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

Lisa J. Banks and Michael A Filoromo

9th EDITION JANUARY 2020
# TABLE OF CONTENTS

INTRODUCTION .......................................................................................................................................................... 1

BACKGROUND .......................................................................................................................................................... 2

THE SEC WHISTLEBLOWER PROGRAM RULES ................................................................................................. 3
   A. Whistleblower Status ........................................................................................................................................ 3
      1. “Voluntarily Provide” .................................................................................................................................. 3
      2. “Original Information” ............................................................................................................................. 4
         Independent Knowledge and Independent Analysis ..................................................................................... 4
         Exclusions from Independent Knowledge and Analysis –
         Attorneys, Compliance Personnel, Auditors and Officers ............................................................................. 5
         Information “Not Already Known” and the “Original Source” Exception .................................................. 8
   B. Rules Designed to Incentivize Internal Reporting .......................................................................................... 9
   C. Information that Leads to Successful Enforcement ...................................................................................... 10
   D. Monetary Sanctions Totaling More Than $1 Million ...................................................................................... 12
   E. SEC Procedures for Submitting a Tip and Claiming an Award .................................................................... 13
      The TCR Form ............................................................................................................................................... 13
      Submitting an Anonymous Tip ...................................................................................................................... 13
   F. Determining the Amount of an Award .......................................................................................................... 14
      SEC Enforcement Interests .......................................................................................................................... 14
      Unreasonable Delay ..................................................................................................................................... 14
      Culpability of the Whistleblower ............................................................................................................... 15
      Impact of Proposed Rules Changes on Amount of Awards ........................................................................... 16
   G. Whistleblower Awards to Date .................................................................................................................... 16
   H. Claiming a Whistleblower Award .................................................................................................................. 17

PROTECTIONS AGAINST RETALIATION ............................................................................................................ 18
   A. Employee Protections Under the Sarbanes-Oxley Act ................................................................................. 19
   B. Employee Protections Under the Dodd-Frank Act ....................................................................................... 20
   C. Extraterritorial Application of Whistleblower Protections ....................................................................... 20
   D. Enforcement of Anti-Retaliation Provisions by the SEC ............................................................................ 21
   E. Employer-Imposed Agreements That Impede Whistleblowers ................................................................... 22

THINGS TO THINK ABOUT BEFORE AND AFTER YOU TIP ............................................................................ 24

ENDNOTES ................................................................................................................................................................ 28

APPENDIX ............................................................................................................................................................... 34
INTRODUCTION

The Whistleblower Program of the U.S. Securities and Exchange Commission (“SEC” or the “Commission”) is now in its ninth year, and as of this writing has paid out some $387 million in monetary rewards to 72 individuals who have provided information that the Commission used in enforcing U.S. securities laws. Congress directed the SEC to establish the whistleblower program as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”). 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 ranging from 10% to 30% of the moneys collected.

Past editions of this SEC Whistleblower Practice Guide 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 2020 edition reports on a program that is moving ahead at full steam and evolving, 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 32 awards that exceeded $1 million, twelve of which exceeded $10 million, three of which were more than $30 million to a single individual, and one of which included an undivided payment of nearly $50 million to two joint whistleblowers. The SEC issued awards in the amount of $60 million to eight individuals in fiscal year (FY) 2019 alone. As of the end of that fiscal year on September 30, 2019, whistleblower tips had led to enforcement actions resulting in orders totaling more than $2 billion in monetary sanctions, including over $1 billion in disgorgement of ill-gotten gains with interest.

At the same time that the Dodd-Frank Act’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. Employees who have faced retaliation for reporting securities violations have brought lawsuits under these provisions, and the SEC itself has taken action against several employers for retaliating against whistleblowing employees.

The Commission also has continued its efforts to prevent companies from using employer-imposed agreements to impede their employees from providing information to the SEC. To date, the Commission has brought and settled nine enforcement actions against employers for using a variety of such agreements, 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 a 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 and willingness of employees to raise concerns about perceived securities violations, both to their employers and to the SEC. As a result, employees and former employees can participate confidently in the SEC Whistleblower Program and earn monetary awards, and can do so even after their employers have forced them to sign agreements intended to deter them from speaking to the SEC.

“The strength of our whistleblower program is a critical component in our investor protection toolbox.”
– Jay Clayton, SEC Chairman

As it grows, the SEC Whistleblower Program is also evolving, as reflected by the June 2018 proposed amendments to the existing 2011 Whistleblower Program rules. In FY 2019, the Commission continued to consider the public comments received on the proposed amendments and noted that it anticipated new rules being adopted in FY 2020. The Commission characterized these amendments as building upon the program’s successes by “providing tools to increase efficiencies in the claims review process and address other topics that have developed during the program’s eight year history.” Although some of the proposed amendments will undoubtedly benefit whistleblowers, others could adversely impact certain SEC tipsters, including changes that will empower the SEC to adjust whistleblower awards downward, and proposed interpretive guidance that narrowly construes what constitutes “independent analysis” as the basis for a whistleblower award. The proposed amendments are not yet in effect, however, and are still subject to change.

It is clear that the SEC’s leadership and staff have grown to rely on the help of whistleblowers during the years that the SEC Whistleblower Program has been in existence. The program has repeatedly allowed the SEC to detect well-hidden frauds early on, and to take quick and effective action to protect the investing public while conserving limited agency resources. This has greatly benefited investors in the U.S. capital markets, who
include tens of millions of working families with their savings and retirement funds invested in a wide range of stocks, bonds and mutual funds. 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 financial markets without the need for government action. The program is now in a strong position to continue growing, aiding the SEC’s enforcement efforts and 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 2020 edition also features a useful Appendix A, “SEC Whistleblower Awards Through January 22, 2020,” which provides the dates, amounts and summaries of other available information for every award the SEC has issued since the inception of the program.

BACKGROUND

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

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 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 whistleblowers to assist the U.S. government in recovering money lost to fraud.

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, MCIs and Madoffs from harming the investing public and the broader economy. The Dodd-Frank Act also established a similar whistleblower program for commodities trading that is administered by the Commodity Futures Trading Commission (“CFTC”).

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

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

The final rules that the SEC Commissioners adopted by a 3-2 vote on May 25, 2011, reflected the Commission’s effort to address these competing concerns, as it explained in an adopting release accompanying the rules (“Adopting Release”). The business lobby and defense bar remained dissatisfied, as was evident in a number of statements issued by the U.S. Chamber of Commerce and others in response to issuance of the program. As the subsequent eight 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 other authorities in “related actions” Whistleblower awards can be substantial, as SEC sanctions against companies have run into the tens and even hundreds of millions of dollars in recent years, with one recent judgment for the SEC topping $1 billion in disgorgement and penalties against a real estate company and its owner for running a Ponzi scheme.

A. Whistleblower Status

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

As noted above, the SEC Whistleblower Program has accepted tips from individuals throughout the United States and in at least 123 foreign countries. The SEC will make awards to foreign nationals where otherwise appropriate, even when the whistleblower resides overseas and submits the tip from overseas, and when the misconduct complained of occurs entirely overseas. In issuing one such award in 2014, the SEC acknowledged well-established limits on the extraterritorial application of U.S. law, as set forth by the Supreme Court in Morrison v. Nat’l Aust. Bank Ltd., 561 U.S. 247, 266 (2010). The SEC noted, however, that the Court in Morrison pointed out that the application of U.S. law in cases having certain foreign aspects could nonetheless be a domestic rather than an extraterritorial application in circumstances where the application targeted conduct or situations that were a “focus of congressional concern” and also had a “sufficient U.S territorial nexus.” Based on this analysis, the SEC ruled, whistleblower awards are appropriate where a whistleblower’s information leads to a successful enforcement action, brought in the United States, by a U.S. regulatory agency, which is enforcing U.S. securities laws. In short, international whistleblowers are eligible for awards for providing information that leads to a successful SEC enforcement action.

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

1. “Voluntarily Provide”

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

The program rules address a concern among whistleblower advocates that a whistleblower might lose eligibility because the SEC or another of the agencies listed above has directed an inquiry or request to his employer but not to him individually. Given that such requests or demands are often drafted such that they arguably apply to a large number of employees (and to broad categories of information), this reading of “voluntary” would have barred many corporate employees from participation in the program. The rules as adopted make clear that a whistleblower will be deemed to have submitted information “voluntarily” as long as an official inquiry is not directed to him as an individual. 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. See Rule 21F-4(a)(3). This disqualification is not triggered by an employee’s contractual obligation to his employer or another third party or by the employee’s receipt of a request for the same or related information from his employer as part of an internal investigation. See Adopting Release at 35-37. This means that an employer cannot remove the incentives that are key to the whistleblower program’s effectiveness by requiring all employees to sign agreements that they will report any perceived securities violations to the SEC.

Notwithstanding the rule that whistleblowers provide information to the SEC “voluntarily” only if they do so before receiving requests for the same from the SEC or certain other agencies, the SEC surprised many observers when it demonstrated that it would waive this restriction under certain circumstances. On July 31, 2014, the SEC awarded $400,000 to a whistleblower who had not come forward “voluntarily” as required by the rules because a self-regulatory organization had earlier requested the same information directly from the whistleblower. As the SEC’s order granting the award point 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 self-regulatory organization. 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.” The SEC made a similar decision to waive the voluntariness requirement in issuing a $3,000,000 award in June 2019 upon determining that doing so was “appropriate in the public interest and consistent with the protection of investors.”

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

2. “Original Information”

In order to qualify as “original information” that will support a claim for an award, the whistleblower’s tip must consist of information that is: 1) derived from the individual’s “independent knowledge” or “independent analysis”; 2) not already known to the SEC from any other source (unless the whistleblower is the “original source” of the information, such as where she had first reported the information to the Department of Justice or Department of Labor, 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.” See Rule 21F-4(b)(1).

Independent Knowledge and Independent Analysis

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

In declining to heed the warning of business-side commentators that allowing tips based on third-party information would encourage frivolous claims, the SEC noted when issuing the final rules that excluding such information could deprive the Commission of highly probative information that could aid significantly in an enforcement action. See 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.” See Rule 21F-4(b) available information should do the work of making known and opening up to view for the Commission the possible securities violations.” The requisite level of analysis will likely belong to a whistleblower “with a high level of specialized training or expertise” who “illuminates for the Commission possible violations that are obscured because of the technical nature of the source material.”

In justifying this restrictive interpretation, the Commission contended that both Congress and the SEC had expressed a desire to “substantially restrict any role for publicly available information in potential whistleblower awards.” The SEC further noted that paying awards for public information was inconsistent with the program’s purpose, since Congress had intended it to motivate those with “inside knowledge to come forward and assist the Government to identify and prosecute persons” who violate securities laws. In sum, the SEC’s interpretive guidance strongly suggests that the Commission is growing less inclined to reward whistleblowers who loosely invoke the “independent analysis” prong of original information in seeking an award, and will closely scrutinize applications seeking such awards for consistency with the criteria described above.

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.” According to subsequent media reports, the tip originated from the whistleblower’s review of publicly available information regarding practices of the New York Stock Exchange that favored high-frequency traders over other market participants, 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 opened the door to a wide range of tips, ones submitted not by individuals who learned about securities violations from their vantage points inside an organization or involvement in a transaction, but by individuals with the industry expertise that allowed them to identify and explain such violations through detailed and “revelatory” analyses of market data, company news and filings, and other available sources.

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

---

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

(3). This might include, for example, an expert analysis of data that could significantly advance an investigation. See Adopting Release at 51.

In conjunction with the SEC’s issuance of proposed rule amendments in July 2018, the Commission published interpretive guidance offering a restrictive reading of what constitutes viable “independent analysis.” Under the Commission’s proposed guidance, a whistleblower who relies on independent analysis prong of “original information” must provide the SEC with “evaluation, assessment, or insights” beyond “what would be reasonably apparent to the Commission from publicly available information.” The SEC would make this determination “based on [the Commission’s] own review of the relevant facts during the award adjudication process whether the violations could have been inferred from the facts available in public sources.” The SEC also stated that independent analysis will need to be “revelatory; that is, the whistleblower’s evaluation of the publicly

---

© Copyright 2020
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, see 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, see Rule 21F-4(b)(4)(ii).

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

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

In addition to lawyers, the SEC Whistleblower Program rules make certain other individuals presumptively ineligible to receive awards because of their roles, formal or otherwise, in the internal-compliance functions that the SEC believes are critical to the overall goal of increased adherence to securities laws. The SEC deems 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, see Rule 21F-4(b)(4)(iii)(A);
- An employee or contractor whose principal duties are in compliance or internal audit, see Rule 21F-4(b)(4)(iii)(B);
- Employed by a firm retained to investigate possible violations of the law, see 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, see 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 report the information to the SEC. See Rule 21F-4(b)(4)(vi).

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

- The would-be whistleblower “reasonably believes” that disclosure to the SEC is needed to prevent “substantial injury” to the entity or investors, see 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, see 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, see Rule 21F-4(b)(4)(v)(C).
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.

eligibility for an award, the SEC determined that he reported the information to the SEC because he reasonably believed that disclosure was necessary to prevent a substantial injury to the company or its investors, and he was therefore eligible for an award. As then-SEC Director of Enforcement 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.”32

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.

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

These cases also demonstrate how the program rules strike a reasonable balance between the public’s need for strict enforcement and the interests of corporations (and their shareholders) in maintaining effective legal, compliance and audit functions, which can serve to protect investors and avoid the need for SEC enforcement action. While generally excluding information from employees who staff compliance and audit functions will mean that the SEC will never hear from some would-be whistleblowers who have credible knowledge of securities violations, the rules ensure that even these individuals can report their information to the SEC and become eligible for an award in certain exceptional situations. Where the wrongful conduct is seriously endangering investors, where the entity is destroying evidence, or where upper management 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 professional with compliance-related responsibilities. Corporations thus face the risk that even those employees whom they have entrusted with knowledge of the most serious securities violations can earn awards under the SEC whistleblower program. The only way a corporation can mitigate that risk is to make sure it maintains effective and efficient mechanisms for responding promptly to suspected securities violations.

In deciding where to draw the line between those who can earn an award for blowing the whistle on securities violations and those who cannot, the SEC rejected proposals at the inception
of the program that would have excluded many more, perhaps even most, of those individuals who would most likely be able to provide the Commission with high-quality tips. As originally proposed, the rules excluded from “independent knowledge” and “independent analysis” any information obtained not just by officers, directors, trustees and partners, but also by anyone with “supervisory” or “governance” responsibilities who was given the information with the expectation that they would do something about it. 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, adopting narrow exclusions for core, compliance-related personnel and processes while rejecting pressure to deny eligibility to far more employees than Congress could possibly have intended or anticipated. The balance between these exclusions and the exceptions to them is now leading to successful enforcement actions without harm to legitimate corporate interests.

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

For purposes of determining an individual’s entitlement to a whistleblower award, information that is already known to the SEC cannot qualify as “original information” unless the whistleblower is the “original source” of the information. The “original source” exception applies to information the whistleblower may have already reported to DOJ or certain other agencies, perhaps because the whistleblower was simply trying to alert law enforcement authorities to unlawful practices and reported them to the FBI or DOJ, but was unaware of the SEC Whistleblower Program.

This “original source” exception is particularly important for the many employees who file SOX complaints with the Department of Labor 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. The cross-filing arrangement is codified in 29 C.F.R. § 1980.104(a). These SOX charges often contain detailed information about securities violations that the employee reported to the employer, and that information will become “known” to the SEC upon the SEC’s receipt of the charge from DOL. Without the “original source” exception, the employee’s information thus could not qualify as “original information” for purposes of a whistleblower award under Rule 21F-4(b)(1) if the employee later submitted the information to the SEC. This could undermine a whistleblower’s right to an award because SEC staff from time to time initiate investigations based on the SOX charges they receive from OSHA. By allowing the whistleblower to submit a Tip, Complaint or Referral form (“TCR”) containing information “already known” to the SEC and still have his information qualify as “original information,” the “original source” doctrine allows SOX complainants to participate in the SEC Whistleblower Program.

The authors’ law firm, which represents employees not only before the SEC Whistleblower Program but also in cases of retaliation for blowing the whistle internally on corporate wrongdoing, has seen a significant increase in the number of SEC investigations stemming from the SEC’s review of SOX retaliation charges filed with OSHA. If a SOX complainant is contacted by the SEC for follow-up on the information contained in a charge he filed with OSHA, he should make sure to perfect his SEC tip by then 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. See Rule 21F-4(b)(7).

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

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

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:

…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.

*Id.* at 105.

B. Rules Designed to Incentivize Internal Reporting

With this purpose in mind, the SEC when developing the program rules rejected the business lobby’s near-unanimous insistence that it require all whistleblowers submit their complaints internally before filing them with the SEC and earning an award. *Id.* at 103. “[W]hile internal compliance programs are valuable,” the Commission observed, “they are 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 event 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. *See* Rule 21F-4(c)(3); Rule 21F-4(b)(7).
- Giving a whistleblower full credit for information provided by his employer to the SEC where the employee reports the information internally and the employer then investigates and “self-reports” that information (and even additional information that the whistleblower may not have had) to the SEC, and where the information supplied by the employer “leads” to a successful enforcement action. *See* Rule 21F-4(c)(3). In order to benefit from this provision of the program rules, the whistleblower must also report his information to the SEC within 120 days of reporting it internally, using the procedures set forth in Rule 21F-9. In May 2019, the SEC issued its first award pursuant to this rule to a whistleblower who reported wrongdoing to the company compliance department, prompting the company to notify the SEC of the results of an internal investigation it initiated based on the whistleblower’s internal report.
- Treating a whistleblower’s participation in an internal compliance and reporting system as a positive factor in determining the amount of an award within the range of 10% to 30%. *See* Rule 21F-6(a)(4). Conversely, a whistleblower’s interference with internal compliance and reporting systems, including an internal investigation, may decrease the amount of the award. *See* Rule 21F-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. 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. See Adopting Release at 91-92.

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 authors, who have specialized in the representation of corporate whistleblowers for many years, the business community’s fears of a rush to report improprieties to regulators have proven to be unfounded. In fact, the authors and other whistleblower-side lawyers have observed that very few employees, current or former, report their concerns to the SEC without having first reported them internally. This observation is consistent with data collected from whistleblowers by the SEC Office of the Whistleblower, which has reported that approximately 85% of award recipients who were current or former employees of the subject entity had first reported their concerns internally. 39

C. Information that Leads to a Successful Enforcement Action

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

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

The standard is somewhat higher for information that focuses on conduct already under investigation or examination, although some 33% of whistleblowers who have earned awards from the SEC did so in the basis of such information. 40 The information will be deemed to have led to successful enforcement if it “significantly contributes” to the success of the action. See Rule F-4(c)(2). In determining whether information “significantly contributed” to the success of an investigation and resulting enforcement action, the Commission will consider whether the information allowed the SEC to bring a successful action in significantly less time or with significantly fewer resources, bring additional successful claims, or take action against additional parties. 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. 41

The SEC has provided additional guidance as to what actions might constitute a “significant contribution” to an ongoing investigation within the meaning of Rule 21F-4(c)(2). On May 13, 2016, the SEC announced that it was awarding more than $3.5 million to a whistleblower even though the whistleblower’s reports to the SEC had not prompted the SEC to start an investigation. 42 An SEC investigation was already underway as a result of media coverage of potential securities violations when the whistleblower submitted the tip to the SEC and later assisted SEC staff in their investigation.

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

On May 24, 2019, the SEC made its first whistleblower award under Rule 21F-4(c)(3), which allows whistleblowers who internally report to receive credit for a company’s internal investigation and self-report to the SEC, so long as the whistleblower also externally reported to the SEC within 120 days. The Commission awarded the whistleblower $4.5 million because their internal reporting subsequently led to a successful enforcement action and a related action by another agency. The whistleblower sent an anonymous tip to the company and submitted the same information to the SEC within 120 days. The company self-disclosed the tip as well as the results of an internal investigation it initiated in response to the tip. The Commission found that the whistleblower’s original information led to the successful enforcement under the standards set forth in Rule 21F-4(c)(3), although the whistleblower never communicated with the Commission's staff.

Recently, the Commission emphasized in the 2018 Proposed Rules that whistleblowers whose tips rely on “independent analysis” will face a more difficult challenge in proving that their information “led to” a successful enforcement action. As noted above, the SEC issued proposed guidance in June 2018 in which the SEC offered a restrictive interpretation of what constitutes “independent analysis” for purposes of the SEC whistleblower program rules. In elaborating on this inquiry, the Commission noted that an “independent analysis” whistleblower must show that the information he or she provided to the Commission actually led to a successful enforcement action. The SEC cannot use information protected by attorney-client privilege in an investigation or enforcement action. According to the SEC, this determination hinges on whether the analysis “is of such high quality that it either causes the staff to open an investigation, or significantly contributes to the successful enforcement action.” In addition, the Commission’s proposed guidance cautioned that in instances where the SEC’s staff “looks to other information as well in determining to open an investigation, the Commission will find that the independent analysis ‘led to’ the success of the enforcement action only if the Commission determines that the whistleblower’s analysis was a ‘principal motivating factor’ in the staff’s decision to open the investigation.” For this reason, “even an otherwise compelling analysis may not satisfy the ‘leads to’ requirement depending on the nature of other information already in the staff’s possession.”

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

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

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

Whistleblowers often have difficulty knowing whether their information “led to” the successful enforcement action for which they are applying for an award, but they and their counsel need to be aware that the SEC will not grant them an award unless the record demonstrates that their information either caused the Commission to initiate an investigation or “significantly contributed” to the action as required by Rule 21F-4(e).

The SEC has repeatedly and successfully enforced the rule disallowing awards for information provided to the Commission prior to July 21, 2010, the date of enactment of the Dodd-Frank Act, even if an enforcement action followed. In Stryker v. SEC, the U.S. Court of Appeals for the Second Circuit affirmed the SEC’s denial of an application for such an award. Even though the SEC collected sanctions of more than $20 million in the action after the whistleblower program went into effect, the claimant had submitted the information prior to enactment of the Act and received no award.51

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. See 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. See 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.

The SEC’s 2018 Proposed Rules further reflect the Commission’s broad interpretation of the term “action” for whistleblower award entitlement. As set forth in Proposed Rule 21F-4(d)(3), the Commission would interpret qualifying “administrative” actions to include both deferred prosecution agreements and non-prosecution agreements, such that any monies that are required to be paid out under such an agreement would be deemed a “monetary sanction” that could form the basis for an SEC whistleblower award.52 In addition, qualifying administrative actions under Proposed Rule 21F-4(d)(3) would include settlement agreements entered into by the Commission that addresses violations of securities laws outside of a judicial or administrative proceeding.53 In justifying these rule changes, the Commission emphasized that whistleblowers who provide original information to law enforcement should not be disadvantaged where the SEC, the DOJ, or state attorneys general exercise their enforcement discretion to proceed in a form other than filing a complaint or indictment in court or instituting an administrative proceeding.54 The SEC further noted that “Congress did not intend for meritorious whistleblowers to be denied awards simply because of the procedural vehicle that the Commission (or the other authority) has selected to pursue an enforcement matter.”55

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, or (iv) a state attorney general in a criminal case. See Rule 21F-3(b)(1)(i–iv); see also Adopting Release at 20–24. The SEC has demonstrated that it will interpret this list liberally to include a potentially broader group of “other governmental authorities” than those described in the rule,56 and has issued at least one award based in part on the proceeds collected from a related criminal action.57

Under the SEC’s June 2018 Proposed Rules, whistleblowers would likely be barred from getting paid twice for the same information by two different government agencies. Where the whistleblower’s “related action” is taken by a federal agency that administers a separate whistleblower- reward program, Proposed Rule 21F-3(b)(4) would eliminate a whistleblower’s ability to secure “double recovery” under both the SEC and the other agency’s whistleblower programs.58 Under the proposed rule, the SEC would consider a “related action” as qualifying a whistleblower for a potential SEC award only if the SEC whistleblower program has “more direct or relevant connection to the action.”59 Moreover, the SEC will not issue an award based on a related action if the claimant has already received a whistleblower award through another whistleblower program. Proposed Rule 21F-3(b)(4) also would condition an individual’s receipt of an SEC whistleblower award for a “related action” on the whistleblower’s releasing any claims to awards through other whistleblower programs.60

It is also crucial to note that the SEC considers the amount of money it has collected or will collect from a company, not the amount of the sanctions ordered in the case, when determining both eligibility for a whistleblower award and the amount of the award. This can have a significant impact on the process of claiming an award because the SEC does not always collect the sanctions it levies and sometimes collects more than expected. For example, in the three-year period ending in September 2013,
the SEC collected just 42% of the amount defendants were ordered to pay as a result of enforcement actions. Consequently, whistleblowers and their attorneys cannot rely solely on the amount of sanctions ordered by the SEC in determining the size of an award, but rather must look to how much the SEC ultimately collects from the company. The very first whistleblower to receive an award under the new program in 2012 received an additional $150,000 nearly 20 months after receiving the initial $200,000 reward after the SEC was able to collect additional sanctions levied in the case. The SEC has determined claimants to be eligible for awards based on proceeds yet to be collected in a number of award determinations. See Appendix A.

E. SEC Procedures for Submitting a Tip

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 form that the SEC makes available on its website, and can file either online or by mailing or faxing the same to the SEC. See 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. See 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 between 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 established procedures for submitting tips and claiming awards. The SEC rules nonetheless require that these tips be “in writing” See Rule 21F-9(d). The SEC waived the “in writing” requirement in issuing a $5.5 million award in 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. 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 that information submitted before August 11, 2011, was reliable. For similar reasons, the SEC waived the “in writing” requirement in connection with a $1.7 million award to a whistleblower in July 2017 an $8 million award to another whistleblower in November 2017.

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 5,200 tips in FY 2019 alone – it is important that a first read of a whistleblower tip provide SEC staff with a sound understanding of the alleged violations and, to the extent possible, how to investigate and prove them. Whistleblowers should describe in detail the particular practices and transactions that they believe to have violated U.S. securities laws, identify the individuals and entities that participated in or directed the violations, and provide a well-organized presentation of whatever supporting evidence the whistleblower possesses. The Commission encourages individuals to submit information to the SEC via the online portal, which the SEC modified in January 2018 to better process and handle the submission of much larger attachments to a whistleblower’s electronic TCR form.

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

Submitting an Anonymous Tip

Given the very real risks of retaliation from employers and the risk of associated reputational harm that would interfere with future job prospects, many employee-whistleblowers are understandably concerned that their employers will learn their identities if they submit tips to the SEC. The program rules address this concern by allowing whistleblowers to file their submissions anonymously provided that they do so through counsel. See Rule 21F-9(c). The attorney submits the TCR form without the whistleblower’s signature and other identifying information, while keeping a copy of the same completed form containing the whistleblower’s identifying information and signature in his files. On the anonymous TCR form that the attorney submits to the SEC, the attorney affixes her own signature and certifies that he 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...
The SEC protects against the disclosure of whistleblowers’ identities “to the fullest extent possible” regardless of whether they submit their information anonymously, but the Commission acknowledges that there are limits to its ability to shield a whistleblower’s identity under certain circumstances. For example, the SEC explains on its website that “in an administrative or court proceeding, we may be required to produce documents or other information which would reveal your identity.”

While the SEC cannot provide a 100% guarantee that no one will uncover a whistleblower’s identity during the course of investigation and enforcement action, the risk of public disclosure remains very small. A few whistleblowers to date have self-identified to the media and some have self-identified to their employers as a means of securing 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, and in another case an SEC whistleblower was called to testify in a related criminal proceeding.

In the numerous cases in which these authors have represented whistleblowers before the Commission, SEC staff have demonstrated that they will go to great lengths to protect a whistleblower’s identity at every stage of the process, from receiving the tip, 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 improbable 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 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. See Rule 21F-5. The total award cannot exceed 30% of the sanctions ordered even where the Commission distributes the award to more than one whistleblower. The program rules set forth a number of factors that the SEC may consider when calculating the final award within the 10% to 30% range. Factors that might increase an award include the whistleblower’s reporting the perceived violations through an entity’s internal-compliance program, the significance of information provided by the whistleblower, the degree of assistance provided by the whistleblower to SEC investigators, and the SEC’s programmatic or enforcement interest in the particular securities violations at issue. Rule 21F-6(a)(1)-(4). Factors that might decrease an award include the level of culpability of the whistleblower in the wrongdoing, unreasonable delay on the part of the whistleblower in reporting the violations to the SEC, or the whistleblower’s interference with internal compliance and reporting systems. Rule 21F-6(b)(1)-(3). A number of these factors are discussed in various places throughout this Practice Guide, and three are addressed below, along with a discussion of the potential impact of the 2018 Proposed Rules on the amount of future awards.

**SEC Enforcement Interests**

The SEC’s publicly available descriptions of its law-enforcement interests provide important guidance to practitioners who are assessing the Commission’s likely response to a potential whistleblower tip. Key to the SEC’s response will be, inter alia, whether the conduct at issue involves an industry-wide practice, see 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,” see Rule 21F-6(a)(3)(iv); and the number of entities and individuals who have suffered harm. Id.

Individuals who are thinking about submitting tips regarding suspected securities violations can learn a great deal about the SEC’s regulatory enforcement priorities, which change from time to time, by perusing the Commission’s website. This well-organized resource not only reports on all SEC enforcement actions, the work of SEC divisions, offices and specialized units, and congressional testimony and speeches of SEC Commissioners and high-level staff, but also provides periodic recaps of enforcement actions taken in past periods and enforcement perspectives for coming periods. The site also gives users access to the EDGAR system of company filings and a search engine that can locate all information available from the SEC across various databases.

**Unreasonable Delay in Reporting**

The SEC places significant emphasis on a whistleblower’s timely reporting of suspected securities violations, and delayed reporting has likely cost more than one whistleblower millions of dollars in award money. On September 22, 2014, the SEC announced what was then its largest award to date – $30 million to an overseas whistleblower whose information allowed the SEC to stop an ongoing fraud that would otherwise have
would not be penalized. A whistleblower who delayed reporting beyond 180 days would be considered “presumptively unreasonable,” and a delay of even less than 180 days might still be unreasonable depending on the facts and circumstances of the case. Although the Commission will continue considering “highly unusual facts and circumstances” as sufficient to overcome the presumption in “rare instances,” whistleblowers should be careful not to wait unnecessarily in reporting securities violations – either internally first if appropriate and then to the Commission, or directly to the Commission.

Culpability of the Whistleblower

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

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

Several months later the SEC issued a very sizable award – totaling more than $22.4 million – even though the whistleblower had apparently played some role in the fraud at issue. The SEC announced the award on August 30, 2016, and indicated in its redacted order that the whistleblower was culpable for the misconduct to a certain degree. In justifying this sizable award to this culpable whistleblower, the SEC explained in an accompanying footnote that “[s]everal other factors mitigating the Claimant’s culpability were considered” in determining the award percentage. The SEC noted in particular that the whistleblower had not benefitted financially from the misconduct. The anonymous whistleblower’s counsel later announced that the $22.4 million award represented 28% of the total $80 million settlement between the SEC and Monsanto Company stemming from Monsanto’s
failure to publicly disclose millions of dollars in rebates to Roundup weed-killer retailers.\textsuperscript{44}

In a February 2017 determination, the SEC limited a whistleblower award to 20\% of the amount collected so far and to be collected in the future. Although the SEC did not disclose the amount of the award, it noted in the determination order that it had “reduced the award from what it might otherwise have been because of both the Claimant’s culpability in connection with the securities law violations at issue in the Covered Action and the Claimant’s unreasonable delay in reporting the wrongdoing to the Commission.”\textsuperscript{25}

In a September 14, 2018, determination generating an award of $1.5 million, the SEC “severely reduced” the award after considering various award criteria.\textsuperscript{34} Specifically, the SEC alleged that the claimant had unreasonably delayed by waiting longer than one year to report to the Commission, and then did so only after learning about an ongoing SEC investigation. The SEC also noted that investors were being harmed during the delay and that the size of the total monetary sanctions had increased correspondingly. In addition, the SEC took into account the whistleblower’s culpability in the wrongful conduct, and warned that “[w]hile whistleblowers with similar conduct should expect to receive a severely reduced award – indeed, even one as low as the minimum statutory threshold – in future cases.” This SEC award determination makes clear that the Commission has little patience for dilatory whistleblowers, and even less for those who are culpable and delay reporting for potentially opportunistic reasons while investors suffer further harm.

\textbf{Impact of Proposed Rules Changes on Amount of Awards}

In a significant departure from the manner in which the SEC has administered the program to date, the Commission proposed rules changes in June 2018 that under some circumstances would place floors and ceilings on the size of potential awards. In publishing the 2018 Proposed Rules, the Commission acknowledged that the program rules as promulgated in 2011 “do not expressly permit the Commission to consider whether a relatively small or exceedingly large potential payout is appropriate to advance the program’s goals of rewarding whistleblowers and incentivizing future whistleblowers.”\textsuperscript{42} Under Proposed Rule 21F-6(c), the Commission could upwardly adjust the percentage of an award that would yield a payout of $2 million or less in the absence of the upward adjustment (subject to a cap of 30\% of collected sanctions).\textsuperscript{35} According to the Commission, this sort of upward adjustment would vindicate the whistleblower program’s interests in rewarding meritorious whistleblowers and in incentivizing future whistleblowers who might be worried about the low dollar amount of a potential award.\textsuperscript{26}

The 2018 Proposed Rules would also provide the Commission with discretion to reduce awards that the SEC considers to be “exceedingly large.” Under Proposed Rule 21F-6(d), when an enforcement action yields at least $100 million in sanctions, the Commission would conduct an “enhanced review,” giving consideration to factors in addition to the criteria the SEC has previously applied in determining where in the range of 10\% to 30\% an award will be set.\textsuperscript{22} This mechanism would allow the Commission to ensure against a payout “that does not exceed an amount that is reasonably necessary to reward the whistleblower and to incentivize other similarly situated whistleblowers.”\textsuperscript{32}

However, the SEC’s discretion in reducing an award through this enhanced review would not allow the Commission to reduce the award to below $30 million or below the 10\% statutory minimum.\textsuperscript{21} One factor the SEC would be authorized to consider is the impact that an exceedingly large award might have on the Investor Protection Fund (“IPF”) that the Commission has established for the payment of whistleblower awards. Without such a change in the program rules, the SEC explains, such large awards “could substantially diminish the IPF, requiring the Commission to direct more funds to replenish the IPF rather than making that money available to the United States Treasury, where they could be used for other important public purposes.”\textsuperscript{22}

\textbf{G. Whistleblower Awards to Date.}

As of this writing, the SEC Office of the Whistleblower has issued awards totaling $387 million in monetary rewards to 72 individuals. Awards have ranged from less than $50,000 to tens of millions of dollars, including a payout of a combined $50 million to two whistleblowers in the first awards issued by the SEC in 2019.\textsuperscript{23} Appendix A to this SEC Whistleblower Practice Guide lists all SEC whistleblower awards under the whistleblower program in the nearly nine years of its existence. The awards table, organized chronologically, highlights important information about particular award determinations, including a number of “firsts” in the SEC’s handling of award applications.

As the SEC orders listed in Appendix A show, the SEC discloses limited information when issuing awards in order to protect the identity of whistleblowers, 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 claims for whistleblower awards do not cite the underlying enforcement action, do not disclose the name of the respondent, and disclose little about the nature of the entity or the details of the misconduct involved. For this reason, practitioners will need to read the SEC orders carefully in order to use them effectively as guides to participation in the whistleblower program and as legal precedent for use in preparing tips, assisting the SEC in any ensuing investigations, and claiming awards.

The awards listed in Appendix A reflect a very encouraging first nine 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 forward with helpful information about securities violations, honoring its commitment to reward individuals who come forward with helpful information about securities violations, sometimes at great risk to their careers. Awards to date demonstrate that the SEC is willing to:

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

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

H. Claiming a Whistleblower Award

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

It bears noting that Proposed Rule 21F-4(d)(3) contemplates that the Commission will pay out awards to whistleblowers for monetary sanctions collected as a result of deferred prosecution agreements, non-prosecution agreements, and settlement agreements. Because in those instances there may be no underlying judicial or administrative proceeding, there is similarly no notice of covered action to be posted in connection with the collection of monetary sanctions. For these reasons, the SEC has proposed conforming amendments to Rule 21F-11(b), which provide that “the time period for filing a claim for an agreement covered by this [Proposed Rule 21F-4(d)(3)] would run from earliest public availability of the instrument reflecting the arrangement if evidenced by a press release or similar dated publication notice, or, absent such publication notice, the date of the last signature necessary for the agreement.” This rule, if adopted, will place a new responsibility on whistleblowers and their counsel to monitor not only notices of covered actions for enforcement actions that may yield awards, but also media reports and press releases that discuss deferred prosecution agreements, non-prosecution agreements, and settlement agreements entered into by the Commission, the DOJ, and state attorneys general.

Once a Notice of Covered Action is posted, anyone claiming entitlement to a whistleblower award in connection with the

“Whistleblowers are crucial to our enforcement efforts.”

– Commissioner Robert J. Jackson, Jr.
action has 90 days to apply for an award. Each Notice of Covered Action names the defendants or respondents in the SEC enforcement action, provides links to relevant documents such as administrative or court complaints and settlement orders, and clearly lists the date of the notice and the 90-day deadline for the submission of claims for awards. This deadline is critical. A whistleblower must apply for an award by submitting a completed Form WB-APP to the Office of the Whistleblower by midnight on the claim due date. Whistleblowers and their counsel need to be vigilant in monitoring the list of Cover Actions, which the SEC updates monthly at the end of each calendar month, and in submitting timely claims for awards using the WB-APP form that is available on the SEC website.

The SEC has consistently denied claims where the claimant has failed to meet the 90-day deadline for submitting a WB-APP form. On July 23, 2014, for example, the SEC denied a whistleblower’s claims for awards in connection for two covered actions that the whistleblower had submitted more than three months after the expiration of the 90-day claims window. The SEC found the claimant’s explanation that the claimant was unaware of the Notices of Covered Actions on the SEC’s website fell short of the “extraordinary circumstances” needed under Rule 21F-8(a) to justify the SEC’s waiver of the filing deadline.

In another case in 2017, the claimant went even further in arguing for waiver of the deadline, insisting that the SEC not only should have posted the Notice of Covered Action on its website, but also should have notified him or her personally with specific instructions about how to apply for an award. Not surprisingly, the SEC rejected this argument, noting the even-handedness and reasonableness of the notice mechanism provided under the rules. The SEC’s repeated denial of award applications submitted after the 90-day deadline has not deterred untimely filers in challenging the Commission’s denial of their claims, but the SEC has so far refused arguments put forth by claimants to justify missing the deadline.

Although whistleblowers must meet a strict deadline for filing their claims for awards, there is no such deadline by which the Commission must process those claims. Concerns about a growing backlog in the SEC’s processing of award application began to be raised within the first several years of the program, and the backlog has continued to increase. The Wall Street Journal reported in April 2018 that the one-year backlog that had slowed the process in its early years had grown to more than two years by the end of 2017. Although this has understandably been a source of frustration for whistleblowers, the Office of the Whistleblower has consistently acknowledged the problem, explained the factors contributing to it over the years, and, in the view of the authors, done its best to expedite processing of a fast-growing number of award applications without a commensurate increase in staffing. Certain of the rules changes that the Commission proposed in June 2018, if adopted, will likely go a long way towards allowing the SEC to reduce the backlog and process new applications more promptly.

Thus far, no whistleblower has been successful in overturning a denial of their award application by the SEC Office of the Whistleblower. A group of whistleblowers recently brought their challenge to the SEC’s denial of their award applications before the U.S. Court of Appeals for the Second Circuit. Kilgour v. Sec. & Exch. Comm’n, 942 F.3d 113 (2d Cir. 2019). The Second Circuit affirmed the SEC’s decision. The court found for one whistleblower that although he may have provided useful information to the SEC, it did not lead to an award because the SEC did not use the information. Id. at 121–23. For two more whistleblowers, the court affirmed the SEC’s denial of an award upon finding that the SEC already had the information they provided by the time they submitted a Form TCR. Id. at 124–25.

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. Individuals who contact lawyers in search of legal representation before the SEC Whistleblower Program fall into this category at least as often as not, and in many cases are still reeling from a recent and sudden firing when they first meet with a lawyer. Some contact a lawyer for the purpose of challenging their wrongful termination, and learn only during the initial consultation that the conduct that they reported to their company, leading to their termination, could form the basis for an important, timely and potentially lucrative tip to the SEC.

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

The Dodd-Frank Act and the SEC 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 (SOX) to make them more favorable to employees; creates a new cause of action that a whistleblowing employee can bring in federal court; and, as implemented by the SEC’s rules for the whistleblower program, allows the Commission to use its enforcement powers to hold employers accountable for retaliation against whistleblowers. The SEC has invoked this power in
three 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-damaging retaliation by an employer, the goal of correcting that injustice and obtaining prompt and just compensation can be just as important as, if not more important than, submitting a tip to the SEC in hopes of earning an award that may not come for years if at all. 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 that it will penalize employers for using such agreements to impede whistleblowers from participating in the whistleblower program.

A. Employee Protections Under SOX

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

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

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

Dodd-Frank and a 2014 Supreme Court decision have also widened the range of employers whose employees are protected by SOX. Section 929A of the Dodd-Frank Act expanded SOX 806’s coverage to include subsidiary entities whose financial information is included in a publicly traded parent’s consolidated financial statements. 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 Section 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).

An employee seeking relief from retaliation under SOX must file the claim with OSHA, which investigates the claim and

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

– Mary Jo White, former SEC Chair
issues a determination. SOX claims are further adjudicated by administrative law judges, or, if the DOL has not issued a final decision within 180 days, in federal district court if the claimant decides to pull the matter from the DOL and refile it there. 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.

B. Employee Protections Under Dodd-Frank

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

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

A Dodd-Frank retaliation claim may be filed directly in federal court within three years “after the date when facts material to the right of action are known or reasonably should have been known to the employee” (but subject to a maximum of six years). 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).

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

The courts were initially divided as to whether Dodd-Frank’s anti-retaliation provisions provided protection to employees who reported perceived securities violations internally to their employers, or provided protection only to those who reported the violations to the SEC. The confusion arose from unclear statutory language. In a show of support for whistleblowers, the SEC made clear its position that Dodd-Frank protected internal reporting since the start of the whistleblower program. In an early comment to the program rules, the SEC stated, “[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.” 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.

On February 21, 2018, however, the Supreme Court ruled unanimously that the statutory definition of the word “whistleblower” limited the anti-retaliation protections of Section 922 to those who have reported to the SEC. Digital Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018). In the June 2018 Proposed Rules, the SEC proposed a rule (Proposed Rule 21F-2(a)) that would embody the Supreme Court’s decision, which is binding on the SEC as a federal agency. In July 2019, the U.S. House of Representatives passed H.R. 2515, known as the Whistleblower Protection Reform Act of 2019, which would, among other things, effectively reverse Digital Realty and protect whistleblowers who only reported their concerns internally. On September 23, 2019, a group of senators introduced S. 2529, the Whistleblower Programs Improvement Act, which would similarly fill the gap in protections caused by Digital Realty. As of this writing, the Senate has not brought the bill to the floor for a vote.

While widely viewed as a victory for the management bar, unless and until the matter is resolved legislatively, the Supreme Court’s Digital Realty decision will likely frustrate one of the primary policy goals that corporate interests had pursued during the development of the SEC whistleblower program. While the SEC was crafting rules to implement the program, several corporations weighed in requesting that the Commission put in place rules designed to encourage or even require whistleblowers to first utilize internal whistleblower programs before reporting to the SEC. Because the Supreme Court’s decision will limit the generous remedies available under the Dodd-Frank anti-retaliation provision to those employees who report to the SEC, employees will now be incentivized to report to the Commission before they report internally and face the prospect of retaliation. These incentives to report externally could lessen the effectiveness of internal compliance programs and thus degrade their ability to help management identify and address securities violations without facing full-blown SEC investigations and potential sanctions.

C. Extraterritorial Application of Whistleblower Protections.

As the Office of the Whistleblower’s statistics demonstrate, it is not uncommon for whistleblowers to discover securities violations while working overseas for their corporate employers – i.e., in places falling outside of the U.S. government’s territorial jurisdiction. Whether and to what extent an overseas
D. Enforcement of Anti-Retaliation Provisions by the SEC

Both SOX and the Dodd-Frank Act allow individuals who have suffered unlawful retaliation to prosecute their own legal actions against employers, but the SEC Whistleblower Program rules allow the SEC also to sanction employers for violations of the Dodd-Frank anti-retaliation provisions through the Commission’s own enforcement actions. See 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.111 The whistleblower later received an award of $600,000 for the information he provided to the SEC.112

On September 29, 2016, the SEC issued its only penalty so far against a company for retaliating against a whistleblower in a “stand-alone” case of retaliation in which the Commission did not also impose a penalty for substantive securities violations. In that case, a casino-gaming company known as International Game Technology (IGT) agreed to pay $500,000 “for firing an employee with several years of positive performance reviews because he reported to senior management and the SEC that the company’s financial statements might be distorted.”113 The SEC found that the employee had been “removed from significant work assignments within weeks of raising concerns about the company’s cost accounting model” and was terminated just three months later.

On January 19, 2017, the SEC announced the settlement of charges that a financial service company, HomeStreet, Inc., had engaged in misconduct by impeding whistleblowers who reported to the SEC.114 The Commission found that in response to an SEC inquiry, HomeStreet management officials had attempted to investigate and uncover the identity of the whistleblower, including by interrogating employees as to whether they or their colleagues were the “whistleblower.” These SEC actions have sent a strong signal to employers that the SEC will take action when they retaliate against whistleblowers. Employers that engage in unlawful retaliation risk having to defend themselves not only against lawsuits and administrative charges filed by the employees, but also against costly SEC investigations and enforcement actions that can lead to significant penalties over and above any amounts employees
Rule 21F-17(a), which states: the whistle on securities violations whistleblowers is found in E. Employer-Imposed Agreements That Impede continue to be a high priority for us." SEC's whistleblower program and bringing retaliation cases will of the anti-retaliation protections is critical to the success of the advocate." at the SEC increasingly see ourselves as the whistleblower's of securities lawyers in April 2015, when she explained that "we that the Commission is allowed to do so by law. This gives retaliation against whistleblowing employees to the extent appropriate, but also by penalizing (and hopefully deterring) two ways – not only by providing financial rewards where 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.

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

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

E. Employer-Imposed Agreements That Impede Whistleblowers

Another very important protection for employees who blow the whistle on securities violations 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 to sign when exiting a company, as these almost invariably include confidentiality provisions and non-disparagement provisions. The rule has no parallel in the Internal Revenue Service’s whistleblower program or under the False Claims Act, although courts have refused to enforce confidentiality agreements in the context of the False Claims Act. 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.

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. The SEC began addressing these concerns in late 2013 or early 2014, and since that time has taken a series of enforcement actions that have prompted companies nationwide to rewrite their employee agreements to bring them into compliance with Rule 21F-17(a).

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

I understand that in order to protect the integrity of this review I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.
Without admitting to any rule violation, KBR agreed to pay a $130,000 fine and change its confidentiality agreement language going forward. The new language would read:

> Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures.122

Following the KBR action, the SEC stepped up its efforts to combat agreements that similarly impeded whistleblowers, and broadened its targets to include additional types of provisions that could dissuade employees from approaching the SEC with concerns about securities violations. In her April 2015 speech on “The SEC as the Whistleblower’s Advocate,” SEC Chair White noted that “a number of other concerns have come to our attention, including that some companies may be trying to require their employees to sign agreements mandating that they forego any whistleblower award or represent, as a precondition to obtaining a severance payment, that they have not made a prior report of misconduct to the SEC. You can imagine our Enforcement Division’s view of those and similar provisions under our rules.”123

The SEC has since taken a number of additional enforcement actions targeting such employer-imposed agreements. These include the following:

- 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 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.”124
- 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.”125
- 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.”126
- 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.”127
- 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.”128
- 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.”129
- 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.”130
- 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 rewards or risk losing their severance payments and other post-employment benefits.”131

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 a letter from Katz, Marshall & Banks to the SEC told the Commissioners in 2013, the attempt to require employees to waive their right to an SEC award was among the most common and insidious impediments that employers had contrived to discourage employees from communicating with the Commission. 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.

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 leaves them free to challenge the retaliation, obtain just compensation by settling the dispute prior to or during litigation, and then still participate in the SEC Whistleblower Program, if they so choose, without fear that an employer will be able to sue them and claw back whatever severance or settlement amount it may have paid them.

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

- Determine whether the client has original information about violations of securities laws or the Foreign Corrupt Practices Act.
- Assess the seriousness of the alleged violations by reviewing past SEC regulatory and enforcement actions, which are available on the SEC’s website and searchable by topic, violation, company and other parameters.
- Where needed, assess the potential tip with the help of an expert in the appropriate specialty, such as securities trading or public accounting. Do the work necessary to find experts in whatever subspecialty is needed, such as broker-dealer compliance, revenue recognition, loan loss reserves, alternative trading platforms, or the intricacies of accounting standards applicable to the particular industry or sector whose activities are in question.
- Determine whether and to what extent your client’s information might advance the SEC’s current enforcement agenda, which is not a constant. The SEC’s website contains a great deal of information about Commission priorities, including enforcement actions, press releases and task-force reports. Speeches by SEC commissioners and leading officials can also shed light on the types of information that may be of greatest interest to the SEC.
- Make sure that your client will be providing information “voluntarily,” prior to receiving a request for the same from the SEC or another agency or self-regulatory organization (“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 of the “voluntary” requirement in one case in 2014 as discussed above.
• Prepare the client’s submission to the SEC with an emphasis on facts about which the client has “independent knowledge” as defined in the final rules above. Review the client’s position, job duties, and how he came into possession of his information to determine whether he falls within one of the groups of individuals who are presumptively excluded from the program for lack of “independent knowledge.” This would include attorneys, compliance and audit personnel, and officers or directors who received the information in connection with corporate-governance responsibilities.

• If the client falls into one of the excluded categories, see 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. And as discussed above, your client may have legal protections against retaliation for internal reporting under SOX even if not directly under the anti-retaliation provisions of the Dodd-Frank Act.

• Remember that your client, through you, may file his tip anonymously as long as you follow the procedures set forth in the rules for anonymous submissions. This can certainly help prevent retaliation against your client, especially if he is determined not to report internally for fear of retaliation. Anonymous reporting can also provide your client with greater confidence that his identity will not become known to future employers and thus pose future risk to his career.

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

• Remember that the SEC receives thousands of tips per year, and that it is important to make sure your client’s TCR is as compelling as possible. If the lawyers and accountants who review tips in the Office of the Whistleblower and the Office of Market Intelligence cannot understand your client’s submission on a first read, it will not likely end up at the top of the stack. Present your facts and analysis clearly and include with the TCR 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 useful analysis that you, your client, or an expert you retain can apply to other facts, even publicly available ones, in a way that will assist SEC lawyers in an investigation. Keep in mind that your submission cannot be “exclusively derived” from certain public sources, but that SEC investigators will accept and appreciate your analysis of publicly available information if the analysis helps lead the SEC to information that is not publicly available or provides insights that are not generally known. One successful tip discussed above appears to have consisted entirely of independent analysis and no independent knowledge.

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

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

• If you are an individual thinking about submitting a tip to the SEC, you may want to consult with attorneys who specialize in representing whistleblowers before the SEC, and who have 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 in submitting your tip. The statute of limitations for securities violations is generally five years, but beyond the risk of submitting a tip that the SEC is time-barred from pursuing, an unreasonable delay in submitting a tip can negatively affect the size of the whistleblower’s reward. Promptly submitting a tip also reduces the chances of a competing whistleblower submitting the same information first. As of this writing, the SEC has proposed interpretive guidance that it will consider a delay beyond 180 days “presumptively unreasonable,” barring unusual facts and circumstances.

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

… And After You Tip.

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

- 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.

- Related to the prior practice point, remember that the primary purpose of the SEC Whistleblower Program is to assist the Commission in enforcing the nation’s securities laws, and that the financial incentives the program provides are designed to further that purpose. The whistleblower’s role is to submit information she believes will be helpful to the SEC in bringing a successful enforcement action, hopefully one that qualifies as a covered action and entitles the whistleblower to an award. The role of the SEC and its staff is to investigate the information if warranted, to take action if appropriate, and to impose sanctions in an amount that the facts, the law, and the SEC’s enforcement priorities warrant. The whistleblower 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.” Whistleblowers should also monitor media reports about potential deferred prosecution, non-prosecution, and settlement agreements in light of the SEC’s June 2018 Proposed Rules providing that whistleblower awards will be made on the basis of those types of administrative actions, and making it whistleblowers’ responsibility to monitor SEC press releases and media reports to determine whether a qualifying agreement has been announced publicly (thereby triggering the 90-day period of time to file an application for an award).
Lisa J. Banks and Michael A. Filoromo are partners with Katz, Marshall & Banks, LLP, a whistleblower and employment law firm based in Washington, D.C. They specialize in the representation of whistleblowers in tips submitted to the Securities and Exchange Commission’s Office of the Whistleblower, in qui tam lawsuits filed under the False Claims Act, in tips filed with the Commodity Futures Trading Commission, and in tips submitted to the Internal Revenue Service’s whistleblower program. They also represent employees in whistleblower-retaliation cases filed under the Sarbanes-Oxley Act, the Dodd-Frank Act and other federal and state laws.

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


For a comprehensive guide to the CFTC Whistleblower Program, see Lisa J. Banks’ CFTC Whistleblower Practice Guide, a sister publication to this SEC Whistleblower Practice Guide that is also published annually by Katz, Marshall & Banks, LLP. The 2020 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, commodities such as currencies, cryptocurrencies and alternative investment products such as derivatives and swaps. Although the CFTC program has attracted far fewer whistleblower tips than the SEC program, 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.

5The 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 the final rules and Adopting Release.


82019 Annual Report at 25.


12Section 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.


15See also Rule 21F-8(a), which expressly allows the SEC, “upon a showing of extraordinary circumstances,” to waive any of the procedures for submitting tips and claiming an award that are set forth in Rules 21F-9 through 21F-11.

16See 2018 Proposed Rules.

17See 2018 Proposed Rules at 97.

18Id.

19Id. at 103.

20Id. at 104.

21Id. at 96.

22Id. at 97.

23The Proposed Rules make clear that the SEC will not accept “mere[] observations drawn from publicly available information” as “independent analysis” qualifying for an award. The Commission’s proposed interpretive guidance on “independent analysis” explains:

Examples [of inadequate “independent analysis”] would be where the whistleblower points to common hallmarks of fraud on the face of the public materials (e.g., impossibly high, guaranteed investment returns or extravagant claims in press releases) or to public discourse (e.g., discussions on a public message board) in which investors or others are alleging a fraudulent scheme. Further, it would not matter whether the individual relied on only one source (e.g., a single website) to collect the publicly available information that demonstrates the hallmarks of the fraud, or whether the individual relied on a multitude of different publicly available sources to collect the information. These tips generally would not qualify as “independent analysis” under our interpretation because
the whistleblower’s essential contribution is merely that he or she directed the staff to publicly available information that gives rise to an inference of violations; the whistleblower’s tip has not “bridged the gap” between public information that does not itself provide a basis for inferring a possible violation and a conclusion that a violation may have occurred. Further, we believe that this same result would generally obtain whether the whistleblower directs the staff to a single piece of publicly available information or the whistleblower aggregates information from multiple different sources. If the violations can be inferred by the Commission from the available and/or assembled publicly available information, without more, then the whistleblower has not contributed significant independent information that reveals the violations.

24 Id. at 107–08.


29 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).


33 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.

34 As reflected in a November 2017 SEC award determination, the Commission takes the “original source” requirement seriously and is hostile to applications from persons whom a whistleblower retained to assist that whistleblower in communicating information to the SEC. See Order Determining Whistleblower Award Claim (Nov. 30, 2017), available online at https://www.sec.gov/rules/other/2017/34-82181.pdf, at 10–12. In that case, two claimants had been hired by a whistleblower to prepare an expert report on behalf of that whistleblower, which the whistleblower then provided to the Commission. The SEC eventually gave an award of $8 million to the whistleblower, but it refused awards to the two experts who also applied for a share of the award in the same covered action, reasoning that the experts were not the original source of the information but rather were working on behalf of the whistleblower.


As discussed above, a similar 120-day rule applies to cases in which a whistleblower seeks an award based on information passed to the SEC by another federal agency. In such cases, the SEC will treat the whistleblower as “first in line” as of the time he or she submitted the information to the other federal agency only if the whistleblower submits the same information with 120 days of providing the information to the other federal agency. 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.


39 See id.

40 See, e.g., Order Determining Whistleblower Award Claim (Mar. 19, 2018), available online at https://www.sec.gov/rules/other/2018/34-82897.pdf, at 7–9 (emphasizing the importance of the “leads to” requirement and underscoring the SEC’s strong reluctance ever to waive that requirement). The SEC website provides a complete list of orders approving and denying awards, many of which turn on the “leads to” requirement, at http://www.sec.gov/about/offices/owb/owb-final-orders.shtml.


42 See 2018 Proposed Rules at 96.

43 Id. at 108.

44 Id.

45 Id. at 108–09.

46 Id. at 109.

47 See Order Determining Whistleblower Award Claim (Apr. 5, 2016),


47Id. at 6–12.


53Id.

54Id. at 19.

55Id. at 17.


58See 2018 Proposed Rules at 10.

59See id. at 30–31 (“In reaching this determination, we would look to the complaint in the action, the overall monetary sanctions recovered (e.g., are they principally tied to a different whistleblower program for which Congress provided an award mechanism), and the court’s final order to assess which award program has the closer relationship to the overall case”).

60Id. at 32.


63In an October 2017 award determination granting more than $1 million, the Commission exercised its discretionary power to waive the requirement that a whistleblower have submitted a declaration to the SEC under penalty of perjury. See Order Determining Whistleblower Award Claim (Oct. 12, 2017), available online at https://www.sec.gov/rules/other/2017/34-61857.pdf, at 2 n. 1 (noting that this failure was the result of the SEC’s online portal and that the claimant promptly submitted a declaration once the issue was flagged for him by the SEC).


68SEC Form TCR – Tip, Complaint or Referral – and related instructions are available online at https://www.sec.gov/files/formtcr.pdf.


77See https://www.sec.gov/search/search.htm.


82See 2018 Proposed Rules at 56–57.


88See 2018 Proposed Rules at 11.

89Id.

90The Proposed Rules contain an extensive discussion of the mechanics of the proposed downward adjustments to whistleblower awards and the SEC’s view of the policy considerations supporting them. See Proposed Rules at 10–13 and at 43–56.

91Id. at 11.

92Id. at 43–44.


94The 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. The SEC has published on its website an easy-to-read flow chart describing the program, with attention to the steps in the award application and determination process. See https://www.sec.gov/page/whistleblower-

95See 2018 Proposed Rules at 22.


99See Order Determining Whistleblower Award Claim (Mar. 26, 2019), available online at https://www.sec.gov/rules/other/2019/34-85412.pdf, at 12–14, in which the SEC denied an award to a claimant who failed to file an application until 15 months past the deadline because he or she had not seen the Notice of Covered Action and was “under the impression that the Commission would contact claimants about filing an award application.” In denying the claimant an award, the Commission explained that it would waive the 90-day deadline only under “extraordinary circumstances” that caused a failure to file on time for reasons “beyond the claimant’s control.”


101The 2019 Annual Report, at 12–16, 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.

102See 2018 Annual Report at 26, discussing proposed rules changes that would allow the SEC to reduce the backlog significantly, and to bar repeat filers of frivolous applications from submitting future applications. As of this writing, the SEC has proposed Rule 21F-18 to establish a “summary disposition process” through which the Commission could deny applications in a more streamlined fashion. See 2018 Proposed Rules at 14–16. The proposed summary disposition process would apply to instances involving untimely award applications, noncompliance with TCR submission requirements, information that was never provided to or used by SEC staff handling the action or investigation, and noncompliance with the requirements governing the submission of supplementary information to the SEC. See id.


104OSHA 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 Statutes 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. 23, 2016), available online at https://www.whistleblowers.gov/sites/default/files/whistleblowers/whistleblower acts-desk reference.pdf


108See 2018 Proposed Rules at 60–72. The new definition of “whistleblower” would confer whistleblower status on an individual who provides the SEC with information “in writing” relating to possible violations of federal securities laws. The SEC noted in the proposed rules that Digital Realty did not require a uniform manner of providing information to the SEC, but the Commission nevertheless opted to maintain the “in writing” requirement for both award eligibility and Section 922’s anti-retaliation protections. The Commission also stated that in the award eligibility context the requirement facilitated the SEC staff’s ability to track its use of information; for anti-retaliation consideration, the SEC opined that, “[i]n the recognition of additional manners of reporting for anti-retaliation purposes (such as placing a telephone call), the Commission’s staff could be ensnared by disputes in private anti-retaliation lawsuits over what information was provided to whom on what dates. Requiring that any reporting be done in writing obviates these difficulties.” See id. at 64.


116On 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 Anti-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.


119See id. at 3.


130 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.

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


134 See id. at 4–8.

APPENDIX A
SEC Whistleblower Awards Through January 22, 2020

Each award is issued through an “Order Determining Whistleblower Award Claim.” The SEC also issues 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](https://www.sec.gov/news/pressreleases). Most press releases announcing whistleblower awardshave links to the accompanying order at the upper right of the page. The orders granting and denying award applications are also listed, by date only, on the SEC Office of the Whistleblower website at [https://www.sec.gov/about/offices/owb/owb-final-orders.shtml](https://www.sec.gov/about/offices/owb/owb-final-orders.shtml).

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

<table>
<thead>
<tr>
<th>Date</th>
<th>Release Nos.</th>
<th>Award Total</th>
<th>%</th>
<th>Allocation Among Claimants</th>
<th>Notes from SEC Press Releases and Orders Determining Awards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aug. 21, 2012</td>
<td>67698; 2012-162</td>
<td>$50,000</td>
<td>30%</td>
<td>All to single claimant.</td>
<td>Whistleblower helped prevent “multi-million dollar fraud” from “ensnaring additional victims”; SEC later paid an additional $150,000 after further collections, for a total of $200,000.</td>
</tr>
<tr>
<td>June 12, 2013</td>
<td>69749; no press release(^i)</td>
<td>$125,000</td>
<td>15%</td>
<td>5% of collected proceeds to each of three claimants.</td>
<td>In two award announcements concerning a June 12 Order, the SEC announced payment to three whistleblowers a total of 15% of amounts that SEC collected, and also of amounts DOJ collected in related action, against sham hedge fund.</td>
</tr>
<tr>
<td>Aug. 30, 2013</td>
<td>70293; 2013-169</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sept. 30, 2013</td>
<td>70544; 2013-209</td>
<td>$14 million</td>
<td>30%</td>
<td>All to single claimant.</td>
<td>Information allowed recovery of “substantial investor funds . . . more quickly than otherwise would have been possible.”</td>
</tr>
<tr>
<td>Oct. 30, 2013</td>
<td>70775; 2013-231</td>
<td>$150,000</td>
<td>30%</td>
<td>All to single claimant.</td>
<td>SEC investigated fraud scheme and “obtain emergency relief before additional investors were harmed.”</td>
</tr>
<tr>
<td>June 3, 2014</td>
<td>72301; 2014-113</td>
<td>$875,000</td>
<td>30%</td>
<td>15% of collected sanctions to each of two claimants.</td>
<td>Information allowed SEC to “bring a successful enforcement action in a complex area of the securities market.”</td>
</tr>
<tr>
<td>July 22, 2014</td>
<td>72652</td>
<td>?</td>
<td>30%</td>
<td>15%, 10%, and 5% to three claimants.</td>
<td>Amount of award not disclosed by SEC.</td>
</tr>
<tr>
<td>July 31, 2014</td>
<td>72727; 2014-154</td>
<td>$400,000</td>
<td>25%</td>
<td>All to single claimant.</td>
<td>SEC waived “voluntary” requirement where employee tried diligently to have company address violations.</td>
</tr>
</tbody>
</table>


\(^i\)The SEC did not report the percentage in its press release or accompanying order. However, the whistleblower later sat for a newspaper interview and reported that he had received 25% of a $1.6 million penalty. See J. Nocera, The Man Who Blew the Whistle, N.Y. Times (Aug. 18, 2014), [https://www.nytimes.com/2014/08/19/opinion/joe-nocera-the-man-who-blew-the-whistle.html](https://www.nytimes.com/2014/08/19/opinion/joe-nocera-the-man-who-blew-the-whistle.html). At around this time the SEC began redacting the percentage from most orders prior to public release.
<table>
<thead>
<tr>
<th>Date</th>
<th>Release Nos.</th>
<th>Award Total</th>
<th>%</th>
<th>Allocation Among Claimants</th>
<th>Notes from SEC Press Releases and Orders Determining Awards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aug. 29, 2014</td>
<td>72947; 2014-180</td>
<td>$300,000</td>
<td>20%</td>
<td>All to single claimant.</td>
<td>First award to employee working in compliance and audit function; also first application of “120-day” exception to exclusion of such employees from program.</td>
</tr>
<tr>
<td>Sept. 22, 2014</td>
<td>73174;2014-206</td>
<td>$30 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Substantial award issued to a foreign resident working outside U.S. Percentage not disclosed but award decreased by “unreasonable delay” in reporting to SEC.</td>
</tr>
<tr>
<td>March 2, 2015</td>
<td>74404; 2015-45</td>
<td>Between $475,000 &amp; $575,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>First award to company officer receiving information in compliance role; waited 120 days after reporting internally. Percentage not disclosed.</td>
</tr>
<tr>
<td>Apr. 22, 2015</td>
<td>74781; 2015-73</td>
<td>$1.4 to $1.6 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Second award to an employee working in compliance function and first application of “substantial injury” exception to exclusion of such employees from program.</td>
</tr>
<tr>
<td>Apr. 28, 2015</td>
<td>74826; 2015-75</td>
<td>$600,000 plus</td>
<td>30%</td>
<td>All to single claimant.</td>
<td>First award issued in part in connection with retaliation case. Percentage set at 30% in light of “unique hardships” claimant experienced for reporting to SEC.</td>
</tr>
<tr>
<td>July 17, 2015</td>
<td>75477; 2015-150</td>
<td>$3 million plus</td>
<td>?</td>
<td>All to single claimant.</td>
<td>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.</td>
</tr>
<tr>
<td>Sept. 28, 2015</td>
<td>76000; no press release</td>
<td>?</td>
<td>20%</td>
<td>11% and 9% to two claimants.</td>
<td>Amount of award not disclosed by SEC.</td>
</tr>
<tr>
<td>Sept. 29, 2015</td>
<td>76025; no press release</td>
<td>?</td>
<td>28%</td>
<td>All to single claimant.</td>
<td>Amount of award not disclosed by SEC.</td>
</tr>
<tr>
<td>Nov. 4, 2015</td>
<td>76338; 2015-252</td>
<td>$325,000 plus</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Percentage not disclosed but reduced by “unreasonable delay” that allowed wrongdoers to obtain additional ill-gotten gains.</td>
</tr>
<tr>
<td>Jan. 15, 2016</td>
<td>76921; 2016-10</td>
<td>$700,000 plus</td>
<td>?</td>
<td>All to single claimant.</td>
<td>First award for “independent analysis” by an “industry expert,” whose information significantly contributed to successful enforcement action.</td>
</tr>
<tr>
<td>Mar. 8, 2016</td>
<td>77322; 2016-41</td>
<td>$1.93 million</td>
<td>?</td>
<td>$1.8 million to Claimant 1 and $65,000 to each of Claimants 2 &amp; 3.</td>
<td>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.</td>
</tr>
<tr>
<td>Date</td>
<td>Release Nos.</td>
<td>Award Total</td>
<td>%</td>
<td>Allocation Among Claimants</td>
<td>Notes from SEC Press Releases and Orders Determining Awards</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------------------</td>
<td>--------------------------------------------------</td>
<td>-----</td>
<td>-----------------------------</td>
<td>----------------------------------------------------------</td>
</tr>
<tr>
<td>Apr. 5, 2016</td>
<td>77530; no press release</td>
<td>$275,000 or more, offset by sanctions against claimant</td>
<td>?</td>
<td>All to single claimant.</td>
<td>The $275,000 award, issued in part for sanctions in a related criminal action, “shall be subject to offset for any monetary obligations” remaining unpaid as part of an earlier final judgment against claimant, probably in a related action. SEC denied award to second claimant upon determining that he/she had not provided any information which led to successful enforcement of the covered action.</td>
</tr>
<tr>
<td>May 13, 2016</td>
<td>77833; 2016-88</td>
<td>$3.5 million plus</td>
<td>?</td>
<td>All to single claimant.</td>
<td>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 be first award issued in connection with a whistleblower’s disclosures of FCPA violations.</td>
</tr>
<tr>
<td>May 17, 2016</td>
<td>77843; 2016-10</td>
<td>$5 to $6 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Whistleblower’s “detailed tip led the agency to uncover securities violations that would have been nearly impossible for it to detect[.]”</td>
</tr>
<tr>
<td>May 20, 2016</td>
<td>77873; 2016-11</td>
<td>$450,000 plus</td>
<td>?</td>
<td>Awarded jointly to two claimants.</td>
<td>SEC paid each claimant half of the amount awarded.</td>
</tr>
<tr>
<td>June 9, 2016</td>
<td>78025; 2016-13</td>
<td>$17 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant’s information, provided in one or more TCRs and in subsequent communications, directed SEC staff to new information that conserved SEC’s time and resources, helped staff collect evidence, “substantially advanced” investigation, and thus “led to” successful enforcement action” for securities violations already under investigation. SEC denied applications of four other claimants.</td>
</tr>
<tr>
<td>Aug. 30, 2016</td>
<td>78719; 2016-173</td>
<td>$22.437 million</td>
<td>28%</td>
<td>All to single claimant.</td>
<td>The SEC did not disclose the percentage, but the whistleblower’s counsel informed the media that his client had received 28% of sanctions against Monsanto. The SEC’s press release announced that this award pushed the program total to date above $100 million mark. The SEC referenced the claimant’s culpability in the misconduct in explaining SEC’s decision to make the second most sizable award to date.</td>
</tr>
<tr>
<td>Sept. 20, 2016</td>
<td>78881; 2016-17</td>
<td>$4 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant did not contest award.</td>
</tr>
<tr>
<td>Date</td>
<td>Release Nos.</td>
<td>Award Total</td>
<td>%</td>
<td>Allocation Among Claimants</td>
<td>Notes from SEC Press Releases and Orders Determining Awards</td>
</tr>
<tr>
<td>------------</td>
<td>--------------</td>
<td>--------------</td>
<td>---</td>
<td>-----------------------------</td>
<td>-------------------------------------------------------------</td>
</tr>
<tr>
<td>Nov. 14, 2016</td>
<td>70294; 2016-237</td>
<td>$20 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Sizable award upwardly adjusted after claimant contested preliminary amount. Award will include amounts collected in future. Award went to a 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.</td>
</tr>
<tr>
<td>Dec. 5, 2016</td>
<td>79464; 2016-255</td>
<td>$5 million</td>
<td>?</td>
<td>All to single claimant; two other claimants denied awards.</td>
<td>SEC rejected an unsuccessful claimant’s arguments that 1) the claimant’s information “should have caused an investigation,” and 2) the SEC’s failure to provide the claimant with “actual notice” of the Covered Action, rather than simply post it on the OWB website list of covered actions, caused the claimant to submit application for an award after 90-day deadline elapsed.</td>
</tr>
<tr>
<td>Dec. 9, 2016</td>
<td>79517; 2016-260</td>
<td>$900,000 plus</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Whistleblower’s tip led to “multiple actions against wrongdoers.” Actions were consolidated for purpose of award determination; claimant received award based on sanctions collected in both, including proceeds collected after date of order.</td>
</tr>
<tr>
<td>Jan. 6, 2017</td>
<td>79747; 2017-1</td>
<td>$5.5 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>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.</td>
</tr>
<tr>
<td>Jan. 23, 2017</td>
<td>79853; 2017-27</td>
<td>$7 million</td>
<td>?</td>
<td>One claimant received $4 million; two others shared $3 million.</td>
<td>Information submitted by claimant awarded $4 million provided impetus for investigation of “investment scheme that defrauded hundreds of investors, many . . . unsophisticated.” Two claimants awarded $3 million jointly submitted new information while investigation underway, significantly contributing to successful enforcement action. All claimants to receive additional award moneys based on additional sanctions recovered after date of order.</td>
</tr>
<tr>
<td>Date</td>
<td>Release Nos.</td>
<td>Award Total</td>
<td>%</td>
<td>Allocation Among Claimants</td>
<td>Notes from SEC Press Releases and Orders Determining Awards</td>
</tr>
<tr>
<td>--------------</td>
<td>--------------</td>
<td>-------------</td>
<td>-----</td>
<td>-----------------------------</td>
<td>-----------------------------------------------------------</td>
</tr>
<tr>
<td>Feb. 28, 2017</td>
<td>80115; no press release</td>
<td>?</td>
<td>20% of</td>
<td>All to single claimant.</td>
<td>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.”</td>
</tr>
<tr>
<td>Apr. 25, 2017</td>
<td>80521; 2017-84</td>
<td>$4 million</td>
<td>?</td>
<td>All to single claimant.</td>
<td>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” under Rule 21F-3(b)(1).</td>
</tr>
<tr>
<td>May 2, 2017</td>
<td>80571; 2017-90</td>
<td>$500,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>“Claimant, a company insider, provided information to the Commission that instigated the Commission’s investigation into well-hidden and hard-to-detect violations of the securities laws.”</td>
</tr>
<tr>
<td>July 25, 2017</td>
<td>81200; 2017-130</td>
<td>Almost $2.5 million</td>
<td>30%*</td>
<td>All to single claimant.</td>
<td>Claimant was a public sector employee who assisted SEC in stopping a mutual fund company’s illegal practice of manipulating the prices of mutual fund shares to the detriment of shareholders.</td>
</tr>
<tr>
<td>July 27, 2017</td>
<td>81227; 2017-134</td>
<td>$1.7 million plus</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Company insider provided SEC with information to help stop a fraud that would have otherwise been difficult to detect. SEC waived noncompliance with rule requiring information be submitted “in writing” if submitted between signing of Dodd-Frank Act and effective date of SEC rules based on quality of whistleblower’s cooperation with SEC.</td>
</tr>
<tr>
<td>Oct. 12, 2017</td>
<td>81857; 2017-195</td>
<td>$1 million plus</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Award granted to “company outsider” who provided SEC with information regarding securities violations by entity that impacted retail customers. SEC found “extraordinary circumstances” that warranted waiver of requirement that claimants submit declaration signed under penalty of perjury at the time the tip was filed.</td>
</tr>
</tbody>
</table>

*Although the SEC Order Determining Whistleblower Award Claim and the agency press release did not specify the percentage of the whistleblower’s award, the whistleblower was a client of the authors’ law firm, Katz, Marshall & Banks, LLP, and authorized the firm to disclose the percentage information publicly. Read more about the award and our representation here: [https://www.kmblegal.com/news/katz-marshall-banks-client-awarded-24-million-sec-whistleblower-office-role-stopping](https://www.kmblegal.com/news/katz-marshall-banks-client-awarded-24-million-sec-whistleblower-office-role-stopping).
<table>
<thead>
<tr>
<th>Date</th>
<th>Release Nos.</th>
<th>Award Total</th>
<th>%</th>
<th>Allocation Among Claimants</th>
<th>Notes from SEC Press Releases and Orders Determining Awards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nov. 30, 2017</td>
<td>82181; 2017-216</td>
<td>$16 million plus</td>
<td>?</td>
<td>$8 million each to two claimants; five other claimants denied.</td>
<td>Claimant 1 informed SEC of misconduct that was focus of the staff’s investigation and cornerstone of the agency’s subsequent enforcement action. Claimant 2 provided additional significant information” that saved substantial amount of time and agency resources.</td>
</tr>
<tr>
<td>Dec. 5, 2017</td>
<td>82214; 2017-222</td>
<td>$4.1 million plus</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Although SEC reduced award because of Claimant’s unreasonable delay in reporting misconduct, this award reduction was also mitigated by, <em>inter alia</em>, fact that Claimant was foreign national working outside U.S. and therefore potentially not protected against retaliation.</td>
</tr>
<tr>
<td>Mar. 19, 2018</td>
<td>82897; 2018-44</td>
<td>About $88 million</td>
<td>?</td>
<td>Nearly $50 million jointly to two claimants; $33 million plus to one claimant; three other claimants denied.</td>
<td>As of publication of this appendix, these awards became the highest to date, outstripping the previous high of $30 million in 2014. The $50 million award had been reduced slightly due to the whistleblowers’ unreasonable delay.</td>
</tr>
<tr>
<td>Apr. 5, 2018</td>
<td>82996; 2018-58</td>
<td>$2.2 million plus</td>
<td>?</td>
<td>All to single claimant.</td>
<td>This marked SEC’s first “safe harbor” award under Rule 21F-4(b)(7), which provides that if whistleblower submits information to another federal agency and submits same to SEC within 120 days, SEC will treat information as though submitted at same time it was submitted to the other agency.</td>
</tr>
<tr>
<td>Apr. 12, 2018</td>
<td>83037; 2018-64</td>
<td>$2.1 million plus</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant was a former company insider whose information strongly supported the findings and provided SEC with ongoing helpful assistance to staff during the investigation. Reduced award because Claimant unreasonably delayed in reporting the matter to the SEC.</td>
</tr>
<tr>
<td>Sept. 6, 2018</td>
<td>84046; 2018-179</td>
<td>$54 million plus</td>
<td>?</td>
<td>One claimant received $39 million; another received $15 million. A third claimant was denied an award.</td>
<td>SEC noted that although Claimants 1 and 2 both provided helpful information, Claimant 1 came forward 18 months before Claimant 2, and his or her information was “critical to advancing the investigation” and “saved the Commission considerable time and resources.” SEC also noted that “several facts mitigate the unreasonableness of Claimant 1’s reporting delay.” In its order, SEC also stated that Claimant 2, who had a pending action with “Agency 2” which had its own whistleblower award mechanism, would not be eligible for SEC award for information that led to enforcement action by Agency 2.</td>
</tr>
<tr>
<td>Date</td>
<td>Release Nos.</td>
<td>Award Total</td>
<td>Allocation Among Claimants</td>
<td>Notes from SEC Press Releases and Orders Determining Awards</td>
<td></td>
</tr>
<tr>
<td>---------------</td>
<td>--------------</td>
<td>-------------------</td>
<td>----------------------------</td>
<td>------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Sept. 14, 2018</td>
<td>84125; 2018-194</td>
<td>$1.5 million plus</td>
<td>All to single claimant.</td>
<td>The SEC noted it had “severely reduced” award because Claimant had “unreasonably delayed in reporting the information to the Commission and was culpable.”</td>
<td></td>
</tr>
<tr>
<td>Sept. 24, 2018</td>
<td>84270; 2018-209</td>
<td>Nearly $4 million</td>
<td>All to single claimant.</td>
<td>The award was to “overseas whistleblower” where covered action had “opened as a direct result of Claimant’s tip to the Commission.”</td>
<td></td>
</tr>
<tr>
<td>Mar. 26, 2019</td>
<td>85412; 2019-42</td>
<td>$50 million</td>
<td>$37 million to one claimant; $13 million to another; five claimants denied awards.</td>
<td>$37 million to Claimant 2 who “swiftly” provided “smoking gun” evidence; award reduced by amount claimant received through another agency’s reward program so as to avoid double payment for same information. $13 million to Claimant 1 who “unreasonably delayed” reporting while investors were harmed and claimant “passively financially benefitted” as basis for award amount grew.</td>
<td></td>
</tr>
<tr>
<td>May 24, 2019</td>
<td>85936; 2019-76</td>
<td>$4.5 million</td>
<td>All to single claimant.</td>
<td>The award was to claimant whose tip triggered the company to review the allegations as part of an internal investigation and subsequently report the whistleblower’s allegations to the SEC and another agency. This was the first time a claimant was awarded under Rule 21F-4(c)(3), which incentivizes internal reporting by whistleblowers who also report the same information to the Commission within 120 days.</td>
<td></td>
</tr>
<tr>
<td>June 3, 2019</td>
<td>86010; 2019-81</td>
<td>$3 million</td>
<td>$3 million jointly to two claimants.</td>
<td>The SEC noted that it “positively assessed” the “significant and timely steps” the claimants undertook to have the company remediate the harm caused by the alleged violations, including advocating for full disclosure of the violation and for compensation of harmed investors.</td>
<td></td>
</tr>
<tr>
<td>July 23, 2019</td>
<td>86431; 2019-138</td>
<td>$500,000</td>
<td>All to single claimant.</td>
<td>The award was to “an overseas whistleblower” and involved misconduct occurring abroad. The SEC noted that the claimant’s tip was the first information that the Commission received on the charged misconduct.</td>
<td></td>
</tr>
<tr>
<td>Date</td>
<td>Release Nos.</td>
<td>Award Total</td>
<td>%</td>
<td>Allocation Among Claimants</td>
<td>Notes from SEC Press Releases and Orders Determining Awards</td>
</tr>
<tr>
<td>--------------</td>
<td>--------------------------------</td>
<td>------------------</td>
<td>---</td>
<td>-----------------------------</td>
<td>------------------------------------------------------------</td>
</tr>
<tr>
<td>Aug. 29, 2019</td>
<td>86803; 2019-165</td>
<td>$1.8 million plus</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant informed SEC of misconduct, which occurred overseas, and provided extensive and ongoing cooperation during the course of the investigation. Claimant also internally reported the conduct on multiple occasions.</td>
</tr>
<tr>
<td>Sept. 20, 2019</td>
<td>87039; no press release</td>
<td>$38,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant prompted SEC to open investigation that resulted in two successful enforcement actions involving harm to retail investors.</td>
</tr>
<tr>
<td>Nov. 15, 2019</td>
<td>87544; 2019-238</td>
<td>$260,000</td>
<td>?</td>
<td>$260,000 jointly to three claimants.</td>
<td>Claimants were not insiders, but rather were themselves harmed investors who alerted the agency “to a well-concealed fraud targeting retail investors.” The SEC noted that it would have been unlikely for Commission staff to have learned of the misconduct absent the Claimants’ initial tip.</td>
</tr>
<tr>
<td>Jan. 22, 2020</td>
<td>88014; 2020-15</td>
<td>$45,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>Claimant was an investor who lost money in the fraudulent scheme and was able to provide the SEC “new, critical, time-sensitive information that allowed staff to recover assets that were later returned to harmed investors.”</td>
</tr>
<tr>
<td>Jan. 22, 2020</td>
<td>88015; 2020-15</td>
<td>$277,000</td>
<td>?</td>
<td>All to single claimant.</td>
<td>This award included proceeds recovered from a related action. The SEC noted that Claimant’s information helped shut down an ongoing scheme preying on retail investors.</td>
</tr>
</tbody>
</table>