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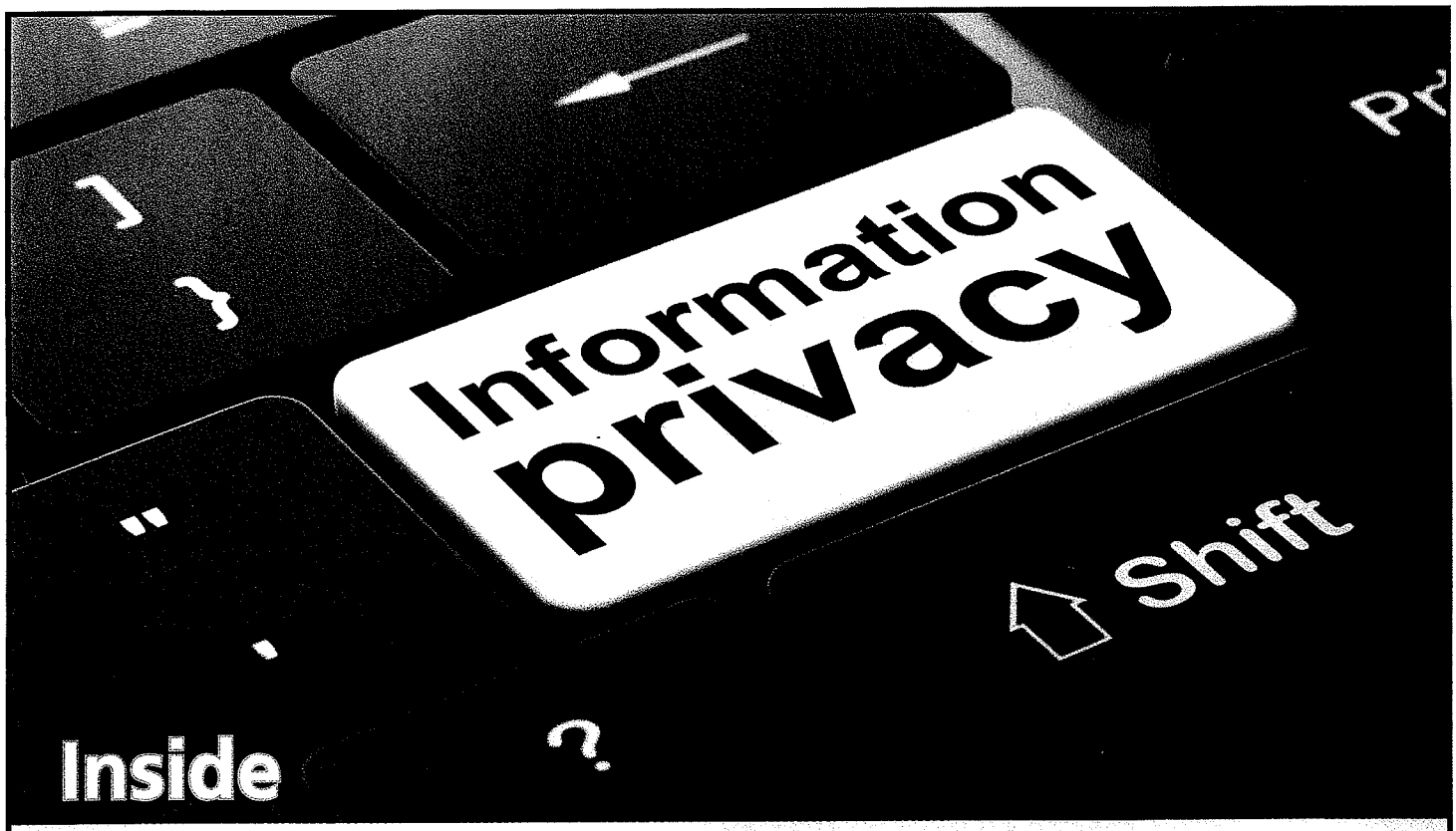

Inside

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Federal False Claims Act and SEC Whistleblower Program Practice Points

By Hon. Margaret J. Finerty and Richard J. Dircks

I. Introduction

In recent years, the private citizen whistleblower has come to play an increasingly important role in anti-fraud public law enforcement. The Federal False Claims Act, the New York False Claims Act, and the Securities and Exchange Commission Whistleblower Program have empowered and incentivized citizens to come forward and blow the whistle on corporate fraud. The Commercial and Federal Litigation Section's Committee on Civil Prosecution[1] recently sponsored two continuing legal education courses focused on these three areas of whistleblower enforcement.[2] The collective program faculty comprised over twenty seasoned experts and top practitioners who provided practical guidance as they explored the interplay between whistleblower laws, the agencies that administer or utilize them, and the resulting synergies of public and private sector resources.[3]

"In the 27 years since the statute was significantly strengthened in 1986, the FCA resulted in the recovery of over $38 billion. Citizen whistleblower-initiated actions were responsible for approximately 70% of those recoveries, or over $27 billion. Of that amount, whistleblowers received awards totaling over $4.2 billion."

This article highlights ten takeaways from among the many issues raised and discussed during the federal practice portions of the CLE programs.[4] These ten points were selected because of their fundamental importance and their practical utility for practitioners in this field.

II. The Federal False Claims Act

The Federal False Claims Act (FCA),[5] sometimes referred to as the "Lincoln Law," dates back to 1863 when it was passed in an effort to combat unscrupulous war profiteers attempting to defraud the United States government during the Civil War. A defining characteristic of the FCA, then and now, is its powerful *qui tam*[6]—or whistleblower—provisions, which permit those with knowledge of fraud on the government to bring an action on behalf of both the government and the whistleblower. In its current form, the FCA provides that a successful whistleblower may receive an award of up to 30% of the monies recovered by the government.[7] The FCA is potentially applicable in almost any situation where federal funds are lost as the result of fraud on the government.[8]

A. Takeaway #1: The FCA Is the Government's Primary Civil Fraud-Fighting Tool

The first takeaway is that the FCA has risen to prominence as the federal government's primary civil fraud-fighting tool. In the 27 years since the statute was significantly strengthened in 1986, the FCA has resulted in the recovery of over $38 billion.[9] Citizen whistleblower-initiated actions were responsible for approximately 70% of those recoveries, or over $27 billion.[10] Of that amount, whistleblowers received awards totaling over $4.2 billion.[11]

As remarkable as those total numbers are, the impact of whistleblower-initiated actions is particularly pronounced when one looks at the recoveries in the past five years. From fiscal year 2009 through fiscal year 2013, total *qui tam* recoveries topped $13.4 billion, with whistleblowers awards exceeding $2 billion.[12]

In addition to the impressive recovery numbers, the breadth of application (and its continued expansion) of this statute is remarkable. As recently expressed by the United States Department of Justice,

> The False Claims Act is the government's primary civil remedy to redress false claims for government funds and property under government contracts, including national security and defense contracts, as well as under government programs as varied as Medicare, veterans benefits, federally insured loans and mortgages, transportation and research grants, agricultural supports, school lunches and disaster assistance.[13]

Many of the defendants involved in the most significant cases are companies that are well known and whose products many of us use in our daily lives.

The FCA is a statute that needs to be on every attorney's radar and should be of particular relevance to: plaintiffs' counsel who represent (or are interested in representing) whistleblowers with knowledge of fraud on the federal government; in-house counsel at any company whose business involves or has a connection to federal funding; and defense attorneys who act as outside litigation or business counsel to those companies.

B. Takeaway #2: FCA Whistleblower Litigation—The Basics

The second takeaway from the CLE programs was the overview provided on how FCA whistleblower litigation works at its most fundamental level.

1. Liability, Damages, and Knowledge

The FCA statute sets forth seven types of conduct that may form the basis for liability under the Act; of those, only four are invoked with any regularity.[14] Liability may attach to any person who: (i) "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;"[15] (ii) "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;"[16] (iii) conspires to commit a violation of the FCA;[17] or (iv) acts improperly to avoid having to pay an obligation to the government.[18]

A person who violates the FCA may be liable for treble damages and civil penalties of $5,500–$11,000 per violation.[19] Where a successful action has been brought by a whistleblower, the defendant will also be liable for the whistleblower's attorneys' fees, expenses, and costs.[20]

In order to be liable under the FCA, a person needs to act "knowingly."[21] For the purpose of the FCA, this "mean[s] that a person...has (i) actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information."[22]

2. *Qui Tam* Procedure

The whistleblower—or "relator"—files the Complaint under seal in federal court and serves the complaint, together with a statement of material facts, on the Department of Justice (DOJ).[23] The Government has the opportunity to investigate the allegations of the Complaint during this seal period without alerting the potential subject or target of the investigation.[24] Before the expiration of the seal period,[25] the Government shall elect to intervene in the action or decline to do so.[26] If the Government declines, the relator has the right to conduct the action.[27]

3. Checks and Balances

The FCA contains a number of checks and balances to prevent abuse of the statute. For example, cases are barred if the allegations are substantially the same as those (i) on the public record,[28] or (ii) in an existing filed case.[29] In addition, a defendant may recover attorneys' fees and expenses from the relator if the court finds the case to be "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."[30] Finally, a relator's award may be reduced—down to zero in certain circumstances—where the relator was involved in the conduct giving rise to the FCA violations.[31]

C. Takeaway #3: Intervention, Intervention, Intervention

Takeaway number three is like the old joke that asks, "How do you get to Carnegie Hall?"—"Answer: Practice, Practice, Practice." In the area of FCA litigation, the question might be, "How do you get to a successful resolution?" Judging by the statistics, the answer may well be, "Intervention, Intervention, Intervention."

Of the total amount recovered by the government through FCA cases since 1986, a startling 96% (or $26.2 billion) of the recoveries resulted from cases where the government intervened or otherwise pursued the action; four percent (or less than $1 billion) resulted from cases where the government declined and the relator proceeded without the government.[32] Further, we heard from our CLE faculty that the government only intervenes in about 20% of filed FCA cases; in other words, the government declines to intervene in the vast majority (approximately 80%) of filed FCA cases.

These statistics support practical action steps for FCA practitioners: choose your cases carefully and move quickly.

1. The Importance of Case Selection

The FCA envisions a public-private partnership where citizen whistleblowers, and their counsel, can work together with the federal government to prosecute civil fraud and recover monies misappropriated from the national fisc. Together with the potential power of the FCA also comes great responsibility for relators' counsel.

With regard to the government, it is incumbent upon relators' counsel to live up to their part in the public-private partnership and only bring well-founded and well-developed cases to the government. The government has limited resources, yet, at the same time, it is statutorily obligated to investigate the cases that are filed and served on the DOJ. Therefore, in order for the partnership to work, it becomes the responsibility of relators' counsel to thoroughly vet potential matters and only bring the best cases to the government.

Relators' counsel have perhaps an even greater responsibility with respect to the relator client. The last thing one's client wants or needs is to suffer the downside of a whistleblower action—putting at risk one's job, livelihood, and well-being—when there is little to no realistic chance of success. Relators' counsel must protect the relator by only filing the strongest FCA cases.

2. Go in Early

This point was made most strongly by defense counsel faculty: once you learn of an actual or potential FCA action against a client, move quickly to engage the government and present your client's position with a view toward bringing the investigation to a close. A recommended first step is an immediate call to the investigating

agency to find out what you can about the investigation. Answers to questions concerning the origin and scope of the investigation can help counsel get a sense of the type of scrutiny one's client is facing, and determine the best course of action. After moving expeditiously (but thoroughly) to gather the facts through an internal investigation, it is often prudent to seek a meeting with the government as soon as practicable to explain why the matter should not proceed. Defendants often try to demonstrate that the questioned conduct does not result in FCA liability or that, even if there is a potential violation, the damages are such that it would not be worth the government's resources to pursue the matter.

Relators' counsel would also be well-advised to "go in early," albeit in a different context. We heard repeatedly that the government welcomes pre-filing meetings with relator's counsel to discuss potential FCA cases. These meetings can be of great value to both the relator and the government. For the relator, such a meeting provides an opportunity to present the theory of the case to the government and gauge potential interest at a point early in the process. In addition, the relator is given the opportunity to raise specific facts and evaluate the magnitude of potential difficulties with the case (e.g., if there is misconduct attributable to the whistleblower; if the whistleblower has arguably violated a contractual obligation to the defendant; or if the defendant does not have the financial wherewithal to pay damages in the event the FCA action is successful). Finally, a pre-filing meeting affords relator's counsel the opportunity to hear from the government, to the extent the government is willing and able to comment. This may be useful in honing the shape of the case and evaluating whether to proceed with the potential action.

Early meetings may also benefit the government in a number of ways. An early meeting with a defendant may prove to be an efficient means to get to the facts of the matter and move toward resolution or dismissal. Likewise, a pre-filing meeting with relator's counsel may dissuade the filing of an unsuccessful case, or it may provide the government with a head start in terms of thinking about and planning an investigation at a time when the statutory clock for an intervention decision has not yet begun to run.

3. "Not Intervening at this Time"

A notable point that was raised repeatedly is a phenomenon that has arisen in practice, but is nowhere to be found in the FCA statute. There have been a number of instances where, at the end of the seal period when the judge requires the government to make its intervention decision, the government files a notice that it is "not intervening at this time." This is neither an intervention nor a declination,[33] but something in-between. It appears to be recognized as a signal to all involved that, although the seal period has expired, the government has not completed its investigation.

D. Takeaway #4: Wartime Suspension of Limitations Act

The FCA has a six-year statute of limitations that may, under limited circumstances, extend to ten years.[34] This limitations period, however, has been called into question recently by courts applying a statute that dates back to World War II: the Wartime Suspension of Limitations Act (WSLA).[35] This statute provides that,

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces...the running of any statute of limitations applicable to any offense...involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not...shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.[36]

At least one federal Court of Appeals and a number of district courts have applied the WSLA in FCA actions, finding that the WSLA tolled the FCA statute of limitations due to ongoing military activity of the United States.[37] A petition for writ of certiorari on this matter is currently pending before the U.S. Supreme Court,[38] and the Court has invited the Solicitor General to file a brief in the case expressing the views of the United States.[39]

E. Takeaway #5: The FCA Does Not Exist in a Vacuum

A final takeaway regarding the FCA is that the statute, and its enforcement, does not exist in a vacuum. Fraudulent conduct that may violate the FCA may also violate other statutes or enforcement regimes, and for a number of those, there exist avenues for citizen whistleblower civil prosecution. So, for example, a fraudulent loan origination by a financial institution may be the subject of an FCA whistleblower action and a declaration under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).[40] Other fraudulent conduct actionable under the FCA may also have a component to be addressed through the Internal Revenue Service whistleblower program (tax) or the Securities and Exchange Commission whistleblower program (securities fraud).

Counsel needs to be aware of and on the lookout for overlapping enforcement programs that may apply to complex commercial fraud—as defense counsel for areas of potential additional exposure, and as plaintiffs' counsel for additional avenues for recovery.

III. The Securities and Exchange Commission Whistleblower Program

The Securities and Exchange Commission (SEC or "Commission") Whistleblower Program is a creation of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank").[41] Dodd-Frank amended the Securities Exchange Act of 1934 ("Exchange Act")[42] by, among other things, adding Section 21F, entitled "Securities Whistleblower Incentives and Protection."[43] This section authorizes the Commission to make monetary awards to eligible individuals who voluntarily provide original information[44] derived from independent knowledge unique to the whistleblower, or independent analysis by the whistleblower, that leads to successful Commission enforcement actions, and successful related actions, resulting in monetary sanctions of over $1,000,000.[45] Successful whistleblowers are entitled to awards in an amount equal to 10% to 30% of the sanctions collected.[46] "The program was designed to incentivize individuals to provide the U.S. Securities and Exchange Commission...with specific, credible, and timely information about possible securities law violations, and thereby enhance the Commission's ability to act swiftly to protect investors from harm and bring violators to justice."[47] The final rules established by the SEC to implement the provisions of Section 21F, and explain the procedures that a whistleblower needs to follow to be eligible for an award, went into effect in August of 2011.[48] Section 924(d) of Dodd-Frank directed the SEC to establish a separate office to administer and enforce the provisions of Section 21F of the Exchange Act. This office, known as the Office of the Whistleblower (OWB), is led by its Chief, Sean X. McKessy, and Deputy Chief, Jane A. Norberg. They supervise a staff of nine attorneys and three paralegals.[49]

A. Takeaway #6: How to File a Whistleblower Case with the SEC—The Basics

The first takeaway from the CLE programs regarding the SEC Whistleblower Program is an overview of how to file a case with the SEC.

1. Submit a Tip

A tip concerning a potential securities law violation may be submitted online by filling out the Tips, Complaints and Referrals ("Form TCR") questionnaire via the OWB's webpage at http://www.sec.gov/whistleblower, or by submitting a Form TCR by mail or fax, to the SEC Office of the Whistleblower, 100 F Street NE, Mail Stop 5553, Washington, DC 20549-5631, Fax (703) 813-9322.[50] If a whistleblower or his or her counsel has questions about how to submit a tip to the Commission, or questions about the program, he or she can call the whistleblower hotline at (202) 551-4790.

Whistleblowers who file a Form TCR via the web will receive a computer-generated confirmation receipt with a TCR submission number. OWB will send an acknowledgement or a deficiency letter to whistleblowers who submit their TCRs by mail or fax, and this notification will also include a TCR submission number. All whistleblower tips received by the Commission are entered into the TCR System, which is the Commission's centralized database for prioritization, assignment, and tracking.

2. Evaluation of the Tip by the Commission

The Commission's Office of Market Intelligence (OMI) within its Enforcement Division evaluates every TCR submitted by a whistleblower and assigns what it determines to be TCRs worthy of further attention and resources to members of Commission staff for follow-up investigation or analysis.[51] The tips that survive this review are assigned to one of the Commission's eleven regional offices, a specialty unit, or to an Enforcement Associate Director depending on the nature and subject matter involved and expertise required. Complaints that relate to an existing investigation are forwarded to the staff already working on that matter. Occasionally, and if warranted, the OWB will arrange meetings between the whistleblower and subject matter experts on the Enforcement staff who are investigating the tip.[52] This is especially true if the whistleblower has significant knowledge or expertise in the matter under investigation. This is a positive step from the whistleblower's perspective because it promotes the successful outcome of the case and also will be considered as a factor in determining the percentage of any award that is ultimately made.[53]

3. How to Collect an Award

Once a matter is concluded and there is a final judgment or order resulting in monetary sanctions exceeding $1,000,000, the OWB posts a Notice of Covered Action (NoCA) pertaining to that matter on its website.[54] Once a NoCA is posted, individuals have 90 calendar days to apply for an award by submitting a completed Form WB-APP to OWB by the claim due date listed for that action.[55] If a claim is denied and the applicant does not object within the statutory time period, then the Preliminary Determination of the Claims Review Staff becomes the Final Order of the Commission.[56] An applicant can request reconsideration, and the procedure for doing this is spelled out in the Commission's Rules.[57]

It is a whistleblower's responsibility to look for a NoCA that pertains to his or her tip, and to proactively claim an award. In most cases, a tip will not lead to a final judgment with monetary sanctions, and the whistleblower will not be officially notified that the tip filed was unfruitful. An attorney who wishes to effectively represent a whistleblower client should endeavor to establish lines of communication with the Commission, even before filing a tip, and to offer as much assistance as the client can provide in pursuing the case.

4. Filing an Appeal

A Final Order from the Commission with respect to a whistleblower's right to an award may be appealed, within 30 days after the Commission issues its final decision, to the United States Court of Appeals for the District of Columbia Circuit, or to the circuit where the whistleblower resides or has his principal place of business.[58] However, if the Commission has made an award of not less than 10 percent and not more than 30 percent of the monetary sanctions collected, based upon the factors set forth in 17 C.F.R. § 240.21F-6, the amount of the award is not appealable.[59]

5. Some Things to Keep in Mind

There are a number of factors that are important to consider when determining whether to file an SEC whistleblower case on behalf of a client.

a. Vet Your Cases Carefully

The number of tips the Commission receives is increasing as word of the program spreads, and as the Commission issues awards. Last October, the Commission made its largest award to date of $14 million to a whistleblower whose information led to a Commission enforcement action that recovered substantial investor funds less than six months after the whistleblower filed the tip.[60] With the number of potential cases increasing, and limited government resources, the Commission will be looking for tips with specific, credible, and meaningful information that will justify the use of its time and efforts, and that will result in large monetary sanctions or prevent major fraud in the market place. The Commission is willing to meet with whistleblowers and their attorneys in advance of filing a tip, so consider availing yourself of that opportunity in determining whether to report a case.

b. Follow the Rules

Whistleblowers can report incidents involving securities fraud that have occurred, are ongoing, or are about to occur. The information presented in a tip must not only be compelling, but it must comply with the following requirements.

(1) The information must be voluntarily provided.[61] In other words it cannot be information that was compelled, for example, through the issuance of a subpoena or other compulsory process.

(2) The information must be original.[62] In order for your whistleblower submission to be considered original information, it must be derived from independent knowledge or independent analysis. The Commission will *not* consider information to be derived from independent knowledge or independent analysis in any of the following circumstances:

(a) "[i]f you obtained the information through a communication that was subject to the attorney-client privilege, unless disclosure of that information would otherwise be permitted by an attorney pursuant to [17 C.F.R.] § 205.3(d)(2)...,[63] the applicable state attorney conduct rules, or otherwise;"[64]

(b) "[i]f you obtained the information in connection with the legal representation of a client..., and you seek to use the information to make a whistleblower submission for your own benefit, unless disclosure would otherwise be permitted by an attorney pursuant to [17 C.F.R.] § 205.3(d)(2), the applicable state attorney conduct rules, or otherwise."[65]

(c) the information was obtained by an officer, director, trustee, or partner of an entity, or in an auditing, investigative, compliance or accounting capacity.[66] There are exceptions, however, if the reporting individual has "a reasonable basis to believe that disclosure of the information...is necessary to prevent...substantial injury to... investors;" the "entity is engaging in conduct that will impede investigation of the misconduct;" or "[a]t least 120 days have elapsed since" the individual reported the information to the relevant audit committee, chief legal officer, chief compliance officer, or supervisor (or 120 days from when the individual received information if those entities/individuals were already aware of the information).[67]

(d) There are other provisions in the law that preclude certain individuals from filing tips, e.g., if you are an employee of the Commission or other government law enforcement entity; if you have been criminally convicted in relation to the reported conduct; or if you are an employee of a foreign government entity.[68]

B. Takeaway #7: Protecting the Whistleblower's Identity

Understandably, many whistleblowers fear the consequences, both on a personal and professional level, for themselves and their families, if their identity is revealed. The Commission is cognizant of this legitimate concern and takes precautions not to reveal the whistleblower's identity during the investigation through, and including, the bestowal of an award. The Commission also allows individuals who prefer to remain anonymous to still be eligible under the whistleblower program if they submit their tip through an attorney.[69] This provision is one of several reasons why a whistleblower should seek legal representation in filing a tip under the SEC Whistleblower Program. Although a whistleblower must disclose his or her identity to the Commission when an award is made (obviously taxes must be paid), the Commission does not name the whistleblower when it announces the award.[70]

There is a possibility that the whistleblower will be asked to cooperate with other agencies, e.g., the Department of Justice, in addition to the Commission, during the investigation and enforcement proceeding. Although this cooperation will reveal the whistleblower's identity to

those in the government with whom he or she interacts, this cooperation increases the likelihood of a successful resolution and will be counted in the whistleblower's favor when an award decision is being made.[71] There is the possibility that, if a matter goes to litigation, the whistleblower's identity could be revealed. That being said, the Commission has proclaimed its commitment to protecting the identity of the whistleblower to the fullest extent possible in pursuing an enforcement action arising from the whistleblower's tip, and has demonstrated that commitment in granting awards without publicly identifying the whistleblower. Filing a tip anonymously through an attorney is a meaningful way to protect the whistleblower's identity, and should be seriously considered when counseling a client.

C. Takeaway #8: Anti-Retaliation Protection for Whistleblowers

Protection of whistleblowers from retaliation by their employers is crucial to the success of the SEC Whistleblower Program. Dodd-Frank extended anti-retaliation protections to SEC whistleblowers.[72] The Commission has the authority to enforce these anti-retaliation provisions through civil enforcement actions and proceedings,[73] and the whistleblower may also maintain a private right of action in federal court.[74] For purposes of the anti-retaliation protections, a person is considered a whistleblower if he or she possesses a reasonable belief that the information being provided "relates to a possible securities law violation...that has occurred, is ongoing, or is about to occur," and the information is provided as required by statute.[75] The anti-retaliation protections apply whether or not the whistleblower ultimately qualifies for an award.[76] This is significant because many of the whistleblowers who report tips to the Commission will not receive awards; however, 100% of whistleblowers who report tips based on a reasonable belief of securities law violations receive protection from retaliation.

Furthermore, the Commission's rules prohibit any person from taking action to impede an individual from reporting a securities law violation to the Commission, including through the use of a confidentiality agreement.[77] OWB is coordinating actively with Enforcement Division staff to identify matters where employers may have taken retaliatory measures against individuals who reported potential securities law violations, or have utilized confidentiality, severance, or other agreements in an effort to prohibit their employees from voicing concerns about potential wrongdoing. OWB also monitors federal court cases addressing the anti-retaliation provisions of the Dodd-Frank Act and the Sarbanes-Oxley Act of 2002. In addition, OWB reviews employee confidentiality and other agreements provided by whistleblowers for potential conduct by employers that would interfere with a whistleblower's direct communication with the Commission.[78]

The protection against retaliation that Dodd-Frank affords an employee who lawfully provides information to the Commission, or assists the Commission in an investigation, is far reaching. It prohibits not only demotion or discharge, but also guards against threats and harassment, direct or indirect, and any other manner of discrimination.[79] The Dodd-Frank protections are much more expansive than those set forth in Sarbanes-Oxley.[80] Some of the key employment protections are the following:

(1) Private right of action to go directly to federal district court.[81] There is no requirement that administrative proceedings be pursued beforehand.

(2) The statute of limitations is six years after the date that retaliation occurred or three years after discovering the retaliation, but in no event longer than ten years.[82]

(3) Relief includes reinstatement with same seniority status, twice the amount of back pay with interest, and attorneys' fees and litigation costs.[83]

An important case to be aware of when considering protection for whistleblowers from retaliation is *Asadi v. G.E. Energy (USA), L.L.C.*,[84] decided by the United States Court of Appeals for the Fifth Circuit on July 17, 2013, and which the Commission discussed in its 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program. *Asadi* holds that the anti-retaliation provisions of the Dodd-Frank Act provide a private cause of action only for those employees who report allegations of possible securities law violations directly to the Commission.[85] The Commission specifically notes in its 2013 Annual Report that:

> The Fifth Circuit's decision in *Asadi* is contrary to several district court decisions and may contradict a Commission regulation that provides protection for employees from retaliation where they report possible securities violations to persons or authorities other than the Commission, including reporting internally. District courts in both Colorado and California, however, have agreed with the *Asadi* holding.[86]

The Commission recently filed an amicus brief in a case that is currently up on appeal before the United States Court of Appeals for the Second Circuit, *Liu v. Siemens AG*, wherein the Commission makes clear its view that whistleblowers are entitled to Dodd-Frank's full protections against retaliation whether they report their employers' wrongdoing internally or go to the Commission.[87] In its brief, the Commission sets forth its concerns that, if the Dodd-Frank anti-retaliation provisions do not apply in situations where employees report internally, its rules that provide strong incentives for a whistleblower to first report internally will be undermined, and its ability to pursue enforcement action against employ-

ers who retaliate against whistleblowers who report internally would be substantially weakened.[88] These are serious concerns that have a direct impact on whether a whistleblower will choose to report first to the company, or bypass this option and go directly to the Commission. During the rule-making process, many corporations urged the Commission to draft the rules in a way that will not discourage a whistleblower from first reporting perceived wrongdoing to the company, in order for the company to have an opportunity to address the situation on its own in an appropriate way. By not offering whistleblowers who report internally the anti-retaliation protections of Dodd-Frank, case law could make it less likely that whistleblowers will choose to report to the company in the first instance. Neither the Commission nor the corporate community think that this is a good thing.

D. Takeaway #9: The SEC Whistleblower Program Incentivizes Whistleblowers to Report Internally First

The SEC drafted its rules implementing the Whistleblower Program so as to incentivize whistleblowers to report their concerns to their companies in the first instance.

1. Employees—Generally

Ideally, a company would like a whistleblower to report any concerns internally first, instead of going directly to the Commission. That way the company can conduct its own thorough investigation, under the supervision of expert outside counsel, and decide the best course of action to take, including whether the matter needs to be reported to the Commission. The Commission intentionally drafted its rules with provisions that would encourage whistleblowers in appropriate circumstances to first report internally.

Under the rules pertaining to awards, whistleblowers are given credit if they first report internally. Specifically listed as factors that can increase a whistleblower's award are,

> Whether, and the extent to which, a whistleblower reported the possible securities violations through internal whistleblower, legal or compliance procedures before, or at the same time as, reporting them to the Commission; and (ii) Whether, and the extent to which, a whistleblower assisted any internal investigation or inquiry concerning the reported securities violations.[89]

Likewise, an award can be decreased if a whistleblower undermined the integrity of a company's compliance or reporting system, or hindered an internal investigation through, for example, delay tactics or making false statements.[90]

In addition, if a whistleblower first reports internally, and within 120 days after that also reports the matter to the Commission, the Commission will treat the date of the internal report to the company as the date of reporting to the Commission for purposes of making an award to the whistleblower.[91] Also, with prior internal reporting the whistleblower receives "credit" for any information provided by the company to the Commission (information which could be much more extensive than the information originally known to the whistleblower), as long as the whistleblower reports to the SEC within 120 days of reporting that information to the company.[92] This is the case even if the company reports to the Commission before the whistleblower does. The assessment of whether the whistleblower presented "original" information will not be affected by the company reporting first under these circumstances. The significance of the whistleblower receiving "credit" for the information provided by the company (as long as the 120-day requirement is met) is to encourage whistleblowers to bring issues to the attention of the company before reporting to the Commission.

2. Gatekeepers

The way the SEC whistleblower rules were written allows even gatekeepers in an organization to report a tip to the Commission, including officers, directors, accountants and even lawyers, if the company does not do the "right thing." Certain senior level people, who otherwise are not permitted to be whistleblowers, can become whistleblowers if they have reported internally first.

Information is not considered original information derived from independent knowledge or analysis (i.e., eligible for a whistleblower award) if it is: (1) a "communication that was subject to the attorney-client privilege, unless disclosure of that information would otherwise be permitted by an attorney pursuant to [17 C.F.R.] § 205.3(d)(2)..., the applicable state attorney conduct rules, or otherwise"; or (2) if the whistleblower obtained the information as an officer, director, trustee, or partner of an entity or in an auditing, investigative, or accounting capacity,[93] *unless* the whistleblower has "a reasonable basis to believe that disclosure of the information...is necessary to prevent...substantial injury to...investors"; the "entity is engaging in conduct that will impede an investigation of the misconduct"; or at least 120 days have elapsed since the whistleblower reported the information to the relevant audit committee, chief legal officer, chief compliance officer, or supervisor (or 120 days from when the whistleblower received the information if high level management was already aware of the information).[94]

E. Takeaway #10: How to Protect Your Corporate Client Against an SEC Whistleblower

The Commission has limited resources and cannot possibly investigate and pursue all violations of securities law on its own. It is in the government's interest to encourage companies to implement and enforce effective

compliance programs and to self-report when an issue is discovered. The Commission will factor in the way a company addresses problems and whether the company voluntarily informed the Commission, in fashioning an appropriate resolution in an enforcement action. With the enactment of the SEC Whistleblower Program and the publicity that the awards granted through this program have already received, it is obvious that the likelihood that corporate wrongdoing will be reported to the Commission has greatly increased. Self-reporting is crucial because a company has to assume that a whistleblower from within the company will alert the Commission to perceived wrongdoing.

In what has come to be known as the "Seaboard Report," the Commission set forth a road map of the various factors it will consider in deciding how to respond to a company that self-reports a securities law violation.[95] A significant consideration is whether the company has taken steps to put into place effective internal controls and procedures designed to prevent a recurrence of the misconduct. Having a mechanism in place for a whistleblower to effectively and safely report concerns and issues internally within the company is essential. But it has to be a system that protects the whistleblower's status in the company, and that allows for issues raised to be addressed in a serious and meaningful way. The vast majority of whistleblowers first report within, and hope that the company will investigate and correct the perceived wrongdoing.[96] They care about their job and the company, which is why they come forward with their concerns in the first place. They do not want to be put in a position where they are reporting to the government unless it is the only way to correct the problem. If companies implement meaningful systems for whistleblowers to report issues, and ensure that they will not be retaliated against, whistleblowers will be less likely to go outside of the company. Reporting systems should be user friendly and well publicized, and include the following: a way to report anonymously if desired by the whistleblower; mechanisms for giving feedback to the whistleblower and others in the company regarding action taken to address reported issues; a reward system for employees who speak up about concerns and problems; and zero tolerance for retaliatory actions against a whistleblower. Whistleblowers who report internally should be embraced and celebrated by the company, not shunned and ostracized. The company needs to send a loud, clear message from the top down that it is a good corporate citizen, and it has to act like one.

The Commission will meet with a company that wishes to self-report and work with it to achieve an appropriate resolution. A company risks far more serious consequences if it fails to self-report securities law violations. The success of the Commission's Enforcement Cooperation Program,[97] which utilizes cooperation agreements, deferred prosecution agreements and non-prosecution agreements in situations where individuals or companies have exhibited full, complete and truthful cooperation, illustrates the benefits to companies of self-reporting.[98]

IV. Conclusion

As was made clear in our CLE programs, and as further highlighted in the takeaway points discussed above, the Federal False Claims Act and the SEC Whistleblower Program are important weapons in the federal government's arsenal for fighting fraud and corruption. The vast majority of whistleblowers who report on their employer company do not wish to "blow the whistle," but only do so as a last resort because their concerns fall on deaf ears, and they are often marginalized or fired for reporting what they perceive to be misconduct. The monetary compensation provided to successful whistleblowers is a powerful and necessary incentive for them to report fraud and wrongdoing to the government, but companies can protect themselves against whistleblower-initiated actions. By providing meaningful opportunities for concerned employees to first report issues internally and responding to those concerns in a supportive and meaningful way, companies can show that they are truly good corporate citizens, that they value employees who speak up about problems, and that they will correct behavior that violates the law. This will benefit all affected parties—the company, its employees, the government, and the public.

Endnotes

1. The Committee on Civil Prosecution is focused on the dynamic and increasingly important legal practice area involving the civil prosecution of commercial fraud. For more information regarding the Committee, *see* https://www.nysba.org/ComFedCivilProsecution.aspx.
2. The first CLE course, *Blowing the Whistle on Commercial Fraud*, was presented on May 5, 2013 at the Section's Spring Meeting in Saratoga Springs; the second CLE course, *Blowing the Whistle on Fraud: Litigating Federal and New York False Claims Act and SEC Whistleblower Cases*, was given on December 9, 2013 in New York City.
3. Faculty members represented a broad array of perspectives, including private counsel (both plaintiff and defendant) and the government (including representatives from the United States Attorney's Office for the Southern District of New York, the United States Attorney's Office for the Eastern District of New York, the New York State Office of the Attorney General, and the United States Securities and Exchange Commission).
4. This article is limited to those portions of the CLE programs that covered the federal whistleblower enforcement, namely, the Federal False Claims Act and the SEC Whistleblower Program. It does not address the portions of the CLE programs that covered state whistleblower enforcement through the New York False Claims Act.
5. 31 U.S.C. §§ 3729-33 (2009).
6. *Qui tam* is short for the Latin *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which translates to "who as well as for the king as for himself sues in this matter." BLACK'S LAW DICTIONARY 1282 (8th ed. 2004).
7. The FCA provides that in cases where the government elects to intervene or join the action as lead prosecutor, the whistleblower

award will generally fall within the range of 15-25% of the amount recovered by the government. 31 U.S.C. § 3730(d)(1). Where the government declines to intervene and the relator is nonetheless successful in recovering money for the government, the whistleblower award will generally fall within the range of 25-30% of the recovery. 31 U.S.C. § 3730(d)(2).

8. *See* 31 U.S.C. § 1329(a)(1). An important exception is the explicit exclusion of tax fraud. The FCA provides that it "does not apply to claims, records, or statements made under the Internal Revenue Code of 1986." 31 U.S.C. § 3729(d).

9. U.S. Dep't of Justice, Civil Division, *Fraud Statistics—Overview, October 1, 1987–September 30, 2013*, at 2 (2013), *available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf (last visited Feb. 28, 2014) [hereinafter Dep't of Justice *Fraud Statistics-Overview*].

10. *Id.*

11. *Id.*

12. *Id.* It is notable that, as significant as the federal civil FCA recovery statistics are, they only tell part of the story because they do not include criminal fines and recoveries under state false claims acts. For instance, according to one source,

> In fiscal year 2012, federal and state False Claims Act cases returned over $9 billion back to the government. This sum consists of criminal fines as well as several large state False Claims Act settlements, including over $300 million recovered by the State of California in a single Medicaid HMO case.

See FY 2012 Is Record Year for FCA Recoveries, TAXPAYERS AGAINST FRAUD, Oct. 10, 2012, *available at* http://www.taf.org/blog/fy-2012-record-year-fca-recoveries (last visited Feb. 28, 2014).

13. Press Release, U.S. Dep't of Justice, Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013 (Dec. 20, 2013), *available at* http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html (last visited Feb. 28, 2014).

14. *See* 31 U.S.C. § 3729(a)(1). The FCA liability provisions that are not typically invoked are 31 U.S.C. § 3729(a)(1)(D), (E), (F).

15. 31 U.S.C. § 3729(a)(1)(A).

16. 31 U.S.C. § 3729(a)(1)(B).

17. 31 U.S.C. § 3729(a)(1)(C).

18. 31 U.S.C. § 3729(a)(1)(G).

19. *See* 31 U.S.C. § 3729(a)(1); 28 C.F.R. § 85.3(9) (2014).

20. 31 U.S.C. § 3730(d)(1), (2).

21. *See* 31 U.S.C. § 3729(a).

22. 31 U.S.C. § 3729(b)(1)(A).

23. 31 U.S.C. § 3730(b)(2).

24. *See id.*

25. The initial seal period is "at least 60 days." 31 U.S.C. § 3730(b)(2). This period may be extended by court order upon a showing of good cause. 31 U.S.C. § 3730(b)(3). Depending on the nature of the case, the seal period may be repeatedly extended. It is not uncommon for the seal period to last several years.

26. 31 U.S.C. § 3730(b)(2), (4).

27. 31 U.S.C. § 3730(c)(3).

28. 31 U.S.C. § 3730(e)(4).

29. 31 U.S.C. § 3730(b)(5).

30. 31 U.S.C. § 3730(d)(4).

31. If the relator is found to have "planned and initiated" the FCA violation, the Court may reduce the relator's share of the recovery. If the relator is convicted of criminal conduct in connection with the FCA violation, the relator shall be dismissed from the case and shall not receive a portion of the recovery. 31 U.S.C. § 3730(d)(3).

32. Dep't of Justice *Fraud Statistics-Overview*, *supra* note 9, at 2.

33. *See* 31 U.S.C. § 3730(b)(2), (4).

34. The statute provides that,

> A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

31 U.S.C. § 3731(b).

35. Pub. L. No. 80-772, § 3287, 62 Stat. 828 (1948) (codified as amended at 18 U.S.C. § 3287 (2009)) (This law was based on a temporary suspension of limitations act adopted in 1942). The Act was amended for the first time in 2008. *See* Pub. L. No. 110-329, § 8117, 122 Stat. 3647 (2008).

36. 18 U.S.C. § 3287.

37. *See United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 180-81 (4th Cir. 2013) (WSLA suspends the statute of limitations in FCA cases); *United States v. Wells Fargo Bank, N.A.*, No. 12 Civ. 7527 (JMF), 2013 U.S. Dist. LEXIS 136539, at 20-21 (S.D.N.Y. Sept. 24, 2013) (WSLA applies to fraud unrelated to the war effort); *United States ex rel. Paulos v. Stryker Corp.*, No. 11-0041-CV-W-ODS, 2013 U.S. Dist. LEXIS 82294, at *50-51 (W.D. Mo. June 12, 2013) (WSLA tolls FCA statute of limitations); *United States v. BNP Paribas SA*, 884 F. Supp. 2d 589, 603 (S.D. Tex. 2012)(WSLA applies to civil FCA regardless of whether claims had to do with war); *but see, United States ex rel. Bergman v. Abbot Labs*, No. 09-4264, 2014 U.S. Dist. LEXIS 12333, at *56-57 (E.D. Pa. Jan. 29, 2014)(WSLA does not apply in a non-intervened (declined) FCA action); *United States ex rel. Emanuele v. Medicor Assocs.*, No. 10-245 Erie, 2013 U.S. Dist. LEXIS 104650, at *19-21 (W.D. Pa. July 26, 2013) (same).

38. *United States ex rel. Carter v. Kellogg Brown & Root Servs., Inc.*, 710 F.3d 171 (4th Cir. 2013), *petition for cert. filed* (U.S. June 24, 2013) (No. 12-1497).

39. *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 134 S. Ct. 375 (2013).

40. FIRREA, 12 U.S.C. §§ 1833a *et seq.*, provides bounties for whistleblowers against financial institutions seeking the disgorgement of fraud-induced gains and the recovery of related losses suffered by the public.

41. Pub. L. No. 111-203, § 922(a), 124 Stat 1841 (2010) (codified at 15 U.S.C. § 78u-6).

42. 15 U.S.C. §§ 78a-78pp.

43. Exchange Act § 21F, 15 U.S.C. § 78u-6.

44. 15 U.S.C. § 78u-6(b)(1). *See also* 17 C.F.R. § 240.21F-4(a), (b).

45. Awards are paid not only based on monetary sanctions associated with SEC enforcement actions, but also on related enforcement actions. 15 U.S.C. § 78u-6(b)(1); 17 C.F.R. § 240.21F-3(b). "The term 'covered judicial or administrative action' means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $ 1,000,000." 15 U.S.C. § 78u-6(a)(1). A related action, which includes criminal actions, is "any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action." 15 U.S.C. § 78u-6(a)(5); *see also* 17 C.F.R. § 240.21F-3(b)(1).

46. 15 U.S.C. § 78u-6(b)(1)(A), (B).

47. SEC, *2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, at 1 (2013), *available at* http://www.sec.gov/about/offices/owb/annual-report-2013.pdf (last visited Feb. 28, 2014) [hereinafter SEC *Annual Report*].

48. Securities Whistleblower Incentives and Protections Final Rule, 76 Fed. Reg. 34,300 (June 13, 2011). The SEC's Final Rules are codified at 17 C.F.R. §§ 240.21F-1 through 240.21F-17. A careful examination of these rules should obviously occur prior to filing a whistleblower case with the SEC.

49. SEC *Annual Report*, *supra* note 47, at 5.

50. 17 C.F.R. § 240.21F-9(a)(1), (2).

51. The SEC Office of Market Intelligence is a very sophisticated unit that includes subject matter experts that screen the vast amount of information to which the SEC has access. *See* SEC, *The Securities and Exchange Commission Post-Madoff Reforms* (Apr. 2012), *available at* http://www.sec.gov/spotlight/secpostmadoffreforms.htm; Ben Protess and Axam Ahmed, *With New Firepower, S.E.C. Tracks Bigger Game*, N.Y. TIMES, May 21, 2012, *available at* http://dealbook.nytimes.com/2012/05/21/with-new-firepower-s-e-c-tracks-bigger-game (last visited Feb. 28, 2014); Zachary A. Goldfarb, *SEC is hiring more experts to assess complex financial systems*, WASHINGTON POST, June 15, 2010 ("Although lawyers fill most of the SEC's ranks, the agency has been hiring experts with specialized quantitative skills and those who have worked on Wall Street who are hip to its tricks."), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/06/14/AR2010061404757.html (last visited Feb. 28, 2014).

52. *See* 17 C.F.R. § 240.21F-8(b) for a description of the type of assistance and cooperation a whistleblower may be asked to provide to the Commission.

53. 17 C.F.R. § 240.21F-6(a)(2).

54. 17 C.F.R. § 240.21F-10(a). The OWB also announces on Twitter each time a new group of NoCAs is posted to its website, and sends e-mail alerts to GovDelivery when its website is updated. GovDelivery is a vendor that provides communications for public sector clients. In addition, whistleblowers may sign up to receive an update via e-mail every time the list of NoCAs on OWB's website is updated. *See* SEC *Annual Report*, *supra* note 47, at 13.

55. 17 C.F.R. § 240.21F-10(b).

56. *See* 17 C.F.R. § 240.21F-10(e)(2), (f).

57. *See* 17 C.F.R. § 240.21F-10(e).

58. *See* 15 U.S.C. § 78u-6(f); 17 C.F.R. § 240.21F-13(a).

59. *See id.*

60. Press Release, SEC, SEC Awards More than $14 Million to Whistleblower (Oct. 1, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258#.UmAruPmkqu8 (last visited Feb. 28, 2014)[hereinafter SEC Press Release]. The Commission expects future awards will exceed this amount. Since the inception of the whistleblower program in August 2011, the Commission has granted awards to six whistleblowers. Four whistleblowers have received awards in Fiscal Year 2013. *See* SEC *Annual Report*, *supra* note 47, at 14.

61. 17 C.F.R. § 240.21F-3(a)(1).

62. 17 C.F.R. § 240.21F-3(a)(2).

63. This section addresses conduct of an attorney who is representing an issuer before the Commission. It reads as follows:

> (d) Issuer confidences.
>
> ***
>
> (2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:
>
> (i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;
>
> (ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or
>
> (iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

17 C.F.R. § 205.3(d)(2).

64. 17 C.F.R. § 240.21F-4(b)(4)(i).

65. 17 C.F.R. § 240.21F-4(b)(4)(ii). It is advisable for an attorney to seek the advice of ethics counsel before deciding to be a whistleblower. *See* NYCLA Comm. on Prof'l Ethics, Formal Op. 746 (2013), *available at* https://www.nycla.org/siteFiles/Publications/Publications1647_0.pdf (last visited Feb. 28, 2014).

66. 17 C.F.R. § 240.21F-4(b)(4)(iii).

67. 17 C.F.R. § 240.21F-4(b)(4)(v).

68. 17 C.F.R. § 240.21F-8(c)(1) (employee of the SEC, DOJ or other government law enforcement entities); 17 C.F.R. § 240.21F-8(c)(2) (employee of foreign government entity); 17 C.F.R. § 240.21F-8(c)(3) (criminally convicted in relation to conduct reported); *see also* 17 C.F.R. § 240.21F-8(c)(7) (knowingly provided false information to the Commission or any authorities in connection with related actions).

69. *See* 17 C.F.R. § 240.21F-9(c). These requirements include the following: (1) you must have an attorney represent you in connection with both your submission of information and your claim for an award, and your attorney's name and contact information must be provided to the Commission at the time you submit your information; and (2) before the Commission will pay any award to you, you must disclose your identity to the Commission, and your identity must be verified by the Commission as set forth in 17 C.F.R § 240.21F-10(c).

70. Even in the announcement of the Commission's most recent and biggest award to a whistleblower of $14 million, it did not reveal the identity of the whistleblower or the facts surrounding the case. *See* SEC Press Release, *supra* note 60.

71. 17 C.F.R. § 240.21F-6(a)(2)(i).

72. 15 U.S.C. § 78u-6(h)(1)(A).

73. 17 C.F.R. § 240.21F-2(b)(2).

74. 15 U.S.C. § 78u-6(h)(1)(B)(i).

75. 17 C.F.R. § 240.21F-2(b)(1)(i), (ii).

76. 17 C.F.R. § 240.21F-2(b)(1)(iii).

77. 17 C.F.R. § 240.21F-17(a).

78. 17 C.F.R. § 240.21F-17(b).

79. 15 U.S.C. § 78u-6(h)(1)(A):

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

See also, Menendez v. Halliburton, ARB Case No. 12-026, ALJ Case No. 2007-SOX-005, 2013 DOLSOX LEXIS 11, at *52-53 (A.L.J. Mar. 20, 2013) (wherein the A.L.J. found in favor of the whistleblower under Sarbanes-Oxley, and awarded $30,000 compensatory damages, plus attorneys' fees and litigation costs, based upon the employer's failure to protect Menendez's identity as a whistleblower, which led employee to suffer "emotional distress and reputational injury").

80. *See* 18 U.S.C. § 1514A(b)(2)(D) (which requires a complaint to be filed "not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation"); 18 U.S.C. § 1514A(b)(1)(A) (which requires a complaint be filed first with the Secretary of Labor); 18 U.S.C. § 1514(b)(1)(B) (which permits the whistleblower to bring "an action at law or equity for de novo review in the appropriate district court" if the Secretary of Labor fails to issue a final determination within 180 days of filing the complaint).
81. 15 U.S.C. § 78u-6(h)(1)(B)(i).
82. *Compáre* 15 U.S.C. § 78u-6(h)(1)(B)(iii) *with* 18 U.S.C. § 1514A(b)(2)(D) (which Dodd-Frank extended from 90 days to 180 days).
83. *Compare* 15 U.S.C. § 78u-6(h)(1)(C), *with* 18 U.S.C. § 1514A(c) (which provides for same reinstatement rights, but only back pay with interest, attorneys' fees and litigation costs).
84. 720 F.3d 620 (5th Cir. 2013).
85. *Id.* at 629.
86. SEC *Annual Report*, *supra* note 47, at 6 n.7.
87. *See* Brief for SEC as Amicus Curiae Supporting Appellant, *Liu v. Siemens, A.G.*, No. 13-4385 (2d Cir. Feb. 20, 2014), *available at* http://www.sec.gov/litigation/briefs/2014/liu-siemens-0214.pdf (last visited Feb. 28, 2014).
88. *See id.* at 18-27.
89. 17 C.F.R. § 240.21F-6(a)(4)(i), (ii).
90. 17 C.F.R. § 240.21F-6(b)(3).
91. 17 C.F.R. § 240.21F-4(b)(7).
92. 17 C.F.R. § 240.21F-4(c)(3).
93. 17 C.F.R. § 240.21F-4(b)(4)(i), (iii).
94. 17 C.F.R. § 240.21F-4(b)(4)(v).
95. SEC, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, Release No. 44969 (Oct. 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm#P16_499 (last visited Feb. 28, 2014).
96. *See* Ethics Resource Center, Inside the Mind of a Whistleblower, at 13 (2012) (stating that, in 2011, only 3% of whistleblowers report externally at first; 18% reported externally in a secondary report), *available at* http://www.ethics.org/files/u5/reportingFinal.pdf (last visited Feb. 28, 2014).
97. *See* http://www.sec.gov/spotlight/enfcoopinitiative.shtml (last visited Feb. 28, 2014).
98. *See, e.g.*, Press Release, SEC, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171514780#.UxFMH-NdVUR (last visited Feb. 28, 2014); Press Release, SEC, SEC Charges Former Carter's Executive with Fraud and Insider Trading (Dec. 20, 2010) ("The SEC also announced that it has entered a non-prosecution agreement with Carter's under which the Atlanta-based company will not be charged with any violation of the federal securities law relating to Elles's unlawful conduct."), *available at* http://www.sec.gov/news/press/2010/2010-252.htm (last visited Feb. 28, 2014).

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