NAVIGATING THE NUANCES OF SARBANES-OXLEY AND DODD-FRANK WHISTLEBLOWER CLAIMS




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Twice in the last two decades, Congress has enacted sweeping reform legislation in response to major scandals and financial collapses that shook the financial markets and caused devastating harm to our nation's economy. The Sarbanes-Oxley Act of 2002 followed the revelation of huge financial frauds at multi-billion dollar publicly traded companies, such as Enron, Worldcom, and Tyco. The Dodd-Frank Act of 2010 was a massive overhaul of financial regulation that sought to address the causes of the market meltdown and financial crisis of 2008.

Although the two laws differed—Sarbanes-Oxley focused on corporate disclosure and accounting abuses, whereas Dodd-Frank crafted a broader range of regulatory reforms across the financial markets—both statutes sought to enhance protections and incentives for those who blew the whistle on wrongdoing in the financial markets. Sarbanes-Oxley Section 806 prohibited employers from retaliating against employees who provided evidence of corporate securities fraud and created a robust private right of action for victims of such retaliation. And in Dodd-Frank, Congress sought to further incentivize whistleblowing by creating a new SEC Whistleblower Program that not only strengthened anti-retaliation protections but also provided for the payment of sizable monetary awards to whistleblowers whose information led to successful SEC enforcement actions. In the ensuing years, that program has proved to be an extraordinarily successful public-private partnership; it has resulted in more than $1 billion in monetary sanctions levied by the SEC and has granted scores of individual whistleblowers monetary awards in excess of $380 million.

This article discusses both the Sarbanes-Oxley and Dodd-Frank whistleblower provisions and examine their key points, meaningful differences, and critical unresolved issues in need of further development.

WHISTLEBLOWER PROTECTION UNDER THE SARBANES-OXLEY ACT

Under Section 806 of the Sarbanes-Oxley Act (SOX), 18 U.S.C. section 1514A, employees and agents of publicly traded companies and their subsidiaries have a civil cause of action if their employers retaliate against them because they engaged in certain types of protected whistleblowing activity. Employees must first file a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA), but subsequently may pursue a case in federal court. To establish a claim under Section 806, an employee must establish:

- That a covered employee;
- Engaged in protected activity;
- That the employee suffered a materially adverse personnel action; and
- That the protected activity was a contributing factor in the unfavorable action. In the years since the enactment of SOX, the case law has elaborated further on many of these elements.

Who is Covered by Section 806?

Under the statute, Section 806's anti-retaliation protections apply to:

- Employees of any company that has a class of securities registered under Section 12 of the Securities Exchange Act or that is required to file reports under Section 15(d) of that Act (commonly referred to as "publicly traded companies");
- Employees of any subsidiary or affiliate of a publicly traded company whose financial information is included in the consolidated financial statements of the public company;
- Employees of a nationally recognized statistical rating organizations, as defined in Section 3(a) of the Securities Exchange Act; and
- Employees of a contractor or subcontractor of any of the above companies.

Although the Supreme Court did not limit its holding in Lawson v. FMR LLC, 571 U.S. 429 (2014), that Section 806 protects employees of contractors or subcontractors of a publicly traded company, several lower courts have ruled that the whistleblowing must relate to the contractor's provision of services to the public company and concern fraud by a public company.[1] Covered employees also include in-house counsel, outside lawyers, and accountants for public companies.[2] The courts generally have rejected claims that the rules of professional conduct per se preclude whistleblower-retaliation lawsuits by in-house counsel and that counsel may not rely upon attorney-client communications to prove their cases.[3]

What is Protected Activity?

SOX's anti-retaliation provision prohibits a covered employer from retaliating against an employee because the employee engaged in certain types of whistleblowing ("protected activity"). Section 806 defines protected activity as: (1) providing information to, causing information to be provided to, or otherwise assisting in an investigation, (2) regarding conduct the employee reasonably believes constitutes a violation of any (i) federal mail fraud, wire fraud, bank fraud, or securities fraud statute, (ii) SEC rule or regulation, or (iii) any federal law related to fraud against shareholders. Protected activity also includes filing, causing to be filed, participating in, or assisting in a proceeding related to alleged violations of the laws outlined above.

Section 806 encompasses both external complaints to federal regulatory and law enforcement agencies, Congress, and Congressional committees, and importantly, internal complaints to supervisors or other employees who are authorized to investigate misconduct. To constitute protected activity, the complaint must pertain to a violation of an SEC rule or regulation or fraud against shareholders, including mail fraud, wire fraud, bank fraud, or securities fraud.

It is important to emphasize several points about the scope of protected activity under SOX 806. First, the employee need not prove that an *actual* violation of law occurred but only that he had a reasonable belief that the employer engaged in illegal conduct. The employee must demonstrate both subjective reasonableness—that he actually believed the complained-about conduct constituted a legal violation—and objective reasonableness—"based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee."[4] Indeed, the "courts universally recognize that § 1514A protects employees who reasonably but mistakenly believe that the conduct at issue constitutes a violation of relevant law."[5] Of course, as a practical matter, attorneys representing whistleblowers should be prepared to point to a specific SEC rule or fraud statute and explain how the complained-about conduct can reasonably be seen to violate these provisions. Administrative law judges (ALJs) and the courts routinely dismiss retaliation claims when an employee asserts only vague, conclusory allegations about fraud.[6] Because it is difficult to predict when a factfinder will determine that an incorrect belief was "reasonable," to the extent possible, counsel should frame complained-about conduct as actual legal violations.

What Types of Retaliatory Conduct Does Section 806 Prohibit?

Section 806 applies to a broad range of materially adverse employment actions, including termination, demotion, suspension, other types of discipline, denial of benefits, denial of promotion, threats, intimidation or other harassment, and other acts that might dissuade a reasonable employee from whistleblowing. Termination can include "constructive discharge," which occurs when an employer subjects an employee to working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign. In one case, the Fifth Circuit held that a company's disclosure of the identity of a whistleblower could constitute actionable retaliation, where the disclosure led to ostracism of the employee.[7]

What Connection is Required Between the Whistleblowing and the Retaliation?

Section 806 applies the burden-shifting framework set forth in the Federal Aviation Act Whistleblower Protection Program, another whistleblower statute. 18 U.S.C. § 1514A(b)(2)(C) (applying 49 U.S.C. § 42121(b)). Under this standard, an employee must prove by a preponderance of the evidence that his or her protected activity was a *contributing factor* to the adverse personnel action. The burden then shifts to the employer to prove by clear and convincing evidence that it would have taken the same personnel action absent the protected activity.

Most often, an employer's defense centers on its argument that a legitimate, non-retaliatory basis existed for the adverse action. However, close temporal proximity between a whistleblower's protected activity and the adverse action is a powerful factor which demonstrates retaliatory intent.

Litigating Section 806 Actions

Forum choice

OSHA administers SOX's anti-retaliation provision. Under the statute, a complainant must file as an administrative complaint with OSHA within 180 days of the date on which the retaliatory action occurred or on which the employee became aware of the employer's retaliation.

The statute also provides that, if the Department of Labor has not rendered a final decision within 180 days of filing, the employee may bring a de novo action in the appropriate federal district court and is entitled to a jury trial.

After an employee files an OSHA complaint, OSHA will investigate the complaint to determine whether the evidence provides "reasonable cause" to believe that the employer has violated Section 806. OSHA will issue a findings letter to the parties, either of which may object and require the parties to litigate the matter before an ALJ. Similarly, either party may appeal an ALJ's decision to the Department of Labor's Administrative Review Board (ARB).

Note that while a matter is pending, parties may settle through OSHA's Alternative Dispute Resolution program or through their own negotiated settlement. OSHA must approve any settlement agreement reached between an employer and employee while an employee's administrative SOX complaint remains pending at OSHA. OSHA prohibits settlement agreements which contain "gag" provisions that restrict or discourage an employee from openly communicating with the government about the employer's past or future legal violations. In particular, OSHA scrutinizes confidentiality and non-disparagement provisions to ensure that they do not restrict an employee from participating in a government investigation, require an employee to notify an employer before communicating with the government, insist that an employee affirm that he has not previously provided information to the government or that he has no knowledge of a legal violation, or bar an employee from collecting a monetary award.[8]

Between 2008 and 2018, the DOL docketed 1,978 SOX cases—approximately 180 per year. This demonstrates a recent downward trend from the mid-200s per year in earlier years. https://www.whistleblowers.gov/sites/default/files/3D-Charts-FY2008-FY2018.pdf. During fiscal years 2008 through 2018, between 15 percent and 26 percent of SOX cases filed with the DOL resulted in "positive outcomes" for complainants, meaning they settled or were decided favorably on the merits. In FY17, 23 percent of the cases had positive outcomes for complainants, while 50 percent were dismissed, and 26 percent were kicked out to federal court or withdrawn. In FY18, 21 percent resulted in positive outcomes for complainant, while 56 percent were dismissed, and 22 percent were kicked out or withdrawn.

Relief

SOX's antiretaliation provision authorizes "all relief necessary to make the employee whole," 18 U.S.C. § 1514A(c)(1)-(2), including back pay (with interest), reinstatement with the same seniority that the employee would have had but for the retaliation,[9] and uncapped special damages to compensate for harm suffered from the retaliation. Special damages include damages for reputational harm, diminution of future earning capacity, and mental anguish. An employee's remedies also include reasonable attorney's fees and litigation costs. Section 806 does not provide for punitive damages.

Extraterritoriality

The law governing the extraterritorial application of SOX is unsettled and continues to evolve. In a 2011 opinion, Villanueva v. Core Labs. NV, ARB Case No. 09-108 (ARB Dec. 22, 2011), the ARB held that Section 806 did not apply extraterritorially, based on the Morrison presumption against extraterritorial application of a statute.[10] However, following the U.S. Supreme Court's decision in RGR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016), in which it reasoned that a "clear indication" of extraterritoriality will suffice, and that an "express statement of extraterritoriality is not essential" in holding that the Racketeer Influenced and Corrupt Organizations Act applied extraterritorially, the ARB revised its analysis. In a 2017 opinion, Blanchard v. Exelis Sys. Corp./Vectrus Sys. Corp., ARB Case No. 15-031 (ARB Aug. 29, 2017), the ARB stated that a SOX claim should not be dismissed solely because it involves overseas conduct because SOX, at least in some circumstances, applies to extraterritorial conduct. Specifically, the ARB reasoned that Section 806 applied extraterritorially to cover "*all* public[ ]ly-traded domestic and foreign companies and their employees regardless of the location of the affected employer/employee." Id. at 12. However, it explained that Section 806 covers the *foreign* conduct of foreign issuers and employers only if the misconduct "affect[s] in some significant way" the United States. Id. Regardless, the ARB concluded that because the case involved a U.S. national employed by a U.S. subsidiary of a U.S. publicly traded company on Bagram Air Force Base in Afghanistan (a U.S. Department of Defense facility), who reported potential violations of U.S. mail and wire fraud statutes, and was terminated by U.S. employees, the case did not require an extraterritorial application of SOX, because it involved a domestic application of the statute.

However, other courts have been reluctant to apply SOX to extraterritorial conduct. For example, in Ulrich v. Moody's Corp., 2014 U.S. Dist. LEXIS 138082 (S.D.N.Y. Sept 30, 2014), aff'd, 721 F. App'x 17 (2d Cir. 2018), the court dismissed a SOX anti-retaliation claim brought by a U.S. citizen who was an overseas permanent resident working for a foreign subsidiary of Moody's, who reported wrongdoing and engaged in protected activity outside the U.S. By contrast, in Prout v. Vladeck, 2018 U.S. Dist. LEXIS 97714 (S.D.N.Y. June 11, 2018), even though the plaintiff worked for the foreign subsidiary of a U.S. company, the court distinguished Ulrich and concluded that plaintiff had a viable claim under SOX because he was a U.S. citizen, the misconduct he reported took place in the U.S., and he was fired in the U.S.

Accordingly, in evaluating a retaliation claim with potential extraterritoriality issues, counsel should assess the following facts:

- The employee's citizenship and work location;
- The employer's domicile, and the employer's corporate relationship to U.S.-based parents;
- The location of the underlying misconduct and its connection to violation of U.S. law;
- Where the protected activity occurred—i.e., did the employee report the unlawful conduct to individuals or authorities in the U.S.; and
- Where the alleged retaliatory action occurred.

While not all of these facts necessarily must point toward the U.S., the courts have recognized the difficult nature of litigating "foreign cubed cases," that is, cases which involve foreign employees who sue foreign issuers in U.S. courts for violations of U.S. securities laws based on securities transactions in foreign countries.

Use of a Company's Confidential Documents

The Defend Trade Secrets Act of 2016 (DTSA), 18 U.S.C. § 1831 et seq., provides certain immunities and protections for whistleblowers' use of employers' trade secrets. Specifically, the DTSA provides that an individual may not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret: (1) made in confidence to a federal, state, or local government official, either directly or indirectly, or to an attorney, solely for the purpose of reporting or investigating a suspected violation of law; or (2) made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal. 18 U.S.C. § 1833(b)(1).

Generally, the courts permit a whistleblower to use confidential employer information to substantiate his whistleblower claims, even if the employee entered into a non-disclosure and confidentiality agreement, due to public policy concerns and to advance SEC Rule 21F-17, which prohibits employers from taking action to impede an employee from communicating directly with the SEC about possible securities laws violations.

However, employees may subject themselves to sanctions if they engage in a "wholesale stripping of [an employer]'s confidential documents" or "vast and indiscriminate" appropriations. Erhart v. BofI Holding, Inc., No. 15-CV-02287-BAS-NLS, 2017 WL 588390 (S.D. Cal. Feb. 14, 2017). Instead, an employee should take and rely on only those documents: (1) "specifically related to one of the allegations of wrongdoing"; (2) which are "reasonably necessary" to support his allegations of wrongdoing; and (3) those to which he "had properly accessed in the course of performing [his] work[.]" Id. at *13. The district court in Erhart subsequently denied the employer's motion to dismiss and held that the employee was entitled to disclose the employer's confidential information to prove his case because the employer failed to show that the information had no bearing on the SOX retaliation claim. Erhart v. BofI Holding, Inc., 269 F. Supp. 1059, 1087-88 (S.D. Cal. 2017). The Erhart case is scheduled for jury trial on September 17, 2019.

Some other courts have interpreted an employee's right to rely upon proprietary information more narrowly. For example, in JDS Uniphase Corp. v. Jennings, the district court distinguished between employees who "*orally* disclos[ed] proprietary information to [their] counsel in preparation for suit against the employer," when such a disclosure was necessary to vindicate legal rights, from employees who "physically cart[ed] away stacks of documents, disks, or computers belonging to the business without authorization to do so and in contravention of a confidentiality agreement." 473 F. Supp. 2d 697, 703-04 (E.D. Va. 2007).

As a practical matter, employees' counsel should ascertain at the outset which documents a potential client has in his possession. To the extent a client possesses confidential documents which are not specifically related to, and necessary to prove, his claims, or if the client did not access those documents during the regular course of his employment, he should not rely upon them in asserting his claims. Rather, counsel should prepare an index of all such documents and return them to the employer, without further disclosure.

DODD-FRANK'S SEC WHISTLEBLOWER PROGRAM

As part of the Dodd-Frank Act's sweeping overhaul of financial regulation, Congress included a special statutory provision establishing a new SEC whistleblower program. This was largely in response to the SEC's well-publicized failure to respond promptly to whistleblower tips it had received about the massive fraud being perpetrated by Bernard Madoff. Dodd-Frank's new whistleblower program consists of three key elements: (1) a requirement that the SEC pay monetary awards to whistleblowers who provided original information leading to successful SEC enforcement actions; (2) confidentiality for whistleblowers; and (3) new anti-retaliation protections to strengthen those provided by SOX Section 806.

By any measure, the SEC Whistleblower Program has been a stunning success. Since implementation after final rules were adopted in 2011, the SEC has brought successful enforcement actions with over $1.7 billion in monetary sanctions (disgorgement and penalties) in cases based on whistleblower information. The SEC has awarded nearly $400 million to more than 60 individual whistleblowers since making its first award in 2012. The largest award paid, in March 2018, was $50 million to joint whistleblowers, with a total of $83 million being paid to all three whistleblowers in that matter. Moreover, the program has led to a steady increase in tips provided to the SEC—from just over 3,000 in 2012 to nearly 5,300 in 2018—and a growing awareness of wrongdoing in the workplace as well as an awareness of the SEC program's incentives for reporting that wrongdoing.

For the practitioner representing a potential SEC whistleblower, it is critical to understand several aspects of the Dodd-Frank whistleblower provision: what is required to provide a tip that is eligible for an SEC monetary award; what is particularly useful in making such a tip; and how the Dodd-Frank anti-retaliation protection enhances, but also differs from, the SOX retaliation protections.

Requirements for an Award-Eligible Tip

Under the statute and the SEC's implementing rules, the SEC will pay an award of between 10-30 percent of the amount of monetary sanctions collected to an individual who:

- voluntarily provides
- original information to the SEC
- that leads to a successful SEC enforcement action
- resulting in monetary sanctions exceeding $1,000,000.

It is important to understand what each of these elements requires.

"Voluntary" Provision of Information

To qualify for an award as a whistleblower, the individual must "voluntarily provide" the information to the SEC. Under SEC Rule 21F-4(a), an individual provides information voluntarily when he or she provides it "before a request, inquiry, or demand" for such information is directed to the individual: (i) by the SEC; (ii) by the Public Company Accounting Oversight Board or any self-regulatory organization in connection with an investigation, inspection or examination; or (iii) in connection with an investigation by Congress, the Federal Government, or a state Attorney General or securities regulatory authority. The submission is *not* be considered voluntary if the whistleblower was required to provide the information to the SEC as a result of a pre-existing legal duty to the Commission, a contractual duty owed to the Commission or to one of the other authorities enumerated in the previous sentence, or pursuant to a duty that arises out of a judicial or administrative order. For purposes of determining voluntariness, only a request, inquiry, or demand to an individual whistleblower (or his personal representative, such as counsel) matters—not a request or demand made to that individual's employer.

Thus, if an employee is aware that the SEC seeks information from his or her employer (whether by subpoena, in an examination, or otherwise) and provides the SEC with information about a possible securities violation, the submission still could be deemed voluntary. But an issue could arise if the employee provides the same information that the SEC already has received from the employer. In that case, the SEC still would need to determine whether the whistleblower had provided "original" information (as described below) and whether any additional or different information provided by the whistleblower led to a successful enforcement action.

Another important caveat is that a submission to the SEC may be deemed voluntary, even if made after receiving a request, inquiry, or demand from the SEC, if the information was voluntarily provided to another law enforcement or regulatory authority prior to the SEC's request or inquiry. For example, if OSHA shares information from an employee's SOX complaint with the SEC, resulting in SEC inquiries to the employee, the SEC still may deem the employee's provision of information in response to its demands voluntary.

Original information

In order to receive an SEC award, an individual also must provide "original information." To be considered original under SEC Rule 21F-4(b), the information must be:

- Derived from the whistleblower's independent knowledge or independent analysis;
- Not already known to the SEC from any other source;
- Not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the media, unless the whistleblower was the original source for the information; and
- Provided to the SEC after July 21, 2010.

SEC Rule 21F-4(b)(2) defines "independent knowledge" as factual information in the individual's possession that is not derived from publicly available sources. Significantly, the whistleblower can learn of the information from experiences, communications, and observations in business or social interactions—in other words, from a third party. Rule 21F-4(b)(3) defines "independent analysis" as an individual's own examination and evaluation of information that may be publicly available, such as financial reports, but which reveals information that is not generally known or available to the public.

Several exclusions under the SEC rules exclude information from the definition of independent knowledge or analysis, particularly if the source of the information is a lawyer, consultant, or other third party who acquires information as part of his or her work on behalf of a client, or a company insider who learns of the information in connection with his or her role in internal investigations. The rules also exclude information acquired illegally. Specifically, under SEC Rule 21F-4(b)(4), information is not derived from "independent knowledge or analysis" if:

- It was obtained in violation of federal or state criminal law; it is subject to the attorney-client privilege, unless disclosure would otherwise be permitted by the SEC's attorney conduct rule, 17 C.F.R. § 205.3(d)(2), the applicable state attorney conduct rules, or otherwise;
- It was obtained in connection with the legal representation of a client, and the lawyer seeks to make a whistleblower submission for his or her own benefit, unless disclosure would otherwise be permitted pursuant to 17 C.F.R. section 205.3(d)(2), the applicable state attorney conduct rules, or otherwise; or
- It was obtained because the individual was (a) an officer, director, trustee, or partner of an entity and was informed of the allegations by another person, or learned of the allegations in connection with the entity's internal process for identifying and reporting violations of law; (b) an employee whose duties involve compliance or internal audits, or an employee of a firm retained to perform compliance or internal audit; (c) employed by a firm retained to conduct an internal investigation; or (d) an employee of a public accounting firm and the information was obtained during an engagement.

There are three important exceptions to the last category of exclusion. In general, they prohibit employees who have sensitive legal, compliance, or governance responsibilities, or those involved in required audit engagements, from bypassing internal reporting or compliance processes without good reason. The exceptions allow these employees to become eligible whistleblowers: (1) if the whistleblower has a reasonable basis to believe disclosure is necessary to prevent the entity from engaging in conduct that will cause substantial injury to the entity or the investing public; (2) if the entity is engaging in conduct that will impede an investigation; or (3) if more than 120 days have elapsed since the whistleblower provided the information to the entity's audit committee, chief legal or compliance officer, or his or her supervisor, and the entity took no remedial action. In short, if reporting to the SEC is necessary to stop substantial ongoing harm or obstruction of an investigation, or if the individual has already reported internally and more than 120 days have passed with no corrective action, then these individuals can provide information to the SEC and be considered eligible for whistleblower awards.

Original Source

The SEC will consider information original if it has not learned of it from any other source. There are two exceptions to this rule. First, the SEC will consider a whistleblower the original source of information that was previously received by the SEC from another source if that source obtained the information from the whistleblower. Second, the SEC will consider a whistleblower to be the original source of information if it derives from the whistleblower's independent knowledge or analysis, and materially adds to the information the SEC already knows.

Information that leads to successful enforcement action

The third requirement is that the whistleblower's information must "lead to" a successful enforcement action. SEC Rule 21F-4(c) sets forth three circumstances in which information will be considered to "lead to" a successful enforcement action:

- The information caused the Commission to commence an examination, open an investigation, reopen a previously closed investigation, or inquire about different conduct as part of a current investigation, and the Commission brings a successful action based in whole or in part on the original information provided;
- The original information relates to a conduct that is already under investigation by the Commission (or other federal authority) and significantly contributes to the success of an enforcement action; or
- The information is provided by an employee through his or her employer's internal reporting procedures before or at the same time the

> employee submits the information to the Commission, and the employer then provides the employee's information to the SEC, which leads to a successful enforcement action. In this situation the employee will get the full credit for providing the information to the SEC. The caveat to this provision is that the whistleblower must provide the information to the SEC within 120 days of providing it to his employer.

This last category was included in the SEC's rules to address the concern that whistleblowers would bypass organizations' internal reporting mechanisms to assure their eligibility for monetary awards. The addition of this provision, along with other incentives, was designed to encourage internal reporting by whistleblowers. That goal appears to have been successful, as statistics from the SEC's Office of the Whistleblower indicate that among whistleblowers who report information about wrongdoing in their own workplaces, 83 percent report their concerns internally before going to the SEC.[11]

Monetary Sanctions Exceeding $1 Million

Generally, the SEC may pay a whistleblower award only when the monetary sanctions exceed $1 million in a single judicial or administrative action. In some circumstances, however, the SEC will aggregate the sanctions collected in two or more proceedings arising out of a common nucleus of operative facts. In such cases, once this threshold is met, a whistleblower is eligible for a monetary award based upon all monetary sanctions collected in related enforcement actions—regardless of amount.

In addition, as long as there is an SEC action with monetary sanctions exceeding $1 million, the SEC will pay an award based on monetary sanctions obtained in certain "related actions." Under the SEC rules, a "related action" is one that is brought by the Department of Justice, an appropriate regulatory authority or self-regulatory organization, or a state attorney general in a criminal case, and that is based on the same information that led to the Commission's successful enforcement action. Frequently, criminal or other regulatory authorities bring actions parallel to SEC enforcement actions. It is important to be aware of the existence of any such actions and the possibility of whistleblower awards for those related actions.

Additional Eligibility Requirements

Apart from the basic requirements described above, SEC rules also specify other requirements for whistleblowers who seek monetary awards. First, the whistleblower must submit his or her information through the SEC's Form TCR by mail or fax, or through the website portal provided at sec.gov for submitting whistleblower tips. A whistleblower may file anonymously, but in that case, must be represented by counsel. Counsel for an anonymous whistleblower must verify the whistleblower's identity, review and obtain the whistleblower's signed Form TCR (signed under penalty of perjury), and consent to provide the signed Form TCR to the SEC within 7 days upon request.

Second, as a condition of eligibility for an award, the SEC may require a whistleblower to provide further assistance to assist the staff in evaluating the information provided. Among other things, the SEC may require the whistleblower to provide all information in his or her possession that is related to the submission in a complete and truthful manner; provide testimony or other evidence related to the individual's eligibility for an award; and enter into a confidentiality agreement with the Commission.

Finally, certain individuals simply are ineligible to receive a whistleblower award. For example, the SEC prohibits individuals from collecting an award if they were convicted of criminal violations related to SEC actions; are members of the SEC, DOJ, or any law-enforcement agency, are members of a foreign government, or they knowingly made false statements to the SEC in their whistleblower submissions.[12]

HOW TO SUCCEED AS AN SEC WHISTLEBLOWER

As the above discussion makes clear, a whistleblower must satisfy a number of basic requirements before he or she is eligible for a monetary award. Beyond these basic requirements, however, several other factors are important to maximize the likelihood that a whistleblower tip will result in a monetary award.

One fundamental issue is how to present the whistleblower's information in a manner that makes it most likely that SEC staff will pursue an investigation. Each year, the SEC receives thousands of tips and complaints—over 5,200 whistleblower tips in FY 2018 alone—but it lacks the resources to launch full-scale investigations of all of these complaints, let alone to bring enforcement actions in each case. Thus, a critical first task for counsel representing an SEC whistleblower is to catch the staff's attention by demonstrating the significance and credibility of the tip. To do so, counsel should provide a clear and credible presentation of the facts known to the whistleblower and a cogent explanation of why those facts suggest the likelihood of a significant underlying violation of the federal securities laws.

The SEC's Form TCR contains sections for providing a narrative description of facts known to the whistleblower, a description of supporting documentation, and a summary of the possible violations of securities law. However, counsel need not be restricted by the format of the Form TCR. As a supplement to the Form, it can be quite helpful to provide the SEC with a self-contained memorandum, marshalling the facts known to the whistleblower and outlining potential theories of legal liability. The written submission also can provide relevant documentary evidence. A credible and professional submission can help persuade the staff to investigate the claim and potentially can serve as a road map for the SEC's investigation, by suggesting new leads and additional sources of information. In some cases, it also can be useful to include expert accounting or financial analyses to support the whistleblower's allegations of misconduct.

In general, the whistleblower should provide additional assistance to the SEC as requested. If a whistleblower has concerns about confidentiality and possible retaliation if he or she cooperates, counsel should provide the whistleblower's responses to staff without compromising whistleblower confidentiality. And if the whistleblower is amenable to meeting with staff to take questions and provide further explanation, this can be a valuable way of advancing the staff's investigation and helping convince the staff of the whistleblower's credibility.

Providing the maximum amount of assistance to the staff investigation is important for several reasons. First, of course, by helping the staff conduct a successful investigation and bring a strong case, counsel increases the chances of the desired outcome: a successful SEC enforcement action resulting in an order of monetary sanctions exceeding $1 million. But in addition, assistance is one of the best ways to maximize the whistleblower's monetary award. Recall that the SEC has the discretion to pay awards in an amount between 10-30 percent of the monetary sanctions obtained in a case. Under the process set out in SEC rules, a whistleblower makes an application for a monetary award only after the SEC has completed its successful case and decides on the amount of the award.[13] One factor relevant to the amount of the award granted by the SEC is the degree of assistance provided to the SEC by the whistleblower.

In the award application, counsel must establish that the whistleblower meets the eligibility requirements for an award. But counsel also should take the opportunity to persuade the SEC why an award at a higher percentage level is warranted. In so doing, the award application should address the criteria set forth in SEC Rule 21F-6, which the Commission may consider in adjusting the amount of an award. Under that rule, the SEC will consider the following factors in determining whether to increase the amount of an award:

- The significance of the information provided by the whistleblower;
- The degree of assistance provided by the whistleblower;
- The programmatic law enforcement interest in the case at issue;
- Whether the whistleblower participated in, or assisted, internal compliance efforts.

The SEC will also consider the following factors in determining whether to decrease the amount of an award:

- The whistleblower's culpability or involvement in the matter at issue;
- Any unreasonable delay by the whistleblower in reporting the information to the SEC;
- Whether the whistleblower interfered with internal compliance efforts.

Dodd-Frank Anti-Retaliation Protections

In addition to its whistleblower award program, Dodd-Frank established additional anti-retaliation protections for whistleblowers, including a new private right of action for employees subjected to retaliation by their employer.[14] Under the Dodd-Frank retaliation provision, added as Securities Exchange Act Section 21F(h), an employer may not discharge, demote, suspend, threaten, harass, or take any other retaliatory action against an employee who:

- Provides information about his or her employer to the SEC in accordance with the whistleblower rules;
- Initiates, testifies in, or assists in an investigation or judicial or administrative action; or
- Makes disclosures that are required or protected under SOX, the Exchange Act, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

An employee has a private right of action in federal court, without the need to exhaust administrative remedies prior to filing. This immediate right to sue in federal court is a key difference from the Section 806 of SOX's requirement that a complainant first file with OSHA. The remedies available under Dodd-Frank include reinstatement to the same seniority, double back pay (Sarbanes-Oxley allows for only actual back pay), and litigation costs (including attorneys' fees and expert witness fees). An employee who files suit under Section 21F(h) must file the claim no later than six years from the retaliatory conduct or three years from when the employee knew, or reasonably should have known, of the retaliatory conduct, but in no event more than 10 years after the date of the violation.

There is one important way in which Dodd-Frank's retaliation provision affords less protection than Section 806. This difference arises from the recent Supreme Court decision in Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018). In the Digital Realty case, the Court held that under Dodd-Frank a whistleblower is protected by the statute only if he or she provides information *to the SEC*. Thus, unlike under Section 806, an employee who reports internally but does not report his or her information to the SEC is not covered by Dodd-Frank's anti-retaliatory protections.[15]

To qualify for Dodd-Frank's anti-retaliatory protections, the whistleblower must possess a "reasonable belief" that the information provided relates to a possible securities violation. As with Section 806, a "reasonable belief" is a subjectively genuine belief that the information demonstrates a possible violation, and that this belief is one that a similarly situated employee might reasonably possess. Furthermore, the information must demonstrate a "possible violation," which eliminates frivolous submissions from eligibility. It is important to note that a successful SEC enforcement action is not a prerequisite for Dodd-Frank anti-retaliation protections.

As a supplement to private rights of action by victims of retaliation, the SEC has brought its own enforcement actions based on wrongful retaliation by companies against whistleblowing employees. A notable example is the SEC action in Paradigm Capital Management, Inc., Rel. No. 34-72393 (June 16, 2014). Paradigm's head trader reported to the SEC that the firm and its owner had engaged in principal transactions that created an undisclosed conflict of interest with a client. After the firm learned of the whistleblowing, it reassigned the head trader to full-time compliance assistant, stripped him of his supervisory responsibilities, and otherwise marginalized him. The SEC's case against Paradigm included a charge that it had violated the anti-retaliation provision of the statute; Paradigm agreed to settle this case for $2.2 million, and following the resolution of the case, the whistleblower received the statutory maximum award.[16] In another important case, the SEC brought a stand-alone enforcement action against a company for violating Dodd-Frank's anti-retaliation provision without charging violations of any other securities laws—including those which were the subject of the whistleblower's reports.[17]

The SEC also has used both its rulemaking and enforcement powers to clamp down on companies' use of overbroad non-disclosure and severance agreements that prohibit or deter employees from reporting violations to regulators and law enforcement. As part of its rules implementing the Dodd-Frank Whistleblower program, the SEC adopted Rule 21F-17(a), which states that:

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

In recent years, the SEC has brought several enforcement cases against companies which have violated this rule. These include cases against companies that: required employees to sign overly broad confidentiality agreements;[18] used separation agreements to inhibit communications with the SEC;[19] and required employees in severance agreements to waive their rights to obtain monetary awards via the SEC whistleblower program.[20]

CONCLUSION

Although Congress significantly expanded the protections available to whistleblowers in the aftermath of the 2008 financial crisis, Sarbanes-Oxley and Dodd-Frank whistleblowers navigate a minefield replete with complex questions including where, when, and how to report malfeasance. A one-size-fits-all approach is impossible in this context, given the particulars of each case and the available whistleblower paradigms. Whistleblowers may be well served by collaborating with advocates early in the process to map out internal and external reporting strategies, prepare exit strategies when necessary, compile a persuasive prosecution package for regulators, and maximize potential recoveries, all while ensuring that they avoid potential pitfalls.

The impact of whistleblower disclosures on financial transparency and accountability, as well as regulators' ability to bring successful enforcement actions, cannot be overstated. As a country, we need to ensure that whistleblowers are rewarded, or otherwise made whole, for the risks they assume in reporting the illegal activities of their employers.

Notes

1 See Anthony v. Nw. Mutual Life Ins. Co., 130 F. Supp. 3d 644 (N.D.N.Y. 2015); Gibney v. Evolution Mktg Research, LLC, 25 F. Supp. 3d 741 (E.D. Pa. 2014).

2 Van Asdale v. Int'l Game Tech., 577 F.3d 989 (9th Cir. 2009).

3 Wadler v. Bio-Rad Labs., Inc., 212 F. Supp. 3d 829 (N.D. Cal. 2016); Jordan v. Sprint Nextel Corp., ARB Case No. 06-105, ALJ Case No. 2006-SOX-041 (ARB Sept. 30, 2009). In Wadler, the jury reached a verdict in the employee's favor, which the Ninth Circuit largely upheld on appeal. Wadler v. Bio-Rad Labs., Inc., 916 F.3d 1176 (9th Cir. 2019), reh'g denied, No. 17-16193 (9th Cir. Apr. 8, 2019).

4 Allen v. Admin. Rev. Bd., 514 F.3d 468, 477 (5th Cir. 2008).

5 Rhinehimer v. U.S. Bancorp Inv., Inc., 787 F.3d 797, 812 (6th Cir. 2015).

6 See, e.g., Nielsen v. AECOM Tech. Corp., 762 F.3d 214, 216 (2d Cir. 2014) (affirming the dismissal of SOX retaliation claims where the employee pleaded generically that he "reasonably believed that defendants were committing fraud upon [their] shareholders and would likely continue violating the United States mail and wire fraud statutes by using telephone lines and emails in furtherance of the fraud").

7 Halliburton v. Admin. Rev. Bd., 771 F.3d 254 (5th Cir. 2014).

8 https://www.whistleblowers.gov/sites/default/files/2017-10/InterimGuidance-DeFactoGagOrderProvisions.pdf.

9 Although reinstatement is the preferred remedy to make an employee whole, in a case where reinstatement is not feasible a SOX whistleblower may be able to receive "front pay" as an alternative remedy.

10 See Morrison v. Nat'l Australian Bank, Ltd., 561 U.S. 247, 255 (2010).

11 2018 Annual Report of the SEC Office of the Whistleblower, at 17.

12 SEC Rule 21F-8(c).

13 Under SEC Rule 21F-10, an award application, on SEC Form WB-APP, must be submitted within 90 days after the SEC posts a "Notice of Covered Action," the notice that informs the public that it has completed a case for which it may pay an award.

14 Dodd-Frank also amended Section 806 of SOX to strengthen the existing anti-retaliation provision. The amendments have been discussed above, and include adding the right to jury trial, and specifying when employees of subsidiaries of public traded companies are protected.

15 Currently, legislation, H.R. 2515, is pending in the House of Representatives that would overturn Digital Realty by amending the statutory definition of "whistleblower" to include internal whistleblowers.

16 See SEC Press Release 2015-75 (April 28, 2015).

17 See In the Matter of Int'l Gaming Tech., Rel. No. 34-78991 (Sept. 29, 2016).

18 See, e.g., KBR, Inc., Rel. No. 34-74619 (Apr. 1, 2015).

19 See, e.g., Anhesuer-Busch Inbev SA/NV, Rel. No. 34-78957 (Sept. 28, 2016).

20 See, e.g., Blackrock, Inc., Rel. No. 34-79804 (Jan. 17, 2017).