Global Investigations Review

# The Practitioner's Guide to Global Investigations

## Volume I: Global Investigations in the United Kingdom and the United States

Fifth Edition

**Editors**
Judith Seddon, Eleanor Davison, Christopher J Morvillo,
Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

2021

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Global Investigations Review

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.globalinvestigationsreview.com



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ISBN 978-1-83862-272-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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# 20

# Whistleblowers: The US Perspective

**Daniel Silver and Benjamin A Berringer**[1]

## Overview of US whistleblower statutes 20.1

The US legal system contains a multitude of state and federal laws that protect individuals who report potential misconduct (whistleblowers) from retaliation for making the report.[2] Some of these laws protect specific classes of individuals, such as truck drivers,[3] nuclear engineers,[4] pilots[5] and miners.[6] Others relate to specific

1 Daniel Silver is a partner and Benjamin A Berringer is an associate at Clifford Chance US LLP.

2 The exact nature of this protection depends significantly on the statute that creates the protection. For example, the Surface Transportation Assistance Act states that 'no person' is allowed to 'discriminate' against truck drivers and certain other employees 'with respect to his compensation, terms, conditions, or privileges of employment' for making a whistleblower report. 49 U.S.C. § 31105. On the other hand, the Sarbanes-Oxley Act prohibits a broader range of conduct, but applies to a narrower class of employers. See infra notes 17 to 24 and accompanying text.

3 The Surface Transportation Assistance Act protects truck drivers and certain other employees from retaliation for reporting violations of regulations related to the safety of commercial vehicles. 49 U.S.C. § 31105.

4 The Energy Reorganization Act protects employees of operators, contractors and subcontractors of nuclear power plants licensed by the Nuclear Regulatory Commission from retaliation for reporting violations of the Atomic Energy Act of 1954. 42 U.S.C. § 5851.

5 The Federal Airline Deregulation Act's Whistleblower Protection Program protects employees, contractors, and subcontractors of air carriers from retaliation for, *inter alia*, reporting violations of laws related to aviation safety. 49 U.S.C. § 42121.

6 The Federal Mine Safety and Health Act of 1977 prohibits employment discrimination against a miner, representative of miners, or applicant for employment in any coal or other mine as a reprisal for making safety-related complaints. 30 U.S.C. § 815.

conduct such as motor vehicle safety issues,[7] violations of the Clean Air Act,[8] violations of the Clean Water Act[9] or violations of the Affordable Care Act.[10] Each of these laws is structured differently. As a result, the precise steps that a whistleblower must take to file a report, whether the whistleblower has a private right of action and the scope of protection may vary depending on the statutory basis for the whistleblower claim.[11]

### 20.1.1 The SEC whistleblower regimes

US securities laws protect whistleblowers who report potential misconduct by entities and individuals subject to regulation by the US Securities and Exchange Commission (SEC). This protection was originally created by the Sarbanes-Oxley Act (SOX) in 2002. It was then strengthened and expanded by the Dodd-Frank Act (DFA) in 2009, which created the Whistleblower Protection Program (the Program), pursuant to which individuals who voluntarily report 'original information'[12] about potential violations of federal securities laws are protected from retaliation and entitled to a financial award if the information leads to a successful judicial or administrative enforcement action in which the SEC obtains monetary sanctions over US$1 million.[13] The Program has been a significant success for the SEC. Since August 2011, the Program has received over 40,200 whistleblower reports from individuals in all 50 US states and 130 foreign countries.[14] In fiscal year 2020 alone, the SEC received over 6,900 whistleblower reports,

7 The Moving Ahead for Progress in the 21st Century Act prohibits discrimination by motor vehicle manufacturers, parts suppliers or dealerships against employees who provide information about any motor vehicle defect or violation of the Motor Vehicle Safety Act. 49 U.S.C. § 30171.

8 The Clean Air Act contains a provision protecting employees from retaliation for reporting violations of the Clean Air Act. 42 U.S.C. § 7622.

9 The Water Pollution Control Act contains a provision protecting employees from retaliation for reporting violations of the Act. 33 U.S.C. § 1367.

10 The Affordable Care Act protects employees from retaliation for reporting violations of certain of its provisions, including, *inter alia*, discrimination based on an individual's receipt of health insurance subsidies, denial of coverage for a pre-existing condition, and an insurer's failure to rebate a portion of an excess premium to customers. 29 U.S.C. § 218c.

11 Compare, e.g., 42 U.S.C. § 7622 (no private cause of action for whistleblower retaliation under the Clean Air Act), with 29 U.S.C. § 1132(a) (creating a private cause of action for the enforcement of ERISA provisions, including anti-retaliation provisions).

12 The US Securities and Exchange Commission (SEC) has defined original information as 'information derived from your independent knowledge (facts known to you that are not derived from publicly available sources) or independent analysis (evaluation of information that may be publicly available but which reveals information that is not generally known) that is not already known by us.' SEC, Office of the Whistleblower, Frequently Asked Questions, https://www.sec.gov/about/offices/owb/owb-faq.shtml. The SEC has also stated that information from certain individuals, including attorneys and fiduciaries, may not be deemed original. See infra notes 77 to 79 and accompanying text.

13 See 15 U.S.C. § 78u-6. Dodd-Frank also imposed a similar regime under the Commodity Exchange Act. See 7 U.S.C. § 26.

14 SEC, 2020 Annual Report to Congress – Whistleblower Program, 27, 30 (2020), https://www.sec.gov/files/2020%20Annual%20Report_0.pdf [2020 Annual Report on Whistleblower Program].

including 751 (11 per cent) from foreign whistleblowers.[15] As a result of these reports, the SEC has instituted enforcement actions that have resulted in penalties of more than US$2.7 billion and awarded over US$500 million to 106 different whistleblowers.[16]

The Program rewards individuals for making reports pursuant to both SOX and the DFA whistleblower provisions. Under both statutes, individuals qualify as whistleblowers if they report alleged misconduct and have 'a reasonable belief that the information [they are] providing relates to a possible securities law violation . . . that has occurred, is ongoing, or is about to occur'.[17] A belief is reasonable if it is both subjectively and objectively reasonable; that is, the employee must have both 'a subjectively genuine belief that the information demonstrates a possible violation, and that this belief is one that a similarly situated employee might reasonably possess'.[18]

To satisfy the subjective component of this standard, the employee must have 'actually believed the conduct complained of constituted a violation of pertinent law'.[19] For the objective component, '[the] employee need not show that an actual violation occurred so long as "the employee reasonably believes that the violation is likely to happen"'.[20] 'A belief is objectively reasonable when a reasonable person with the same training and experience as the employee would believe that the

15 Id. at 27, 42.

16 Id. at 2.

17 17 C.F.R. § 240.21F-2(b)(i). Prior to 2011, the Department of Labor applied a 'definitively and specifically' standard to claims under the Sarbanes-Oxley Act (SOX), which required that the whistleblower show that the conduct was definitively and specifically related to one or more of the laws listed in SOX. See, e.g, *Welch v. Cardinal Bankshares Corporation*, ARB No. 05-064, ALJ No. 2003-SOX-15 (ARB 31 May 2007) (Whistleblower report related to deviation from generally accepted accounting practices was not necessarily protected activity under SOX because an accounting deviation is not inherently a violation of the securities laws). However, in a 2011 decision, the Department of Labor clarified that the reasonable belief standard applied. *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039 to -042 (ARB 23 May 2011). The SEC has stated that a reasonable belief is sufficient under either statute. See Implementation of the Whistleblower Provisions of Section 21f of the Sec. Exch. Act of 1934, Release No. 64545 (S.E.C. Release No.), Release No. 34-64545, 101 S.E.C. Docket 630, 2011 WL 2045838, at *7, n. 36 (25 May 2011) [DFA Implementation Release] (adopting the reasonable belief standard and noting that the SOX anti-retaliation provision has the same requirement). However, at least some courts still apply the definitively and specifically standard for SOX claims. See, e.g., *Riddle v. First Tenn. Bank*, 497 F. App'x. 588 (6th Cir. 2012) ('[A]n employee's complaint must "definitively and specifically relate" to one of the six enumerated categories found in 18 U.S.C. § 1514A'). But see *Genberg v. Porter*, 882 F.3d 1249, 1255 (10th Cir. 2018) (holding that the 'definitive and specific' standard used by the District Court was 'obsolete' and reversing grant of summary judgment for defendant based on that standard); *Wiest v. Lynch*, 710 F.3d 121, 131 (3d Cir. 2013) (adopting reasonable belief standard based on *Sylvester* decision).

18 *Ott v. Fred Alger Mgmt., Inc.*, 2012 WL 4767200, at *4 (S.D.N.Y. 27 September 2012) (quoting DFA Implementation Release, at *7).

19 *Welch v. Chao*, 536 F.3d 269, 277 n.4 (4th Cir. 2008) (interpreting whether a plaintiff qualified for whistleblower status under SOX).

20 *Stewart v. Doral Fin. Corp.*, 997 F. Supp. 2d 129, 137 (S.D.N.Y. 2014) (quoting *Sylvester*, 2011 WL 2165854, at *13).

conduct implicated in the employee's communication could rise to the level of a violation of' the securities laws.[21]

While the standard for whistleblower status is similar under both statutes, there are also some material differences. First, there are differences in who is protected. SOX protects employees, contractors and subcontractors of publicly traded companies[22] and rating agencies from retaliation for reporting certain criminal offences (mail or wire fraud) or the potential violation of 'any rule or regulation of the Securities and Exchange Commission, or any provision of federal law relating to fraud against shareholders' either internally or to certain government entities.[23] The DFA, on the other hand, prohibits any employer from taking adverse employment actions against employees who report potential violations of the securities laws to the SEC.[24]

Second, there are differences in what misconduct can be reported. DFA protections only apply to whistleblowers who report potential violations of the securities laws, while SOX prohibits retaliation against whistleblowers who report potential violations of a wider range of laws.

Third, there are differences in the definition of retaliation. The DFA prohibits a broader range of retaliatory conduct. Pursuant to the statute, no employer 'may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower'.[25] The SOX prohibition is substantially similar, but it does not specifically prohibit indirect action against employees.[26]

Fourth, there are procedural differences in how whistleblowers must report the conduct. SOX specifically states that whistleblowers are protected against retaliation if they report misconduct internally to 'a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)' or externally to a

21 *Wiest*, 710 F.3d at 132.

22 The Supreme Court has ruled that this protection extends to employees of a non-public company who report fraud against shareholders of a public company that receives services from the non-public company. *Lawson v. FMR LLC*, 571 U.S. 429, 440 (2014). But, where the party committing the misconduct is a private company contracted by the publicly traded company and the whistleblower is an employee of the contracted company, SOX liability does not apply to the publicly traded company. *Tellez v. OTG Interactive, LLC*, 2019 WL 2343202, at *4 (S.D.N.Y. 3 June 2019).

23 18 U.S.C. § 1514A. Judicial decisions have made clear that disclosures regarding third parties are protected activity. See, e.g., *Sharkey v. J.P. Morgan Chase & Co.*, No. 10 Civ. 3824, 2011 WL 135026, at *5 to 6 (S.D.N.Y. 14 January 2011) (finding that the plaintiff properly pleaded that a report concerning a third-party client's illegal activity constituted a protected activity under SOX).

24 The Dodd-Frank Act (DFA) defines a whistleblower as 'any individual who provides . . . information relating to a violation of the securities laws to the Commission.' 15 U.S.C. § 78u-6(a)(6).

25 15 U.S.C. § 78u-6(h)(1)(A).

26 18 U.S.C. § 1514A(a) (identified classes of employers may not 'discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee').

federal regulatory or law enforcement agency, or to the US Congress.[27] The DFA, on the other hand, statutorily defines a whistleblower as 'any individual who provides . . . information relating to a violation of the securities laws' to the SEC.[28] Recognising that SOX whistleblowers – who can report internally – are also protected under the DFA, the SEC attempted to extend DFA protection to whistleblowers who report internally pursuant to SOX.[29] This interpretation, however, was unanimously rejected by the Supreme Court, which held that the DFA only protects employees who report misconduct to the SEC.[30]

Finally, there are significant differences in how a whistleblower can bring a claim for retaliation. SOX is enforced by the Occupational Safety and Health Administration (OSHA), which is responsible for investigating claims.[31] Once a whistleblower makes a claim, OSHA will conduct an initial investigation to determine if the whistleblower has made a *prima facie* showing that their whistleblower report was a contributing factor to an unfavourable employment decision.[32] If OSHA comes to this determination, the employer can then rebut the claim with clear and convincing evidence.[33] Once OSHA makes a final finding, either party may appeal to the Department of Labor's Office of Administrative Law Judges (ALJ).[34] The regulations then allow for limited discovery, after which an ALJ will conduct a hearing and render a decision.[35] The ALJ's decision can be appealed by the unsuccessful party to the Department of Labor's Administrative Review Board,[36] with further appeal to the United States Circuit Court of Appeals for the circuit in which the employee resided or the violation allegedly occurred.[37] Additionally, a SOX whistleblower may bring a retaliation claim in federal court if the Secretary of Labor 'has not issued a final decision within 180 days of the

27 18 U.S.C. § 1514A. Administrative decisions have made clear that disclosures to other entities, including the IRS and local law enforcement, may also be protected. See, e.g., *Vannoy v. Celanese Corp.*, ARB No. 09-118, ALJ No. 2008-SOX-064 (ARB 28 September 2011) (finding that disclosures to the IRS constituted protected activity under SOX); *Funke v. Federal Express Corp.*, ARB No. 09-004, ALJ No. 2007-SOX-043 (ARB 8 July 2011) (finding that reports to local law enforcement constituted protected activity).

28 15 U.S.C. § 78u-6(a)(6). This provision arguably conflicts with the broader anti-retaliation provision of the DFA, which states that an employer cannot 'discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment' in retaliation for: (1) providing information to the SEC; (2) initiating, testifying in, or assisting an SEC investigation or action; or (3) making disclosures that are protected by the Sarbanes-Oxley Act or 'any other law, rule, or regulation subject to the jurisdiction of' the SEC. 15 U.S.C. § 78u-6(h)(1)(A).

29 17 C.F.R. § 240.21F-2.

30 *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018).

31 See 29 C.F.R. § 1980.104(e).

32 Id.

33 29 C.F.R. § 1980.104(e)(4).

34 29 C.F.R. § 1980.106.

35 29 C.F.R. §§ 1980.107, 1980.109.

36 29 C.F.R. § 1980.110.

37 29 C.F.R. § 1980.112.

filing of [a] complaint and there is no showing that such delay is due to the bad faith of the claimant'.[38]

Individuals claiming DFA protections, on the other hand, may immediately bring a claim in federal court. There, courts will employ a burden-shifting standard. The employee must initially meet the 'rather light burden of showing by a preponderance of evidence that [the whistleblower report] tended to affect [the adverse action] in at least some way'.[39] Once the employee has made this *prima facie* showing of retaliation, the burden shifts to the employer to prove that there was a legitimate non-retaliatory reason for the decision.[40] Only if the employer is able to provide a non-retaliatory reason does the burden shift back to the employee to show that the proffered legitimate reason is a pretext.[41]

### 20.1.2 The CFTC whistleblower regime

The DFA added Section 23 of the Commodity Exchange Act (CEA), which provides for whistleblower protections. The CEA anti-retaliation provision is identical to the DFA provision in the Exchange Act. Although the CEA has been used less frequently than the SEC provision by employees, given the similarities between the two, the Commodity Futures Trading Commission (CFTC) began, among other things, to strengthen its anti-retaliation protections for whistleblowers and harmonise its rules with those of the SEC's Program in May 2017. The CFTC has also explicitly stated that it will rely on SEC precedent[42]

### 20.1.3 State law regimes

Many states also have laws to protect whistleblowers from retaliation, but the scope of protection varies by state. For example, New York has several laws which protect whistleblowers from employer retaliation. New York's Labor Law, at Section 740, prohibits employers from taking any adverse employment action against an employee who discloses or threatens to disclose to a public body an employer's potential violation of public safety regulations, so long as the employee first brings the potential violation to the attention of their employer.[43] Health care workers are separately protected for reporting activities they think 'in good faith, reasonably . . . constitute improper quality of patient care' if they first report the perceived

38 18 U.S.C. § 1514A(b)(1)(B).

39 *Feldman v. Law Enf't Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014).

40 Implementation Release at 18, n. 41.

41 Id.

42 See In the Matter of Claims for Award by: Redacted WB-APP Redacted; and Redacted WB-APP Redacted, in Connection with Notice of Covered Action Redacted (1 January 2018) (The CFTC adopted principles 'consistent with those of the SEC's whistleblower program' to evaluate a whistleblower's award claim.). See also 17 C.F.R. §§ 165.15(A)(2), 165.7(F)–(1) (2017). (The CFTC replaced the Whistleblower Award Determination Panel with the Claims Review Staff (CRS). The CFTC stated that the CRS would include an enhanced review process 'similar to that established under the whistleblower rules of the US Securities and Exchange Commission.)

43 N.Y. Lab. Law § 740(2)-(3).

issue to their employer.[44] Furthermore, New York government employees are protected under New York Civil Service Law, which protects public employees who report to public health and safety officials violations which they reasonably believe to be true.[45]

## The corporate perspective: preparation and response 20.2

### Preparing for a whistleblower report 20.2.1

There is no legal requirement to create whistleblower policies, but companies that are potentially subject to SOX or DFA whistleblower requirements should ensure that they are prepared by creating policies and procedures that address how they will respond to and protect whistleblowers. These policies and procedures must be appropriately tailored to take into account factors such as the size of the company, the statutory whistleblower provisions that apply, and the nature of its business. At a minimum, whistleblower policies should include the following three types of guidance.

First, the whistleblower policy needs to make clear how an employee or external party can report information about potential misconduct. There are a number of methods that firms can use to facilitate whistleblower reports, including designating an employee from legal or compliance who will receive those reports, creating a web-based interface for making reports, or creating a telephone hotline. Ultimately, the company should adopt one or more methods that will best facilitate reports. Regardless of the method chosen, whistleblowers must also be able to escalate the report to a designated senior employee or board member in the event that the conduct implicates legal, compliance or senior executive management.

Second, the policy should explain how the company will investigate a whistleblower claim. This aspect of the policy should not mandate that specific steps will be followed in each case, as the actual nature and scope of any investigation will depend heavily on the nature and circumstances of the claim. Among the aspects that may be included are: (1) who is responsible for initially investigating a whistleblower claim; (2) who is responsible for making an initial determination on the merit of the claim; (3) the circumstances under which the company will conduct a more extensive investigation; and (4) who is responsible for ultimately evaluating the whistleblower report and implementing remedial improvements if necessary.

Finally, the policy should ensure that when the identity of a whistleblower is known and the whistleblower is an employee, steps are taken to protect that person from retaliation. This protection could include designating an employee from legal or compliance to monitor the status of the whistleblower to ensure that they are not subject to adverse actions. Additionally, the policy should make clear that any personnel who retaliate against a whistleblower will be subject to discipline.

44 Id. § 741(2)-(3).

45 N.Y. Civ. Serv. § 75-b.

### 20.2.2 Responding to a whistleblower report

Once a company learns that a whistleblower report has been made, it should adhere to its whistleblower policy. First, the company should assess the whistleblower's claim to determine what responsive action is appropriate. As discussed above, the nature of the inquiry will depend on the claim, but could range from an informal assessment by the compliance team to a formal investigation conducted by external counsel. Ultimately, the determination of how to investigate the claim will depend on the severity of the alleged conduct and the credibility of the claim. In conducting the inquiry, it is critical that the company make clear to any employees who are interviewed that even though the substance of the interview may be protected by the company's attorney–client privilege, the employee retains the right to disclose the facts discussed during the interview to the appropriate authorities.[46]

Second, in the case of a whistleblower report by an employee whose identity is known, in addition to the steps outlined in the whistleblower policy to protect the employee, the company should also ensure that it has documented any previous warnings or disciplinary actions taken against the employee, as well as adhere to consistent disciplinary procedures. Such documentation and adherence will, if necessary, support the company's position that a whistleblower employee was disciplined or terminated for conduct unrelated to a whistleblower report.

### 20.2.3 Defending anti-retaliation suits

If a whistleblower brings a retaliation action it will be difficult, if not impossible, to defeat the action at an early stage in the litigation. This difficulty exists because the standard for what constitutes an adverse employment action is purposely vague to allow for 'a factual determination on a case-by-case basis',[47] which has been interpreted by courts to reflect a 'congressional intent to prohibit a very broad spectrum of adverse action against . . . whistleblowers'.[48] As a result, courts have refused to create a bright-line standard for what constitutes an adverse employment action and instead 'pore over each case to determine whether the challenged employment action' constitutes an adverse action.[49] While any action can be construed by an

46 See, e.g., *In re KBR, Inc.*, Securities Exchange Act Release No. 74619 (1 April 2015) (KBR agreed to settle charges that its standard form confidentiality provision, which stated that witnesses needed permission of the company to disclose matters discussed in internal investigation interviews, undermined the Program.). The company should also ensure that similar language is used in any interview conducted by counsel as part of an internal investigation.

47 DFA Implementation Release, at *8.

48 *Anthony Menendez v. Halliburton, Inc.*, 2011 WL 4915750, at *10 (ARB 13 September 2011) (SOX anti-retaliation claim).

49 *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997) (ADEA anti-retaliation claim).

employee as retaliatory, in practice, whistleblower claims are generally predicated on conduct, such as dismissals,[50] demotions[51] or decreased compensation.[52]

Despite these difficulties, there are certain defences that may be successfully asserted in a retaliation lawsuit. First, an employer can argue that there was no causal connection between the protected activity and the adverse employment decision.[53] Two factors that can sever the causal connection are the passage of time or a legitimate intervening event. The passage of time between a whistleblower's report and their termination can demonstrate that the adverse action was not retaliatory. The Second Circuit has declined to establish a bright-line rule,[54] but in the absence of additional evidence of a defendant's retaliatory motive, the passage of two months may be sufficient to sever the causal connection.[55] However, to the extent that there is evidence of other retaliatory actions against the whistleblower, courts will allow for a longer gap between the protected activity and termination.[56] Similarly, a legitimate intervening event that occurs after the whistleblower's disclosure to the SEC will sever the causal connection and create a non-retaliatory justification for the termination. For example, one court granted summary judgment for an employer because, after making his disclosure to the SEC, the whistleblower told investors that the external directors were 'worthless', which provided a non-retaliatory justification for the whistleblower's dismissal.[57] However, because causation is generally a question of fact, a court is unlikely to decide as a matter of law that either the passage of time or an intervening event has severed the causal chain.[58]

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50 See e.g., *Ott*, 2012 WL 4767200 at *3 (employee alleged that she was terminated for reporting to the SEC that she believed that the hedge fund's trading policy allowed the firm to trade ahead of customer orders).

51 See, e.g., *In re Paradigm Capital Management, Inc.*, S.E.C. File No. 3-15930 (2014) (hedge fund settled claims by SEC that it retaliated against an employee who was relieved of his responsibilities following complaint).

52 See, e.g., *O'Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506, 508 (S.D.N.Y. 2008) (SOX whistleblower allegations were adequately pled where defendant reduced plaintiff's level of responsibility and compensation shortly after plaintiff reported defendant's alleged fraudulent activity).

53 *Fraser v. Fiduciary Trust Co. Int'l*, No. 04 CIV. 6958 (PAC), 2009 WL 2601389, at *6 (S.D.N.Y. 25 August 2009) aff'd, 396 F. App'x 734 (2d Cir. 2010).

54 *Gorman–Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 554 (2d Cir. 2001).

55 *Garrett v. Garden City Hotel, Inc.*, No. 05-CV-0962, 2007 WL 1174891, at *21 (E.D.N.Y. 19 April 2007) (collecting cases).

56 See, e.g., *Mahony v. KeySpan Corp.*, No. 04 CV 554 SJ, 2007 WL 805813, at *6 (E.D.N.Y. 12 March 2007) (denying motion for summary judgment in SOX whistleblower case despite 13-month gap between protected activity and termination because a 'reasonable juror could find that the string of retaliatory acts culminating in Plaintiff's termination is evidence that Plaintiff's protected activity was a contributing factor in the adverse employment action').

57 *Feldman*, 752 F.3d at 349.

58 See, e.g., *Mahony*, 2007 WL 805813, at *6. ('The gap in time between protected activity and adverse employment action is merely one factor which a jury can consider when determining causation. A jury may look to other facts to decide whether the protected activity precipitated the adverse employment action, including evidence of a strained relationship between the parties that portended the employee's termination.')

An employer could argue that the whistleblower did not have a reasonable belief that the alleged conduct constituted a violation or potential violation of the securities law. In particular, whistleblower complaints need to provide more than 'self-serving averments'[59] or 'bald statement[s]'[60] in support of the claim that the plaintiff had a reasonable belief that the conduct was illegal.

There are certain defences that may be more applicable to either DFA or SOX whistleblower claims. First, DFA whistleblower claims may be amenable to arbitration. As a general principle, US federal courts 'strongly [favour] arbitration as an alternative dispute resolution process',[61] and statutory claims may be submitted to arbitration unless the statute explicitly prohibits arbitration.[62] As a result, some courts have held that DFA retaliation claims are amenable to arbitration, although a prohibition on arbitration was added to other whistleblower retaliation statutes by the DFA.[63] The Third Circuit, the only circuit court to examine this issue so far, has concluded that 'although Congress conferred on whistleblowers the right to resist the arbitration of certain types of retaliation claims, that right does not extend to Dodd-Frank claims arising under [the Dodd-Frank whistleblower provision]'.[64] SOX claims, on the other hand, are not arbitrable as a result of an amendment to SOX that was passed as part of the DFA.[65]

Finally, in some instances, an employer can argue that an anti-retaliation claim is barred because it is extraterritorial. In *Liu Meng-Lin v. Siemens AG*, for example, the Second Circuit held that DFA whistleblower protection does not generally apply extraterritorially and that the plaintiff, a resident of Taiwan who was employed by the Chinese subsidiary of a German company, did not have a valid anti-retaliation complaint because neither his report to superiors in China and Germany regarding allegedly corrupt activities that took place outside the United States, nor the decision by Siemens in Germany or China to terminate him, had a sufficient connection to the United States to treat it as a domestic application of the statute.[66] The Second Circuit declined to define the precise boundary between extraterritorial and domestic applications of the anti-retaliation provision because the case was 'extraterritorial by any reasonable definition',[67] but the Second Circuit affirmed the dismissal of foreign whistleblower claims again in *Ulrich v. Moody's Corp.* where the alleged whistleblower

59 *Livingston v. Wyeth Inc.*, 2006 WL 2129794, *10 (M.D.N.C. 28 July 2006).

60 *Nielsen v. AECOM Tech. Corp*', 762 F.3d 214, 223 (2d Cir. 2014).

61 *Nat'l City Golf Fin. v. Higher Ground Country Club Mgmt. Co., LLC*, 641 F. Supp. 2d 196, 201 (S.D.N.Y. 2009).

62 *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 226 (1987).

63 See, e.g., *Murray v. UBS Sec.*, LLC, 2014 WL 285093, *11 (S.D.N.Y. 27 January 2014) (holding SOX's prohibition on pre-dispute arbitration does not apply to DFA retaliation claims); *Ruhe v. Masimo Corp.*, 2011 WL 4442790, *5 (C.D. Cal. 16 September 2011) (refusing to read an anti-arbitration provision into 15 U.S.C. § 78u).

64 *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 493 (3d Cir. 2014).

65 18 U.S.C. § 1514A(e)(2).

66 *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 179-180 (2d Cir. 2014).

67 Id.

was a US citizen and occasionally interacted with the company's US managers.[68] This suggests that many foreign whistleblowers may not be protected by the DFA.[69]

### Anti-retaliation suits by the SEC 20.2.4

In addition to potential suits by a whistleblower, the SEC has asserted an independent right to bring whistleblower retaliation claims. In June 2014, the SEC brought its first enforcement action against a registered investment adviser for retaliation.[70] Subsequent actions show that this remains an enforcement priority for the SEC.[71] In particular, the SEC may enforce the DFA anti-retaliation provision for 'conduct occurring outside the United States that has a foreseeable substantial effect within the United States'.[72] Therefore, even if a company can successfully avoid a retaliation suit by a whistleblower on extraterritorial grounds, the SEC could still bring a suit for the same conduct.

## The whistleblower's perspective: representing whistleblowers 20.3

In determining whether to advise a client to make a whistleblower report, there are several key preliminary considerations. First, if the client is implicated in the wrongdoing this will impact whether they receive a whistleblower award and the amount of any award. The SEC in the DFA Implementation Release noted that 'culpable whistleblowers can enhance the Commission's ability to detect violations of the federal securities laws, increase the effectiveness and efficiency of the Commission's investigations and provide important evidence for the Commission's

68 *Ulrich v. Moody's Corp.*, 721 Fed.Appx. 17, 19 (2d Cir. 2018) (affirming the District Court's dismissal of the whistleblower complaint because 'although Ulrich, a United States citizen who sometimes interacted with Moody's United States managers, did allege more connection with the United States than was evident in *Liu*, he was nevertheless an overseas permanent resident working for a foreign subsidiary of Moody's, and the alleged wrongdoing and protected activity took place outside the United States').

69 Employers may also be able to argue that the SOX whistleblower provisions do not apply to foreign employees. See, e.g., *Asadi v. G.E. Energy (USA) LLC*, No. 4:12-345, 2012 WL 2522599 (S.D. Tex. 28 June 2012) (Neither SOX nor DFA anti-retaliation provisions protected US citizen employed by US company who was temporarily relocated to a foreign country because 'the majority of events giving rise to the suit occurred in a foreign country'). See also *In re Li Tao Hu*, ALJ Case No. 2017-SOX-00019, 2019 WL 5089597, at *5 (18 Sep. 2019) (The complaint of a foreign employee in a foreign office of a US-based company was not valid under SOX just because the retaliation decision ultimately took place in the US and the misconduct may have affected the US market). But see *Walters v. Deutsche Bank, et al.*, 2008-SOX-70, slip op. at 41 (ALJ 20 March 2009) (US citizen working in Switzerland was protected as a whistleblower because 'all elements essential to establishing a *prima facie* violation of Section 806 allegedly occurred in the United States').

70 *In re Paradigm Capital Management, Inc.*, S.E.C. File No. 3-15930 (2014).

71 See, e.g., *In re KBR, Inc.*, S.E.C. File No. 3-16466 (2015) (cease and desist order forbidding KBR, Inc. from violating Rule 21F-17, which prohibits companies from taking any action to impede whistleblowers from reporting possible securities violations to the SEC and imposing civil monetary penalties of US$130,000 for violations).

72 15 U.S.C. § 78aa(b)(2).

enforcement actions'.[73] As such, pursuant to SEC regulations, the SEC 'will assess the culpability or involvement of the whistleblower in matters associated with the Commission's action or related actions' in determining the amount of a whistleblower award.[74] In at least one case, it appears that the SEC gave an award to a culpable whistleblower. In an April 2016 order, the SEC stated that a whistleblower was subject to a parallel proceeding and that the award was 'subject to an offset for any monetary obligations', including disgorgement, prejudgment interest, and penalty amounts that the whistleblower had yet to pay towards a judgment.[75] In ordering this relief, the SEC noted that the whistleblower had previously been advised of the potential offset and did not object.[76]

Second, counsel should consider whether the putative whistleblower is subject to any professional confidentiality obligations that would be implicated. In particular, SEC regulations generally exclude attorneys from recovering under the Program. Information obtained through communications that are subject to the attorney–client privilege or information obtained 'in connection with the legal representation of a client' is generally not considered 'original information'.[77] These exclusions are clearly directed at attorneys to 'send a clear, important signal to attorneys, clients, and others that there will be no prospect of financial benefit for submitting information in violation of an attorney's ethical obligations'.[78] Similarly, certain fiduciaries and professionals engaged by the company who obtained the information through those roles are generally not deemed to have 'original information' about misconduct.[79] However, there is no general bar on the use of information that is otherwise deemed confidential by a company.

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73 DFA Implementation Release, at *89.

74 17 C.F.R. § 240.21F-6(b)(1).

75 Order Determining Whistleblower Award Claim, Exchange Act Release No. 34-77530, 2016 WL 1328926 (5 April 2016).

76 Id.

77 See 17 C.F.R. § 240.21F-4(b)(4)(i)-(ii).

78 See DFA Implementation Release, at *27. The SEC has, however, provided for exceptions to the attorney exclusions in order to balance an attorney's ethical obligations with the desire to prevent securities law violations. As a result, information obtained through a confidential communication or legal representation will be deemed 'original information' in three situations: (1) if the attorney is representing an issuer and reasonably believes that the disclosure is necessary to prevent the issuer from committing a material violation of the securities law or to rectify a material violation, which is likely to cause substantial injury to financial interests, or to prevent perjury or fraud upon the SEC in the course of an SEC investigation or administrative proceeding; (2) when allowed to make the disclosure pursuant to applicable state attorney conduct rules; or (3) 'otherwise'. The SEC has not provided guidance on the circumstances that would qualify an attorney to invoke the 'otherwise' exclusion.

79 17 C.F.R. § 240.21F-4(b)(4)(iii). The SEC has stated that information from these sources will not be deemed 'original' if: (1) the whistleblower is in a leadership position and learned the information either from another person or in connection with internal compliance procedures; (2) the whistleblower is an internal audit or compliance employee or external adviser; (3) the whistleblower was retained to conduct an internal investigation into the company; or (4) the whistleblower is an employee of a public accounting firm, and the information was obtained while performing a function required under the federal securities laws, and relates to a violation by the client or its employees.

### Disclosing to the SEC 20.3.1

Neither DFA nor SOX whistleblower provisions mandate that a whistleblower make their initial disclosure to the SEC. Therefore, a whistleblower can choose to disclose initially to the SEC or first make an internal report to the employer.

From a rewards perspective, there is no benefit to disclosing first to the SEC. Pursuant to SEC regulations, the date of a whistleblower's initial internal report will be treated as the date of disclosure to the SEC, so long as the whistleblower makes a report to the SEC within 120 days of the internal report or a report to another federal agency.[80] Therefore, delaying SEC disclosure to make an internal report first will not affect whether the whistleblower is the first person to provide original information and thereby qualifies for an award.[81]

Moreover, reporting directly to the SEC could, in theory, reduce an award as one of the factors that the SEC considers in determining the amount of an award is whether the whistleblower reported the potential misconduct through internal company compliance systems and whether the whistleblower co-operated with any internal investigations.[82] Therefore, reporting directly to the SEC could reduce an award if the whistleblower is perceived to have circumvented the company's internal reporting system.

However, there is one major potential benefit to first disclosing to the SEC – guaranteed protection as a whistleblower under the DFA. In particular, the Supreme Court has held that individuals must report to the SEC in order to be protected as whistleblowers under the DFA.[83] Therefore, if an employee only makes an internal report, the employee will lose the anti-retaliation protection provided by the DFA.[84] Moreover, because the SEC treats all whistleblower complaints as confidential and the Program provides additional confidentiality protections to ensure that a whistleblower's identity is protected, whistleblowers receive an added protection through SEC disclosure.[85]

Once a whistleblower decides to make a report to the SEC, the process itself is fairly simple. Whistleblowers may submit a complaint either through the online Tips, Complaints, and Referrals (TCR) Portal on the SEC's whistleblower website or by mailing or faxing a TCR Form to the SEC Office of the Whistleblower.[86]

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80 17 C.F.R. § 240.21F-4(b)(7); see also, In re the Claim for an Award in Connection with [Redacted], Securities Exchange Act of 1934 Release No. 82996 (5 April 2018) (awarding US$2.2 million to whistleblower who initially provided notification to another federal agency).

81 See 17 C.F.R. § 240.21F-4(b) (defining 'original information' as information '[n]ot already known to the Commission for any other source').

82 See 17 C.F.R. § 240.21F-6(a)(4).

83 *Digital Realty*, 138 S. Ct. at 769; see also *Verble v. Morgan Stanley Smith Barney, LLC*, No. 3:14-CV-74, 2015 WL 8328561 (E.D. Tenn. 8 December 2015) (employee who was dismissed for assisting federal authorities, including the FBI, was not a protected whistleblower because he had not provided information to the SEC).

84 *Digital Realty*, 137 S. Ct. at 769.

85 17 C.F.R. § 240.21F-7. For added protection, a whistleblower may also submit a complaint anonymously through an attorney. See 2020 Annual Report at 4.

86 See https://www.sec.gov/about/offices/owb/owb-tips.shtml.

Once the form is received, it will be reviewed by Division of Enforcement staff, who will then determine who is best placed to investigate the allegations.[87] In some instances, the TCR will be sent to another federal or state enforcement agency, in which case information that could identify the whistleblower is generally withheld.[88]

### 20.3.2 Recent SEC and CFTC awards

The SEC awarded over US$168 million in whistleblower awards to 13 individuals in fiscal year 2018,[89] over $60 million in whistleblower awards to eight individuals in FY2019,[90] and over $175 million to 39 individuals as of November 2020,[91] including the largest award ever given to an individual.[92] On 19 March 2018, the SEC awarded US$83 million to three whistleblowers related to the SEC's US$415 million settlement with Merrill Lynch in 2016, with two whistleblowers sharing approximately US$50 million and the third receiving US$33 million for their significant information, prompting the SEC to open two investigations and their ongoing assistance.[93] On 26 March 2019, the SEC awarded US$50 million to two whistleblowers related to the SEC's US$367 million settlement with JPMorgan Chase & Co in 2015, with one whistleblower receiving US$37 million – the fourth-largest award – and the other US$13 million for their information and assistance.[94] On 4 June 2020, one whistleblower received nearly US$50 million after providing a detailed, first-hand account of a company's misconduct, allowing the SEC to bring a successful enforcement action and return a large sum of money to affected investors.[95] This award surpassed the March 2018 award to become the largest ever given to an individual in the SEC's whistleblower programme.

87 See SEC, Division of Enforcement, Enforcement Manual (4 June 2015), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

88 Id.

89 SEC, 2018 Annual Report to Congress – Whistleblower Program, 1 (2018), https://www.sec.gov/files/sec-2018-annual-report-whistleblower-program.pdf [2018 Annual Report on Whistleblower Program].

90 SEC, 2019 Annual Report to Congress – Whistleblower Program, 9 (2019), https://www.sec.gov/files/sec-2019-annual-report-whistleblower-program.pdf.

91 SEC, Division of Enforcement, 2020 Annual Report, 5 (2020), https://www.sec.gov/files/enforcement-annual-report-2020.pdf.

92 SEC, Release No. 89002 (4 June 2020).

93 SEC, press release, 'SEC Announces Its Largest-Ever Whistleblower Awards', https://www.sec.gov/news/press-release/2018-44; see also Pete Schroeder, 'U.S. SEC Awards Merrill Lynch Whistleblowers a Record $83 Million', *Reuters*, 19 March 2018, https://www.reuters.com/article/us-usa-sec-whistleblower/u-s-sec-awards-merrill-lynch-whistleblowers-a-record-83-million-idUSKBN1GV2MT; 2018 Annual Report on Whistleblower Program, supra note 89, at 10.

94 SEC, press release, 'SEC Awards $50 Million to Two Whistleblowers', https://www.sec.gov/news/press-release/2019-42; see also Matt Robinson and Neil Weinberg, 'Whistleblowers Awarded $50 Million by SEC in JPMorgan Case', *Bloomberg*, 26 March 2019, https://www.bloomberg.com/news/articles/2019-03-26/two-whistleblowers-awarded-50-million-for-aiding-sec-case.

95 SEC, Release No. 89002 (4 June 2020).

In addition to the aforementioned trend, on 24 May 2019, the SEC granted its first award under the internal reporting provision of the Program.[96] According to the SEC, the whistleblower sent an anonymous tip-off of alleged wrongdoings to his company before submitting the same information to the SEC within 120 days. The company opened an internal investigation and reported the allegations of misconduct to the SEC, which then opened its own investigation. The company also reported the results of its internal investigation, leading the SEC to take enforcement actions. The SEC credited the whistleblower for the results of the company's internal investigation and awarded him over US$4.5 million.

The SEC has also granted whistleblower awards to individuals who have engaged in reported misconduct. On 14 September 2018, the SEC provided a financial award to a claimant, although the claimant 'unreasonably delayed in reporting information to the Commission and was culpable'.[97] Similarly, on 26 March 2019, the SEC awarded a whistleblower (Claimant A) an unreported sum, despite Claimant A's participation in the reported misconduct.[98]

The CFTC has also shown an upward trend in granting whistleblower awards in increasing amounts. Starting with its first award of US$246,000 on 20 May 2014, the CFTC issued one award for US$300,000 in 2015, two awards for a total of US$11,551,320 in 2016, five awards for a total of US$75,575,113 in 2018, and five awards for a total of approximately US$15 million in the 2019 fiscal year.[99] Similarly, the CFTC's whistleblower programme has seen significant advancement and growth.

The three most notable CFTC whistleblower awards took place in 2018. On 12 July 2018, the CFTC granted its largest award of approximately US$30 million to one whistleblower who provided key information related to the 2015 settlement with JPMorgan Chase & Co, which also settled with the SEC.[100] On 16 July 2018, the CFTC gave an award to a foreign whistleblower for the first time, providing over US$70,000 for significant contributions to the CFTC investigation and demonstrating the international reach of the whistleblower programme through

96 SEC, press release, 'SEC Awards $4.5 Million to Whistleblower Whose Internal Reporting Led to Successful SEC Case and Related Action', https://www.sec.gov/news/press-release/2019-76.

97 SEC, Release No. 84125 (14 September 2018).

98 SEC, Release No. 85412 (26 March 2019). Claimant A's reward was reduced because Claimant A delayed reporting and continued to passively benefit financially from the 'underlying misconduct during a portion of the period of delay'.

99 US Commodity Futures Trading Commission (CFTC), Annual Report on the Whistleblower Program and Customer Education Initiatives (October 2019), https://whistleblower.gov/sites/whistleblower/files/2019-10/FY19%20Annual%20Whistleblower%20Report%20to%20Congress%20Final.pdf.

100 CFTC, press release, 'CFTC Announces Its Largest Ever Whistleblower Award of Approximately $30 Million', https://www.cftc.gov/PressRoom/PressReleases/7753-18; Henry Cutter, 'JPMorgan Whistleblower Set to Get Largest Payout from CFTC', *Wall St.* J., 12 July 2018, https://www.wsj.com/articles/jpmorgan-whistleblower-set-to-get-largest-payout-from-cftc-1531421603?mod=djemRiskCompliance&ns=prod/accounts-wsj.

an online system.[101] On 2 August 2018, the CFTC granted multiple whistleblower awards of more than US$45 million in total, and the Director of the CFTC's Division of Enforcement announced he expected the trend to continue.[102] While the awards in fiscal year 2020 have not been as large as those handed down in 2018, the CFTC has awarded close to US$20 million to whistleblowers so far.

## 20.4 Filing a qui tam action under the False Claims Act

Individuals who report fraud against the United States government have another option for disclosing information – the False Claims Act. This Act was created in 1863 initially to combat price-gouging during the Civil War, but the modern incarnation of the statute is a result of congressional concern regarding defence procurement fraud.[103] Since the statute was enhanced in 1986, there has been a significant growth in False Claims Act suits, from 30 in 1987 to 633 in 2019.[104] As a result of these suits, the US Department of Justice (DOJ) collected US$62 billion between 1986 and 2019, including over US$3 billion in the 2019 fiscal year alone.[105]

The False Claims Act can be used to prosecute claims for false monetary claims against the government, false statements in aid of false claims, conspiracies to defraud the government into paying a false claim, or false statements intended to reduce an obligation to the government.[106] Moreover, pursuant to the False Claims Act, private individuals – referred to as relators – may bring *qui tam* claims on behalf of the government alleging that a defendant has committed fraud against the US government.[107] If the prosecution of the *qui tam* claim is successful, the relator may receive between 15 per cent and 30 per cent of the recovery.[108] This can result in substantial compensation for a whistleblower, as False Claims Act defendants may be liable for penalties of US$5,000 to US$10,000 per violation and for treble damages.[109]

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101 CFTC, press release, 'CFTC Announces First Whistleblower Award to a Foreign Whistleblower', https://www.cftc.gov/PressRoom/PressReleases/7755-18.

102 CFTC, press release, 'CFTC Announces Multiple Whistleblower Awards Totaling More than $45 Million', https://www.cftc.gov/PressRoom/PressReleases/7767-18.

103 *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649-51 (D.C. Cir. 1994). Defence contracting remains one of the most frequent targets of *qui tam* complaints, constituting approximately 14 per cent of *qui tam* complaints. The healthcare industry is the most frequent target, accounting for approximately 58 per cent of *qui tam* complaints. US Dep't of Justice (DOJ), Fraud Statistics – Overview: 1 October 1987 – 30 September 2017 (19 December 2017), https://www.justice.gov/opa/press-release/file/1020126/download.

104 DOJ, press release, 'Justice Department Recovers over $3 billion from False Claims Act Cases in Fiscal Year 2019,' (9 January 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019.

105 Id.

106 31 U.S.C. § 3729.

107 31 U.S.C. § 3730(b).

108 See 31 U.S.C. § 3730(d). However, as discussed further below, this can in some circumstances be reduced to 10 per cent or less. See infra notes 114 to 120 and accompanying text.

109 31 U.S.C. § 3729.

### How a qui tam action operates 20.4.1

To bring a *qui tam* action, the relator must file their complaint in federal court under seal.[110] The initial complaint is only served on the DOJ, which has 60 days to examine the merits of the claim.[111] During this 60-day period (which is often subject to extensions), the DOJ will determine whether to terminate or settle the claim, intervene and take 'primary responsibility' for the claim, or decline to intervene and allow the relator to proceed alone.[112] After this period expires, the complaint is unsealed and the defendant will receive notice of the claim.

At this stage, the government's 'ultimate election among the options has a direct effect on the relator's right to share in a recovery'.[113] If the government decides to intervene in the action, the relator is entitled to 15 per cent to 25 per cent of any recovery, while the government receives the remaining recovery.[114] The precise amount will 'depend upon the extent to which the person substantially contributed to the prosecution of the action'.[115] If, on the other hand, the government decides not to pursue the case, the relator will be entitled to 25 per cent to 30 per cent of the recovery, with the government again receiving the remainder of the recovery. The relator is also entitled to 'an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs'.[116] However, one study has revealed that the majority of plaintiffs voluntarily dismiss the *qui tam* action if the DOJ declines to intervene,[117] despite the potential for a larger award.

In addition to this basic framework, there are also limitations on awards, which may reduce or eliminate a possible award. First, a relator's award will be reduced if they 'planned and initiated' the False Claims Act violation.[118] Second, if the court determines that the information is 'based primarily on disclosures of specific information' relating to governmental investigations or news accounts, the award will be reduced to no more 'than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation'.[119] Finally, a relator is entitled to no award if they are 'convicted of criminal conduct arising from his or her role in the

110 31 U.S.C. § 3730(b).

111 31 U.S.C. § 3730(b).

112 31 U.S.C. § 3730(b)-(c).

113 *Roberts v. Accenture*, LLP, 707 F.3d 1011, 1015 (8th Cir. 2013).

114 31 U.S.C. § 3730.

115 Id.

116 Id.

117 See David Freeman Engstrom, 'Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act', 107 *Nw. U. L. Rev.* 1717, 1718 (stating that in a randomly selected 460 case subsample of the 4,000 unsealed *qui tam* actions filed between 1986 and 2011 'roughly 60% of cases in which DOJ declined intervention appeared to generate no further litigation prior to a voluntary dismissal by the relator').

118 31 U.S.C. § 3730(d)(3).

119 31 U.S.C. § 3730(d)(1).

violation'.[120] Additionally, there are provisions that preclude filing additional suits based on substantially similar *qui tam* or government enforcement proceedings.[121] These provisions are intended to achieve 'the golden mean between adequate incentives for whistle-blowing insiders . . . and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own'.[122]

In addition to determining the quantum of a *qui tam* award, the DOJ's decision may also have a substantial impact on the outcome of the lawsuit. Statistics published by the DOJ show that cases where the DOJ intervenes are substantially more likely to generate recoveries than declined cases.[123] DOJ declination may also signal a lack of merit to the court.[124]

Recently enacted DOJ policy also encourages DOJ attorneys to 'consider whether the government's interests are served' by seeking dismissal of the *qui tam* action.[125] Pursuant to this policy, DOJ attorneys are encouraged to seek dismissal in order to (1) curb meritless *qui tam* actions, (2) prevent 'parasitic or opportunistic' actions that duplicate a pre-existing investigation, (3) prevent interference with government programmes, (4) preserve the DOJ's litigation prerogatives, (5) safeguard national security, (6) preserve government resources or (7) address 'egregious procedural errors' that would frustrate a proper investigation.[126]

However, even if the DOJ decides not to intervene a case, it still has an oversight role in the litigation. First, the DOJ retains the continuing right to dismiss or settle an action being prosecuted by a relator,[127] although at least some courts

120 Id.

121 31 U.S.C. § 3730(e)(4)(A).

122 *United States ex rel. Springfield Terminal R. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

123 See DOJ, Fraud Statistics – Overview: 1 October 1987 – 30 September 2015 (12 July 2016), https://www.justice.gov/civil/file/874921/download (indicating that settlements and judgments in qui tam actions where the government intervened represented 94 per cent of all *qui tam* settlements and judgments obtained between 1987 and 2015).

124 See, e.g., *United States ex rel. Jamison v. McKesson Corp*., 649 F.3d 322, 331 (5th Cir. 2011) (noting that DOJ decision to intervene in cases involving 7 of 400 defendants suggested that the unintervened claims 'presumably lacked merit'); *United States ex rel. Karvelas v. Melrose-Wakefield Hosp*., 360 F.3d 220, 242 n.31 (1st Cir. 2004) ('[T]he government's decision not to intervene in the action also suggested that [relator's] pleadings of fraud were potentially inadequate.'); *United States ex rel. Mikes v. Straus*, 78 F. Supp. 2d 223, 225-26 (S.D.N.Y. 1999) (suggesting that 'the reason the Government chose not to intervene in this matter is its recognition that Relator's allegations . . . were a 'stretch' under the False Claims Act'). But see *United States ex rel. Williams v. Bell Helicopter Textron Inc*., 417 F.3d 450, 455 (5th Cir. 2005) (noting that 'a decision not to intervene may not [necessarily be] an admission by the United States that it has suffered no injury in fact, but rather [the result of] a cost-benefit analysis' (citations and internal quotation marks omitted)); *United States ex rel. Downy v. Corning*, Inc., 118 F. Supp. 2d 1160, 1170 (D.N.M. 2000) (noting that intervention decision may have been driven by a 'lack of available Assistant United States Attorneys' or 'respect for the skill of the relator's attorneys').

125 DOJ, Justice Manual § 4-400.

126 Id.

127 31 U.S.C. § 3730(c)(2)(b).

have suggested that this is not an absolute right.[128] Second, the DOJ retains the right to veto private dismissals or settlements because any judgment will have preclusive effect on a future lawsuit by the US government based on the same facts.[129] That said, a minority of courts have held that the DOJ can only object by showing 'good cause' in a case where it has not intervened.[130]

### Effects of filing a qui tam action 20.4.2

A *qui tam* action can have a substantial impact on both the relator and the defendant. First, the relator faces both reputational and financial risk. By filing a *qui tam* action the relator has agreed to be publicly identified because the unsealed complaint will identify them as the complainant.[131] Relators have tried to avoid this consequence by moving to dismiss and seal cases if the DOJ declines to intervene, but have met with, at best, limited success.[132] For relators who are still employed by the defendant, this risk is mitigated by the anti-retaliation provisions in the False Claims Act, which provide for reinstatement and double damages in the event of retaliation.[133] Nonetheless, depending on the situation, relators may have legitimate concerns about the impact on their professional reputations.

Relators often face additional financial risks if the government declines to intervene. In particular, relators may be responsible for the defendant's reasonable legal fees if the defendant prevails and 'the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment'.[134]

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128 See *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) ('A two step analysis applies here to test the justification for dismissal: (1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose.') [Internal citations and quotations omitted.]

129 See, e.g., *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 160 (5th Cir. 1997) (noting the 'danger that a relator can boost the value of settlement by bargaining away claims on behalf of the United States').

130 *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 722 (9th Cir. 1994); but see *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 931 n.8 (10th Cir. 2005). ('Even where the Government has declined to intervene, relators are required to obtain government approval prior to entering a settlement or voluntarily dismissing the action.')

131 *United States ex rel. Wenzel v. Pfizer, Inc.*, 881 F. Supp. 2d 217, 222–23 (D. Mass. 2012) ('[Relator] filed his claim with the expectation that his identity would be revealed to the public in the event that the government entered the case'). Relators have attempted to avoid this outcome by filing under a pseudonym or creating a corporation to file the complaint. This strategy, however, will only work if the case is not litigated. If it is litigated, this is unlikely to provide significant protection because the defendant is likely to seek discovery regarding the relator's identity and the basis of their knowledge. Moreover, in some cases there is no way to effectively hide the source of the information. See, e.g., id. at 223 (noting that 'it is doubtful that redaction would provide any protection given the very specific allegations contained in the complaint').

132 Id. at 221 (collecting cases and noting that '[m]ost courts have . . . decided that a relator's general fear of retaliation is insufficient to rebut the presumption of public access').

133 31 U.S.C. § 3730(h).

134 31 U.S.C. § 3730(d)(4). US courts also have the inherent authority to impose sanctions, as well as authority pursuant to Rule 11 of the Federal Rules of Civil Procedure.

A *qui tam* action also creates financial and reputational risks for a defendant. A successful *qui tam* action could cost a corporation millions, if not billions, of dollars.[135] Moreover, defendants also risk debarment from additional federal contracts.[136] From a reputational perspective, the corporation faces negative publicity associated with public accusations of committing fraud against the government, although at least one court has suggested that this impact is minimised when the DOJ declines to intervene.[137]

135 See DOJ, press release, 'GlaxoSmithKline to Plead Guilty and Pay $3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data' (2 July 2012), https://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-and-pay-3-billion-resolve-fraud-allegations-and-failure-report (announcing settlement of civil and criminal actions against pharmaceutical company, including a US$1.043 billion settlement resolving four related *qui tam* actions).

136 31 U.S.C. § 3729 (2012).

137 *United States ex rel. Pilon v. Martin Marietta Corp*., 60 F.3d 995, 999 (2d Cir. 1995). ('[A] defendant's reputation is protected to some degree when a meritless qui tam action is filed, because the public will know that the government had an opportunity to review the claims but elected not to pursue them.')

# Appendix 1

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ISBN 978-1-83862-272-5