbitration decision may be useful, if not dispositive.
  - Plaintiff failed to show prejudice as a result of the delay.

Recent Developments: Timeliness of SOX Claims – *Xanthopoulos v. United States Dep't of Labor*

In *Xanthopoulos v. United States Dep't of Labor*, the Seventh Circuit affirmed an Administrative Review Board decision, dismissing petitioner's SOX complaint for whistleblower retaliation because petitioner failed to file the complaint within 180 days of alleged wrongful termination. No. 20-2604, 2021 U.S. App. LEXIS 8321 (7th Cir. Mar. 22, 2021).

- Petitioner filed several TCR forms with the SEC between 2014 and 2018. 350 days after his termination, he filed a SOX complaint for retaliation.
- The statute of limitations for a SOX administrative complaint filed with OSHA is not equitably tolled by previously filed "tips, complaints, and referrals" (TCR) forms filed with the SEC.
  - SEC complaint forms were considered "independent of and separate from" his SOX retaliation claim.

Recent Developments: "Chain of Command" Location Relevant for Venue – *Vuoncino v. Forterra*

In *Vuoncino v. Forterra, Inc.*, the plaintiff brought SOX and Dodd-Frank whistleblower retaliation claims against former employer and parent company. No. 18-CV-02437, 2021 WL 1589356 (D. N.J. Apr. 22, 2021).

- Former employer is a Delaware corporation headquartered in Florida.
- Parent company is a Delaware corporation headquartered in Texas.

District Court's Ruling: Venue was improper in New Jersey even though the plaintiff's employment and termination occurred in New Jersey.

- The question is whether a substantial part of the events or omissions occurred in the district and, here, the court found no retaliation occurred in New Jersey.
- Because the plaintiff's **chain of command flowed through the parent company** headquarters in Texas, the misconduct occurred there.

Recent Developments: SOX Dismissal Based on Non-employee Finding – *Moody v. American National Insurance Co.*

- The plaintiff in *Moody v. American National Insurance Co*. argued that the Defendant retaliated against him by terminating a contract with "Moody Insurance Company" (MIG). No. 20-40462, 842 F. App'x 875, 2021 U.S. App. LEXIS 2528 (5th Cir. Jan. 29, 2021).
- The plaintiff was the owner and President of MIG, but not party to the contract.
- The defendant filed a motion to dismiss, alleging that the plaintiff was not a covered employee under § 1514A, and the District Court granted the motion under FRCP 12(b)(6). The Fifth Circuit affirmed.
- Section 1514A(a)'s enforcement procedures and remedies "make it clear that the whistleblower entitled to protection must be an employee of the retaliator," and here, Moody is employed by MIG, not the Defendant.
- **Significance:** This case limits employer liability in SOX whistleblower retaliation claims.

Recent Developments: SOX Protected Activity – *Ngai v. Urban Outfitters*

- **The court in *Ngai v. Urban Outfitters* dismissed the SOX retaliation claim because the plaintiff failed to establish protected activity.** No. 19-cv-1480, 2021 U.S. Dist. LEXIS 59211 (E.D. Pa. Mar. 29, 2021).
- The plaintiff alleged that he complained about corporate waste and unlawful or improper activity by Urban's vendors and manufacturers. The plaintiff was later terminated.
- **The court concluded that the plaintiff did not subjectively believe he was reporting legal violations covered by Section 806.**
  - None of the plaintiff's letters refer to SOX, Section 806, or any federal law violation.
  - The facts tend to show that the plaintiff believes that he was reporting violations of internal company policies.
  - Generic references to mismanagement, lost profits, etc., fall short of connecting Urban's conduct to a violation of an SEC rule or regulation or fraud. *Westawski v. Merck & Co.*, 739 F. App'x 150, 152-53, 2018 U.S. App. LEXIS 17595 (3d Cir. 2018).

Recent Developments: SOX Protected Activity – *Samaroo v. Bank of N.Y. Mellon*

- In *Samaroo v. Bank of N.Y. Mellon*, No. 21-cv-02441, 2021 U.S. Dist. LEXIS 193355 (S.D.N.Y. Oct. 5, 2021), a Magistrate Judge recommended granting a motion to dismiss the plaintiff's SOX retaliation complaint for failure to state a claim.
- Documents submitted by the plaintiff primarily concerned alleged nepotism or favoritism within the Defendant company.
- The magistrate stated "nepotism does not violate any of the laws listed under SOX § 806 and does not form the basis of a valid SOX complaint."
  - Similarly, complaints "that various managers were poor managers and mismanaged projects" cannot form a basis of a SOX complaint.

Recent Developments: SOX Protected Activity – *Wagner v. Southern California Edison*

- In *Wagner v. Southern California Edison Co.*, the Ninth Circuit affirmed the District Court's grant of summary judgment for the defendant on the SOX claim. 840 F. App'x 993 (9th Cir. Mar. 23, 2021).
- The plaintiff failed to submit evidence at the District Court level that he had an objectively reasonable belief that one of the violations listed in 18 U.S.C. §1514A(a)(1) had occurred.
- **The court found that upon "reviewing the facts and circumstances in the record, a reasonable person would not have formed a good faith belief that he was reporting a [SOX] violation."**
  - Vague references to alleged SOX violations and unspecified accounting controls did not equate to the requisite reasonable belief that the supervisor violated an SEC rule or regulation.

Recent Developments: Temporal Proximity in SOX Retaliation Complaint – *Botta v. PricewaterhouseCoopers*

- In *Botta v. PricewaterhouseCoopers LLP*, No. 18-cv-02615, 2021 U.S. Dist. LEXIS 138949 (N.D. Cal. July 26, 2021), the plaintiff sued his former employer alleging retaliation for sending whistleblower communications to the SEC.
- PwC countered that the plaintiff was fired for cause after performance issues.
  - Botta documented an internal control that did not actually exist (and that he had made up).
  - PwC also took issue with the plaintiff's reluctance to consider other points of view, lack of sensitivity, reasonableness, and empathy. Another employee resigned because she "didn't want to deal with [him] anymore."
- Notably, Botta worked for PwC for 17 years, but was fired just four months after the SEC notified the employer that it had opened an investigation.

Recent Developments: Temporal Proximity in SOX Retaliation Complaint – *Botta v. PricewaterhouseCoopers*

Following a bench trial, the Magistrate Judge determined that the plaintiff did not quality for whistleblower protections:

1. "The temporal proximity between his complaint and his termination generated suspicion, but at trial that suspicion wasn't confirmed."
2. The plaintiff's argument that the complaint started the chain of events that resulted in his firing was not compelling since the Defendant proved its sole reason for firing Plaintiff was a company policy violation.
   - SEC complaint wasn't considered, so it was not a contributing factor in decision to fire him.
3. The court rejected the plaintiff's argument that it only takes a single person in a supervisory role to know or suspect his whistleblower activity to impute knowledge of the protective activity.
   - SOX § 1514A does not support this standard, which borders on strict liability.

Recent Developments: Sox Claim Dismissed for Destruction of ESI – *Burris v. JPMorgan Chase & Co.*

- In *Burris v. JPMorgan Chase & Co.*, No. 18-cv-03012, 2021 U.S. Dist. LEXIS 194232 (D. Az. Oct. 7, 2021), the court dismissed the plaintiff's claims without reaching the merits of the claim.
- The plaintiff made "systematic efforts to destroy electronically stored information ('ESI') from an array of phones, laptops, email accounts," etc.
- The court reasoned that the Plaintiff's conduct made it impossible to have confidence that the defendant will have access to true facts.
- **Significance:** Dismissal is a possible sanction in SOX/Dodd-Frank retaliation claim where a plaintiff destroys potentially relevant ESI.

Recent Developments: FCA Whistleblower Protections *– United States v. William Beaumont Hospital*

- In *United States ex rel. Felten v. William Beaumont Hospital* , No. 20-cv-1002, 2021 WL 1204981 (6th Cir. Mar. 31, 2021), **the Sixth Circuit held that False Claims Act (FCA) whistleblower protections extend post-employment.**
- The plaintiff in this case filed a qui tam action against the hospital, which was allegedly paying kickbacks to physicians.
- The plaintiff also alleged that the hospital retaliated against him for his complaint, terminating him and undermining his subsequent employment applications.
- The Sixth Circuit vacated the dismissal order at the lower court, holding that the FCA anti-retaliation provision protects former employees from retaliation post-employment.
- This decision created a circuit split with the Tenth Circuit. *Potts v. Center for Excellence in Higher Education Inc.*, 908 F.3d 610 (10th Cir. 2018) (holding that the FCA does not provide relief for retaliation post-employment).

Practical Implications: Moving Forward

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Practical Implications: Moving Forward

- Strengthen internal reporting mechanisms and culture
  - With the SEC awarding record-breaking sums to meritorious whistleblowers—and in an era of "work-from-home"—would-be whistleblowers have more incentive than ever to bypass internal reporting.
  - Companies need to strengthen their internal reporting procedures and create a culture within their businesses that encourages employees to report concerns internally.
  - Develop and refine robust anti-retaliation policies to encourage employees to come forward with reports of misconduct without fear of reprisal.
- Utilize holding in *William Beaumont Hospital* to inform post-employment treatment of terminated employees
  - Though the Supreme Court may be asked to resolve the split between the Sixth and Tenth Circuit regarding whether the FCA allows for relief for retaliation post-employment, employers should be aware of the potential for lingering legal risk.
- Anticipate potential increased litigation for New York employers in light of 2021 amendments
  - Anticipate potential increased litigation nationwide given current trends.

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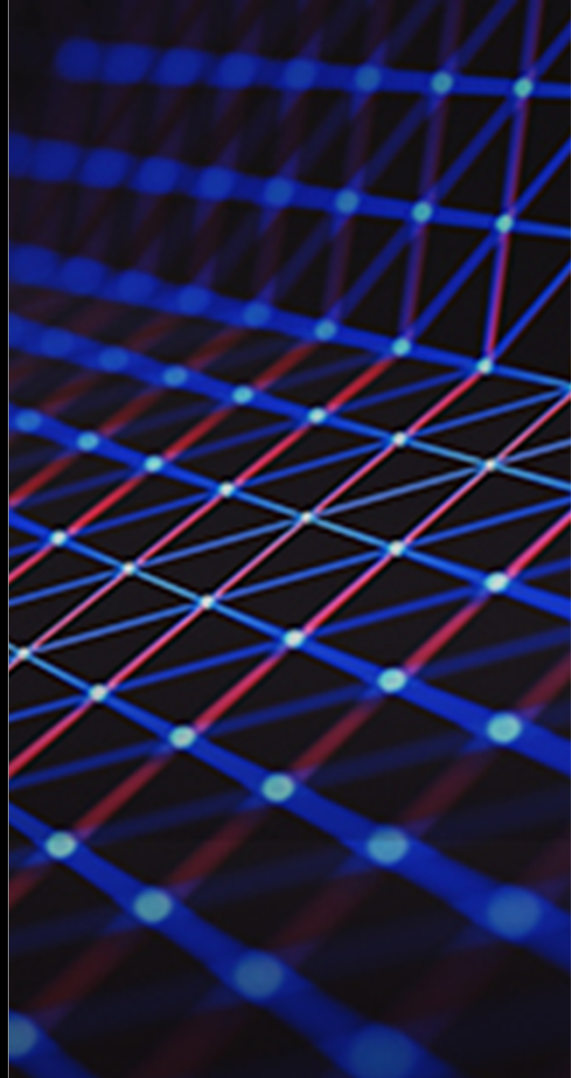
Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at **www.morganlewis.com/topics/coronavirus-covid-19**

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to **subscribe** using the purple "Stay Up to Date" button.



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Our Global Reach

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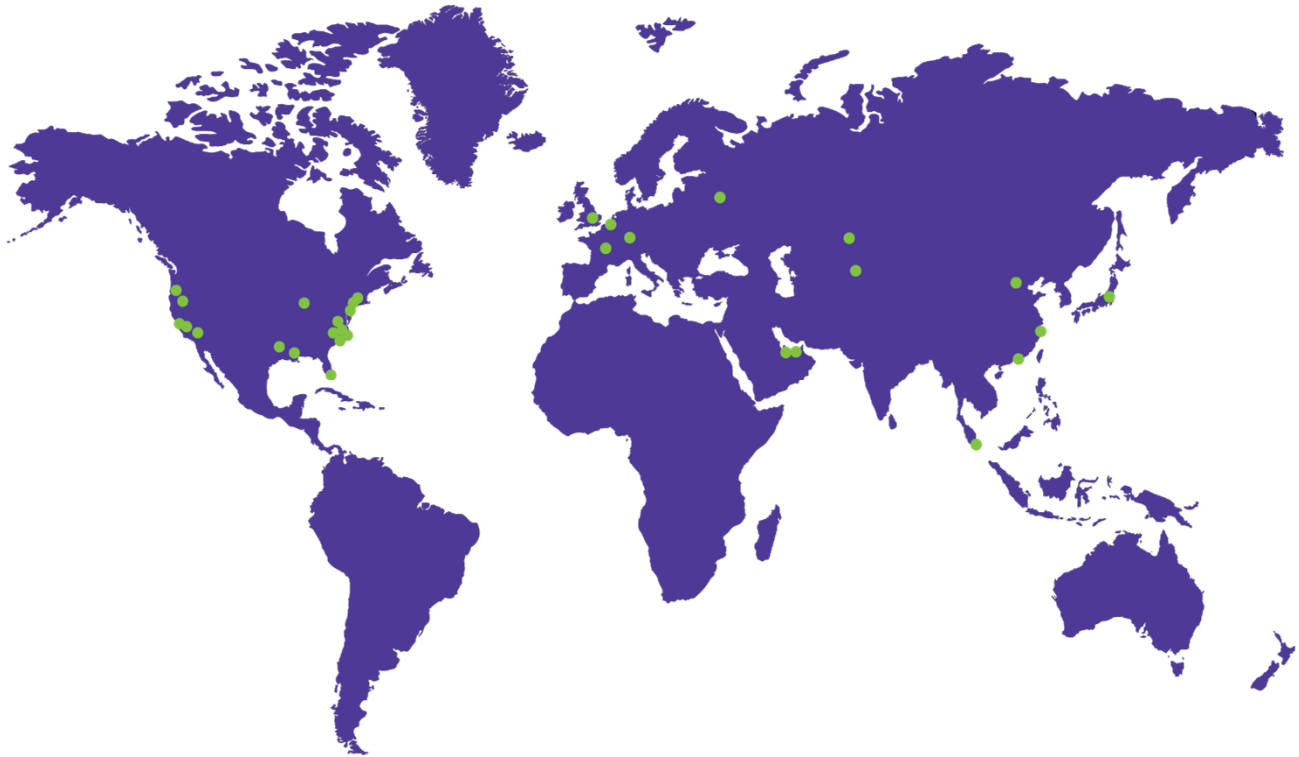

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