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In this Issue

SEC WHISTLEBLOWER INCENTIVES UNDER THE DODD-FRANK WALL STREET REFORM ACT

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On August 12, 2011, in the wake of the 2008 Wall Street driven financial crisis and securities regulators' failure to detect Madoff and other Ponzi schemes, the Securities and Exchange Commission (the "SEC") implemented whistleblower regulations, which were promulgated at the direction of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). Along with its regulations, the SEC has also implemented its "Office of the Whistleblower."[3]

The SEC's efforts were in response to the Dodd-Frank legislation, which is arguably the most significant financial securities-related legislation in modern history. The stated purpose of this comprehensive legislation is to

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3. More information about the Office of the Whistleblower can be found on the SEC's website at: http://www.sec.gov/whistleblower.

"promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect consumers from abusive financial services practices, and for other purposes."[4]

Among the 848-page Dodd-Frank legislation, there are a series of revolutionary whistleblower provisions which open the door for bounties, while providing protections for whistleblowers who report violations. Dodd-Frank added Section 21F to the Securities Exchange Act of 1934, entitled "Securities Whistleblower Incentives and Protection."[5] Pursuant to this section, the SEC is required to pay awards, subject to certain restrictions and conditions discussed in this article, to whistleblowers who provide information that leads to a successful SEC enforcement action where the SEC obtains sanctions in excess of one million dollars.[6] These awards may be as much as thirty percent of the monetary sanctions.[7] The regulations provide the SEC with the authority to divide the bounty among whistleblowers. This is in marked contrast to the False Claims Act where the general rule is the whistleblower who files first gets the entire bounty.

Dodd-Frank protects whistleblowers by providing them with a cause of action in cases where employers discharge or retaliate against them for reporting (either internally or to the government) securities law violations.[8] Relief includes reinstatement, double-back pay and attorney fees.[9] Additionally, whistleblowers may state a cause of action for retaliation even if the underlying allegations of fraud did not result in a penalty.[10]

Promulgation of the final rules was not the result of a unanimous vote by the SEC. On May 25, 2011, the SEC voted 3-2 to adopt final rules which went into effect in August.[11] On August 4, 2011, the Commodity Futures Trading Commission ("CFTC") adopted a similar rule.[12]

The SEC whistleblower program is "primarily intended to reward individuals who act early to expose violations and who provide significant

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4. Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The Act also includes a general reference to "other purposes." *Id.*
5. 15 U.S.C. § 78u-6 (2010).
6. 15 U.S.C. § 78u-6(a) (2011).
7. 15 U.S.C. § 78u-6(b) (2011).
8. 15 U.S.C. § 78u-6(h)(1)(B) (2011).
9. 15 U.S.C. § 78u-6(h)(1)(C) (2011).
10. *See* 15 U.S.C. § 78u-6(h)(1)(A), (B) (2011).
11. Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act, SEC Release No. 34-64545, File No. S7-33-10 (May 25, 2011).
12. *See* 7 U.S.C. § 26 (2011).

evidence that helps the SEC bring successful cases."[13] SEC Chairman Mary Shapiro stated that the whistleblower rules "are intended to break the silence of those who see a wrong. . . I believe it is critical to be able to leverage the resources of people who may have first-hand information about potential violations."[14]

The purpose of this article is to provide a backdrop of this legislation and to provide an overview of the SEC whistleblower rules. This article should assist lawyers and others in navigating these new and complex procedures to prevent ongoing or impending fraud and collect an award.

I. HISTORY OF THE WHISTLEBLOWER

Whistleblower legislation in the United States dates back to the Civil War and was intended to address government contract fraud. The first whistleblower legislation in the United States originated during the Civil War under the False Claims of March 2, 1863 (revised in 1986).[15] As enacted, the False Claims Act was intended to prevent and punish frauds upon the government during the Civil War.[16] Whistleblowers were encouraged to report frauds and share in the penalty recovered by the United States.[17]

In the last century, there have been various laws enacted to protect whistleblowers, including the Clean Water Act of 1972,[18] the Surface Transportation Assistance Act of 1982,[19] and the Sarbanes-Oxley Act of 2002.[20] The Sarbanes-Oxley Act provided, for the first time, specific whistleblower protection against employer retaliation based on the reporting of securities-related violations and various federal crimes.[21] The Whistleblower Protection Program of the Occupational Safety and Health

13. Release, Securities and Exchange Commission, SEC Adopts Rules to Establish Whistleblower Program (May 25, 2010) http://www.sec.gov/news/press/2011/2011-116.htm.
14. Chairman Mary L. Shapiro, Speech by SEC Chairman: Opening Statement at SEC Open Meeting: Item 2 — Whistleblower Program (May 25, 2010), http://www.sec.gov/news/speech/2011/spch052511mls-item2.htm.
15. False Claims Act, 37th Cong. Ch. 67; 12 Stat. 696 (enacted Mar. 2, 1863 and subsequently revised in 1986).
16. *Id.*
17. *Id.*
18. Pub. L. 92-500; 86 Stat. 816 (enacted Oct. 18, 1972).
19. Pub. L. 97-424; 96 Stat. 2097 (enacted Jan. 6, 1983).
20. Pub. L. 107-204; 116 Stat. 745 (enacted July 30, 2002).
21. *See id.*

Administration has administered the whistleblower protection provisions of 21 whistleblower protection statutes, including Sarbanes-Oxley.[22]

The Internal Revenue Service ("IRS") also has a whistleblower program to reward whistleblowers who report on persons who fail to pay the taxes that they owe.[23] In 2006, the IRS changed the whistleblower awards from discretionary to mandatory.[24] Now, if the taxes, penalties, interest and other amounts in dispute exceed $2 million, and a few other qualifications are met, the IRS will pay between 15 percent to 30 percent of the amount collected to the whistleblower.[25] In 2011, a Philadelphia-area accountant who tipped off the IRS that his employer was skimping on taxes has received $4.5 million in the first IRS whistleblower award.[26]

In the last decade, whistleblowers have received international media attention as a result of a number of major corporate and accounting scandals, including the infamous Enron, Tyco and WorldCom debacles. In 2002, TIME Magazine named whistleblowers Sherron Watkins of Enron, Coleen Rowley of the FBI and Cynthia Cooper of Worldcom as its "Persons of the Year" for having the "strength to stand for what's right."[27]

It should come as no surprise that many major U.S. companies and the Chamber of Commerce have attempted to derail the whistleblower program, promoting internal compliance systems or a program of self-regulation. Unfortunately, not only have these types of compliance systems failed, whistleblowers are frequently the subject of retaliation and are either forced to resign or treated as a pariah for trying to do the right thing. The new regulations offer significant protections for whistleblowers to help whistleblowers from being victimized.

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22. More information about the Office of the Whistleblower Protection Program can be found on its website: http://www.whistleblowers.gov/.

23. More information about the IRS whistleblower program can be found on the IRS website: http://www.irs.gov/compliance/article/0,,id=180171,00.html.

24. *See* Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432 § 406(a)(i); 120 Stat. 2922 (enacted Dec. 20, 2006).

25. IRC § 7623(b)(1) (2011).

26. MaryClaire Dale, *IRS Awards $4.5M to Whistleblower,* USA TODAY, Apr. 8, 2011, http://www.usatoday.com/money/perfi/taxes/2011-04-08-irs-whistleblower-taxes-reward.htm#.

27. TIME, Persons of the Year 2002, http://www.time.com/time/specials/packages/0,28757,2022164,00.html.

II. THE CONTROVERSY SURROUNDING THE SEC WHISTLEBLOWER LEGISLATION

On November 3, 2010, the SEC proposed rules to implement the whistleblower legislation.[28] The proposed rules defined certain terms critical to the whistleblower program and outlined procedures for reporting and for the SEC making decisions on claims. The SEC received more than 240 comment letters and approximately 950 form letters on the proposed rules.[29] Commentators included individuals, whistleblower advocacy groups, public companies, corporate compliance personnel, law firms and individual lawyers, academics, professional associations, nonprofit organizations and audit firms.

The most contentious issue raised during the SEC Whistleblower rules' comment period was whether the financial incentive for employees to complain to the SEC would undermine companies' internal compliance and reporting programs. The corporate interests that commented on the rule were unanimous in advocating for a requirement that whistleblowers report violations of securities law through their internal compliance and reporting systems before submitting the information to the SEC in order to be eligible for the award.[30] Those in-house reporting requirements were mandated by the Sarbanes-Oxley Act of 2002. Many commentators, however, responded that reporting misconduct directly to the people engaging in misconduct serves no beneficial purpose. No one realistically believes Bernard Madoff would have stopped his fraud if a junior staff member highlighted he was running Ponzi scheme.

In its final rules, the SEC did not adopt a mandatory internal reporting requirement. The SEC struck a balance of concerns from both sides and added incentives for employees to comply with internal procedures. As discussed further in detail below, the SEC rules financially incentivize

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28. Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities and Exchange Act of 1934, Release No. 34-63237 (Nov. 3, 2010) ("Proposing Release").

29. Securities and Exchange Commission, Comments on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, http://www.sec.gov/comments/s7-33-10/s73310.shtml.

30. *See, e.g.*, Letter from David Hirschman, President and Chief Executive Officer, Center for Markets Competitiveness, U.S. Chamber of Commerce and Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform to Ms. Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission (Dec. 17, 2010) (*available at* http://www.sec.gov/comments/s7-33-10/s73310-194.pdf).

whistleblowers to report violations internally first.[31] Among the SEC's criteria for determining the amount of an award, is if a whistleblower participates in internal compliance and reporting first, that is a factor that can increase the amount awarded to the whistleblower. Also, if a whistleblower reports internally to the company, and then the company reports the information to the SEC, the whistleblower will receive credit, and potentially a greater award, for any additional information generated by the company in its investigation.[32] This criterion is not black letter law in that the SEC will also look at whether reporting internally could have addressed the problem. Typically, where fraud is pervasive, there is an argument that internal compliance programs will not address the fraud. This argument was made by a number commentators including Voices for Corporate Responsibility and the Change to Win Labor Coalition.[33]

The SEC made the right decision in not requiring whistleblowers to report their concerns internally to the company before reporting them to the SEC. There is no logical basis to require a junior level employee to report corporate malfeasance when the malfeasance is being conducted by senior management. A requirement to report internally first would have created unnecessary and improper hurdles for whistleblowers, resulting in some whistleblowers deciding not to report the misconduct. Further, a requirement to report internally would have contravened an employee's right to disclose information anonymously (as discussed further herein).

III. MEETING THE REQUIREMENTS OF THE SEC WHISTLEBLOWER STATUTE

A. Definition of a Whistleblower

The SEC's Whistleblower rules define a whistleblower as an individual, who alone or jointly with others, provides the SEC with information pursuant to the procedures set forth by the SEC, and the information relates to a possible violation of the federal securities laws that has occurred, is ongoing, or is about to occur.[34] The definition clarifies that a company or entity is not

31. *See* 17 C.F.R.§ 240.21F-6(a)(4) (2011).
32. *See* 17 C.F.R. § 240.21F-4(c)(3) (2011).
33. This argument was made by a number of commentators to the proposed rules. *See, e.g.*, Letter from Reuben Guttman, Voices For Corporate Responsibility, *et al.* to Ms. Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission (Dec. 17, 2010) (http://www.sec.gov/comments/s7-33-10/s73310-162.pdf).
34. 17 C.F.R. § 240.21F-2(a)(1) (2011).

eligible to be a whistleblower.[35] Only individuals will meet the requirements of a whistleblower.

As noted above, the definition includes individuals that report "possible violations" of the securities law.[36] So an individual would meet the whistleblower definition if he or she provides information about a "possible violation" that "is about to occur."[37] However, the submission must relate to a violation of the federal securities laws, or a rule or regulation promulgated by the SEC.[38] An individual who submits information that relates only to state law or foreign law violations would not meet the whistleblower requirements.

To qualify as a whistleblower eligible for an award, the individual must submit their information to the SEC in accordance with the procedures set forth in the rules.[39]

Notably, the whistleblower definition does not contain a materiality requirement. In other words, there is no requirement that that the information submitted relate to a "material" violation of the securities laws. The SEC's commentary in implementing the final rules stated that "rather than use a materiality threshold barrier that might limit the number of submissions to us, it is preferable for individuals to provide us with any information they possess about possible securities violations...and for us to evaluate whether the information warrants action."[40]

This is consistent with the SEC's goals of the program to encourage whistleblowers to come forward. It is not for the individual whistleblower to determine the materiality of the violation. They should be afforded the protections of the rules (i.e., anti-retaliation and confidentiality) if in good faith they report a securities law violation that the SEC decides not to move forward with not having found a material violation. Materiality is certainly subjective and such a requirement would have provided whistleblowers with unease in reporting violations.

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35. *Id.*
36. *Id.*
37. 17 C.F.R. § 240.21F-2(a)(1) (2011).
38. *Id.*
39. *See* 17 C.F.R. § 240.21F-9(a) (2011). The procedures for submitting a possible securities law violation are further discussed in Section V *infra.*
40. Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act, SEC Release No. 34-64545, File No. S7-33-10 (May 25, 2011).

B. Payment of Award

The monetary threshold requirement for a whistleblower to qualify for payment of an award under the SEC whistleblower rules is a successful enforcement action by the SEC in which the SEC obtains monetary sanctions totaling more than $1,000,000.[41] Whistleblowers who meet this threshold requirement, as well as the other conditions of the rules, are entitled to receive cash awards of between 10% and 30% of the sanctions the SEC collects.[42]

i. Related Actions

In determining whether the threshold of $1,000,000 in monetary sanctions has been met, the rules provide that the SEC will also pay an award based on amounts collected in certain "related actions."[43] A "related action" is defined as a "judicial or administrative action" that is brought by the United States Attorney General, an appropriate regulatory authority, a self-regulatory organization (*e.g.*, the Financial Industry Regulatory Authority "FINRA"), or a state attorney general in a criminal case.[44] In order for the SEC to make an award in connection with a related action, the SEC must determine that the same original information that the whistleblower gave to the SEC also led to the successful enforcement of the related action.[45]

A whistleblower will not be able to recover based on a related action if the SEC itself does not make a recovery. For example, if a whistleblower reports information to the SEC, and the SEC does not bring an enforcement action, but forwards the information to the Attorney General who makes a recovery, the whistleblower is not entitled to recovery under the SEC whistleblower rules. This is because the statute expressly requires a successful SEC action before there can be a "related action" upon which a whistleblower may recover.[46]

Also, the SEC will not pay an award to a whistleblower for a related action if they "have already been granted an award by the Commodity

41. 17 C.F.R. § 240.21F-3 (2011).
42. 15 USC § 78u-6(b) (2011).
43. *Id.*
44. 15 USC § 78u-6(a)(5) (2011).
45. *See id.*
46. *See* 15 USC § 78u-6(a)(5) (2011) (related action must be "based upon the original information...that lead to the successful enforcement of the Commission action").

Futures Trading Commission ("CFTC") for that same action pursuant to its whistleblower award program under Section 23 of the Commodity Exchange Act (7 U.S.C. 26)."[47] Similarly, if the CFTC previously denied an award to an individual in a related action, the individual "will be precluded from relitigating any issues" before the SEC that the CFTC resolved against the individual as part of the denial of the award.[48]

ii. SEC's Discretion to Determine the Amount of the Award

The range of the award paid to the whistleblower (between 10%-30% of the sanctions) is at the complete discretion of the SEC.[49] The SEC's rules provide four factors for the SEC to evaluate in determining the amount of an award: 1) the significance of the information provided by the whistleblower; 2) the degree of assistance provided by the whistleblower and the whistleblower's counsel; 3) law enforcement interest; and, 4) participation in internal compliance systems.[50]

For the first factor, the SEC "will assess the significance of the information provided by a whistleblower to the success" of the SEC's action or a related action.[51] The SEC will decide how reliable and complete the information provided to the SEC was. The SEC will also determine how helpful the information was in supporting the SEC's claims.

The second factor takes into account the "assistance provided by the whistleblower" and his/her legal counsel in the SEC action or a related action.[52] In considering this factor, the SEC looks at "whether the whistleblower provided ongoing, extensive, and timely cooperation and assistance" and the extent the whistleblower encouraged others to assist the SEC that may not have otherwise assisted. The SEC also looks at the timeliness of the whistleblower reporting the violation (to the SEC and/or to internal compliance), "the resources conserved as a result of the whistleblower's assistance," the "efforts undertaken by the whistleblower to remediate the harm caused by the violations," and "any unique hardship experienced by the whistleblower" as result of their reporting the violations.[53]

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47. 17 C.F.R. § 240.21F-3(b)(3) (2011).
48. *Id.*
49. 15 U.S.C. § 78u-6(c)(1)(A) (2011).
50. 15 USC § 78u-6(c) (2011); 17 C.F.R. § 240.21F-6 (2011).
51. 17 C.F.R. § 240.21F-6(a)(1) (2011).
52. 17 C.F.R. § 240.21F-6(a)(2) (2011).
53. *Id.*

In its third factor for determining the amount of the award (the "law enforcement interest"), the SEC evaluates its programmatic interest "in deterring securities law violations by making awards to whistleblowers who provide information that leads to the successful enforcement" of those laws.[54] This includes whether the subject matter of the action is an SEC priority, "the dangers to investors or others by the underlying violations" of the action, and "the degree to which an award enhances the [SEC]'s ability to enforce the Federal securities laws and protect investors" and "encourages the submission of high quality information from whistleblowers."[55]

The fourth factor ("participation in internal compliance systems"), was intended to incentivize whistleblowers to utilize their companies' internal compliance and reporting systems.[56] The rules provide that the SEC can increase the award if the whistleblower first reported the violations internally or assisted with any internal investigation.[57] Conversely, if a whistleblower interfered with internal compliance and reporting, that is a factor that may decrease the amount of the award.[58] Other factors that can decrease the amount of the award to the whistleblower include the culpability of the whistleblower (if they were involved with the violations or financially benefited from the violations) and whether the whistleblower unreasonably delayed reporting the securities violations.[59]

C. Voluntary Information

In order for a whistleblower to qualify for an award under the SEC rules, the whistleblower must "voluntarily" provide information to the SEC.[60] This requirement means that a whistleblower needs to come forward before being contacted by government investigators.

The rules provide that a submission of information is deemed to have been made "voluntarily" if the whistleblower makes his or her "submission before a request, inquiry, or demand that relates to the subject matter of [the] submission" is directed to the whistleblower or anyone representing the whistleblower (such as an attorney): 1) by the SEC; 2) "in connection with an investigation, inspection, or examination by the Public Company

54. 17 C.F.R. § 240.21F-6(a)(3) (2011).
55. *Id.*
56. 17 C.F.R. § 240.21F-6(a)(4) (2011).
57. 17 C.F.R. § 240.21F-6(a)(4)(ii) (2011).
58. 17 C.F.R. § 240.21F-6(b)(3) (2011).
59. 17 C.F.R. § 240.21F-6(b)(1)-(2) (2011).
60. 15 USC § 78u-6(b)(1) (2011).

Accounting Oversight Board or any self regulatory organization;" or 3) "in connection with an investigation by Congress, any other authority of the Federal government, or a state Attorney General or securities regulatory authority."[61]

The rule only precludes the submission of "voluntary" information if the request, inquiry or demand was directed to the whistleblower. In other words, an inquiry to a company would not automatically foreclose whistleblower submissions related to the subject matter of the inquiry from all employees of the company. However, if a particular employee was questioned, that employee could not make a "voluntary" submission related to the subject matter of the inquiry.

The rules also provide that a submission will not be considered "voluntary" if the whistleblower is under a pre-existing legal or contractual duty to report the information to the SEC or to any other authorities designated in the rule, or subject to a duty that "arises out of a judicial or administrative order."[62] Accordingly, if the whistleblower had previously entered into an agreement to assist the SEC, or has entered into a cooperation agreement with another authority, such as the Department of Justice, the individual's disclosures to the SEC regarding that information would not be deemed voluntary because they had a contractual duty to report the information the SEC. However, an agreement with a third party (for example an employer) to report securities violations would not obviate an individual from meeting the voluntary information requirement.

D. Original Information

The whistleblower must provide "original information" to the SEC to be eligible for an award. To be "original," the reported information must: 1) be derived from the whistleblower's independent knowledge or independent analysis; 2) "not already be known to the [SEC] from any other source;" and 3) "not exclusively derived from an allegation made in a judicial or administrative hearing," from the government or the news media, unless the whistleblower is the source of the information.[63] Also, the information must be provided to the SEC for the first time after July 21, 2010 (the date of enactment of Dodd-Frank).[64]

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61. 17 C.F.R. § 240.21F-4(a) (2011).
62. 17 C.F.R. § 240.21F-4(a)(3) (2011).
63. 17 C.F.R. § 240.21F-4(b)(1) (2011).
64. 17 C.F.R. § 240.21F-4(b)(1)(iv) (2011).

i. "Independent Knowledge" and "Independent Analysis"

"Independent knowledge" and "independent analysis" are constituent elements of "original information." The SEC defines independent knowledge as "factual information in [the whistleblower's] possession that is not derived from publicly available sources."[65] The whistleblower "may gain independent knowledge from [his or her] experiences, communications and observations in [his or her] business or social interactions."[66]

Independent analysis is defined as the whistleblower's "own analysis, whether done alone or in combination with others."[67] The SEC defines "analysis" as 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."[68] This definition allows a whistleblower to utilize publicly available information and through their further evaluation and analysis of that information, provide substantial assistance and insight to the SEC in recognizing and understanding securities violations.

The SEC explicitly excludes information gathered by certain individuals from meeting the independent knowledge or independent analysis requirement, making them ineligible for whistleblower awards. These include:

- attorneys (including in-house counsel) who attempt to use information obtained from client engagements to make whistleblower claims for themselves (unless disclosure of the information is permitted under SEC rules or state bar rules);[69]
- officers, directors, trustees or partners of an entity who are informed by another person (such as by an employee) of allegations of misconduct, or who learn "the information in connection with the entity's processes for identifying, reporting and addressing possible violations of law" (such as through the company hotline);[70]
- employees "whose principal duties involve compliance or internal audit responsibilities," or were retained by the company "to perform compliance or internal audit functions" or to perform "investigation into possible violations of law;"[71]

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65. 17 C.F.R. § 240.21F-4(b)(2) (2011).
66. *Id.*
67. 17 C.F.R. § 240.21F-4(b)(3) (2011).
68. *Id.*
69. 17 C.F.R. § 240.21F-4(b)(4)(i)-(ii) (2011).
70. 17 C.F.R. § 240.21F-4(b)(4)(iii)(A) (2011).
71. 17 C.F.R. § 240.21F-4(b)(4)(iii)(B)-(C) (2011).

- public accountants who learn the information through an SEC engagements, if the information relates to violations by the engagement client;[72] or
- individuals who obtain the information by violating U.S. or state criminal law.[73]

However, in certain excluded circumstances, the officer, directors, trustee or partners and compliance and internal audit personnel, as well as public accountants could become whistleblowers.[74]

The first excluded circumstance is when the whistleblower has "a reasonable basis to believe that disclosure of the information to the [SEC] is necessary to prevent the relevant entity from engaging in conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors."[75] A second exception allows these excluded individuals to become a whistleblower if they "have a reasonable basis to believe that the relevant entity is engaging in conduct that will impede an investigation of the misconduct."[76] Finally, the individual may be a whistleblower if at least 120 days elapsed since the whistleblower reported the information to certain compliance individuals specified by the rule, or 120 days elapsed since the whistleblowers received the information if these compliance individuals are already aware of the information.[77]

IV. PROTECTING THE WHISTLEBLOWER

A. Anonymity

Whistleblowers may anonymously report information to the SEC if an attorney represents the whistleblower in connection with the submission of the information and the claim for an award, and follows the procedures for anonymous submissions.[78] Anonymity is one of the added benefits of a whistleblower retaining an attorney to represent them in the matter. An attorney experienced in securities laws issues can also help maximize the recovery for the whistleblower by using their expertise in assisting the SEC in building its case. As discussed earlier, the SEC has the sole discretion in

72. 17 C.F.R. § 240.21F-4(b)(4)(iii)(D) (2011).
73. 17 C.F.R. § 240.21F-4(b)(4)(iv) (2011).
74. *See* 17 C.F.R. § 240.21F-4(b)(4)(v) (2011).
75. 17 C.F.R. § 240.21F-4(b)(4)(v)(A) (2011).
76. 17 C.F.R. § 240.21F-4(b)(4)(v)(B) (2011).
77. 17 C.F.R. § 240.21F-4(b)(4)(v)(C) (2011).
78. 17 C.F.R. § 240.21F-7(b) (2011).

determining the percentage of recovery the whistleblower is entitled to receive (between 10-30% of the monetary sanctions). The participation of the whistleblower and his or her attorney is taken into consideration in determining the amount of the award.[79]

However, if the whistleblower retains an attorney and chooses to remain anonymous when reporting the information to the SEC, the whistleblower must disclose their identity to the SEC before an award is paid.[80] In other words, if the SEC completes a successful action recovering over $1 million as a result of the tips of the anonymous whistleblower, the whistleblower must then disclose their identity to the SEC before he or she can be paid an award. The ability of a whistleblower to remain anonymous up until this point is should encourage whistleblowers to come forward. This is important, as often times, even with anti-retaliation protections, whistleblowers fear losing business and personal relationships, as well as the risk of media exposure, if they come forward.

B. Anti-Retaliation

Dodd-Frank and the SEC rules promulgated thereunder expressly prohibits retaliation by employers against individuals who become whistleblowers under SEC rules, even if the whistleblower does not recover an award.[81] It provides the whistleblower with a cause of action in the event that they are discharged or discriminated against in any manner by their employers in violation of the act.[82] A whistleblower successful in his or her retaliation cause of action is entitled to "reinstatement with the same seniority status that the individual would have had," plus "2 times the amount of back pay otherwise owed to the individual, with interest" and "compensation for litigation costs, expert witness fees, and reasonable attorneys' fees."[83]

The rules provide, that for purposes of the anti-retaliation protections, an individual is a whistleblower if he or she has a "reasonable belief that the information [they] are providing relates to a possible securities law violation" and he or she reports the violation in accordance with Section 21F(h)(1)(A)

79. *See supra* Section III(B)(ii).
80. 17 C.F.R. § 240.21F-7(b)(3) (2011).
81. 17 C.F.R. § 240.21F-2(b) (2011); 15 U.S.C § 78u-6(h) (2011). For a list of retaliation protections afforded to whistleblowers under other whistleblower/retaliation statutes, *see* "Whistleblower Protections" *at* http://www.whistleblowerlaws.com.
82. 15 USC § 78u-6(h)(1)(B)(i) (2011).
83. 15 USC § 78u-6(h)(1)(C)(i)-(iii) (2011).

of the Securities Exchange Act of 1934.[84] The rules also clarify that "the anti-retaliation protections apply whether or not [the whistleblower satisfies] the requirements, procedures and conditions to qualify for an award."[85]

The "reasonable belief" standard requires "that the information demonstrates a possible violation, and that this belief is one that a similarly situated employee might reasonably possess."[86] The SEC stated that the reasonable belief standard for anti-retaliation protection "strikes the appropriate balance between encouraging individuals to provide us with high-quality tips without fear of retaliation, on the one hand, while not encouraging bad faith or frivolous reports, or permitting abuse of the anti-retaliation protections, on the other."[87]

V. PROCEDURE FOR FILING A WHISTLEBLOWER CLAIM WITH THE SEC AND MAKING A CLAIM FOR AN AWARD

In order to be considered a whistleblower under the rules, the whistleblower must submit their original information one of two ways: 1) online through the SEC's website;[88] or (2) by completing a Tip, Complaint or Referral Form (referred to as a "Form TCR")[89] and submitting the form to the SEC by mail or fax.[90] The Form TCR is a relatively straight forward 6-page form. Accompanying sworn certifications by the whistleblower and counsel are required, declaring that under penalty of perjury the information is true and correct to the best of their knowledge and belief.[91]

In instances where information is provided to the SEC by an anonymous whistleblower, their attorney is to submit the information on the whistleblower's behalf to the SEC. Prior to the attorney's submission, the whistleblower is required to provide their attorney with a completed Form TCR that is signed under penalty of perjury.

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84. 17 C.F.R. § 240.21F-2(b)(i)-(ii) (2011).
85. 17 C.F.R. § 240.21F-2(b)(iii) (2011).
86. SEC Release No. 34-64545 (citing *Livingston v. Wyeth, Inc.*, 520 F. 3d 344, 352 (4th Cir. 2008); *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999)).
87. *See* SEC Release No. 34-64545 (internal citations omitted).
88. *See* http://www.sec.gov/whistleblower.
89. Form TCR is a relatively straight forward 6-page form and is available on the SEC's website at: http://www.sec.gov/about/forms/formtcr.pdf.
90. 17 C.F.R. § 240.21F-9(a) (2011).
91. 17 C.F.R. § 240.21F-9(b) (2011).

In making the submission on the whistleblower's behalf, the whistleblower's attorney is required to certify that he or she: 1) has verified the whistleblower's identity; 2) has reviewed the completed and signed TCR for completeness and accuracy and that the information is true, correct, and complete to the best of the *attorney's* knowledge, information and belief;" 3) has obtained the whistleblower's non-waivable consent to provide the SEC with the whistleblower's Form TCR in event that the SEC requests it due to concerned of false or fraudulent statements; and 4) "consents to be legally obligated to provide the signed Form TCR within seven calendar days from request by the SEC."[92]

The rules also outline certain procedures a whistleblower must follow for applying for a whistleblower award. This process begins with the SEC providing notice whenever an SEC action results in monetary sanctions totaling more than $1,000,000.[93] This notice is referred to as a "Notice of Covered Action", and will be published on the SEC's website after a judgment or order is entered.[94] The whistleblower has "**ninety (90) calendar days** from the date of the Notice of Covered Action to file a claim for award based on that action, or the claim will be barred."[95]

To file a claim for a whistleblower award, the whistleblower must file a two-page Form WB-APP (Application for Award for Original Information).[96] The Form WB-APP requires the whistleblower's signature under penalty of perjury that the information contained in the form is accurate. If the whistleblower reported the information anonymously to the SEC through an attorney, the whistleblower is now required to disclose their identity on the Form WB-APP.[97] The form is to be submitted to the SEC's office of the whistleblower by fax or mail and must be received by the Office of the Whistleblower within 90 calendar days of the date Notice of Covered Action in order for the whistleblower to remain eligible for an award.[98]

The SEC's claims staff then evaluates the claim form.[99] The SEC may request additional information from the whistleblower during this time.[100] Following the evaluation, the SEC will provide the whistleblower with "a

92. 17 C.F.R. § 240.21F-9(c)(1)-(4) (2011).
93. 17 C.F.R. § 240.21F-10(a) (2011) (emphasis added).
94. *Id.*
95. *Id.* (emphasis added).
96. 17 C.F.R. § 240.21F-10(b) (2011). This form is available on the SEC's website at http://sec.gov/about/forms/formwb-app.pdf.
97. 17 C.F.R. § 240.12F-10(c) (2011).
98. 17 C.F.R. § 240.12F-10(b) (2011).
99. 17 C.F.R. § 240.12F-10(d) (2011).
100. *Id.*

Preliminary Determination setting a forth a preliminary assessment as to whether the claim" was accepted and the percentage of the award amount.[101]

The whistleblower has 30 days from the Preliminary Determination to request a review certain source documents the SEC perused in its review and to request a meeting with the Office of the Whistleblower (however, these are not mandatory meetings).[102]

The whistleblower has 60 days from the Preliminary Determination (or from the date of receipt of the materials requested for review, if applicable) to submit a response to the Preliminary Determination.[103] If no response is filed, the Preliminary Determination becomes a final order of the SEC.[104] However, if the whistleblower files a timely response, the SEC will review the issues and grounds in the response, as well as any accompanying documents, and will make its Proposed Final Determination for review by an SEC Commissioner.[105] A final order will be then be made by the SEC.[106]

VI. CONCLUSION

Whistleblowers are vital to exposing corporate frauds and other financial misconduct. The SEC's failure to investigate Madoff after Harry Markopolos reported his findings to the SEC strongly demonstrates why the SEC whistleblower office is a necessity. Past government whistleblower offices for the IRS, Medicare and others have helped the government timely detect gross malfeasance, which has saved U.S. taxpayers millions of dollars and prevented further financial crimes.

The SEC whistleblower rules serve an important public interest. This Act provides duality in purpose, providing an environment where a whistleblower is not likely to be adversely affected and thus providing the SEC a powerful enforcement tool. The financial incentives should help the SEC uncover and investigate fraud more efficiently. Investors and counsel are frequently driven by their need to protect other innocent investors from being victims of financial fraud and from protecting investors from a never ending list of corporate fraud, securities malfeasance and a parade of con artists. The SEC whistleblower office gives the SEC the resources to listen

101. *Id.*
102. 17 C.F.R. § 240.12F-10(e)(1)(i)-(ii) (2011).
103. 17 C.F.R. § 240.21F-10(e)(2) (2011).
104. 17 C.F.R. § 240.12F-10(f) (2011).
105. 17 C.F.R. § 240.21F-10(g) (2011).
106. 17 C.F.R. § 240.12F-10(h), (i) (2011).

to investors or others with firsthand knowledge of misconduct. The SEC will be better equipped to halt ongoing misconduct before further damage is done for the benefit of the investing public.