Dodd-Frank SEC Whistleblower Protection Post-*Digital Realty*

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Ten years ago, Congress created a whistleblower reward program at the U.S. Securities and Exchange Commission (SEC). Under the program, the SEC is required to issue awards to eligible whistleblowers who provide original information that leads to successful enforcement actions with total monetary sanctions in excess of $1 million. In exchange for the valuable information, the SEC will pay whistleblowers between 10% and 30% of the total monetary sanctions collected.

Since the inception of the SEC whistleblower program, whistleblower tips have enabled the SEC to recover more than $2.5 billion in financial remedies, most of which has been, or is scheduled to be, returned to harmed investors. The SEC has paid approximately $720 million to whistleblowers. The program has significantly improved the SEC's ability to detect and halt fraud schemes and protect investors. In addition, the SEC whistleblower program has significantly enhanced the SEC's ability to uncover difficult-to-detect misconduct occurring abroad. Since the program's inception, the SEC has received tips from whistleblowers in 123 countries outside the United States, claims have been filed from 72 countries, and the SEC has made substantial awards to foreign residents who have provided information. Speech, Andrew Ceresney, The SEC's Whistleblower Program: The Successful Early Years (Sept. 14, 2016), *available at* https://www.sec.gov/news/speech/ceresney-sec-whistleblower-program.html.

As the current and former SEC Chairs have recognized, robust whistleblower protection is essential to the success of the SEC whistleblower rewards program. In particular, SEC Chair Jay Clayton recognized in a statement about proposed amendments to the SEC whistleblower rules that "retaliation protections are a key component of the whistleblower program." Similarly, former Chair Mary Jo White noted in a speech titled *The SEC as the Whistleblower's Advocate* that "[s]trong enforcement of the anti-retaliation protections is critical to the success of the SEC's whistleblower program."

In February 2018, however, the Supreme Court narrowed the scope of Dodd-Frank whistleblower protection. In *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018), the Court held that the definition of "whistleblower" in the anti-retaliation provision of the Dodd-Frank Act, 5 U. S. C. §78u– 6(h), requires that an individual report a possible securities law violation to the Securities and Exchange Commission ("SEC") to qualify for protection against retaliation. As approximately 85% of the award recipients to date raised concerns internally to their supervisors, compliance personnel, or through internal reporting mechanisms before reporting violations to the SEC, *Digital Realty* significantly weakens Dodd-Frank's

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whistleblower protection provision, thereby dissuading whistleblowers from reporting potential securities law violations to their employers.

Congress should amend the anti-retaliation provision of the Dodd-Frank Act to broaden the scope of protected conduct and correct other deficiencies in the Act's whistleblower protection provision. In the interim, whistleblowers should carefully assess how they can utilize Dodd-Frank and other remedies, including Section 806 of the Sarbanes-Oxley Act, to combat retaliation. This article provides an overview of protections for SEC whistleblowers post-*Digital Realty* by addressing the following questions:

- Does the Dodd-Frank Act protect whistleblowers who disclose potential violations of securities law to the SEC?
- Does the Dodd-Frank Act's whistleblower protection provision protect internal disclosures (disclosures made to a supervisor, company management, or a corporate compliance program)?
- Does the Dodd-Frank whistleblower protection law require a whistleblower to demonstrate that the employer knew about the whistleblower's disclosure to the SEC prior to the employer retaliating against the whistleblower?
- Are oral disclosures to the SEC protected under the Dodd-Frank Act?
- Does the Sarbanes-Oxley Act protect corporate whistleblowers who suffer retaliation for reporting fraud or other potential violations of securities law to the SEC or to an employer?
- What acts of retaliation are prohibited under the Dodd-Frank anti-retaliation law?
- What is the statute of limitations for a Dodd-Frank Act whistleblower retaliation claim?
- Should a corporate whistleblower suffering retaliation bring a claim under Dodd-Frank, Sarbanes-Oxley, or both laws?
- Can a whistleblower settle a retaliation lawsuit without waiving their ability to recover a potential Dodd-Frank whistleblower award?
- Does the SEC enforce the anti-retaliation provision of the Dodd-Frank Act?
- Is an employee protected against retaliation for providing testimony in an SEC investigation or at a hearing in an administrative or judicial enforcement action?
- Should a whistleblower report internally before disclosing a violation to the SEC?
- In addition to SOX, do other whistleblower protection laws protect corporate whistleblowers?

Does the Dodd-Frank Act protect whistleblowers who disclose potential violations of securities law to the SEC?

Yes. To qualify for protection under the anti-retaliation provision of the Dodd-Frank Act, a whistleblower must demonstrate that they i) reported to the SEC in writing a potential securities law violation to the SEC; and ii) engaged in a form of protected whistleblowing set forth in the statute:

1. providing information to the SEC in accordance with the whistleblower incentive section;
2. initiating, testifying in, or assisting in any investigation or judicial or administrative action of the SEC based upon or related to such information; or
3. making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002, the Securities Exchange Act of 1934, and any other law, rule, or regulation subject to the jurisdiction of the SEC.

15 U.S.C. § 78u-6(h)(1)(A). The third category encompasses protected activities under the Sarbanes-Oxley Act.

To demonstrate that they engaged in protected conduct, a Dodd–Frank whistleblower "is not required to prove that a securities law violation had occurred, but only that he possessed a good faith reasonable belief that such a violation had occurred." *Williams v. Rosenblatt Sec. Inc*., 136 F. Supp. 3d 593, 605 (S.D.N.Y. 2015); *see also* 17 CFR 240.21F-2(d) (protecting a disclosure of information that "relates to a possible violation of the federal securities laws").

Does the Dodd-Frank Act's whistleblower protection provision protect internal disclosures (disclosures made to a supervisor, company management, or a corporate compliance program)?

Yes, but only if the whistleblower also disclosed the potential violation to the SEC prior to the employer taking an adverse action and the internal disclosure relates to the subject matter of the whistleblower's report to the SEC. *See* 17 CFR 21F-2(d)(1)(iii)(B). Under Exchange Act Rule 21F-2(d)(2), retaliation protection extends to lawful acts described in Section 21F(h)(1)(A) even if done before reporting to the SEC when the retaliation takes place after a person qualifies as a whistleblower by providing information directly to SEC.

Does the Dodd-Frank whistleblower protection law require a whistleblower to demonstrate that the employer knew about the whistleblower's disclosure to the SEC prior to the employer retaliating against the whistleblower?

No. In *Digital Realty*, the Supreme Court held that where an employee blows the whistle to the SEC and subsequently reports the misconduct to the employer and suffers retaliation because of the internal disclosure, the internal disclosure is protected under Dodd-Frank, even where the employer does not know that the employee reported a possible securities law violation to the SEC:

> [Dodd-Frank] protects a whistleblower who reports misconduct both to the SEC and to another entity, but suffers retaliation because of the latter, non-SEC, disclosure. That would be so, for example, where the retaliating employer is unaware that the employee has alerted the SEC. In such a case, without clause (iii), retaliation for internal reporting would not be reached by Dodd-Frank, for clause (i) applies only where the employer retaliates against the employee "because of" the SEC reporting. §78u–6(h)(1)(A). Moreover, even where the employer knows of the SEC reporting, the third clause may operate to dispel a proof problem: The employee can recover under the statute without having to

> demonstrate whether the retaliation was motivated by the internal report (thus yielding protection under clause (iii)) or by the SEC disclosure (thus gaining protection under clause (i)).

Somers, 138 S. Ct. at 779. Similarly, Exchange Act Rule 21F-2(d)(2) extends retaliation protection to lawful acts described in Exchange Act Section 21F(h)(1)(A) even if done before reporting to the Commission when the retaliation takes place after a person qualifies as a whistleblower by providing information to the SEC.

Are oral disclosures to the SEC protected under the Dodd-Frank Act?

The text of the statute does not limit protection to written disclosures, but the SEC has adopted a rule that limits retaliation protection to written disclosures to the SEC. *See* 17 CFR 21F-2(a). Under Exchange Act Rule 21F-2(a), however, the whistleblower need not submit a disclosure through Form TCR or the SEC's online portal and need not meet the requirements for award eligibility, *e.g.*, the whistleblower need not show that the disclosure qualified as original information. *See* 17 CFR 240.21F-2(d)(3). The SEC's interpretation will control SEC enforcement actions for violations of the anti-retaliation provision of Dodd-Frank, but federal courts may determine that oral disclosures are protected. Under similar anti-retaliation laws, it is well-established that oral disclosures are protected.

For example, the whistleblower protection provision of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, protects persons providing information, orally or in writing, about potential securities violations. *See Kuhns v. Ledger*, 202 F. Supp. 3d 433, 440 (S.D.N.Y. 2016) ("there is no requirement that the provision of information pursuant to Section 1514A must be in writing"); *Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432, 442, 444-48 (S.D.N.Y. 2013) (denying summary judgment based on plaintiff's oral statement regarding potential mail and wire fraud); *Barker v. UBS AG*, 888 F. Supp. 2d 291, 297 (D. Conn. 2012) (denying summary judgment based, in part, on finding plaintiff's discussions with management about potential violations of securities laws constituted protected activity); *Sequeira v. KB Home*, 716 F. Supp. 2d 539, 555 (S.D. Tex. 2009) ("Plaintiff engaged in protected activity . . . when he met with [his supervisor] to discuss the company's lack of internal controls related to inventory and vendor contracts."); *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1369 (N.D. Ga. 2004) (denying summary judgment based, in part, on finding plaintiff engaged in protected activity when making oral complaints of suspected fraud). In its implementing regulations, the United States Department of Labor declined to limit protected conduct to written disclosures, and no court has held that SOX protected conduct is limited to written disclosures.

The SEC's writing requirement for Dodd-Frank protected conduct is also contrary to the Supreme Court's construction of the anti-retaliation provision of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 215(a)(3). In *Kasten v. Saint–Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011), the Court held that the phrase "filed any complaint" encompasses oral as well as written complaints, so long as the complaint is "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." *See also id.* at 1334 ("To limit the scope of the antiretaliation provision to the filing of written complaints would also take needed

flexibility from those charged with the Act's enforcement. It could prevent Government agencies from using hotlines, interviews, and other oral methods of receiving complaints.").

Regardless of whether the SEC erred by excluding oral disclosures from the ambit of protected conduct, SEC whistleblowers should document their disclosures to the SEC in writing.

Does the Sarbanes-Oxley Act protect corporate whistleblowers who suffer retaliation for reporting fraud or other potential violations of securities law to the SEC or to an employer?

Yes, Section 806 of SOX protects both internal whistleblowing (e.g., reporting securities fraud to a supervisor) and whistleblowing to the SEC. In particular, the whistleblower protection provision of SOX prohibits employers from retaliating against whistleblowers for reporting to law enforcement, regulatory authorities, Congress, or the employee's supervisor 1) suspected mail fraud, wire fraud, bank fraud, or securities fraud; 2) a violation of any rule or regulation of the SEC, or 3) a violation of any provision of federal law relating to fraud against shareholders. Unlike the Dodd-Frank Act, SOX whistleblower protection is not predicated on a showing that the whistleblower disclosed a potential violation directly to the SEC. Instead, it expressly protects internal disclosures, including disclosures made in the course of participating in an internal investigation. For more information about SOX whistleblower protection, see Sarbanes-Oxley Whistleblower Protection: Robust Protection for Corporate Whistleblowers.

The following table identifies some of the major differences between the anti-retaliation provisions of SOX and Dodd-Frank. To maximize the potential recovery, a whistleblower could initially bring a SOX claim at OSHA, subsequently remove it to federal court, and add a Dodd-Frank claim. Doing so could enable the whistleblower to recover double back pay (authorized by Dodd-Frank) and uncapped special damages (authorized by SOX).

	SOX	**Dodd-Frank**
Scope of coverage	Any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934, or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934, including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization, or any officer, employee, contractor, subcontractor, or agent of such company.	Any employer

	SOX	Dodd-Frank
Protection for internal whistleblowing	Yes	Internal whistleblowing protected only if the whistleblower also reported the potential violation to the SEC prior to the employer taking an adverse action.
Protection for whistleblowing to SEC	Yes	Yes
Statute of Limitations	180 days	3 years after whistleblower discovers the retaliation or 6 years after the retaliation
Administrative exhaustion	Must file initially with OSHA	None
Arbitration	Exempt from mandatory arbitration	Not exempt from arbitration
Back pay	Ordinary back pay	Double back pay
Special damages for emotional distress and reputational harm	Available	Not available

What acts of retaliation are prohibited under the Dodd-Frank anti-retaliation law?

The anti-retaliation provision of the Dodd-Frank Act prohibits an employer from:

- Discharging;
- Demoting;
- Suspending;
- Threatening;
- Harassing; or
- Directly or indirectly, or in any other manner discriminating against, a whistleblower in the terms and conditions of employment.

15 U.S.C. 78u-6(h)(1)(A). The SEC deems an actionable adverse action to encompass any act by an employer against a whistleblower that "a reasonable employee [would find] materially adverse," which means "it well might have dissuade[d] a reasonable worker" from engaging in Dodd-Frank protected conduct. *Burlington Northern and Santa Fe Railroad Co. v. White,* 548 U.S. 53, 58 (2006) (citations omitted).

What damages can an SEC whistleblower recover in a retaliation case?

Under the whistleblower protection provision of the Dodd-Frank Act, a prevailing whistleblower can recover:

- double back pay (lost wages) with interest;
- reinstatement or front pay in lieu thereof; and
- reasonable attorneys' fees, litigation costs, and expert witness fees.

If the whistleblower also prevails in a SOX retaliation claim, the whistleblower can recover uncapped "special damages" for emotional distress and reputational harm. Note that SOX authorizes a recovery of ordinary back pay, not double back pay.

What is the statute of limitations for a Dodd-Frank Act whistleblower retaliation claim?

There is some ambiguity about the statute of limitations for a Dodd-Frank retaliation claim. Erring on the side of caution, a whistleblower should aim to bring the claim within three years after the date when facts material to the right of action are known or reasonably should have been known by the whistleblower.

The statute provides for three potential limitations periods:

- Sub-subclause (I)(aa) provides that "An action under this subsection may not be brought more than 6 years after the date on which the violation of subparagraph (A) occurred."
- Sub-subclause (I)(bb) provides that "An action under this subsection may not be brought more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subparagraph (A)."
- Subclause (II) provides that: "Notwithstanding subclause (I), an action under this subsection may not in any circumstance be brought more than 10 years after the date on which the violation occurs."

15 U.S.C. § 78u-6(h)(1)(B)(iii).

Two courts have held that sub-subclause I(aa) is a statute of limitations that bars a plaintiff from filing suit more than three years after the cause of action accrues and that sub-subclause (I)(aa) is a statute of repose that puts an outer limit on the right to bring a civil action. *See Robertson v. Beacon Sales Acquisition*, No. 16-3241, 2018 WL 24644552018, at *5 (D. Md. May 31, 2018); *lgwe v. City of Miami,* No. 1:15-cv-21603, 2016 WL7671370, at *4 (S.D. Fla. Sept. 29. 2016).

Should a corporate whistleblower suffering retaliation bring a claim under Dodd-Frank, Sarbanes-Oxley, or both laws?

We recommend bringing claims under both SOX and Dodd-Frank to maximize the potential recovery, although the claims cannot be brought simultaneously in federal court (the SOX claim must be filed initially at OSHA). The statute of limitations for a SOX whistleblower claim is just 180 days, and this short statute of limitation applies to each discrete adverse employment action. Accordingly, if a whistleblower has suffered retaliation for whistleblowing, it is critical to promptly identify each actionable adverse action and file within the 180-day SOX statute of limitations.

There are four advantages to bringing a SOX claim in addition to a Dodd-Frank claim:

- Uncapped special damages: The Dodd-Frank Act authorizes economic damages and equitable relief but does not authorize non-economic damages. In contrast, SOX authorizes *uncapped* "special damages" for emotional distress and reputational harm.
- Exemption from mandatory arbitration: SOX provides an unequivocal exemption from mandatory arbitration, but Dodd-Frank claims are subject to arbitration.
- Preliminary reinstatement: If an OSHA investigation concludes that an employer violated the whistleblower protection provision of SOX, OSHA can order the employer to reinstate the whistleblower.
- Favorable causation standard: A far more generous burden of proof ("contributing factor" causation under SOX, rather than "but for" causation under Dodd-Frank).

There are four advantages to bringing a Dodd-Frank claim in addition to a SOX claim:

- Double back pay: Dodd-Frank authorizes an award of double back pay (double lost wages) plus interest, whereas SOX authorizes ordinary back pay with interest along with other damages. Both statutes authorize reinstatement and attorney fees.
- Longer statute of limitations: Whereas the statute of limitations for a SOX retaliation claim is just 180 days, the statute of limitations for a Dodd-Frank retaliation claim is a minimum of 3 years after the date when facts material to the right of action are known or reasonably should have been known by the whistleblower.
- Broader scope of coverage: SOX whistleblower protection applies primarily to employees of public companies and contractors of public companies. The Dodd-Frank prohibition against whistleblower retaliation applies to "any employer," not just public companies.
- No administrative exhaustion: In contrast to SOX, Dodd-Frank permits a whistleblower to sue a current or former employer directly in federal district court without first exhausting administrative remedies at DOL.

Can a whistleblower settle a retaliation lawsuit without waiving their ability to recover a potential Dodd-Frank whistleblower award?

Although no court has ruled on this issue, the SEC has taken a firm position that an employer cannot require a whistleblower to waive the right to obtain a potential whistleblower award. And indeed, the SEC has taken several enforcement actions against companies for violating Rule 21F-

17(a), which provides that "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing or threatening to enforce a confidentiality agreement . . . with respect to such communications." *See, e.g.*, *In the Matter of Homestreet, Inc. and Darrell Van Amen*, File No. 3-17801 (Jan. 19, 2017); *In the Matter of Blackrock, Inc.*, File No. 3-17786 (Jan. 17, 2017); *In the Matter of SandRidge Energy, Inc.*, File No. 3-17739 (Dec. 20, 2016); *In the Matter of NeuStar, Inc.*, File No. 3-17736 (Dec. 19, 2016)*; In the Matter of Anheuser-Busch InBev SA/NV*, File No. 3-17586 (Sept. 28, 2016); *In the Matter of Health Net, Inc.*, File No. 3-17396 (Aug. 16, 2016)*; In the Matter of BlueLinx Holdings Inc.*, File No. 3-17371 (Aug. 10, 2016).

In addition, OSHA's Directorate of Whistleblower Protection Programs has issued policy guidelines on provisions in settlement agreements that restrict whistleblowing. The policy guidance states that "OSHA will not approve a 'gag' provision that prohibits, restricts, or otherwise discourages a complainant from participating in protected activity," and defines "protected activity" to include "filing a complaint with a government agency, participating in an investigation, testifying in proceedings, or otherwise providing information to the government."

OSHA's policy guidance clarifies that unlawful "gag clauses" encompass not only express prohibitions on providing information to government agencies, but also indirect restrictions on protected conduct that could dissuade whistleblowing, including broad confidentiality or non-disparagement clauses. In particular, the policy guidance, which will be added to OSHA's Whistleblower Investigations Manual, identifies four types of settlement provisions that can constrain whistleblowing:

1. "A provision that restricts 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. For example, OSHA will not approve a provision that restricts a complainant's right to provide information to the government related to an occupational injury or exposure.
2. A provision that requires a complainant to notify his or her employer before filing a complaint or voluntarily communicating with the government regarding the employer's past or future conduct.
3. A provision that requires a complainant to affirm that he or she has not previously provided information to the government or engaged in other protected activity, or to disclaim any knowledge that the employer has violated the law. Such requirements may compromise statutory and regulatory mechanisms for allowing individuals to provide information confidentially to the government, and thereby discourage complainants from engaging in protected activity.
4. A provision that requires a complainant to waive his or her right to receive a monetary award (sometimes referred to in settlement agreements as a 'reward') from a government-administered whistleblower award program for providing information to a government agency. For example, OSHA will not approve a provision that requires a complainant to waive his or her right to receive a monetary award from the Securities and Exchange Commission, under Section 21F of the Securities Exchange Act, for providing information to the government related to a potential violation of securities laws.[ ]Such an award waiver may discourage a complainant from engaging in protected activity under

> the Sarbanes-Oxley Act, such as providing information to the Commission about a possible securities law violation. For the same reason, OSHA will also not approve a provision that requires a complainant to remit any portion of such an award to respondent. For example, OSHA will not approve a provision that requires a complainant to transfer award funds to respondent to offset payments made to the complainant under the settlement agreement."

U.S. Dep't of Labor, OSHA, Memo re: New *Policy Guidelines for Approving Settlement Agreements* in Whistleblower Cases (Aug. 23, 2016).

Does the SEC enforce the anti-retaliation provision of the Dodd-Frank Act?

Yes, the SEC enforces the anti-retaliation provision of the Dodd-Frank Act, but it does not secure relief for the whistleblower, i.e., the SEC does not obtain lost wages or order reinstatement. Instead, it can take an enforcement action against the registrant for violating the anti-retaliation provision of the Dodd-Frank Act.

In a June 28, 2018 public statement at an open meeting announcing proposed amendments to the rules governing the SEC Whistleblower Program, Chair Clayton stated: "Many have asked whether the SEC will continue to enforce the anti-retaliation provisions of Dodd-Frank. Let me be clear: retaliation protections are a key component of the whistleblower program, and we will bring charges against companies or individuals who violate the anti-retaliation protections when appropriate." Statement at Open Meeting on Amendments to the Commission's Whistleblower Program Rules, *available at* https://www.sec.gov/news/public-statement/statement-open-meeting-amendments-commissions-whistleblower-program-rules.

The SEC has taken enforcement actions for whistleblower retaliation, and such an enforcement action can increase an SEC whistleblower award. In September 2016, the SEC ordered International Game Technology ("IGT") to pay a $500,000 penalty for terminating the employment of a whistleblower because he reported to senior management and to the SEC that the company's financial statements might be distorted. *See* Exchange Act Release No. 78991 (Sept. 29, 2016). During an internal investigation into the whistleblower's allegations, IGT removed him from opportunities that were integral to his ability to perform his job successfully. IGT then fired the whistleblower the same day as the internal investigation concluded that IGT's cost-accounting model was appropriate and did not cause its financial statements to be distorted. The whistleblower was protected under the SEC whistleblower program, despite being mistaken, because he reasonably believed that IGT's cost-accounting model constituted a violation of federal securities laws.

On June 16, 2014, the SEC announced that it was taking enforcement action against Paradigm Capital Management, Inc. ("Paradigm"), a hedge fund advisory firm, for engaging in prohibited principal transactions and for retaliating against the whistleblower who disclosed the unlawful trading activity to the SEC. *See* Exchange Act Release No. 72393 (Jun. 16, 2014). This was the first case in which the SEC exercised its authority under Dodd-Frank to bring enforcement actions based on retaliation against whistleblowers.

According to the order, Paradigm retaliated against its head trader for disclosing, internally and to the SEC, prohibited principal transactions with an affiliated broker-dealer while trading on

behalf of a hedge fund client. The transactions were a tax-avoidance strategy under which realized losses were used to offset the hedge fund's realized gains.

When Paradigm learned that the head trader had disclosed the unlawful principal transactions to the SEC, it retaliated against him by removing him from his position as head trader, changing his job duties, placing him on administrative leave, and permitting him to return from administrative leave only in a compliance capacity, not as head trader. The whistleblower ultimately resigned his position.

Paradigm settled the SEC charges by consenting to the entry of an order finding that it violated the anti-retaliation provision of Dodd-Frank and committed other securities law violations, agreeing to pay more than $1 million to shareholders and to hire a compliance consultant to overhaul their internal procedures, and entering into a cease-and-desist order.

Is an employee protected against retaliation for providing testimony in an SEC investigation or at a hearing in an administrative or judicial enforcement action?

The whistleblower protection provision of SOX protects a whistleblower "testify[ing], participat[ing] in, or otherwise assist[ing] in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of . . . any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 USC § 1514A(a)(2).

The whistleblower provision of the Dodd-Frank Act also protects a whistleblower "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the SEC," but the SEC will protect a whistleblower assisting in an SEC investigation only where the whistleblower has provided information to the SEC in writing concerning a potential violation of the federal securities laws.

Retaliation against a witness in an SEC investigation could also violate the criminal prohibition against retaliation in Section 1107 of SOX, 18 U.S.C. § 1513(e). Section 1107 of SOX provides:

> Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense, shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 1513(e).

The Seventh Circuit's decision in *DeGuelle v. Camilli,* 664 F.3d 192 (7th Cir. 2011) illustrates how a whistleblower suffering retaliation can potentially pursue a RICO action relying on Section 1107 as a predicate offense. To plead a RICO case, the whistleblower must aver a second predicate act that is related to the Section 1107 violation, e.g., securities fraud. RICO is a potent remedy because it authorizes treble damages (financial compensation that is triple the amount of the actual or compensatory damages).

Another potential remedy for a whistleblower who suffers retaliation for participating in a federal court proceeding is 42 U.S.C. § 1985(2). This civil rights statute prohibits conspiracies to intimidate or retaliate against parties, witnesses, or jurors testifying or participating in federal court proceedings. Under 42 U.S.C. § 1985(2), a victim of intimidation or retaliation who

suffers injury to "his person or property" can recover damages against the perpetrators of the conspiracy. The Supreme Court held in *Haddle v. Garrison*, 525 U.S. 121 (1998) that a conspiracy to terminate an employee's at-will employment constitutes injury to person or property and is therefore actionable under 42 U.S.C. § 1985(2).

Should a whistleblower report internally before disclosing a violation to the SEC?

Prior to deciding whether to report internally, the whistleblower should carefully weigh several factors, including the risk of retaliation, the employer's potential inclination to destroy evidence or otherwise cover-up a violation, the extent to which senior management is profiting from the violation, and the adequacy of the company's compliance program. There is a significant incentive to report internally in that a whistleblower who initially reports internally and reports the same information to the SEC within 120 days will receive credit for any information the company subsequently self-reports to the SEC. And the SEC will increase the whistleblower's award percentage if the whistleblower participates in internal compliance or reporting systems. Conversely, the SEC can lower the award percentage where the whistleblower interfered with a company's internal compliance processes or reporting program.

If the whistleblower works in a gatekeeper role, they might need to report internally and wait 120 days prior to reporting to the SEC to remain eligible for an award. In particular, under Rule 21F-4(b)(4)(iii), certain employees in managerial, compliance, audit, and other positions as well as auditors must meet one of the following requirements to be eligible for a whistleblower award for reporting a violation to the SEC:

1. They reasonably believe the disclosure is necessary to prevent conduct that is likely to cause "substantial injury" to the financial interest or property of the entity or investors;
2. They reasonably believe the entity is engaging in "conduct that will impede an investigation of the misconduct"; or
3. At least 120 days have passed either since they properly disclosed the information internally, or since they obtained the information under circumstances indicating that the entity's officers already knew of the information.

In addition to SOX, do other whistleblower protection laws protect corporate whistleblowers?

Yes, some state whistleblower protection laws protect disclosures about corporate fraud, and some states recognize a common law tort action for wrongful discharge in violation of public policy. Adding a state law claim can potentially enable the whistleblower to recover punitive damages. Depending upon the specific disclosure that the whistleblower made, the following federal whistleblower protection laws may provide an additional remedy:

- Taxpayer First Act (protecting whistleblowing about tax fraud or tax underpayment);
- False Claims Act and NDAA (protecting whistleblowing about fraud on the government and waste, fraud, and abuse in federal contracts); and
- Consumer Financial Protection Act (protecting disclosures concerning consumer financial protection).