

CHAPTER 17

Corporate Whistleblowing in the Sarbanes-Oxley/Dodd-Frank Era

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SYNOPSIS

Since the passage of the Sarbanes-Oxley Act in 2002 and the Dodd-Frank Act in 2010, the U.S. has seen a tremendous rise in whistleblower activity. This has been both in the form of bounty programs awarding millions of dollars to whistleblowers who report violations directly to government regulators and whistleblower retaliation lawsuits brought by former employees. This chapter provides an overview of the Sarbanes-Oxley Act whistleblower retaliation provision and the Securities and Exchange Commission and Commodity Futures Trading Commission whistleblower programs under Dodd-Frank that all companies need to know of to properly handle whistleblower issues as they arise and avoid significant risks of regulator scrutiny and legal liability.

§17.01 Sarbanes-Oxley's Anti-Retaliation Provision

Section 806 of the Sarbanes-Oxley Act ("SOX") protects from retaliation employees of covered companies who report any conduct that the employee reasonably believes constitutes a violation of:

- (1) federal criminal law provisions prohibiting mail, wire, bank or securities fraud;
- (2) any rule or regulation of the Securities and Exchange Commission; or
- (3) any provision of federal law relating to fraud against shareholders.¹

SOX covers reports made to the employee's supervisor or other persons with investigative or disciplinary authority, as well as information or assistance provided to a federal regulatory or law enforcement agency.² Covered whistleblowers also include those persons who file, testify, participate in or otherwise assist in a proceeding relating to alleged corporate or shareholder fraud.³

To establish a claim for a violation of SOX, an employee must prove by a preponderance of the evidence

- (1) that the employee engaged in protected activity;
- (2) that the employer was aware of the protected activity;

¹ 18 U.S.C. § 1514A(a)(1).

² *Id.*

³ *Id.*

- (3) that the claimant suffered an adverse employment action; and
- (4) that the protected activity was a contributing factor in the adverse employment action.

If the employee establishes this *prima facie* case, the employer may avoid liability “if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of that protected behavior.”

A successful complaining party under Sarbanes-Oxley is entitled to a broad array of remedies to make that individual “whole.” Damages may include reinstatement (in a termination case), backpay with interest, special damages, attorney fees, litigation costs and expert witness fees.⁴ SOX, however, does not provide for the recovery of punitive or liquidated damages. Civil liability may flow not only to the employer, but also to any officer, employee, contractor, subcontractor or agent found to have engaged in retaliatory action.⁵ Also, under limited circumstances, criminal liability can attach to certain retaliatory acts under section 1107 of the Act.⁶

§17.02 The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The Act included significant new whistleblower incentives and protections, including SEC and CFTC whistleblower programs, expansion of whistleblower protections under SOX, and a whistleblower cause of action for employees performing tasks related to consumer financial products or services. The legislation “aim[ed] to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud.” *Id.*

Significantly, Dodd-Frank created alternative paths for whistleblowers to assert their rights, often with different and conflicting rights and procedures. These various paths are described below.

[1] Section 922’s Whistleblower Bounty Provisions

Section 922 of the Dodd-Frank Act⁷ amended the Securities Exchange Act of 1934 (Exchange Act) to add a new section 21F. Pursuant to section 21F, “whistleblowers” who “voluntarily” provide the SEC with “original” information about violations of securities laws “shall” be awarded a share of between 10% and 30% of monetary sanctions ultimately imposed by the SEC when sanctions exceed \$1 million.⁸ Section 924 of the Dodd-Frank Act required the SEC to establish a separate office specifically to administer and enforce section 922’s

⁴ 18 U.S.C. § 1514A(c).

⁵ 18 U.S.C. § 1514A(a); *Kalkunte v. DVI Fin. Servs., Inc.*, 2004-SOX-56 (ALJ July 18, 2005), *aff’d in part, vacated in part on other grounds*, ARB Case Nos. 05-139, 05-140 (ARB Feb. 27, 2009); *Gallagher v. Granada Entm’t USA*, 2004-SOX-74 (ALJ Oct. 19, 2004).

⁶ See *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 456 F. Supp. 2d 131 (D. Me. 2006).

⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

⁸ Dodd-Frank Act, § 922(a); 15 U.S.C.A. § 78u-6 (2010). The SEC’s dispositions of applications for awards can be found at www.sec.gov/about/offices/owb/owb-final-orders.shtml.

whistleblower provisions.⁹ It also required the SEC to issue final regulations implementing section 21F, which became effective on August 12, 2011.¹⁰

[a] Definition of Whistleblower

Section 922 defines a whistleblower as “any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.”¹¹

The SEC’s regulations further define whistleblower for purposes of the bounty provision as follows:

You are a whistleblower if, alone or jointly with others, you provide the Commission with information pursuant to the procedures set forth in § 240.21F-9(a) of this chapter, and the information relates to a possible violation of the federal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing, or is about to occur. A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower.¹²

Thus, a whistleblower must be an individual as opposed to an entity to be covered by the whistleblower bounty provision. Moreover, in stating that information must only relate to a “possible” violation to be covered, the SEC in its implementing regulations has adopted a broad view of the definition of whistleblower, making clear the agency’s position that reporting of an “actual” or even “probable” violation of law, rule, or regulation is not required to meet the standard.

[b] Eligibility for an Award

To be eligible for an award under the SEC bounty provision, the whistleblower must:

- Voluntarily provide the Commission
- With original information
- That leads to the successful enforcement by the Commission of a federal court or administrative action
- In which the Commission obtains monetary sanctions totaling more than \$1,000,000.¹³

The SEC will also pay awards based on amounts collected in certain “related actions,” defined by the regulations as judicial or administrative actions brought by the U.S. Attorney

⁹ 15 U.S.C. § 78u-7(d).

¹⁰ 15 U.S.C. § 78u-7(a); 17 C.F.R. pts. 240.21F *et seq.* and 249.1800-01 (2011).

¹¹ 15 U.S.C. § 78u-6(a)(6).

¹² 17 C.F.R. § 240.21F-2. The regulations contain a further definition of whistleblower with respect to who qualifies for protection under the section’s anti-retaliation provision, which is discussed *infra*.

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

General, an appropriate regulatory authority, a self-regulatory organization, or a state attorney general in a criminal case, which are based on the same original information that the whistleblower voluntarily provided to the SEC and that led the SEC to obtain monetary sanctions totaling more than \$1,000,000.¹⁴

The SEC will not make an award to a whistleblower who has already been granted an award for the same related action by the CFTC pursuant to its whistleblower award program under section 23 of the Commodity Exchange Act (7 U.S.C. § 26).¹⁵ Similarly, a whistleblower who is denied an award by the CFTC in a related action will be precluded from relitigating any issues before the SEC that were decided against the whistleblower as part of the CFTC’s award denial.¹⁶

[i] Voluntary Submission of Information

The SEC will consider a submission voluntary for purposes of a bounty award if it is made **before** the whistleblower (or his or her representative) receives a request, inquiry, or demand that relates to the subject matter of the submission (i) from the SEC; (ii) in connection with an investigation by the Public Company Accounting Oversight Board (PCAOB) or a self-regulatory organization; or (iii) in connection with an investigation by Congress, any other authority of the federal government, or a state attorney general or securities regulatory authority.¹⁷

Even if the whistleblower is not compelled by subpoena or other applicable law to respond to a request, such a request from one of these authorities will remove a whistleblower from eligibility for a bounty award.¹⁸ In addition, a submission will not be considered voluntary if the individual is required to report the information to the SEC as a result of a preexisting legal duty, a contractual duty that is owed to the SEC or one of the other authorities, or a duty that arises out of a judicial or administrative order.¹⁹

Notwithstanding the requirement that a submission be voluntary, in at least one instance the SEC has granted a bounty award where a whistleblower provided information as part of a prior inquiry conducted by a self-regulatory organization (“SRO”).²⁰ While the Commission noted the information was not truly “voluntarily” provided, it waived the requirement after considering the claimant’s “detailed description” of the underlying misconduct and the individual’s “diligent efforts to correct and to bring to light the underlying misconduct in this case.”

[ii] Original Information

Original information is defined as information that is:

- derived from the independent knowledge or analysis of a whistleblower;

¹⁴ 17 C.F.R. § 240.21F-3(b).

¹⁵ 17 C.F.R. § 240.21F-3(b)(3).

¹⁶ *Id.*

¹⁷ 17 C.F.R. § 240.21F-4(a)(1).

¹⁸ 17 C.F.R. § 240.21F-4(a)(2).

¹⁹ 17 C.F.R. § 240.21F-4(a)(3).

²⁰ *In re* Award Claim in Connection with [redacted], Exchange Act Release No. 72,727, Whistleblower Award Proceeding File No. 2014-8 (July 31, 2014).

- not known to the SEC from any other source, unless the whistleblower is the original source of the information;
- not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information; and
- provided to the SEC for the first time after July 21, 2010.²¹

[A] Independent Knowledge or Analysis

“Independent knowledge” is factual information in the whistleblower’s possession that is not derived from publicly available sources.²² The regulations explain that a whistleblower may gain independent knowledge from his or her experiences, communications, and observations in business or social interactions.²³ “Independent analysis” means the whistleblower’s own analysis, whether done alone or with others, that is, the whistleblower’s examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public.²⁴

[B] Exclusions from Independent Knowledge and Analysis

The SEC excludes a number of categories of information from the definition of “independent knowledge or analysis,” and thus, excludes the individuals who report such information from eligibility for a bounty award. As described below, however, the exceptions to these exclusions may render them largely ineffective in preventing these categories of whistleblower disclosures.

The regulations provide that information will not be considered to be derived from independent knowledge or analysis if:

- the information is obtained through an attorney-client privileged communication, unless disclosure of the information would otherwise be permitted by an attorney pursuant to SEC rules, the applicable state attorney conduct rules, or otherwise; or
- the information is obtained in connection with legal representation of a client, unless disclosure would otherwise be permitted by an attorney.²⁵

²¹ 15 U.S.C. § 78u-6(a)(3); 17 C.F.R. § 240.21F-4(b). *See also* Stryker v. SEC, 780 F.3d 163 (2d Cir. 2015) (upholding SEC determination that information submitted prior to July 21, 2010, was not “original information”); *In re* Award Claim in Connection with [redacted], Exchange Act Release No. 69,912 (July 12, 2013), Whistleblower Award Proceeding File No. 2013-2 (denying award claim where claimant’s information was not provided to the SEC for the first time after July 21, 2010, and therefore was not “original information”).

²² 17 C.F.R. § 240.21F-4(b)(2).

²³ *Id.*

²⁴ 17 C.F.R. § 240.21F-4(b)(3).

²⁵ 17 C.F.R. § 240.21F-4(b)(4)(i) and (ii).

Thus, information learned through legal representation of a client will generally not be eligible for a whistleblower award under the SEC bounty provision.

In addition, individuals will not be eligible for a bounty if they learned the information because they were:

- an officer, director, trustee, or partner of an entity where the information was learned from another or in connection with the entity's processes for handling possible violations of law;
- a compliance or internal audit employee or an employee or contractor of an outside firm retained to perform these functions;
- employed or associated with a firm retained to conduct an investigation into possible violations of law; or
- employed or associated with a public accounting firm, if the individual obtained the information through the performance of an engagement required of an independent public accountant under the federal securities laws and the information related to a violation by the engagement client or client's directors, officers, or other employees.²⁶

The exclusions in (a) through (d), however, will not apply to preclude eligibility for a whistleblower bounty if any one of the following three conditions is met:

- the individual has a reasonable basis to believe that disclosure of the information to the SEC is necessary to prevent the entity from engaging in conduct likely to cause substantial injury to the financial interest or property of the entity or shareholders;
- the individual has a reasonable basis to believe that the entity is engaging in conduct that will impede an investigation of the misconduct; **or**
- at least 120 days have gone by since the individual provided the information to his or her supervisor, the entity's audit committee, chief legal officer, chief compliance officer or their equivalents, or at least 120 days have gone by since the individual received the information, if the individual received the information under circumstances indicating that one or more of these individuals or committees was already aware of the information.²⁷

These broad exceptions to the exclusions may, in many cases, swallow the rule, as otherwise ineligible individuals can simply make a report to the company and then go to the SEC after 120 days and be eligible.²⁸ In addition, otherwise ineligible individuals may report to the

²⁶ 17 C.F.R. § 240.21F-4(b)(4)(iii).

²⁷ 17 C.F.R. § 240.21F-4(b)(4)(v).

²⁸ See, e.g., *In re* Award Claim in Connection with [redacted], Exchange Act Release No. 74,404, Whistleblower Award Proceeding File No. 2015-1 (Mar. 2, 2015) (granting award to corporate officer where individual reported information to responsible persons at the company or the company was aware of the information at least 120 days before officer reported to the Commission); *In re* Award Claim in Connection with [redacted], Exchange Act Release No. 72,947, Whistleblower Award Proceeding File No. 2014-9 (Aug. 29, 2014) (granting award to audit and compliance professional where individual reported information to responsible persons at the company at least 120 days before officer reported to the Commission).

SEC, asserting that they are eligible because they reported conduct that is likely to cause substantial injury or that an investigation of the misconduct was being impeded by the company.²⁹

Finally, in addition to the above categories, the regulations provide that information will not be considered to be derived from independent knowledge or analysis if the individual learned the information by violating a state or federal criminal law, as determined by a U.S. court, or if the individual learned the information from a person who is not eligible for a bounty, unless the information concerns possible violations involving that person.³⁰

[iii] Additional Eligibility Requirements

In addition to the above categories of individuals and information that the SEC will not consider eligible for a bounty under the independent knowledge or analysis inquiry, the statute and regulations list several more requirements for eligibility for an award and categories of individuals who will not qualify for a bounty under section 922.

First, to be eligible, an individual must give the SEC information in the form and manner required by the regulations, although the SEC may waive any of its procedures based upon a showing of extraordinary circumstances.³¹ Whistleblowers are also required to provide any follow-up information the SEC may request after the initial report and may be barred from eligibility for a bounty upon a refusal to do so.³²

Second, the following categories of individuals are not eligible for a bounty under the Dodd-Frank Act and/or its regulations:

- members, officers, or employees of the SEC, the Department of Justice, an appropriate regulatory agency, a self-regulatory agency, the PCAOB, or any law enforcement association;
- members, officers, or employees of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority;
- individuals convicted of a criminal violation related to the action;
- individuals who obtained information through an audit of the company's financial statements, if making a whistleblower submission would be contrary to the requirements of section 10A of the Exchange Act;

²⁹ See, e.g., *In re* Award Claim in Connection with [redacted], Exchange Act Release No. 74,781, Whistleblower Award Proceeding File No. 2015-2 (Apr. 22, 2015) (granting award to compliance officer upon finding that he/she had reasonable belief his/her report to the SEC was necessary to prevent substantial injury).

³⁰ 17 C.F.R. § 240.21F-4(b)(4)(iv) and (vi).

³¹ 15 U.S.C. § 78u-6(c)(2)(D); 17 C.F.R. § 240.21F-8(a).

³² 17 C.F.R. § 240.21F-8(b).

- persons who acquired information from individuals who obtained the information through an audit (unless the information was about the individuals' own violations or the individuals are not themselves excluded from using the information);
- spouses, parents, children, siblings, or those residing in the same household of an SEC member or employee;
- individuals who acquired the information from a person with the intent to evade any provision of the SEC's rules; or
- individuals who knowingly make false, fictitious, or fraudulent statements or representations, or knowingly use any false writing or document with the intent to mislead or hinder the SEC or another authority in a related action.³³

[c] Incentives to Report Internally

Perhaps the most controversial aspect of section 922's bounty provisions is that they strongly incentivize employees to go directly to the SEC with concerns of violations rather than first reporting issues internally to the company to try to resolve them through internal compliance procedures. Many companies commenting on the SEC's proposed regulations urged that the SEC require internal reporting before a whistleblower could make disclosures to the SEC and be eligible for a whistleblower bounty. The SEC rejected such a requirement, and instead attempted through its final regulations to incentivize employees in several ways to use their companies' internal compliance and reporting systems when appropriate.

First, the regulations provide that a whistleblower who first reports possible violations of the law internally to the company and within 120 days reports the same information to the SEC could be an eligible whistleblower whose submission is measured as if it had been made at the earlier internal reporting date.³⁴

Second, the regulations provide that if the employee reports internally, and the company then provides information arising out of that report to the SEC, the employee will be eligible for a bounty as the original source of not only the information the employee provided to the company, but the information the company provided to the SEC, meaning a potentially greater award. To qualify under this rule, the employee must report to the SEC within 120 days of reporting to the company.³⁵

Third and finally, with respect to the criteria for determining the amount of an award, the final rules expressly provide that a whistleblower's voluntary participation in an entity's internal compliance and reporting systems is a factor that can increase the amount of an award, and a

³³ 15 U.S.C. § 78u-6(c)(2); 15 U.S.C. § 78u-6(i); 17 C.F.R. § 240.21F-8(c).

³⁴ 17 C.F.R. § 240.21F-4(b)(7); Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,301 (June 13, 2011).

³⁵ 17 C.F.R. § 240.21F-4(c)(3); 76 Fed. Reg. at 34,301.

whistleblower's interference with internal compliance and reporting is a factor that can decrease the amount of an award.³⁶

[d] Anonymous Reports to the SEC

Reports under section 922 may be submitted anonymously, but in such cases an attorney must represent the whistleblower in submitting the information.³⁷ Before the attorney submits the information, the whistleblower must provide the attorney with a completed Form TCR (the required paperwork for a whistleblower report), signed under penalty of perjury.³⁸

When submitting a report on behalf of an anonymous whistleblower, an attorney must certify that the attorney (1) has verified the whistleblower's identity; (2) has reviewed the completed Form TCR and that, to the best of the attorney's knowledge, information, and belief it is complete and accurate; (3) has obtained the whistleblower's non-waivable consent to provide the SEC with the whistleblower's Form TCR in the event the SEC requests it due to concerns of false representations; and (4) consents to submit the Form TCR within seven days of a request by the SEC.³⁹

[e] SEC's Communications with Employees

The SEC's regulations make clear that employers may not impede employees from communicating directly with the SEC staff about possible securities law violations, including by enforcing, or threatening to enforce, a confidentiality agreement.⁴⁰ Moreover, the SEC is not required to seek the consent of the entity's counsel before communicating directly with a whistleblower who has initiated communication with the SEC relating to a possible securities law violation.⁴¹

[f] Amount of Award

The Dodd-Frank Act provides that the SEC "shall" pay an award or awards to one or more whistleblowers who voluntarily provide original information to the SEC that leads to the successful enforcement of a covered SEC action or related action, in an aggregate amount equal to:

- not less than 10%, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and
- not more than 30%, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.⁴²

³⁶ 17 C.F.R. § 240.21F-6; 76 Fed. Reg. at 34,301.

³⁷ 17 C.F.R. § 240.21F-9(c).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 17 C.F.R. § 240.21F-17(a).

⁴¹ 17 C.F.R. § 240.21F-17(b).

⁴² 15 U.S.C. § 78u-6(b)(1).

The statute provides that the determination of the amount of an award is in the discretion of the SEC.⁴³ The regulations further explain that the “percentage awarded in connection with a Commission action may differ from the percentage awarded in connection with a related action.”⁴⁴ The regulations also clarify that, if the SEC makes awards to multiple whistleblowers in connection with the same action or related action, it will determine an individual percentage award for each whistleblower, “but in no event will the total amount awarded to all whistleblowers in the aggregate be less than 10 percent or greater than 30 percent of the amount the Commission or the other authorities collect.”⁴⁵

[g] Criteria for Determining Amount of Award

In determining the amount of an award, the Dodd-Frank Act provides that the SEC shall take into consideration:

- the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;
- the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;
- the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and
- such additional relevant factors as the Commission may establish by rule or regulation.⁴⁶

The SEC may not take into consideration the balance of the Investor Protection Fund, which is the fund from which whistleblower awards are made.⁴⁷

The SEC’s regulations elaborate on these required statutory considerations and also list several additional considerations that may increase or decrease the amount of a whistleblower’s award.⁴⁸ In instances where awards are being determined for multiple whistleblowers in the same action, the regulations explain that these factors will be used to determine the relative allocation of awards among the whistleblowers.⁴⁹

⁴³ 15 U.S.C. § 78u-6(c)(1)(A).

⁴⁴ 17 C.F.R. § 240.21F-5.

⁴⁵ 17 C.F.R. § 240.21F-5(c). *See, e.g., In re Award Claim in Connection with [redacted]*, Exchange Act Release No. 72,301 (June 3, 2014), Whistleblower Award Proceeding File No. 2014-5 (splitting a 30% total bounty between two whistleblowers by awarding each individual 15% of the monetary sanctions collected); *In re Award Claim in Connection with [redacted]*, Exchange Act Release No. 72,652 (July 22, 2014), Whistleblower Award Proceeding File No. 2014-6 (splitting a 30% total bounty between three whistleblowers by awarding one individual 15%, one 10%, and one 5% of the monetary sanctions collected).

⁴⁶ 15 U.S.C. § 78u-6(c)(1)(B).

⁴⁷ *Id.*; 15 U.S.C. § 78u-6(g).

⁴⁸ 17 C.F.R. § 240.21F-6.

⁴⁹ *Id.*

[h] No Amnesty

The SEC's regulations make clear that a whistleblower's report of information to the SEC through its whistleblower program will not preclude the SEC from bringing an action against the whistleblower based upon his or her own conduct in connection with violations of securities laws.⁵⁰ If such an action is determined to be appropriate, the SEC will take the whistleblower's cooperation into consideration in accordance with its Policy Statement Concerning Cooperation by Individuals in Investigations and Related Enforcement Actions.⁵¹

[i] Awards to Whistleblowers Who Engage in Culpable Conduct

The SEC's regulations provide that, in determining whether the required \$1 million threshold has been met for the purposes of making an award, the SEC will not take into account any monetary sanctions that the whistleblower is ordered to pay, or that any entity is ordered to pay when liability is based substantially on conduct that the whistleblower directed, planned, or initiated.⁵²

Similarly, if the SEC determines that a whistleblower is eligible for an award, it will not include in its calculation of the amounts collected, for purposes of making payments to the whistleblower, any amounts that the whistleblower pays in sanctions, or any amounts an entity pays in sanctions, when liability is based substantially on conduct that the whistleblower directed, planned, or initiated.⁵³

[2] Section 922's Whistleblower Retaliation Protections

Section 922 of the Dodd-Frank Act⁵⁴ also added to section 21F of the Securities Exchange Act anti-retaliation protections for whistleblowers who report possible securities law violations. The anti-retaliation protections provide:

- PROTECTION OF WHISTLEBLOWERS.—
- PROHIBITION AGAINST RETALIATION.—
- IN GENERAL.—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—
- in providing information to the Commission in accordance with this section;
- 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

⁵⁰ 17 C.F.R. § 240.21F-15.

⁵¹ *Id.*; 17 C.F.R. § 202.12.

⁵² 17 C.F.R. § 240.21F-16.

⁵³ *Id.*

⁵⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

- 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.⁵⁵

[a] Procedures and Statute of Limitations

An individual alleging retaliation under section 21F can file suit directly in federal district court.⁵⁶ Unlike the Sarbanes-Oxley Act (“SOX”), there is no requirement to first file a complaint with an agency and exhaust remedies prior to filing a district court action. Moreover, the regulations implementing section 21F provide that the anti-retaliation provisions “shall be enforceable in an action or proceeding brought by the Commission.”⁵⁷ Accordingly, in 2014 the SEC itself brought its first retaliation suit under the Dodd-Frank Act.⁵⁸

In sharp contrast to SOX’s 180-day statute of limitations, under section 21F an action must be filed either within six years after the date when the retaliation occurs or within three years after the date “facts material to the right of action are known or reasonably should have been known by the employee,” but not more than ten years after the date of the violation.⁵⁹ Not only does this limitation period expand employers’ potential liability under the Dodd-Frank Act as compared to SOX, it could create problems for employers who do not typically maintain employee records for ten years.

[b] Scope of Protections

Section 21F defines a whistleblower as “any individual who provides, or two or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.”⁶⁰

Based on this statutory language, it would appear that the anti-retaliation provision only covers individuals who provide information “to the Commission.” The Fifth Circuit and several district courts have so interpreted the Dodd-Frank Act. However, the Second Circuit, the SEC, and numerous district court cases to address the issue have interpreted the scope of the Dodd-Frank Act’s protections far more broadly, creating a split on the issue, as described below.

[i] Categories of Protected Reporting

[A] SEC Final Rule

The SEC’s Final Rule, published on May 25, 2011, provides that a whistleblower need not make a disclosure to the SEC to be protected under section 21F. Rather, under the agency’s interpretation, an individual is a protected whistleblower if he or she provides covered information

⁵⁵ Dodd-Frank Act § 922(h); 15 U.S.C.A. § 78u-6(h)(1)(A) (2010).

⁵⁶ 15 U.S.C. § 78u-6(h)(1)(B)(i).

⁵⁷ 17 C.F.R. § 240.21F-2(b)(2).

⁵⁸ *In re* Paradigm Capital Mgmt., Inc., Exchange Act Release No. 72,393 (June 16, 2014).

⁵⁹ 15 U.S.C. § 78u-6(h)(1)(B)(iii).

⁶⁰ 15 U.S.C. § 78u-6(a)(6).

in any manner described in section 21F(h)(1)(A). In other words, an individual is protected from retaliation if he or she *either* provides information to the SEC *or* if he or she makes a disclosure otherwise “required or protected” under SOX, the Exchange Act (15 U.S.C. § 78f(m)), 18 U.S.C. § 1513(e), or any other law, rule, or regulation subject to the SEC’s jurisdiction.⁶¹

[B] Judicial Interpretations – Circuit Split

The Fifth Circuit has rejected the SEC’s interpretation of section 21F, holding that, pursuant to the plain language of the statute, whistleblower protection extends only to “whistleblowers” defined as those who make reports “to the Commission.” In *Asadi v. G.E. Energy (USA), L.L.C.*,⁶² the Fifth Circuit explained that, when faced with questions of statutory construction, “we must first determine whether the statutory text is plain and unambiguous” and, “[i]f it is, we must apply the statute according to its terms.” In addition, “in construing a statute, a court should give effect, if possible, to every word and every provision Congress used.”⁶³

Looking to the Dodd-Frank Act’s definition of “whistleblower” and the use of that term in the anti-retaliation provision, the court found that the plain text of section 78u-6 unambiguously limits protection to individuals who provide information “to the Commission.”⁶⁴ The court explained that a contrary interpretation would impermissibly render the words “to the Commission” out of the definition of “whistleblower” for purposes of the whistleblower protection provision.⁶⁵

The court further held that it did not owe deference to the SEC’s broader interpretation of the anti-retaliation provision as covering internal reports to company management because the statute was clear and unambiguous.⁶⁶ Nor did it find persuasive the district court cases holding that the anti-retaliation provision covers internal reports of wrongdoing to company management in light of the clear statutory language.⁶⁷

Finally, the court noted that to construe the Dodd-Frank Act’s anti-retaliation provision to extend beyond the statutory definition of “whistleblowers” would render SOX’s whistleblower provision moot for practical purposes.⁶⁸ The court explained that individuals would be unlikely to file SOX anti-retaliation claims, with their administrative exhaustion requirement, much shorter statute of limitations, and more limited damages, instead of simply filing Dodd-Frank Act claims, if the Dodd-Frank Act’s anti-retaliation provision overlapped with SOX in covering reports to company management.⁶⁹ The court opined that this could not have been the intent of Congress,

⁶¹ 17 C.F.R. § 240.21F-2(b). *See also* 17 C.F.R. § 241, Interpretation of the SEC’s Whistleblower Rules under Section 21F of the Securities Exchange Act of 1934, Release No. 34-75592 (Aug. 4, 2015) (further clarifying the SEC’s position that an individual’s status as a whistleblower for purposes of the anti-retaliation provision does not depend on reporting to the SEC).

⁶² *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 622 (5th Cir. 2013).

⁶³ *Id.*

⁶⁴ *Id.* at 623.

⁶⁵ *Id.* at 628.

⁶⁶ *Id.* at 629–30.

⁶⁷ *Id.* at 624 n.6.

⁶⁸ *Id.* at 628.

⁶⁹ *Id.* at 628–29.

which amended SOX to broaden its protections at the same time it passed the new Dodd-Frank Act provisions.⁷⁰

Notably, the Fifth Circuit decided *Asadi* on different grounds than the district court, which held that the Dodd-Frank Act's anti-retaliation provision did not apply extraterritorially to Asadi, who worked in Jordan. The Fifth Circuit did not address that issue on appeal, resting its decision solely on the definition of whistleblower under the statute. Several district courts have since adopted *Asadi*'s analysis of the definition of whistleblower under the Dodd-Frank Act's anti-retaliation provision.⁷¹

In contrast, the Second Circuit in *Berman v. Neo@Ogilvy LLC*⁷² held that employees need not report to the SEC to be covered under section 21F. Rather, individuals who make disclosures "required or protected" under 15 U.S.C.A. § 78u-6(h)(1)(A)(iii) are also protected. In so holding, the Second Circuit observed that "[a]pplying the Commission reporting requirement to employees seeking Sarbanes-Oxley remedies pursuant to subdivision (iii) would leave that subdivision with an extremely limited scope."

In assessing whether "Congress intended to add subdivision (iii) . . . only to achieve such a limited result," the court noted that an inquiry into legislative history "yields nothing" because subdivision (iii) was added at the end of the legislative process during attempts to reconcile House and Senate versions of Dodd-Frank. The majority found it "not surprising" that the "new subdivision" and the whistleblower definition "do not fit together neatly" given the "realities of the legislative process" whereby "conferees are hastily trying to reconcile House and Senate bills, each of which number hundreds of pages."

Based on the "tension" between the definition of "whistleblower" and "the limited protection provided by subdivision (iii)" if it was subject to Commission reporting, the court found the statute "as a whole sufficiently ambiguous to oblige us to give *Chevron* deference to the reasonable interpretation of the agency charged with administering the statute." As a result, the court deferred to the SEC position on the issue and concluded that Berman was permitted to pursue Dodd-Frank anti-retaliation remedies despite not reporting to the Commission before being terminated.

Judge Jacobs dissented. Siding with the reasoning in *Asadi*, he stated that the statute was unambiguous in defining "whistleblowers" as those who report information to the SEC, excluding

⁷⁰ *Id.*

⁷¹ *See, e.g.,* Wagner v. Bank of Am. Corp., No. 12-cv-00381-RBJ, 2013 WL 3786643, at *4 (D. Colo. July 19, 2013); Banko v. Apple, Inc., 20 F. Supp. 3d 749, 755-57 (N.D. Cal. 2013); Englehart v. Career Educ. Corp., No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at *9 (M.D. Fla. May 12, 2014); Verfuert v. Orion Energy Sys., 65 F. Supp. 3d 640, 646 (E.D. Wis. Nov. 4, 2014); Lutzeier v. Citigroup, Inc., 305 F.R.D. 107, 110 (E.D. Mo. Mar. 2, 2015); Duke v. Prestige Cruises Int'l, Inc., Case No. 14-23017-CIV-KING, 2015 U.S. Dist. LEXIS 107181, at *10 (S.D. Fla. Aug. 14, 2015); Davies v. Broadcom Corp., 130 F. Supp. 3d 1343, 1350 (C.D. Cal. 2015); Verble v. Morgan Stanley Smith Barney, LLC, No. 3:15-CV-74-TAV-CCS, 2015 U.S. Dist. LEXIS 164495, at *27 (E.D. Tenn. Dec. 8, 2015); Puffenbarger v. Engility Corp., Case No. 1:15-cv-188, 2015 U.S. Dist. LEXIS 173764, at *25-26 (E.D. Va. Dec. 31, 2015).

⁷² *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015).

internal reporters from Dodd-Frank retaliation protections. Given this lack of ambiguity, Judge Jacobs determined that *Chevron* deference should never have come into play.

Judge Jacobs took strong issue with the panel’s “limited effect” analysis:

the majority has no support for the proposition that when a plain reading of a statutory provision gives it an ‘extremely limited’ effect, the statutory provision is impaired or ambiguous. The U.S. Code is full of statutory provisions with ‘extremely limited’ effect; there is no canon that counsels reinforcement of any sub-sub-section that lacks a paradigm-shift.

Nevertheless, both before and after the *Berman* decision, numerous district courts have reached the same conclusion as the Second Circuit that reporting to the SEC is not required to state a claim under section 21F.⁷³

[ii] Employees Outside of the United States

In *Liu v. Siemens AG*,⁷⁴ the Second Circuit held that the Dodd-Frank Act’s anti-retaliation provision does not cover employees working outside of the United States. Liu, who was a Taiwanese resident, claimed that Siemens China terminated his employment for reporting alleged Foreign Corrupt Practices Act (FCPA) violations in China and North Korea. The court concluded that “there is absolutely nothing in the text of the provision . . . or in the legislative history of the Dodd-Frank Act that suggests that Congress intended the anti-retaliation provision to regulate the relationships between foreign employers and their foreign employees working outside the United States.”⁷⁵

[iii] Individual Liability

In *Wadler v. Bio-Rad Labs., Inc.*,⁷⁶ the court addressed whether individual directors may be held liable for retaliation under section 21F. The court noted that, unlike SOX, which lists

⁷³ See, e.g., *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011); *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 WL 4444820 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106–07 (D. Colo. 2013); *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *3–7 (S.D.N.Y. May 21, 2013); *Ellington v. Giacomakis*, 977 F. Supp. 2d 42, 45–46 (D. Mass. 2013); *Rosenblum v. Thomson Reuters (Mkts.) LLC*, 984 F. Supp. 2d 141, 148 (S.D.N.Y. 2013); *Ahmad v. Morgan Stanley & Co.*, 2 F. Supp. 3d 491, 496 n.5 (S.D.N.Y. 2014); *Khazin v. TD Ameritrade Holding Corp.*, Civil Action No. 13-4149 (SDW) (MCA), 2014 WL 940703, at *6 (D.N.J. Mar. 11, 2014); *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 533 (S.D.N.Y. 2014); *Bussing v. CorClearing LLC*, 20 F. Supp. 3d 719, 729 (D. Neb. May 21, 2014); *Connolly v. Remkes*, Case No. 5:14-cv01344, 2014 WL 5473144, at *6 (N.D. Cal. Oct. 28, 2014); *Somers v. Dig. Realty Trust, Inc.*, 119 F. Supp. 3d 1088 (N.D. Cal. 2015); *Dressler v. Lime Energy, Civ. No. 3:14-cv-07060 (FLW)(DEA)*, 2015 U.S. Dist. LEXIS 106532, at *9-43 (D.N.J. Aug. 13, 2015); *Wadler v. Bio-Rad Labs., Inc.*, Case No. 15-cv-02356-JCS, 2015 U.S. Dist. LEXIS 144468, at *56 (N.D. Ca. Oct. 23, 2015).

⁷⁴ *Liu v. Siemens AG*, 763 F.3d 175 (2d Cir. 2014).

⁷⁵ See also *Asadi v. G.E. Energy (USA), L.L.C.*, Civil Action No. 4:12-345, 2012 WL 2522599 (S.D. Tex. June 28, 2012), *aff’d on other grounds*, 720 F.3d 620 (5th Cir. 2013).

⁷⁶ *Wadler v. Bio-Rad Labs., Inc.*, Case No. 15-cv-02356-JCS, 2015 U.S. Dist. LEXIS 144468, at *41-47 (N.D. Ca. Oct. 23, 2015).

categories of individuals and entities who may be sued, the Dodd-Frank Act permits whistleblowers to sue an “employer” for retaliation. As the term “employer” is not defined in the statute, the court looked to other federal statutes for guidance, and determined that the term “employer” has been used in both a narrow sense (in the ADA and Title VII) and in a broader sense (in the FLSA). In the absence of any statutory definition, the court found the meaning of the word “employer” in the Dodd-Frank Act to be ambiguous. The court therefore looked to the legislative history, and concluded that “Congress intended that Dodd-Frank provide for individual liability that is at least as extensive as that of Sarbanes-Oxley, and therefore, that directors may be held individually liable for retaliating against whistleblowers under Dodd-Frank.”⁷⁷

[iv] “Reasonable Belief” Standard

Pursuant to the regulations, to be protected under section 21F, a whistleblower must possess a reasonable belief that the information being provided relates to a “possible” securities law violation (or, where applicable, a possible violation under SOX) that has occurred, is ongoing, or is about to occur.⁷⁸ The comments to the regulations explain that the reasonable belief standard requires that the employee hold 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.⁷⁹ This is the same standard employed in the SOX context.⁸⁰

The whistleblower need not provide information about an actual securities law violation to be covered, as the regulations make clear that it is sufficient for the whistleblower to reasonably believe that there is a possible violation that has occurred, is ongoing, or is about to occur.⁸¹

[v] “Providing Information” to the SEC

Section 21F(h)(1)(A)(i) protects whistleblowers who “provide information” to the SEC in accordance with the statute. In *Egan v. TradingScreen, Inc.*,⁸² it was undisputed that the plaintiff did not make any disclosures directly to the SEC. Rather, Egan reported alleged misconduct by the company’s CEO to the president of the company and its outside counsel. Egan nevertheless contended that he “provided information” to the SEC pursuant to section 21F(h)(1)(A)(i) by initiating the inquiry into the CEO’s malfeasance and disclosing information to outside counsel in interviews, which, upon information and belief, outside counsel then reported to the SEC. Egan argued that these actions amounted to “jointly” providing information to the SEC with outside

⁷⁷ *Id.* at *47.

⁷⁸ 17 C.F.R. § 240.21F-2(b)(i). *See also* *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 WL 4444820, at *7 (D. Conn. Sept. 25, 2012).

⁷⁹ Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,303 (June 13, 2011).

⁸⁰ *See, e.g.*, *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir. 2008).

⁸¹ 17 C.F.R. § 240.21F-2(b)(i). *See also* *Beacom v. Oracle Am., Inc.*, No. 15-1729, 2016 U.S. App. LEXIS 10183, at *9 (8th Cir. June 6, 2016) (dismissing Dodd-Frank claim upon holding that reporting was not “required or protected” under SOX); *Yang v. Navigators Grp., Inc.*, 13-cv-2073 (NSR), 2016 U.S. Dist. LEXIS 477, at *21-22 (S.D.N.Y. Jan. 4, 2016) (same); *Safarian v. Am. DG Energy, Inc.*, Civ. No. 10-6082, 2014 WL 1744989, at *4 (D.N.J. Apr. 29, 2014) (no reasonable belief of violation where plaintiff reported overbilling, improper construction, and failure to obtain proper permits).

⁸² *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011).

counsel. The defendants countered that, to be protected under section 21F, a whistleblower must personally provide information directly to the SEC.

The court chose to broadly interpret section 21F's anti-retaliation provision and concluded that Egan "adequately alleged that he acted jointly with the Latham attorneys, in an effort to provide information to the SEC regarding [the CEO's] alleged misconduct."⁸³ Egan had not, however, adequately alleged that outside counsel *actually* reported the CEO's alleged misconduct to the SEC, so the court dismissed the claim without prejudice, giving Egan the opportunity to amend his complaint to include such factual allegations.⁸⁴

In reaching its conclusion that Egan adequately alleged that he acted jointly with his employer's outside counsel in an effort to provide information to the SEC, the court drew a distinction between section 21F's anti-retaliation provisions and its bounty provisions, stating with respect to the bounty provisions, "[o]bviously, a whistleblower must directly report to the SEC to receive a bounty award from the SEC."⁸⁵

Egan's broad interpretation of what constitutes "providing information" to the SEC raises potential concerns for employers, who may unwittingly increase their exposure to a retaliation suit under the Dodd-Frank Act by investigating and reporting issues to the SEC that stem from a whistleblower's report. *Egan* was the first federal district court case to weigh in on the scope of the Dodd-Frank Act's anti-retaliation provisions, and it remains to be seen how influential this decision will be in other cases.

[vi] Remedies/Jury Trial

The remedies available under section 21F are more generous than those available to whistleblowers under SOX. Upon a finding of retaliation, section 21F provides for the whistleblower's reinstatement, double back pay (as opposed to just back pay as under SOX), and attorneys' fees and other litigation costs.⁸⁶ There is no explicit provision for the recovery of non-pecuniary damages, such as emotional distress or loss of reputation damages.⁸⁷ Section 21F does not provide for recovery of punitive damages.⁸⁸ The one court thus far to address the issue of whether a jury trial is available under section 21F has held that it is not.⁸⁹

[vii] Pre-Dispute Arbitration Agreements/Waivers of Claims

Unlike the amendments to SOX and the provisions of section 748 of the Dodd-Frank Act (the CFTC's whistleblower provisions), which provide that their rights and remedies "may not be waived by any agreement, policy form, or condition of employment, including by a predispute

⁸³ *Id.* at *9.

⁸⁴ *Id.* at *9–10. Egan was unable to do so, and the court subsequently dismissed his amended complaint with prejudice. *See Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 4344067 (S.D.N.Y. Sept. 12, 2011).

⁸⁵ *Egan*, 2011 WL 1672066, at *8.

⁸⁶ 15 U.S.C. § 78u-6(h)(1)(C).

⁸⁷ *See id.*; *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 WL 4444820, at *7 (D. Conn. Sept. 25, 2012) (granting motion to strike demand for compensatory and punitive damages under the Dodd-Frank Act).

⁸⁸ *See id.*; *Pruett v. BlueLinx Holdings, Inc.*, CIVIL ACTION No. 1:13-cv-020607-JOF, 2013 U.S. Dist. LEXIS 185551, at *2 (N.D. Ga. Nov. 12, 2013).

⁸⁹ *Pruett*, 2013 U.S. Dist. LEXIS 185551, at *10.

arbitration agreement,” section 21F does not explicitly ban pre-dispute arbitration agreements or waivers of claims. It is the SEC’s position, however, as stated in the comments to the regulations, that such language is unnecessary because section 29(a) of the Exchange Act provides that “any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or any rule or regulation thereunder . . . shall be void.”⁹⁰ The comments conclude, “Thus, under Section 29(a), employers may not require employees to waive or limit their anti-retaliation rights under Section 21F.”⁹¹

The majority of courts to address the issue thus far, however, have compelled arbitration of retaliation claims under section 21F, holding that the plain wording of the statute contains no provision rendering pre-dispute arbitration agreements unenforceable.⁹²

But in *Wiggins v. ING U.S., Inc.*,⁹³ the court denied a motion to compel arbitration of a Dodd-Frank retaliation claim based on a Form U-4 arbitration clause. There, the court looked to the language of 18 U.S.C. § 1514A(e)(2), which provides that “[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under” SOX. The court concluded that the Dodd-Frank retaliation claim was a dispute “arising under” SOX, reasoning that the term “arising under” is not limited to the provision under which the private right of action exists, but also extends to any law that “provides a necessary element of the plaintiff’s claim for relief.”⁹⁴ As SOX defines prohibited conduct under Dodd-Frank, the Dodd-Frank claim arose under SOX and was therefore excluded from coverage under the arbitration clause.

[3] Section 748’s Whistleblower Bounty Provisions

Section 748 of the Dodd-Frank Act, codified at 7 U.S.C. § 26, amended the Commodity Exchange Act (CEA) to add a new section 23, entitled “Commodity Whistleblower Incentives and Protections.”⁹⁵ Pursuant to section 23, “whistleblowers” who “voluntarily” provide the CFTC with “original” information about violations of the CEA that leads to the successful enforcement of judicial or administrative actions with monetary sanctions exceeding \$1 million, or related actions, shall be awarded a share of between 10% and 30% of the sanctions ultimately imposed by the CFTC or imposed in the related actions.⁹⁶ The CFTC’s final rules implementing section 23 can be found at 17 C.F.R. part 165.⁹⁷

⁹⁰ 76 Fed. Reg. at 34,304.

⁹¹ *Id.*

⁹² See *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488 (3d Cir. 2014); *Ruhe v. Masimo Corp.*, No. SACV 11-00734-CJC(JCGx), 2011 WL 4442790, at *4–5 (C.D. Cal. Sept. 16, 2011); *Murray v. UBS Sec., LLC*, 12 Civ. 5914, 2014 U.S. Dist. LEXIS 9696 (Jan. 27, 2014). Cf. *Neal v. Asta Funding, Inc.*, Civ. No. 13-3438, 2013 U.S. Dist. LEXIS 170801, at *23-25 (D.N.J. Dec. 4, 2013) (holding that arbitrator should decide question of arbitrability and staying action pending that determination).

⁹³ *Wiggins v. ING U.S., Inc.*, Civil Action No. 3:14-CV-1089(JCH), 2015 WL 3771646, at *6–7 (D. Conn. June 17, 2015), *abrogated on other grounds*, *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015).

⁹⁴ *Id.* citing *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 376 (2004).

⁹⁵ *Id.*

⁹⁶ 7 U.S.C. § 26(b).

⁹⁷ Compare Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,354 (June 13, 2011), *with* Whistleblower Incentives and Protection, 76 Fed. Reg. 53,172, 53,199 (Aug. 25, 2011).

Section 23 and its implementing regulations are somewhat similar to section 922 of the Dodd-Frank Act, which governs the SEC’s whistleblower bounty program.

[a] Definition of Whistleblower

Section 23 defines a whistleblower as “any individual, or 2 or more individuals acting jointly, who provides information relating to a violation of [the CEA] to the Commission, in a manner established by rule or regulation by the Commission.”⁹⁸ A company or another entity is not eligible to be a whistleblower.⁹⁹ Section 165.3 of the regulations also clarifies that to be considered a “whistleblower,” an individual must submit information by means of a “Form TCR” (Tip, Complaint, or Referral questionnaire) to the CFTC.¹⁰⁰

[b] Eligibility for an Award

To be eligible for an award under the CFTC bounty provision, the whistleblower must:

- voluntarily provide the CFTC
- with original information
- leading to successful resolution of a “covered judicial or administrative action,” defined as an action brought by the CFTC under the CEA that results in monetary sanctions exceeding \$1,000,000, **or** a “related action,” defined as any judicial or administrative action brought by one of the following entities that is based upon original information provided by a whistleblower that led to a successful CFTC enforcement action: (i) the Department of Justice; (ii) an appropriate department or agency of the federal government acting within its jurisdiction; (iii) a registered entity, registered futures association, or self-regulatory organization; (iv) a state attorney general; (v) an appropriate state department or agency acting within its jurisdiction; or (vi) a foreign futures authority.¹⁰¹

To be eligible for a bounty under the CFTC whistleblower provisions, a whistleblower is also required by the CFTC’s regulations (1) to provide the CFTC with additional information, upon request, relating to the whistleblower’s submission or eligibility for an award; and (2) to enter into a confidentiality agreement with the CFTC upon request.¹⁰²

[i] Voluntary Submission of Information

⁹⁸ 7 U.S.C. § 26(a)(7). *See also* CFTC Whistleblower Award Determination No. 16-WB-07 (Apr. 22, 2016) (denying award application where the claimant sought awards for non-CFTC actions).

⁹⁹ 17 C.F.R. § 165.2(p).

¹⁰⁰ 17 C.F.R. § 165.3. *See also* CFTC Whistleblower Award Determination No. 16-WB-05 (Feb. 23, 2016) (concluding the claimant failed to file a Form TCR and was “therefore not a whistleblower”); CFTC Whistleblower Award Determination No. 16-WB-01 (Nov. 13, 2015) (determining that claimant was not a whistleblower because the individual mistakenly submitted complaints on Form WB-APPs rather than on Form TCRs).

¹⁰¹ 7 U.S.C. §§ 26(a)(1); (a)(5); (b). *See also In re* Whistleblower Award Claim of Claimant, Form WB-APP 2012-06-25-01 (Aug. 7, 2013) (denying award application in part where the claimant provided information regarding a matter that was already under investigation by the Commission where the information did not significantly contribute to the success of the Commission’s action).

¹⁰² 17 C.F.R. § 165.5(b).

The CFTC will consider a submission “voluntary” for purposes of a bounty award if it is made **before** the whistleblower (or his or her representative) receives a request, inquiry, or demand about a matter “to which the information in the whistleblower’s submission is relevant,” from the CFTC, Congress, any other federal or state authority, the Department of Justice, a registered entity, a registered futures association, or a self-regulatory organization.¹⁰³ Even if the whistleblower is not compelled by subpoena or other applicable law to respond to a request, such a request from one of these authorities will remove a whistleblower from eligibility for a bounty award.¹⁰⁴

Pursuant to the regulations, and in contrast to the SEC’s bounty provisions, a whistleblower will be considered to have received a request, inquiry, or demand if documents or information provided by the whistleblower are within the scope of a request, inquiry, or demand to the whistleblower’s employer.¹⁰⁵ There is, however, one exception: in the event the whistleblower’s employer, after receiving the documents or information from the whistleblower, fails to provide the whistleblower’s documents or information to the requesting authority in a timely manner, the whistleblower may submit the information and the submission will be considered voluntary.¹⁰⁶

Finally, a submission will not be considered voluntary if the individual is under a preexisting legal or contractual duty to report the violations to one of the requesting authorities listed above, or if the whistleblower has a duty to disclose such information based on a judicial or administrative order.¹⁰⁷

[ii] Original Information

“Original” information is defined as information that is:

- derived from the “independent knowledge” or “independent analysis” of a whistleblower;
- not already known to the CFTC from any other source, unless the whistleblower is the original source of the information;
- not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit or investigation, or from the news media, unless the whistleblower is a source of the information; and
- provided to the CFTC for the first time after July 21, 2010.¹⁰⁸

¹⁰³ 17 C.F.R. § 165.2(o). *See also In re Whistleblower Award Claim of Claimant*, Form WB-APP 2013-02-15-01 (Dec. 3, 2013) (denying claim in part because “Claimant supplied the information on which the claim [was] based in response to a request from Commission staff”).

¹⁰⁴ 17 C.F.R. § 165.2(o).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ 7 U.S.C. § 26(a)(4); 17 C.F.R. § 165.2(k). *Compare* CFTC Whistleblower Award Determination No. 16-WB-01 (Nov. 13, 2015) (denying award to claimant because the information was already known to the CFTC) *with In re Whistleblower Award Claim of Claimant*, Form WB-APP [redacted] (Sept. 29, 2015) (awarding bounty where whistleblower provided information that was “sufficiently specific, credible, and timely to cause the Commission to open an investigation” and “allowed the Commission to conserve valuable resources by focusing the Commission’s attention on the marketplace misconduct”).

[A] Independent Knowledge or Analysis

“Independent knowledge” is defined by the regulations as factual information in the whistleblower’s possession that is not generally known or available to the public.¹⁰⁹ “Independent analysis” means the whistleblower’s own analysis, whether done alone or in combination with others.¹¹⁰

[B] Exclusions from Independent Knowledge

The CFTC will not consider information to be derived from a whistleblower’s independent knowledge if the whistleblower obtained the information:

- from sources generally available to the public, such as corporate filings and the media;
- through a communication that was subject to the attorney-client privilege, unless the disclosure is otherwise permitted by applicable federal or state attorney conduct rules;
- in connection with the legal representation of a client on whose behalf the whistleblower, or the whistleblower’s employer or firm, has been providing services, where the whistleblower seeks to use the information to make a submission for the whistleblower’s own benefit, unless disclosure is authorized by applicable federal or state attorney conduct rules;
- because the whistleblower was an officer, director, trustee, or partner of an entity and another person informed the whistleblower of allegations of misconduct, or the whistleblower learned the information in connection with the entity’s processes for identifying, reporting, and addressing possible violations of law;
- because the whistleblower was an employee whose principal duties involved compliance or internal audit responsibilities; or
- by means or in a manner that is determined by a U.S. court to violate applicable federal or state criminal law.¹¹¹

If the whistleblower falls under exclusion (4) or (5), however, his or her information will nevertheless be considered to be derived from independent knowledge if one of the following three conditions is met:

- the whistleblower has a reasonable basis to believe that disclosure of the information to the CFTC is necessary to prevent the entity from engaging in conduct likely to cause substantial injury to the financial interest or property of the entity or investors;

¹⁰⁹ 17 C.F.R. § 165.2(g).

¹¹⁰ 17 C.F.R. § 165.2(h).

¹¹¹ 17 C.F.R. § 165.2(g).

- the whistleblower has a reasonable basis to believe that the entity is engaging in conduct that will impede an investigation of the misconduct; or
- at least 120 days have elapsed since the whistleblower provided the information to the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or the whistleblower's supervisor, or since the whistleblower received the information, if the whistleblower received it under circumstances indicating that one of the persons or committees above was already aware of the information.¹¹²

[iii] Additional Categories of Ineligible Individuals

In addition to the above categories of individuals and information that the CFTC will not consider eligible for a bounty under the independent knowledge inquiry, the statute lists several more categories of individuals who will not qualify for a bounty. It provides that no award shall be made to any whistleblower who:

- is, or was at the time of acquiring the original information, a member, officer or employee of certain federal regulatory agencies, the Department of Justice, a registered entity, a registered futures association, a self-regulatory organization, or a law enforcement organization;
- is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award;
- submits information that is based on facts underlying the covered action submitted previously by another whistleblower;
- fails to submit information to the CFTC in such form as it may, by rule or regulation, require; or
- knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or makes or uses any false writing or document knowing same to contain any false, fictitious, or fraudulent statement or entry.¹¹³

The regulations further provide that the following categories of individuals will not be eligible:

- individuals who acquired the information from certain categories of ineligible individuals;¹¹⁴
- individuals who are members, officers, or employees of either a foreign regulatory authority or law enforcement organization, individuals who were in such a role at the time

¹¹² 17 C.F.R. § 165.2(g)(7).

¹¹³ 7 U.S.C. § 26(c)(2); § 26(m). *See also* 17 C.F.R. §§ 165.6(a)(1); (a)(2); (a)(3); and (a)(5).

¹¹⁴ 17 C.F.R. § 165.6(a)(4).

they acquired the original information, or individuals who acquired the original information as a result of being in such a role;¹¹⁵ or

- individuals who acquired the original information from any other person with the intent to evade any provision of the CFTC's implementing regulations.¹¹⁶

Although a whistleblower will be ineligible for a bounty based on any of the above criteria, the whistleblower will still be covered under section 23's anti-retaliation protections.¹¹⁷

[c] Incentives to Report Internally

The CFTC, like the SEC, rejected a requirement that an individual first report internally to the company before making disclosures to the CFTC to be eligible for a whistleblower bounty, and instead attempted through its final regulations to incentivize employees in several ways to use their companies' internal compliance and reporting systems when appropriate. Those attempted incentives are identical to those promulgated by the SEC, discussed *supra*.

[d] Anonymous Reports to the CFTC

Under section 23, a whistleblower need not be represented by counsel to submit a whistleblower report of an alleged violation to the CFTC anonymously. This is in contrast to the SEC's whistleblower program, which requires whistleblowers reporting anonymously to be represented by counsel.¹¹⁸

If, however, the whistleblower subsequently wishes to request a bounty award based on information anonymously provided, at that point the whistleblower has two choices: he or she may either (1) identify him/herself on a Form WB-APP (the required paperwork for requesting an award); or (2) retain counsel in order to request an award anonymously.¹¹⁹

A whistleblower who wishes to remain anonymous during the award request process must provide his or her counsel with a completed Form WB-APP, of which counsel must retain a signed original.¹²⁰ The whistleblower's counsel may then submit a version of the Form WB-APP signed solely by counsel and that does not reveal the whistleblower's identity.¹²¹ Upon the CFTC's request, however, the whistleblower's counsel must produce the whistleblower's signed original WB-APP to the CFTC.¹²²

¹¹⁵ 17 C.F.R. § 165.6(a)(6) and (7).

¹¹⁶ 17 C.F.R. § 165.6(a)(8).

¹¹⁷ 17 C.F.R. § 165.6(b).

¹¹⁸ 17 C.F.R. § 240.21F-9(c).

¹¹⁹ 7 U.S.C. § 26(d)(2)(A); 17 C.F.R. § 165.7(c).

¹²⁰ 17 C.F.R. § 165.7(c)(2).

¹²¹ *Id.*

¹²² *Id.*

Prior to the payment of an award under section 23, a whistleblower is required to identify him or herself.¹²³ The whistleblower's identity must be verified in a form and manner that is acceptable to the CFTC prior to the payment of any award.¹²⁴

[e] CFTC's Communications with Employees

The CFTC's regulations provide that, to the extent a whistleblower is a director, officer, member, agent, or employee of an entity that has counsel, once the whistleblower has initiated a communication with the CFTC relating to a potential violation of the CEA, the CFTC's staff is authorized to communicate directly with the whistleblower regarding the subject matter of the whistleblower's communication, without seeking the consent of the entity's counsel.¹²⁵

[f] Amount of Award

The Dodd-Frank Act provides that the CFTC "shall" pay an award or awards to one or more whistleblowers who voluntarily provide original information to the CFTC that leads to the successful enforcement of a covered CFTC action or related action, in an aggregate amount equal to:

- not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and
- not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.¹²⁶

The determination of the amount of an award is in the discretion of the CFTC.¹²⁷ The regulations explain that if the CFTC makes awards to multiple whistleblowers in connection with the same action or related action, it will determine an individual percentage award for each whistleblower, "but in no event will the total amount awarded to all whistleblowers as a group be less than 10 percent or greater than 30 percent of the amount the Commission or the other authorities collect."¹²⁸

[g] Criteria for Determining Amount of Award

In determining the amount of an award, section 23 provides that the CFTC shall take into consideration:

- the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;

¹²³ 7 U.S.C. § 26(d)(2)(B); 17 C.F.R. § 165.7(c).

¹²⁴ 17 C.F.R. § 165.7(c).

¹²⁵ 17 C.F.R. § 165.18.

¹²⁶ 7 U.S.C. § 26(b)(1).

¹²⁷ 7 U.S.C. § 26(c)(1)(A).

¹²⁸ 17 C.F.R. § 165.8.

- the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;
- the programmatic interest of the CFTC in deterring violations of the chapter (including regulations under the chapter) by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and
- such additional relevant factors as the CFTC may establish by rule or regulation.¹²⁹

The CFTC’s regulations add two additional considerations: “[w]hether the award otherwise enhances the Commission’s ability to enforce the [CEA], protect customers, and encourage the submission of high quality information from whistleblowers,” and “[p]otential adverse incentives from oversized awards.”¹³⁰

The CFTC may not take into consideration the balance of the Commodity Futures Trading Commission Customer Protection Fund, which is the fund from which whistleblower awards are made.¹³¹

[h] No Immunity

The CFTC’s regulations make clear that the fact that an individual may become a whistleblower and assist in CFTC investigations and enforcement actions does not preclude the CFTC from bringing an action against the whistleblower based upon his or her own conduct in connection with violations of the CEA and the CFTC’s regulations.¹³² If such an action is determined to be appropriate, the CFTC’s Division of Enforcement will take into consideration the whistleblower’s cooperation when making its sanction recommendations to the CFTC.¹³³

[i] Awards to Whistleblowers Who Engage in Culpable Conduct

The CFTC’s regulations provide that, in determining whether the required \$1 million threshold has been met for the purposes of making an award, the CFTC will not take into account any monetary sanctions that the whistleblower is ordered to pay, or that any entity is ordered to pay when liability is based primarily on conduct that the whistleblower principally directed, planned, or initiated.¹³⁴ Similarly, if the CFTC determines that a whistleblower is eligible for an award, it will not include in its calculation of the amounts collected, for purposes of making payments to the whistleblower, any amounts that the whistleblower or such entity pays in sanctions as a result of the action or related actions.¹³⁵

[4] Section 748’s Whistleblower Anti-Retaliation Provisions

¹²⁹ 7 U.S.C. § 26(c)(1)(B).

¹³⁰ 17 C.F.R. §§ 165.9(a)(4); (a)(5).

¹³¹ 7 U.S.C. §§ 26(a)(2); 26(g); 17 C.F.R. § 165.9(d).

¹³² 17 C.F.R. § 165.16.

¹³³ *Id.*

¹³⁴ 17 C.F.R. § 165.17.

¹³⁵ *Id.*

Section 748 of the Dodd-Frank Act also contains anti-retaliation protections for whistleblowers who report violations of the CEA to the CFTC.¹³⁶ Specifically, section 23(h) provides:

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 subsection (b);¹³⁷ or

(ii) in assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information.¹³⁸

On August 4, 2011, the CFTC issued final rules implementing section 23. They can be found at 17 C.F.R. Part 165.

[a] Who is Covered?

The statute defines a “whistleblower” as “any individual, or 2 or more individuals acting jointly, who provides information relating to a violation of this chapter to the Commission, in a manner established by rule or regulation of the Commission.”¹³⁹

The regulations define a “whistleblower” slightly differently, as “any individual, or 2 or more individuals acting jointly, who provides information relating to a *potential violation* of this chapter to the Commission, in a manner established by rule or regulation of the Commission.”¹⁴⁰ The comments to the regulations explain that the term “potential violation” is used in the regulations to make clear that the whistleblower anti-retaliation protections set forth in section 23(h) “do not depend on an ultimate adjudication, finding or conclusion that the conduct identified by the whistleblower constituted a violation of the CEA.”¹⁴¹ This definition of whistleblower in the regulations, to the extent it differs from the plain statutory text, will likely be subject to challenge in the courts.

The regulations also provide that a whistleblower is covered by section 23(h) if:

¹³⁶ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1743 (2010); 7 U.S.C. §26(h).

¹³⁷ Subsection (b) provides, in relevant part: “In any covered judicial or administrative action, or related action, the Commission...shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action...” 7 U.S.C. §26(b).

¹³⁸ See 7 U.S.C. §26(h)(1).

¹³⁹ See 7 U.S.C. §26(a)(7).

¹⁴⁰ See 17 C.F.R. § 165.2(p) (emphasis added).

¹⁴¹ See Whistleblower Incentives and Protection, 76 Fed. Reg. 53172, 53181 (Aug. 25, 2011).

- the whistleblower possesses a “reasonable belief” that the information being provided relates to a “possible violation of the CEA, or the rules or regulations thereunder, that has occurred, is ongoing, or is about to occur;” and
- provides that information “in a manner described in §165.3” of the regulations, *i.e.*, submits a completed Form TCR (Tip, Complaint or Referral questionnaire) to the CFTC.¹⁴²

The regulations further state that the anti-retaliation provisions apply “whether or not the whistleblower satisfies the requirements, procedures and conditions to qualify” for a bounty award, and clarify that a “company or another entity is not eligible to be a whistleblower.”¹⁴³

[b] Statute of Limitations and Procedures For Enforcement

Anti-retaliation claims under section 23(h) must be filed in federal district court “not more than 2 years” after the alleged retaliation occurs.”¹⁴⁴ If the whistleblower is an employee of the federal government, however, the claim must be filed with the Merit Systems Protection Board in accordance with 5 U.S.C. §1221.¹⁴⁵

[c] Remedies

The remedies available to an employee that prevails in a whistleblower action under section 23(h) include:

- reinstatement with the same seniority status that the individual would have had, but for the retaliation;
- back pay, with interest; and
- compensation for any special damages resulting from the retaliation, including litigation costs, expert witness fees, and reasonable attorney’s fees.¹⁴⁶

Section 23(h) does not provide for the recovery of punitive damages.¹⁴⁷

[d] Pre-Dispute Arbitration Agreements/Waivers of Claims

Section 23 provides that “[t]he rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment including a predispute arbitration agreement” and further provides that “[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.”¹⁴⁸ As such, employers that have implemented mandatory arbitration by adopting pre-dispute arbitration programs will not be able to compel section 23 whistleblower retaliation claims to

¹⁴² See 17 C.F.R. § 165.2(p).

¹⁴³ See *id.*

¹⁴⁴ 7 U.S.C. §26(h)(1)(B).

¹⁴⁵ 7 U.S.C. §26(h)(1)(B)(i).

¹⁴⁶ 7 U.S.C. §26(h)(1)(C).

¹⁴⁷ See *id.*

¹⁴⁸ 7 U.S.C. §26(n).

arbitration. It also appears that standard release agreements that employees sign on separation of employment be not be effective to release such claims.