The SEC Whistleblower Practice Guide

Navigating the SEC Whistleblower Program and the Rules and Procedures that Can Lead to Financial Rewards for Reporting Securities Violations

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INTRODUCTION

The Securities and Exchange Commission's (SEC) Whistleblower Program is only in its seventh year, and as of this writing has already paid some $154 million in monetary rewards to 44 whistleblowers who have provided information that the Commission used in enforcing U.S. securities laws.[1] Congress directed the SEC to establish the whistleblower program as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Under the program rules, 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 in the amount of 10% to 30% of the moneys collected.

Past editions of this SEC Whistleblower Practice Guide have tracked developments in the SEC Whistleblower Program as it got off the ground, steadily picked up speed, and became more widely known to would-be whistleblowers in the U.S. and abroad. This 2017 edition reports on a program that is now moving ahead at full steam, routinely issuing large monetary awards and acting to protect employees who speak up about violations of U.S. securities laws. Since the SEC Office of the Whistleblower announced the first award in 2012, the Commission has issued fifteen awards that exceeded $1 million, six of which exceeded $10 million and one of which was more than $30 million. The SEC paid out $57 million in awards in fiscal year (FY) 2016 alone, more than in all previous years combined.[2] As of the end of that fiscal year on September 30, 2016, whistleblower tips had led to enforcement actions resulting in orders totaling more than $584 million in financial sanctions, including over $346 million in disgorgement of ill-gotten gains with interest.

At the same time that Dodd-Frank's whistleblower rewards are providing increasingly large monetary incentives to individuals who submit helpful information to the SEC, the statute's whistleblower protections are helping to ensure that insiders can approach the SEC with information without fear of reprisal. In 2014 and again in 2016, the SEC took decisive action against employers for retaliating against whistleblowing employees. The Commission has also been weighing in on the side of employee-whistleblowers in a number of private retaliation actions brought under Dodd-Frank's whistleblower-protection provisions.

In 2016 the Commission also stepped up its efforts to prevent companies from using employer-imposed agreements to impede their employees from providing information to the SEC. The Commission brought and settled eight enforcement actions against employers for using a variety of such agreements in 2016 and early 2017, including prohibitions on employees and former employees from speaking with the SEC, requiring them to notify the employer's legal department prior to speaking with the SEC, and requiring their waiver of the right to receive an whistleblower award from the SEC. The Commission's leadership on this front has even influenced other federal agencies to institute similar policies prohibiting the use of such agreements to silence employees within their regulatory reach.

Taken together, these actions and initiatives have had a profound impact on the ability 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.

> "The SEC's whistleblower program has proven to be a game-changer for the agency in its short time of existence."
>
> – Mary Jo White, former SEC Chair

SEC 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. Former SEC Chair Mary Jo White summed it up well on the occasion of whistleblower awards surpassing the $100 million mark last year. "The SEC's whistleblower program," she said, "has proven to be a game-changer for the agency in its short time of existence."[3]

In this short time, the SEC Whistleblower Program 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. It has also benefited corporations and financial firms by encouraging them to strengthen their internal compliance programs, giving responsible management the opportunity to address misconduct in the markets without the need for government action. The program is now in a strong position to continue growing, aiding the SEC's enforcement efforts generating more and even larger awards.

The goal of the 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 2017 edition also features a useful Appendix A, "SEC Whistleblower Awards Through May 24, 2017," which provides the dates, amounts and summaries of other available information regarding every award the SEC has issued since the inception of the program.

BACKGROUND

The Dodd-Frank Act is the latest in a series of significant financial reforms that began with passage of the Sarbanes-Oxley Act (SOX) in 2002. Popular outrage over the greed exhibited and corruption engaged in by Enron, MCI and other companies prompted Congress' near-unanimous passage of the earlier law, 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.

Another wave of financial overhaul and enhanced corporate whistleblower protections accompanied the extraordinary infusion of government funds into the private sector that addressed the sharp downturn of the housing and financial markets in 2008. That financial crisis was still unfolding when Bernard Madoff's "Ponzi" scandal hit the news and educated large numbers of Americans about the shortcomings in the government's ability to detect and prevent large-scale fraud on investors in the financial markets. The "bailout" legislation that followed included protections for whistleblowers who reported fraud, gross mismanagement, or waste of bailout funds. In 2009, Congress also amended the U.S. False Claims Act, making it easier for whistleblower to bring assisting the U.S. government in recovering monies lost to fraud.

> The past six years have demonstrated that the Commission and its staff have designed and implemented a workable and effective program that both rewards and protects whistleblowers.

The Dodd-Frank Act of 2010 initiated a massive financial regulatory overhaul that lawmakers hoped would help restore confidence (and some would say sanity) in U.S. financial markets through a wide range of regulatory measures. In the new law, Congress directed the SEC to create a whistleblower program that would contribute to this effort by incentivizing insiders to come forward with information about securities violations. This would give the SEC a powerful enforcement tool to help it prevent future Enrons, MCI's and Madoffs from harming the investing public and the broader economy. The Dodd-Frank Act also established a very similar whistleblower program for commodities trading that is administered by the Commodity Futures Exchange Commission (CFTC).[4]

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 corporate 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 outweighs the rewards, 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 they 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 the Sarbanes-Oxley Act required public companies to do, only to find themselves facing a radical new program that would give would-be whistleblowers little or no reason to use internal channels that could help management correct minor problems 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.[5] 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 final rules. As the subsequent six years have 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

Under the program, 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. If the whistleblower meets these and certain other criteria, he or she (or "they" as explained below) is entitled to an award of 10% to 30% of the amount recovered by the SEC or by certain other authorities in "related actions." These awards can be substantial, as SEC sanctions against companies have run into the tens and even hundreds of millions of dollars in recent years.

A. Whistleblower Status

The Dodd-Frank Act defines a "whistleblower" as an "individual … or two or more individuals acting jointly." ection 21F(a)(6). The final rules make clear that a corporation or other such entity is not eligible for whistleblower status. Rule 21F-2(a).

As noted above, the SEC Whistleblower Program has accepted tips from individuals throughout the United States and in at least 103 foreign countries.[6] 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,[7] 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, whistleblower awards would be 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 where their information leads to a successful SEC enforcement action.

The SEC Whistleblower Program has accepted tips from individuals throughout the United States and in at least 103 foreign countries.

1. "Voluntarily Provide"

In order to qualify for an award under Section 21F(b)(1) of the Securities Exchange Act,[8] 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; or 2) 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 final rules address a concern among whistleblower advocates that a whistleblower might lose eligibility because the SEC or another of the agencies listed above had directed an inquiry or request to his employer but not to him individually. Given that such requests or demands are often drafted so as to 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 final rules 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. *Id.*

If the whistleblower is obligated to report his 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, his information will not be considered voluntary and he 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 another third party, *see* Adopting Release at 36-37, or by the employee's receipt of a request for the same or related information from his employer as part of an internal investigation. *Id.* at 35. 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 can 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 provided for in the rules because a self-regulatory organization (SRO) had earlier requested the same information directly from the whistleblower. As the SEC's order granting the award pointed out, the whistleblower had gone out of his way first to raise the issues internally 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 SRO. Under these "materially significant extenuating circumstances," the SEC found waiver of the "voluntary" requirement of Rule 21F-4(a) to be "in the public interest and consistent with the protection of investors." [9]

The SEC's decision to waive the "voluntary" requirement in this case 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."[10] 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 will strengthen the whistleblower program, as 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 she had first reported the information to the Department of Justice (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).

a) 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 first-hand, but may also acquire the knowledge through her "experiences" or communications. This means that the whistleblower can have "independent knowledge" of facts despite having learned the facts 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), 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. Adopting Release at 47. 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 first-hand) knowledge of the facts. *Id.* n. 104.

"Independent analysis" refers to a whistleblower's "examination and evaluation," conducted by herself 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." Rule 21F-4(b)(3). This might include, for example, expert analysis of data that could significantly advance an investigation. Adopting Release at 51.

Although many whistleblower tips include some amount of independent analysis, the SEC has described only one award to date as having been based solely on such analysis. 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."[11] According to subsequent media reports,[12] 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, and which resulted in a $5 million fine against the exchange. In the SEC's press release announcing the $700,000 award, then-Director of Enforcement Andrew Ceresney noted that the "voluntary submission of high-quality analysis by industry experts can be every bit as valuable as first-hand knowledge of wrongdoing by company insiders." This SEC award thus opens the door to a wide range of tips, ones submitted not by individuals who learn about securities violations not from their vantage points inside an organization or involvement in a transaction, but by individuals with the industry expertise that allows them to identify and explain such violations through detailed analysis of market data, company news and filings, and other available sources.

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

b) 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 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.[13] 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 disclosure of client confidences, with some following the American Bar Association's Model Rule 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 take a close look at the rules of professional conduct that apply to them and their actions.

Some state bar associations and at least 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. For example, 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.[14] In another case, a 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.[15]

In addition to lawyers, the SEC Whistleblower Program rules make certain other individuals presumptively ineligible to receive awards in most circumstances 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. Rule 21F-4(b)(4)(iii). The SEC deems information to lack "independent knowledge or analysis" where the person obtains the information because she is:

- 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);
- Employed by a firm retained to investigate possible violations of the law, Rule 21F-4(b)(4)(iii)(C); or
- Employed by 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 second-hand from these categories of persons will also not be considered to be providing "original information" if they turn around and report the information to the SEC. Rule 21F-4(b)(4)(vi).[16]

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);
- 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 of other appropriate official of the entity, or since she obtained the information under circumstance indicating that those officials were already aware of the information, Rule 21F-4(b)(4)(v)(C).

The SEC first applied these 120-day exception on August 29, 2013, when it issued a whistleblower award of more than $300,000, or 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).[17]

On March 2, 2015, the SEC again applied the 120-day exception, this time in 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 passed and the company failed to take action. The SEC awarded the officer between $475,000 and $575,000 for the information the officer provided.[18]

In April 2015, the SEC applied the "substantial injury" exception for the first time. In this case, the Commission awarded a compliance professional between $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 SEC Director of Enforcement 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."[19]

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 that the entity is acting in a way that would impede an investigation of the violations. This exception, set forth in Rule 21F-4(b)(4)(v)(B), may allow the whistleblower to proceed with a tip to the SEC without waiting 102 days, as where the entity is destroying evidence or preparing to abscond with the proceeds of the wrongdoing.

The SEC's payment of these three awards to employees who submitted 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 these professionals 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 were 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 has ensured that more employees and officers who have roles in compliance and audit functions will come forward if they believe they fit into one of the three exceptions to the rule that would presumptively 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 have 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 compliance professional. Corporations thus face the risk that even those employees whom they have entrusted with the most damning knowledge of 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.

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.

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 are most likely 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. *See* Adopting Release at 64. 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, 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,[20] 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.

c) 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. This "original information" exception is particularly important for the many employees who file SOX complaints with 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. This cross-filing arrangement is codified in 29 C.F.R. § 1980.104(a). These SOX charge often contain detailed information about the 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 to the SEC. This could undermine a whistleblower's right to an award because SEC staff do initiate investigations based on the SOX charges they receive from OSHA. By allowing the whistleblower to submit a TCR containing information "already known" to the SEC and still have his information qualify as "original information," the "original source" doctrine allows SOX complainants to participate in the SEC Whistleblower Program.

This author's law firm, which represents employees not only before the SEC Whistleblower Program but also in cases of retaliation for blowing the whistle 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 he filed with OSHA, he should make sure to perfect his SEC tip by submitting a TCR form with SEC reiterating the relevant facts from his charge and adding any additional information he possesses regarding the underlying securities violations. This must be done within 120 days of the date the complainant filed his SOX charge with OSHA in order for the SEC to deem the tip to have been filed at the time the whistleblower submitted his charge to OSHA. Rule 21F-4(b)(7).

The same "original source" exception applies to information the whistleblower may have already reported to 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, being unaware of the SEC Whistleblower Program. In all such situations, in order to quality for an award, the whistleblower must "perfect" his SEC tip by filing it with the Commission within 120 days of transmitting it to the other agency. *Id.*

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 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 Covered Actions. *See* Order Determining Whistleblower Award Claims No. 2017 -10 (May 4, 2017), available online at https://www.sec.gov/rules/other/2017/34-80596.pdf, at 6.

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 Adopting Release at 105 that:

> …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 rejected the business lobby's near-unanimous insistence that it require whistleblowers submit their complaints internally before filing them with the SEC. *Id.* at 103. "[W]hile internal compliance programs are valuable," the Commission observed, "they not substitutes for strong law enforcement." *Id.* at 104. 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. *Id.* For these and related reasons, the SEC leaves it to each whistleblower to decide whether to report first internally or to the SEC. *Id.* at 91 – 92.

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 reports the information internally, as long as the he 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).[21]
- 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.

- 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 may decrease the amount of the award. Rule 21 F-6(b)(3).

These rules provide flexibility to the whistleblower, who the SEC believes is the best position to determine the effectiveness or ineffectiveness of the particular internal-compliance system that he can decide to use or not to use, in choosing how to report violations. See Adopting Release at 103. 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 to use the internal compliance programs by the new financial incentives the 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. *Id.*

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. *Id.* at 104. 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. *Id.* at 92 n. 197.

In the view of the author, who has specialized in the representation of corporate whistleblowers for many years, the business community's fears of a rush to report improprieties to regulators has proven to be unfounded. In fact, the writer 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 80% of those award recipients who were current or former employees of the subject entity had first reported their concerns internally.[22]

C. Information that Leads to Successful Enforcement

The final rules clarify 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, open an investigation, 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 21 F-4(c)(1).

The standard is somewhat higher for information that focuses on conduct already under investigation or examination, although some 40% of whistleblowers who have earned awards from the SEC did so in the basis of such information.[23] Such information will be deemed to have led to successful enforcement if it "significantly contributed" to the success of the action. Rule F-4(c)(2). In determining whether information "significantly contributed" to the success of an investigation, 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. *See* Adopting Release at 100. 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.[24]

The SEC has provided additional guidance as what actions might constitute a "significant contribution" to an ongoing investigation within the meaning of Rule F-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 actually prompted the SEC to start an investigation.[25] An SEC investigation was already underway as a result of media attention potential securities violations when the whistleblower submitted the tip to the SEC and later assisted SEC staff in their investigation.

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. Order at 2. 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 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." *Id.* at 3. 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.

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 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).[26]

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. For example, in *Stryker v. SEC*, the U.S. Court of Appeals for the Second Circuit affirmed the SECs 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.[27]

D. Monetary Sanctions Totaling More than $1 Million

Under the final rule, 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 21 F-4(d). However, in certain circumstances 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 21 F-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. *See* Adopting Release at 110.

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 in "related actions." Those are actions based on the same original information the whistleblower provided to the SEC and which are brought by: (i) the Attorney General of the U.S., (ii) an "appropriate regulatory authority," (iii) a self-regulatory organization, and (iv) a state attorney general in a criminal case. Rule 21F-3(b)(1)(i – iv); and see Adopting Release at 20 – 24. The SEC has issued at least one award based in part on the proceeds collected from a related criminal action,[28] and 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.[29]

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.[30] 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. That additional collections can augment an award over time was illustrated in the case of the very first whistleblower to receive an award under the new program in 2012, who 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.[31] The SEC has ordered claimants eligible for awards based on proceeds yet to be collected in a number of award determinations. *See* Appendix A.

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

E. SEC Procedures for Submitting a Tip

1. The TCR Form

The program rules describe a straightforward set of procedures for the submission of original information about possible securities violations to the SEC Office of the Whistleblower. An individual must file a Tip, Complaint or Referral ("TCR") form that the SEC makes available on its website, and can file either online or by mailing or faxing the same to the SEC. Rule 21F-9(a). The rules require the individual to declare, under penalty of perjury, that the information he is providing in the TCR form is true and correct to the best of his knowledge and belief. Rule 21F-9(b).

The only formal exception for the need to submit a TCR as a pre-condition of earning an award is for information submitted during the period from July 21, 2010, when the Dodd-Frank Act was enacted, and August 11, 2011, the date that the SEC Whistleblower Program Rules took effect and provided procedures for submitting tips and claiming awards. Rule 21F-9(d). The SEC waived the "in writing" requirement for such tips in issuing a $5.5 million award on January 2017, where staff were already working with the whistleblower before the enactment of Dodd-Frank and where it would have been unreasonable to revert to having the whistleblower begin providing information in writing once the rules went into effect.[32] The SEC noted in its Order that the whistleblower had provided all information after the enactment of Dodd-Frank in the format that SEC staff had requested, and that waiver of the "in writing" requirement was consistent with the rule's primary purpose of ensuring only reliable information submitted before August 11, 2011, was reliable.

When preparing tips for submission to the SEC, whistleblowers and their counsel should make sure that the TCR form and accompanying exhibits present the most comprehensive and compelling evidence and argument for the SEC taking enforcement action that his information and appropriate inferences can support. With the SEC receiving a steadily increasing number of tips per year -- more than 4,200 tips in FY 2016 alone[33] -- 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.[34]

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 could disclose in a written submission or 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 privilege.

> The SEC cannot use information protected by attorney-client privilege in an investigation or enforcement action.

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 employer will learn their identities if they submit a tip 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 after without the whistleblower's signature and other identifying information, while keeping a copy of the same 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 her own signature and certifies that she has verified the whistleblower's identity, has reviewed a version of the TCR form signed by the whistleblower and that the information therein is true and correct, and has obtained the whistleblower's non-waivable consent for her to provide that document to the SEC if Commission staff have reason to believe the whistleblower has willfully provided false information. *Id.; see also* U.S. SEC Form TCR – Tip, Complaint or Referral, available online at https://www.sec.gov/files/formtcr.pdf, Part G.

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." [35]

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 and some have self-identified to their employers as a means to secure maximum protection against retaliation or discourage further retaliation if it has already occurred. In one case a court has ordered the SEC to hand over an anonymously filed TCR form (although without the whistleblower's name) to counsel defending a corporation in an SEC enforcement action, [36] and in another case an SEC whistleblower was called to testify in a related criminal proceeding.

In the numerous cases in which this author has 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 an anonymous tip, to working with the whistleblower and counsel protect the whistleblower's identity from disclosure during an investigation, to announcing whistleblower awards. The SEC has instituted policies that prevent agency staff from sharing any identifying information with other law enforcement agencies without permission. Even in the unlikely event that the SEC is forced to disclose a whistleblower's identity in the course of a legal proceeding, it is likely that the SEC and the courts will be able to take effective steps to prevent the disclosure from becoming public.

F. Determining the Amount of an Award

The final rules reiterate that 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. *Id.*

The final rules set forth a number of factors that the SEC may consider when calculating the final award. 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 21 F-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 21 F-6(b)(1)-(3). In short, the rules enable a whistleblower to maximize his or her award by reporting violations timely and effectively, using internal channels where practical, and assisting the SEC as needed.

1. SEC Enforcement Interests

The SEC's publicly available descriptions of its law-enforcement interests provide some 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 also learn a great deal about particular SEC enforcement initiatives and priorities, which change from time to time, by perusing the Commission's website. *See* www.sec.gov. This well-organized resource not only reports on all SEC enforcement actions but also highlights regulatory and enforcement priorities,[37] the work of SEC divisions and specialized units,[38] and the speeches of SEC Commissioners and high-level staff,[39] and also provides periodic recaps of enforcement actions taken in past periods and enforcement perspectives for coming periods.[40] The site also gives users access to databases of company filings, SEC enforcement actions and other SEC documents, which can be invaluable to whistleblowers and for whistleblower-side counsel who are evaluating information for potential submission to the SEC.[41]

2. Unreasonable Delay

Unreasonable delay in reporting suspected securities violations may have cost one whistleblower millions of dollars in award money. On September 22, 2014, the SEC announced 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.[42] 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 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.[43] 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 Commissions whistleblower program." *Id.*

3. Culpability of the Whistleblower

The rules balance concerns about rewarding culpable whistleblowers with the understanding that, at times, those with the best access to information may have participated in wrongdoing at some level. In order to incentivize these whistleblowers to come forward with securities violations, the rules do not exclude culpable whistleblowers from awards altogether, but they do prevent them 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 rule thus allows culpable whistleblowers, who may be uniquely situated to provide information regarding securities violations, to come forward while not creating incentives that would be encourage them to engage in securities violations. Rule 21 F-6(b)(1)-(3) also allows the SEC to consider the whistleblower's culpability in setting the amount of any award earned.

The SEC has issued awards to whistleblowers who took part in some of the offending misconduct, but has also offset or reduced such awards by penalties imposed on the whistleblower for his or her role in the underlying securities violations. On April 5, 2016, for example, the SEC announced an award of $275,000 to a claimant for information that had led to a successful enforcement action and related criminal action he or she had provided to the Commission, but noted that the SEC would offset the whistleblower's award by the (undisclosed) amount of a final judgment entered earlier against the whistleblower that remained unpaid.[44]

Several months later the SEC issued its second-highest award to date – totaling more than $22.4 million – even though the whistleblower had apparently played some role in the fraud at issue, which involved Monsanto Company. 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 that culpable whistleblower, the SEC noted in an accompanying footnote that "[s]everal other factors mitigating the Claimant's culpability were considered" in determining the award percentage. The SEC expressly noted 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.[45]

In a February 2017 determination, the SEC limited a whistleblower award to 20% of the amount collected 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."[46]

G. Whistleblower Awards to Date

As of this writing, the SEC Office of the Whistleblower has issued awards totaling $154 million to 44 individuals. Awards have ranged from less than $50,000 to $30,000,000. Appendix A to this SEC Whistleblower Practice Guide lists all SEC whistleblower awards under the whistleblower program in the nearly six 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.

The SEC has issued awards totaling $154 million to 44 individuals.

As further discussed in Appendix A, the SEC discloses limited information when issuing awards in order to protect the identity of whistleblowers, both those who have filed their tips anonymously and those who have filed without requesting anonymity. The SEC's guarded approach to disclosing such information is warranted because it minimizes the chances that a whistleblower's identity will become public, and that 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 most claims for whistleblower awards do not cite the underlying enforcement action, do not disclosing 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, aiding the SEC in investigations, and claiming awards.

The awards listed in Appendix A reflect a very encouraging first six years of the SEC Whistleblower Program as viewed from the whistleblower perspective. 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 recovers 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; 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, and much larger ones, are forthcoming. It is a fair assumption that in coming years a growing number of 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" 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 issued after July 21, 2010, results in monetary sanctions exceeding $1 million.[47] The inclusion of a notice on the website means only that an order was entered with monetary sanctions exceeding $1 million. It does not 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 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 complaint 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. 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 near the end of each calendar month, and in submitting timely claims for awards using the WB-APP form made available via a link on the SEC Office of the Whistleblower web page.[48]

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 for two covered actions, which the whistleblower had submitted more than three months after the expiration of the 90-day claims window.[49] 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 should not only have posted the Notice of Covered Action on its website, but also should have notified him directly or her with specific instructions about how to apply for an award.[50] Not surprisingly, the SEC rejected this argument, noting the evenhandedness and reasonableness of the notice mechanism provided under the rules.

Although whistleblowers must meet a strict deadline for filing their claims for awards, there is no such deadline by which the Commission must respond to those claims. In the first several years of the program, concerns have been raised about the significant backlog that exists in the SEC's processing of award application. The *Wall Street Journal* reported that as of May 10, 2015, 297 whistleblowers had submitted claims, but the SEC had issued final decisions for just 50 of them.[51] Although this backlog was cause for concern, it appears that the SEC is working diligently to respond in a timelier fashion, and is making progress.[52]

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.[53] 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 in to the rules governing the SEC Whistleblower Program. The most impactful protection may be the ability of whistleblower to submit their tips anonymously and 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 Whistleblower 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 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 final rules for the whistleblower program, allows the Commission to use its enforcement powers to hold employers accountable for retaliation. The SEC has invoked this power in two cases already, bringing successful enforcement actions against companies that retaliated against employees who reported securities violations to the Commission.

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-derailing 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 or at all. And 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 a willingness invalidate such agreements for illegally deterring 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 who allege that their 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.

The information or 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. *Id.* 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. 18 U.S.C. § 1514A(a)(2). 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. 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 SOC 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. 18 U.S.C. § 1514A(a). 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 Seciton 806 protects the employees of contractors and of subcontractors of publicly-traded companies. *See Lawson v. FMR LLC*, 134 S. Ct. 1158 (Mar. 4, 2014). In that case the plaintiffs were employees of a company that performed accounting and financial-reporting functions for the Vanguard Group of mutual funds, which itself had no employees. A divided Supreme Court upheld the plaintiffs' right to whistleblower protections, largely because ruling otherwise would have denied millions of mutual-fund shareholders the protection against fraud that only whistleblowers can provide.

By declining to set limits on this extension of coverage, the *Lawson* decision left the lower courts to decide, at least for now, what types of contractors doing certain types of work for publicly traded companies would be covered by SOX Section 806. Several federal district courts have made clear that the claims of plaintiffs whose protected activity challenged a defendant's fraud on investors are those most likely to survive. In *Gibney v. Evolution Mktg. Research, LLC*, No. 14-1913, 2014 WL 2611213 (E.D. Pa. June 11, 2014), for example, a fired employee sued his former employer under SOX after the employer fired him for complaining that it was overbilling a publicly traded company for which it provided marketing services. Pointing to *Lawson's* emphasis on SOX's goal of preventing fraud by public companies on shareholders, the district court dismissed the employee's claim of retaliation for reporting his employer's billing fraud on the public company, which had little if any impact on shareholders. *Id.* at *7.

An employee seeking relief from retaliation under SOX must file the claim with the OSHA, which investigates the claim and issues a determination. SOX claims are further adjudicated by administrative law judges or in federal district court, and can entitle a successful complainant to back pay, front pay, compensatory damages for emotional distress, and attorneys' fees.[54] If the DOL has not issued a final decision within 180, the complainant can withdraw his case from the DOL process refile it in federal district court.

B. New 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:

i. provide information about their employer to the SEC in accordance with the above-described whistleblower bounty program;
ii. initiate, testify or assist in any investigation related to the program; or
iii. 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). Section 21F(h)(1)(B)(iii). A whistleblower's remedies include reinstatement, double back pay with interest, attorneys' fees, and reimbursement of other related litigation expenses. Section 21F(h)(1)(C). Punitive damages are not recoverable under the statute. *See Rosenblum v. Thomson Reuters (Markets) LLC,* 13 CIV. 2219 SAS, 2013 WL 5780775, at *5 (S.D.N.Y. Oct. 25, 2013).

The courts are divided as to whether Dodd-Frank's anti-retaliation provisions provide protection to employees who report perceived securities violations internally to their employers, or provides protection only to those who report the violations to the SEC. The confusion arises from unclear statutory language. The statute purports to allow claims by "whistleblowers," which Section 21F(a)(6) of the Act defines as individuals who provide information to the SEC, but another section of the statute protects whistleblowers for making "disclosures that are required or protected" under SOX, which itself does not require external reporting. 15 U.S.C. § 78u-(h)(1)(A). In short, the law as drafted suggests in one place that reporting to the SEC is required and in another place that internal reporting will suffice.

The question of whether the Dodd-Frank Act's whistleblower protections cover internal reporting is a critically important for would-be whistleblowers, as the lack of clarity poses a difficult choice after an employee discovers securities violations that she believes need addressing. She can report her concerns internally, as the SEC program incentivizes whistleblowers to do in the hope of earning larger awards, or she can bypass internal compliance channels and take her information directly to the SEC as allowed by the rules. If Dodd-Frank protects only those who choose the latter option and leaves vulnerable those who report internally, many employees will simply circumvent internal channels and take the safer route. If the ambiguity in the statute causes this to happen on a large scale, it will threaten the delicate balance that the SEC struck when it promulgated the rules governing the program.

The SEC takes the position that Dodd-Frank protects internal reporting.

The SEC has made clear its position that Dodd-Frank protects internal reporting since the start of the whistleblower program. In an early comments to the final rule, the SEC states, "[T]he statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the [SEC]."[55] On August 4, 2015, the SEC formalized its position by issuing detailed guidance stating that the Dodd-Frank anti-retaliation provisions apply to employees who report wrongdoing internally.[56]

The federal courts have split on the issue. To date, three U.S. Courts of appeals have weighed in on whether Dodd-Frank protects internal whistleblowers. In *Asadi v. G.E. Energy (USA)*, LLC, 720 F.3d 620, 625 (5th Cir. 2013), the Fifth Circuit held that, under "Dodd-Frank's plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC." The Second Circuit took the opposite position two years later in *Berman v. Neo@Ogilvy LLC,* 801 F.3d 145 (2d Cir. 2015), deferring to the SEC's interpretation and holding that the anti-retaliation provision in Dodd-Frank "does not within its own terms limit its protection to those who report wrongdoing to the SEC," and instead "expands the protections of Dodd-Frank to include the whistleblower protection provisions of Sarbanes-Oxley, and those provisions, which contemplate an employee reporting violations internally, do not require reporting violations to the [SEC]." *Id.* at 147. On March 8, 2017, the Ninth Circuit joined the Second Circuit in deferring to the SEC's interpretation, holding that internal reporting is protected under the Dodd-Frank Act. *See Somers v. Digital Realty Trust Inc.,* No. 15-17352, 2017 WL 908245 (9th Cir. Mar. 8, 2017). The federal district courts have gone both ways on the issue, with a significant number ruling for and against protection of internal reporting.

With a sharp division among U.S. Courts of Appeals, whistleblower advocates and the defense bar alike have called for clarification of the issue by the U.S. Supreme Court or through Congressional action. The resolution of this open question will have far-reaching effect not only on corporate internal-reporting programs, discussed above, but it will also determine whether employees who have engaged in protected activity under Section 806 can circumvent the administrative-filing requirements of SOX, take their claims directly to federal court, do so with the benefit of a three-year statute of limitations versus 180 days under SOX, and win double back-pay damages if they succeed. Until the issue is clarified, the question of whether a whistleblower is protected for raising concerns within the company without reporting them to the SEC will generally turn on where the whistleblower worked, as the law that federal courts apply will vary from state to state.

C. Extraterritorial Application of Whistleblower Protections

Neither SOX nor Dodd-Frank is likely to provide protection 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 if the offending company is listed on a U.S. stock exchange, such employees do not enjoy the same anti-retaliation protections as U.S.-based employees. In *Liu Meng-Lin v. Siemens AG,* 763 F.3d 175 (2d Cir. 2014), 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 Second Circuit 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."[57] As described in more detail below, the SEC has 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 on 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.

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 SEC also to prosecute 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 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.[58] The whistleblower later received an award of $600,000 for the information he provided to the SEC.[59]

On September 29, 2016, the SEC for the first time issued a penalty 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."[60] 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.

These two 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 employees is protected even if they end up being wrong in their 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. *See* Adopting Release at 12-13. The same rule makes clear that the anti-retaliation protections apply regardless of whether a whistleblower qualifies for an award.

> "Strong enforcement of the anti-retaliation protections is critical to the success of the SEC's whistleblower program."
>
> – Mary Jo White, former SEC Chair

The SEC's enforcement actions against retaliating employers also send a strong signal to would-be whistleblowers – that is, that the SEC Whistleblower Program welcomes their participation in two ways – not only by providing financial rewards where appropriate, but also by and by penalizing (and hopefully deterring) retaliation against whistleblowing employees. 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."[61] 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 whistleblowers 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 ground-breaking 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 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. *See, e.g.,Head v. The Kane Co.,* 668 F. Supp.2d 146, 152 (D.D.C. 2009). The CFTC adopted rules amendments similar to the SEC's prohibition of impediments to whistleblowers on May 22, 2017.[62]

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 or effect, or both, of impeding individuals from communicating directly with the Commission.

Attorneys representing whistleblowers before the SEC started bringing employers' widespread use of restrictive agreements to the SEC's attention as early as mid-2013.[63] 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 that are subject to SEC regulation 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.[64]

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.[65]

Following the KBR action, the SEC stepped up its efforts to combat agreements that 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."[66]

The SEC has since taken eight additional enforcement actions targeting such employer-imposed agreements:

- On June 23, 2016, the SEC required Merrill Lynch to pay $415 million in settlement of charges that it had misused its customers' cash and placed customer securities at risk. The SEC order also sanctioned the firm for requiring departing employees to sign agreements prohibiting them from disclosing confidential information except in response to legal process or with the firm's permission, and limiting the types of information employees could report to the SEC. *See* the SEC's press release and a link to the underlying order here: https://www.sec.gov/news/pressrelease/2016-128.html

- On August 10, 2016, the SEC ordered BlueLinx Holdings Inc. to pay a $265,000 penalty for "using severance agreements that required outgoing employees to waive their rights to monetary recovery should they file a charge or complaint with the SEC or other federal agencies." *See* https://www.sec.gov/news/pressrelease/2016-157.html.
- On August 16, 2016, Health Net Inc. agreed to pay a $340,000 penalty for "illegally using severance agreements requiring outgoing employees to waive their ability to obtain monetary awards from the SEC's whistleblower program." *See* https://www.sec.gov/news/pressrelease/2016-164.html.
- On September 28, 2016, the SEC ordered Anheuser-Busch InBev to pay $6 million to resolve charges that it violated the Foreign Corrupt Practices Act (FCPA) and that it had "entered into a separation agreement that stopped an employee from continuing to voluntarily communicate with the SEC about potential FCPA violations due to a substantial financial penalty that would be imposed for violating strict non-disclosure terms." *See* https://www.sec.gov/news/pressrelease/2016-196.html.
- On December 19, 2016, the SEC ordered NeuStar Inc. to pay $180,000 to settle charges that its severance agreements "impeded at least one former employee from communicating information to the SEC." *See* https://www.sec.gov/news/pressrelease/2016-268.html.
- On December 20, 2016, the SEC ordered SandRidge Energy Inc. to pay a penalty of $1.4 million to resolve charges that it retaliated against an internal whistleblower and "continued to regularly use restrictive language that prohibited outgoing employees from participating in any government investigation or disclosing information potentially harmful or embarrassing to the company." *See* https://www.sec.gov/news/pressrelease/2016-270.html.
- On January 17, 2017, the SEC ordered BlackRock Inc. to pay a $340,000 penalty to resolve charges that it "improperly used separation agreements in which exiting employees were forced to waive their ability to obtain whistleblower awards." *See* https://www.sec.gov/news/pressrelease/2017-14.html.
- On January 19, 2017, the SEC ordered HomeStreet Inc. to pay $500,000 to settle charges that it conducted improper hedge accounting and "required former employees to sign severance agreements waiving potential whistleblower awards or risk losing their severance payments and other post-employment benefits." *See* https://www.sec.gov/news/pressrelease/2017-24.html.

Seeing the SEC take aggressive and rapid-fire aim at company agreements that required an employee to waive her right to receive an SEC was a welcome development for whistleblowers. As the Katz, Marshall & Banks letter told the SEC 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 come up with to discourage employees from communicating with the Commission. The letter explained:

> 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. The right to an award is triggered by the SEC's recovery of more than $1 million from the company in an enforcement action, and although the amount of the award is tied to the amount the SEC recovers, the employer does not pay the award to the whistleblower or pay any additional moneys to the government to satisfy the SEC's obligation to the whistleblower. … Because the only benefit inuring to a company that obtains a waiver of an employee's right to recover an award from the SEC whistleblower program is to remove the whistleblower's incentive and thus to prevent or thwart SEC action against the company, deterring the employee from reporting to the SEC is clearly a company's only motivation for imposing the waiver on the employee. There is no legitimate justification for allowing companies to impede whistleblowers in this manner.
>
> In this sense, the SEC program can be analogized to a law enforcement agency's practice of posting a notice of monetary reward on the bulletin board in the post office for anyone providing information that leads law enforcement to the arrest and prosecution of a bank robber. A company should not be able by contract to require a whistleblower to forego an award from the SEC any more than a bank robber should be able by contract to require members of the community not to accept an award for turning him in to the authorities in response to a wanted poster in the post office.
>
> We believe that it is likely that a court would find a contract void as against public policy…but that does not prevent such contracts from impeding individuals in providing the Commission with information about securities violations. The great majority of such agreements will never end up in court because individuals who have signed them will believe they are barred from receiving an award from the SEC, and they will have

no incentive to stick their necks out and risk a breach-of-contract lawsuit and the harm to their careers that whistleblowers commonly suffer. The deterrent effect of the language can, in itself, serve as an impediment to a would-be whistleblower.[67]

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

The SEC's enforcement actions against employers who have erected barriers to whistleblowers advances 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 leave 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.[68]

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 it 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 do's and don'ts for practitioners who seek to assist their clients make 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 final rules discussed above, the SEC's handling of whistleblower tips to date, and the author's 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 SRO. If such a request has already been made, give consideration to whether your client might still be eligible for an award given the circumstances of the SEC's waiver the "voluntary" requirement in one case this year 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 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 if 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 the company is taking action that is likely to impede an investigation.

- Give careful consideration 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.
- 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.
- 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.[69] 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 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 form 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 the basis for a winnable enforcement action to remedy a pressing need in the first thirty minutes of reviewing your tip, and you get only one chance to make that happen.
- Include any "independent 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 reveals 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,[70] 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 (www.sec.gov) 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 first-hand 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 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 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.

… 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. This oversight 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.[71]

- 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.[72]
- 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 a tool, even if a critical one, for furthering that purpose. The whistleblower's role is to submit information 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 it 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 has no right, nor should she, to decide what action, if any, the SEC should take based on 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 NoCA postings and to properly calculate the deadline for filing an award claim."[73]

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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. *See* 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 with broader whistleblower news and developments. *See* http://www.kmblegal.com/blogs.

ENDNOTES

[1]*See* SEC Press Release No. 2017-90, "Whistleblower Award of More than Half-Million Dollars for Company Insider" (May 2, 2017), available at https://www.sec.gov/news/press-release/2017-90.

[2]*See* 2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program (referred to hereinafter as "2016 Annual Report") (Nov. 15, 2016), available online at https://www.sec.gov/files/owb-annual-report-2016.pdf, at 10 – 13 for the SEC's summary of awards issued during the 2016 fiscal year.

[3]*See* SEC Press Release No. 2016-173, "SEC Whistleblower Program Surpasses $100 Million in Awards," available online at https://www.sec.gov/news/pressrelease/2016-173.html.

[4]For a comprehensive guide to the CFTC Whistleblower Program, *see* Lisa 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 2017 edition is available online at http://www.kmblegal.com/resources/guide-navigating-cftc-whistleblower-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, currencies, and alternative investment products such as derivatives and swaps. Although the CFTC program has attracted far fewer whistleblower tips than the SEC program, the CFTC's announcement in April 2016 of its largest award of over $10 million is sure to attract more tips and lead to more awards. *See* CFTC Release No. pr7351-16, "CFTC Announces Whistleblower Award of More Than $10 Million (Apr. 4, 2016), available online at http://www.cftc.gov/PressRoom/PressReleases/pr7351-16. The size of the CFTC's collection efforts suggests the potential for more and even larger awards. *See* CFTC Press Release No. pr7488-16, "CFTC Releases Annual Enforcement Results for Fiscal Year 2016 (Nov. 21, 2016), available online at http://www.cftc.gov/PressRoom/PressReleases/pr7488-16.

[5]The final rules and accompanying Adopting Release, a combined 305 pages, are available on the SEC's website at http://www.sec.gov/rules/final/2011/34-64545.pdf. This document 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. The rules are codified at 17 C.F.R. Parts 240 and 249 (2012), available online at https://www.law.cornell.edu/cfr/text/17/240.21F-1 (for the rules) and https://www.law.cornell.edu/cfr/text/17/part-249/subpart-S (for whistleblower forms), but this SEC Whistleblower Practice Guide employs instead the numbering system used in online versions of the final rules and Adopting Release.

[6]*See* 2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program (Nov. 15, 2016), available online at https://www.sec.gov/files/owb-annual-report-2016.pdf, at 25 – 26.

[7]*See*, e.g., Order Determining Whistleblower Award Claim (Sept. 22, 2014), available at https://www.sec.gov/rules/other/2014/34-73174.pdf, at n. 2.

[8]Section 922 of the Dodd-Frank Act amends the Securities Exchange Act of 1934 (commonly referred to as the "Exchange Act") to add a Section 21F, which directs the SEC to establish the SEC Whistleblower Program.

[9]*See* SEC Press Release No. 2014-154, "SEC Announces Award for Whistleblower Who Reported Fraud to SEC After Company Failed to Address Issue Internally" (July 31, 2014) and linked Order Determining Whistleblower Award Claim, available online at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542578457#.U9qeu_ldXxo.

[10]*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-ll.

[11]*See* Press Release No. 2016-10 (Jan. 15, 2016), at https://www.sec.gov/news/pressrelease/2016-10.html, and the accompanying Order Determining Whistleblower Award Claim, Release No. 76921 (Jan. 15, 2016), at https://www.sec.gov/rules/other/2016/34-76921.pdf.

[12]*See* e.g., F. McKenna, "Whistleblower award for NYSE fine goes to HFT critic," MarketWatch (Mar. 1, 2016), available online at http://www.marketwatch.com/story/whistleblower-award-for-nyse-fine-goes-to-hft-critic-2016-03-01.

[13]*See* 17 CFR Part 205 – Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, available online at https://www.law.cornell.edu/cfr/text/17/part-205.

[14]*See* New York County Lawyers Association, Ethics Opinion 746, "Ethical Conflicts Caused by Lawyers as Whistleblowers under the Dodd-Frank Act of 2010" (Oct. 7, 2013).

[15]*See* State of New York *ex rel* David Danon v. Vanguard Group, Inc., et al, available at http://www.courts.state.ny.us/Reporter/pdfs/2015/2015_32213.pdf; *see also*, J. Distefano, "Danon barred from whistleblower's cut in Vanguard NY case" (Nov. 18, 2015), http://www.philly.com/philly/blogs/inq-phillydeals/Exclusive-Vanguard-tax-lawyers-NY-whistleblower-claim-barred.html#Rqt4dymOMu5CGyoC.99.

[16]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). The rules provide for no exception to this exclusion.

[17]*See* SEC Press Release No. 2014-180 (Aug. 29, 2014), "SEC Announces $300,000 Whistleblower Award to Audit and Compliance Professional Who Reported Company's Wrongdoing" and linked Order Determining Whistleblower Award Claim" and linked Order Determining Whistleblower Award Claim (Aug. 29, 2014), available online at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542799812#.VACeEfldXxo.

[18]*See* SEC Press Release No. 2015-45, "Former Company Officer Earns Half-Million Dollar Whistleblower Award for Reporting Fraud Case to SEC" and linked Order Determining Whistleblower Award Claim (March 2, 2015), available online at http://www.sec.gov/news/pressrelease/2015-45.html#.VPclTfnF-qs.

[19]*See* SEC Press Release No. 2015-73,"SEC Announces Million-Dollar Award to Compliance Officer" and linked Order Determining Whistleblower Award Claim (April 22, 2015), available online at https://www.sec.gov/news/pressrelease/2015-73.html.

[20]*See* Adopting Release 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.

[21]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. *See* Order Determining Whistleblower Award Claims No. 2017 -10 (May 4, 2017), available online at https://www.sec.gov/rules/other/2017/34-80596.pdf, at 6 n. 9.

[22]*See* 2016 Annual Report at 18.

[23]*See* 2016 Annual Report at 17.

[24]The SEC website provides a complete list of orders approving and denying awards at http://www.sec.gov/about/offices/owb/owb-final-orders.shtml.

[25]*See* SEC Press Release No. 2016-88, "Whistleblower Earns $3.5 Million Award for Bolstering Ongoing Investigation" and linked Order in Whistleblower Award Proceeding (May 13, 2016), available online at https://www.sec.gov/news/pressrelease/2016-88.html.

[26]*See* Order Determining Whistleblower Award Claim (Apr. 5, 2016), available online at https://www.sec.gov/rules/other/2016/34-77530.pdf, at 2 (discussion of "Claimant 2").

[27]*See Stryker v. SEC,* 780 F.3d 163 (2d Cir. Mar. 11, 2015), discussed in 2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program (Nov. 16, 2015), available online at https://www.sec.gov/files/owb-annual-report-2015.pdf, at 15. *See also*, Order Determining Whistleblower Award Claim, Exchange Release No. 79294 (Nov. 14, 2016), available online at https://www.sec.gov/rules/other/2016/34-79294.pdf, at 4, 5 – 8 (two claimants denied awards because information submitted prior to July 21, 2010 did not constitute "original information" under the rules, citing Second Circuit's decision in *Stryker*).

[28]*See* Order Determining Whistleblower Award Claim (Apr. 5, 2016), available online at https://www.sec.gov/rules/other/2016/34-77530.pdf.

[29]*See* Order Determining Whistleblower Award Claim (Apr. 25, 2017), available online at https://www.sec.gov/rules/other/2017/34-80521.pdf, at 2 n. 1.

[30]M. Rothfeld and B. Reagan, "Prosecutors are Still Chasing Billions in Uncollected Debts" (Sept. 17, 2014), at http://www.wsj.com/articles/prosecutors-are-still-chasing-97-billion-in-uncollected-debts-1410984264.

[31]*See* SEC Press Release No. 2014-68, "SEC Announces Additional $150,000 Payment to Recipient of First Whistleblower Award" (April 4, 2014), available online at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541413136#.U0LJ88RDt1Y.

[32]*See* SEC Press Release No. 2017-1, "SEC Awards $5.5 Million to Whistleblower" and linked Order Determining Whistleblower Award Claim (Jan. 6, 2017), available online at https://www.sec.gov/news/pressrelease/2017-1.html, Order at 1 and n. 2, n. 3.

[33]*See* 2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program (Nov. 15, 2016), available online at https://www.sec.gov/files/owb-annual-report-2016.pdf, at 23.

[34]*See* Annual Report at 27.

[35]*See* SEC OWB Frequently Asked Questions No. 10 at http://www.sec.gov/about/offices/owb/owb-faq.shtml#P19_5641.

[36]*See* Opinion and Order, *SEC v. Yorkville Advisors, LLC*, *et al.*, No. 12-cv-7728 (S.D.N.Y. May 27, 2014) (opinion and order granting in part and denying in part motion to compel production of documents).

[37]*See, e.g.,* SEC Press Release 2017-7, "SEC Announces 2017 Examination Priorities (Jan. 12, 2017), available online at https://www.sec.gov/news/pressrelease/2017-7.html.

[38]*See, e.g.*, Andrew Ceresney, Director, SEC Division of Enforcement, "Testimony on 'Oversight of the SEC's Division of Enforcement'" (Mar. 19, 2015), available online at https://www.sec.gov/news/testimony/031915-test.html.

[39]*See, e.g.,* Speech by Acting Chairman Michael S. Piwowar, "Remarks at the 'SEC Speaks' Conference 2017: Remembering the Forgotten Investor (Feb. 24, 2017), available online at https://www.sec.gov/news/speech/piwowar-remembering-the-forgotten-investor.html. For a report on the remarks of SEC Division of Enforcement leaders at the conference, *see* Ropes & Gray, "The SEC Speaks 2017: Division of Enforcement Highlights" (Mar. 10, 2017), available online at https://www.ropesgray.com/newsroom/alerts/2017/03/The-SEC-Speaks-2017-Division-of-Enforcement-Highlights.aspx.

[40]*See, e.g.*, SEC Press Release 2017-212, "SEC Announces Enforcement Results for FY 2016" (Oct. 11, 2016), available online at https://www.sec.gov/news/pressrelease/2016-212.html.

[41]*See* https://www.sec.gov/search/search.htm.

[42]*See* SEC Press Release No. 2014-206, "SEC Announces Largest-Ever Whistleblower Award" and linked Order Determining Whistleblower Award (Sept. 22, 2014), available online at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290#.VCDTjPldU0F.

[43]*See* SEC Press Release No. 2015-252, "SEC Announces Whistleblower Award of More Than $325,000" and linked Order Determining Whistleblower Claim (Nov. 4, 2015), available online at http://www.sec.gov/news/pressrelease/2015-252.html.

[44]*See* SEC Order Determining Whistleblower Award Claim, File no. 2016-7 (Apr. 5, 2016), available online at https://www.sec.gov/rules/other/2016/34-77530.pdf.

[45]*See, e.g.*, S. Barlyn, "SEC awards $22 million to ex-Monsanto executive through whistleblower program," Reuters News Agency (Aug. 30, 3016), available online at http://www.reuters.com/article/us-sec-monsanto-whistleblower-idUSKCN1152KG.

[46]*See* Order Determining Whistleblower Award Claim (Feb. 28, 2017), available online at https://www.sec.gov/rules/other/2017/34-80115.pdf.

[47]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 http://www.sec.gov/about/offices/owb/owb-awards.shtml.

[48]The WB-APP form is available at https://www.sec.gov/files/formwb-app.pdf.

[49]*See* Order Determining Award Claim (July 23, 2014), available online at http://www.sec.gov/rules/other/2014/34-72659.pdf.

[50]*See* Order Determining Whistleblower Award Claim (Dec. 5, 2016), available online at https://www.sec.gov/rules/other/2016/34-79464.pdf.

[51]*See* R. Ensign and J. Eaglesham, "SEC Backlog Delays Whistleblower Awards" (May 4, 2015), http://www.wsj.com/articles/sec-backlog-delays-whistleblower-awards-1430693284.

[52]The 2016 Annual Report, at 13 – 16, contains a concise summary of the claims-review and awards process, along with an explanation of some of the factors that bear on the length of time it takes the SEC to issue a final determination of an award claim.

[53]*See* Ethics Resource Center, "National Business Ethics Survey of the U.S. Workforce 2013," available at http://www.ethics.org/downloads/2013NBESFinalWeb.pdf.

[54]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 a handy Whistleblower Statues Desk Aid that summarizes these laws' application, remedies, statues of limitations and other information. *See* Whistleblower Statutes Desk Aid, Occupational Safety and Health Admin. (last updated Feb. 2, 2017), available online at https://www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf.

[55]*See* "Securities Whistleblower Incentives and Protections," 76 Fed. Reg. 34300-01 (June 13, 2011) (codified at 17 C.F.R. pts. 240-49).

[56]*See* "Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934, SEC Release No. 34-75592 (Aug. 4, 2015), available at http://www.sec.gov/rules/interp/2015/34-75592.pdf. *See also* Rule 21F-2(b)(1)(iii), which states that Dodd-Frank's anti-retaliation provisions apply "whether or not you satisfy the requirements, procedures and conditions to qualify for an award."

[57]*See* Order Determining Whistleblower Award Claim, Release No. 73174 (Sept. 22, 4014), at 2 n. 2.

[58]See SEC Press Release No. 2014-118, "SEC Charges Hedge Fund Adviser With Conducting Conflicted Transactions and Retaliating Against Whistleblower" and linked Order Instituting Cease and Desist Proceedings (June 16, 2014), available online at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542096307#.VAndkPldXxp.

[59]*See* SEC Press Release No. 2015-75, "SEC Announces Award to Whistleblower In First Retaliation Case," and linked Order Determining Whistleblower Award Claim (April 28, 2015), available online at https://www.sec.gov/news/pressrelease/2015-75.html.

[60]*See* SEC Press Release No. 2016-204, "SEC: Casino-Gaming Company Retaliated Against Whistleblower" (Sept. 29, 2016), available online at https://www.sec.gov/news/pressrelease/2016-204.html. For more analysis of the enforcement action, *see* A. Ronickher, "SEC brings its first stand-alone whistleblower retaliation action," FCPA Blog (Oct. 6, 2016), available online at http://www.fcpablog.com/blog/2016/10/6/sec-brings-its-first-stand-alone-whistleblower-retaliation-a.html. Ms. Ronickher and Lisa Banks, both partners with whistleblower law firm Katz, Marshall & Banks, represented the IGT whistleblower in the case.

[61]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.

[62]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. *See* "Strengthening Andi-Retaliation Protections for Whistleblowers and Enhancing the Award Claims Review Process," CFTC Office of Public Affairs (May 22, 2017), available online at http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/wbruleamend_factsheet052217.pdf.

[63]*See* D. Marshall and D. Katz, "SEC Whistleblowers' Rights Being Restricted in Severance Agreements" (May 15, 2013), available online at http://www.kmblegal.com/sec-whistleblower-blog/sec-whistleblowers-rights-being-restricted-severance-agreements. *See also* D. Marshall and D. Katz, "A Letter to SEC Commissioners re: The Use of Severance Agreements to Impede Individuals from Participating in the SEC Whistleblower Program: A Growing Problem and a Recommendation" (May 8, 2013), available online at http://www.kmblegal.com/wp-content/uploads/2015/04/130508-Letter-to-SEC-Commissioners.pdf.

[64]*In the Matter of KBR, Inc.,* SEC Release No. 74619 (Apr. 1, 2015), Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, at 2, available at http://www.sec.gov/litigation/admin/2015/34-74619.pdf.

[65] *Id.* at 3.

[66]*See* http://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html.

[67]*See* D. Marshall and D. Katz, A Letter to SEC Commissioners, *supra* n. 62 at 6 – 7.

[68]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 Inspector General examined confidentiality agreements that the 30 largest State Department contractors have required their employees to sign.

[69]This article does not discuss all of the forms and procedures in detail, but they are spelled out clearly in the final rules, 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 final rules at 278 – 305.

[70]*See* http://www.sec.gov/whistleblower

[71]See Order Determining Whistleblower Award Claim (Nov. 14, 2016), available online at https://www.sec.gov/rules/other/2016/34-79294.pdf, at 6 – 7.

[72]*See, e.g.,* Order Determining Whistleblower Award Claim (Nov. 14, 2016), available online at https://www.sec.gov/rules/other/2016/34-79294.pdf, at 4, 5 – 8.

[73]*See* Order Determining Whistleblower Award Claim (Dec. 5, 2016), available online at https://www.sec.gov/rules/other/2016/34-79464.pdf, at 3 n. 6.

APPENDIX A

SEC Whistleblower Awards Through May 24, 2017

Each award is issued through an "Order Determining Whistleblower Award Claim," The SEC has also issued press releases announcing most but not all awards. The top number in the second column in the table below refers to the Exchange Release number that appears on all Orders. The bottom, 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 release have links to the accompanying order at the upper right of the page. The orders are also listed, by date only, on the SEC Office of the Whistleblower web page at https://www.sec.gov/about/offices/owb/owb-final-orders.shtml.

The SEC heavily redacts its Orders Determining Whistleblower Award Claims of 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.

Date	Exchange Rel. No. and Press Release No.	Award Total	% of sanctions awarded	Allocation among claimants	Notes from SEC Press Releases and Orders Determining Awards
Aug. 21, 2012	67698; 2012-162	$50,000	30%	All to single claimant.	Whistleblower helped prevent "multi-million dollar fraud" from "ensnaring additional victims"; SEC paid an additional $150,000 after further collections, for a total of $200,000.
June 12, 2013	69749; no press release[1]	$125,000	15%	5% of collected proceeds to each of three claimants.	In two award announcements concerning a June 12 order, SEC announced award of 15% of amounts that SEC collected, and also of amounts DOJ collected in related action, against sham hedge fund.
Aug. 30, 2013	70293; 2013-169				
Sept. 30, 2013	70544; 2013-209	$14 million	30%	All to single claimant.	Information allowed recovery of "substantial investor funds … more quickly than otherwise would have been possible."
Oct. 30, 2013	70775; 2013-231	$150,000	30%	All to single claimant.	SEC investigated fraud scheme and was able to "obtain emergency relief before additional investors were harmed."
June 3, 2014	72301; 2014-113	$875,000	30%	15% of collected sanctions to each of two claimants.	Information allowed SEC to "bring a successful enforcement action in a complex area of the securities market."
July 22, 2014	72652	?	30%	15%, 10%, 5% to three claimants.	Amount of award not disclosed by SEC.

[1]The SEC released only a press announcement and not a formal press release. See SEC Announces Whistleblower Action (June 12, 2013), available online at https://www.sec.gov/news/press/2013/2013-06-announcement.htm.

July 31, 2014	72727; 2014-154	$400,000	25%[2]	All to single claimant.	SEC waived "voluntary" requirement where employee tried diligently to have company address violations.
Aug. 29, 2014	72947; 2014-180	$300,000	20%	All to single claimant.	First award to employee working in compliance and audit function; also first application of "120-day" exception to exclusion of such employees from program.
Sept. 22, 2014	73174;2014-206	$30 million	?	All to single claimant.	Largest award to date, and to a foreign resident working outside U.S. Percentage not disclosed but award decreased by "unreasonable delay" in reporting to SEC.
March 2, 2015	74404; 2015-45	Between $475,000 & $575,000	?	All to single claimant.	First award to company officer receiving information in compliance role, who waited 120 days after reporting internally.
April 22, 2015	74781; 2015-73	$1.4to $1.6 million	?	All to single claimant.	Second award to an employee working in compliance function and first application of "substantial injury" exception to exclusion of such employees from program.
April 28, 2015	74826; 2015-75	$600,000 plus	30%	All to single claimant.	First award issued in part in connection with retaliation case. Percentage set at 30% in light of "unique hardships" claimant experienced for reporting to SEC.
July 17, 2015	75477; 2015-150	$3 million plus	?	All to single claimant.	Information allowed 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 SEC Whistleblower Program.
Sept. 28, 2015	76000; no press release	?	20%	11% and 9% to two claimants.	Amount of award not disclosed by SEC.
Sept. 29, 2015	76025; no press release	?	28%	All to single claimant.	Amount of award not disclosed by SEC.
Nov. 4, 2015	76338; 2015-252	$325,000 plus	?	All to single claimant.	Percentage not disclosed but reduced by "unreasonable delay" that allowed wrongdoers to obtain additional ill-gotten gains.
Jan. 15, 2016	76921; 2016-10	$700,000 plus	?	All to single claimant.	First award for "independent analysis," by an "industry expert" whose information significantly contributed to successful enforcement action.

[2]The SEC did not report the percentage in its press release or accompanying order. 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," New York Times (Aug. 18, 2014). From this award forward, the SEC began redacting the percentage from most orders prior to public release.

Mar. 8, 2016	77322; 2016-41	$1.93 million	?	$1.8 million to Claimant 1 and $65,000 to each of Claimants 2 & 3.	Claimant receiving bulk of award submitted tip causing 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. SEC denied award altogether to a fourth claimant who had "knowingly and willfully made false, fictitious, or fraudulent statements" to SEC over several years.
Apr. 5, 2016	77530; no press release	$275,000 less offset	?	All to single claimant.	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. SEC denied award to second claimant who had not provided information which led to successful enforcement action.
May 13, 2016	77833; 2016-88	$3.5 million plus	?	All to single claimant.	Whistleblower's award did not cause SEC to initiate investigation but rather bolstered an ongoing investigation, strengthened SEC's settlement position, and thus "significantly contributed" to success of covered action.
May 17, 2016	77843; 2016-10	$5 to $6 million	?	All to single claimant.	Whistleblower's "detailed tip led the agency to uncover securities violations that would have been nearly impossible for it to detect…."
May 20, 2016	77873; 2016-11	$450,000 plus	?	Awarded jointly to two claimants.	
June 9, 2016	78025; 2016-13	$17 million	?	All to single claimant.	Claimant's TCRs and subsequent communications directed SEC staff to new information that conserved SEC's time and resources, helped staff to collect evidence, "substantially advanced" investigation and thus "led to" successful enforcement action. Investigation of alleged securities violations was already underway. SEC denied applications of four other claimants.
Aug. 30, 2016	78719; 2016-173	$22.437 million	28%	All to single claimant.	The SEC did not disclose the percentage, but whistleblower's counsel informed media his client received 28% of sanctions against Monsanto. This second-highest award pushed the program total to date above $100 million mark. SEC referenced the claimant's culpability as basis for reducing percentage.
Sep. 20, 2016	78881; 2016-17	$4 million	?	All to single claimant.	

Nov. 14, 2016	70294; 2016-237	$20 million	?	All to single claimant.	Third-largest award to date, upwardly adjusted after claimant contested preliminary amount. Award will include amounts collected in future. Award went to a whistleblower 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.
Dec. 5, 2016	79464; 2016-255	$5 million	?	All to single claimant; two other claimants denied awards.	SEC rejected unsuccessful claimant's arguments that 1) the claimant's information "should have caused an investigation," and 2) that the SEC's failure to provide the claimant with "actual notice" of Covered Action rather than simply posting notice of same on website. SEC rejected argument that this caused the claimant to miss 90-day deadline for submitting WB-APP.
Dec. 9, 2016	79517; 2016-260	$900,000 plus	?	All to single claimant.	Whistleblower's tip led to "multiple actions against wrongdoers." Actions were consolidated for purpose of award determination; claimant to receive award based on sanctions collected in both, including proceeds collected after date of order.
Jan. 6, 2017	79747; 2017-1	$5.5 million	?	All to single claimant.	Whistleblower "helped prevent further harm to a vulnerable investor community by boldly stepping forward while still employed at the company. SEC applies first waiver of Rule 21F-9(d) "in writing" requirement for pre-TCR period between enactment of Dodd-Frank and issuance of program rules.
Jan. 23, 2017	79853; 2017-27	$7 million	?	One claimant get $4 million to, two others share $3 million.	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 investigation underway, significantly contributing to successful enforcement action. All claimants to receive additional award moneys based on additional sanctions recovered after date or order.
Feb. 28, 2017	80115; no press release	?	20%	All to single claimant.	Amount of award not disclosed. 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."

Apr. 25, 2017	8052; 2017-84	$4 million	?	All to single claimant.	Whistleblower provided "detailed and specific information about serious misconduct and provided additional assistance during the ensuing investigation, including industry-specific knowledge and expertise." Award based in part on moneys paid to a government agency not among those enumerated as prosecutors of "related actions" Rule 21F-3(b)(1)(i – iv).
May 2, 2017	80571; 2017-90	$500,000	?	All to single claimant.	"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."