The Investment Lawyer

Covering Legal and Regulatory Issues of Asset Management

VOL. 23, NO. 4 • APRIL 2016

Self-Disclosing to the SEC in the Age of the Whistleblower

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An investment management firm has started its annual review auditing process. During its review, certain compliance breaches are identified and one employee has come forward alleging potential improprieties by his supervisors. The company engages outside counsel to conduct an internal investigation into the compliance issues and to report back to the company's independent audit committee. Based on the investigation to date, it appears that there are compliance issues related to potentially improper trades for firm clients by a small group of employees within a particular department, although the independent investigator's findings are not yet complete and there could be broader systemic issues that the company will need to address. The company is considering whether it should affirmatively reach out to the Securities and Exchange Commission (SEC or Commission) and self-disclose its findings and, if so, when.

This Article examines the factors involved in considering whether to self-disclose potential federal securities law violations to the SEC and how the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) in 2010 and ensuing awards to corporate whistleblowers have dramatically changed the decision-making process about whether to self-disclose compliance matters to the SEC.

I. A Look Back: Self-Disclosure Before Dodd-Frank

In order to better understand the changes effected by Dodd-Frank, it is helpful to first review how companies handled self-disclosure to the SEC before Dodd-Frank. Prior to Dodd-Frank, self-disclosure to the SEC was encouraged but not required.[1]

In remarks made to the National Society of Compliance Professionals in 2004, Lori Richards (the then-director of the SEC's Office of Compliance, Inspections and Examinations) encouraged companies to inform regulators about compliance issues: "Pick up the phone. Let us know about the problems you're dealing with, and the changes you are implementing. It may be a difficult call to make, but you're much better off being forthcoming with your regulator than if we detect the problem ourselves."[2]

Nearly five years later, Ms. Richards gave remarks related to the SEC's plans to "strengthen examination oversight" of broker-dealer and investment adviser firms.[3] Part of the changes she outlined included improving the SEC's "handling of tips and complaints."[4] In that context, she also "encourage[d]" industry professionals to "communicate directly with your local SEC regional office or FINRA district office" if they identified any "signs of possible fraud."[5]

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Overall, however, despite such remarks made to encourage self-disclosure to the SEC, it was infrequent in practice. Understandably, firms were reluctant to disclose potential issues to the SEC that may have already been remediated, or that were still being assessed internally. By self-disclosing, firms may have felt they were essentially shooting themselves in the foot by inviting the SEC to open a costly and invasive investigation of the company, whether warranted or not. Of course, there was always the risk of an inside or outside whistleblower reporting to the SEC in the first instance. Under the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), whistleblowers are protected against retaliation.[6] But that risk was less likely before the enactment of Dodd-Frank, in part because the Sarbanes-Oxley Act did not entitle whistleblowers to any financial bounties and whistleblowers were required to exhaust certain administrative remedies before filing any lawsuit for retaliation taken by the company. In short, many companies may have believed that a good-faith remediation of the compliance issue at hand was sufficient and that there was significant risk and little if any upside to self-disclosing the issue or remediation efforts to the SEC.

II. Dodd-Frank and the New Whistleblower Regime: A "Game Changer"

Dodd-Frank was enacted in the wake of the financial crisis of 2008 and 2009 and the Bernard Madoff fraud. The very aim of Dodd-Frank was to "motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated federal securities laws and recover money for victims of financial fraud."[7] Among other requirements, Dodd-Frank required the SEC to establish a separate office specifically to administer the SEC's whistleblower program,[8] which created the SEC's "Office of the Whistleblower." Individuals can "submit a tip" or "claim an award" via the Office of the Whistleblower's website.[9]

The SEC's whistleblower program under Dodd-Frank has been described as no less than "a game changer" by SEC officials.[10] In relation to self-disclosing and as discussed further below, Dodd-Frank dramatically changed the calculus about whether to self-disclose by creating an entirely new framework to encourage employees to be whistleblowers. Importantly, Dodd-Frank still does not *require* companies to self-disclose to the SEC. As in the past, companies are theoretically free to choose not to disclose allegations or evidence of wrongdoing to the SEC in the first instance. What Dodd-Frank did do, however, was create a robust apparatus, with the promise of powerful cash bounties, to encourage and reward whistleblowing by company insiders and outsiders.

A. Monetary Incentives and Eligibility Requirements

Dodd-Frank sought to encourage whistleblowing most notably by providing powerful monetary incentives for individuals to report alleged violations to the SEC.[11] In particular, Section 922 of Dodd-Frank provides that certain eligible whistleblowers who report federal securities laws violations to the SEC may be entitled to a share of between 10 percent and 30 percent of monetary sanctions ultimately imposed and collected by the SEC that exceed $1 million.[12]

To be eligible for a monetary award, the whistleblower must satisfy several requirements. In particular, he or she must: (i) voluntarily provide the Commission, (ii) with original information, (iii) that leads to the successful enforcement by the Commission of a federal court or administrative action, and (iv) in which the Commission obtains monetary sanctions totaling more than $1 million.[13]

With regard to the requirement of providing "original information," Dodd-Frank requires (among other conditions) that the information be "derived from the independent knowledge or analysis of a whistleblower" and excludes a number of categories of information from its definition of

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"independent knowledge or analysis."[14] These exclusions include that individuals will not be eligible for an award if they learned the information through various fiduciary or internal compliance roles, including (but not limited to) if they are an officer, director, trustee, or compliance or internal audit employee.[15] These same exclusions, however, also have exceptions, that is, certain of these individuals could be entitled to an award if any of the following three conditions is met:

> **(A)** You have a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the relevant entity from engaging in conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors;
>
> **(B)** You have a reasonable basis to believe that the relevant entity is engaging in conduct that will impede an investigation of the misconduct; or
>
> **(C)** At least 120 days have elapsed since you provided the information to the relevant entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or your supervisor, or since you received the information, if you received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or your supervisor was already aware of the information.[16]

Examples of actual and recent awards under such circumstances are discussed further below.

B. Protection Against Retaliation

In addition to monetary incentives, Dodd-Frank also sought to promote whistleblowing through two other measures: (1) prohibiting employment-related retaliation against whistleblowers and (2) providing various guarantees to keep the whistleblower's identity confidential. To protect against and provide a remedy for any retaliation, Dodd-Frank provides employees with a private cause of action in the event that they are discharged or discriminated against by their employers in violation of the Act. When issuing the final whistleblower rules in August 2011, the Commission adopted a rule (Exchange Rule 21F-2) to clarify that these employment-related retaliation protections apply not only to individuals who report to the SEC but also to employees who report violations internally.[17]

Any employee claiming retaliation under Dodd-Frank may bring an action directly in federal court. This is in contrast to the procedures under Sarbanes-Oxley where a complainant whistleblower alleging retaliation must first file an administrative complaint with the secretary of labor.[18] Moreover, the statute of limitations for filing a complaint under Sarbanes-Oxley (180 days after the violation occurs and 180 days after the employee becomes aware of the violation) is far shorter than the statute of limitations for filing suit under Dodd-Frank, which is six to 10 years from the time a violation occurs.[19]

Notably, in June 2014, the Commission brought its first anti-retaliation case against an employer, and the Office of the Whistleblower "continues to work with Enforcement staff on identifying potential anti-retaliation enforcement actions."[20]

C. Recent and Notable Monetary Awards

In the over five years since its inception, the SEC's whistleblower program has given fruit to very sizable awards to both company insiders (including compliance personnel) and outsiders. For example:[21]

- On September 22, 2014, the SEC announced its largest ever whistleblower award to one individual (living in a foreign country) that amounted to more than $30 million for providing key information about an ongoing fraud that "would have been very difficult to detect."[22]

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- On March 2, 2015, the Commission made a half-million dollar award to a former company officer who reported "original, high-quality information."[23] This award was noteworthy because, as mentioned above, officers, directors, trustees, or partners who learn about a fraud are generally not eligible for an award. However, as noted above, this general rule is subject to several exceptions. In this case, the officer had reported the information to the Commission more than 120 days "after other responsible compliance personnel possessed the information and failed to adequately address the issue."[24]
- On April 22, 2015, it was announced that a "compliance professional" received an award of between $1.4 million and $1.6 million. "This compliance officer reported misconduct after responsible management at the entity became aware of potentially impending harm to investors and failed to take steps to prevent it." Of note, like officers and directors, compliance or internal audit professionals who learned of the information through their role at the company are also not generally eligible for a bounty, subject to the same exceptions.[25] In this case, the applicable exception was the "exigent circumstances"[26] exception, namely that the claimant for the award " 'had a reasonable basis to believe that disclosure of the information to the Commission [was] necessary to prevent the relevant entity from engaging in conduct that [was] likely to cause substantial injury to the financial interest or property of the entity or investors.' "[27]
- On April 28, 2015, the Commission announced an award of over $600,000 in connection with the Commission's first anti-retaliation case in which a whistleblower had been the subject of numerous retaliatory actions by his employer (Paradigm Capital Management, Inc.), "including removing the whistleblower from the whistleblower's then-current position, tasking the whistleblower with investigating the very conduct the whistleblower reported to the Commission, changing the whistleblower's job function, stripping the whistleblower of supervisory responsibilities, and otherwise marginalizing the whistleblower."[28]
- On July 17, 2015, the SEC announced it paid another whistleblower more than $3 million to a company insider "whose information helped the SEC crack a complex fraud."[29]
- More recently, on January 15, 2016, the SEC announced a whistleblower award of more than $700,000 to a company outsider "who conducted a detailed analysis that led to a successful SEC enforcement action."[30] In that same press release, the SEC noted that the whistleblower program had now paid more than $55 million to 23 whistleblowers.
- In the 2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program, the chief of the Office of the Whistleblower (Sean McKessy) noted that the number of whistleblower awards has continued to increase, and that in 2015 the Office of the Whistleblower saw a "significant increase" in award claims (it received more than 120 whistleblower award claims). McKessy noted that this "uptick" was "attributable to the increased public awareness of the SEC's whistleblower program and in response to the tens of millions of dollars that have been paid to whistleblowers under the program."[31]

D. Incentives for Reporting Internally First

In the words of the Office of the Whistleblower, the "whistleblower program was designed to complement, rather than replace, existing corporate compliance programs."[32] In August 2011, the SEC adopted rules in order to try to incentivize employees to report internally first.[33] It did not, however, require internal reporting as a pre-condition to receiving an award (despite the requests of some commentators to do so).[34] Moreover, the Commission also did not adopt a rule that categorically excluded tips about violations "that a company may have addressed

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through remedial action."[35] The fact that a company may have addressed the issues through such remedial action, however, could be considered by the Commission in its "exercise of discretion in determining whether to open an investigation, whether to bring an enforcement action, and the nature and scope of any action filed and relief granted."[36]

Rather, potential whistleblowers are incentivized to report internally in the first instance because his or her "participation in internal compliance systems is . . . a factor that will generally increase an award, whereas interference with those systems will surely decrease an award."[37] A whistleblower who internally reports, and who also at the same time or within 120 days reports to the Commission, "will receive credit for any information the company subsequently self-reports" to the Commission.[38] Moreover, if a company conducts an internal investigation based on the whistleblower's information and thereafter reports to the SEC, the whistleblower will receive "credit" for submission of the same information or even "for any additional information generated by the entity in its investigation."[39] The SEC has noted that, of the company insiders (current or former employees) who had collected awards so far, "approximately 80%" of them had first raised their concerns "internally to their supervisors or compliance personnel, or understood that their supervisor or relevant compliance personnel knew of the violations."[40]

E. Timing Requirements

The SEC has stated that the whistleblower rules "should incentivize the prompt and early submission of high-quality, credible tips."[41] Indeed, award decisions issued by the Commission make clear the importance of prompt reporting by determining the amount of award based in part on temporal issues (which further incentivizes whistleblowers to come forward earlier rather than later). For example, on November 4, 2015, the Commission released an award decision in which it decided to reduce the claimant's award percentage because the claimant had delayed—even though the delay was "limited in duration"—to report the violations (ultimately the claimant was still awarded over $325,000).[42] The claimant for the award had argued that the delay should not reduce the award amount because such a policy would encourage the submission of "lower-quality" tips.[43] The Commission rejected that argument, noting, among other things, that whistleblowers can always "supplement their initial tips."[44] Moreover, the Commission did not want to encourage delays in reporting because a whistleblower might unreasonably delay reporting in order to receive a greater award "due to the continued accrual of wrongful profits" as a result of the violations. In the press release accompanying this award, the chief of the Office of the Whistleblower underscored the fact that the SEC wanted whistleblowers to report information "expeditiously."[45]

Under certain circumstances, a 120-day period applies. In particular, certain persons in designated categories (for example, a director, officer, or compliance professional) may become eligible for an award only if 120 days has elapsed since he or she provided the information to core decision makers, such as the company's audit committee.[46] In addition, in order to encourage internal compliance, whistleblowers who report internally are deemed to have reported the same information to the SEC on the same date, as long as the whistleblower, or the company on the whistleblower's behalf, provides the same information to the SEC within 120 days.[47]

III. Recent Guidance Further Encouraging Whistleblower Activity

If anything, whistleblower activity is poised to only increase. As noted above, the SEC's Office of the Whistleblower noted there was a significant "uptick" in claims for whistleblower awards based on increased public awareness of the whistleblower program and the tens of millions of dollars paid out to whistleblowers so far.[48] And the number of tips received by the Commission increased by 30 percent between fiscal years 2012 and 2015. Moreover, the SEC has

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indicated it will continue to encourage and support whistleblowing and that one of the primary goals of the Office of the Whistleblower is to "increase public awareness of the Commission's whistleblower program."[49] In its own words, the SEC Staff "increasingly see ourselves as the whistleblower's advocate."[50] As discussed further below, additional recent remarks and enforcement actions by the SEC also support the reality that the SEC is trying to promote whistleblowing and, at least in the context of Foreign Corrupt Practices Act (FCPA) violations, trying to offer further incentives for companies to self-disclose.

A. KBR Enforcement Action

In April 2015, the SEC announced its first enforcement action against a company under Dodd-Frank for using restrictive language in confidentiality agreements that the SEC asserted runs the risk of stifling the whistleblowing process. The SEC charged Houston-based KBR Inc. with violating the whistleblower provisions of Rule 21F-17 under Dodd-Frank by imposing confidentiality obligations during the course of internal investigations that employees could interpret as prohibiting them from disclosing information to the SEC or other government agencies. Rule 21F-17 provides in relevant part that "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement … with respect to such communications."

KBR's confidentiality agreements—which it used when conducting internal investigations—contained a provision prohibiting employees interviewed during the investigation from discussing the contents of the interview without prior authorization of the Law Department. In order to settle the charges, KBR agreed to a $130,000 penalty and to remove the offending language from its standard confidentiality agreement and substitute the following: "Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures."

In terms of future enforcement actions, McKessy, has advised Congress that "[a]ssessing confidentiality agreements for compliance with Rule 21F-17(a) will continue to be a top priority for that office into Fiscal Year 2016."[51]

B. Ongoing Advocacy by the SEC Regarding Retaliation Protections

As mentioned above, in August 2011, the Commission adopted Exchange Act Rule 21F-2 to clarify that the retaliation protections under Dodd-Frank apply not only to individuals who report to the SEC but also to employees who report violations internally.[52] Since that time, however, several courts have interpreted the anti-retaliation provisions more narrowly to protect *only* those individuals who report to the SEC.[53] In response, the SEC has filed numerous *amicus curiae* briefs in support of the position taken in the rule.[54] In addition, in August 2015, the Commission adopted additional guidance to clarify that individuals who report information of possible federal securities law violations are protected from retaliation regardless of whether they report such information internally or to the Commission, and that "an individual's status as a whistleblower does not depend on adherence to the reporting procedures specified in Exchange Act Rule 21F-9a (specifying procedures to be followed to qualify for a whistleblower award), but is determined solely by the terms of Exchange Act Rule 21F-2(b)(1)."[55]

On September 10, 2015, the Second Circuit Court of Appeals supported the SEC's position,

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deferring to the agency's decision that employees who report federal securities law violations to their employers are protected by the Dodd-Frank anti-retaliation provisions.[56] More recently, the Commission filed an *amicus* brief before the Sixth Circuit Court of Appeals in support of the plaintiff-appellant, to argue that individuals are entitled to employment anti-retaliation protection irrespective of whether the individual makes a separate report to the Commission.[57]

In short, the SEC has made vigorous efforts to protect and encourage whistleblowers by protecting a broader swath of whistleblowers from retaliation, rather than just the ones that report directly to the SEC.

C. New Policy Change Encouraging Self-Reporting in FCPA Actions

With respect to the SEC's enforcement of the Foreign Corrupt Practices Act, the SEC recently reinforced the importance of company self-reporting and cooperation by companies. It provided clear and concrete incentives for a company to do so. In particular, the SEC's director of the Division of Enforcement, Andrew Ceresney, stated that, going forward, a company must self-report in order to be eligible for a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA).[58] By making this policy change, he wanted to make clear that there were "significant and tangible" benefits for cooperating with the SEC in regards to its FCPA investigations and that it "will further incentivize firms to promptly report FCPA misconduct to the SEC."[59] He did note, however, that merely self-reporting was not by itself sufficient to be entitled to a DPA or NPA and that other factors would determine how much cooperation credit to give to a corporation and whether taking the "extraordinary step of entering into a DPA or NPA" was warranted.[60] In short, there is no guarantee that self-reporting will result in a DPA or NPA, but the SEC's Division of Enforcement "will not even consider this step if a company fails to self-report."[61]

IV. What Is a Company to Do?

Given the new regulatory landscape and the ever-increasing likelihood that a company is dealing with a known (or unknown) whistleblower, the momentous decision to self-disclose to the SEC is ever more pressing. As an initial matter and before any company is presented with such a decision, companies would be well advised to have the following practices and programs in place:

- A company should have an internal reporting system that encourages and allows for anonymous reporting of potential violations or concerns. Phone and online reporting options should be readily accessible (and potentially multilingual, depending on the company). As previously noted above, the SEC views internal reporting as a positive factor. The company benefits also by being made directly aware of potential issues (rather than indirectly from a sudden SEC investigation), which allows the company to respond and try to remedy the issue.
- Companies should have clear policies in place and internal messaging that prohibit any retaliation against whistleblowers. These policies should clearly state that reprisal for good faith reporting of allegation of misconduct will not be tolerated. The policy should be widely publicized and distributed (for example, Code of Conduct, posters, company intranet site, and during in-person and online training sessions). The company should also require acknowledgment of the policy and related training.
- Companies should avoid any adverse actions to whistleblowers, for example a change in job responsibilities that could be interpreted as marginalizing the whistleblower (as in the *Paradigm* example above).
- In addition, the company should promptly conduct an internal investigation of credible allegations by whistleblowers. Ideally, this investigation should be conducted by an independent and objective internal or external party.[62]

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On the issue of whether to self-disclose to the SEC potential or actual violations that have been uncovered through an internal investigation, it is important to note the following:

- There is still no outright obligation to self-disclose, even under Dodd-Frank.
- Whether to disclose the results of an internal examination is ultimately a complex decision to make, with many factors and risks to consider, including the following:

  Risks of Not Self-Disclosing: Given the powerful incentives and more widespread knowledge of the whistleblower programs, there is a greater probability that issues will be brought to the SEC's attention via a whistleblower (either internal or external to the company) and that the alleged misconduct will come to light. And a company that does not self-disclose may lose cooperation benefits (although there is no absolute guarantee of receiving any leniency) or even face greater penalties or disfavor by the SEC if the SEC independently discovers the conduct through alternative channels. As described above, the SEC has made it clear that companies are ineligible for a DPA or an NPA if they do not self-disclose in the FCPA context. Even though there is not yet such a formally stated requirement in other contexts, it seems likely that the SEC would informally impose that requirement in other contexts, given the SEC's emphasis on incentivizing self-reporting and cooperation.

  Risks of Self-Disclosing: The obvious risks include alerting the SEC to potential federal securities law issues (which may or may not have merit) and inviting a potentially costly and highly disruptive regulatory examination or investigation as well as potential public scrutiny and private civil actions against the company.

  Reporting "Non-Issues": A company might also consider self-disclosing even where the internal investigation suggests no misconduct. This might discourage a potential whistleblower from reporting to the SEC, and even if it does not, self-reporting the allegations and the results of the investigation in an informal, self-disclosure setting may avoid more significant expenditure of resources involved in responding to SEC requests in a formal setting (for example, subpoena).

- Among other factors a company should consider are the actual scope/impact of the compliance breach (for example, does it point to a larger systemic issue that needs to be addressed or that could cause harm to investors) and whether and how any illegal or unethical conduct can be halted and otherwise remediated.

If, after consideration of all relevant facts and circumstances, a company decides to self-disclose to the SEC, the company should make the disclosure as soon as reasonably possible, given the SEC's favorable views on a company disclosing early and providing real-time help with a potential SEC investigation. However, the company should balance these considerations against the possibility that the company would be presenting the SEC with underdeveloped facts and, possibly, with insufficient or incomplete remediation. This, of course, underscores why it is so important to start an internal investigation promptly and complete that investigation, and take appropriate remedial actions as expeditiously as possible.

V. Concluding Thoughts

In conclusion, in this day and age of incentivized whistleblowers (both external and internal) and given the SEC's statements and recent actions

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in this area, the decision of whether to self-disclose federal securities laws violations to the SEC should be discussed and seriously considered with company counsel and the company's board of directors. In any internal investigation, the company should be very careful to follow up on claims and make sure that individuals who come forward with information are not retaliated against in any fashion. Self-reporting, whistleblower considerations and internal investigations raise complex legal issues that can have a significant impact on the outcome of the matter at hand and, ultimately, on the future viability of the company and, in some cases, its parent and other affiliates.

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NOTES

1 Even prior to Dodd-Frank, investment advisers were required to implement a compliance program that was reasonably designed to prevent violation of the Investment Advisers Act of 1940 (the Advisers Act), by October 5, 2004. Rule 206(4)-7 under the Advisers Act. Firms were also required to conduct annual reviews of their compliance programs. Investment advisers are also expected to identify various risks to their firms and client accounts and ensure that the firm's compliance program adequately addresses those risks.

2 Lori Richards, "Instilling Lasting and Meaningful Changes in Compliance" (Oct. 28, 2004), available at *http://ftp.sec.gov/news/speech/spch102804lr.htm*.

3 Lori Richards, "Strengthening Examination Oversight: Changes to Regulatory Examinations," Remarks before the SIFMA Compliance and Legal Division, St. Louis Regional Seminar, The New World of Compliance and Legal, St. Louis Missouri (June 17, 2009), available at *http://ftp.sec.gov/news/speech/2009/spch061709lar.htm*.

4 *Id.*

5 *Id.*

6 Sarbanes-Oxley Act, 18 U.S.C. § 1514A (2002) (providing for whistleblower protection against retaliation for employees of publicly traded companies and allowing whistleblowers to seek relief under certain conditions).

7 S. Rep. No. 111-176 at 110-112 (2010).

8 The SEC's whistleblower program refers to the SEC's activities in implementing the whistleblower provisions of Dodd-Frank and the rules thereunder.

9 SEC Office of the Whistleblower, *https://www.sec.gov/whistleblower* (last visited Feb. 16, 2016).

10 Remarks by Chair Mary Jo White at the Ray Garrett, Jr. Corporate and Securities Law Institute-Northwestern School of Law, Chicago, Illinois (April 30, 2015), available at *https://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html*.

11 Section 749 of Dodd-Frank also provided monetary awards for whistleblowers who report commodities law violations to the Commodity Futures Trading Commission (CFTC). 7 U.S.C. § 26.

12 Dodd-Frank Act, Section 922(a); 15 U.S.C.A. Section 78u-6 (2010).

13 *See* 15 U.S.C. § 78u-6(a)(3). In addition to these eligibility requirements, the actual amount awarded is subject to a number of factors, including the significance of the information provided, the amount of assistance provided, the culpability of the whistleblower, any interference with the investigation, and if the whistleblower made any false statements. 15 U.S.C. § 78u-6(c).

14 15 U.S.C. § 78u-6(a)(3); 17 C.F.R. § 240.21F-4(b).

15 17 C.F.R. § 240.21F-4(b).

16 17 C.F.R. § 240.21F-4(b)(4)(v)(A)-(C).

17 In 2011, using its authority to issue rules implementing section 21F (*see* 15 U.S.C. § 78u-6j), the SEC promulgated Exchange Act Rule 21F-2, 17 C.F.R. § 240.21F-2, which prohibits retaliation against whistleblowers subject to certain requirements and

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states that "[t]he anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award."

18 18 U.S.C. § 1514A(b)(1).

19 *See* 15 U.S.C. § 78u-6h(1)(B)(iii); 18 U.S.C. § 1514A(b)(2)(D).

20 2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program (2015 Annual Report) at 7, available at *https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf*.

21 Although the SEC is obligated to maintain the confidentiality of whistleblowers, the SEC's Office of the Whistleblower provided certain aggregate, non-identifying information on the profiles of whistleblower recipients in its 2015 Annual Report. For example, it noted that "to date, almost half of the award recipients were current or former employees of the company on which they reported information of wrongdoing," and of these current or former employees, "approximately 80% raised their concerns internally to their supervisors or compliance personnel, or understood that their supervisor or relevant compliance personnel knew of the violations." *Id.* at 17. Also in the 2015 Annual Report, the Office of the Whistleblower noted that the highest number of whistleblower tips were received during the months of March, August, September, and October and that "Corporate Disclosures and Financials, Offering Fraud, and Manipulation have consistently ranked as the three highest allegation types reported by whistleblowers." *Id.* at 23. In terms of geography, the states with the highest number of tips were California, New York, Texas, Florida, and New Jersey, although tips were received from all states and territories and 95 countries outside the United States.

22 *Id.* at 11.

23 *Former Company Officer Earns Half-Million Dollar Whistleblower Award for Reporting Fraud Case to SEC* (March 2, 2015), available at *https://www.sec.gov/news/pressrelease/2015-45.html*.

24 *Id.*

25 *See* 17 C.F.R. § 240.21F(b)(4)(v)(A)-(C) (noting three exceptions).

26 Remarks by Chair Mary Jo White at the Ray Garrett, Jr. Corporate and Securities Law Institute-Northwestern School of Law, Chicago, Illinois (April 30, 2015), available at *https://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html*.

27 *In the Matter of the Claim for Award, Whistleblower Award* Proceeding File No. 2015-2, Release No. 34-74791, 2015 WL 1814377 (April 22, 2015) (quoting 17 C.F.R. § 240.21F-4 (b)(4)(v)(A)).

28 2015 Annual Report at 10-11, available at *https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf* (citing to *In the Matter of Paradigm Capital Mgmt., Inc. and Candace King Weir*, Exchange Act Rel. No. 72393, File No. 3-15930 (June 16, 2014)).

29 *SEC Pays More Than $3 Million to Whistleblower* (July 17, 2015), available at *https://www.sec.gov/news/pressrelease/2015-150.html*.

30 SEC *Awards Whistleblower More Than $700,000 for Detailed Analysis* (Jan. 15, 2016), available at *https://www.sec.gov/news/pressrelease/2016-10.html*.

31 2015 Annual Report at 1, available at *https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf*.

32 2015 Annual Report at 4, available at *https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf*.

33 *Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 34-64545, at 5 (Aug. 12, 2011), available at *https://www.sec.gov/rules/final/2011/34-64545.pdf*.

34 *Id.*

35 *Id.*

36 *Id.*

37 Remarks by Chair Mary Jo White at the Ray Garrett, Jr. Corporate and Securities Law Institute-Northwestern School of Law, Chicago, Illinois (April 30, 2015), available at *https://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html*.

38 *Id.*

39 *Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*,

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Release No. 34-64545, at 6 (Aug. 12, 2011), available at *https://www.sec.gov/rules/final/2011/34-64545.pdf*.

40 2015 Annual Report at 17, available at *https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf*.

41 *Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 34-64545, at 217 (Aug. 12, 2011).

42 *In the Matter of the Claim for Award*, Release No. 76338, File No. 2016-1 (released Nov. 4, 2015), available at *https://www.sec.gov/rules/other/2015/34-76338.pdf*.

43 *Id.*

44 *Id.*

45 *SEC Announces Whistleblower Award of More Than $325,000* (Nov. 4, 2015), available at *https://www.sec.gov/news/pressrelease/2015-252.html*.

46 17 C.F.R. § 240.21F-4 (b)(4)(v)(A)-(C).

47 Rule 21F-4(b)(7); *Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 34-64545, at 251-253 (Aug. 12, 2011).

48 2015 Annual Report at 1, available at *https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf*.

49 *Id.* at 8.

50 Remarks by Chair Mary Jo White at the Ray Garrett, Jr. Corporate and Securities Law Institute-Northwestern School of Law, Chicago, Illinois (April 30, 2015), available at *https://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html*.

51 2015 Annual Report at 2, available at *https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf*.

52 In 2011, using its authority to issue rules implementing section 21F (*see* 15 U.S.C. § 78u-6j), the SEC promulgated Exchange Act Rule 21F-2, 17 C.F.R. § 240.21F-2, which prohibits retaliation against whistleblowers subject to certain requirements and states that "[t]he anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award."

53 *See, e.g.*, *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013).

54 2015 Annual Report at 2, available at *https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf*.

55 *Interpretation of the SEC's Whistleblower Rules, Under Section 21F of the Securities Exchange Act of 1934*, SEC Release No. 34-75592, 2015 WL 4624264 (F.R.) (Aug. 4, 2015).

56 Opinion at 29, *Berman v. Neo@Ogilvy LLC*, Case No. 14-4626 (2d Cir. Sept. 10, 2015), ECF No. 141-1. In the *Berman* case, the employee did eventually go to the SEC but not during his employment, as he had been discharged "long before" he had reported the alleged violations to the SEC. *Id.* at 12. By giving deference to the SEC's interpretative rule, the court ruled that the employee was "entitled to pursue Dodd-Frank remedies for alleged retaliation after his report of wrongdoing to his employer, despite not having reported to the Commission before his termination." *Id.* at 29. The Second Circuit further noted that, by departing from the Fifth Circuit's ruling in *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013), it was creating a "circuit split" as to this issue of whether to give deference to the SEC's interpretative rule. *Id.* at 22-24.

57 Brief of the Securities and Exchange Commission *Amicus Curiae* in Support of the Appellant, *John S. Verble v. Morgan Stanley Smith Barney LLC*, Case No. 15-6397 (6th Cir. Feb. 4, 2016), ECF No. 24.

58 Remarks by Andrew Ceresney, ACI's 32nd FCPA Keynote Address (Nov. 17, 2015), available at *https://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html*.

59 *Id.*

60 *Id.*

61 *Id.*

62 Although beyond the scope of this article, the SEC's Seaboard Report provides guidance for assessing the adequacy of an investigation and remedial measures, including how soon the investigation was started and whether the investigation was fulsome and designed to uncover the truth. *See Report of*

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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, Securities Exchange Act of 1934, Release No. 44,969 (Oct. 23, 2001), available at *http://www.sec.gov/litigation/investreport/34-44969.htm* (Seaboard Report) (setting forth what the agency "will consider in determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation—from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents we use to announce and resolve enforcement actions").

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