

K&L GATES



Southwestern Institute for  
**INTERNATIONAL AND  
COMPARATIVE LAW**

# Whistleblowers: Are You Prepared?

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## SELECTED WHISTLEBLOWER LEGISLATION

- United States False Claims Act (1863; revised in 1986)
  - Instituted to combat fraud by suppliers of the U.S. government during the Civil War
  - Entitles whistleblowers who bring *qui tam* actions a reward of 15-30% of money recovered or damages won by the government
- IRS Tax Fraud Program (origins in 1867 legislation; amended in 1996 and 2006)
  - A whistleblower who reports tax fraud can receive 15-30% of the amount recovered.



## SELECTED WHISTLEBLOWER LEGISLATION

- Sarbanes-Oxley Act (2002)
  - Protects against retaliation for reporting violations
- Dodd-Frank Act (2010)
  - Protection to employees who report securities violations to legal authorities, Congress, or supervisors
  - Entitles whistleblowers to 10-30% of recovery on actions with over \$1 million in sanctions
- OSHA's Office of Whistleblower Protection Program
  - Enforces whistleblower and retaliation laws under 22 statutes and counting!
  - Enforcement procedures.



The image features a background of blue bokeh light effects, with a solid orange horizontal band across the middle. The text "FALSE CLAIMS ACT" is centered within this band in white, uppercase letters.

# FALSE CLAIMS ACT

# WHISTLEBLOWER PROTECTION

- Whistleblower (relator) incentives
  - DOJ or relator may file case
  - After relator files suit, DOJ investigates and decides whether to intervene
    - If it does: relator may receive 15-25% of recovery
    - If it does not: relator may receive 25-30% of recovery
  - Relator may recover attorneys' fees
- In 2014, whistleblowers received more than \$435 million in FCA cases.





## TRINITY INDUSTRIES

- Harman sued Trinity in 2012 on behalf of the government under the *qui tam* provisions of the FCA.
- Harman alleged that Trinity modified the guardrails it had sold to the federal government for use on federal highways but did not disclose these modifications as required by law.
- Federal judge awarded Harman \$199 million, or 30% of the total \$663 million judgment against Trinity Industries.



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# IRS TAX FRAUD PROGRAM

## OVERVIEW

- If taxes, penalties, interest and other amounts in dispute exceed \$2 million, the IRS will pay 15-30% of the amount collected. If the whistleblower disagrees with the outcome, s/he can appeal to the Tax Court.
- IRS also has an award program for other whistleblowers who do not meet the \$2 million threshold: maximum award of 15% up to \$10 million. Awards are discretionary and the outcome cannot be disputed.





## UBS WHISTLEBLOWER SECURES \$104 MILLION

- UBS AG banker, who went to prison after telling the IRS how the bank helped thousands of Americans evade taxes, secured a whistleblower award of \$104 million.
- Employee told authorities how UBS bankers managed \$20 billion of American assets and helped them cheat the IRS.



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# SARBANES-OXLEY ACT

## OVERVIEW

- Protects employees of publicly-traded companies from retaliation for reporting violations of federal securities laws and regulations or any other federal law against shareholder fraud
- Protects employees from retaliation for making truthful reports to law enforcement officers of suspected violations of federal law
  - Public and private companies
  - Not limited to fraud/securities act violations



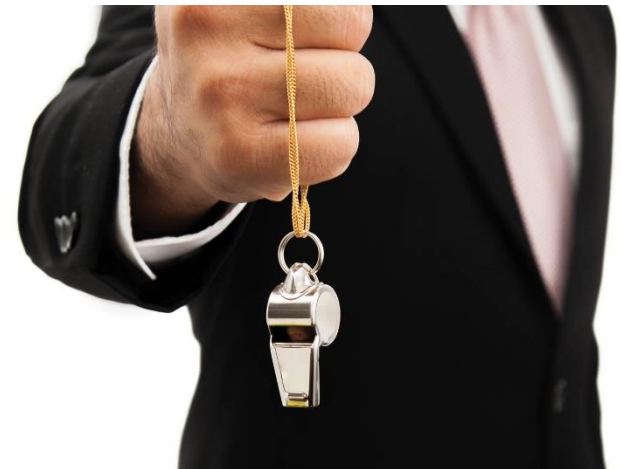
## REMEDIES AND PENALTIES

- Reinstatement, back pay, interest, compensatory damages, special damages (including attorneys' fees and costs and expert witness fees)
- Criminal penalty of up to 10 years for illegal retaliation under SOX.



## ***LAWSON V. FMR LLC, 134 S.CT. 1158 (2014)***

- First U.S. Supreme Court decision interpreting SOX
- Held that SOX whistleblower provisions apply to employees of privately-held contractors and sub-contractors of a publicly-traded company, even when the subject of the employee communication is unrelated to the business of the publicly-traded company.
- Also applies to employees of officers, agents and employees





## JURY AWARDS \$6 MILLION TO ZULFER

- Zulfer alleged that her employer, Playboy Enterprises, Inc., terminated her employment in retaliation for refusing the CFO's instruction to set aside \$1 million for discretionary bonuses that the board had not approved.
- Following Zulfer's internal whistleblowing, the CFO eventually terminated her employment.
- After a short trial, the jury awarded Zulfer \$6 million in compensatory damages and ruled she was entitled to additional punitive damages. Zulfer and Playboy settled before a determination of punitive damages.



## ***HALLIBURTON INC. V. ARB,*** **NO. 13-60323 (5<sup>TH</sup> CIR. NOV. 12, 2014)**

- Outing of whistleblower to colleagues and informing them that the whistleblower caused them to be the subject of an SEC investigation “created an environment of ostracism” for the whistleblower, which well might dissuade a reasonable employee from whistleblowing.
- Applied *Burlington Northern* material-adversity standard to SOX: whether a company’s actions would have dissuaded a reasonable worker from engaging in protected conduct.



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# DODD-FRANK ACT PROVISIONS AND AGENCY RULES

## OVERVIEW

- Provides broad whistleblower protection relating to complaints to the Securities Exchange Commission, the Commodities Future Trading Commission, and the financial services industry in general
- A “whistleblower” is any individual who provides information to the CFTC regarding the Commodity Exchange Act or the SEC relating to a potential violation of the federal securities laws
- Rejection of requirement that whistleblowers must first report suspected violations internally



## 2014 SEC ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM

- 3,620 whistleblower tips received in FY2014
- Tips from all 50 states, the District of Columbia, and Puerto Rico
  - Most tips from California (556), Florida (264), New York (204), and Texas (208)
- 448 tips from 60 countries outside the U.S.
  - *E.g.*, India (69 tips), Canada (58 tips), U.K. (70 tips)
- Most common complaint categories included Corporate Disclosure and Financials (16.9%), Offering Fraud (16%), and Manipulation (15.5%)





## GENERAL FRAMEWORK

- Payment of 10-30% of monetary sanctions obtained
- To eligible whistleblowers
- Who voluntarily provide
- Original information about a possible violation of the federal securities laws
- Leading to successful enforcement action with sanctions exceeding \$1 million.



## ELIGIBLE WHISTLEBLOWERS

- Only individuals are eligible for the whistleblower protections in Dodd-Frank
- Whistleblowers must act voluntarily as an “original source” to provide “original information”
- Not voluntary if whistleblower had a legal/contractual duty to report the information
- Can potentially be eligible for an award even if original information was obtained in violation of company policies, civil law, and privileges other than the attorney-client privilege
- Eligibility does not require whistleblower to report information to employer or to cooperate with internal investigation.

## ELIGIBLE WHISTLEBLOWERS

- The knowledge of officers, directors, and internal audit personnel does not qualify as independent knowledge unless:
  - The whistleblower has reasonable basis to believe it is necessary to disclose the information
    - To prevent the entity from engaging in conduct likely to cause substantial injury to the financial interest or property of the entity or investors; or
    - That the entity is engaging in conduct that will impede an investigation of the misconduct; or
  - The information is provided after 120 days have elapsed
    - Since the whistleblower provided the information to the whistleblower's supervisor or the entity's audit committee, chief legal officer, or chief compliance officer; or
    - Since the whistleblower received the information, if the whistleblower received it under circumstances indicating that the whistleblower's supervisor or entity's audit committee, CLO or CCO was already aware of the information.

# PROTECTIONS FOR WHISTLEBLOWERS

- Employer may not discharge, demote, threaten or discriminate against whistleblower
- Rights cannot be waived; pre-dispute arbitration agreements are unenforceable as to whistleblower claims.
- Whistleblowers can remain anonymous even to the government by reporting through legal counsel, until the time that the award is to be paid.
- Whistleblower as a federal right of action to enforce anti-retaliation protections.
- No immunity from prosecution or amnesty.



## “ORIGINAL INFORMATION”

- Derived from independent knowledge or independent analysis of the whistleblower;
- Derived from a non-public source and is not attorney-client privileged information;
- Was not previously known to authorities;
- Was voluntarily provided to authorities; and
- Materially added to the information the CFTC or SEC already had





## FINANCIAL AWARDS

- A whistleblower who voluntarily reports “original information” leading to the collection of more than \$1 million in monetary sanctions is entitled to 10-30% of the monetary sanctions.
- Award within CFTC’s and SEC’s discretion.
- “Monetary sanctions” include penalties, disgorgement, restitution, and interest ordered to be paid.



## SEC WHISTLEBLOWER AWARDS

- 6/3/14: Commission awarded \$875,000 to be shared between two whistleblowers who acted in concert to provide information to the SEC.
- 7/31/14: Commission awarded more than \$400,000 to a whistleblower who reported a fraud to the SEC after the company failed to address the issue internally.
- 8/29/14: Individual with internal audit responsibilities awarded over \$300,000 after reporting internally.
- 9/22/14: Awarded more than \$30 million to a whistleblower who provided key original information that led to successful enforcement action, making it the largest-ever whistleblower award.

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# OCCUPATIONAL SAFETY AND HEALTH ACT

## OSHA'S WHISTLEBLOWER PROTECTIONS



- OSHA's Whistleblower Protection Program enforces the whistleblower provisions of 22 statutes.
- Protects workers against retaliation for complaining to employers, unions, the OSHA, or other government agencies about unsafe or unhealthful conditions in the workplace, environmental problems, public safety hazards, and violations of certain federal provisions concerning securities fraud
- Complaints must be reported to OSHA within set timeframes as prescribed by each law
  - Most require discrimination complaints to be filed within 30 days of the alleged reprisal.

## WHISTLEBLOWING EMPHASIS

- Office of Whistleblower Protection directly reports to the Assistant Secretary of Labor. DOL FY2011 budget added new investigators and support staff.
- OSHA Whistleblower Investigations Manual, which makes it easier to file and process whistleblower complaints; accepts *oral* whistleblower complaints
- Fairfax Memo (Mar. 2012): memorandum challenging common safety incentive award programs; may constitute retaliation by incentivizing employees not to report injuries.
- 3060 total cases received in FY2014



## RECENT DEVELOPMENTS

- April 2015: Court orders dentist to pay \$85k to employee fired for safety complaint
- March 2015: Union Pacific Railroad disciplines locomotive engineer for reporting workplace injury, owes worker \$350k in damages
- March 2015: Whistleblower who was fired for reporting hazards wins \$33k in settlement
- February 2015: Federal judge orders US Postal Service to pay employee \$229k in damages for whistleblower retaliation



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# PROACTIVE STEPS

## ESTABLISH CULTURE OF COMPLIANCE

- Promote the expectation that the company *wants to know* about potential wrongdoing
- Appeal to shared values of integrity
- Remind personnel of the risks posed by illegal conduct
- Explain the company's need to know of employee concerns
- Policy statement signed/issued by top executive



## ENCOURAGE INTERNAL REPORTING

- Encourage reporting of genuine concerns, even if they turn out to be mistaken
  - Provide clear instructions on how to report
  - Offer alternative ways to report
  - Describe what company will do with report
- Publicize reporting requirements
  - Permit anonymous reporting
  - Assure employees violations will be taken seriously
  - Assure protection from retaliation
- Enhance credibility of internal reporting
  - Promptly investigate and take appropriate remedial actions
  - Regularly audit procedures for effectiveness
  - Consider reporting back to whistleblower the results of the investigation



## PROVIDE TRAINING

- Focus on
  - Policy of full-compliance with laws and regulations
  - Policy of non-retaliation
  - Mandatory obligation to report
- Train managers to recognize and appropriately handle expressions of concern about improper conduct
- Do not exempt high-level executives from training



## REDUCE RISK OF RETALIATION CLAIMS

- Do not tolerate retaliation in any form
- Limit the number of individuals aware of the identities of whistleblowers
- Adhere to best practices for employee evaluations
  - Document fully and accurately
  - Review performance honestly and timely





## REQUIRE ANNUAL CERTIFICATIONS FROM EMPLOYEES

- Certification that the employee is not aware of any violations of law or company policy that are not described in the certification or otherwise reported to the company, including anonymously
- Interview departing employees



## BE PREPARED TO RESPOND TO GOVERNMENT INQUIRIES

- Company has opportunity to maximize ability to influence situation by demonstrating cooperation, credibility, and competence to Government.
- Advance planning
  - Be prepared to undertake prompt internal review
  - Consider establishing protocol on how reviews will be conducted and identify situations when Company may seek to have independent counsel conduct review



# QUESTIONS?



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