METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
Annual Conference – February 10, 2017

Counseling the Whistleblower Client on Employment Law Concerns[1]

Lynne Bernabei, Alan R. Kabat, and Christopher Sousa
Bernabei & Kabat PLLC
1775 T Street NW
Washington, D.C. 20009-7102

The courts and agencies are actively addressing the dynamics underlying the substantive provisions of the whistleblower laws as applied to the anti-retaliation provisions. Congress, the courts, and government agencies are working to counteract efforts by companies to raise obstacles to a whistleblower's ability to disclose information about potential illegal activity to the government, whether through confidentiality agreements or retaliating by outing the employee as a whistleblower. The courts are also addressing the scope of protected conduct under Dodd-Frank, and individual liability under both Dodd-Frank and Sarbanes-Oxley (SOX).

Background – Relevant Laws

False Claims Act. The FCA provides that any company that knowingly submits false claims to the government is liable for treble damages and penalties. The law allows whistleblowers to file a *qui tam* lawsuit on behalf of the United States. If the government intervenes in the *qui tam* action, the relator is entitled to 15 to 25 percent of the amount recovered by the government.[2] If the government declines to intervene in the action, the successful relator is entitled to 25 to 30 percent of the judgment or settlement.

The FCA also contains an anti-retaliation provision that bars an adverse action against an employee because of his or her report, or attempt to report, a company's claims to the government that he or she reasonably believes is false:

> [An individual] shall be entitled to all relief necessary [if he or she] is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done [by that individual] in furtherance of an [FCA action] or other efforts to stop 1 or more violations of the False Claims Act.

31 U.S.C. § 3730(h).

[1] These materials are updated and expanded from the ABA Labor and Employment Law Conference, "Advising Clients throughout the Whistleblower Investigation" (Nov. 11, 2016).

[2] Department of Justice, False Claims Act: A Primer, https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf (last accessed Jan. 25, 2017).

The use of its *qui tam* and anti-retaliation provisions has exploded in recent years. In fact, in the first half of 2016, federal and state governments have already collected more than $1.86 billion dollars through the False Claims Act.[3]

Sarbanes-Oxley Act. Passed in the wake of the Enron and Worldcom financial scandals, SOX protects individuals who provide information about securities fraud, shareholder fraud, bank fraud, a violation of any SEC rule or regulation, or mail or wire fraud. The anti-retaliation provision within SOX prohibits a covered company from:

> discharg[ing], demot[ing], suspend[ing], threaten[ing], harass[ing], or in any other manner discriminat[ing] against an employee in the terms and conditions of employment because of any lawful act done by the employee to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [SOX], any rule of the Securities and Exchange Commission, or any provision of Federal law related to fraud against shareholders.

18 U.S.C. § 1514A. SOX delegated authority to the Occupational Safety and Health Administration ("OSHA") to investigate whistleblower claims and issue a proposed finding as to whether or not SOX was violated. The aggrieved party can then seek further review by an agency Administrative Law Judge, with further review by the Administrative Review Board. The complainant also has the ability to remove the case to the U.S. District Court for a *de novo* trial if the agency has not resolved the complaint within 180 days. 18 U.S.C. § 1514A(b)(1)(B).[4]

Dodd-Frank Act. Enacted in 2010, Congress expanded the underlying conduct that can be reported by a whistleblower, and created a new bounty program:

> 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 . . . .

15 U.S.C. § 78u-6(h)(1)(A). That protection was also buttressed by a provision giving whistleblowers monetary incentives for revealing company actions that violate the securities laws and regulations. As stated by the SEC, the Congressional purpose underlying these provisions was "to encourage whistleblowers to report possible violations of the securities laws by providing financial incentives, prohibiting employment-related retaliation, and providing various confidentiality guarantees." *See* SEC, Final Rule, "Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934," at 197 (Aug. 12, 2011).

---

[3] Gibson Dunn, 2016 Mid-Year False Claims Act Update, July 7, 2016, http://www.gibsondunn.com/publications/Pages/2016-Mid-Year-False-Claims-Act-Update.aspx

[4] *See also* OSHA, "Procedures for the Handling of Retaliation Complaints under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended," 80 Fed. Reg. 11865-11885 (Mar. 5, 2015).

I. Scope of Protected Conduct under Dodd-Frank and SOX.

A key issue under both Dodd-Frank and SOX is what conduct is protected – what reports by an employee are covered by the statute. Are internal reports within the company protected, or must the employee report the alleged wrongdoing to the U.S. Securities and Exchange Commission (SEC) or another agency?

For SOX, the answer is clear in the statute, which sets forth two ways in which an employee is protected – either by providing information or by participating in an investigation:

> (a) Whistleblower Protection for Employees of Publicly Traded Companies.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c), or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—
>
> > (1) **to provide information, cause information to be provided, or otherwise assist in an investigation** regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, **when the information or assistance is provided to or the investigation is conducted by—**
> >
> > > **(A) a Federal regulatory or law enforcement agency;**
> > > **(B) any Member of Congress or any committee of Congress; or**
> > > **(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)**; or
> >
> > (2) **to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed** (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. § 1514A(a) (emphasis added). Thus, SOX protects both internal and external reports, with the caveat that the external reports must be to a federal agency or to Congress.

In contrast, Dodd-Frank is less clear on the scope of its protected conduct, due to some ambiguity in the drafting of the statute, which reflected last-minute legislative additions. This has resulted in a split in the courts, with a majority of the courts agreeing with the SEC that internal reports are protected under Dodd-Frank, and a minority of the courts holding that only reports to the SEC are protected under Dodd-Frank.

The argument turns on the interpretation of 15 U.S.C. § 78u-6, which provides that:

> (A) No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
> (iii) **in making disclosures that are required or protected under the Sarbanes–Oxley Act of 2002** (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u–6(h)(1)(A) (emphasis added). The courts have agreed that (i) and (ii) require reporting to the SEC. However, the courts have disagreed on whether (iii) also allows internal reporting, *i.e.*, the reference to "making disclosures that are required or protected under [SOX]."

The Fifth Circuit was the first appellate court to address this question, and it held that only reporting to the SEC was protected by Dodd-Frank, notwithstanding the reference to disclosures under SOX. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013). The plaintiff worked in Jordan and alleged that after he made internal reports of potential violations of the Foreign Corrupt Practices Act (FCPA), he was terminated. *Id.* at 621. The district court dismissed his claim on the grounds that Dodd-Frank did not apply to conduct outside the United States, and did not address GE's alternative argument regarding internal reporting. *Id.* The Fifth Circuit, on appeal, declined to address the extraterritoriality argument, and instead upheld the dismissal on the grounds that Dodd-Frank requires reporting to the SEC. *Id.* at 623-30.

The Fifth Circuit noted that since Dodd-Frank also defined "whistleblower" as "any individual who provides … information relating to a violation of the securities law *to the Commission*, in a manner established by rule or regulation, by the Commission," *id.* at 623 (quoting 15 U.S.C. § 78u-6(a)(6) (emphasis added)), that definition "standing alone, expressly and unambiguously requires that an individual provide information to the SEC to qualify as a 'whistleblower' for purposes of § 78u-6." *Id.*

The Fifth Circuit did recognize that Section 78u-6(h)(1)(A)(i) – (iii) set forth three categories, but concluded that they "represent the protected activity in a whistleblower-protection claim. They do not, however, define which individuals qualify as whistleblowers." *Id.* at 625. The Fifth Circuit did recognize the incongruity in that if the employer fired the employee because of his internal reports – and the employer did not know that the employee had also made an external report to the SEC – the employee would still be protected under Dodd-Frank, yet it refused to resolve that ambiguity in the employee's favor. *Id.* at 627-28.

The Second Circuit, in *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015), reached the opposite conclusion from the Fifth Circuit. As a threshold matter, the Second Circuit recognized that the majority of district courts had held that internal reporting alone was protected under Dodd-Frank. *Id.* at 153 (collecting cases). The SEC, in issuing its Exchange Rule 21F-2, which implemented Dodd-Frank's retaliation provision, stated that Dodd-Frank applied "to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities *other than the Commission*." *Id.* at 148. The Second Circuit noted the "arguable tension between the definitional section of subsection 21F(a)(6) [15 U.S.C. § 78u-6(a)(6)] and subdivision (iii) of subsection 21F(h)(1)(A) [15 U.S.C. § 78u-6(h)(1)(A)] creates sufficient ambiguity as to the coverage of subdivision (iii) to oblige us to give *Chevron* deference to the SEC's rule." *Id.* The Second Circuit resolved this ambiguity in the employee's favor, given not only the deference to the SEC's rule, but also because some whistleblowers – auditors and attorneys – are required to report up the chain *before* they can report to the SEC, since they have to wait for a response from the company before reporting outside. *Id.* at 151-52. In those circumstances, auditors and attorneys would have no protection under Dodd-Frank if they were fired after making an internal report but before they could make an external report. *Id.*

On remand, the district court denied the employer's motion to dismiss the amended complaint (which also alleged a SOX violation), because "a retaliation claim under Dodd-Frank and Sarbanes-Oxley requires Berman to plead *only* that he had a reasonable belief that the alleged misconduct violated the covered laws – not to prove that such a violation occurred," and such a determination required discovery that cannot be resolved on a motion to dismiss. *Berman v. Neo@Ogilvy LLC*, No. 1:14-cv-00523-GHW-SN, 2016 WL 7975001, at *1 (S.D.N.Y. Oct. 24, 2016). According to the court's docket, the case then settled.

The Sixth Circuit recently recognized this split in the circuits as to whether internal reports were protected under Dodd-Frank. *Verble v. Morgan Stanley Smith Barney, LLC*, No. 15-6397, __ Fed. Appx. __, 2017 WL 129040, at *4 (6th Cir. Jan. 13, 2017). However, the Sixth Circuit did not have to resolve this question, for it instead upheld the district court's dismissal of the Dodd-Frank retaliation claim on the basis that the "complaint fails to allege sufficient facts … to state a plausible claim for relief." *Id.*

II. Litigating SOX and Other Employment Claims in Separate Proceedings.

Under the statute and the Department of Labor's implementing rules, a SOX claim starts with a complaint filed with the Occupational Safety and Health Administration (OSHA). The typical procedure for the numerous whistleblower statutes enforced by the Department of Labor is that OSHA assigns an investigator who makes a determination either to dismiss the complaint (the usual outcome) or to order reinstatement or other remedies. The OSHA investigator's determination can be appealed to an Administrative Law Judge, who conducts a *de novo* evidentiary hearing after allowing the parties an opportunity for discovery. The ALJ's decision, in turn, can be appealed to the Department of Labor's Administrative Review Board (ARB), and the ARB's decision, in turn, can be appealed to the U.S. Court of Appeals for the circuit in which the employee worked.

SOX, however, has an unusual "kick-out" procedure allowing the complainant to withdraw his complaint from the Department of Labor and file a *de novo* action in the U.S. District Court, if the Department of Labor has not issued a final decision within 180 days, and any delay in issuing the decision was not caused by the complainant's own conduct. *See* 18 U.S.C. § 1514A(b)(1)(B). Thus, as a strategic matter, counsel for a SOX complainant will have to decide whether to use that procedure.

For example, a complainant may also have discrimination and retaliation claims under other federal, state, or local laws. Since the ALJ cannot adjudicate those other claims, the complainant would have to first file the SOX claim with OSHA, and file a separate complaint in federal or state court on his other claims. The complainant could either allow both complaints to proceed in litigation, or could seek to consolidate them in one federal complaint after removing the SOX claim from the Department of Labor.

Another scenario is that a complainant may be required to arbitrate his employment claims, pursuant to an arbitration agreement with his employer. However, SOX claims are <u>not</u> subject to mandatory arbitration agreements, so a complainant could choose to litigate his SOX claims in either the Department of Labor or in federal court (after removal), while litigating his other employment claims in arbitration.

In all of these scenarios, the question may arise as to whether a ruling by one tribunal as to one set of claims would have a preclusive effect on the other tribunal's consideration of the other claims. This is *res judicata*, and can involve either claim preclusion or issue preclusion (collateral estoppel). The courts have taken divergent approaches as to whether *res judicata* would apply to SOX claims when there is or has been another proceeding (or vice versa).

First, the most obvious situation is where the ALJ rules against the SOX complainant, dismissing the SOX claim, and the complainant then attempts to file a *de novo* action in the district court (instead of appealing the SOX dismissal). In that situation, the ALJ has decided both the claim and the issues underlying that claim, so that the ALJ's decision is *res judicata*. *Groncki v. AT&T Mobility LLC*, 640 F. Supp. 2d 50 (D.D.C. 2009). Essentially, the federal court action is an improper collateral attack on the ALJ's ruling.

Second, a more complex situation is where the employee brings a SOX claim with OSHA, which is fully litigated, and also files a complaint in court under <u>other</u> statutes (such as Title VII claims), or state common-law claims (such as wrongful discharge in violation of public policy). To what extent would the rulings on the SOX claim have a preclusive effect on the other claims (or vice versa)? Where the ALJ found that the SOX complainant was terminated for a legitimate, non-discriminatory reason, then *res judicata* is likely to apply. The Third and Fifth Circuits have ruled against employees in those circumstances.

The Fifth Circuit, in *Thanedar v. Time Warner, Inc.*, 352 Fed. Appx. 891 (5th Cir. 2009) (*per curiam*), held that *res judicata* applied, since the SOX complainant had also filed a Title VII claim, which arose from the same core of facts: "both of Thanedar's lawsuits focus on one critical issue: whether Thanedar's employer had a legitimate and lawful reason for taking the adverse employment action of which he complains. This is sufficient to address a same nucleus of operative fact." *Id.* at 898. The Fifth Circuit concluded that the employee should have removed the SOX claim to federal court, and moved to consolidate it with his then-pending Title VII lawsuit. *Id.* at 898-99.

Similarly, the Third Circuit, in *Tice v. Bristol-Myers Squibb Co.*, 325 Fed. Appx. 114 (3d Cir. 2009), held that the ALJ's administrative ruling in the SOX case had a preclusive effect on her Title VII, Age Discrimination in Employment Act (ADEA), and Pennsylvania Human Relations Act claims. Judge Hardiman, writing for a split panel, noted that in the SOX proceeding, the ALJ concluded that the employee "was terminated for the act of falsifying calls, not for the reporting of doing so," and that "Bristol-Myers demonstrated by clear and convincing evidence that it would have disciplined Tice or terminated her even in the absence of [any] protected activity." *Id.* at 115. The employee, instead of appealing the ALJ's decision, pursued her other discrimination claims in federal court, and while she alleged that her supervisor "was motivated to retaliate against her because of a sexual harassment claim she filed previously," she also alleged "that she was fired for reporting SOX violations while unidentified younger and male employees were not fired." *Id.* at 116. In that situation, the employee's other claims were improperly "relitigating issues specifically decided in the course of her SOX proceedings." *Id.* at 120. Judge Hardiman recognized that the plaintiff could have, but did not, allege that "she was fired for discriminatory reasons *in addition to* the legitimate reason established in the SOX proceedings," *i.e.*, a mixed-motive approach for Title VII claims. *Id.* at 123. But, the plaintiff did not proceed under the mixed-motive approach, so the ALJ's ruling barred her other claims.

Senior Judge Garth dissented in part, on the grounds that the majority's approach "sets up a fractious system where employees with legitimate claims under both Title VII/ADEA and SOX effectively are deterred from filing simultaneous complaints with the EEOC and OSHA because early adjudication by one agency would preclude their claims pending before the other – to say nothing of the district court." *Id.* at 125 (Garth, J., dissenting in part).

In contrast, at least two district court judges, and one ALJ, have found that preclusion did not apply as to at least some of the claims, because the rulings by the first tribunal were based on different theories or methods of proof than for the claim(s) before the second tribunal. U.S. District Judge Zobel, in *Seetharaman v. Stone & Webster, Inc.*, No. 05-11105-RWZ, 2009 WL 1364706 (D. Mass. May 11, 2009), found that preclusion did not apply to several claims, where the employee had filed both retaliation claims with OSHA (under several environmental statutes, but not SOX), and various state and federal discrimination claims in federal court. Several of the claims in federal court were precluded because they were based on allegations that the employer retaliated against him based on his protected conduct (particularly his wrongful discharge in violation of public policy claim), because the DOL proceedings "clearly established that Seetharaman did not suffer any adverse employment actions as a result of his alleged whistleblowing activities." *Id.* at *6. However, the remaining race, national origin, age, and disability discrimination claims were not precluded "to the extent plaintiff alleges that he was terminated based on a 'mixed motive' of legitimate and illegitimate reasons." *Id.* at *7. Nonetheless, Judge Zobel recognized that even were the plaintiff to prevail on his mixed motive analysis, he still "cannot reargue the prior determination that S&W terminated plaintiff's employment for a legitimate reason, *i.e.*, that he was the least productive member of the HB Group," so that his remedies would be limited, with no damages or reinstatement. *Id.* at *8.

U.S. District Judge Pauley, in *Feldman-Boland v. Morgan Stanley*, No. 15-cv-6698, 2016 WL 3826285 (S.D.N.Y. July 13, 2016), addressed the situation where the plaintiffs brought both SOX and Dodd-Frank claims in court, and had previously brought gender and Family Medical Leave Act (FMLA) claims with the New York City Commission on Human Rights. *Id.* at *2. The New York city agency "issued No Probable Cause Determinations and Orders, finding that each of them was 'terminated for legitimate nondiscriminatory reasons and not because of discrimination or retaliation.'" *Id.* Judge Pauley rejected defendants' arguments that preclusion applied, for two reasons. First, the New York agency claims required the plaintiffs to "demonstrate by a preponderance of the evidence" that Morgan Stanley discriminated or retaliated against them. *Id.* at *3. In contrast, to plead and prove a *prima facie* SOX claim, the plaintiffs "need only establish that whistleblower retaliation was a contributing factor to their termination" and for a Dodd-Frank claim, that plaintiffs "need only establish that their termination was 'causally connected' to protected whistleblower activity." *Id.* And, defendants "would then need to demonstrate by clear and convincing evidence that plaintiffs' employment would have been terminated in the absence of any protected activity." *Id.* Thus, Judge Pauley concluded that the issues in the two proceedings were "plainly not identical," given the quite different reasons and burdens of proof. *Id.* at *4. Second, the New York agency claims were not part of an evidentiary hearing, and there was no discovery, so the plaintiffs did not have a full opportunity to litigate their discrimination claims at that agency. *Id.*

ALJ Burke, in *Gonzalez v. Colonial Bancgroup*, No. 2004-SOX-39 (ALJ Aug. 9, 2004), addressed a situation where the employee had filed a SOX claim with OSHA and also filed a complaint in court alleging claims for both defamation and violations of the Florida Whistleblower statute. *Id.* at 1. The employer sought to dismiss the SOX claim on the grounds that the Florida state whistleblower claim sought the same relief and was "impermissible claim-splitting." *Id.* However, ALJ Burke found that there had been no determination by the federal court on the Florida state law claims, so that no issues had already been decided. *Id.* at 2. Further, SOX has an enforcement scheme and procedures that differ materially from those available under the Florida state statute, so that *res judicata* would not apply. *Id.* at 3-4.

III. <u>The *Wadler v. Bio-Rad Laboratories* litigation.</u>

At the time these materials were prepared, the jury trial was underway in the Northern District of California on SOX and Dodd-Frank claims brought by the former general counsel of a biotechnology company. *Wadler v. Bio-Rad Laboratories, Inc.*, No. 15-cv-02356-JCS (N.D. Cal.). Mr. Wadler alleged that he reported potential violations of the Foreign Corrupt Practice Act (FCPA) in the company's sales in several overseas countries, particularly in China. Several reported decisions are of broader interest.

First, the district court (Magistrate Judge Spero) denied the defendants' motion to dismiss the claims. *Wadler v. Bio-Rad Laboratories, Inc.*, 141 F. Supp. 3d 1005 (N.D. Cal. 2015), *motion for certification of interlocutory appeal denied*, 2015 WL 8753292 (N.D. Cal. Dec. 15, 2015). The court held that there was individual liability under both SOX and Dodd-Frank, where the individual defendants were involved in the decision to terminate the plaintiff. *Id.* at 1015-24. However since several of the individual defendants were not named in the SOX complaint filed with OSHA, those defendants were dismissed as to the SOX claim alone, due to failure to exhaust administrative remedies. *Id.* The Court further held that Mr. Wadler's internal reports alone were sufficient to qualify for Dodd-Frank protection, following the majority of courts, and declining to adopt the reasoning of the Fifth Circuit in *Asadi*. *Id.* at 1024-27.

Second, the district court issued a shorter opinion addressing the propriety of the plaintiff's rebuttal expert witness report, concluding that while some of the rebuttal expert's opinions "directly address opinions expressed by" defendants' expert, other opinions "go beyond the scope of Dr. Carr's opinions and therefore are not proper rebuttal." *Wadler v. Bio-Rad Laboratories, Inc.*, No. 15-cv-02356-JCS, 2016 WL 6070530 (N.D. Cal. Oct. 17, 2016).

Third, only one month before the trial started, the district court denied the defendants' pretrial motion *in limine* that sought to exclude all attorney-client privileged information from use at trial. *Wadler v. Bio-Rad Laboratories, Inc.*, No. 15-cv-02356-JCS, 2016 WL 7369246 (N.D. Cal. Dec. 20, 2016). Since Mr. Wadler was the company's General Counsel, that meant that much of the evidence (both documentary and testamentary) was potentially protected by the attorney-client privilege. However, the district court, after an extensive analysis, concluded that SOX, as a federal law, preempted the California Rules of Professional Conduct that govern client confidences. The SEC "filed an amicus brief in which it argues, *inter alia,* that the Sarbanes-Oxley Act preempts California's ethical rules regarding the disclosure of attorney-client communications and the client's confidential information." *Id.* at *9. The district court recognized that a number of other courts, including the Fifth and Ninth Circuits, had allowed attorneys who were in-house counsel to bring SOX claims against their former employers, since federal law trumped over contrary state laws or ethics regulations. *Id.* at *11-*14. Moreover, the SEC had adopted rules governing SOX retaliation claims, which created a "direct conflict that gives rise to preemption of California ethical rules," since "the rule adopted by the SEC here reflects an unambiguous intent to preempt state ethical rules that prevent attorneys from disclosing privileged information necessary to comply with Sarbanes-Oxley." *Id.* at *20-*21. The district court concluded that "this is a textbook example of obstacle preemption," so that the federal law controlled. *Id.* at *21.

IV. Counseling a Client Asserting a False Claims Act Retaliation Claim.

Often, when an employer retaliates against a client for his actions raising or reporting a potential false claim, it may engage in settlement negotiations to resolve the retaliation claim. In that situation, the client may find himself in a position where he could file a *qui tam* claim against the company under the FCA ***and*** a retaliation claim at the same time. In such situations, it is important for the parties to draw a bright line between negotiating a resolution of the retaliation claim and the *qui tam* claim that the client may be able to initiate.

Ownership of the ability to settle FCA claims depends on whether it is a *qui tam* claim or an FCA retaliation claim. The statute provides that once *qui tam* litigation is initiated by the whistleblower, the case can only be dismissed with permission of the government and of the court. 31 U.S.C. § 3730(b)(1); *see also U.S. ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1168 (10th Cir. 2009) ("[T]he statute only governs the enforceability of settlement agreements made after the filing of a qui tam claim."). On the flip-side, it is well established that the anti-retaliation cause of action belongs to the employee and it is within his or her exclusive discretion whether to initiate or settle a retaliation action. Nonetheless, settlement of a retaliation claim cannot be used as an artifice to deprive the government of interest in the *qui tam* claim. *See U.S. ex rel. Summit v. Baker Corp.*, 40 F. Supp. 2d 772, 775-76 (E.D. Va. 1999). In *Summit*, the court recognized that, upon private settlement between the *qui tam* plaintiff and the defendant, the government continues to be the real-party-in-interest for the *qui tam* claims—which thus cannot be dismissed without written government authorization. This is the case even where the government declines to intervene in the *qui tam* litigation.

The calculus changes before any litigation is filed. A whistleblower can release a *qui tam* claim before he initiates litigation only when the information underlying such claims has already been disclosed to the government. *See U.S. ex rel. Radcliffe v. Purdue Pharma L.P.*, 600 F.3d 319 (4th Cir. 2010). In *Purdue Pharma*, the Fourth Circuit recognized the long line of authority that held that a private *qui tam* plaintiff cannot settle an FCA claim after litigation has commenced, but rightly identified that such a limitation is a creation of statute. *Id*. at 327. According to the court, "the consent of the government is not a necessary condition precedent to enforcement of an otherwise valid release where such a release is executed prior to filing a *qui tam* action." *Id*. at 328. However, following many other circuits, including the *en banc* Ninth Circuit, the *Purdue Pharma* court held that public policy considerations preclude enforcement of a release of FCA claims when the underlying allegations have not been disclosed to the government:

> When the government is unaware of potential FCA claims, the public interest favoring the use of *qui tam* suits to supplement federal enforcement weighs against enforcing pre-filing releases. But when the government is aware of the claims, prior to suit having been filed, public policies supporting the private settlement of suits heavily favor enforcement of a pre-filing release.

Id. at 332 (relying on *U.S. ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230 (9th Cir. 1997) (*en banc*)). Once the government already knows about the underlying allegations, and is free to initiate its own investigation or litigation arising out of the potential false claim, public policy protecting the government's right to recover for false claims is no longer at issue.

However, in situations where the underlying allegations ***are not*** within the government's knowledge, it is important for whistleblowing plaintiffs, and their counsel, to understand that it cannot attempt to leverage release of the FCA claims when negotiating a settlement of the whistleblower's retaliation claim. Introducing a specter of filing a *qui tam* case in settlement negotiations of an employment claim may be considered extortionate in some jurisdictions. Most notably, the California Court of Appeals has held that, in certain circumstances, the underlying claim of wrongdoing that violated the False Claims Act belongs with the U.S. government, and that a threat to leverage a release of *qui tam* claims could amount to civil extortion. *See Stenehjem v. Sareen*, 226 Cal. App. 4th 1405 (2014). In *Stenehjem*, an individual seeking to "settle" sent a letter to a former business partner about his knowledge of conduct that would violate the state False Claims Act. In the letter, counsel for the individual clearly stated that, without resolution, it would reveal these facts to the government and potentially file a *qui tam* suit. This, according to the appellate court, constituted extortion:

> It threatened to expose Sareen to federal authorities for alleged violations of the False Claims Act unless he negotiated a settlement of Stenehjem's private claims. Even were it true that Sareen had in fact committed acts violate the False Claims Act . . . this is "irrelevant" to whether the threatened disclosure was extortion.

Id. at 1423. In other words, when a potential whistleblower has information that could constitute a violation of the False Claims Act, and such information is not already known to the government, using the potential for submitting that information to the government as a chit in settlement negotiations is extortionate. In negotiating a FCA retaliation claim, a prudent lawyer would avoid any inference that the client is negotiating a release of a *qui tam* case.

In finalizing a resolution of retaliation claims with a whistleblower, a company will demand that the whistleblower commit to a sworn declaration or an affidavit where the whistleblower states that he has already disclosed to the company everything that he knows about the issues or states that a list of enumerated facts underlying the purported false claim on the government are the only facts that he knows. Whether this demand is contrary to the policy of ensuring that companies do not impede any individual's ability to report false claims or other illegal activity has not yet been adjudicated.

The Fourth Circuit recently addressed an unfortunate scenario where the relator and the government contractor had agreed to a settlement of almost $9 million (with part of that going to the relator), but the Department of Justice rejected that settlement, on the alleged basis that the payment schedule was not feasible. *United States ex rel. Ubl v. IIF Data Solutions, Inc.*, 650 F.3d 445 (4th Cir. 2011). Hence, the relator, in an attempt to obtain some recovery, had to take the case to a jury trial. Unfortunately, the jury reached a defense verdict, which the Fourth Circuit upheld on appeal. The Fourth Circuit did reverse the district court's grant of the contractor's attorneys' fee petition, *id.*, but the relator was still left empty-handed, due to the government's rejection of the settlement proposal.

V. Counseling Clients Whose Employers Have Conducted Internal Investigations Following a Whistleblower Complaint.

If a corporation conducts an internal investigation in response to a whistleblower's allegations, but the corporation does not release the results of the investigation, may the whistleblower be able to get discovery into the internal investigation if her claims go into litigation? The whistleblower may want to use the investigation in order to obtain leads to key documents and witnesses, or to help prove her claims, or to rebut the employer's defenses.

If the employer affirmatively used the investigation as part of its defense, either in court or in response to outside inquiries, then the courts are likely to have found that the employer opened the door to discovery into the investigation. The rationale is that an employer cannot use an investigation as both a sword and a shield, *i.e.*, to support its defenses while also denying discovery into the bases for its defenses. Thus, the privilege cannot be used "as a tool for manipulation of the truth-seeking process" and "cannot be allowed, after disclosing as much as he pleases, to withhold the remainder." *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982).

However, if the employer does not affirmatively use its investigation in subsequent litigation, then the employer may be able to argue that the attorney-client privilege bars discovery into the investigation. This scenario was recently presented in a False Claims Act case brought against a defense contractor, where the relator (Barko) alleged that there was fraud through kickbacks on certain contracts in Iraq and Jordan. Initially, the district court allowed the relator discovery of the internal investigation that was prepared (by a non-lawyer internal investigation) for the company's legal department. *See United States ex rel. Barko v. Halliburton Co.*, 37 F. Supp. 3d 1 (D.D.C. 2014). The defense contractor filed a petition for writ of mandamus, which the D.C. Circuit granted. *See In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 1163 (2015). The opinion, by Judge Kavanaugh, held that since the internal investigation was pursuant to direction from the company's in-house attorneys, and was done "to gather facts and ensure compliance with the law after being informed of potential misconduct," it was privileged as it fell squarely within the scope of the Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). *In re KBR*, 756 F.3d at 757. The fact that the company also did the internal investigation as part of a compliance program required by government statute or regulation was immaterial, since the privilege will apply "if one of the significant purposes of the internal investigation was to obtain or provide legal advice." *Id.* at 760.

On remand, District Judge Gwin (sitting by special assignment), ordered disclosure on the grounds that KBR had waived the privilege either (1) by having its Rule 30(b)(6) corporate designee testify at a deposition that he had reviewed the investigation prior to the deposition; and (2) by placing the investigation documents at issue through its summary judgment briefing. The D.C. Circuit, for a second time, granted mandamus to KBR. *See In re Kellogg Brown & Root, Inc.*, 796 F.3d 137 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 823 (2016).

The D.C. Circuit's second opinion, by Judge Wilkins, first rejected the district court's argument that the waiver principle of Rule 612, Fed. R. Evid., applied when KBR's corporate designee "testified he had in preparation for the deposition reviewed the now-disputed documents related to KBR's internal investigation." *In re KBR*, 796 F.3d at 141. The corporate designee also testified that even when KBR has notified the Department of Defense of the investigation (as it was contractually required to do), "it has never provided an internal investigation itself to the Department because it has always treated the investigation as subject to attorney-client privilege." *Id.* The D.C. Circuit held that Rule 612 did not apply here, since it only applies when a document is used to refresh a witness's recollection, and the document "influenced the witness's testimony." *Id.* at 144. Thus, "Barko cannot overcome the privilege by putting [the internal investigation] in issue at the deposition and then demanding under Rule 612 to see the investigatory documents the witness used to prepare." *Id.* at 145.

The D.C. Circuit also found that KBR had not placed the investigation at issue through its summary judgment briefing. KBR, in its ensuing summary judgment motion, stated in a footnote that it has made reports to the government "when a COBC [internal] investigation reveals reasonable grounds to believe that a violation … may have occurred requiring disclosure to the government," and then went on to say that "with respect to the allegations raised by Mr. Barko, KBR represents that KBR did perform [internal] investigations … and made no reports to the Government following those investigations. *Id.* at 142. The D.C. Circuit recognized that this statement about the investigation "is undoubtedly the highest hurdle to our conclusion that KBR did not waive the privilege," *id.* at 148, but concluded that this statement, buried in a footnote, was just a recitation of fact, not an argument, and that since this was at the summary judgment stage, any inference had to be drawn against KBR, not in KBR's favor. *Id.* Thus, "the District Court may not, in resolving the motion for summary judgment, make any inference in KBR's favor based on the contents of the privileged documents." *Id.* On remand, KBR supplemented its summary judgment briefing, and as of early October 2016, the motion remains pending.

Keep in mind that internal investigations, even if discoverable, may not necessarily contain useful information for a plaintiff. Defense lawyers caution companies to begin an internal investigation "with the end in mind" and caution against coming up with formal, written findings because it "draws great attention" from government agencies and plaintiff's lawyers.[5] In response, counsel for employees should advise clients to provide detailed written submissions to the investigator and to insist on recording interviews, to create a documentary trail.

VI. Counseling Clients Targeted by Employers After Disclosing Information to a Government Agency

Once a client reports potential violations of law to government agencies, the employer may be interested in the identity of the employee who conveyed such information to regulators, and to learn what exactly had been communicated to the government.

The SEC will protect whistleblowers' identities to the fullest extent possible, and will not reveal identities under normal circumstances, including in response to a request under the Freedom of Information Act.[6] However, the identity of a whistleblower must be revealed under certain circumstances, including in administrative or court proceedings, or if the SEC is required to provide information containing the whistleblower's name to other governmental or regulatory entities.[7] Whistleblowers may submit information to the SEC anonymously if he or she has an attorney submit the claim on his behalf, in accordance with 17 C.F.R. § 240.21F-9. However, the award will not be paid until the individual reveals his or her identity.[8]

Recent court and agency decisions have drawn the bounds of what employers are allowed to do once a whistleblower's identity is revealed.

In *Halliburton, Inc. v. Administrative Review Bd.*, 771 F.3d 254 (5th Cir. 2014), the Fifth Circuit affirmed the DOL's determination that the company's disclosure about a whistleblower's actions to his colleagues constituted illegal retaliation under section 806 of SOX. The original

---

[5] *See, e.g.*, Crowell & Moring LLP, "Fox in the Hen House," *available at* https://www.crowell.com/documents/Internal-Investigations-of-Whistleblower-Complaints-and-Dealing-with-the-Whistleblower-Employee.pdf (last accessed Jan. 25, 2017).

[6] 17 C.F.R. § 240.21F-7 (2015).

[7] *Id.*

[8] *Id.*

complainant in *Halliburton* filed a confidential complaint with the SEC who alleged that Halliburton had engaged in unlawful accounting practices regarding its revenue recognition. *Id*. at 256. He followed up that confidential complaint by emailing the company's Board of Directors relaying the same information. *Id*. Shortly afterwards, the SEC contacted the company to notify that it had opened an investigation into the alleged accounting irregularities. *Id*. at 257. The company determined the identity of the person who had made the confidential disclosures that started the SEC investigation.

The company's next steps then gave rise to a retaliation claim. The same day the whistleblower received notice of the investigation from the SEC, the company's General Counsel sent an email to all fifteen of the whistleblower's colleagues informing them that the named whistleblower had made a confidential disclosure to the SEC. *Id*. at 257. Upon learning about the General Counsel's email, the complainant was horrified, and later "described that day as one of the worst of his life." *Id*. The Fifth Circuit explained:

> Colleagues began to treat him differently, generally avoiding him. [The complainant] missed work frequently after the revelation, showing up at the office only sporadically and, in early March, requested paid administrative leave "given the current environment and circumstances involving the SEC investigation."

Id. After the SEC closed the investigation without taking any enforcement action against the company, the complainant resigned from the company. In the interim, he had filed a complaint with OSHA pursuant to the anti-retaliation provision of SOX. The ALJ dismissed the complaint on the basis that the simple disclosure of a whistleblower's identity was not an "adverse action," which is a requirement of a retaliation claim. DOL's Administrative Review Board ("ARB") however, reversed and held that the disclosure was an "adverse action" that is protected against by the anti-retaliation law. Halliburton appealed this issue to the Fifth Circuit, which affirmed the ARB.

The Fifth Circuit stated that "adverse actions" that give rise to retaliation claims must be "materially adverse," and the test for materiality is whether the action "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id*. at 259 (quoting *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006) (internal quotation marks omitted)). In agreeing with the ARB that disclosure of a whistleblower's identity to co-workers constitutes an "adverse action," the Fifth Circuit held:

> The undesirable consequences, from a whistleblower's perspective, of the whistleblower's supervisor telling the whistleblower's colleagues that he presorted them to authorities for what are allegedly fraudulent practices, thus resulting in an official investigation, are obvious. **It is inevitable that such a disclosure would result in ostracism, and unsurprisingly, that is exactly what happened to Menendez following the disclosure.** Further, when it is the boss that identifies one of his employees as the whistleblower who has brought an official investigation upon the department, as happened here, the boss could be read as sending a warning, granting his implied imprimatur on differential treatment of the employee, or otherwise expressing a sort of discontent from on high.

Id. at 262 (emphasis added). According to the Fifth Circuit, the natural consequence of disclosing a whistleblower's identity to his coworkers is the creation of a hostile work environment which is a materially adverse action for a whistleblower.

Some district courts, in unpublished opinions, have limited the effect of the Fifth Circuit's logic in *Halliburton*. In *Quast v. Mid-American Energy Co.*, 2016 WL 4536460 (S.D. Iowa Feb. 8, 2016), the court suggested that sharing the identity of a whistleblowing employee does not constitute retaliation where the underlying allegations were about a former employee at the company. *Id*. In *Quast*, what created the hostile work environment was not the outing of a whistleblower, but rather whether the alleged bad actor remained at the company and continued to interact with the whistleblower in the scope of his duties. This is stark contrast to the reasoning in *Halliburton*, where the Fifth Circuit focused primarily on the ostracism that naturally arises when an individual's supervisor or another manager outed the whistleblower.

Another case where a court has distinguished the holding of *Halliburton* is *Morrow v. Kroger Ltd. Partnership I*, 2016 WL 1260778 (N.D. Miss. March 30, 2016). In *Morrow*, the court interpreted *Halliburton* to require proof that identification of a whistleblower "created . . . an environment in which the whistleblower is ostracized . . . ." *Id*. at *4 ("The plaintiffs in the case *sub judice* have presented no set of facts demonstrating the ostracism and potential deprivation of professional advancement opportunities suffered by the *Halliburton* employee."). This reading of *Halliburton* departs from the precise holding of the Fifth Circuit, which found that identification *alone* was enough of an adverse action to lead to a materially adverse action. *See Halliburton*, 771 F.3d at 262 (not requiring showing that identification of complainant by supervisor as whistleblower in fact led to ostracism of complainant).

The SEC has recently taken action against International Game Technology ("IGT") for its termination of a Director who raised concerns regarding the company's cost accounting models that may have resulted in "distorted financial statements."[9] The whistleblower had attempted to raise his concerns internally, but was met with a stern rebuke from his direct supervisor. *See In re Int'l Game Tech.*, Exchange Act Release No. 78991 at ¶ 11 (Sept. 29, 2016). After reporting the allegedly faulty accounting models to the Office of the Whistleblower, he then informed his supervisors that he had done so. *Id*. at ¶ 15. In what was its first stand-alone enforcement action pursuant to Dodd-Frank, the SEC ordered that IGT pay a fine of $500,000 for excluding the whistleblower from significant work assignments immediately after he raised concerns about the company's cost accounting model. *Id*. at ¶ 20. The company ultimately terminated the whistleblower, notwithstanding the whistleblower's years of positive performance reviews, raises, and promotions. *Id* at ¶¶ 3-14. For the SEC, this constituted a clear violation of the Dodd-Frank retaliation statute. *Id*. at ¶ 20. In touting the significance of this retaliation enforcement action, SEC Enforcement Director Andrew Ceresney stated that it places a "high priority" on "ensuring a safe environment for whistleblowers."[10]

---

[9] SEC, Casino-Gaming Company Retaliated Against Whistleblower (Sept. 29, 2016), *available at* https://www.sec.gov/news/pressrelease/2016-204.html (last accessed Jan. 25, 2017).

[10] *Id*.

Both courts and agencies have prioritized the protection of a whistleblower after the provision of confidential information to the government, even in situations where there is no finding that the underlying allegations of fraud are true.

VII. Counseling Potential Whistleblowers When Employers Stop Them from Sharing Confidential Information with Government Investigators

It is in a company's best interest to put obstacles in the way of whistleblowers sharing information with government agencies. Fortunately, both government agencies and Congress have taken action to ensure that employers do not impede whistleblowers.

A. Agency Enforcement Efforts

1. SEC Enforcement Actions

In passing Dodd-Frank, Congress inserted Section 21F into the Securities and Exchange Act – which identified Congress's intention to ***encourage*** whistleblowers to report possible violations of the securities laws. To implement those purposes, the SEC promulgated Rule 21F-17, making it unlawful to take "any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation." SEC, Final Rule, "Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934," at 197 (Aug. 12, 2011).

The SEC is holding employers' feet to the fire. It fined a major defense contractor for attempting to use confidentiality agreements – such as in an employee handbook or an employment contract – to prevent employees from reporting issues to the SEC. *See* SEC, No. 3-16466, Release No. 74619, *In re KBR, Inc.*, Order (Apr. 1, 2015) (online at: http://www.sec.gov/litigation/admin/2015/34-74619.pdf) (last accessed Jan. 25, 2017); *see also* SEC, "Companies Cannot Stifle Whistleblowers in Confidentiality Agreements: Agency Announces First Whistleblower Protection Case Involving Restrictive Language" (Apr. 1, 2015) (online at: https://www.sec.gov/news/pressrelease/2015-54.html) (last accessed Jan. 25, 2017).

KBR, a defense contractor, had a "form" confidentiality provision as part of the *KBR Code of Business Conduct Investigation Procedures* manual, and required all witnesses to sign this provision prior to being interviewed for an internal investigation. That provision stated:

> I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the [KBR] Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.

This provision had the effect of punishing employees if they were to report issues to the SEC without having obtained approval from KBR's in-house counsel. The SEC initiated an enforcement action on the grounds that this provision violated SEC Rule 21F-17(a), which is intended to encourage individuals to provide information to the SEC. As a result of the enforcement action, KBR agreed to amend its confidentiality statement to provide that it does <u>not</u>

prevent employees "from reporting possible violations of federal law or regulation to any government agency or entity" and that "prior authorization of the Law Department" is not needed. KBR also agreed to pay a civil penalty of $130,000 to the SEC. However, this penalty was only 0.0026 percent of KBR's annual revenue in 2015 of just over $5 billion.

In June 2016, the SEC announced that Merrill Lynch paid $415 million to settle charges that it misused customer cash to generate profits for itself as well as other violations, including Rule 21F-17 by using language in severance agreements that operated to discourage employees from voluntarily providing information to the SEC. To remedy that violation, Merrill Lynch and its parent company, Bank of America, agreed to revise its agreements, policies and procedures, and to implement a mandatory annual whistleblower-training program for all employees.[11]

In August of 2016, the SEC brought two enforcement actions in a matter of days. In *In re BlueLinx Holdings, Inc.*, the SEC entered a Consent Order against BlueLinx Holdings for requiring that terminated employees sign severance agreements prohibiting them from voluntarily sharing confidential information concerning the company. *In re BlueLinx Holdings, Inc.*, Exchange Act Release No. 78528 (Aug. 10, 2016).

According to the Consent Order, these severance agreements violated SEC rules because they prohibited the departing employee from being able to contact government agencies regarding potential illegal activity that they learned during their employment. Later severance agreements drafted by the Company removed that language, but required departing employees to waive their right to any monetary recovery through the SEC bounty program for whistleblowers. According to the SEC:

> Restrictions on the ability of employees to share confidential corporate information regarding possible securities law violations with the Commission and to accept financial awards for providing information to the Commission . . . undermine the purpose of Section 21F [of the Securities Exchange Act], which is to "encourage individuals to report" to the SEC.

Id. at ¶ 18. Any contractual provision that imposes legal burdens on potential whistleblowers will be scrutinized by the SEC. Here, the SEC took action against BlueLinx even though the SEC found no substantive violations of the securities laws. *See also* C. Ryan Barber, "SEC Hits Company over Severance Agreements," *National Law Journal*, Aug. 15, 2016, at 6.

Just six days later, the SEC brought another enforcement action in *In the Matter of Health Net, Inc.*, Exchange Act Release No. 78590 (Aug. 16, 2016). Similar to the severance agreements in *BlueLinx*, Health Net required its employees to sign severance agreements including a provision in which the departing employee expressly waived "the right to file an application for award for original information submitted pursuant to Section 21F of the

---

[11] U.S. SEC, PRESS RELEASE, MERRILL LYNCH TO PAY $415 MILLION FOR MISUSING CUSTOMER CASH AND PUTTING CUSTOMER SECURITIES AT RISK (June 23, 2016), https://www.sec.gov/news/pressrelease/2016-128.html (last accessed Jan. 25, 2017).

Securities Exchange Act of 1934."[12] *Id.* at ¶ 8. Notably, the SEC found no evidence of any instances in which Health Net took action to enforce these provisions. As part of the enforcement order, Health Net agreed that it would make reasonable efforts to contact Health Net employees who had signed such agreements and provide them with a statement that Health Net does not prohibit former employees from seeking and obtaining whistleblower awards from the SEC. *Id.* at ¶ 15. Sanctions of $340,000 were imposed. *Id.* at IV.B.

2. <u>CFTC Proposed Rulemaking</u>

Dodd-Frank also authorizes the Commodity Futures Trading Commission ("CFTC") to institute a whistleblower bounty program. Subject to part 165 of its own regulations, and as other whistleblower bounty provisions, individuals who voluntarily provide CFTC with original information about violation of the Commodity Exchange Act ("CEA") are eligible for an award or "bounty." The CFTC initially rejected an interpretation of Dodd-Frank that would give it authority to take enforcement actions against retaliation that arise out of CEA-related whistleblowing. However, in part because of the SEC's increased policing of confidentiality agreements of covered entities with their employees, the CFTC has proposed a rule that would prohibit the enforcement of confidentiality and pre-dispute arbitration clauses in post-employment (i.e. severance or settlement) agreements, to be codified at 17 C.F.R. § 165.19(b). *See* CFTC, Proposed Rule, "Whistleblower Award Process," 81 Fed. Reg. 59551, 59560-61 (Aug. 30, 2016). Should the proposed rule become final, then the CFTC's own whistleblower protection program will move in the same direction of the SEC's: vigilant examination of any contractual obligations that may impede or prevent individuals from blowing the whistle on their company in reports to the CFTC.

3. <u>OSHA's Dougherty Memorandum</u>

OSHA enforces several federal whistleblower statutes, including those claims that arise under SOX. Once an individual files a SOX complaint with OSHA, the agency retains jurisdiction to review settlement agreements. OSHA's own *Whistleblower Investigations Manual* provides OSHA investigators guidance on how to review settlement agreements that could prevent individuals from providing information.

In an August 2016 memorandum directed to Regional Administrators of the OSHA Whistleblower Program, OSHA Director Dorothy Dougherty instructed staff to reject settlement agreements that prohibit, restrict, or otherwise discourage a complainant from participating in protected activity.[13] The Dougherty Memo particularly scrutinizes the confidentiality and non-

---

[12] According to the SEC, approximately 600 employees signed agreements that contained the above language. *Id.* at ¶ 11. Later iterations of the agreement removed express language prohibiting employees from applying for whistleblower awards, but retained restrictions in the Waiver and Release of Claims section of its agreements, which removed financial incentive for former employees who blew the whistle.

[13] New policy guidelines for approving settlement agreements in whistleblower cases (Aug. 23, 2016), available at http://www.whistleblowers.gov/memo/InterimGuidance-DeFactoGagOrderProvisions.html (last accessed Jan. 25, 2017).

disparagement clauses contained in such settlements. *Id*. Other questionable provisions highlighted by the Dougherty Memo include:

- those that "restrict[] the complainant's ability to provide information to the government, participate in investigations, file a complaint, or testify in proceedings based on a respondent's past or future conduct,"
- "require[] a complainant to notify his or her employer before" communicating with the government, "require[] a complainant to affirm that he or she has not previously provided information to the government," or
- "require[] a complainant to waive his or her right to receive a monetary award from a government-administered whistleblower award program."

Id. The Dougherty Memo also instructed staff to examine liquidated damages provisions contained within settlement agreements to ensure their proportionality to the anticipated breach. Lastly, the Memo advised staff to insert a provision in the bargained-for agreement which would emphasize and detail the whistleblower's prospective rights to provide information to the government and to avail him or herself in any sort of monetary victory by a relevant government agency.

The Dougherty Memo will further OSHA's efforts to put its thumb on the scale for whistleblowers who may be asked to make representations and commitments in a settlement agreement to resolve their retaliation claims.

B. <u>Defend Trade Secrets Act of 2016</u>

One problem commonly faced by employees in contacting a government agency regarding potential unlawful conduct, or seeking relief for retaliation that results from such whistleblowing, is the company's assertion that their disclosures constitute protected trade secrets and hence violate the statutes and common law governing trade secrets. Recent legislation gives employees protection from such allegations.

One provision of the Defend Trade Secrets Act ("DTSA"), signed into law on May 11, 2016, amends the U.S. Code to declare that "an individual shall not be held liable under any Federal or State trade secret law for the disclosure of a trade secret that (A) is made (i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and (ii) solely for the purpose of reporting or investigating a suspected violation of law; or (B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal." 18 U.S.C. § 1833(b)(1). Another provision of the DTSA requires companies to "provide notice of the immunity . . . in any contract or agreement with an employee that governs the use of a trade secret or other confidential information." 18 U.S.C. § 1833(b)(3).

As of January 2017, it appears that there has been only one reported decision that interpreted the scope of the whistleblower protections included in the DTSA. *Unum Group v. Loftus*, No. 4:16-cv-40154-TSH, 2016 WL 7115967 (D. Mass. Dec. 6, 2016). The employee (Loftus) worked for an insurance company (Unum Group); on three occasions, he was videotaped (by security cameras) taking out boxes and bags full of documents, along with the company laptop. *Id.* at *1-*2. The employer then filed a federal and state law trade secret misappropriation and conversion claim against the employee, who filed a motion to dismiss on the grounds that he had "turned over the documents he removed from Unum to his attorney to report and investigate a violation of law," pursuant to Section 1833(b). *Id.* at *2.

Although the district court recognized that this Section 1833(b) defense was an affirmative defense, the employee had "not filed any potential lawsuit that could be supported by information in those documents" and it could not be determined what documents the employee took, or whether he "turned over *all* of Unum's documents to his attorney," or "whether he used, is using, or plans to use, those documents for any purpose other than investigating a potential violation of law." *Id.* Therefore, the court denied the employee's motion to dismiss, and granted the employer's motion for a preliminary injunction requiring that the employee and his attorney turn over all documents to the employer. *Id.* at *3-*4.