The SEC Whistleblower Practice Guide


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INTRODUCTION

Congress directed the U.S. Securities and Exchange Commission ("SEC" or the "Commission") to establish a whistleblower program as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"). Under the rules of the SEC Whistleblower Program ("Whistleblower Program"), individuals who provide the SEC with original information leading to an enforcement action that results in over $1 million in monetary sanctions are entitled to receive an award ranging from 10% to 30% of the moneys collected.

The Whistleblower Program is now in its tenth year, and, since its inception, it has steadily gained momentum and influence. Between its first award in 2012 and January 31, 2021, the SEC Office of the Whistleblower has issued approximately $738 million in awards to 134 individuals whose information led to successful enforcement actions for violations of securities laws. Fiscal Year 2020, which ended on September 30, 2020, saw a record-setting total of $175 million awarded to 39 individuals. That record has already been broken in Fiscal Year 2021, as the SEC has awarded approximately $190 million to 33 individuals between October 1, 2020, and February 28, 2021.

Since 2012, the SEC has issued at least 56 awards that exceeded $1 million, at least 15 of which were in the tens of millions. The highest award to date was over $114 million issued to a single whistleblower, which consisted of approximately $52 million in connection with an SEC action and approximately $62 million arising from related actions by another enforcement agency.

The true measure of the success of the Whistleblower Program is the powerful role that it has played in incentivizing whistleblowers to report information regarding securities violations that the SEC otherwise might never have discovered. As of September 30, 2020, whistleblower tips had led to enforcement actions resulting in orders totaling more than $2.5 billion in monetary sanctions. Of this amount, more than $1.4 billion was disgorgement of ill-gotten gains with interest. In addition to providing monetary incentives to individuals who submit helpful information to the SEC, the Dodd-Frank Act established whistleblower protections designed to ensure that individuals who experience retaliation for providing information to the SEC have legal remedies. Additionally, as detailed in this guide, the SEC has taken direct action against several employers for retaliating against whistleblowers.

The Commission also has sought to prevent companies from using employer-imposed agreements to impede their employees from providing information to the SEC. To date, the Commission has brought and settled 12 enforcement actions against employers for using a variety of such agreements to bind employees and former employees, including provisions that: (1) prohibit communication with the SEC, (2) require notification to the employer’s legal department prior to speaking with the SEC, or (3) require an employee to waive the right to receive a whistleblower award from the SEC. The Commission’s leadership on this front has prompted other federal agencies to institute similar policies prohibiting the use of agreements to silence employees on matters within their regulatory reach.

Taken together, the Commission’s actions and initiatives to support whistleblowers have had a profound impact on the ability and willingness of employees to raise concerns about perceived securities violations, both to their employers and to the SEC. As a result, employees and former employees can participate confidently in the SEC Whistleblower Program and earn monetary awards and can do so even after their employers have forced them to sign agreements intended to deter them from speaking to the SEC.

"[I]t seems that nearly every day has provided us with an opportunity to appreciate the contributions of whistleblowers.”

– Allison Herren Lee, Acting SEC Chair

As it grows, the SEC Whistleblower Program is also evolving. On September 23, 2020, the SEC adopted final rules ("Final Rules"), the first revisions to the rules since the inception of the Whistleblower Program. The Final Rules became effective on December 7, 2020. They include amendments to how the SEC calculates a whistleblower’s award, most significantly creating a presumption—subject to some exceptions—that an individual is entitled to the 30% statutory maximum award if the award will be $5 million or less. The Final Rules alter or provide additional guidance on the definitions of several terms, including who qualifies as a “whistleblower,” what qualifies as an “action” that a whistleblower may recover an award from, and when the SEC may add to a whistleblower’s award based on recovery in a “related action.”

It is clear that the SEC’s leadership and staff have grown to rely on the help of whistleblowers during the years that the SEC Whistleblower Program has been in existence. The program has repeatedly allowed the SEC to detect well-hidden frauds early on and to take quick and effective action to protect the investing public while conserving limited agency resources. This has greatly benefited investors in the U.S. capital markets, who
include tens of millions of working families with their savings and retirement funds invested in a wide range of stocks, bonds, and mutual funds. While sometimes cast as incentivizing disloyalty and greed among employees, the Whistleblower Program has actually benefited corporations and financial firms by encouraging them to strengthen their internal compliance programs, giving management the opportunity to address potential misconduct before it becomes a larger problem—or one that merits a government enforcement action. The Whistleblower Program is in a strong position to continue growing, aiding the SEC’s enforcement efforts and generating more and even larger awards.

The goal of this Practice Guide is to explain the rules and procedures of the SEC Whistleblower Program in a way that will aid whistleblowers and their counsel in submitting high-quality tips to the SEC, in assisting the SEC and related agencies in any investigations that follow, and in claiming the financial awards they have earned for their role in helping the SEC to enforce the nation’s securities laws. The Practice Guide contains an up-to-date explanation of the expanding protections for employees who seek to blow the whistle on securities violations and for those who experience retaliation for their courage in speaking up to protect investors. This 2021 edition also features a useful Appendix A, “SEC Whistleblower Awards Through January 31, 2021,” which provides the dates, amounts, and summaries of other available information for every award the SEC has issued since the inception of the Whistleblower Program.

BACKGROUND

The Dodd-Frank Act is one of a series of significant financial reforms that began with passage of the Sarbanes-Oxley Act (“SOX”) in 2002. Popular outrage over the greed exhibited by and corruption engaged in at Enron, MCI and other companies prompted Congress’s near-unanimous passage of SOX, which provided a comprehensive set of rules and regulations designed to prevent accounting fraud by publicly traded companies. SOX also contained a whistleblower provision to protect employees from retaliation by their employers for reporting fraud or violations of securities laws.

In late 2008, six years after the enactment of SOX, the housing and financial markets collapsed, revealing rampant, dangerous financial risk-taking and misconduct, particularly with respect to securities backed by subprime mortgages. That financial crisis was still unfolding when Bernard Madoff’s “Ponzi” scandal hit the news and educated large numbers of Americans about shortcomings in the government’s ability to detect and prevent large-scale fraud on investors. The market collapse prompted a massive infusion of government “bailout” funds, with legislation that included protections for whistleblowers who reported fraud, gross mismanagement, or waste of those funds. In 2009, Congress also amended the U.S. False Claims Act, making it easier for whistleblowers to assist the U.S. government in recovering money lost to fraud.

Perhaps the most significant, comprehensive response to the 2008 crisis was the Dodd-Frank Act, enacted in 2010. The Dodd-Frank Act initiated a massive financial regulatory overhaul that lawmakers hoped would help restore confidence—some would say sanity—in U.S. financial markets through a wide range of oversight and enforcement measures. Among other sweeping changes, the Dodd-Frank Act directed the SEC to create the Whistleblower Program to incentivize individuals to come forward with information about securities violations. This would give the SEC a powerful enforcement tool to help it prevent future Enrons, MCIs and Madoffs from harming the investing public and the broader economy. The Dodd-Frank Act also established a similar whistleblower program for commodities trading that is administered by the Commodity Futures Trading Commission (“CFTC”).

The past ten years have demonstrated that the Commission has designed and implemented an effective program that both rewards and protects whistleblowers.

At its inception, the SEC Whistleblower Program received an enthusiastic welcome from employee-rights advocates and “good-government” groups but generated a great deal of concern among large corporations and their law firms. After asking for public comment on its proposed rules for the program in November 2010, the SEC received some 240 comment letters and 1,300 form letters from a broad array of stakeholders. Consumer advocates and the whistleblower community argued that the program was necessary to prevent the sort of fraud that had damaged the economy in the prior decade, largely at the expense of the nation’s working people. The whistleblower community noted that employees were in the best position to identify corporate misconduct but that many were afraid to come forward because the very real risk of derailing their careers far outweighed the benefits of speaking up, which would be few in the absence of the significant financial incentives mandated by the Dodd-Frank Act.

The corporate defense bar and their clients, on the other hand, claimed that the SEC Whistleblower Program, which many of them derisively called a “bounty-hunter program,” would serve...
only to create a perverse incentive for employees to hunt for potential corporate fraud or illegalities, disclose nothing to the employer, and then report their information to the government only when the violations had grown to a size that would warrant payment of a large enough “bounty” to justify the risk to their careers. Corporations noted that they had gone to great lengths to create internal reporting mechanisms, as SOX required public companies to do, only to find themselves facing a radical new program that would give the would-be whistleblowers little to no reason to use internal channels that could help management correct minor problem before they became major liabilities.

The final rules that the SEC Commissioners adopted by a 3-2 vote on May 25, 2011, reflected the Commission’s effort to address these competing concerns, as it explained in an adopting release accompanying the rules (“2011 Adopting Release”). The business lobby and defense bar remained dissatisfied, as was evident in a number of statements issued by the U.S. Chamber of Commerce and others in response to issuance of the program. As the subsequent decade has demonstrated, however, the Commission and its staff designed, and have since implemented, what is proving to be a workable and very effective program—both in rewarding and protecting whistleblowers and in giving corporations strong incentives to strengthen their compliance programs and improve their corporate governance standards.

**THE SEC WHISTLEBLOWER PROGRAM RULES**

The Dodd-Frank Act added a new provision to the Securities Exchange Act of 1934, Section 21F, that created the Whistleblower Program. Under the Whistleblower Program rules, the SEC is required to pay awards to eligible whistleblowers who voluntarily provide the Commission with original information that leads to a successful enforcement action in which the SEC recovers monetary sanctions in an amount over $1,000,000. Sanctions can include disgorgement, penalties, fines, and interest. A whistleblower who meets these and certain other criteria is entitled to an award of 10% to 30% of the amount recovered by the SEC or by other authorities in “related actions.” Whistleblower awards can be substantial, as SEC sanctions against companies have run into the tens and even hundreds of millions of dollars in recent years, with at least one judgment for the SEC topping $1 billion in disgorgement and penalties against a real estate company and its owner for running a Ponzi scheme.

**A. Whistleblower Status**

The Whistleblower Program rules define a “whistleblower” as an individual who, “alone or jointly with others,” provides the SEC with “information in writing that relates to a possible violation of the federal securities laws (including any law, rule, or regulation subject to the jurisdiction of the Commission) that has occurred, is ongoing, or is about to occur.” Rule 21F-2(a).

The program rules make clear that a corporation or other such entity is not eligible for whistleblower status. Rule 21F-2(a)(2). In an award determination in November 2017, the SEC cited this corporate ineligibility rule as one reason justifying the denial of awards to two experts whose incorporated entity had provided information to the SEC in the form of an expert report.

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**The SEC Whistleblower Program has accepted tips from individuals throughout the United States and in at least 130 foreign countries.**

The SEC Whistleblower Program has accepted tips from individuals throughout the United States and in at least 130 foreign countries. The SEC will make awards to foreign nationals where otherwise appropriate, even when the whistleblower resides overseas and submits the tip from overseas and when the misconduct complained of occurs entirely overseas.

In issuing one such award in 2014, the SEC acknowledged well-established limits on the extraterritorial application of U.S. law, as set forth by the Supreme Court in *Morrison v. Nat’l Aust. Bank Ltd.*, 561 U.S. 247, 266 (2010). The SEC noted, however, that the Court in *Morrison* pointed out that the application of U.S. law in cases having certain foreign aspects could nonetheless be a domestic rather than an extraterritorial application in circumstances where the application targeted conduct or situations that were a “focus of congressional concern” and also had a “sufficient U.S territorial nexus.” Based on this analysis, the SEC ruled that whistleblower awards are appropriate where a whistleblower’s information leads to a successful enforcement action brought in the United States by a U.S. regulatory agency which is enforcing U.S. securities laws. In short, international whistleblowers are eligible for awards for providing information that leads to a successful SEC enforcement action.

The Dodd-Frank Act and Rule 21F-8(c) specifically exclude from participation in the SEC Whistleblower Program employees of the SEC, the U.S. Department of Justice (“DOJ”), certain regulatory agencies and self-regulatory organizations, any law enforcement organization, and foreign governments. In an award determination issued in July 2017, however, the SEC made clear that not all government employees are excluded, even where their agencies may have certain law-enforcement functions, when...
it awarded nearly $2.5 million to an employee of an unnamed “domestic government agency” who worked in a section of the agency unrelated to law enforcement.\textsuperscript{24}

1. “Voluntarily Provide”

In order to qualify for an award under Section 21F(b)(1) of the Securities Exchange Act,\textsuperscript{25} a whistleblower must “voluntarily provide” the SEC with information concerning a securities violation. The SEC will view such information as provided voluntarily only if the whistleblower provides it to the Commission before he or she has received a request, inquiry, or demand for the same: 1) from the SEC; 2) in connection with an investigation, inspection, or examination by the Public Company Accounting Oversight Board or a self-regulatory organization; or 3) related to an investigation by Congress, another federal agency or authority, or a state attorney general or securities regulator. Rule 21F-4(a)(1), (2).

The program rules address a concern among whistleblower advocates that a whistleblower might lose eligibility because the SEC or another of the agencies listed above has directed an inquiry or request to his employer but not to him individually. Given that such requests or demands are often drafted such that they arguably apply to a large number of employees (and to broad categories of information), this reading of “voluntary” would have barred many corporate employees from participation in the program. The rules as adopted make clear that a whistleblower will be deemed to have submitted information “voluntarily” as long as an official inquiry is not directed to him as an individual. Rule 21F-4(a).

If the whistleblower is obligated to report information to the SEC as a result of a pre-existing duty to the Commission or to one of the other entities described above, whether by contract or by court or administrative order, the information will not be considered voluntary, and he or she will not be entitled to an award. Rule 21F-4(a)(3). This disqualification is not triggered by an employee’s contractual obligation to his employer or a third party or by the employee’s receipt of a request for the same or related information from his employer as part of an internal investigation.\textsuperscript{26} This means that an employer cannot remove the incentives that are key to the Whistleblower Program’s effectiveness by requiring all employees to sign agreements that they will report any perceived securities violations to the SEC.

Notwithstanding the rule that whistleblowers provide information to the SEC “voluntarily” only if they do so before receiving requests for the same from the SEC or certain other agencies, the SEC surprised many observers when it demonstrated that it would waive this restriction under certain circumstances.

On July 31, 2014, the SEC awarded $400,000 to a whistleblower who had not come forward “voluntarily” as required by the rules because a self-regulatory organization had earlier requested the same information directly from the whistleblower.\textsuperscript{28} As the SEC’s order granting the award pointed out, the whistleblower had gone out of his way to raise the issues internally first and had made every effort to have the company address them before turning to the SEC after the company refused. The SEC further found that the whistleblower initially believed that a third party had relayed all of the whistleblower’s information to the self-regulatory organization. Under these “materially significant extenuating circumstances,” the SEC found a waiver of the “voluntary” requirement of Rule 21F-4(a) to be “in the public interest and consistent with the protection of investors.”\textsuperscript{29} The SEC made a similar decision to waive the voluntariness requirement in issuing a $3,000,000 award in June 2019, upon determining that doing so was “appropriate in the public interest and consistent with the protection of investors.”\textsuperscript{30}

The SEC’s decision to waive the “voluntary” requirement in these cases is particularly noteworthy because it reflects the Commission’s willingness to use its full authority under the Exchange Act to reward individuals who show courage and determination in helping the Enforcement Division undertake a more prompt and effective investigation of serious securities violations than would otherwise have been possible. As authority for its decision to waive the “voluntary” requirement, the SEC relied on Section 36(a) of the Exchange Act, 15 U.S.C. § 77mm, which allows the Commission to “conditionally or unconditionally exempt any person … or transaction” from a provision, rule, or regulation of the securities laws “to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”\textsuperscript{31} The SEC’s application of the same exemptive authority to the issuance of whistleblower awards that it has applied in the regulation of issuers and financial advisors has strengthened the Whistleblower Program. It reassures would-be whistleblowers that the SEC and its staff are willing, where appropriate, to reach as far as the law allows to reward individuals who assist in enforcing the nation’s securities laws.

2. “Original Information”

In order to qualify as “original information” that will support a claim for an award, the whistleblower’s tip must consist of information that is: 1) derived from the individual’s “independent knowledge” or “independent analysis”; 2) not already known to the SEC from any other source (unless the whistleblower is the “original source” of the information, such as where he or she had first reported the information to the DOJ or Department of Labor (“DOL”), which then passed the information on to the SEC); and 3) not “exclusively derived” from allegations made in certain judicial or administrative hearings, government reports, audits, or investigations or derived from the media, unless the whistleblower is “a source of the information.” Rule 21F-4(b)(1).
Independent Knowledge and Independent Analysis

Rule 21F-4(b)(2) defines “independent knowledge” simply as “factual information … this is not derived from publicly available sources.” The whistleblower may have observed the facts firsthand but may also have acquired the knowledge through her “experiences” or communications. This means that the whistleblower can have “independent knowledge” of facts despite having learned those from someone else such as a supervisor, co-worker, or customer, as long as that third person is not a company attorney, compliance officer, or other representative who would usually be ineligible for a reward under Rule 21F-4(b)(4) as discussed below.

In declining to heed the warning of business-side commentators that allowing tips based on third-party information would encourage frivolous claims, the SEC noted when issuing the final rules that excluding such information could deprive the Commission of highly probative information that could aid significantly in an enforcement action. The SEC pointed out that Congress had recently amended the False Claims Act to remove a similar requirement that a qui tam relator possess “direct” (or firsthand) knowledge of the facts.

Exclusions from Independent Knowledge and Analysis—Attorneys, Compliance Personnel, Auditors and Officers

Consistent with its goal of promoting enforcement of securities laws while also encouraging corporate efforts to maintain effective

Employees in certain roles can participate in the SEC’s whistleblower reward program only under certain circumstances.

“Independent analysis” refers to a whistleblower’s “examination and evaluation,” conducted by her alone or with others, of information that might be publicly available where the whistleblower’s analysis reveals additional information that is not generally known or available to the public. This might include, for example, an expert analysis of data that could significantly advance an investigation.

In conjunction with the SEC’s 2020 Final Rules and Adopting Release, the Commission published interpretive guidance offering a restrictive reading of what constitutes viable “independent analysis.” Under this guidance, a whistleblower’s conclusion must derive “from multiple sources, including sources that, although publicly available, are not readily identified and accessed by a member of the public without specialized knowledge, unusual effort, or substantial cost,” and those sources must “collectively raise a strong inference of a potential securities law violation that is not reasonably inferable by the Commission from any of the sources individually.” There is no bright-line test for when an individual tip rises to the level of “independent analysis” under the statute—the SEC retains discretion to decide each case based on its facts. While the guidance states that “technical expertise is not a requirement” for a whistleblower to submit “independent analysis,” the analysis must be “highly-probative” and should “bridge the gap between the publicly available information itself and the possibility of securities violations,” something that will be most feasible for experts to do. The guidance also emphasized that for both “independent knowledge” and “independent analysis,” the SEC must not know about the information from any other source, and the tip must lead to a successful enforcement action before the whistleblower is entitled to an award.

In justifying this restrictive interpretation, the Commission contended that both Congress and the SEC had expressed a desire to “substantially restrict any role for publicly available information in potential whistleblower awards.” The SEC asserted that Congress did not intend for the SEC to pay for publicly available information but rather to reward “detailed and sophisticated” work such as that done by the whistleblower who exposed the Madoff fraud. In sum, the SEC’s interpretive guidance strongly suggests that the Commission will not reward whistleblowers who loosely invoke the “independent analysis” prong of original information in seeking an award and will closely scrutinize applications seeking such awards for consistency with the criteria described above.

Until recently, awards for tips based on independent analysis alone were rare, with only one such award issued through the end of August 2020. On January 15, 2016, the SEC issued a whistleblower award to a “company outsider” whose information was derived not from independent knowledge of the facts but rather from his or her “independent analysis.” According to subsequent media reports, the tip originated from the whistleblower’s review of publicly available information regarding practices of the New York Stock Exchange that favored high-frequency traders over other market participants. This tip resulted in a $5 million fine against the exchange.

However, awards based on independent analyses have become more common recently. On September 1, 2020, the SEC issued a joint award to two whistleblowers who were unaffiliated with the company and whose tip was based largely on independent analysis of the company’s public filings. Already in Fiscal Year 2021, the SEC has awarded five individuals based on independent analyses.
corporate-governance and internal-compliance programs, the SEC has designated information in the possession of certain categories of individuals as not being derived from independent knowledge or analysis, making these individuals presumptively ineligible for participation in the whistleblower reward program. Two of these exclusions apply specifically to attorneys, both in-house and retained, and to non-attorneys who possess attorney-client-privileged information. The rules exclude:

- Information obtained through a communication subject to attorney-client privilege, unless disclosure would be permitted under either SEC rules governing the conduct of attorneys practicing before the Commission, or state ethics rules governing attorneys, Rule 21F-4(b)(4)(i); and
- Information obtained in connection with the whistleblower’s (or her firm’s) legal representation of a client, unless disclosure would be permitted by the rules described above. Rule 21F-4(b)(4)(ii).

The SEC rules that govern the professional conduct of attorneys practicing before the SEC on behalf of an issuer of publicly traded securities are found at 17 CFR Part 205 (“SEC Part 205”). Section 205.3(d)(2) permits attorneys practicing before the Commission to disclose client confidences when reporting suspected securities violations to the SEC under certain circumstances, including where necessary to prevent a material violation that would significantly harm investors or to prevent the issuer from committing perjury or a fraud on the SEC during an investigation. Lawyers who are considering providing the SEC with information about securities violations need to be particularly careful, however, as they may run afoul of state rules of professional responsibility even when SEC Part 205 would allow disclosure and thus allow participation in the SEC Whistleblower Program. State bar rules vary widely in their restrictions on attorney disclosures of client confidences, with some following the American Bar Association’s Model Rule of Professional Conduct 1.6 and other states imposing either more or less restrictive rules. For this reason, attorneys thinking of participating in the Whistleblower Program should make sure to carefully review and adhere to the rules of professional conduct that apply to them and their actions.

At least one state bar association and one court have gone as far as to bar attorneys altogether from participating in whistleblower reward programs on the grounds that attorneys who disclose client confidences for financial gain are in fundamental conflict with the interests of their clients. The Professional Ethics Committee of the New York County Lawyers Association issued a bar opinion stating that New York’s rules of professional conduct prohibit attorneys from collecting SEC awards and, presumably, other “bounties,” based on the confidential information of a client. In another case, one branch of the New York Supreme Court ruled that an attorney could not maintain a qui tam lawsuit against his former employer for state tax avoidance, as the action would potentially result in the attorney’s earning a whistleblower reward for his disclosure of client confidences that he obtained as in-house counsel.

In addition to lawyers, the SEC Whistleblower Program rules make certain other individuals presumptively ineligible to receive awards because of their roles, formal or otherwise, in the internal compliance functions that the SEC believes are critical to the overall goal of increased adherence to securities laws. The SEC deems a person to lack “independent knowledge or analysis” where the person obtains the information through his or her role as:

- An officer, director, trustee, or partner to whom another employee reports the information, or who learns the information, in connection with the entity’s processes for identifying and addressing unlawful conduct, Rule 21F-4(b)(4)(iii)(A);
- An employee or contractor whose principal duties are in compliance or internal audit, Rule 21F-4(b)(4)(iii)(B);
- An employee of a firm retained to investigate possible violations of the law, Rule 21F-4(b)(4)(iii)(C); or
- An employee of a public accounting firm performing an engagement required by federal securities laws who, through the engagement, obtains information about a violation by the engagement client, Rule 21F-4(b)(4)(iii) (D).

Persons who learn information secondhand from these categories of persons will also not be considered to be providing “original information” if they report the information to the SEC. Rule 21F-4(b)(4)(vi).

The four non-attorney exclusions described above—those for upper-level management, compliance personnel, and auditors serving in the roles set forth in Rule 21F-4(b)(4)(iii)—do not apply in all circumstances. The wording of the rules suggests that these persons might have “independent knowledge” as long as they obtain their information outside their roles in compliance, investigation, or audit. In addition, these exclusions do not apply, and the person submitting the information can be eligible for an award, where at least one of the following conditions is present:

- The would-be whistleblower “reasonably believes” that disclosure to the SEC is needed to prevent “substantial injury” to the entity or investors, Rule 21F-4(b)(4)(v)(A); and
- The would-be whistleblower “reasonably believes” that the entity is acting in a way that would impede an investigation of the violations, Rule 21F-4(b)(4)(v)(B); or
- At least 120 days have passed since the whistleblower reported her information internally to the audit committee, chief legal officer, or other appropriate official of the entity or since he or she obtained the information under circumstances indicating that those officials were already aware of the information, Rule 21F-4(b)(4)(v)(C).

The SEC first applied this 120-day exception on August 29, 2014, when it issued a whistleblower award of more than...
$300,000, or approximately 20% of the more than $1,500,000 it recovered from the wrongdoers, to an employee who performed audit and compliance functions. In that case, the whistleblower reported the securities violations internally, gave the company at least 120 days to take action, and then reported the same information to the SEC when the company did not act to address the violations. This entitled the whistleblower to claim an award under the 120-day exception set forth in Rule 21F-4(b)(4)(v)(C).

On March 2, 2015, the SEC again applied the 120-day exception, this time issuing an award to a former corporate officer who received the information about a violation of U.S. securities laws from another employee who had reported the misconduct through the company’s corporate compliance channels. The officer first reported the misconduct through internal compliance channels and then reported to the SEC when 120 days had passed and the company failed to take action. The SEC issued an award between $475,000 and $575,000 for the information the officer provided. The SEC applied the exception a third time on March 30, 2020, awarding $450,000 to a whistleblower with internal compliance responsibilities who reported to the SEC at least 120 days after reporting violations internally to a supervisor.

The SEC Whistleblower Program rules strike a reasonable balance between the public’s need for strict enforcement and the need for strong corporate compliance programs.

The SEC applied the “substantial injury” exception for the first time in April 2015 when it awarded a compliance professional $1.4 and $1.6 million. Although the whistleblower’s compliance role would have presumptively excluded him from eligibility for an award, the SEC determined that he reported the information to the SEC because he reasonably believed that disclosure was necessary to prevent a substantial injury to the company or its investors, and he was therefore eligible for an award. As then-SEC Director of Enforcement Andrew J. Ceresney explained, “[t]his compliance officer reported misconduct after responsible management at the entity became aware of potentially impending harm to investors and failed to take steps to prevent it.”

Whistleblowers and their counsel should keep in mind that a whistleblower’s belief that “substantial injury” is imminent could be misplaced. For this reason, they should strongly consider waiting 120 days to submit their tips to the SEC in such situations, at least unless they can also qualify for the third exception—i.e., that the whistleblower has reason to believe that the entity is acting in a way that would impede an investigation of the violations.

The SEC issued its first award under this third exception in December 2020. The SEC noted that the whistleblower “aggressively attempted to remedy the misconduct and suffered a unique hardship,” having had reason to believe that the company would impede the SEC investigation.

The SEC’s payment of awards to employees who submit information gained through their respective roles in a company’s compliance functions shows that the door is open for the submission of tips from categories of employees who hold trusted roles in corporations but who are often the best-positioned to learn about their employers’ securities violations. All three of the award recipients mentioned above did exactly what Congress intended the program to encourage: two of them reported the violations internally, acted responsibly by giving their companies four months to address them, and then turned to the SEC when the companies failed to act. The third learned that an entity’s management was refusing to prevent impending harm to investors, and reported the information to the SEC because he reasonably believed it necessary in order to prevent the harm. By paying these individuals awards for their tips, the SEC ensured that more employees and officers who have roles in compliance and audit functions would come forward if they believe they fit into one of the three exceptions to the rule that would otherwise exclude them from the program.

These cases also demonstrate how the program rules strike a reasonable balance between the public’s need for strict enforcement and the interests of corporations (and their shareholders) in maintaining effective legal, compliance, and audit functions, which can serve to protect investors and avoid the need for SEC enforcement action. While generally excluding information from employees who staff compliance and audit functions will mean that the SEC will never hear from some would-be whistleblowers who have credible knowledge of securities violations, the rules ensure that even these individuals can report their information to the SEC and become eligible for an award in certain exceptional situations. Where the wrongful conduct is seriously endangering investors, where the entity is destroying evidence, or where upper management has known about the problem for four months or more, the SEC will accept the non-attorney whistleblower’s original information despite her role as a professional with compliance-related responsibilities.

Corporations thus face the risk that even those employees whom they have entrusted with knowledge of the most serious securities violations can earn awards under the SEC Whistleblower Program. The only way a corporation can
mitigate that risk is to make sure it maintains effective and efficient mechanisms for responding promptly to suspected securities violations.

In deciding where to draw the line between those who can earn an award for blowing the whistle on securities violations and those who cannot, the SEC rejected proposals at the inception of the program that would have excluded many more, perhaps even most, of those individuals who would most likely be able to provide the Commission with high-quality tips. As originally proposed, the rules excluded from “independent knowledge” and “independent analysis” any information obtained not just by officers, directors, trustees, and partners but also by anyone with “supervisory” or “governance” responsibilities who was given the information with the expectation that they would do something about it. The proposed rules also required such persons to wait a “reasonable time” (as opposed to 120 days) before reporting to the SEC.

These proposals drew intense criticism from whistleblower advocates, who pointed out correctly that excluding all “supervisory” personnel would effectively undermine the program. The whistleblower bar also criticized the rule as being so vague as to ensure that few supervisors would risk their positions to report to the SEC. At the same time, the SEC’s proposed exclusion of some employees with governance responsibilities emboldened big-business interests to call for extending the ban to all variety of positions in operations, finance, technology, credit, risk, product management, and on and on. In the end, the SEC struck a fair balance, adopting narrow exclusions for core, compliance-related personnel and processes while rejecting pressure to deny eligibility to far more employees than Congress could possibly have intended or anticipated. The balance between these exclusions and the exceptions to them is now leading to successful enforcement actions without harm to legitimate corporate interests.

**Information “Not Already Known” and the “Original Source” Exception**

For purposes of determining an individual’s entitlement to a whistleblower award, information that is already known to the SEC cannot qualify as “original information” unless the whistleblower is the “original source” of the information.

The “original source” exception applies to information the whistleblower may have already reported to the U.S. Department of Justice (“DOJ”) or certain other agencies, perhaps because the whistleblower was simply trying to alert law enforcement authorities to unlawful practices and reported them to the FBI or DOJ, but was unaware of the SEC Whistleblower Program.

This “original source” exception is particularly important for the many employees who file SOX complaints with the DOL after facing retaliation for reporting securities violations to their employers, but who have not filed tips with the SEC. Under an arrangement between the SEC and DOL, DOL’s Occupational Safety and Health Administration (“OSHA”) cross-files with the SEC every charge of unlawful retaliation it receives under Section 806 of SOX. These SOX charges often contain detailed information about securities violations that the employee reported to the employer, and that information will become “known” to the SEC upon the SEC’s receipt of the charge from DOL. Without the “original source” exception, the employee’s information thus could not qualify as “original information” for purposes of a whistleblower award under Rule 21F-4(b)(1) if the employee later submitted the information to the SEC. This could undermine a whistleblower’s right to an award because SEC staff from time to time initiate investigations based on the SOX charges they receive from OSHA. By allowing the whistleblower to submit a Tip, Complaint or Referral form (“TCR”) containing information “already known” to the SEC and still have her information qualify as “original information,” the “original source” doctrine allows SOX complainants to participate in the SEC Whistleblower Program.

**Whistleblowers cannot earn awards for information provided to other agencies where the SEC never learns of or uses the information in taking enforcement action.**

The authors’ law firm, which represents employees not only before the SEC Whistleblower Program but also in cases of retaliation for blowing the whistle internally on corporate wrongdoing, has seen a significant increase in the number of SEC investigations stemming from the SEC’s review of SOX retaliation charges filed with OSHA. If a SOX complainant is contacted by the SEC for follow-up on the information contained in a charge filed with OSHA, he or she should perfect the SEC tip by then submitting a TCR form with the SEC reiterating the relevant facts from the charge and supplementing them with any additional information in her possession regarding the underlying securities violations. The whistleblower must do so within 120 days of filing the SOX charge with OSHA in order for the SEC to deem the tip to have been filed at the time the whistleblower submitted the SOX charge to OSHA. Rule 21F-4(b)(7).

On April 5, 2018, the SEC made its first whistleblower award pursuant to this 120-day safe harbor provision, awarding over $2.2 million to a former company insider who had first reported
the violations to another government agency. In that case, the Commission determined that the whistleblower had voluntarily reported the wrongdoing to an agency covered by Rule 21F-4(b) (7). That agency then referred the information to the SEC, which opened an investigation into the matter. The whistleblower also submitted a TCR to the SEC’s Office of the Whistleblower within the 120-day safe harbor period, including in that tip the same information the whistleblower had provided to the Rule 21F-4(b) (7) agency, thereby satisfying the requirements of the safe harbor provision. In announcing the award, Jane Norberg, Chief of the SEC’s Office of the Whistleblower, explained, “Whistleblowers, especially non-lawyers, may not always know where to report, or may report to multiple agencies. This award shows that whistleblowers can still receive an award if they first report to another agency, as long as they also report their information to the SEC within the 120-day safe harbor period and their information otherwise meets the eligibility criteria for an award.” The SEC not only considers such whistleblowers eligible for an award but also accepts the date of their reporting to the other agency as the date of their reporting to the SEC, placing them ahead in time of any other whistleblowers who may have submitted a TCR during the 120-day period.

The whistleblower cannot earn an award, however, for information provided to other agencies where the SEC never learns of or uses the information in taking enforcement action. In denying the award application of one individual who had provided information to other federal agencies, the Commission found that those other agencies “did not share, directly or indirectly, any information provided by Claimant with Commission staff” and, thus, that “any information provided by Claimant to those federal agencies could not have had any impact on the SEC’s investigation.”

B. Rules Designed to Incentivize Internal Reporting

The SEC rules repeatedly make clear that the main purpose of the Whistleblower Program is to encourage individuals to provide high-quality tips to the Commission. The SEC notes in the 2011 Adopting Release:

…the broad objective of the whistleblower program is to enhance the Commission’s law enforcement operations by increasing the financial incentives for reporting and lowering the costs and barriers to potential whistleblowers, so that they are more inclined to provide the Commission with timely, useful information that the Commission might not otherwise have received.

With this purpose in mind, the SEC when developing the program rules rejected the business lobby’s near-unanimous insistence that it require all whistleblowers submit their complaints internally before filing them with the SEC and earning an award. “[W]hile internal compliance programs are valuable,” the Commission observed, “they are not substitutes for strong law enforcement.” The Adopting Release recognizes that whistleblowers might reasonably fear retaliation for raising their concerns and also notes that law enforcement interests are sometimes better served when the Commission can launch an investigation before the alleged wrongdoers learn about it and are able to destroy evidence or tamper with potential witnesses. For these and related reasons, the SEC leaves it to each whistleblower to decide whether to report first internally or to the SEC.

At the same time, the Commission included several provisions in the rules that are expressly designed to incentivize whistleblowers to utilize internal compliance programs.

These include:

• Affording whistleblower status to the individual as of the date he or she reports the information internally as long as the whistleblower provides the same information to the SEC within 120 days. This allows an employee to report internally while preserving his “place in line” for an award from the SEC for 120 days, even if another whistleblower provides the same or related information to the Commission in the interim. Rule 21F-4(c)(3); Rule 21F-4(b)(7).

• Giving a whistleblower full credit for information provided by his employer to the SEC where the employee reports the information internally and the employer then investigates and “self-reports” that information (and even additional information that the whistleblower may not have had) to the SEC and where the information supplied by the employer “leads” to a successful enforcement action. Rule 21F-4(c)(3). In order to benefit from this provision of the program rules, the whistleblower must also report his information to the SEC within 120 days of reporting it internally, using the procedures set forth in Rule 21F-9. In May 2019, the SEC issued its first award pursuant to this rule to a whistleblower who reported wrongdoing to the company compliance department, prompting the company to notify the SEC of the results of an internal investigation it initiated based on the whistleblower’s internal report.

• Treating a whistleblower’s participation in an internal compliance and reporting system as a positive factor in determining the amount of an award within the range of 10% to 30%. Rule 21 F-6(a)(4). Conversely, a whistleblower’s interference with internal compliance and reporting systems, including an internal investigation, may decrease the amount of the award. Rule 21 F-6(b)(3).

These rules provide flexibility to the whistleblower, whom the SEC believes to be in the best position to determine the effectiveness or ineffectiveness of the particular internal-compliance system that he or she can decide whether to use, in choosing how to report...
violations. The rules enhance the SEC’s law enforcement operations by encouraging people who may otherwise be deterred to report violations. This group includes those who will be persuaded by the new financial incentives to use the internal compliance programs that come with such reporting as well as those who will report directly to the SEC and who may not have reported any violations at all if required to go to the company first. The SEC also points out that the rules’ incentives to employees to report internally are likely to encourage companies to create and maintain effective internal compliance programs, as whistleblowers are more likely to participate in such a program.

Maintaining an effective program is in the best interests of a company because the SEC, upon receiving reports of a violation, will often notify the company and give it an opportunity to investigate the issue. In deciding whether to give a company that opportunity, the SEC will consider the company’s “existing culture related to corporate governance” and, in particular, the effectiveness of the company’s internal compliance programs.

In the view of the authors, who have specialized in the representation of corporate whistleblowers for many years, the business community’s fears of a rush to report improprieties to regulators have proven to be unfounded. In fact, the authors and other whistleblower-side lawyers have observed that very few employees, current or former, report their concerns to the SEC without having first reported them internally. This observation is consistent with data collected from whistleblowers by the SEC Office of the Whistleblower, which has reported that approximately 85% of award recipients who were current or former employees of the subject entity had first reported their concerns internally.

C. Information that Leads to a Successful Enforcement Action

The program rules establish the standard for determining when a whistleblower’s information has led to a successful investigation, entitling her to an award if the action results in monetary sanctions exceeding $1,000,000. When information concerns conduct not already under investigation or examination by the SEC, it will be considered to have led to successful enforcement if:

- It is “sufficiently specific, credible, and timely” to cause the staff to commence an examination, to open an investigation, to reopen an investigation that the Commission had closed, or to inquire concerning different conduct as part of a current examination or investigation; and
- The Commission brings a successful judicial or administrative action based in whole or in part on the conduct identified in the original information. Rule 21F-4(c)(1).

The standard is somewhat higher for information that focuses on conduct already under investigation or examination although some 33% of whistleblowers who have earned awards from the SEC did so on the basis of such information. The information will be deemed to have led to successful enforcement if it “significantly contributes” to the success of the action. Rule F-4(c)(2). In determining whether information “significantly contributed” to the success of an investigation and resulting enforcement action, the Commission will consider whether the information allowed the SEC to bring a successful action in significantly less time or with significantly fewer resources, bring additional successful claims, or take action against additional parties. The SEC has denied a number of claims for awards on the grounds that the tip neither led to nor contributed to a successful enforcement action.

The SEC has provided additional guidance as to what actions might constitute a “significant contribution” to an ongoing investigation within the meaning of Rule 21F-4(c)(2). On May 13, 2016, the SEC announced that it was awarding more than $3.5 million to a whistleblower even though the whistleblower’s reports to the SEC had not prompted the SEC to start an investigation. An SEC investigation was already underway as a result of media coverage of potential securities violations when the whistleblower submitted the tip to the SEC and later assisted SEC staff in their investigation.

The size of an SEC award is based on how much the SEC ultimately collects from the company.

On these facts, the SEC’s Claims Review Staff preliminarily decided that the whistleblower was not entitled to an award because his or her information had not caused the SEC to open an investigation or to expand the investigation to focus on additional conduct. The whistleblower contested the preliminary determination, arguing that his or her information had in fact “significantly contributed” to the covered action’s success within the meaning of Rule 21F-4(c)(2), and the SEC enforcement staff supported the whistleblower’s position. The Commission ultimately agreed, finding that the whistleblower’s information had “significantly contributed” by focusing the staff’s attention on certain evidence and “meaningfully increasing Enforcement staff’s leverage during the settlement negotiations.” In determining the percentage to award the whistleblower, the SEC noted that it
had also considered the “unique hardship” the whistleblower had suffered in the form of being unable to find a job since reporting the misconduct.

On May 24, 2019, the SEC made its first whistleblower award under Rule 21F-4(c)(3), which allows whistleblowers who internally report to receive credit for a company’s self-report of those same allegations to the SEC so long as the whistleblower also externally reported the matter to the SEC within 120 days of making her internal report. The Commission awarded the whistleblower $4.5 million because their internal reporting subsequently led to a successful enforcement action and a related action by another agency.

The whistleblower sent an anonymous tip to the company and submitted the same information to the SEC within 120 days. The company self-disclosed the tip as well as the results of an internal investigation it initiated in response to the tip. The Commission found that the whistleblower’s original information led to the successful enforcement under the standards set forth in Rule 21F-4(c)(3) although the whistleblower never communicated with the Commission’s staff.

In the SEC’s 2020 guidance interpreting what qualifies as “independent analysis,” the Commission adopted a new standard—it will only consider a whistleblower’s analysis to have led to a successful enforcement action if the “analysis—as distinct from the publicly available information on which the analysis was based—either (1) was a principal motivating factor in the staff’s decision to open its investigation, or (2) made a substantial and important contribution to the success of an existing investigation.”

According to the SEC, this determination hinges on whether the analysis “is of such high quality that it either causes the staff to open an investigation, or significantly contributes to the successful enforcement action.” In addition, the Commission has cautioned that in instances where the SEC’s staff “looks to other information as well in determining to open an investigation, the Commission will find that the independent analysis ‘led to’ the success of the enforcement action only if the Commission determines that the whistleblower’s analysis was a ‘principal motivating factor’ in the staff’s decision to open the investigation.” For this reason, “even an otherwise compelling analysis may not satisfy the ‘leads to’ requirement depending on the nature of other information already in the staff’s possession.”

It should go without saying that for a whistleblower’s information to have “led to” a successful enforcement action, the SEC staff had to have been aware of the information when they investigated and took enforcement action. The SEC has repeatedly denied claims for awards after determining that SEC staff were not aware of the whistleblower’s information and thus the information could not have led to the success of the covered action. In one determination in April 2016, for example, the SEC found that its Office of Market Intelligence, which screens tips as they come into the SEC, had designated one claimant’s tips for “no further action” and had never forwarded them to Enforcement staff, and that Enforcement staff had not had any contact with the claimant until after settlement of the enforcement action.

In a March 2018 order awarding three whistleblowers a combined $83 million, the SEC denied the claims of four additional whistleblowers on the grounds that the information they provided had not “led to” the Commission’s successful enforcement action as required under the program rules. Whistleblowers and their counsel seeking an understanding of the “led to” requirement can benefit from reviewing this award determination, as it describes in detail some of the ways in which information that appears potentially relevant can fall short of “leading to” a successful enforcement action. In the case of these four unsuccessful claimants, the SEC found that their information was variously submitted too late in the investigation, duplicative of information submitted by others, too vague or too general in content, focused on misconduct different from the conduct that was the focus of investigation, or not used or even received by the SEC, whose investigation resulted in the enforcement action.

In March 2019, the SEC denied an award to a claimant who had provided potentially relevant information to an SEC regional office some time before two other whistleblowers contacted other SEC enforcement staff with information that led the SEC enforcement staff to commence an investigation leading to a successful enforcement action. The two later whistleblowers received large awards, but the SEC found that the first whistleblower’s information had not “led to” the enforcement action because the regional office forwarded the first whistleblower’s information to the investigating SEC staff only after they had commenced an investigation and the investigating staff stated that the first whistleblower’s information had not “advanced the investigation in any way.” The SEC rejected the first whistleblower’s argument that the regional staff “should have” forwarded his or her information earlier.

Whistleblowers often have difficulty knowing whether their information “led to” the successful enforcement action for which they are applying for an award, but they and their counsel need to be aware that the SEC will not grant them an award unless the record demonstrates that their information either caused the Commission to initiate an investigation or “significantly contributed” to the action as required by Rule 21F-4(c). The SEC has repeatedly and successfully enforced the rule disallowing awards for information provided to the Commission...
prior to July 21, 2010, the date of enactment of the Dodd-Frank Act, even if an enforcement action followed. In Stryker v. SEC, the U.S. Court of Appeals for the Second Circuit affirmed the SEC’s denial of an application for such an award. Even though the SEC collected sanctions of more than $20 million in the action after the Whistleblower Program went into effect, the claimant had submitted the information prior to enactment of the Act and received no award.

D. Monetary Sanctions Totaling More than $1 Million

In determining whether the recovery in an enforcement action exceeds the $1,000,000 threshold, the word “action” generally means a single judicial or administrative proceeding. Rule 21F-4(d). In certain circumstances, however, actions can be aggregated. The SEC adopted this broad interpretation of the term “action” in accordance with congressional intent to increase the incentives for individuals to report securities violations. Actions may include cases from two or more administrative or judicial proceedings that arise out of a common nucleus of operative facts, and any follow-on proceedings arising out of the same nucleus of operative facts may be aggregated as well. Rule 21F-4(d)(1). Factors that may be taken into account when determining whether two or more proceedings arise from the same nucleus of operative facts include parties, factual allegations, alleged violations of federal securities laws, or transactions and occurrences.

The 2020 Final Rules and Adopting Release expanded upon the definition of “action” to also include non-prosecution and deferred prosecution agreements by the DOJ and any similar agreements entered into by the SEC to address securities law violations. The Commission noted that these agreements are key tools of enforcement for both the DOJ and the SEC and that they include “monetary sanctions” as defined by Rule 21F-4(e). The SEC further noted that “Congress did not intend for meritorious whistleblowers to be denied awards simply because of the procedural vehicle that the Commission (or the other authority) has selected to pursue an enforcement matter.”

Rule 21F-3(b) provides that, where the SEC has brought a successful enforcement action resulting in sanctions exceeding $1 million, the SEC will also issue awards based on amounts collected by other entities in “related actions.” Those are judicial or administrative actions that yield monetary sanctions, are based on the same original information the whistleblower voluntarily provided to the SEC, and are brought by the U.S. Attorney General, a state Attorney General in a criminal case, an “appropriate regulatory authority,” or a self-regulatory organization. Rule 21F-3(b)(1). The SEC has demonstrated that it will interpret this list liberally to include a potentially broader group of “other governmental authorities” than those described in the rule and has issued at least one award based in part on the proceeds collected from a related criminal action. The largest single award issued by the SEC to date consisted of $52 million in relation to an SEC action and $62 million in connection with related actions.

In determining whether to add to the whistleblower’s award based on the monetary sanctions collected by another entity, the SEC will consider a number of factors to avoid double recovery for the whistleblower. First, if the second entity has a separate monetary award program, the SEC must decide whether its own Whistleblower Program or the other entity’s program has a “more direct and relevant connection to the action.” The action by the other entity will only be deemed a “related action” for purposes of the SEC’s award if the SEC program has the more direct connection to the action. The SEC will then make an award for the related action only if the whistleblower has not already received an award from the other entity and waives her right to receive such an additional award.

It is also crucial to note that the SEC considers the amount of money it has collected or will collect from a company, not the amount of the sanctions ordered in the case, when determining both eligibility for a whistleblower award and the amount of the award. This can have a significant impact on the process of claiming an award because the SEC does not always collect the sanctions it levies and sometimes collects more than expected. For example, in the three-year period ending in September 2013, the SEC collected just 42% of the amount defendants were ordered to pay as a result of enforcement actions. Consequently, whistleblowers and their attorneys cannot rely solely on the amount of sanctions ordered by the SEC in determining the size of an award but rather must look to how much the SEC ultimately collects from the company.

The very first whistleblower to receive an award under the new program in 2012 received an additional $150,000 nearly 20 months after receiving the initial $200,000 reward after the SEC was able to collect additional sanctions levied in the case. The SEC has determined claimants to be eligible for awards based on proceeds yet to be collected in a number of award determinations.

E. SEC Procedures for Submitting a Tip
1. The TCR Form

The program rules describe a straightforward set of procedures for submitting original information about possible securities violations to the SEC Office of the Whistleblower. An individual must file a Form Tip, Complaint or Referral (“TCR”) that the SEC makes available on its website and can file either online or by mailing or faxing it to the SEC. Rule 21F-9(a). The rules require the individual to declare under penalty of perjury that the facts include parties, factual allegations, alleged violations of federal securities laws, or transactions and occurrences.

The 2020 Final Rules and Adopting Release stressed that a whistleblower must submit a tip both in writing and through the Form TCR. First, it added the words “in writing” to the definition
of “whistleblower,” meaning that an individual who gives information to the SEC only orally is not protected from retaliation and cannot receive a whistleblower award. Rule 21F-2(a). Second, the Final Rules clarified that while the whistleblower can initially submit information to the SEC in any form, in order to be eligible for an award he or she must submit the information through the online portal or the Form TCR via fax or mail within 30 days of making initial contact. Rule 21F-9(c). The SEC will waive this requirement only if the whistleblower complies with the specified procedures within 30 days of receiving actual or constructive notice about the requirements and if the SEC can “readily” and “unambiguously” determine that the whistleblower would otherwise be eligible for an award.

When preparing tips for submission to the SEC, whistleblowers and their counsel should make sure that the Form TCR and accompanying exhibits present the most comprehensive and compelling evidence and argument for the SEC taking enforcement action that their information and appropriate inferences can support. With the SEC receiving a steadily increasing number of tips per year—more than 23,650 TCRs in FY 2020 alone—it is important that a first read of a whistleblower tip provide SEC staff with a sound understanding of the alleged violations and, to the extent possible, how to investigate and prove them.

Whistleblowers should describe in detail the particular practices and transactions that they believe to have violated U.S. securities laws, identify the individuals and entities that participated in or directed the violations, and provide a well-organized presentation of whatever supporting evidence the whistleblower possesses.

The Commission encourages individuals to submit information to the SEC via the online portal, which the SEC modified in January 2018 to better process and handle the submission of much larger attachments to a whistleblower’s electronic TCR form.

Under no circumstances should whistleblowers give the SEC information that is protected by attorney-client privilege, as the SEC cannot use privileged information in an investigation or enforcement action, and the SEC’s mere receipt of such information can interfere with and significantly delay the staff’s ability to proceed. Potentially privileged information generally includes documents authored by, received by, or prepared at the request of counsel for the entities or individuals that may be the subjects of an SEC investigation. It also can include conversations with counsel, the contents of which the whistleblower might disclose in a written submission or in discussions with SEC staff. Determinations about the application of attorney-client information to specific information can be complicated. For whistleblowers submitting information to the SEC without counsel, the best practice is to avoid the submission of any information about which the whistleblower has any doubt as to whether the information to be submitted might be governed by attorney-client privilege.

2. Submitting an Anonymous Tip

Given the very real risks of retaliation from employers and the risk of associated reputational harm that would interfere with future job prospects, many employee-whistleblowers are understandably concerned that their employers will learn their identities if they submit tips to the SEC. The program rules address this concern by allowing whistleblowers to file their submissions anonymously, provided that they do so through counsel. Rule 21F-9(c). The attorney submits the TCR form without the whistleblower’s signature and other identifying information while keeping a copy of the same completed form containing the whistleblower’s identifying information and signature in his files. On the anonymous TCR form that the attorney submits to the SEC, the attorney affixes his or her own signature and certifies that: (i) he or she has verified the whistleblower’s identity, (ii) has reviewed a version of the TCR form signed by the whistleblower and that the information therein is true and correct, and (iii) has obtained the whistleblower’s non-waivable consent for the attorney to provide that document to the SEC if Commission staff have reason to believe the whistleblower has willfully provided false information. The SEC Form TCR and instructions, available on the Commission’s website, explain these requirements clearly.

The SEC protects against the disclosure of whistleblowers’ identities “to the fullest extent possible” regardless of whether they submit their information anonymously, but the Commission acknowledges that there are limits to its ability to shield a whistleblower’s identity under certain circumstances. For example, the SEC explains on its website that “in an administrative or court proceeding, we may be required to produce documents or other information which would reveal your identity.”

While the SEC cannot provide a 100% guarantee that no one will uncover a whistleblower’s identity during the course of investigation and enforcement action, the risk of public disclosure remains very small. A few whistleblowers to date have self-identified to the media. Others may choose to disclose to their employers that they have blown the whistle to the SEC to secure maximum protection against retaliation or to discourage further retaliation if it has already occurred. Whistleblowers’ submissions, and occasionally their identities, may become known through other legal proceedings, including criminal proceedings in which a whistleblower is called to testify. In one case, a court ordered the SEC to hand over an anonymously filed TCR form—without disclosing the whistleblower’s name—to counsel defending a corporation in an SEC enforcement action.

In the numerous cases in which the authors and their firm have represented whistleblowers before the Commission, SEC staff have demonstrated that they will go to great lengths to protect a whistleblower’s identity at every stage of the process, from receiving the tip and investigating it to announcing
whistleblower awards. Indeed, the SEC has instituted policies that prevent agency staff from sharing any identifying information even with other law enforcement agencies without permission. In the improbable event that the SEC is forced to disclose a whistleblower’s identity in the course of a legal proceeding, whistleblowers can expect the SEC (and the court) to take steps to prevent the disclosure from becoming public.

F. Determining the Amount of an Award

The amount of a successful whistleblower’s award is within the sole discretion of the Commission as long as the award falls within the 10% to 30% range that Congress established in the Dodd-Frank Act. Rule 21F-5. The total award cannot exceed 30% of the sanctions ordered even where the Commission distributes the award to more than one whistleblower. The program rules set forth a number of factors that the SEC may consider when calculating the final award within the 10% to 30% range. Factors that might increase an award include the whistleblower’s reporting the perceived violations through an entity’s internal-compliance program, the significance of information provided by the whistleblower, the degree of assistance provided by the whistleblower to SEC investigators, and the SEC’s programmatic or enforcement interest in the particular securities violations at issue. Rule 21F-6(a)(1)-(4). Factors that might decrease an award include the level of culpability of the whistleblower in the wrongdoing, unreasonable delay on the part of the whistleblower in reporting the violations to the SEC, or the whistleblower’s interference with internal compliance and reporting systems. Rule 21F-6(b)(1)-(3). These factors are discussed in various places throughout this Practice Guide.

The 2020 Final Rules and Adopting Release created a new presumption that the whistleblower is entitled to the maximum “30 percent of the monetary sanctions collected in any covered and related action(s)” if that award will be $5 million or less. Rule 21F-6(c). The presumption is designed to encourage whistleblowing by increasing transparency and efficiency in the award process and ensuring the highest award for smaller cases. A whistleblower will not receive the maximum award if they trigger any of the negative factors listed in Rules 21F-6(b)(1) (culpability), 21F-16 (highly culpable conduct), or 21F-6(b)(3) (interference with internal compliance and reporting systems). The SEC has discretion to award the maximum if the whistleblower unreasonably delayed reporting under Rule 21F-6(b)(2), but only if awarding the maximum amount is “consistent with the public interest, the promotion of investor protection, and the objectives of the whistleblower program.” The SEC also retains discretion to grant an award below the 30% maximum if the claimant’s assistance was limited as assessed under Rule 21F-6(a) or if awarding the maximum “would be inconsistent with the public interest, investor protection or the objectives of the whistleblower program.” The SEC has already found that a claimant’s limited assistance overcame the presumption in at least one case. Where there are multiple whistleblowers and one alone would be eligible for the presumptive maximum, the SEC must award 30% to the group as a whole but has discretion as to how to divide it among the individuals.

In the 2020 Final Rules and Adopting Release, the SEC voted not to pass one of the more controversial proposed amendments, which would have allowed the SEC to reduce an award based on the total dollar amount if that amount was more than reasonably necessary to incentivize a similar whistleblower—but never reducing an award to less than 10% of the total sanctions or less than $30 million on that basis. The proposal received numerous comments in opposition that argued the rule would discourage whistleblowers from coming forward and that it would arbitrarily penalize whistleblowers. Rather than adopt the proposed rule, the SEC modified the introductory language of Rule 21F-6 to make explicit that the SEC can consider the total dollar amount of an award as well as the percent of monetary sanctions collected. The Commission justified the change as simply a clarification of the discretion that it already had to consider the dollar amount of an award although it had stated explicitly in its 2018 proposal that it did not have such discretion.

While some whistleblower advocates fear that this new language will lower awards and deter whistleblowers from making reports at all, that may not be the result. The presumption that the SEC will award the maximum 30% will apply in many more cases than the potential for the SEC to reduce an award based on the monetary award amount being too excessive. As of July 2020, 74% of all whistleblower awards had been under $5 million (although it is not clear how many of those could have exceeded $5 million if the statutory maximum were granted) while only 7% were at least $30 million. Due to the highly redacted nature of award announcements and the brevity with which the Commission explains its determinations, it will be difficult to calculate the impact of this amendment. However, the frequency and size of awards has been steadily increasing, particularly in the past few years, and likely will continue to do so.

1. SEC Enforcement Interests

The SEC’s publicly available descriptions of its law-enforcement interests provide important guidance to practitioners who are assessing the Commission’s likely response to a potential whistleblower tip. Key to the SEC’s response will be, inter alia, whether the conduct at issue involves an industry-wide practice, Rule 21F-6(a)(3)(iii); the type, severity, duration, and isolated or ongoing nature of the violations, id.; the danger to investors “and others,” Rule 21F-6(a)(3)(iv); and the number of entities and individuals who have suffered harm. Id.
Individuals who are thinking about submitting tips regarding suspected securities violations can learn a great deal about the SEC’s regulatory enforcement priorities, which change from time to time, by perusing the Commission’s website. This well-organized resource not only reports on all SEC enforcement actions, but also provides periodic recaps of recent enforcement actions and enforcement perspectives for the future. The site also gives users access to the Commission’s system of company filings, known as EDGAR, and a search engine that can locate all information available from the SEC across various databases.

2. Unreasonable Delay in Reporting

The SEC places significant emphasis on a whistleblower’s timely reporting of suspected securities violations, and an “unreasonable reporting delay” is a negative factor that the SEC considers in determining whistleblower award amounts. Rule 21F-6(b)(2). In determining whether a delay was “unreasonable” and should reduce an award, the SEC may consider factors such as whether the whistleblower took reasonable steps to report or prevent the violations, whether the whistleblower only reported the violations after learning about a related investigation or action, and whether the whistleblower had a legitimate reason to delay reporting. Id.

Delayed reporting has likely cost more than one whistleblower millions of dollars in award money. On September 22, 2014, the SEC announced what was then its largest award to date—$30 million to an overseas whistleblower whose information allowed the SEC to stop an ongoing fraud that would otherwise have gone undetected. In its order determining the award, the SEC explained that it had adjusted the whistleblower’s award downward because the whistleblower delayed reporting a serious fraud for a period long enough to allow additional investors to be harmed. The whistleblower’s explanation for the delay was that the whistleblower was unsure whether the SEC would take action on the information provided. The SEC found this to constitute unreasonable delay and reduced the award percentage significantly. Noting that no previous award had involved such an unreasonable delay, the SEC stated in its order that it would have reduced the award even further had it not been for the fact that some of the delay had occurred before the inception of the SEC Whistleblower Program. This suggests that the SEC awarded the whistleblower somewhat more than the statutory minimum of 10% of collected proceeds, but well below the 30% maximum.

In another case in November 2015, the SEC awarded a whistleblower $325,000 but explained that the reward would have been greater had the whistleblower not waited until he left his job to report to the Commission. The SEC noted in its order that the delay in this case occurred entirely after the SEC Whistleblower Program went into effect and was thus “unreasonable in light of the incentives and protections now afforded to whistleblowers under the Commission’s whistleblower program.” In an April 2018 award determination, the SEC decreased a whistleblower’s award because the individual had delayed unreasonably in reporting the information for a period of ten months. Even where the SEC finds that a whistleblower delayed reporting unreasonably, the Commission also considers mitigating circumstances surrounding the delay in lessening the blow to the whistleblower’s award. In a December 2017 award determination, for instance, the SEC awarded a whistleblower more than $4.1 million, but also noted that the award might have been larger if the whistleblower had not delayed his or her reporting to the SEC. However, the SEC did not weigh the delay as severely as might have done due to two mitigating factors: (1) much of the reporting delay occurred before the SEC’s Whistleblower Program was established in 2010; and (2) the whistleblower was a foreign national working outside the United States and, therefore, might have been protected by U.S. anti-retaliation prohibitions, giving the whistleblower greater reason to fear retaliation for reporting the matter than a domestic whistleblower might have.

Even more surprising, the SEC awarded over $27 million to a whistleblower on April 16, 2020, and did not reduce the award at all despite finding that the individual had unreasonably delayed reporting. The Commission determined that the positive factors—including that whistleblower uncovered hidden conduct occurring overseas, provided substantial assistance to the SEC, furthered a significant law enforcement interest, and repeatedly raised concerns internally—outweighed the delay in reporting.

3. Culpability of the Whistleblower

The program rules balance policy concerns about rewarding persons who are culpable for wrongdoing with the understanding that, at times, those who have participated in the wrongdoing at some level are often the individuals with the best access to information that the Commission needs in order to investigate and take action. In order to incentivize these whistleblowers to come forward with information about securities violations, the rules do not exclude culpable whistleblowers from awards altogether, but the rules prevent such award claimants from recovering from their own misconduct. This means that in determining whether the whistleblower has met the $1,000,000 threshold and in calculating an award, the SEC will exclude any monetary sanctions that the whistleblower is ordered to pay individually or that an entity is ordered to pay based substantially on the conduct of the whistleblower. Rule 21F-16. The SEC also considers the whistleblower’s culpability as a negative factor in setting the amount of any award earned. Rule 21F-6(b)(1)-(3). The program rules thus allow culpable whistleblowers, who may be uniquely...
situated to provide information regarding securities violations, to come forward and earn awards while not creating incentives that would encourage them to engage in securities violations.

The SEC has issued awards to whistleblowers who took part in the offending misconduct but has also offset or reduced such awards by penalizing whistleblowers for their culpability when setting the amount of awards. On April 5, 2016, for example, the SEC announced an award of $275,000 to a claimant for submitting information that had led to a successful enforcement action and also to a related criminal action but noted that the SEC would offset the whistleblower’s award by the (undisclosed) portion of a final judgment entered earlier against the whistleblower that remained unpaid.137

Several months later, the SEC issued a very sizable award—totaling more than $22.4 million—even though the whistleblower had apparently played some role in the fraud at issue.138 The SEC announced the award on August 30, 2016, and indicated in its redacted order that the whistleblower was culpable for the misconduct to a certain degree. In justifying this sizable award to this culpable whistleblower, the SEC explained in an accompanying footnote that “[s]everal other factors mitigating the Claimant’s culpability were considered” in determining the award percentage. The SEC noted in particular that the whistleblower had not benefitted financially from the misconduct. The anonymous whistleblower’s counsel later announced that the $22.4 million award represented 28% of the total $80 million settlement between the SEC and Monsanto Company stemming from Monsanto’s failure to publicly disclose millions of dollars in rebates to Roundup weed-killer retailers.139

In a February 2017 determination, the SEC limited a whistleblower award to 20% of the amount collected so far and to be collected in the future. Although the SEC did not disclose the amount of the award, it noted in the determination order that it had “reduced the award from what it might otherwise have been because of both the Claimant’s culpability in connection with the securities law violations at issue in the Covered Action and the Claimant’s unreasonable delay in reporting the wrongdoing to the Commission.”140

In a September 14, 2018, determination generating an award of $1.5 million, the SEC “severely reduced” the award after considering various award criteria.141 Specifically, the SEC alleged that the claimant had unreasonably delayed by waiting longer than one year to report to the Commission and then did so only after learning about an ongoing SEC investigation. The SEC also noted that investors were being harmed during the delay and that the size of the total monetary sanctions had increased accordingly. In addition, the SEC took into account the whistleblower’s culpability in the wrongful conduct and warned that “[w]hile whistleblowers with similar conduct should expect to receive a severely reduced award—indeed, even one as low as the minimum statutory threshold—in future cases.” This SEC award determination makes clear that the Commission has little patience for dilatory whistleblowers and even less for those who are culpable and delay reporting for potentially opportunistic reasons while investors suffer further harm.

G. Whistleblower Awards to Date

As of January 31, 2021, the SEC Office of the Whistleblower has issued awards totaling $738 million in monetary rewards to 134 individuals. Awards have ranged from less than $50,000 to $114 million.142 Appendix A to this SEC Whistleblower Practice Guide lists all SEC whistleblower awards under the Whistleblower Program in the nearly ten years of its existence. The awards table, organized chronologically, highlights important information about particular award determinations, including a number of “firsts” in the SEC’s handling of award applications.

As the SEC orders listed in Appendix A show, the SEC discloses limited information when issuing awards in order to protect the identity of whistleblowers, whether or not they filed their tip anonymously. The SEC’s guarded approach to disclosing such information is warranted because it minimizes the chances that a whistleblower’s identity will become public, which is a critical concern of would-be whistleblowers on whom the success of the program depends. However, unlike court and agency decisions that normally allow the public to fully understand the bases for government action, the SEC’s orders determining claims for whistleblower awards do not cite the underlying enforcement action, do not disclose the name of the respondent, and disclose little about the nature of the entity or the details of the misconduct involved. For this reason, practitioners will need to read the SEC orders carefully in order to use them effectively as guides to participation in the Whistleblower Program and as legal precedent for use in preparing tips, assisting the SEC in any ensuing investigations, and claiming awards.

The awards listed in Appendix A reflect a very active, successful first decade of the SEC Whistleblower Program. Even in heavily redacted orders, the Commission has made clear that the program is honoring its commitment to reward individuals who come forward with helpful information about securities violations, sometimes at great risk to their careers. Awards to date demonstrate that the SEC is willing to:

- set award amounts relatively high within the allowable range, at an average that is likely greater than 25% of
sanctions imposed;
• pay awards both to whistleblowers whose information causes the SEC to commence investigations leading to enforcement actions and to whistleblowers whose information “significantly contributes” to investigations already underway;
• pay whistleblowers in installments and increase the awards paid as the government collects additional sanctions and penalties from respondents;
• use the Commission’s authority to waive program requirements where needed to serve the interests of investors and to act fairly towards whistleblowers;
• apply appropriate exceptions to the presumptive exemptions that prohibit compliance and audit personnel, as well as corporate officers who receive information as part of a company’s internal-reporting mechanism, from participating in the Whistleblower Program;
• protect whistleblowers’ identities from public disclosure by ensuring that orders determining whistleblower award claims and related press releases disclose little information about the underlying enforcement actions;
• allow whistleblowers to challenge the amounts of their awards, give fair consideration to the arguments the whistleblowers raise, and reverse or revise preliminary determinations in whistleblowers’ favor when appropriate;
• pay awards to individuals who report only internally when the company ultimately self-discloses the information; and
• reward individuals who voluntarily come forward with information containing “independent analysis” as well as “independent knowledge.”

Based on these results of the SEC Whistleblower Program to date, whistleblowers and their counsel can be sure that many more awards, including very large ones, are forthcoming. It is a fair assumption that in coming years a growing number of the Commission’s successful enforcement actions of all varieties and sizes will have begun with a tip from a whistleblower.

H. Claiming a Whistleblower Award

The SEC posts a “Notice of Covered Action” on its website for each Commission enforcement action in which a final judgment or order, by itself or together with prior judgments or orders in the same action, results in monetary sanctions exceeding $1 million. The posting of a notice on the SEC website means only that an order was entered with monetary sanctions exceeding $1 million. The notice does not necessarily mean that a whistleblower tip led to the investigation or enforcement action or that the SEC will pay an award to a whistleblower in connection with the case.

Once a Notice of Covered Action is posted, anyone claiming entitlement to a whistleblower award in connection with the action has 90 days to apply for an award. Each Notice of Covered Action names the defendants or respondents in the SEC enforcement action, provides links to relevant documents such as administrative or court complaints and settlement orders, and clearly lists the date of the notice and the 90-day deadline for the submission of claims for awards. This deadline is critical. For Whistleblowers seeking to earn awards based on deferred prosecution, non-prosecution, or similar agreements under the newly expanded definition of “action,” the SEC will not post a Notice of Covered Action. Rather, the 90-day window will begin on the day the first press release or similar public notice of the action is posted or, if no public notice is granted, the date of the last signature necessary for the agreement. Rule 21F-11(b)(1)(ii). If that date is before December 7, 2020 when the Final Rules became effective, the 90-day period began on December 7. Rule 21F-11(b)(1)(i).

A whistleblower must apply for an award by submitting a completed Form WB-APP to the Office of the Whistleblower by midnight on the claim due date. Whistleblowers and their counsel need to be vigilant in monitoring the list of Cover Actions, which the SEC updates monthly at the end of each calendar month, and in submitting timely claims for award using the WB-APP form that is available on the SEC website. The SEC has consistently denied claims where the claimant has failed to meet the 90-day deadline for submitting a WB-APP form. On July 23, 2014, for example, the SEC denied a whistleblower’s claims for awards in connection to two covered actions that the whistleblower had submitted more than three months after the 90-day claims window. The SEC found the claimant’s explanation that the claimant was unaware of the Notices of Covered Actions on the SEC’s website fell short of the “extraordinary circumstances” needed under Rule 21F-8(a) to justify the SEC’s waiver of the filing deadline.

In another case in 2017, the claimant went even further in arguing for waiver of the deadline, insisting that the SEC not only should have posted the Notice of Covered Action on its website but also should have notified him or her personally with specific instructions about how to apply for an award. Not surprisingly, the SEC rejected this argument, noting that

“We hope these awards continue to encourage individuals with information…to report to the Commission.”

– Office of the Whistleblower Chief, Jane Norberg
even-handedness and reasonableness of the notice mechanism provided under the rules. The SEC’s repeated denial of award applications submitted after the 90-day deadline has not deterred untimely filers in challenging the Commission’s denial of their claims, but the SEC has so far refused arguments put forth by claimants to justify missing the deadline. 147

Although whistleblowers must meet a strict deadline for filing their claims for awards, there is no such deadline by which the Commission must process those claims. Concerns about a growing backlog in the SEC’s processing of award applications began to be raised within the first several years of the program, and the backlog has continued to increase. The Wall Street Journal reported in April 2018 that the one-year backlog that had slowed the process in its early years had grown to more than two years by the end of 2017. 148 Although this has understandably been a source of frustration for whistleblowers, the Office of the Whistleblower has consistently acknowledged the problem, explained the factors contributing to it over the years, and, in the view of the authors, done its best to expedite processing of a fast-growing number of award applications without a commensurate increase in staffing. 149 Some of the 2020 amendments were designed to expedite award processes, including the presumption that whistleblowers with potential awards under $5 million will receive the maximum, clarification on the SEC’s ability to bar whistleblowers who have submitted false information in the past, and a new Rule 21F-18 creating summary disposition procedure for common types of denials like untimely award applications. 150

Thus far, no whistleblower has been successful in overturning a denial of their award application by the SEC Office of the Whistleblower. A group of whistleblowers recently brought their challenge to the SEC’s denial of their award applications before the U.S. Court of Appeals for the Second Circuit. 151 The Second Circuit affirmed the SEC’s decision. The court found for one whistleblower that, although he may have provided useful information to the SEC, it did not lead to an award because the SEC did not use the information. 152 For two more whistleblowers, the court affirmed the SEC’s denial of an award upon finding that the SEC already had the information they provided by the time they submitted a Form TCR. 153

PROTECTIONS FOR WHISTLEBLOWERS AGAINST RETALIATION

Firings, demotions, and other acts of retaliation against employees who blow the whistle on employer misconduct are all too common. A 2013 survey of more than 6,400 employees working in the for-profit sector found that 21% of responding employees who had reported misconduct said that they had suffered some form of retribution as a result of their actions. 154 Individuals who contact lawyers in search of legal representation before the SEC Whistleblower Program fall into this category at least as often as not, and in many cases are still reeling from a recent and sudden firing when they first meet with a lawyer. Some contact a lawyer for the purpose of challenging their wrongful termination and learn only during the initial consultation that the conduct that they reported to their company leading to their termination, could form the basis for an important, timely, and potentially lucrative tip to the SEC.

Certain protections for whistleblowers against retaliation are built into the rules governing the SEC Whistleblower Program. The most impactful protection may be the ability of whistleblowers to submit their tips anonymously and the SEC’s commitment to shielding the whistleblower’s identity from disclosure throughout the investigation, enforcement action, and awards process, as discussed above.

The Dodd-Frank Act and the SEC Whisteblower Program have significantly expanded whistleblower protections for employees in other ways as well. The Dodd-Frank Act amends the employee-protection provisions of the Sarbanes-Oxley Act (SOX) to make them more favorable to employees; creates a new cause of action that a whistleblowing employee can bring in federal court; and, as implemented by the SEC’s rules for the Whistleblower Program, allows the Commission to use its enforcement powers to hold employers accountable for retaliation against whistleblowers. 155 The SEC has brought successful enforcement actions against companies that retaliated against employees who reported securities violations to the Commission. 156

Attorneys who represent employee-whistleblowers before the SEC will want to familiarize themselves with applicable anti-retaliation laws and the SEC’s enforcement actions enforcing those laws, discussed below, as their clients may have suffered or might yet suffer retaliation, including loss of their jobs, especially where they have reported their employers’ securities violations internally with the company. Practitioners should remember that, for a whistleblower who has suffered career-derauling retaliation by an employer, the goal of correcting that injustice and obtaining prompt and just compensation can be just as important as, if not more important than, submitting a tip to the SEC in hopes of earning an award that may not come for years, if at all. Whistleblowers often have the ability to remedy the retaliation with little downside. Because of the stakes involved for companies defending against lawsuits by such whistleblowers, plaintiff-side attorneys may find that they can negotiate a favorable resolution of their clients’ claims, in many cases without having to take legal action, and in a manner that allows their clients to rebuild their careers without the reputational harm that typically flows from suing their current or previous employers.

In addition to focusing on the enforcement of employee protections afforded by these laws, the SEC has taken aim in recent years at employer-imposed agreements that might impede the flow of information from employees to the Commission. The agreements at issue, often signed by the employee as a condition
of employment itself or as a condition of receiving severance payments, might require employees to certify that they have not shared confidential information with any third party, to alert the employer to any inquiries from government agencies, or to waive their right to the monetary awards that Dodd-Frank directed the SEC to provide to whistleblowers. The SEC has shown that it will penalize employers for using such agreements to impede whistleblowers from participating in the Whistleblower Program.

A. Employee Protections Under SOX

Section 806 of SOX, 18 U.S.C. § 1514A(a)(1), provides a cause of action to employees of publicly traded companies and certain of their subsidiaries and contractors whose employers retaliated against them because they provided information about, or participated in an investigation relating to, what they:

reasonably believe[d] constitute[d] a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. 112

The information must have been provided to or the investigation must be conducted by: (1) a federal regulatory or law enforcement agency; (2) a member of Congress or any committee of Congress; (3) a person with supervisory authority over the employee; or (4) a person working for the employer who has the authority to investigate, discover, or terminate the misconduct. 113

The law also protects those who file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed, or about to be filed, relating to an alleged violation of federal securities and fraud laws. 114 In order to prevail in a claim of retaliation brought under SOX, the complainant must show that his protected activity was a contributing factor in the adverse personnel action. Available remedies include reinstatement, back pay, compensatory damages, and attorneys’ fees and costs sustained as a result of the discharge or other retaliation.

The Dodd-Frank Act amendments to SOX Section 806 are in Section 21F(c) of the Act. 115 These provisions strengthen the hand of employees bringing claims of retaliation under SOX by increasing the SOX statute of limitations from 90 days to 180 days, providing for jury trials in SOX cases brought in federal court, and invalidating mandatory, pre-dispute arbitration agreements, which typically favor employers, to the extent those agreements purport to apply to SOX retaliation claims.

Dodd-Frank and a 2014 Supreme Court decision have also widened the range of employers whose employees are protected by SOX. Section 929A of the Dodd-Frank Act expanded SOX 806’s coverage to include subsidiary entities whose financial information is included in a publicly traded parent’s consolidated financial statements. 116 In a 2014 decision that will gradually expand the ranks of employees bringing SOX whistleblower claims, the Supreme Court further expanded the statute’s coverage, holding that SOX Section 806 protects the employees of certain of their subsidiaries and contractors of publicly traded companies. 117

An employee seeking relief from retaliation under SOX must file the claim with OSHA, which investigates the claim and issues a determination. SOX claims are further adjudicated by administrative law judges, or, if the DOL has not issued a final decision within 180 days, in federal district court if the claimant decides to pull the matter from the DOL and refile it there. 118

B. Employee Protections Under Dodd-Frank

The new cause of action created by the Dodd-Frank Act is set forth in Section 21F(h)(1)(A), which allows “whistleblowers” to sue in federal court if their employers retaliate against them because they:

- provide information about their employer to the SEC in accordance with the above-described whistleblower bounty program;
- initiate, testify, or assist in any investigation related to the program; or
- make disclosures “required or protected” under the Sarbanes-Oxley Act, the Securities Exchange Act of 1934, or any other law, rule, or regulation under the jurisdiction of the SEC.

A Dodd-Frank retaliation claim may be filed directly in federal court within three years “after the date when facts material to the right of action are known or reasonably should have been known to the employee” (but subject to a maximum of six years). 119 A whistleblower’s remedies include reinstatement, double back pay with interest, attorneys’ fees, and reimbursement of other related litigation expenses. 120 Punitive damages are not recoverable under the statute. 121

The SEC initially interpreted Dodd-Frank to cover employees who report violations internally to their employers as well as those who report to the SEC. 122 On February 21, 2018, however, the Supreme Court ruled unanimously that the

“Strong enforcement of the anti-retaliation protections is critical to the success of the SEC’s whistleblower program.”

– Mary Jo White, former SEC Chair
statutory definition of the word “whistleblower” limited the anti-retaliation protections of Section 922 to those who have reported to the SEC. The SEC codified that decision in its 2020 Final Rules and Adopting Release by adding a provision explicitly stating that Dodd-Frank’s retaliation protection only applies to employer conduct which occurred after the employee qualified as a “whistleblower” under the rules. Where the whistleblower first reports a violation internally and then to the SEC, Dodd-Frank only prohibits retaliation after the employee files the written report with the SEC.

In July 2019, the U.S. House of Representatives passed H.R. 2515, known as the Whistleblower Protection Reform Act of 2019, which would, among other things, effectively reverse Digital Realty and protect whistleblowers who only reported their concerns internally. As of this writing, the Senate has not brought the bill to the floor for a vote.

While widely viewed as a victory for the management bar, this change will likely frustrate one of the primary policy goals that corporate interests had pursued during the development of the SEC Whistleblower Program. While the SEC was initially crafting rules to implement the program in 2010, several corporations weighed in, requesting that the Commission put in place rules designed to encourage or even require whistleblowers to first utilize internal whistleblower programs before reporting to the SEC. Because the Supreme Court’s decision and the 2020 rules amendment limit the generous remedies available under the Dodd-Frank anti-retaliation provision to those employees who report to the SEC, employees will now be incentivized to report to the Commission before they report internally and face the prospect of retaliation.

C. Extraterritorial Application of Whistleblower Protections

It is not uncommon for whistleblowers to discover securities violations while working overseas for their corporate employers, i.e., in places falling outside of the U.S. government’s territorial jurisdiction. Whether and to what extent an overseas whistleblower can successfully prosecute extraterritorial claims of retaliation is an evolving issue. In 2017, the U.S. Department of Labor’s Administrative Review Board (“ARB”) held that SOX 806 extended to whistleblowers who worked overseas so long as the misconduct of the employer affected the United States “in some significant way.” Just over two years later, however, an ARB containing several new appointees effectively reversed that decision and held that SOX does not apply extraterritorially. The ARB did, however, appear to leave the door open to claims brought by employees based in the United States who experienced retaliation during a temporary post overseas.

Similar to SOX, the Dodd-Frank Act is unlikely to provide anti-retaliation protections for employees working overseas. Although non-U.S. employees working for non-U.S. companies can be eligible for rewards under the SEC’s Whistleblower Program, such employees do not enjoy the same anti-retaliation protections as U.S.-based employees. In Liu Meng-Lin v. Siemens AG, the Second Circuit held that Dodd-Frank’s anti-retaliation provisions do not apply to non-U.S. employees working for non-U.S. companies, even when those companies are listed on a U.S. stock exchange. In that case, a non-U.S. employee of a Chinese company was subjected to retaliation for reporting violations of the Foreign Corrupt Practices Act to both the company’s compliance department and the SEC. The Court of Appeals held that the anti-retaliation provisions of the Dodd-Frank Act do not apply to non-U.S. employees of non-U.S. companies where all events related to the employee’s disclosures occurred outside the U.S.

The SEC has made clear that the considerations underlying the Second Circuit’s holding in Liu do not prevent the Commission from issuing whistleblower awards to individuals working and living outside the U.S. “[T]he whistleblower award provisions have a different Congressional focus than the anti-retaliation provisions,” the SEC explained in its first order paying an award to a foreign whistleblower, “which are generally focused on preventing retaliatory employment actions and protecting the employment relationship.” As described in more detail below, the SEC has also taken action against a company for impeding a foreign-based employee from communicating with the SEC, if not directly for retaliating against him. This action impacting the employer-employee relationship in another country, while not strictly an action challenging an act of retaliation, could point the way towards a more expansive view on the part of the SEC of its ability to protect whistleblowing employees against retaliation overseas.

**Dodd-Frank provides protection against retaliation only for employees who have reported to the SEC.**

**retaliation. These incentives to report externally could lessen the effectiveness of internal compliance programs and thus degrade their ability to help management identify and address securities violations without facing full-blown SEC investigations and potential sanctions. The SEC addressed this concern by stating that whistleblowers will still be incentivized to comply with internal reporting procedures by the fact that the SEC can adjust a whistleblower’s award up or down depending on their compliance with employer procedures. Whether this is a strong enough incentive remains to be seen.**
D. Enforcement of Anti-Retaliation Provisions by the SEC

Both SOX and the Dodd-Frank Act allow individuals who have suffered unlawful retaliation to prosecute their own legal actions against employers, but the SEC Whistleblower Program rules allow the SEC also to sanction employers for violations of the Dodd-Frank anti-retaliation provisions through the Commission’s own enforcement actions. Rule 21F-2(b) (2). The SEC invoked this authority on June 15, 2014, when it announced its first enforcement action against a company based in part on the company’s retaliation against a whistleblower.

In that case, the SEC charged a hedge fund advisory firm with engaging in principal transactions that created an undisclosed conflict of interest and also charged the firm with retaliating against an employee who had reported the matter to the SEC and suffered retaliation as a result. The company agreed to settle the SEC enforcement action for $2.2 million although the SEC’s order implementing the settlement left unclear what portion of the settlement was based on the retaliation allegations. The whistleblower later received an award of $600,000 for the information he provided to the SEC.

On September 29, 2016, the SEC issued its only penalty so far against a company for retaliating against a whistleblower in a “stand-alone” case of retaliation in which the Commission did not also impose a penalty for substantive securities violations. In that case, a casino-gaming company known as International Game Technology (IGT) agreed to pay $500,000 “for firing an employee with several years of positive performance reviews because he reported to senior management and the SEC that the company’s financial statements might be distorted.” The SEC found that the employee had been “removed from significant work assignments within weeks of raising concerns about the company’s cost accounting model” and was terminated just three months later.

On January 19, 2017, the SEC announced the settlement of charges that a financial service company, HomeStreet, Inc., had engaged in misconduct by impeding whistleblowers who reported to the SEC. The Commission found that, in response to an SEC inquiry, HomeStreet management officials had attempted to investigate and uncover the identity of the whistleblower, including by interrogating employees as to whether they or their colleagues were the “whistleblower.”

These SEC actions have sent a strong signal to employers that the SEC will take action when they retaliate against whistleblowers. Employers that engage in unlawful retaliation risk having to defend themselves not only against lawsuits and administrative charges filed by the employees but also against costly SEC investigations and enforcement actions that can lead to significant penalties over and above any amounts employees win in court. As the IGT case further shows, the rules protect whistleblowing employees who have a “reasonable belief” that the information they are reporting reveals possible securities law violations, which means that an employee is protected even if he or she ends up being wrong in her belief or if the SEC decides not to take action targeting those violations. Rule 21F-2(b). The terms “reasonable belief” and “possible violation” were included in Rule 21F-2(b) as an attempt to deter frivolous claims while still protecting those with information regarding a plausible violation. The same rule makes clear that the anti-retaliation protections apply regardless of whether a whistleblower qualifies for an award.

The SEC’s enforcement actions against retaliating employers also send a strong signal to would-be whistleblowers: the SEC Whistleblower Program welcomes their participation in two ways—not only by providing financial rewards where appropriate but also by penalizing (and hopefully deterring) retaliation against whistleblowing employees to the extent that the Commission is allowed to do so by law. This gives meaning to former SEC Chair White’s comment to a gathering of securities lawyers in April 2015, when she explained that “we at the SEC increasingly see ourselves as the whistleblower’s advocate.” Chair White further stated, “Strong enforcement of the anti-retaliation protections is critical to the success of the SEC’s whistleblower program and bringing retaliation cases will continue to be a high priority for us.”

E. Employer-Imposed Agreements That Impede Whistleblowers

Another very important protection for employees who blow the whistle on securities violations is found in Rule 21F-17(a), which states:

No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement … with respect to such communications.

This groundbreaking rule applies to all confidentiality and non-disclosure agreements that employers require of current employees. It also applies to separation, severance or settlement agreements that employers require employees to sign when exiting a company, as these almost invariably include confidentiality provisions and non-disparagement provisions. The rule has no parallel in the Internal Revenue Service’s whistleblower program or under the False Claims Act although courts have refused to enforce confidentiality agreements in the context of the False Claims Act. The CFTC adopted rules amendments similar to the SEC’s prohibition of impediments to whistleblowers on May 22, 2017.
During the first few years of the SEC Whistleblower Program, lawyers representing whistleblowers observed a troubling trend among employers seeking to circumvent Rule 21F-17(a). Employees increasingly found themselves presented with agreements that required them to certify that they had not shared and would not share confidential information with any third party except “as required by law,” to waive their right to an SEC award, to assign any award received to the government, and/or to keep the employer informed of any contact with or inquiries from government agencies. While not expressly prohibiting contact with the SEC, such terms have the purpose of interfering with an employee’s ability to directly communicate with the Commission.

Employees can participate in the SEC Whistleblower Program without regard to restrictive agreements that employers have forced them to sign.

Attorneys representing whistleblowers before the SEC started bringing employers’ widespread use of restrictive agreements to the SEC’s attention as early as mid-2013. The SEC began addressing these concerns in late 2013 or early 2014 and, since that time has taken a series of enforcement actions that have prompted companies nationwide to rewrite their employee agreements to bring them into compliance with Rule 21F-17(a).

In early 2015 the SEC sent letters to a number of companies requesting years of nondisclosure agreements in an effort to determine whether the companies had restricted their employees’ ability to share information with law enforcement agencies. These investigations culminated in an enforcement action against KBR, Inc. On April 1, 2015, the SEC announced that it had entered into a settlement with KBR related to the company’s confidentiality agreements. The provision at issue appeared in an agreement that KBR required employees to sign when participating in the company’s internal investigations:

I understand that in order to protect the integrity of this review I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.

Without admitting to any rule violation, KBR agreed to pay a $130,000 fine and change its confidentiality agreement language going forward. The new language would read:

Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures.

Following the KBR action, the SEC stepped up its efforts to combat agreements that similarly impeded whistleblowers and broadened its targets to include additional types of provisions that could dissuade employees from approaching the SEC with concerns about securities violations. In her April 2015 speech on “The SEC as the Whistleblower’s Advocate,” SEC Chair White noted that “a number of other concerns have come to our attention, including that some companies may be trying to require their employees to sign agreements mandating that they forego any whistleblower award or represent, as a precondition to obtaining a severance payment, that they have not made a prior report of misconduct to the SEC. You can imagine our Enforcement Division’s view of those and similar provisions under our rules.”

The SEC has since taken nearly a dozen additional enforcement actions specifically targeting such employer-imposed restrictions in employment and severance agreements.

Seeing the SEC take aggressive and rapid-fire aim at company agreements that required an employee to waive her right to receive an SEC award was a welcome development for whistleblowers. As a letter from Katz, Marshall & Banks to the SEC told the Commissioners in 2013, the attempt to require employees to waive their right to an SEC award was among the most common and insidious impediments that employers had contrived to discourage employees from communicating with the Commission. In the SEC Whistleblower Program, it is the government, and not the employer that pays an award to the employee. The whistleblower’s right to an award is a statutory right that has nothing to do with the legal dispute the employee settled with the employer. Therefore, the only benefit an employer receives from such an agreement is to disincentivize employee whistleblowing to the SEC—a goal with no legitimate justification. Courts would likely find such agreements void as against public policy, but the agreement could still prevent
individuals from reporting to the SEC if they believe they will receive no award and will face a breach-of-contract lawsuit and accompanying career harm.

The SEC’s enforcement actions against employers who have erected barriers to whistleblowers advance the ability of the Commission (and investors) to draw on the knowledge of whistleblowers to protect investors against securities fraud.

These SEC actions have not only forced employers nationwide to scramble to reform their agreements with employees, but they have no doubt rendered the outlawed provisions and ones like them effectively unenforceable in court. The removal of such onerous restrictions is especially welcome for employees who are abruptly fired or otherwise retaliated against for reporting their concerns internally, as it leaves them free to challenge the retaliation, obtain just compensation by settling the dispute prior to or during litigation, and then still participate in the SEC Whistleblower Program, if they so choose, without fear that an employer will be able to sue them and claw back whatever severance or settlement amount it may have paid them.[ii]

**THINGS TO THINK ABOUT BEFORE YOU TIP**

Whistleblowers who prepare strong submissions focusing on violations that fit within the SEC’s law-enforcement priorities can expect an opportunity to meet with SEC staff early on in the process. From there, the whistleblower’s responsibility is to assist the SEC as needed in the ensuing investigation and to be prepared to claim an award if the Commission takes enforcement action resulting in a qualifying sanction.

The following is a partial list of practical advice for practitioners who seek to assist their clients in making a compelling case for enforcement action by the SEC. These considerations, which should also be helpful to whistleblowers who participate in the program without counsel, are based on the program discussed above, the SEC’s handling of whistleblower tips to date, and the authors’ first-hand experience representing numerous clients before the SEC Whistleblower Program, leading to successful enforcement actions:

- Determine whether the client has original information about violations of securities laws or the Foreign Corrupt Practices Act.
- Assess the seriousness of the alleged violations by reviewing past SEC regulatory and enforcement actions, which are available on the SEC’s website and searchable by topic, violation, company, and other parameters.
- Where needed, assess the potential tip with the help of an expert in the appropriate specialty, such as securities trading or public accounting. Do the work necessary to find experts in whatever subspecialty is needed, such as broker-dealer compliance, revenue recognition, loan loss reserves, alternative trading platforms, or the intricacies of accounting standards applicable to the particular industry or sector whose activities are in question.
- Determine whether and to what extent your client’s information might advance the SEC’s current enforcement agenda, which is not a constant. The SEC’s website contains a great deal of information about Commission priorities, including enforcement actions, press releases and task-force reports. Speeches by SEC commissioners and leading officials can also shed light on the types of information that may be of greatest interest to the SEC.
- Make sure that your client will be providing information “voluntarily,” prior to receiving a request for the same from the SEC or another agency or self-regulatory organization. If such a request has already been made, consider whether your client might still be eligible for an award, given the circumstances of the SEC’s waiver of the “voluntary” requirement in one case in 2014 as discussed above.
- Prepare the client’s submission to the SEC with an emphasis on facts about which the client has “independent knowledge” as defined in the final rules above. Review the client’s position, job duties, and how he came into possession of his information to determine whether he falls within one of the groups of individuals who are presumptively excluded from the program for lack of “independent knowledge.” This would include attorneys, compliance and audit personnel, and officers or directors who received the information in connection with corporate-governance responsibilities.
- If the client falls into one of the excluded categories, see whether the client may be exempt from the exclusion because he reported his concerns internally and has waited 120 days, as in the case of the compliance employee discussed above, or because he has reason to believe investors may suffer imminent harm or because the company is taking action that is likely to impede an investigation.
- Give careful consideration as to whether to advise the client to report internally, keeping in mind that doing so might subject the client to retaliation but might also entitle the client to a larger award, both because he can benefit from additional, related information the company “self-reports” to the SEC and because SEC staff will consider his internal reporting as a factor in determining the size of an award. And as discussed above, your client may have legal protections against retaliation for internal reporting under SOX even if not directly under the anti-retaliation provisions of the Dodd-Frank Act.
Remember that your client, through you, may file his tip anonymously as long as you follow the procedures set forth in the rules for anonymous submissions. This can certainly help prevent retaliation against your client, especially if he is determined not to report internally for fear of retaliation. Anonymous reporting can also provide your client with greater confidence that his identity will not become known to future employers and thus pose future risk to his career.

Use the SEC-supplied forms and carefully follow the rules that apply to them, as a whistleblower is eligible for a reward only if he follows the prescribed procedures. The importance of following the rules cannot be overemphasized.

Remember that the SEC receives thousands of tips per year and that it is important to make sure your client’s TCR is as compelling as possible. If the lawyers and accountants who review tips in the Office of the Whistleblower and the Office of Market Intelligence cannot understand your client’s submission on a first read, it will not likely end up at the top of the stack. Present your facts and analysis clearly and include with the TCR any relevant documents your client can provide.

Although it is possible to supplement your submission later, you do not want to lose the opportunity for the SEC staff to see in the first 30 minutes of reviewing your tip the basis for a winnable enforcement action to remedy a pressing need, and you get only one chance to make that happen.

Include any useful analysis that you, your client, or an expert you retain can apply to other facts, even publicly available ones, in a way that will assist SEC lawyers in an investigation. Keep in mind that your submission cannot be “exclusively derived” from certain public sources but that SEC investigators will accept and appreciate your analysis of publicly available information if the analysis helps lead the SEC to information that is not publicly available or provides insights that are not generally known. One successful tip discussed above appears to have consisted entirely of independent analysis and no independent knowledge.

Do not include attorney-client privileged communications in your client’s submission to the SEC. The Commission will not consider the information, and its receipt of such communications will in itself delay or even discourage the SEC’s consideration of the submission as a whole. If unsure about potentially privileged materials, speak with the Office of the Whistleblower and/or Enforcement staff assigned to the investigation about the possibility of having an SEC “filter” team screen certain documents to prevent staff involved in the investigation from viewing privilege materials, possibly resulting in their disqualification from the investigation.

Make sure to study the website of the SEC Office of the Whistleblower thoroughly, as it contains a wealth of useful information about how to submit a tip and claim an award. That office’s staff also answers telephone inquiries about the program and how it works. In addition, the SEC website provides comprehensive, searchable information about securities laws, company filings, comment letters to issuers of securities, and past and ongoing Commission enforcement actions that can be very helpful in preparing your tip and claiming an award. The Office of the Whistleblower’s annual reports also contain valuable information about the Whistleblower Program.

If you are an individual thinking about submitting a tip to the SEC, you may want to consult with attorneys who specialize in representing whistleblowers before the SEC and who have firsthand experience with the SEC’s handling of tips under the new program. Attorneys practicing before the SEC will have useful advice about how best to prepare your tip, how to direct the information to appropriate SEC staff, how best to aid the staff in a successful investigation of your information, and how to claim an award successfully.

Do not needlessly delay in submitting your tip. The statute of limitations for securities violations is generally five years, but, beyond the risk of submitting a tip that the SEC is time-barred from pursuing, an unreasonable delay in submitting a tip can negatively affect the size of the whistleblower’s reward. Promptly submitting a tip also reduces the chances of a competing whistleblower submitting the same information first.

Provide the SEC with as much documentation of your allegations as possible. While being mindful of any privilege issues, including documentation that supports the allegations made in the tip allows the SEC to judge the reliability of the information in the tip and helps the agency build a case against the company. Whistleblowers can further assist the SEC by providing a “roadmap” for the agency to follow in seeking additional information from the respondent to the investigation and related individuals and entities.

… And After You Tip.

Check your email! Do not make the mistake that one claimant made when he or she failed to respond to an email from SEC staff seeking to follow up on the claimant’s tip. The SEC’s follow up email was directed...
to the email address the claimant had provided on the TCR form. The whistleblower’s failure to check his or her inbox led SEC staff to close the tip with no further action and was in part responsible for the SEC’s later denial of an award to the claimant, whose tip had not “led to” a successful enforcement action. In so ruling, the SEC rejected the claimant’s argument that he or she “would have” provided critical information had the SEC tried harder to make contact. 197

• Throughout the process, think twice—no, at least ten times—before accusing the SEC and its staff of corruption, dishonesty, or other malfeasance in their handling of your whistleblower tip or in making a preliminary determination regarding your application for an award. The SEC staff are extremely hard-working, dedicated, honest, and fair-minded in their dealings with whistleblowers. Their advocacy for the whistleblower, moreover, is critical to the whistleblower’s ability to earn an award, and you should assume that the Commission will reject wild allegations of malfeasance as lacking credibility. 198

• Related to the prior practice point, remember that the primary purpose of the SEC Whistleblower Program is to assist the Commission in enforcing the nation’s securities laws and that the financial incentives the program provides are designed to further that purpose. The whistleblower’s role is to submit information he or she believes will be helpful to the SEC in bringing a successful enforcement action, hopefully one that qualifies as a covered action and entitles the whistleblower to an award. The role of the SEC and its staff is to investigate the information if warranted, to take action if appropriate, and to impose sanctions in an amount that the facts, the law, and the SEC’s enforcement priorities warrant. The whistleblower, for good reason, has no right to decide what action, if any, the SEC should take based on his or her tip.

• This does not mean you cannot argue for investigation, suggest theories of recovery, etc., in working with the SEC as a whistleblower. It does mean that you need to be careful to remember your role, manage your expectations, and show respect for the SEC staff’s decisions as to strategy and tactics over the course of what can be a long process.

• Keep detailed records of all contact with the SEC and with related agencies that are investigating alongside the SEC. If the SEC takes enforcement action resulting in more than $1 million in sanctions, you will be glad that you can support your claim with your saved emails, phone records, recollections informed by contemporaneous notes, etc. that demonstrate the extent to which you and your information assisted the SEC in achieving a favorable outcome.

• Monitor the monthly postings of notice of covered actions carefully. The SEC has made clear that “[a] potential claimant’s responsibility includes the obligation to regularly monitor the Commission’s web page for Notice of Covered Action postings and to properly calculate the deadline for filing an award claim.” 199 Whistleblowers should also monitor media reports about potential deferred prosecution, non-prosecution, and settlement agreements in light of Rule 21F-11(b)(1), making it a whistleblower’s responsibility to monitor SEC press releases and media reports to determine whether a qualifying agreement has been announced publicly (thereby triggering the 90-day period of time to file an application for an award).
Lisa J. Banks and Michael A. Filoromo are partners with Katz, Marshall & Banks, LLP, a whistleblower and employment law firm based in Washington, D.C. They specialize in the representation of whistleblowers in tips submitted to the Securities and Exchange Commission’s Office of the Whistleblower, in qui tam lawsuits filed under the False Claims Act, in tips filed with the Commodity Futures Trading Commission, and in tips submitted to the Internal Revenue Service’s whistleblower program. They also represent employees in whistleblower-retaliation cases filed under the Sarbanes-Oxley Act, the Dodd-Frank Act and other federal and state laws.

Katz, Marshall & Banks, LLP’s website at www.kmblegal.com features detailed information about how employees who have blown the whistle on unlawful conduct can fight back against unlawful retaliation and also earn financial rewards where available. Articles in the website’s Whistleblower Law section explain both the law and practicalities of whistleblowing as they play out in a wide range of industries and professions. Whistleblower topics include the SEC Whistleblower Program, Corporate and Accounting Fraud, Qui Tam Lawsuits under the False Claims Act, IRS Whistleblowers, Compliance Officer Whistleblowers, Consumer Finance Whistleblowing, the Pharmaceutical Industry, Food Safety, the Nuclear Industry, and Consumer Product Safety Whistleblowers, to name just a few. http://www.kmblegal.com/practice-areas/whistleblower-law/ and http://www.kmblegal.com/practice-areas/sec-whistleblower-law.

The Katz, Marshall & Banks website also hosts an informative SEC Whistleblower Law Blog and also a more general Whistleblower Law Blog that can help keep whistleblowers and other conscientious employees up to date on new developments in whistleblower law and related news separate from broader whistleblower news and developments. http://www.kmblegal.com/blogs.
ENDNOTES


2 This Guide follows SEC numbering practice by referring to the Rules as “Rule 21F-1,” etc. The rules are codified at 17 C.F.R. §§ 240.21F-1 et seq. The most recent version of the rules, as amended in December 2020, can be found on the SEC’s website at https://www.sec.gov/files/amended-rules-whistleblower-december2020.pdf. The rule establishing the range of awards is Rule 21F-3(a).


8 2020 Annual Report, supra note 4, at 20.


11 2020 Final Rules and Adopting Release, supra note 10, at 49-52; Rule 21F-6(c).

12 For the definition of “whistleblower,” see Rule 21F-2(a), and 2020 Final Rules and Adopting Release, supra note 10, at 63-64 (discussing changes to the rule). For the definition of “action,” see Rule 21F-4(d), and 2020 Final Rules and Adopting Release supra note 10, at 15-20 (discussing changes). For the definition of “related action,” see Rule 21F-3(b), and 2020 Final Rules and Adopting Release, supra note 10, at 35-43 (discussing changes).

13 2020 Final Rules and Adopting Release, supra note 10, at 94-102; Rule 21F-9(e).

14 12 U.S.C. 7201 et seq.

15 18 U.S.C. § 1514A.


17 For a comprehensive guide to the CFTC Whistleblower Program, see Lisa J. Banks’ CFTC Whistleblower Practice Guide, a sister publication to this SEC Whistleblower Practice Guide that is also published annually by Katz, Marshall & Banks, LLP. The 2021 edition is available online at http://www.kmblegal.com/resourcesguide-navigating-cfctrulewhistleblower-program. The range of trading activity that can form the basis for tips to the CFTC includes trades not only in cotton and pork bellies but also in oil and gas, treasury futures, commodities such as currencies, cryptocurrencies, and alternative investment products such as derivatives and swaps. Although the CFTC program has attracted far fewer whistleblower tips than the SEC program, it has seen increased activity in the past few years, perhaps due in part to the CFTC’s announcement in April 2018 of its largest award of approximately $30 million. Id. at 3; CFTC Release No. 7753-18, CFTC Announces Its Largest Ever Whistleblower Award of Approximately $30 Million (July 12, 2018), https://www.cftc.gov/PressRoom/PressReleases/7753-18.


19 The 2011 Final Rules and Adopting Release, supra note 18, a combined 305 pages, provides a very useful summary of the policy discussion surrounding the formation of the SEC Whistleblower Program and remains an invaluable resource for whistleblowers and their lawyers in preparing tips and applying for awards. Corporate counsel whose clients may be the subject of whistleblower tips can also benefit from a review of the Adopting Release. The text of the rules themselves begins on page 241.


29 Id.


31 See also Rule 21F-8(a), which expressly allows the SEC “upon a showing of extraordinary circumstances” to waive any of the procedures for submitting tips and claiming an award that are set forth in Rules 21F-9 through 21F-11.

32 2011 Final Rules and Adopting Release, supra note 18, at 47.

33 Id. at 47 n. 104.

34 Id. at 51.


36 Id. at 118-19.

37 Id. at 120. The SEC gave examples in its proposed rule of insufficiently insightful analysis, such as where the whistleblower “points to common hallmarks of fraud on the face of public materials (e.g., impossibly high, guaranteed investment returns or extravagant claims in press releases) or to public discourse (e.g., discussions on a public message board) in which investors or others are alleging a fraudulent scheme.” Id. at 113; SEC Whistleblower Program Rules, Proposed Rule, Release No. 34-83557, at 106-08 (June 28, 2018), available online at https://www.sec.gov/rules/proposed/2018/34-83557.pdf (hereinafter “2018 Proposed Rules”).

38 Id. at 119-20.

39 Id. at 123.

40 Id. at 124.

41 Id. at 112.

42 Id. at 120.


50 Individuals who obtain information for a tip using methods that a court finds to have violated criminal laws are excluded as well, without exception. Rule 21F-4(b)(4)(iv).


55 Id.


58 2011 Final Rules and Adopting Release, supra note 18, at 64.

59 2011 Final Rules and Adopting Release, supra note 18, at 90–92 for the SEC’s most comprehensive explanation of these competing interests and how the Commission weighed them in developing the final rules.

60 29 C.F.R. § 1980.104(a).
As reflected in a November 2017 SEC award determination, the Commission takes the “original source” requirement seriously and is hostile to applications from persons whom a whistleblower retained to assist that whistleblower in communicating information to the SEC. Order Determining Whistleblower Award Claim, Exchange Act Release No. 82181, at 10-12 (Nov. 30, 2017), https://www.sec.gov/rules/other/2017/34-82181.pdf. In that case, two claimants had been hired by a whistleblower to prepare an expert report on behalf of that whistleblower, which the whistleblower then provided to the Commission. The SEC eventually gave an award of $8 million to the whistleblower, but it refused awards to the two experts who also applied for a share of the award in the same covered action, reasoning that the experts were not the original source of the information but rather were working on behalf of the whistleblower.


Id.


Id. at 103.

Id. at 104.

Id. at 91-92.

SEC Press Release No. 2019-76, SEC Awards $4.5 Million to Whistleblower Whose Internal Reporting Led to Successful SEC Case and Related Action (May 24, 2019), https://www.sec.gov/news/press-release/2019-76. As discussed above, a similar 120-day rule applies to cases in which a whistleblower seeks an award based on information passed to the SEC by another federal agency. In such cases, the SEC will treat the whistleblower as “first in line” as of the time he or she submitted the information to the other federal agency only if the whistleblower submits the same information with 120 days of providing the information to the other federal agency. Order Determining Whistleblower Award Claims, Exchange Act Release No. 80596, at 6, n.9 (May 4, 2017), https://www.sec.gov/rules/other/2017/34-80596.pdf.


Id. at 104.

Id. at 92 n.197.


Id.

2011 Final Rules and Adopting Release, supra note 18, at 100.


Id. at 108–09.

Id. at 109.


Id. at 6–12.


Id. at 12.


Rule 21F-3(b)(3); 2020 Final Rules and Adopting Release, supra note 10, at 38-43.

Rule 21F-3(b)(3)(i). Factors for determining which award program has a more direct or relevant connection to the action include *(A)* The relative extent to which the misconduct charged in the potential related action implicates the public policy interests underlying the Federal securities laws (such as investor protection) rather than other law-enforcement or regulatory interests (such as tax collection or fraud against the Federal Government); *(B)* The degree to which the monetary sanctions imposed in the potential related action are attributable to conduct that also underlies the Federal securities law violations that were the subject of the Commission's enforcement action; and *(C)* Whether the potential related action involves state-law claims and the extent to which the state may have a whistleblower award program that potentially applies to that type of law-enforcement action.*

Rule 21F-3(b)(3)(ii).


Appendix A, infra.

The Form TCR can be found online at https://www.sec.gov/files/formtcr.pdf. The 2020 Final Rules and Adopting Release allowed the SEC to update the Form TCR as frequently as it chooses, so attorneys and whistleblowers should monitor the website for form changes. 2020 Final Rules and Adopting Release, supra note 10, at 84.

In an October 2017 award determination granting more than $1 million, the Commission exercised its discretionary power to waive the requirement that a whistleblower have submitted a declaration to the SEC under penalty of perjury. Order Determining Whistleblower Award Claim, Exchange Act Release No. 81857, at 2 n.1 (Oct. 12, 2017), https://www.sec.gov/rules/other/2017/34-81857.pdf (noting that this failure was the result of the SEC’s online portal and that the claimant promptly submitted a declaration once the issue was flagged for him by the SEC).

See also 2020 Final Rules and Adopting Release, supra note 10, at 72-76.

Id. at 94-95. The only exception to this rule is for information submitted between July 21, 2010, when Dodd-Frank was enacted, and August 11, 2011, when the SEC Whistleblower Program Rules took effect. E.g. SEC Press Release No. 2017-1, SEC Awards $5.5 Million to Whistleblower, and the linked Order Determining Whistleblower Award Claim, at 1 & nn.2, 3 (Jan. 6, 2017) https://www.sec.gov/news/pressrelease/2017-1.html (waiving “in writing” requirement where whistleblower provided information before Dodd-Frank and in the format the SEC requested). The Commission also waived the requirement in April 2020 under “highly unusual facts and circumstances” where the SEC had requested that the Claimant provide information over the phone. Order Determining Whistleblower Award Claim, Exchange Act Release No. 88687, at 1-3 (Apr. 20, 2020), https://www.sec.gov/rules/other/2020/34-88687.pdf. The SEC waived the Form TCR requirement twice in December 2020 for unique circumstances but may be stricter for tips submitted after December 7, 2020, when the Final Rules went into effect. In the first case, the whistleblower had provided the information in writing, unambiguously indicated that it was a tip pursuant to the whistleblower program. However, their attorney misunderstood SEC communications about the procedural requirements and they would otherwise have been eligible for an award. Order Determining Whistleblower Award Claims, Exchange Act Release No. 90580, at 1-2 (Dec. 7, 2020), https://www.sec.gov/rules/other/2020/34-90580.pdf. In the second, the whistleblower provided information to their attorney, who submitted a Form TCR with the attorney as the whistleblower, without the client’s informed consent. The client provided follow-up information to the SEC and believed that the information was submitted on the client’s behalf. Order Determining Whistleblower Award Claim, Exchange Act Release No. 90721, at 1-2 (Dec. 18, 2020), https://www.sec.gov/rules/other/2020/34-90721.pdf.

2020 Annual Report, supra note 4, at 19. This was up from approximately 16,850 TCRs in Fiscal Year 2019, which the SEC attributed at least in part to the COVID-19 pandemic. Id.


SEC Form TCR Tip, Complaint or Referral and related instructions are available online at https://www.sec.gov/files/formtcr.pdf.


Id. at 50.

Id. at 50-51.

Id. at 51.

Id. at 52.


Id. at 55-59.

Id. at 59-60.

Id. at 43-44.


2020 Annual Report, supra note 4, at 20.


The list of Covered Actions can be accessed by clicking on the “Claim an Award” tab on the SEC Office of the Whistleblower website, at https://www.sec.gov/page/whistleblower-100million. The SEC has published on its website an easy-to-read flow chart describing the program, with attention to the steps in the award application and determination process. https://www.sec.gov/page/whistleblower-100million.

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Kilgour v. Sec. & Exch. Comm’n, 942 F.3d 113 (2d Cir. 2019).

Id. at 121-23.

Id. at 124-25.


Id.


OSHA handles the initial investigation and remediation stages for complaints of retaliation not only under SOX but also under more than 20 other federal statues, most of which are particular to certain industries. OSHA publishes desk aids for some of the statutes it administers, including SOX, OSHA, Investigator’s Desk Aid to the Sarbanes-Oxley Act (SOX) Whistleblower Protection Provision (Sept. 27, 2018), available at https://www.osha.gov/sites/default/files/SOXDeskAid.pdf.


Rule 21F-2(d)(1)(i).

Id. at 76.


2020 Final Rules and Adopting Release, supra note 10, at 80; Rule 21F-6(a)(4), (b)(3).


Liu Meng-Lin v. Siemens AG, 763 F.3d 175, 180-83 (2d Cir. 2014).

Id.


185 Chair White’s speech, The SEC as the Whistleblower’s Advocate, presented at the Ray Garrett, Jr. Corporate and Securities Law Institute at Northwestern University School of Law in April 2015, is available online at http://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html.


187 On May 22, 2017, the CFTC adopted a series of amendments to the rules governing the CFTC Whistleblower Program. Among other changes, the amendments allow the agency, like the SEC, to take action to enforce the anti-retaliation provisions of the Dodd-Frank Act that apply to CFTC whistleblowers. The amendments also prohibit entities from impeding whistleblowers from reporting commodities-trading violations to the CFTC, including through the use of confidentiality and pre-dispute arbitration agreements. CFTC Office of Public Affairs, Strengthening the Rules Governing the CFTC Whistleblower Program, including Rules 21F-1, 21F-2 and 21F-10, and in the sample claims review process, (May 22, 2017), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/wbruleamend_factsheet052217.pdf.


190 Id. at 3.


192 For an up-to-date list of all enforcement actions the SEC has taken based on employer actions to impede reporting, see SEC, Enforcement Actions Based on Actions Taken to Impede Reporting, https://www.sec.gov/whistleblower/retaliation#enforcement-actions (last visited Feb. 1, 2021).


194 Other agencies have also given greater scrutiny to confidentiality agreements. The National Labor Relations Board, Equal Employment Opportunity Commission, and Financial Industry Regulatory Authority, to name a few, have taken action against employer-employee confidentiality agreements in recent years. In addition, a March 2015 report by the State Department’s Office of the Inspector General examined confidentiality agreements that the 30 largest State Department contractors have required their employees to sign. U.S. Dep’t of State Office of Inspector General, Review of the Use of Confidentiality Agreements by Department of State Contractors, Report ESP-15-03 (March 2015), https://www.stateoig.gov/system/files/esp-15-03.pdf.

195 This Practice Guide does not discuss all of the forms and procedures in detail, but they are spelled out clearly in the SEC Whistleblower Program, including Rules 21F-1, 21F-2 and 21F-10, and in the sample forms and directions for Form TCR (“Tip, Complaint or Referral”) and Form WB-APP (“Application for Award of Original Information”) that are appended to the rules at 278–305.


198 Id. at 4-8.

APPENDIX A
U.S. Securities and Exchange Commission (“SEC”) Whistleblower Awards Through March 31, 2021

Each award is issued through an “Order Determining Whistleblower Award Claim.” The SEC also issues press releases announcing most but not all awards. The first number in the second column in the table below refers to the Exchange Release number that appears on all Orders. The second, hyphenated number refers to the Press Release number that appears at the top left of each press release.

Readers can find all SEC press releases listed by date and number on at https://www.sec.gov/news/pressreleases. Most press releases announcing whistleblower awards have links to the accompanying order at the upper right of the page. The orders granting and denying award applications are also listed, by date only, on the SEC Office of the Whistleblower website at https://www.sec.gov/about/offices/owb/owb-final-orders.shtml.

The SEC heavily redacts its Orders Determining Whistleblower Award Claims to eliminate any information that would potentially disclose a whistleblower’s identity. This practice has evolved to the point where the redacted orders on the website lack not only the names of the whistleblower and the sanctioned entity but also the percentage of proceeds awarded and occasionally the total amounts of the award. The reasoning behind these redactions is that disclosing these numbers could make it possible to link an award to a Covered Action, which would in turn show which actions rested on whistleblower tips and possibly encourage employers, the media, or others to search for the identity of the whistleblower.

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<th>Date</th>
<th>Release Nos.</th>
<th>Award Total</th>
<th>%</th>
<th>Allocation Among Claimants</th>
<th>Notes from SEC Press Releases and Orders Determining Awards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mar. 29, 2021</td>
<td>91427; No press release.</td>
<td>Less than $5 million</td>
<td>20% and 10%</td>
<td>Two-thirds to one claimant; one-third to another.</td>
<td>The SEC cited the revised Rule 21F-6(c), which created a presumption for a maximum (30%) award where the award would be less than $5 million, the claimant has no negative factors, and the claimant is not a culpable whistleblower. Notably, both claimants were harmed investors, not insiders. The claimant receiving the larger award (20% of the proceeds) submitted information earlier in time, significantly expanding an ongoing investigation. Both claimants provided substantial assistance that helped the SEC stop an ongoing fraudulent scheme.</td>
</tr>
<tr>
<td>Mar. 29, 2021</td>
<td>91426; 2021-54</td>
<td>Over $500,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>The SEC granted this award through the safe harbor provision under Rule 21F-4(b)(7), which provides that if the whistleblower submits information to another federal agency and submits same to the SEC within 120 days, the SEC will treat the information as though submitted at the same time it was submitted to the other agency.</td>
</tr>
<tr>
<td>Mar. 16, 2021</td>
<td>91332; No press release.</td>
<td>Less than $5 million</td>
<td>30%</td>
<td>All to single claimant.</td>
<td>The SEC for the first time cited the presumption under revised Rule 21F-6(c) for a maximum (30%) award where the award would be less than $5 million. The claimant provided significant ongoing assistance, answering the investigative staff’s questions and providing numerous documents.</td>
</tr>
<tr>
<td>Mar. 9, 2021</td>
<td>91280; 2021-44</td>
<td>$1.5 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>The claimant raised flags about previously unknown misconduct, identified potential witnesses, and talked with the SEC on multiple occasions.</td>
</tr>
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</tr>
<tr>
<td>Mar. 4, 2021</td>
<td>91253; 2021-41</td>
<td>Over $5 million</td>
<td></td>
<td>Two claimants split the award.</td>
<td>Claimants provided significant information about misconduct overseas that directly supported certain allegations in the enforcement action.</td>
</tr>
<tr>
<td>2021</td>
<td>91225; 2021-37</td>
<td>$500,000</td>
<td></td>
<td>Two claimants split the award</td>
<td>Both claimants provided substantial, ongoing assistance that conserved the agencies’ time and resources.</td>
</tr>
<tr>
<td>Feb. 25, 2021</td>
<td>91207; 2021-34</td>
<td>Over $800,000</td>
<td></td>
<td>All to single claimant.</td>
<td>The Commission waived noncompliance with the requirement to file a TCR because the claimant complied with this obligation within 30 days of having learned of those filing requirements. The claimant participated in an interview and provided documents that showed false and misleading statements made to investors.</td>
</tr>
<tr>
<td>Feb. 25, 2021</td>
<td>91206; 2021-34</td>
<td>Over $900,000</td>
<td></td>
<td>All to single claimant.</td>
<td>The Commission waived noncompliance with the requirement to file a TCR because the claimant complied with this obligation within 30 days of having learned of those filing requirements. The claimant’s substantial information and “critical declaration” helped stop a scheme to defraud retail investors.</td>
</tr>
<tr>
<td>Feb. 23, 2021</td>
<td>91183; 2021-31</td>
<td>Over $9.2 million</td>
<td></td>
<td>All to single claimant.</td>
<td>This marks the first time an award had been granted on the basis of the Dec. 7, 2020 amendments which included deferred and non-prosecution agreements as “related actions” eligible for an award.</td>
</tr>
<tr>
<td>Feb. 19, 2021</td>
<td>91164; 2021-30</td>
<td>Nearly $700,000</td>
<td></td>
<td>All to single claimant.</td>
<td>Claimant prompted the SEC investigation, provided significant information, and reported internally.</td>
</tr>
<tr>
<td>Feb. 19, 2021</td>
<td>91163; 2021-30</td>
<td>Over $2.2 million</td>
<td></td>
<td>All to single claimant.</td>
<td>Information in the claimant’s submission was “of such high quality that staff was able to draft document requests . . . without speaking to Claimant.”</td>
</tr>
<tr>
<td>Jan. 14, 2021</td>
<td>90922; 2021-7</td>
<td>Nearly $600,000</td>
<td></td>
<td>All to single claimant.</td>
<td>Claimant provided substantial assistance and met with investigators multiple times.</td>
</tr>
<tr>
<td>Jan. 7, 2021</td>
<td>90866; 2021-2</td>
<td>Nearly $600,000</td>
<td></td>
<td>All to single claimant.</td>
<td>Claimant prompted the SEC investigation, provided significant information, and reported internally many times.</td>
</tr>
<tr>
<td>Jan. 7, 2021</td>
<td>90867; 2021-2</td>
<td>Over $100,000</td>
<td></td>
<td>All to single claimant.</td>
<td>Claimant credited for independent analysis of public documents. The Rule 21F-6(c) presumption of the 30% maximum award applied but was overcome because claimant provided limited assistance.</td>
</tr>
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<td>Date</td>
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<td></td>
</tr>
<tr>
<td>Jan. 7, 2021</td>
<td>90864; 2021-2</td>
<td>Nearly $500,000</td>
<td>?</td>
<td>Claimant 1, an outsider, prompted the SEC investigation. The others provided significant additional information leading to two SEC actions.</td>
<td></td>
</tr>
<tr>
<td>Dec. 22, 2020</td>
<td>90767; 2020-333</td>
<td>Over $1.6 million</td>
<td>?</td>
<td>Claimant provided ongoing assistance to the SEC despite fears for personal safety.</td>
<td></td>
</tr>
<tr>
<td>Dec. 18, 2020</td>
<td>90721; 2020-325</td>
<td>Over $500,000</td>
<td>?</td>
<td>The SEC waived the Form TCR requirement due to attorney misconduct, but the award was reduced due to unreasonable delay in reporting.</td>
<td></td>
</tr>
<tr>
<td>Dec. 18, 2020</td>
<td>90718; 2020-325</td>
<td>Over $1.8 million</td>
<td>?</td>
<td>Claimant took immediate steps to mitigate harm to investors and provided significant assistance to the SEC, leading to millions of dollars returned to investors.</td>
<td></td>
</tr>
<tr>
<td>Dec. 18, 2020</td>
<td>90720; 2020-325</td>
<td>Over $1.2 million</td>
<td>?</td>
<td>The SEC determined that claimant did not initiate the misconduct but did actively participate in it, financially benefit from it, and unreasonably delay reporting. Award was therefore reduced.</td>
<td></td>
</tr>
<tr>
<td>Dec. 14, 2020</td>
<td>90656; 2020-316</td>
<td>$300,000</td>
<td>?</td>
<td>Claimant had audit responsibilities but met the exception where the wrongdoer is engaging in conduct that impedes internal investigation.</td>
<td></td>
</tr>
<tr>
<td>Dec. 7, 2020</td>
<td>90582; 2020-307</td>
<td>Nearly $400,000</td>
<td>?</td>
<td>Claimants’ independent analysis prompted the SEC to open an investigation and provided ongoing support.</td>
<td></td>
</tr>
<tr>
<td>Dec. 7, 2020</td>
<td>90580; 2020-307</td>
<td>$750,000</td>
<td>?</td>
<td>Claimant 1 submitted the first tip and provided more information than Claimant 2, whose information led to additional allegations in the charges brought. Claimant 1 refused to participate in the wrongdoing and Claimant 2 reported internally.</td>
<td></td>
</tr>
<tr>
<td>Dec. 7, 2020</td>
<td>90578; 2020-307</td>
<td>Nearly $1.8 million</td>
<td>?</td>
<td>Claimant reported internally and to the SEC; provided detailed information into wrongdoing the SEC would not otherwise have uncovered.</td>
<td></td>
</tr>
<tr>
<td>Dec. 1, 2020</td>
<td>90537; 2020-297</td>
<td>Over $6 million</td>
<td>?</td>
<td>Claimants’ joint tip and ongoing assistance led to successful actions by multiple agencies, uncovering tens of millions of dollars in ill-gotten gains.</td>
<td></td>
</tr>
<tr>
<td>Nov. 24, 2020</td>
<td>90506; No press release.</td>
<td>?</td>
<td>30%</td>
<td>Claimant’s tip was a factor in the SEC opening an investigation, which uncovered additional misconduct. Minimal sanctions were collected.</td>
<td></td>
</tr>
<tr>
<td>Nov. 20, 2020</td>
<td>90468; No press release.</td>
<td>?</td>
<td>30%</td>
<td>Claimant helped uncover a Ponzi scheme preying on retail investors. No collections were anticipated in the matter.</td>
<td></td>
</tr>
<tr>
<td>Nov. 19, 2020</td>
<td>90460; 2020-288</td>
<td>Over $900,000</td>
<td>?</td>
<td>Claimant provided timely and ongoing assistance, including information about misconduct overseas.</td>
<td></td>
</tr>
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</tr>
<tr>
<td>Nov. 13, 2020</td>
<td>90412; 2020-283</td>
<td>Over $1.1 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant’s independent analysis refocused an ongoing SEC investigation, saved significant time and resources, and allowed the SEC to freeze wrongdoer assets.</td>
</tr>
<tr>
<td>Nov. 5, 2020</td>
<td>90351; 2020-278</td>
<td>$750,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant provided significant information without which the SEC likely would not have uncovered the fraud.</td>
</tr>
<tr>
<td>Nov. 5, 2020</td>
<td>90350; 2020-278</td>
<td>Over $3.6 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant successfully contested the award amount and the SEC increased the award percentage. Claimant provided significant information, including misconduct abroad, and traveled internationally at own expense for the investigation.</td>
</tr>
<tr>
<td>Nov. 3, 2020</td>
<td>90317; 2020-275</td>
<td>Over $28 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant’s reports prompted internal and SEC investigations. Claimant identified a key witness and provided information closely related to some of the charges brought.</td>
</tr>
<tr>
<td>Oct. 29, 2020</td>
<td>90284; 2020-270</td>
<td>Over $10 million</td>
<td>?</td>
<td>All to single claimant. Two others denied.</td>
<td>Claimant’s information caused the SEC to open its investigation and led to almost every finding and charge. Claimant also raised concerns internally several times. Other claimants submitted information later and did not add significant new information.</td>
</tr>
<tr>
<td>Oct. 22, 2020</td>
<td>90247; 2020-266</td>
<td>Over $114 million</td>
<td>?</td>
<td>All to single claimant. Three others denied.</td>
<td>The award consisted of $52 million in connection with the SEC case and $62 million from related actions. Other claimants did not significantly contribute to the enforcement actions. This is the highest award as of publication.</td>
</tr>
<tr>
<td>Oct. 15, 2020</td>
<td>90189; 2020-255</td>
<td>More than $800,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant offered detailed independent analysis but no continuing assistance.</td>
</tr>
<tr>
<td>Sept. 30, 2020</td>
<td>90054; No press release.</td>
<td>Nearly $400,000</td>
<td>?</td>
<td>Half to each of two claimants.</td>
<td>Claimants provided detailed and ongoing information, reported internally, and faced retaliation.</td>
</tr>
<tr>
<td>Sept. 30, 2020</td>
<td>90059; No press release.</td>
<td>Nearly $2.9 million</td>
<td>?</td>
<td>All to single claimant. Two others denied.</td>
<td>Claimant’s tip prompted the SEC to open an investigation. Claimant did not recover for “related action” because it was not based on the same original information. Claimants 2 and 3 submitted tips after Claimant 1 and did not provide significant additional information.</td>
</tr>
<tr>
<td>Sept. 30, 2020</td>
<td>90049; 2020-239</td>
<td>Nearly $30 million</td>
<td>?</td>
<td>$22 million to one; $7 million to another.</td>
<td>Claimant 1 reported to the SEC first, provided substantial ongoing assistance, and internally reported. Claimant 2 provided more limited and duplicative information.</td>
</tr>
<tr>
<td>Sept. 30, 2020</td>
<td>90057; No press release.</td>
<td>Over $1.7 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>The award was reduced for unreasonable delay of three years but mitigated because the claimant attempted to alert investors in the interim and feared retaliation by the company.</td>
</tr>
<tr>
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</tr>
<tr>
<td>Sept. 28, 2020</td>
<td>90021; 2020-231</td>
<td>Over $1.8 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant was unaffiliated with the wrongdoer and provided prompt information that was closely connected to the charges brought.</td>
</tr>
<tr>
<td>Sept. 25, 2020</td>
<td>89996; 2020-225</td>
<td>Over $1.8 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant provided key information to an internal investigation, which aided the SEC’s investigation and uncovered overseas misconduct. The company had been sanctioned previously for similar misconduct.</td>
</tr>
<tr>
<td>Sept. 25, 2020</td>
<td>89995; 2020-225</td>
<td>$750,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant’s information prompted the SEC investigation and uncovered foreign misconduct, but the case was largely built on information from other sources.</td>
</tr>
<tr>
<td>Sept. 21, 2020</td>
<td>89929; 2020-215</td>
<td>$2.4 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant’s information prompted the investigation and contributed to all charges.</td>
</tr>
<tr>
<td>Sept. 17, 2020</td>
<td>89912; 2020-214</td>
<td>Nearly $250,000</td>
<td>?</td>
<td>Half to each of two claimants.</td>
<td>Claimants promptly provided the information that initiated the investigation, but the case was largely built by SEC investigators.</td>
</tr>
<tr>
<td>Sept. 14, 2020</td>
<td>89850; 2020-209</td>
<td>Over $10 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant exposed abuses and provided extensive and ongoing assistance during the investigation, including identifying witnesses and assisting the SEC in understanding complex issues. Claimant suffered hardships after persistently trying to remedy the issues.</td>
</tr>
<tr>
<td>Sept. 8, 2020</td>
<td>89780; No press release.</td>
<td>Nearly $30,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant alerted the SEC to violations and provided exemplary assistance to programmatically significant enforcement action, but collections were limited.</td>
</tr>
<tr>
<td>Sept. 1, 2020</td>
<td>89721; 2020-201</td>
<td>Over $2.5 million</td>
<td>?</td>
<td>Half to each of two claimants.</td>
<td>Claimants, both unaffiliated with the company, provided highly probative independent analysis of the company’s filings which caused the SEC to open an investigation and saved significant resources.</td>
</tr>
<tr>
<td>Aug. 31, 2020</td>
<td>89712; 2020-199</td>
<td>Over $1.25 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant’s information led to an investigation that promptly returned millions of dollars to investors.</td>
</tr>
<tr>
<td>July 21, 2020</td>
<td>89355; No press release.</td>
<td>?</td>
<td>30%</td>
<td>All to single claimant.</td>
<td>Claimant promptly provided unknown information and continued to provide helpful information.</td>
</tr>
<tr>
<td>July 21, 2020</td>
<td>89354; No press release.</td>
<td>?</td>
<td>20%</td>
<td>All to single claimant.</td>
<td>Claimant provided detailed and previously unknown information to an ongoing investigation but was not able to provide ongoing information.</td>
</tr>
<tr>
<td>July 14, 2020</td>
<td>89311; 2020-155</td>
<td>$3.8 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>The award was lowered because claimant provided discrete information and had no firsthand knowledge of the fraud.</td>
</tr>
<tr>
<td>June 23, 2020</td>
<td>89124; 2020-141</td>
<td>$125,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>The award was based on monetary sanctions obtained by the SEC and another agency in a related action, where claimant’s information led to both investigations.</td>
</tr>
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</tr>
<tr>
<td>June 19, 2020</td>
<td>89102; 2020-138</td>
<td>Nearly $700,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant’s information prompted the SEC to open the investigation, which led to significant returns to investors. Claimant reported internally and suffered retaliation.</td>
</tr>
<tr>
<td>June 4, 2020</td>
<td>89002; 2020-126</td>
<td>Nearly $50 million</td>
<td>?</td>
<td>All to single claimant. Second claimant denied.</td>
<td>First claimant provided significant unknown information that led to significant recovery for investors. Second claimant did not provide information to the SEC relating to the covered action or file a timely WB-APP.</td>
</tr>
<tr>
<td>May 4, 2020</td>
<td>88803; 2020-100</td>
<td>Nearly $2 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant’s information allowed the SEC to obtain a temporary restraining order and asset freeze against wrongdoer, and investors recovered much of their investments.</td>
</tr>
<tr>
<td>April 28, 2020</td>
<td>88759; 2020-98</td>
<td>Over $18 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant’s information prompted the SEC to start an investigation which led to millions of dollars being returned to retail investors, but a large portion stemmed from violations not reported by claimant.</td>
</tr>
<tr>
<td>April 20, 2020</td>
<td>88687; No press release.</td>
<td>?</td>
<td>?</td>
<td>All to single claimant.</td>
<td>The SEC waived the “in writing” requirement due to unusual circumstances, where claimant provided information to an officer who reported it to the SEC, and claimant provided additional information over the phone as requested by the SEC.</td>
</tr>
<tr>
<td>April 20, 2020</td>
<td>88689; 2020-91</td>
<td>$5 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant promptly provided information which led to the SEC’s investigation, provided a critical document and suffered unique hardship after raising concerns internally.</td>
</tr>
<tr>
<td>April 16, 2020</td>
<td>88658; 2020-89</td>
<td>Over $27 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant provided critical information uncovering misconduct partly overseas and saving the SEC significant time. The award was not reduced despite an unreasonable delay in reporting.</td>
</tr>
<tr>
<td>April 3, 2020</td>
<td>88547; 2020-80</td>
<td>$2 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant provided vital information that would have been difficult to obtain otherwise and despite receiving implicit threats from the wrongdoers.</td>
</tr>
<tr>
<td>March 30, 2020</td>
<td>88507; 2020-75</td>
<td>$450,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant’s information did not originate but refocused the SEC investigation. Claimant complied with internal reporting procedures and suffered unique hardships as a result. Claimant had internal compliance responsibilities but met the 120-day waiting period for reporting to the SEC.</td>
</tr>
<tr>
<td>March 24, 2020</td>
<td>88462; 2020-71</td>
<td>Over $570,000</td>
<td>?</td>
<td>$478,000 to one claimant; $94,000 to another.</td>
<td>One claimant received a substantially higher amount because they supplied more information to the SEC, which led to more enforcement actions, and provided it much earlier than the other claimant did.</td>
</tr>
<tr>
<td>Date</td>
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</tr>
<tr>
<td>March 23, 2020</td>
<td>88449; 2020-69</td>
<td>Over $1.6 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant’s information caused the SEC to open its investigation and supported some charges. The underlying fraud would have been difficult for the SEC to detect without the claimant’s information, but the claimant also unreasonably delayed in reporting.</td>
</tr>
<tr>
<td>Feb. 28, 2020</td>
<td>88299; 2020-46</td>
<td>Over $7 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant provided extensive and sustained assistance to the SEC’s investigation and enforcement action against serious financial abuses.</td>
</tr>
<tr>
<td>Jan. 22, 2020</td>
<td>88015; 2020-15</td>
<td>$277,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>This award included proceeds recovered from a related action. The SEC noted that claimant’s information helped shut down an ongoing scheme preying on retail investors.</td>
</tr>
<tr>
<td>Jan. 22, 2020</td>
<td>88014; 2020-15</td>
<td>$45,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant was an investor who lost money in the fraudulent scheme and was able to provide the SEC “new, critical, time-sensitive information that allowed staff to recover assets that were later returned to harmed investors.”</td>
</tr>
<tr>
<td>Nov. 15, 2019</td>
<td>87544; 2019-238</td>
<td>$260,000</td>
<td>?</td>
<td>$260,000 jointly to three claimants.</td>
<td>Claimants were not insiders but rather were themselves harmed investors who alerted the agency “to a well-concealed fraud targeting retail investors.” The SEC noted that it would have been unlikely for Commission staff to have learned of the misconduct absent the claimants’ initial tip.</td>
</tr>
<tr>
<td>Sept. 20, 2019</td>
<td>87039; no press release</td>
<td>$38,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant prompted the SEC to open an investigation that resulted in two successful enforcement actions involving harm to retail investors.</td>
</tr>
<tr>
<td>Aug. 29, 2019</td>
<td>86803; 2019-165</td>
<td>Over $1.8 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant informed the SEC of misconduct, which occurred overseas, and provided extensive and ongoing cooperation during the course of the investigation. Claimant also internally reported the conduct on multiple occasions.</td>
</tr>
<tr>
<td>July 23, 2019</td>
<td>86431; 2019-138</td>
<td>$500,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>The award was to “an overseas whistleblower” and involved misconduct occurring abroad. The SEC noted that the claimant’s tip was the first information that the Commission received on the charged misconduct.</td>
</tr>
<tr>
<td>June 3, 2019</td>
<td>86010; 2019-81</td>
<td>$3 million</td>
<td>?</td>
<td>$3 million jointly to two claimants.</td>
<td>The SEC noted that it “positively assessed” the “significant and timely steps” the claimants undertook to have the company remediate the harm caused by the alleged violations, including advocating for full disclosure of the violation and for compensation of harmed investors.</td>
</tr>
<tr>
<td>Date</td>
<td>Release Nos.</td>
<td>Award Total</td>
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<td>----------------------------------------------------------</td>
</tr>
<tr>
<td>May 24, 2019</td>
<td>85936; 2019-76</td>
<td>$4.5 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>The award was to Claimant whose tip triggered the company to review the allegations as part of an internal investigation and subsequently report the whistleblower’s allegations to the SEC and another agency. This was the first time a claimant was awarded under Rule 21F-4(c)(3), which incentivizes internal reporting by whistleblowers who also report the same information to the Commission within 120 days.</td>
</tr>
<tr>
<td>Mar. 26, 2019</td>
<td>85412; 2019-42</td>
<td>$50 million</td>
<td>?</td>
<td>$13 million to one claimant; $37 million to another; five claimants denied.</td>
<td>$13 million to Claimant 1, who “unreasonably delayed” reporting while investors were harmed and who “passively financially benefitted” as the basis for an award amount grew. $37 million to Claimant 2 who “swiftly” provided “smoking gun” evidence; the award was reduced by the amount Claimant 2 received through another agency’s reward program so as to avoid double payment for the same information.</td>
</tr>
<tr>
<td>Sept. 24, 2018</td>
<td>84270; 2018-209</td>
<td>Nearly $4 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>The award was to an “overseas whistleblower” where covered action had “opened as a direct result of Claimant’s tip to the Commission.”</td>
</tr>
<tr>
<td>Sept. 14, 2018</td>
<td>84125; 2018-194</td>
<td>Over $1.5 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>The SEC noted it had “severely reduced” the award because claimant had “unreasonably delayed in reporting the information to the Commission and was culpable.”</td>
</tr>
<tr>
<td>Sept. 6, 2018</td>
<td>84046; 2018-179</td>
<td>Over $54 million</td>
<td>?</td>
<td>One claimant received $39 million; another received $15 million. A third claimant was denied an award.</td>
<td>The SEC noted that, although Claimants 1 and 2 both provided helpful information, Claimant 1 came forward 18 months before Claimant 2, and his or her information was “critical to advancing the investigation” and “saved the Commission considerable time and resources.” The SEC also noted that “several facts mitigate the unreasonableness of Claimant 1’s reporting delay.” In its order, the SEC also stated that Claimant 2, who had a pending action with “Agency 2,” which had its own whistleblower award mechanism, would not be eligible for an SEC award for information that led to enforcement action by Agency 2.</td>
</tr>
<tr>
<td>Apr. 12, 2018</td>
<td>83037; 2018-64</td>
<td>Over $2.1 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant was a former company insider whose information strongly supported the findings and provided the SEC with ongoing helpful assistance to staff during the investigation. The SEC reduced the award because claimant unreasonably delayed in reporting the matter to the SEC.</td>
</tr>
<tr>
<td>Date</td>
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</tr>
<tr>
<td>Apr. 5, 2018</td>
<td>82996; 2018-58</td>
<td>Over $2.2 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>This marked the SEC’s first safe harbor award under Rule 21F-4(b)(7), which provides that, if a whistleblower submits information to another federal agency and submits the same to the SEC within 120 days, the SEC will treat the information as though it was submitted at the same time it was submitted to the other agency.</td>
</tr>
<tr>
<td>Mar. 19, 2018</td>
<td>82897; 2018-44</td>
<td>About $88 million</td>
<td>?</td>
<td>Nearly $50 million jointly to two claimants; over $33 million to one claimant; three other claimants denied.</td>
<td>The $50 million award had been reduced slightly due to the whistleblowers’ unreasonable delay.</td>
</tr>
<tr>
<td>Dec. 5, 2017</td>
<td>82214; 2017-222</td>
<td>Over $4.1 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Although the SEC reduced the award because of Claimant’s unreasonable delay in reporting misconduct, this award reduction was also mitigated by, <em>inter alia</em>, fact that claimant was a foreign national working outside U.S. and, therefore, potentially not protected against retaliation.</td>
</tr>
<tr>
<td>Nov. 30, 2017</td>
<td>82181; 2017-216</td>
<td>Over $16 million</td>
<td>?</td>
<td>$8 million each to two claimants; five other claimants denied.</td>
<td>Claimant 1 informed the SEC of misconduct that was the focus of the staff’s investigation and the cornerstone of the agency’s subsequent enforcement action. Claimant 2 provided additional significant information” that saved a substantial amount of time and agency resources.</td>
</tr>
<tr>
<td>Oct. 12, 2017</td>
<td>81857; 2017-195</td>
<td>Over $1 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Award was granted to a “company outsider” who provided the SEC with information regarding securities violations by an entity that impacted retail customers. The SEC found “extraordinary circumstances” that warranted waiver of the requirement that claimants submit a declaration signed under penalty of perjury at the time the tip was filed.</td>
</tr>
<tr>
<td>July 27, 2017</td>
<td>81227; 2017-134</td>
<td>Over $1.7 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Company insider provided the SEC with information to help stop a fraud that would have otherwise been difficult to detect. The SEC waived noncompliance with the rule requiring information be submitted “in writing” if submitted between the signing of Dodd-Frank Act and the effective date of the SEC rules based on quality of whistleblower’s cooperation with the SEC.</td>
</tr>
<tr>
<td>Date</td>
<td>Release Nos.</td>
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</tr>
<tr>
<td>July 25, 2017</td>
<td>81200; 2017-130</td>
<td>Nearly $2.5 million</td>
<td>30% (^1)</td>
<td>All to single claimant.</td>
<td>Claimant was a public sector employee who assisted the SEC in stopping a mutual fund company’s illegal practice of manipulating the prices of mutual fund shares to the detriment of shareholders.</td>
</tr>
<tr>
<td>May 2, 2017</td>
<td>80571; 2017-90</td>
<td>$500,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>“Claimant, a company insider, provided information to the Commission that instigated the Commission’s investigation into well-hidden and hard-to-detect violations of the securities laws.”</td>
</tr>
<tr>
<td>Apr. 25, 2017</td>
<td>80521; 2017-84</td>
<td>$4 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant provided “detailed and specific information about serious misconduct and provided additional assistance during the ensuing investigation, including industry-specific knowledge and expertise.” The award was based in part on moneys paid to a government agency not among those enumerated as prosecutors of “related actions” under Rule 21F-3(b)(1).</td>
</tr>
<tr>
<td>Feb. 28, 2017</td>
<td>80115; no press release</td>
<td>?</td>
<td>20% of</td>
<td>All to single claimant.</td>
<td>The amount of the award not disclosed. The SEC “reduced the award from what it might otherwise have been because of both the Claimant’s culpability in connection with the securities law violations at issue in the Covered Action and the Claimant’s unreasonable delay in reporting the wrongdoing to the Commission.”</td>
</tr>
<tr>
<td>Jan. 23, 2017</td>
<td>79853; 2017-27</td>
<td>$7 million</td>
<td>?</td>
<td>One claimant received $4 million; two others shared $3 million.</td>
<td>Information submitted by claimant awarded $4 million provided impetus for investigation of “investment scheme that defrauded hundreds of investors, many . . . unsophisticated.” Two claimants awarded $3 million jointly submitted new information while the investigation was underway, significantly contributing to successful enforcement action. All claimants were to receive additional award moneys based on additional sanctions recovered after the date of the order.</td>
</tr>
<tr>
<td>Jan. 6, 2017</td>
<td>79747; 2017-1</td>
<td>$5.5 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant “helped prevent further harm to a vulnerable investor community by boldly stepping forward while still employed at the company.” The SEC applied the first waiver of Rule 21F-9(d) “in writing” requirement for pre-TCR period between the enactment of Dodd-Frank and the issuance of program rules.</td>
</tr>
</tbody>
</table>

\(^1\) Although the SEC Order Determining Whistleblower Award Claim and the agency press release did not specify the percentage of the whistleblower’s award, the whistleblower was a client of the authors’ law firm, Katz, Marshall & Banks, LLP, and authorized the firm to disclose the percentage information publicly. Read more about the award and our representation here: https://www.kmblegal.com/news/katz-marshall-banks-client-awarded-24-million-sec-whistleblower-office-role-stopping.
<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Dec. 9, 2016</td>
<td>79517; 2016-260</td>
<td>Over $900,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant’s tip led to “multiple actions against wrongdoers.” Actions were consolidated for purpose of award determination; claimant received an award based on sanctions collected in both, including proceeds collected after date of order.</td>
</tr>
<tr>
<td>Dec. 5, 2016</td>
<td>79464; 2016-255</td>
<td>$5 million</td>
<td>?</td>
<td>All to single claimant; two other claimants were denied.</td>
<td>The SEC rejected an unsuccessful claimant’s arguments that 1) the claimant’s information “should have caused an investigation,” and 2) the SEC’s failure to provide the claimant with “actual notice” of the Covered Action, rather than simply post it on the SEC Office of the Whistleblower website list of covered actions, caused the claimant to submit application for an award after 90-day deadline elapsed.</td>
</tr>
<tr>
<td>Nov. 14, 2016</td>
<td>70294; 2016-237</td>
<td>$20 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Sizable award upwardly adjusted after claimant contested preliminary amount. Award will include amounts collected in future. Award went to a claimant whose information “enabled the Commission to move quickly to shut down the [illegal scheme] and to obtain a near total recovery of investors’ funds . . . before the Defendants could squander those monies.” Two additional claimants denied awards for information submitted prior to July 21, 2010.</td>
</tr>
<tr>
<td>Sept. 20, 2016</td>
<td>78881; 2016-17</td>
<td>$4 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant did not contest award.</td>
</tr>
<tr>
<td>Aug. 30, 2016</td>
<td>78719; 2016-173</td>
<td>$22.437 million</td>
<td>28%</td>
<td>All to single claimant.</td>
<td>The SEC did not disclose the percentage, but the claimant’s counsel informed the media that his client had received 28% of sanctions against Monsanto. The SEC’s press release announced that this award pushed the program total to date above $100 million mark. The SEC referenced the claimant’s culpability in the misconduct in explaining the SEC’s decision to make this sizable award.</td>
</tr>
<tr>
<td>June 9, 2016</td>
<td>78025; 2016-13</td>
<td>$17 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant’s information, provided in one or more TCRs and in subsequent communications, directed SEC staff to new information that conserved the SEC’s time and resources, helped staff collect evidence, “substantially advanced” investigation, and thus “led to” successful enforcement action” for securities violations already under investigation. The SEC denied applications of four other claimants.</td>
</tr>
<tr>
<td>May 20, 2016</td>
<td>77873; 2016-11</td>
<td>Over $450,000</td>
<td>?</td>
<td>Awarded jointly to two claimants.</td>
<td>The SEC paid each claimant half of the amount awarded.</td>
</tr>
<tr>
<td>Date</td>
<td>Release Nos.</td>
<td>Award Total</td>
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</tr>
<tr>
<td>May 17, 2016</td>
<td>77843; 2016-10</td>
<td>$5 to $6 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant’s “detailed tip led the agency to uncover securities violations that would have been nearly impossible for it to detect[.]”</td>
</tr>
<tr>
<td>May 13, 2016</td>
<td>77833; 2016-88</td>
<td>Over $3.5 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant’s award did not cause the SEC to initiate investigation but rather bolstered an ongoing investigation, strengthened the SEC’s settlement position, and thus “significantly contributed” to success of the covered action. May be the first award issued in connection with a whistleblower’s disclosures of Foreign Corrupt Practice Act violations.</td>
</tr>
<tr>
<td>Apr. 5, 2016</td>
<td>77530; no press release</td>
<td>$275,000 or more, offset by sanctions against claimant</td>
<td>?</td>
<td>All to single claimant. Second claimant denied.</td>
<td>The $275,000 award, issued in part for sanctions in a related criminal action, “shall be subject to offset for any monetary obligations” remaining unpaid as part of an earlier final judgment against claimant, probably in a related action. The SEC denied award to second claimant upon determining that he/she had not provided any information which led to successful enforcement of the covered action.</td>
</tr>
<tr>
<td>Mar. 8, 2016</td>
<td>77322; 2016-41</td>
<td>$1.93 million</td>
<td>?</td>
<td>$1.8 million to Claimant 1 and $65,000 to each of Claimants 2 &amp; 3. Claimant 4 denied.</td>
<td>Claimant receiving bulk of award submitted tip causing the SEC to open investigation, met with SEC staff several times and gave useful information, all before the other two filed their tips 1.5 years later. The SEC denied award altogether to a fourth claimant who had “knowingly and willfully made false, fictitious, or fraudulent statements” to the SEC over several years.</td>
</tr>
<tr>
<td>Jan. 15, 2016</td>
<td>76921; 2016-10</td>
<td>Over $700,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>First award for “independent analysis” by an “industry expert,” whose information significantly contributed to a successful enforcement action.</td>
</tr>
<tr>
<td>Nov. 4, 2015</td>
<td>76338; 2015-252</td>
<td>Over $325,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Percentage was not disclosed but was reduced by “unreasonable delay” that allowed wrongdoers to obtain additional ill-gotten gains.</td>
</tr>
<tr>
<td>Sept. 29, 2015</td>
<td>76025; no press release</td>
<td>?</td>
<td>28%</td>
<td>All to single claimant.</td>
<td>Amount of award was not disclosed by the SEC.</td>
</tr>
<tr>
<td>Sept. 28, 2015</td>
<td>76000; no press release</td>
<td>?</td>
<td>20%</td>
<td>11% and 9% to two claimants.</td>
<td>Amount of award was not disclosed by the SEC.</td>
</tr>
<tr>
<td>July 17, 2015</td>
<td>75477; 2015-150</td>
<td>Over $3 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Information allowed the SEC to “crack a complex fraud.” Award increased because of successful “related actions” and reduced due to unreasonable delay, not “as severely” as could have been because some of delay occurred before establishment of the SEC Whistleblower Program.</td>
</tr>
<tr>
<td>Apr. 28, 2015</td>
<td>74826; 2015-75</td>
<td>Over $600,000</td>
<td>30%</td>
<td>All to single claimant.</td>
<td>First award issued in part in connection with retaliation case. Percentage set at 30% in light of “unique hardships” claimant experienced for reporting to the SEC.</td>
</tr>
<tr>
<td>Date</td>
<td>Release Nos.</td>
<td>Award Total</td>
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</tr>
<tr>
<td>Apr. 22, 2015</td>
<td>74781; 2015-73</td>
<td>$1.4 to $1.6 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Second award to an employee working in compliance function and first application of “substantial injury” exception to exclusion of such employees from program.</td>
</tr>
<tr>
<td>March 2, 2015</td>
<td>74404; 2015-45</td>
<td>Between $475,000 &amp; $575,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>First award to company officer receiving information in compliance role; waited 120 days after reporting internally. Percentage not disclosed.</td>
</tr>
<tr>
<td>Sept. 22, 2014</td>
<td>73174;2014-206</td>
<td>$30 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Substantial award issued to a foreign resident working outside U.S. Percentage was not disclosed but the award was decreased by “unreasonable delay” in reporting to the SEC.</td>
</tr>
<tr>
<td>Aug. 29, 2014</td>
<td>72947; 2014-180</td>
<td>$300,000</td>
<td>20%</td>
<td>All to single claimant.</td>
<td>First award to claimant working in compliance and audit function; also first application of “120-day” exception to exclusion of such employees from program.</td>
</tr>
<tr>
<td>July 31, 2014</td>
<td>72727; 2014-154</td>
<td>$400,000</td>
<td>25%</td>
<td>All to single claimant.</td>
<td>The SEC waived “voluntary” requirement where employee tried diligently to have company address violations.</td>
</tr>
<tr>
<td>July 22, 2014</td>
<td>72652</td>
<td>?</td>
<td>30%</td>
<td>15%, 10%, and 5% to three claimants.</td>
<td>Amount of award was not disclosed by the SEC.</td>
</tr>
<tr>
<td>June 3, 2014</td>
<td>72301; 2014-113</td>
<td>$875,000</td>
<td>30%</td>
<td>15% of collected sanctions to each of two claimants.</td>
<td>Information allowed the SEC to “bring a successful enforcement action in a complex area of the securities market.”</td>
</tr>
<tr>
<td>Oct. 30, 2013</td>
<td>70775; 2013-231</td>
<td>$150,000</td>
<td>30%</td>
<td>All to single claimant.</td>
<td>The SEC investigated fraud scheme and “obtain[ed] emergency relief before additional investors were harmed.”</td>
</tr>
<tr>
<td>Sept. 30, 2013</td>
<td>70544; 2013-209</td>
<td>$14 million</td>
<td>30%</td>
<td>All to single claimant.</td>
<td>Information allowed recovery of “substantial investor funds . . . more quickly than otherwise would have been possible.”</td>
</tr>
<tr>
<td>June 12, 2013</td>
<td>69749; no press release</td>
<td>$125,000</td>
<td>15%</td>
<td>5% of collected proceeds to each of three claimants.</td>
<td>In two award announcements concerning a June 12 Order, the SEC announced payment to three whistleblowers a total of 15% of amounts that the SEC collected, and also of amounts the U.S. Department of Justice collected in related action, against sham hedge fund.</td>
</tr>
<tr>
<td>Aug. 30, 2013</td>
<td>70293; 2013-169</td>
<td>$50,000</td>
<td>30%</td>
<td>All to single claimant.</td>
<td>Claimant helped prevent “multi-million dollar fraud” from “ensnaring additional victims”; the SEC later paid an additional $150,000 after further collections, for a total of $200,000.</td>
</tr>
</tbody>
</table>

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**ii** The SEC did not report the percentage in its press release or accompanying order. However, the whistleblower later sat for a newspaper interview and reported that he had received 25% of a $1.6 million penalty. See J. Nocera, The Man Who Blew the Whistle, N.Y. Times (Aug. 18, 2014), [https://www.nytimes.com/2014/08/19/opinion/joe-nocera-the-man-who-blew-the-whistle.html](https://www.nytimes.com/2014/08/19/opinion/joe-nocera-the-man-who-blew-the-whistle.html). At around this time the SEC began redacting the percentage from most orders prior to public release.