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Dodd-Frank provides incentives and enhanced protections for individuals to blow its new, shiny "whistle," but Sarbanes-Oxley's old whistleblower protections may have more luster in certain situations

By Michael R. Karnuth

Whistleblowers are a "corporation's conscience" because they prevent, root-out and recover losses due to fraudulent conduct.[1] For decades, whistleblower laws have been an effective tool in providing incentives and protections to recover substantial sums for defrauded federal and state governments. Under the False Claims Act, 31 U.S.C. 3729, et seq. ("FCA"), recoveries of over $3.3 billion were reportedly obtained in hundreds of suits brought for the federal government from 1986 through 1999.[2] Over the years, Congress, as well as state legislatures, have implemented a myriad of whistleblower laws in response to various acts of wrongdoing and have recognized tremendous success in obtaining recoveries.[3]

Whistleblower laws, however, did not apply to address investor losses until the Sarbanes-Oxley Act of 2002 ("SOX"). In the wake of the Enron and other massive financial frauds, Congress added a whistleblower provision in the SOX to afford public company whistleblower employees, as well as private contractors serving public companies, anti-retaliation protections for reporting violations of federal securities laws.[4] But unlike the FCA, the SOX only applied to public companies (and their contractors) and did not provide individuals a guaranteed bounty for information that led to the recovery of losses. That gap, however, was filled approximately eight years later, on July 22, 2010, in response to the 2008 stock market crash and the perceived abuses and lack of adequate regulations in the financial services industry, including the failure to detect billion dollar Ponzi schemes by Bernard Madoff and others, and the collapse of the credit default swap market, when the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. §78u-6, et seq. ("Dodd-Frank Act" or "DFA"), became effective.

The Dodd-Frank Act amended some of SOX's whistleblower provisions and separately provided its own provisions.[5] The DFA expanded, in certain respects, SOX's whistleblower incentive and protection provisions, and also extended its reach to private employers. The DFA also includes a strong confidentiality provision for those who wish to retain an attorney and maintain anonymity. But, individuals must determine which statute to use when seeking applicable whistleblower benefits and protections, including assessing whether to pursue benefits and/or protections under both statutes. Indeed, certain situations warrant strong consideration of one whistleblower provision over the other.

Provided below is an explanation of (I) the DFA's award and protection provisions, and how those provisions differ from SOX's whistleblower provisions for considering which provisions to select and utilize; and (II) the procedures for submitting eligible information and seeking an award from the SEC under the DFA.

I. The DFA's Incentive and Protection Provisions

The DFA incentivizes and protects individuals who meet the Act's definition of whistleblower;[6] i.e., anyone who "voluntarily[7] provide[s] original information[8] to the [SEC] that [leads] to the successful enforcement of [a] covered judicial or administrative action."[9] The individual need not be an employee of the subject company, but certain individuals are specifically excluded from the definition unless an exception applies.[10]

A "covered" action is defined as "any judicial or administrative action brought by the [SEC] under the securities laws that results in monetary sanctions exceeding $1,000,000."[11] For purposes of satisfying the $1 million threshold, monetary sanctions include all penalties, disgorgement and prejudgment or pre-settlement interest ordered to be paid, even if not actually paid.[12]

Notably, the SEC appears willing to aggressively combat attempts to undercut the DFA's incentives and protections. For instance, the SEC's whistleblower chief recently expressed concern with attorneys drafting contracts offering incentives for employees to keep alleged securities fraud whistleblower complaints in-house.[13] According to the chief, agreements which keep employees from engaging in the SEC's whistleblower program may run afoul of regulations and result in disciplinary actions against the com-

pany and the lawyers involved.[14]

A. The DFA's Mandatory Incentive Award

The DFA incentivizes individuals to submit information of possible misconduct by providing them a potential award equal to "not less than 10 percent … and not more than 30 percent" of the monetary sanctions *collected*.[15] Importantly, the DFA mandates that an award be issued to those satisfying the whistleblower provisions and gives the SEC discretion in only determining the amount of the award (within the aforementioned percentages), pursuant to a list of specific "criteria" when making the award determination.[16] Certain individuals, however, are excluded from award eligibility, similar to those excluded from the whistleblower definition,[17] including those employed by regulatory agencies and law enforcement organizations, those who are convicted of a criminal violation related to the covered action, and those who gained the information through the performance of an audit of financial statements required under the securities laws.[18]

B. The DFA's Anti-Retaliation Protections

The DFA protects whistleblowers by providing a cause of action and specific relief for retaliation by a company against a whistleblower's proffer of information about the company's misdeeds.[19] Employers may not "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any manner discriminate against, a whistleblower in the terms and conditions of employment" in connection with a whistleblower's submission of information.[20]

Courts are split, however, on when the DFA's anti-retaliation protections apply; differing on whether the whistleblower must submit his/her information to the SEC. Several district courts (as well as the SEC) support applying the protections broadly, regardless of whether the individual reports information directly to the SEC or through the company's internal reporting program.[21] The Fifth Circuit and some district courts, on the other hand, interpret the DFA narrowly and only apply the anti-retaliation protections when the individual reports information directly to the SEC.[22] The Second Circuit is (as of the time of this article) considering this issue in *Liu Meng-Lin v. Siemens AG*, which could result in a circuit split and an opportunity for U. S. Supreme Court review.[23] Given the uncertainty surrounding this issue, a whistleblower who is considering bringing an anti-retaliation claim should consider reporting the information directly to the SEC, simultaneous with or in lieu of reporting through the company's internal reporting program.

Nonetheless, the anti-retaliation protections apply even if the whistleblower does not qualify for an award or the information is insufficient or erroneous to state a claim, as long as the individual "possess[ed] a reasonable belief that the information … provid[ed] relates to a possible securities law violation … that has occurred, is ongoing, or is about to occur…."[24] The relief provided to a whistleblower who "prevails" in a retaliation claim "shall include—(i) reinstatement …; (ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and (iii) … litigation costs … and reasonable attorneys' fees."[25] Punitive damages, however, have been disallowed by courts.[26]

C. Comparison of the DFA and SOX Whistleblower Provisions

Bounty provisions were implemented under the Dodd-Frank Act out of concern that the SOX and other statutes lacked the necessary incentives to motivate individuals to come forward.[27] The DFA repealed prior bounty provisions which gave the SEC discretion to award up to 10 percent of the penalties paid in a case to a person who provided information leading to the imposition of those penalties.[28] Under the old provisions, very few individuals actually came forward and the awards issued were relatively small.[29] The DFA's mandated awards—issued to eligible recipients of between 10 percent and 30 percent of the amounts collected—have significantly increased whistleblower tips to the SEC, as well as the amounts awarded.[30] Allowing anonymous submissions through counsel also appears to have increased participation and the quality of tips.[31] It is also expected that the DFA's establishment of the SEC's Office of the Whistleblower will address pre-DFA concerns that whistleblower reports were not being properly handled and should result in more effective prosecutions and higher recoveries.[32]

Regarding the anti-retaliation provisions, the Dodd-Frank Act amended the SOX provisions and created significant differences between the DFA and the SOX. First, the DFA and the SOX require different procedures to pursue an action under each statute. To pursue a SOX anti-retaliation claim, an individual must first file a complaint with the Occupational Safety and Health Administration of the Department of Labor ("OSHA"), and exhaust administrative remedies.[33] Under the DFA, no exhaustion of remedies is required and an individual may initiate an action in federal district court.[34]

Other significant differences include a much longer limitations period and significantly greater remedies under the DFA. Although the DFA amended the SOX's anti-retaliation protections to expand the SOX's statute of limitations from 90 days to 180 days,[35] the DFA's limitations period is six years.[36] Additionally, the DFA's anti-retaliation remedies provide "2 times the amount of back pay otherwise owed" compared to the SOX's straight back pay remedy.[37]

And, although the U.S. Supreme Court recently held that SOX's anti-retaliation protections apply to private contractors and subcontractors which serve public companies, the SOX does not extend to private companies which do not involve a public company connection.[38] Thus, the DFA's provisions must be used in cases where the whistleblower is an employee of a private company where the reported fraud does not involve a public entity.

However, despite the aforementioned DFA advantages, an individual may find it more desirable to pursue a whistleblower claim under SOX in certain circumstances. Where an arbitration clause governs the individual's employment and avoiding arbitration is desired, SOX would be preferable because of its exemption from pre-dispute arbitration agreements.[39] Even though the DFA amended the SOX to expressly invalidate pre-arbitration agreements of SOX anti-retaliation claims, the DFA did not extend that amendment to the DFA anti-retaliation provisions. Indeed, courts have refused to extend SOX's arbitration exemption to whistleblower actions brought under the Dodd-Frank Act.[40]

Additionally, as explained in §I.B., *infra*, some courts have interpreted the DFA's anti-retaliation provisions as not allowing a claim to those who report information solely through a company's internal reporting program. Those courts narrowly construe the DFA as allowing such claims only if the individual's information is reported to the SEC. SOX, however, has not been held to have such a limitation and, rather, specifically allows a claim for reports to the SEC or the company's compliance program.[41]

II. Procedures for Submitting Eligible Information and Seeking Awards from the SEC

Individuals submitting original information which leads to monetary sanctions of at least $1 million are eligible to make a claim for an award in the manner prescribed by the SEC.[42] The SEC retains sole discretion to waive compliance with its prescribed procedures "based upon a showing of extraordinary circumstances."[43] The timing and manner of submitting original information and claims for an award differ, but both may be submitted anonymously as long as the individual retains counsel.[44]

A. Specific Procedures for Submitting Original Information

To submit information to the SEC about a possible securities law violation, the individual must either submit it online, through the SEC's Web site; or mail or fax Form TCR (Tip, Complaint or Referral; found at www.sec.gov/about/formtcr.pdf) to the SEC Office of the Whistleblower.[45] Form TCR requests information about the complainant, the complainant's attorney (if applicable), the individual/entity against whom the complaint is being filed, the alleged violation and supporting information, and the complainant's eligibility to be deemed a whistleblower. Form TCR must be signed by the complainant under penalty of perjury.[46]

In addition to submitting a claim directly to the SEC, an individual may be credited with submitting original information to the SEC for purposes of being eligible for an award if they submit it internally, through their company's compliance program, and the company then submits that information to the SEC.[47] However, as explained in §§ I.B. & II.B., *infra*, although a whistleblower may be eligible to obtain an enhanced award for submitting information through the company's reporting program, the whistleblower may not be eligible for the DFA's anti-retaliation protections or the bounty program if the company or individual does not submit the information to the SEC.

Submitting a claim directly to the SEC, however, may be more desirable to individuals who desire anonymity, especially if the entity's internal compliance program does not allow anonymous tips.[48] To do so, the individual must retain an attorney to provide the information on the whistleblower's behalf and the attorney must certify that he verified the whistleblower's identity, reviewed the completed and signed Form TCR, and consents to provide the signed Form TCR to the SEC within seven (7) calendar days of such a request.[49]

B. Specific Procedures for Submitting a Claim for an Award

A whistleblower may submit a claim for an award once the SEC posts a notice that a final judgment or order (i.e., an SEC enforcement action) resulted in a monetary sanction exceeding $1 million against the individual and/or entity the whistleblower submitted information.[50] Notably, the amount of the award is not computed on the amount of the monetary sanction, but rather is computed based on the actual amount the SEC collected.[51] Thus, awards can be distributed even if the amounts collected are below $1 million, as long as the aggregate monetary sanctions exceed $1 million.[52]

Whenever an SEC action results in satisfaction of the monetary threshold, the SEC posts to its Office of the Whistleblower Web site a "Notice of Covered Action."[53] The posting of the notice is not a determination that a whistleblower's tip led to an investigation or the filing of an action, or that an award to a whistleblower will be paid. The determination of an award will only be made after the receipt of a timely submitted claim form from the whistleblower, which must be received within 90 calendar days from the date the notice is posted, or the claim will be barred.[54]

The claim form, Form WB-APP, must be timely mailed or faxed to the Office of the Whistleblower.[55] The applicant must provide in the claim form information which connects the information provided to the SEC with the notice of covered action posted by the SEC, must also explain the basis for an entitlement to an award, and must sign the application under penalty of perjury.[56] If the whistleblower provided the original information to the SEC anonymously, the identity of the whistleblower must be disclosed in the application and verified in a form and manner acceptable to the SEC prior to payment of any award.[57] Disclosure of the whistleblower's identity, however, need not be made to anyone else, including the defendant, unless the whistleblower brings a separate retaliation claim.[58]

All award applications will be evaluated when the time for filing any appeals of the SEC's judicial or administrative action has expired, or where an appeal has been filed, after all appeals have been concluded.[59] Thereafter, a Preliminary Determination will be sent to each applicant identifying whether the claim should be allowed or denied and, if allowed, the proposed award percentage amount.[60] The SEC has identified a list of "materials" that it will consider when determining whether and/or the amount of an award.[61] The SEC has also identified factors that it will consider which may increase the amount of a whistleblower's award.[62] Such factors include, among others, whether the whistleblower voluntarily participated in the entity's internal compliance program.[63] On the flip side, the SEC has identified factors that may decrease the amount of an award, including a whistleblower's interference with any internal response, a whistleblower's culpability and a whistleblower's unreasonable delay in reporting.[64]

Applicants may contest the SEC's preliminary determination.[65] Failure to submit a timely objection, however, will constitute a failure to exhaust administrative remedies and a bar from pursuing an appeal.[66] Notably, an applicant may not appeal the amount of the award if the award is "not less than 10 percent and not more than 30 percent of the monetary sanctions collected."[67]

III. Conclusions

Dodd-Frank's whistleblower provisions provide a powerful deterrent and add substantial incentives for individuals to come forward and report corporate securities fraud. In the short time since the bounty program was implemented, a great deal of interest and significant recoveries have occurred. The SEC's second annual whistleblower report to Congress reports that in fiscal year 2013 (October 1, 2012 through September 30, 2013), the SEC received 3,238 tips, complaints, and referrals from whistleblowers across the country and abroad, involving, among other things, fraudulent disclosures and misstated financial statements, market manipulation and insider trading.[68] In that same year, the SEC also distributed $14,831,965.64 in award payments, including approximately $14 million to one whistleblower for information that led to an enforcement action that recovered substantial investor funds less than six months after the SEC received the information.[69] The DFA's confidentiality provision was also effectively used to conceal the identity of that particular whistleblower. Expectations are high that the program's success will grow.

Utilizing the DFA's anti-retaliation provisions, however, must be carefully considered.

Although they enhance in certain respects those provided under SOX, they may not always be appropriate to utilize, including in situations where employee arbitration agreements apply or the individual chooses to provide information through the company's internal reporting system. In these, and possibly other situations, individuals should carefully assess whether the DFA or SOX anti-retaliation provisions (or both) should be pursued because failing to make the right choice could result in adverse consequences.

Finally, as with many new laws, the DFA's contours may change as a consequence of promulgation of new rules or court interpretations. Whistleblower attorneys can play an important role in advising individuals through the process, including in maintaining anonymity, ensuring deadlines are met for submitting information and claiming awards, and in determining the best approach when considering bringing an anti-retaliation claim. ■

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1. *See* Chelsea Hunt Overhuls, *Unfinished Business: Dodd-Frank's Whistleblower Anti-Retaliation Protections Fall Short for Private Companies and Their Employees*, 6 J. Bus. Entrepreneurship & L. 1, 4 (2012).

2. *See* 13 No. 16 ANGCLR 15 (citing Feb. 24, 2000 announcement of Acting Asst. Attorney Gen. of U.S. Dept. of Justice's Civil Division; stating: the Department's "recovery of more than $3.3 billion through whistleblower suits demonstrates that the public-private partnership encouraged by the statute works and is an effective tool in our continuing fight against the fraudulent use of public funds.").

3. Brooks E. Kostakis, *Crafting A Hybrid Weapon Against Healthcare Fraud: Reflecting Upon the Government's Use of the Civil False Claims Act as an Incentive for Whistleblowers and Advocating a More Aggressive Utilization of Permissive Exclusion as a Deterrent Measure*, 37 U. Mem. L. Rev. 395, 410 (Winter, 2007) (noting that since the 1986 amendments to the FCA, the government recovered approximately $15 billion in health care fraud and that states were adding whistleblower provisions to combat Medicaid and Medicare fraud).

4. 18 U.S.C. 1514A (a)(1); *see also Lawson v. FMR LLC*, -- S. Ct. --, 2014 WL 813701 (Mar. 4, 2014) (holding that SOX's anti-retaliation protections extend to employees of private contractors and subcontractors serving public companies, including investment advisers, law firms and accounting firms; abrogating several decisions which limited its reach to only public company employees and noting that "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation, Congress passed [SOX]").

5. The text of the Dodd-Frank Act describes it as "[a]n Act [t]o 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 the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other reasons." Pub. L. No. 111-203, 124 Stat. 1376 (2010).

6. "Whistleblower" is defined as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [SEC], in a manner established, by rule or regulation, by the [SEC]." 15 U.S.C. 78u-6(a)(6). SEC rules exclude "compan[ies]" and "other entit[ies]" from being eligible whistleblowers. 17 C.F.R. 240.21F-2(a)(1).

7. Information that is provided as a result of a request from the SEC or as a result of a "pre-existing legal duty" or "contractual duty that is owed to the [SEC]" or to other specified authorities, will not be considered voluntary. 17 C.F.R. 240.21F-4(a)(2)&(3).

8. "Original information" is defined as information "(A) … derived from the independent knowledge or analysis of a whistleblower; [and] (B) … not known to the [SEC] from any other source." 15 U.S.C. 78u-6(a)(3); *see also* 17 C.F.R. 240.21F-4(b). The rules apparently do not require knowledge to be direct or personal to the whistleblower. Moreover, using publicly available information as part of an independent analysis is acceptable. 17 C.F.R. 240.21F-4(b)(2)-(3). However, information obtained through attorney-client communications is not considered independent unless disclosure of such information is otherwise permitted. 17 C.F.R. 240.21F-4(b)(4)(i).

9. 15 U.S.C. 78u-6(b); *see also* 17 C.F.R. 240.21F-3.

10. Excluded from the definition of providers of original information are, among others, company officers who either are informed by another individual about allegations of misconduct by the company, or learn the information in connection with the entity's process for identifying, reporting and addressing possible violations of applicable law, employees whose principal duties involve compliance or internal audit responsibilities, and individuals employed by or otherwise associated with a firm retained to perform compliance or internal audit functions for the entity. 17 C.F.R. 240.21F-4(b)(4)(iii). Exceptions to the aforementioned exclusions may occur if the whistleblower has a reasonable basis to believe that disclosing the information is necessary to prevent conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors; the whistleblower has a reasonable basis to believe that the entity is engaging in conduct that will impede an investigation of the misconduct; or at least 120 days have elapsed since the date that the whistleblower either (i)reported the information internally or (ii) received the information. 17 C.F.R. 240.21F(b)(4)(v).

11. 15 U.S.C. 78u-6(a)(1).

12. 15 U.S.C. 78u-6(1) and (4).

13. <www.law360.com/articles/518815/sec-warns-in-house-attys-against-whistleblower-contracts> (last visited March 18, 2014).

14. *Id.*

15. 15 U.S.C. 78u-6(b) (emphasis added).

16. 15 U.S.C. 78u-6(c)(1)(B) (setting forth "(I) the significance of the information provided …; (II) the degree of assistance provided…; (III) the programmatic interest of the [SEC] in deterring violations of the securities laws …; and (IV) such additional relevant factors as the [SEC] may establish by rule or regulation"); *see also* 17 C.F.R. 240.21F-5&6.

17. *See* n11, *infra*.

18. 15 U.S.C. 78u-6(c)(2); *see also* 17 C.F.R. 240.21F-8(c).

19. 15 U.S.C. 78u-6(h)(1)

20. In describing the "prohibition against retaliation," the DFA states: "No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any 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 [SEC] …; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the [SEC]…; or (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002…" 15 U.S.C. 78u-6(h)(1).

21. *See* SEC's amicus brief filed on February 20, 2014 with the Second Circuit in *Liu Meng-Lin v. Siemens AG*, 13-4385, at p. 27 fn19 (citing *Rosenblum v. Thompson Reuters (Markets) LLC*, No. 13 Civ. 2219, 2013 WL 5780775, at *3-5 (S.D.N.Y. Oct. 25, 2013); *Ellington v. Giacoumakis*, No. 13-11791, 2013 WL 5631046, at *2-3 (D. Mass. Oct. 16, 2013); *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914, 2013 WL 2190084, at *3-7 (S.D.N.Y. May 21, 2013); *Kramer v. Trans-Lux Corp.*, No. 11 Civ. 1424, 2012 Wl 4444820, at *3-5 (D. Conn. Sept. 25, 2012); and *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 993-95 (M.D. Tenn. 2012)).

22. *See* 15 U.S.C. 78u-6(a)(6) (defining "whistleblower" as "any individual who provides … information relating to a violation of the securities laws *to the [SEC]*") (emphasis added); *see also Asadi v. G.E. Energy (U.S.A.), L.L.C.*, 720 F.3d 620, 627-30 (5th Cir. 2013); *Banko v. Apple, Inc.*, No. 13-02977, 2013 WL 6623913, at *2-3 (N.D. Cal. Dec. 16, 2013); *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381, 2013 WL 3786643, at *4-6 (D. Colo. July 19, 2013).

23. On February 20, 2014, the SEC submitted an amicus brief in *Liu Meng-Lin v. Siemens AG*, pending before the Second Circuit, arguing for a broad application of the DFA's whistleblower protections. The SEC's brief argues that the SEC's final rules provide, in appropriate circumstances, "strong incentives," including higher award percentages, for individuals to first report internally to ensure corporations maintain robust internal compliance and reporting programs (itself a valuable anti-fraud tool), and that it would undermine these goals to not afford those who report internally the same anti-retaliation protections as those who report directly to the SEC. *See* <www.sec.gov/whistleblower> (last visited February 26, 2014) (SEC's brief at 4-5, 27-30).

24. 17 C.F.R. 240.21F-2(b)(1)

25. 15 U.S.C. 78u-6(h)(1)(C).

26. *See, e.g., Rosenblum v. Thomson Reuters (Markets) LLC*, No. 13 Civ. 2219, 2013 WL 5780775 at *5-6 (S.D.N.Y. Oct. 25, 2013) (concluding that DFA "neither provides for punitive damages nor permits broader relief").

27. Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. Rev. 91, 154 (Feb. 2007) (contending that although

SOX provides protections against obvious methods of employment-related retaliation, it does little to overcome the severe disincentives such as social ostracism and blacklisting, and that to motivate whistleblowers to brave these obstacles and expose major corporate fraud it is necessary to make available a "significant financial bounty").

28. *See* U.S. Securities and Exchange Commission Press Release No. 21601 (July 23, 2010), found at <www.sec.gov/litigation/litreleases/2010/lr21601.htm> (last visited on Mar. 4, 2014).

29. Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. Rev. 1, 51 (Autumn, 2012) (hereinafter, "Morberly at __").

30. *Moberly* at 51-52 (stating that over 3,000 tips were received in its first year after its August 2011 effective date); *see also* 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program, found at <www.sec.gov> (last visited on Mar. 4, 2014) (reporting that it received 3,238 tips in the 2013 fiscal year and awarded over $14 million to whistleblowers).

31. 15 U.S.C. 78u-6(d).

32. *Moberly* at 52.

33. *Murray v. UBS Securities, LLC*, No. 12 Civ. 5914, 2014 WL 285093, at *8 (S.D.N.Y. Jan. 27, 2014) (noting that under SOX the party must first file a complaint with OSHA before a federal court will hear the claim); *see also Ashmore v. CGI Group, Inc.*, No. 11 Civ. 8611, 2012 WL 2148899, at *4 (S.D.N.Y. June 12, 2012) (noting that Congress explicitly delegated to the Secretary of Labor authority to enforce SOX §806 and that the Secretary of Labor delegated such authority to the Department of Labor's Administrative Review Board).

34. *Id*. at *8 (unlike the SOX, the DFA does not require administrative exhaustion).

35. 18 U.S.C. 1514A.

36. *Compare* 18 U.S.C. 1514A(b)(2)(D) *with* 15 U.S.C. 78u-6(h)(1)(B)(iii)(i)(aa).

37. *Compare* 18 U.S.C. 1514A(c)(2) *with* 15 U.S.C. 78u-6(h)(1)(C)(ii); *see also Murray*, 2014 WL 285093, at *8 (recognizing that the DFA provides "2 times the amount of back pay" compared with SOX's straight back pay remedy).

38. *Lawson*, 2014 WL 813701, at *4 (rejecting arguments limiting SOX's application to public company employees only; finding that the statutory text unambiguously affords protections to employees of private companies contracting with public companies, and reasoning that in the Enron scandal which prompted SOX's enactment, employees of contractors to Enron, including Arthur Andersen which participated in the fraud, attempted to bring misconduct to light and encountered retaliation, and that SOX's provisions indicate that it was enacted to remedy and provide protections in these situations).

39. 18 U.S.C. 1514A(e) ("The rights and remedies provided for in this [SOX] section may not be waived by … a predispute arbitration agreement," and "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement required arbitration of a dispute arising under this section.").

40. *See Murray v. UBS Securities, LLC*, No. 12 Civ. 5914, 2014 WL 285093, at *11 (S.D.N.Y. Jan. 27, 2014); *Ruhe v. Masimo Corp.*, No. 11-00734, 2011 WL 4442790, at *4 (C.D. Cal. Sept. 16, 2011).

41. *Compare* 18 U.S.C. 1514A(a)(1)(A)—(C) *with* 15 U.S.C. 78u-6(h)(1)(A)(i)—(iii).

42. 15 U.S.C. 78u-6(b) and (c); *see also* 17 C.F.R. 240.21F-8(a)-(b) & 240.21F-9 through 11.

43. 17 C.F.R. 240.21F-8(a).

44. 17 C.F.R. 240.21F-7(b).

45. 17 C.F.R. 240.21F-9(a).

46. 17 C.F.R. 240.21F-9(b).

47. 17 C.F.R. 240.21F-4(c) (explaining that an individual that submits information through their employer's compliance program is eligible for an award as long as they also submit it to the SEC within 120 days of providing it to the entity).

48. Anonymity may be desired if the individual is not interested or involved in a retaliation claim and seeks to avoid potentially undesirable affects in their careers or employment. The Department of Labor, who oversees SOX whistleblower actions, has recognized the effectiveness of allowing anonymous submissions. *In the Matter of: Anthony Menendez v. Halliburton, Inc.*, ARB Case No. 12-026, 2013 WL 1385561, at *7 n74 (Mar. 15, 2013) (recognizing the effectiveness of the confidentiality requirements in the DFA and other whistleblower statutes).

49. 17 C.F.R. 240.21F-9(c).

50. 17 C.F.R. 240.21F-10(a).

51. 17 C.F.R. 240.21F-5(b) ("The amount will be at least 10 percent and no more than 30 percent of the monetary sanctions that the Commission and the other authorities are able to collect.").

52. *Id.*

53. 17 C.F.R. 240.21F-10(a).

54. 17 C.F.R. 240.21F-10(a).

55. 17 C.F.R. 240.21F-10(b) (referencing the "Application for Award for Original Information Submitted Pursuant to Section 21F of the Securities Exchange Act of 1934").

56. *See* <www.sec.gov/about/forms/formwb-app.pdf>.

57. 17 C.F.R. 240.21F-10(c).

58. 15 U.S.C. 78u-6(d)(2) & (h)(2)(A)

59. 17 C.F.R. 240.21F-10(d).

60. *Id.*

61. 17 C.F.R. 240.21F-12(a) (identifying as materials the SEC considers: "publicly available materials…; [t]he whistleblower's Form TCR…; [t]he whistleblower's Form WB-APP…; and [s]worn declarations (including attachments) from the [SEC] staff…").

62. 17 C.F.R. 240.21F-6(a).

63. 17 C.F.R. 240.21F-6(a)(4). As noted *infra*, however, submitting original information to a company's internal reporting program may not be sufficient to afford an individual an opportunity to pursue an anti-retaliation claim.

64. 17 C.F.R. 240.21F-6(b).

65. 17 C.F.R. 240.21F-10(e).

66. 17 C.F.R. 240.21F-10(f).

67. 17 C.F.R. 240-21F-13(a).

68. <www.sec.gov/about/offices/owb/annual-report-2013.pdf> (last visited March 5, 2014), at 1.

69. *Id.*

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