
GOING DARK(ER): THE SEC WHISTLEBLOWER PROGRAM’S FY 2022 REPORT IS THE LEAST TRANSPARENT IN AGENCY HISTORY

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Under Chair Gary Gensler, the U.S. Securities and Exchange Commission (SEC) has been on a transparency rampage – proposing extensive new disclosure obligations on public companies,¹ activist investors,² private funds,³ and (maybe soon) so-called “unicorn” startups.⁴ When it comes to sharing information about its own operations, however, the Commission has been noticeably less enthusiastic.

Take the SEC Whistleblower Program (WBP). When Congress created the WBP in 2010, it sensibly instructed the agency to avoid disclosing “any information . . . which could reasonably be expected to reveal the identity of a whistleblower.”⁵ But concerns have been mounting that the SEC has abused this justification—invoking “whistleblower anonymity” as a *carte blanche* to shield from disclosure all sorts of information without any remote link to whistleblower identities, undermining the efficacy of the program in the process. Last summer, Commissioner Mark Uyeda observed that the WBP “has come under increasing scrutiny from some on the basis that it operates with a lack of transparency” and

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1. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

2. Modernization of Beneficial Ownership Reporting, 87 Fed. Reg. 13,846 (proposed Mar. 10, 2022) (to be codified at 17 C.F.R. pts. 232, 240).

3. Private Fund Advisers, 87 Fed. Reg. 16,886 (proposed Mar. 24, 2022) (to be codified at 17 C.F.R. pt. 275).

4. Caroline A. Crenshaw, Comm’r, SEC, Big “Issues” in the Small Business Safe Harbor: Remarks at the 50th Annual Securities Regulation Institute (Jan. 30, 2023), <https://www.sec.gov/news/speech/crenshaw-remarks-securities-regulation-institute-013023> [<https://perma.cc/9WCB-TJNN>]; Andrew Ramonas, *Private Unicorn Need Disclosure Boost, SEC’s Lizarraga Says*, BLOOMBERG LAW (Apr. 26, 2023).

5. 15 U.S.C. § 78u-6(h)(2)(A).

called on the Commission to “consider promoting greater visibility into its claims and award determinations.”⁶

Instead, the SEC has done exactly the opposite. This paper shows how the WBP’s FY 2022 Annual Report to Congress (released in November 2022) is the *least* transparent report in agency history, omitting critical information about the Program’s operations that the SEC had previously disclosed in every single prior Annual Report since the earliest days of the program, including the following:

- 1) The proportion of insider and outsider awardees.
- 2) The proportion of awardees who reported internally before coming to the SEC.
- 3) The proportion of awardees whose tips led the agency to open *new* investigations (as opposed to assisting with existing ones).
- 4) The specific geographical origins of all tips (domestic and international).
- 5) The number of attorneys employed by the Office of the Whistleblower.
- 6) The number of ongoing tip-related investigations and matters under inquiry.

The FY 2022 Report does not call attention to, much less explain, these omissions, which to my knowledge have not been identified previously in any commentary. Whether this retrenchment was due to resource constraints, data problems, a general disdain for the mechanisms of administrative accountability, or a specific imperative to hide something embarrassing is impossible to say. But the FY 2022 Report could not be clearer about one thing: the concerns about WBP’s secrecy are not being taken seriously inside the Commission.

This paper proceeds in three parts. Part I reviews the WBP and its excessive secrecy. Part II shows how the WBP’s FY 2022 Report quietly omitted six categories of statistical information that had been disclosed in every single prior report since the earliest days of the program. Part III offers some possible explanations for these omissions.

I. THE SEC WHISTLEBLOWER PROGRAM AND RECENT CALLS FOR GREATER TRANSPARENCY

The SEC Whistleblower Program incentivizes corporate employees and other well-placed individuals to come forward with actionable information about illegal conduct by offering financial payments (“bounties”) and other benefits, such as the right to file tips anonymously and the right to file an anti-retaliation lawsuit against their employer in the event they are fired as a result of their

6. Mark T. Uyeda, Comm’r, SEC, Statement on the Final Rules Related to the Whistleblower Program (Aug. 26, 2022), <https://www.sec.gov/news/statement/uyeda-statement-whistleblower-program-082622> [<https://perma.cc/62P7-BWBJ>]; see also discussion *infra* Part I (collecting calls for greater transparency from a wide range of program participants and stakeholders).

tipping.⁷ The program, and others like it that have been springing up around the federal government,⁸ aim to harness private incentives to bring information to the agency's attention while preserving the agency's complete prosecutorial discretion.⁹ Only tips that lead to successful SEC prosecutions and recoveries will ultimately entitle the tipster to a bounty.¹⁰

The WBP has been broadly hailed as a success,¹¹ and empirical evidence suggests it has indeed deterred certain types of securities fraud.¹² But recently stakeholders have been raising concerns that the program has not maximized its potential; it could be operating even more effectively to prevent, deter, identify, and punish securities law violations.

The WBP's extraordinary secrecy has become especially controversial. The SEC discloses far less about WBP than any other program it administers.¹³ When the SEC issues an award, it does not reveal what defendant or enforcement action the tipster assisted with,¹⁴ what percentage (10%-30%) was awarded,¹⁵ what type of misconduct was at issue, the nature of the tipster's relationship to the target, or anything about the timing or other nature of the tipster's information.¹⁶ The agency has never disclosed the WBP's budget,¹⁷ how many staffers work in the Office of Market Intelligence (the office charged with the critical task of initially sifting through whistleblower tips),¹⁸ or how often that office refers tips for further investigation.¹⁹ The agency does not disclose how many awardees had

7. For an overview, see generally Alexander I. Platt, *The Whistleblower Industrial Complex*, YALE J. ON REG. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4112398 [<https://perma.cc/3L8M-4B4U>].

8. See *id.* (manuscript at 16) (discussing other similar programs).

9. *Id.* (manuscript at 15–16).

10. *Id.* (manuscript at 14).

11. *Id.* (manuscript at 1–2) (collecting statements praising the program by SEC Chairs and Commissioners, elected officials, academics, and others).

12. Philip G. Berger & Heemin Lee, *Did the Dodd-Frank Whistleblower Provision Deter Accounting Fraud?*, 60 J. ACCOUNT. RESEARCH 1337 (2022); Christine Wiedman & Chunmei Zhu, *Do the SEC Whistleblower Provisions of Dodd Frank Deter Aggressive Financial Reporting?* (Feb. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3105521 [<https://perma.cc/X8WA-6KPV>]; Qingjie Du & Yuna Heo, *Political Corruption, Dodd-Frank Whistleblowing, and Corporate Investment*, 73 J. CORP. FIN. 102145 (2022).

13. John Holland, *SEC Tip Line Was Meant To Stop Another Madoff. Is It working?*, BLOOMBERG (Jul. 26, 2022, 3:46 AM), <https://www.bloomberg.com/news/articles/2022-07-26/sec-enriches-fraudsters-lawyers-as-secrecy-shrouds-tips-program#xj4y7vzkg> [<https://perma.cc/A7WK-NQGB>].

14. *Id.* (“The agency in its early years identified some corporate wrongdoers, but hasn’t identified a company in any final order since 2017.”).

15. Amanda M. Rose, *Calculating SEC Whistleblower Awards: A Theoretical Approach*, 72 VAND. L. REV. 2047, 2052 (2019).

16. See, e.g., SEC, Whistleblower Award Proceeding, File No. 2022-86 (Sept. 20, 2022) (prototypically terse final order granting whistleblower award without providing any other meaningful information).

17. See Holland, *supra* note 15.

18. I recently obtained partial disclosure of this information under the Freedom of Information Act, which I reproduce in a recent paper. See Platt, *supra* note 8, at 18. To date, the agency, however, has refused to disclose information about the non-SEC employees (e.g., contractors and detailees) who have also been staffing this office. As of this writing, I am continuing to pursue this FOIA request: the SEC’s FOIA staff has twice denied this request, and the SEC’s Office of the General Counsel has twice reversed and remanded for further consideration.

19. Miriam H. Baer, *Reconceptualizing the Whistleblower’s Dilemma*, 50 U.C. DAVIS L. REV. 2215, 2229 (2017).

separately profited from the revelation of the misconduct by taking a short position²⁰ or how (if at all) this enters into the agency's calculation. The agency does not disclose the extent or nature of informal contacts between enforcement staff and private whistleblower attorneys (including private whistleblower attorneys who are former SEC officials) or how these informal contacts impact agency decisions.²¹ Most critically, the agency does not disclose valuable statistical information comparing the characteristics of successful and unsuccessful tips that would be highly useful to prospective whistleblowers and their attorneys, such as the percentage with/without counsel, the number of tips filed by various whistleblower lawyers, the nature of misconduct alleged, insider/outsider status, the nature of the hard evidence provided (e.g., recorded conversations, documents, etc.) or how that evidence was obtained, whether independent expert or investigator analysis was included along with the tipster's filing, or whether a complete legal analysis (or even a draft complaint) was included.²²

Even when the SEC does disclose information about the WBP, it is often incomplete—sometimes misleadingly so. For instance, agency officials routinely trumpet the impressive total dollar amounts paid out “to whistleblowers” under the program,²³ but these figures fail to account for the substantial percentage of those dollars (as much as 25%) that actually went to cover administrative costs of the program in the form of payments to whistleblower lawyers and other intermediaries, rather than to the whistleblowers themselves.²⁴

To be sure, some secrecy is needed to protect whistleblower anonymity.²⁵ Some tipsters may not come forward if they fear that their identities will be exposed.

But serious concerns have been mounting that the agency has gone too far, keeping secret virtually all aspects of the program's operations regardless of any possible link to anonymity.²⁶ And there have been increasing concerns that this

20. *Cf. infra* note 44 (collecting sources discussing the \$14 million bounty issued by the SEC in 2022 to short-seller Carson Block).

21. *See* Platt, *supra* note 8, at 54–59.

22. *See id.* at 74–79 (calling on the SEC to provide these and other data points to help prospective whistleblowers make more informed decisions about their participation).

23. *SEC Chair Gary Gensler on SEC Surpassing \$1 Billion in Awards to Whistleblowers*, YOUTUBE (Sep. 16, 2021), <https://www.youtube.com/watch?v=kqwqO5GrDZY> [<https://perma.cc/48QA-JY8T>] (“A total of a billion dollars has been awarded to whistleblowers”); Jay Clayton, Chairman, SEC, Strengthening our Whistleblower Program (Sept. 23, 2020), <https://www.sec.gov/news/public-statement/clayton-whistleblower-2020-09-23> [<https://perma.cc/47FL-DJBY>] (“[W]e have awarded approximately \$368 million to eligible whistleblowers.”); Mary Jo White, Chair, SEC, NYU Sch. of L. Program on Compliance and Enft, A New Model for SEC Enforcement: Producing Bold and Unrelenting Results (Nov. 18, 2016), <https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816> [<https://perma.cc/N43E-HMWR>] (“We recently surpassed the \$100 million mark for awards to whistleblowers.”); SEC, 2021 ANN. REP. TO CONG. ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 1 (“SEC has awarded more than \$1.1 billion to 214 individuals”); SEC, 2020 ANN. REP. TO CONG. ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 2 (“[T]he Commission has awarded approximately \$562 million to 106 individuals.”); SEC, 2015 ANN. REP. ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 1 (“The Commission has paid more than \$54 million to 22 whistleblowers”).

24. Platt, *supra* note 8, at 50–52.

25. *See* 15 U.S.C. § 78u-6(h)(2)(A) (requiring SEC to protect whistleblower anonymity).

26. *See, e.g.,* Holland, *supra* note 15.

policy of maximal secrecy has actually been undermining the program's efficacy.²⁷ As noted above, these concerns were endorsed by SEC Commissioner Mark Uyeda in an August 2022 speech where he observed that the WBP "has come under increasing scrutiny from some on the basis that it operates with a lack of transparency" and called on the Commission to "consider promoting greater visibility into its claims and award determinations."²⁸ Similar calls for greater transparency have been recently made by whistleblower lawyers,²⁹ academics,³⁰ and journalists.³¹

But rather than take steps to make the program more transparent, the SEC has done precisely the opposite.

27. *See id.*

28. Uyeda, *supra* note 7. Others had worried about excessive secrecy for years. *See, e.g.*, Keith Paul Bishop, *Five Propositions Concerning the SEC Whistleblower Program*, ALLEN MATKINS: CAL. CORP. & SEC. L. (Oct. 31, 2016), <https://www.calcorporatelaw.com/2016/10/four-propositions-concerning-the-secs-whistleblower-program> [<https://perma.cc/F2LG-4MKS>].

29. Justin W. Evans, Stephanie R. Sipe, Mary Inman & Carolina Gonzalez, *Reforming Dodd-Frank from the Whistleblower's Vantage*, 58 AM. BUS. L.J. 453, 519 (2021) (article co-authored by a pair of whistleblower lawyers and based on interviews with many others that called on the SEC to "publish statistics that would help prospective whistleblowers to make a more informed decision as to whether the risks are worth the possibility of an award").

30. Rose, *supra* note 18, at 2051 (urging the SEC "to be more transparent about the percentages it awards and why" in order to "improve the functioning of the whistleblower program"); Platt, *supra* note 8 (drawing on data obtained under the Freedom of Information Act to show that the WBP has been dominated by a concentrated group of well-connected whistleblower attorneys (leading to various distortions and inefficiencies), and calling on the agency to make to create a more level playing field for whistleblowers and attorneys by releasing more aggregate statistics about tips, awards, and program operations).

31. *See, e.g.*, Holland, *supra* note 15; John Holland, *Carson Block SEC Payout Mystery Deepens with Suit Outing Him*, BLOOMBERG (Jul. 29, 2022, 9:57 AM), <https://www.bloomberg.com/news/articles/2022-07-29/mystery-of-carson-block-sec-payout-deepens-with-suit-outing-him#xj4y7vzkg> [<https://perma.cc/9M96-J53Y>]; John Holland, *Wall Street Whistleblowers Tip Off SEC—But Hear Nothing Back*, BLOOMBERG (Nov. 28, 2022, 9:00 AM), <https://www.bloomberg.com/news/features/2022-11-28/wall-street-whistleblowers-alert-sec-to-stock-fraud-but-hear-nothing-back#xj4y7vzkg> [<https://perma.cc/RE2L-YB7V>]; Mengqi Sun, *SEC Whistleblower Awards Program Might Have a Revolving Door Program, Study Says*, WALL ST. J. (Aug. 25, 2022, 5:30 AM), <https://www.wsj.com/articles/sec-whistleblower-awards-program-might-have-a-revolving-door-problem-study-says-11661419801> [<https://perma.cc/4A8R-3SDA>]; Matt Levine, *Some Free Brokers Are Cheaper than Others*, BLOOMBERG: MONEY STUFF NEWSL. (Aug. 25, 2022, 1:00 PM), <https://www.bloomberg.com/opinion/articles/2022-08-25/some-free-brokers-are-cheaper-than-others#xj4y7vzkg> [<https://perma.cc/9HUL-DCN6>]; Jennifer Sor, *The SEC Has Paid Over \$1 Billion to Whistleblowers Since 2012. But a New Study Says the Agency Has Outsourced the Job to High-priced Law Firms That May Discourage More Tipsters from Coming Forward.*, BUS. INSIDER (Aug. 13, 2022) <https://ca.news.yahoo.com/sec-paid-over-1-billion-123000961.html> [<https://perma.cc/N7LG-7YLLQ>].

II. THE SEC WHISTLEBLOWER PROGRAM'S FY 2022 REPORT IS THE LEAST TRANSPARENT IN AGENCY HISTORY

Congress required the SEC to issue a report on the WBP after the end of each Fiscal Year.³² Like prior reports, the FY 2022 report, issued in November 2022, contains some aggregate level information about the program, including the total dollars paid out (\$229 million),³³ the number of awards issued (103),³⁴ the number of covered actions those awards related to (70),³⁵ the number of tips received (12,300),³⁶ and the number of hotline calls returned (2,500).³⁷ And commentators covered the FY 2022 Report as business as usual, parroting the agency's preferred talking points about the volume of dollars awarded, tips received, and the like.³⁸

But a closer look reveals that the FY 2022 Report was by far the *least transparent* in the agency's history. Without any explanation, it conspicuously omitted at least six pieces of information that the agency had been routinely disclosing since the earliest days of the program.

1. Insider v. Outsider Awardees—Although policymakers tend to emphasize the WBP's role in prompting individuals to come forward with actionable information about their corporate employers,³⁹ no employment relationship or

32. 15 U.S.C. § 78u-6(g)(5) ("Not later than October 30 of each fiscal year beginning after July 21, 2010, the Commission shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives a report on—(A) the whistleblower award program, established under this section, including—(i) a description of the number of awards granted; and (ii) the types of cases in which awards were granted during the preceding fiscal year; (B) the balance of the Fund at the beginning of the preceding fiscal year; (C) the amounts deposited into or credited to the Fund during the preceding fiscal year; (D) the amount of earnings on investments made under paragraph (4) during the preceding fiscal year; (E) the amount paid from the Fund during the preceding fiscal year to whistleblowers pursuant to subsection (b); (F) the balance of the Fund at the end of the preceding fiscal year; and (G) a complete set of audited financial statements, including—(i) a balance sheet; (ii) income statement; and (iii) cash flow analysis.").

33. SEC, 2022 ANN. REP. TO CONG. ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 1.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 9.

38. See, e.g., Jane Norberg & Adam J. Reinhart, *5 Takeaways from the SEC's Annual Whistleblower Report*, LAW360 (Dec. 2, 2022, 4:57 PM), <https://www.law360.com/articles/1553705/5-takeaways-from-the-sec-s-annual-whistleblower-report> [<https://perma.cc/3AXN-A34D>]; Steven J. Pearlman, Pinchos Goldberg & Ryan McGill, *SEC Releases FY 2022 Annual Report*, NAT'L L. REV. (Dec. 9, 2022), <https://www.natlawreview.com/article/sec-releases-fy-2022-whistleblower-annual-report> [<https://perma.cc/JY7R-XJMC>]; Kevin B. Muhlendorf & Holly Wilson, *SEC Annual Whistleblower and Enforcement Reports Signal Continued Aggressiveness in 2023 and Beyond*, WILEY (Dec. 6, 2022), <https://www.wiley.law/printpilot-publication-SEC-Annual-Whistleblower-and-Enforcement-Reports-Signal-Continued-Aggressiveness-in-2023-and-Beyond.pdf?1675459899> [<https://perma.cc/ZX7P-22N2>]; *SEC Whistleblower Program 2022 Annual Report Shows Continued Strength of Program*, CONSTANTINE CANNON (Nov. 28, 2022), <https://constantinecannon.com/whistleblower/sec-whistleblower-2022-annual-report-continued-strength-of-program/> [<https://perma.cc/VA5H-K7QF>].

39. See Hester M. Peirce, Comm'r, SEC, Amendments to the Commission's Whistleblower Program Rules (Sept. 23, 2020), <https://www.sec.gov/news/public-statement/peirce-whistleblower-2020-09-23> [<https://perma.cc/E9B7-6V4R>] ("An award may encourage an individual to make the difficult choice to tell the truth by replacing the income she loses if she is fired from her job and by providing some offset for the reputational, personal, and even physical threats that whistleblowers can endure as a result of alerting us to wrongdoing."); Caroline Crenshaw, Comm'r, SEC, Statement on Whistleblower Program Rule Amendments (Sept. 23, 2020),

other direct connection to the target is necessary to qualify for an award.⁴⁰ For instance, in March 2022 the SEC issued a \$14 million award to activist short-seller Carson Block.⁴¹ There is a compelling public interest in learning about the extent to which bounties are actually incentivizing current employees and other insiders to come forward as opposed to, for instance, compensating activist short-sellers (who may have already profited from their information). Every prior

<https://www.sec.gov/news/public-statement/crenshaw-whistleblower-2020-09-23> [https://perma.cc/22M3-QT4G] (“To date, we have paid more than \$523 million to whistleblowers who risked their livelihoods to do the right thing”); Clayton, *supra* note 26 (“I want to note our appreciation to whistleblowers who, sometimes at great risk to their livelihood, report suspected securities laws violations to the SEC.”); Allison Herren Lee, Comm’r, SEC, June Bug vs. Hurricane: Whistleblowers Fight Tremendous Odds and Deserve Better (Sept. 23, 2020), https://www.sec.gov/news/public-statement/lee-whistleblower-2020-09-23#_ftn1 [https://perma.cc/RFU3-QQHC] (“Whistleblowers . . . take great risks to help law enforcement, never knowing when they make their decision to speak up what will happen to them. Will they lose their jobs?”); Robert J. Jackson, Jr., Comm’r, SEC, Statement on Proposed Rules Regarding SEC Whistleblower Program (June 28, 2018), <https://www.sec.gov/news/public-statement/jackson-statement-whistleblowers-062818> [https://perma.cc/3ZTG-MK2G] (“Let’s start from the perspective of an employee who is witnessing a significant corporate fraud. Especially if she is a high-ranking insider at a large public company—the whistleblowers who are most valuable to us in protecting our markets—there are major risks for the employee if she comes forward. She may lose her job and her salary, but worse, she faces the very real prospect of never working in a senior position in her field again.”).

40. 2019 ANN. REP. TO CONG. ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 18 (“There is no requirement under the Whistleblower Rules that an individual be an employee or company insider to be eligible for an award.”); *Id.* (“Award recipients have included . . . investors who had been victims of the fraud, professionals working in the same or related industry, or other types of outsiders, such as individuals who had a personal relationship with the wrongdoer or individuals who have a special expertise in the market.”).

41. See SEC Whistleblower Award Proceeding File No. 2022-38 (Mar. 11, 2022); Block v. Barnes, No. 1:22-CV-869-LY, 2023 WL 2602859, at *1 (W.D. Tex. Mar. 22, 2023); John Holland, *Carson Block Betrayed Partner to Steal SEC Award, Filing Says*, BLOOMBERG (Sept. 27, 2022, 3:11 PM), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/securities-law/X417MNH8000000?bna_news_filter=securities-law#jcite [https://perma.cc/D7D2-RGUU]; Holland, *Carson Block SEC Payout Mystery Deepens with Suit Outing Him*, *supra* note 33; Mengqi Sun, *Short Seller Carson Block Sued Over \$14 Million Whistleblower Award*, WALL ST. J. (Jul. 28, 2022, 7:10 PM), <https://www.wsj.com/articles/short-seller-carson-block-sued-over-14-million-whistleblower-award-11659049816> [https://perma.cc/3U6E-92GC] .

annual report since FY 2014 disclosed the proportion of insider and outsider awardees.⁴² The FY 2022 report does not.⁴³

2. Internal Reporting—Claimants are not required to report the alleged fraud internally before coming forward to the SEC.⁴⁴ At the outset of the program, this provoked widespread concerns that the program would undermine corporate compliance programs.⁴⁵ There is, therefore, an important public interest in learning the extent to which successful awardees brought their concerns to their employers before coming forward to the SEC. Every prior annual report

42. 2021 ANN. REP., *supra* note 26, at 24 (“Approximately 60% of the award recipients in FY 2021 were current or former insiders of the entity about which they reported information of wrongdoing to the Commission” and 40% were outsiders, including “investors who had been victims of the fraud they reported, professionals working in the same or related industry as where the misconduct occurred, or other types of outsiders, such as individuals with a special expertise in the market.”); 2026 ANN. REP., *supra* note 25, at 18 (“Approximately 40% of the individuals who received awards this year were outsiders not affiliated with the entity on which they were reporting, and certain of those outsiders also reported internally.”); 2019 ANN. REP., *supra* note 43, at 18 (“[A]pproximately 69 percent of the award recipients to date were current or former insiders of the entity about which they reported information of wrongdoing to the SEC.”); SEC, 2018 ANN. REP. TO CONG. ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 17 (“[A]pproximately 69% of the award recipients to date were current or former insiders of the entity about which they reported information of wrongdoing to the SEC.”); SEC, 2017 ANN. REP. TO CONG. ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 17 (breaking down the proportion of awards issued to “Current employees; Former employees; Other types of insiders (including consultants or close affiliates of subject company); Industry professionals; Harmed or prospective investors; Other types of outsiders”); SEC, 2016 ANN. REP. TO CONG. ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 18 (“Almost 65 percent of the award recipients were insiders of the entity on which they reported information of wrongdoing to the SEC.”); 2015 ANN. REP., *supra* note 25, at 16 (“[T]o date, almost half of the award recipients were current or former employees of the company on which they reported information of wrongdoing.”); SEC, 2014 ANN. REP. ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 16 (“To date, over 40% of the individuals who received awards were current or former company employees. Furthermore, an additional 20% of the award recipients were contractors, consultants, or were solicited to act as consultants for the company committing the securities violation.”).

43. *See generally* 2022 ANN. REP., *supra* note 36.

44. *See, e.g., id.* at 4 (“[C]laimants are not required to report internally . . .”).

45. *See, e.g.,* Troy A. Paredes, Comm’r, SEC, Statement at Open Meeting to Adopt Final Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (May 25, 2011), <https://www.sec.gov/news/speech/2011/spch052511tap-item2.htm> [<https://perma.cc/UV2L-XCJ7>] (noting that, as the SEC drafted the initial implementing rules for the program, “singular attention has centered on the extent to which the whistleblower program, depending on how it is structured, could unduly erode the value of internal compliance programs in rooting out and preventing wrongdoing” and voting against the adoption of the final rules on that basis).

since FY 2014 disclosed the proportion of insider awardees who had first reported internally.⁴⁶ The 2022 report does not.⁴⁷

3. *New vs. Existing Investigations*—Although policymakers often emphasize the role of whistleblowers in helping the SEC detect frauds,⁴⁸ a tipster may also receive a bounty for providing information that is useful in pursuing an already open investigation. Every prior annual report since 2015 disclosed the proportion of awards issued during the prior fiscal year to tipsters whose information

46. 2021 ANN. REP., *supra* note 26, at 24 (“Of [insider] recipients, more than 75% raised their concerns internally to their supervisors, compliance personnel, or through internal reporting mechanisms, or understood that their supervisor or relevant compliance personnel knew of the violations, before reporting their information of wrongdoing to the Commission.”); 2020 ANN. REP., *supra* note 26, at 18 (“Approximately 81% of insiders who received awards in FY 2020 raised their concerns internally to their supervisors, compliance personnel, or through internal reporting mechanisms before reporting their information of wrongdoing to the Commission.”); 2019 ANN. REP., *supra* note 43, at 18 (“Of those [insider] recipients, approximately 85 percent raised their concerns internally to their supervisors, compliance personnel, or through internal reporting mechanisms, or understood that their supervisor or relevant compliance personnel knew of the violations, before reporting their information of wrongdoing to the Commission.”); 2018 ANN. REP., *supra* note 45, at 17 (“Of the award recipients who were current or former employees of a subject entity, approximately 83% raised their concerns internally to their supervisors, compliance personnel, or through internal reporting mechanisms, or understood that their supervisor or relevant compliance personnel knew of the violations, before reporting their information of wrongdoing to the Commission.”); 2017 ANN. REP., *supra* note 45, at 17 (“Of the award recipients who were current or former employees of a subject entity, almost 83 percent raised their concerns internally to their supervisors, compliance personnel, or through internal reporting mechanisms, or understood that their supervisor or relevant compliance personnel knew of the violations, before reporting their information of wrongdoing to the Commission.”); 2016 ANN. REP., *supra* note 45, at 18 (“Of the award recipients who were current or former employees of the entity, approximately 80 percent raised their concerns internally to their supervisors or compliance personnel, or understood that their supervisor or relevant compliance personnel knew of the violations, before reporting their information of wrongdoing to the Commission.”); 2015 ANN. REP., *supra* note 26, at 16–17 (“Of the award recipients who were current or former employees, approximately 80% raised their concerns internally to their supervisors or compliance personnel, or understood that their supervisor or relevant compliance personnel knew of the violations, before reporting their information of wrongdoing to the Commission.”); 2014 ANN. REP., *supra* note 45, at 16 (“Of the award recipients who were current or former employees, over 80% raised their concerns internally to their supervisors or compliance personnel before reporting their information of wrongdoing to the Commission.”).

47. *See generally* 2022 ANN. REP., *supra* note 36.

48. *See, e.g.*, Clayton, *supra* note 26 (“Over the past ten years, the whistleblower program has been a critical component of the Commission’s efforts to detect wrongdoing and protect investors and the marketplace, particularly where fraud is well-hidden or difficult to detect.”); Lee, *supra* note 42 (“Since its inception, the Commission’s whistleblower program has enabled us to identify and pursue fraudulent conduct, ongoing regulatory violations, and other wrongdoing that would otherwise have gone undetected.”).

led to the opening of a new investigation versus those whose information helped with existing investigations.⁴⁹ The 2022 report does not.⁵⁰

4. Geographical Distribution of Tips—Every prior report disclosed detailed statistical information about the geographical origins of all tips received including the precise number of tips received from each individual U.S. state and each individual foreign country.⁵¹ This information may be valuable for several reasons, including by potentially informing debates over the scope of whistleblower protections within these jurisdictions. The FY 2022 does not report this information.⁵²

5. OWB Staff—The Office of the Whistleblower (OWB) plays a critical role in the administration of the WBP. This office “serves as the primary liaison between the SEC and individuals who have submitted information or are considering whether to submit information to the agency considering a possible securities law violation.”⁵³ Specifically, OWB “[u]ndertakes appropriate due diligence to ensure a careful and thorough evaluation of all whistleblower claims, responds to hotline calls, tracks tips that are referred for Enforcement investigations, publicly posts NoCAs and Final Orders, and makes recommendations to the [Claims Review Staff] on whistleblower award eligibility.”⁵⁴ There is, accordingly, a

49. 2021 ANN. REP., *supra* note 26, at 24 (“Of the whistleblowers who received awards in FY 2021, approximately 56% provided original information that caused staff to open an investigation or examination, and approximately 44% received awards because their original information significantly contributed to an already existing investigation or examination.”); 2020 ANN. REP., *supra* note 26, at 24 (“Of the whistleblowers who have received awards under the program, approximately 71% provided original information that caused staff to open an investigation or examination, and approximately 29% received awards because their original information significantly contributed to an already existing investigation or examination.”); 2019 ANN. REP., *supra* note 43, at 17 (“Of the whistleblowers who have received awards under the program, approximately 68 percent provided original information that caused staff to open an investigation or examination, and approximately 32 percent received awards because their original information significantly contributed to an already-existing investigation or examination.”); 2018 ANN. REP., *supra* note 45, at 16 (“Of the whistleblowers who have received awards under the program, approximately 67% provided original information that caused staff to open an investigation or examination, and approximately 33% received awards because their original information assisted with an already-existing investigation or examination.”); 2017 ANN. REP., *supra* note 45, at 16 (reporting that 66% of awardees provided information that caused staff to open an investigation or examination and 34% assisted with an existing one); 2016 ANN. REP., *supra* note 45, at 17 (“Almost 60 percent of the whistleblowers who have received awards under the program provided original information that caused Enforcement staff to open an investigation, while the remaining 40 percent received awards because their original information significantly contributed to an existing investigation.”); 2015 ANN. REP., *supra* note 26, at 16 (“Roughly one-half of the whistleblowers who have received awards under the program provided original information that caused Enforcement staff to open an investigation, while the other half received awards because their original information significantly contributed to an existing investigation.”).

50. *See generally* 2022 ANN. REP., *supra* note 36.

51. 2021 ANN. REP., *supra* note 26, at 37–39; 2020 ANN. REP., *supra* note 26, at 41–42; 2019 ANN. REP., *supra* note 43, at 32–33; 2018 ANN. REP., *supra* note 45, at 33–34; 2017 ANN. REP., *supra* note 45, at 32–33; 2016 ANN. REP., *supra* note 45, at 32–33; 2015 ANN. REP., *supra* note 26, at 29–30; 2014 ANN. REP., *supra* note 45, at 28–29; SEC, 2013 ANN. REP. ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 21–22; SEC, 2012 ANN. REP. ON THE DODD-FRANK WHISTLEBLOWER PROGRAM apps. B, C.

52. *See generally* 2022 ANN. REP., *supra* note 36.

53. OFF. OF AUDITS, OFF. OF INSPECTOR GEN., SEC, SEC’S WHISTLEBLOWER PROGRAM: ADDITIONAL ACTIONS ARE NEEDED TO BETTER PREPARE FOR FUTURE PROGRAM GROWTH, INCREASE EFFICIENCIES, AND ENHANCE PROGRAM MANAGEMENT 2 (Dec. 19, 2022).

54. *Id.* at 5.

significant public interest in learning about the resources the agency has devoted to this critical office. Every prior annual report disclosed the number of attorneys assigned to the office.⁵⁵ The FY 2022 report does not.⁵⁶

6. Tip-Related Investigations—Many tips are used in SEC investigations but still do not result in an award because the investigation never turns into an enforcement action that leads to a recovery of at least \$1 million. There is, therefore, a significant interest in learning about the proportion of tips that are used in investigations—separate and apart from the number that lead ultimately to awards. Every prior report since 2014 disclosed the number of active tip-related

55. 2021 ANN. REP., *supra* note 26, at 7 (“[T]here are currently 13 full time attorneys who are dedicated to the work of the Office, which includes, among other things, processing award claims and communicating with the public. OWB also currently has three attorneys assigned to OWB on temporary detail to support the work of the Office.”); 2020 ANN. REP., *supra* note 26, at 6 (“[T]here are currently thirteen full time attorneys who are dedicated to the work of the Office, which includes, among other things, processing award claims and communications with the public. OWB also currently has three attorneys assigned to OWB on temporary detail to support the work of the Office.”); 2019 ANN. REP., *supra* note 43, at 6 (“There are currently two Assistant Directors and nine attorneys who are dedicated to the work of the Office, which includes, among other things, processing award claims, as well as two attorneys devoted to communications with the public.”); 2018 ANN. REP., *supra* note 44, at 6 (“There are two Assistant Directors and twelve attorneys who are dedicated to the work of the Office, including, among other things, processing award claims, as well as an attorney devoted to communications with the public.”); 2017 ANN. REP., *supra* note 45, at 6 (“OWB is staffed by eleven attorneys, four paralegals, and an administrative assistant.”); 2016 ANN. REP., *supra* note 45, at 6 (“In the past fiscal year, OWB also was staffed by eleven attorneys, five paralegals, and an administrative assistant.”); 2015 ANN. REP., *supra* note 26, at 6 (“OWB was staffed during the past fiscal year by ten attorneys, five paralegals, and an administrative assistant.”); 2014 ANN. REP., *supra* note 45, at 6 (“OWB currently is staffed by nine attorneys and three paralegals.”); 2013 ANN. REP., *supra* note 54, at 5 (“OWB currently is staffed by nine attorneys and three paralegals.”); 2012 ANN. REP., *supra* note 54, at 2 (“[T]he Office is currently staffed by eight attorneys, three paralegals, and one program support specialist.”).

56. *See generally* 2022 ANN. REP., *supra* note 36.

investigations and matters under inquiry that the OWB staff was currently tracking.⁵⁷ The 2022 report does not.⁵⁸

III. WHY DID THE SEC WHISTLEBLOWER PROGRAM GO DARK(ER)?

The omissions discussed above are not acknowledged, much less explained, in the FY 2022 Report. It is hard to see how any of the data points described above could “reasonably be expected to reveal the identity of a whistleblower.”⁵⁹ Given the large volume of awards, matters, and tips that are now being processed each year, the variance in time between tips and awards, the fact that awards are not matched to enforcement actions, and the generality of the categories of information at issue (e.g., “insider” includes current employees, former employees, contractors, and others) there is just no conceivable way someone could take any of these aggregate statistics and use these to identify any particular whistleblower. If a company already suspects one of its employees may have blown the whistle, it’s hard to see how any of this data could possibly help it figure out whether that’s true and if so, which employee was the one.⁶⁰

Thus, the SEC must have some other reason(s) for deciding to omit this information from the FY 2022 report. There are at least four possibilities.

1. Scarce Resources—An October 2022 SEC Office of Inspector General report found that the Commission’s aggressive rulemaking agenda under Chair Gensler has come at the cost of “other mission-related work” because SEC “rule-making teams have borrowed staff from other organizational areas to assist with

57. 2021 ANN. REP., *supra* note 26, at 32 (“OWB currently is tracking over 1,300 matters in which a whistleblower’s tip has caused a Matter Under Inquiry or investigation to open, or has been forwarded to Enforcement staff for review and consideration in connection with an ongoing investigation.”); 2020 ANN. REP., *supra* note 26, at 31 (“OWB currently is tracking over 1,100 matters in which a whistleblower’s tip has caused a Matter Under Inquiry or investigation to open, or has been forwarded to Enforcement staff for review and consideration in connection with an ongoing investigation.”); 2019 ANN. REP., *supra* note 43, at 26 (“OWB currently is tracking over 1,000 matters in which a whistleblower’s tip has caused a Matter Under Inquiry or investigation to open, or has been forwarded to Enforcement staff for review and consideration in connection with an ongoing investigation.”); 2018 ANN. REP., *supra* note 45, at 24 (“OWB currently is tracking over 900 matters in which a whistleblower’s tip has caused a Matter Under Inquiry or investigation to open, or has been forwarded to Enforcement staff for review and consideration in connection with an ongoing investigation.”); 2017 ANN. REP., *supra* note 45, at 27 (“OWB currently is tracking over 700 matters in which a whistleblower’s tip has caused a Matter Under Inquiry or investigation to be opened or which have been forwarded to Enforcement staff for review and consideration in connection with an ongoing investigation.”); 2016 ANN. REP., *supra* note 45, at 27 (“OWB currently is tracking over 800 matters in which a whistleblower’s tip has caused a Matter Under Inquiry or investigation to be opened or which have been forwarded to Enforcement staff for review and consideration in connection with an ongoing investigation.”); 2015 ANN. REP., *supra* note 26, at 25 (“OWB currently is tracking over 700 matters in which a whistleblower’s tip has caused a Matter Under Inquiry or investigation to be opened or which have been forwarded to Enforcement staff for review and consideration in connection with an ongoing investigation.”); 2014 ANN. REP., *supra* note 45, at 24 (“OWB currently is tracking over 600 matters in which a whistleblower’s tip has caused a Matter Under Inquiry (‘MUI’) or investigation to be opened or which have been forwarded to Enforcement staff for review and consideration in connection with an ongoing investigation.”).

58. *See generally* 2022 ANN. REP., *supra* note 36.

59. 15 U.S.C. § 78u-6(h)(2)(A).

60. If the SEC now believes that these statistical disclosures were somehow compromising whistleblower anonymity, it should explain its change in position.

rulemaking activities.”⁶¹ It’s possible that the FY 2022 Report was a casualty of this staff reallocation; OWB staffers may have been reassigned to assist with agency rulemakings, leaving the OWB without enough bandwidth to produce the usual information.⁶²

2. *Disrespect for Mechanisms of Participation and Accountability*—Under Chair Gensler, the SEC has attracted bipartisan criticism for shortening comment periods on major rules from the traditional 45 or 60 days to 30 days.⁶³ Critics argued that this undercut the notice and comment process as a site for public participation and accountability. One might see the agency’s decision to omit key data from its FY 2022 Report’s as another symptom of the same underlying indifference towards these traditional mechanisms of administrative participation and accountability.

3. *Data Problems*—Having operated in extreme secrecy and outside the ordinary mechanisms of accountability, the WBP has not been disciplined to follow best administrative practices regarding data retention and tracking.⁶⁴ Perhaps the SEC omitted some of these figures because it has learned that its records are insufficiently reliable. This of course raises the question: are the figures reported in past reports also unreliable?

4. *Hiding Something*—Finally, it is possible that the agency’s choice to omit some of this data was driven by a desire to hide something specific that

61. Memorandum From Nicholas Padilla, Jr., Acting Inspector Gen., SEC, to Gary Gensler, Chair, SEC 3 (Oct. 13, 2022), <https://www.sec.gov/files/inspector-generals-statement-sec-mgmt-and-perf-challenges-october-2022.pdf> [<https://perma.cc/ZB9B-9NBV>].

62. Cf. Hal Scott & John Gulliver, *A Question for Congress: Why Didn’t the SEC Stop FTX?*, WALL ST. J. (Jan. 18, 2023, 1:26 PM), <https://www.wsj.com/articles/a-question-for-congress-why-didnt-the-sec-stop-ftx-crypto-exchange-assets-investors-bankruptcy-fraud-sam-bankman-fried-11674063645> [<https://perma.cc/7LHL-45D5>] (speculating that the SEC’s failure to investigate FTX before its collapse may have been caused by the same issue).

63. See, e.g., Paul Kiernan, *SEC Extends Comment Periods on Three Major Rule Proposals*, WALL ST. J. (May 9, 2022, 1:19 PM), <https://www.wsj.com/articles/sec-extends-comment-period-on-three-major-rule-proposals-until-june-17-11652109343> [<https://perma.cc/7B2J-PFUG>] (discussing democratic Congressional backlash to the shortened comment periods); Declan Harty, *Senate Dems Press SEC Chair to Slow Wall Street Rules*, POLITICO (Oct. 20, 2022, 4:12 PM), <https://www.politico.com/news/2022/10/20/senate-democrats-gensler-public-comments-sec-00062732> [<https://perma.cc/3AQT-THTC>] (same); Al Barbarino, *SEC Under Fire Over Shorter Rule Proposal Comment Periods*, LAW360 (Mar. 9, 2022, 6:57 PM), <https://www.law360.com/articles/1471291/sec-under-fire-over-shorter-rule-proposal-comment-periods> [<https://perma.cc/LCV9-SS5V>] (discussing backlash to 30 day comment periods from Congress and industry groups); Hester M. Peirce, Comm’r, SEC, *Rat Farms and Rule Comments—Statement on Comment Period Lengths* (Dec. 10, 2021), <https://www.sec.gov/news/statement/peirce-rat-farms-and-rule-comments-121021> [<https://perma.cc/5QMF-7QFZ>] (criticizing 30 day comment period as inadequate); Mark T. Uyeda, Comm’r, SEC, *Statement on Reopening of Comment Period for Share Repurchase Disclosure Modernization* (Dec. 7, 2022), <https://www.sec.gov/news/statement/uyeda-statement-share-repurchase-disclosure-modernization-120722> [<https://perma.cc/2PCK-X593>] (same).

64. See Platt, *supra* note 8, at 74–75 (describing the WBP’s poor record-keeping, evidenced by the agency’s repeatedly disclosing information through the FOIA process that later turned out to be false, incomplete, or both, with names added to the disclosures, then removed, then added back, and some of the information posted on the SEC website being revised during the course of the FOIA process as the agency came to realize that it was false); see also Oral Argument at 16:05–10, 17:00–17:30, *Jane Doe v. SEC*, 28 F.4th 1306 (D.C. Cir. 2022) (statement of Judge Tatel) (describing a whistleblower award regulation as “one of the sloppiest . . . I’ve ever seen” and sending “a message back to the commission: they need to get their act together”).

would be controversial or embarrassing. For instance, it could be a political problem for the program if too many outsiders (like activist short-sellers) are getting awards or if too few awards are going to individuals who helped the agency detect *new* frauds (as opposed to assisting with already-open investigations).

IV. CONCLUSION

The FY 2022 Report is transparent about one thing: the SEC is not taking seriously the criticisms that the WBP's excessive secrecy is a problem. For those who beg to differ, the ball is back in your court.