

**MANAGING CORPORATE
WHISTLEBLOWER COMPLAINTS,
FROM PREPARATION
TO RESOLUTION**

WACHTELL, LIPTON, ROSEN & KATZ

Corporate Whistleblowers: Recent Examples

Product failure and recall



Numerous whistleblowers raised concerns to management regarding airplane safety prior to deadly crashes

Workplace safety



Former service technician in Norway alleged unsafe working conditions, and eventually leaked company data to news outlets

Cybersecurity



Former cybersecurity chief alleged that Twitter executives deceived federal regulators and the Board about “extreme, egregious deficiencies” in its defenses against hackers and efforts to fight spam

Workplace misconduct



\$35m SEC penalty for failure to maintain disclosure controls concerning complaints and for violation of whistleblower protection law

Employee NDAs



\$10m SEC penalty for alleged violation of whistleblower protection law

Customer agreements



\$18m SEC penalty for alleged violation of whistleblower protection law

Whistleblower Actions: Record-Breaking Trends in 2023

- Unprecedented number of whistleblower reports received
 - SEC: **18,354 whistleblower reports** (up nearly 50% from 2022)
 - CFTC: **1,530 whistleblower reports** (all time high)
- SEC awarded **\$600m to 68 individual whistleblowers**
 - SEC awarded **\$279m to a single whistleblower**, surpassing the CFTC's previous record for a whistleblower award of \$200 million in 2021
- SDNY launched a whistleblower pilot program in January 2024
- DOJ to launch new whistleblower program in mid-2024
- SEC is also taking action against companies that impede whistleblower activity, resulting in sizable penalties

Preparation and Planning: Before a Whistleblower Comes Forward

- Preparation and planning key
- Maintain and communicate an effective ethics and compliance program, which includes robust whistleblower program and anti-retaliation policy
- Ensure that personnel manning ethics hotlines are trained appropriately and know to surface serious, non-routine reports (*e.g.*, those involving allegations concerning Section 16 officers) promptly to the General Counsel and/or the Chair of the Audit Committee.
- Establish oversight mechanisms and reporting structures
- Develop a communications strategy
- Have in mind a trusted response team of lawyers, advisors, and crisis communicators
- Set sensible limits on employee access to systems and databases
- Keep ahead of evolving business and legal risks

When a Whistleblower Comes Forward: Navigating the Early Days

- Communicate clearly with the whistleblower
- Avoid retaliatory conduct
- Establish a chain of command
- Effective communication with Board and management
- Retain advisors
- Protect privileges
- Preserve documents and data
- Learn the facts behind whistleblower complaint
- Consider whether reporting to government agencies is appropriate
- Evaluate whether public disclosure is required or would be prudent under the circumstances
- Think about the end game early

Getting to the Finish Line: Settlement and Resolution Strategies

- Identify the different inquiries and interests (SEC, DOJ, etc.)
- Ensure that responses are appropriately prioritized
- Communicate clearly with auditors about their role
- Consider disclosure issues (Form 12b-25)
- Evaluate compensation issues
- Manage the perception of the unfolding investigatory activity
- Navigate challenges of settling with a whistleblower

When the Smoke Clears: Learning from the Whistleblower Investigation

- Identify and reflect on lessons learned
- Proactively implement necessary reforms to improve the company's response to the next whistleblower
- Repair reputation and rebuild trust
- Consider follow-up engagement