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The Practitioner's Guide to Global Investigations

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

SEVENTH EDITION

Editors
Judith Seddon, Eleanor Davison, Christopher J Morvillo, Luke Tolaini, Celeste Koeleveld, F Joseph Warin, Winston Y Chan

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

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Enquiries concerning reproduction should be sent to:
natalie.hacker@lbresearch.com
Enquiries concerning editorial content should be directed to the Publisher:
david.samuels@lbresearch.com

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Publisher's Note

The Practitioner's Guide to Global Investigations is published by Global Investigations Review (www.globalinvestigationsreview.com) – a news and analysis service for lawyers and related professionals who specialise in cross-border white-collar crime investigations.

The Guide was suggested by the editors to fill a gap in the literature – namely, how does one conduct (or conduct oneself) in such an investigation, and what should one have in mind at various times?

It is published annually as a two-volume work and is also available online and in PDF format.

The volumes

This Guide is in two volumes. Volume I takes the reader through the issues and risks faced at every stage in the life cycle of a serious corporate investigation, from the discovery of a potential problem through its exploration (either by the company itself, a law firm or government officials) all the way to final resolution – be that in a regulatory proceeding, a criminal hearing, civil litigation, an employment tribunal, a trial in the court of public opinion, or, just occasionally, inside the company's own four walls. As such it uses the position in the two most active jurisdictions for investigations of corporate misfeasance – the United States and the United Kingdom – to illustrate the practices and thought processes of cutting-edge practitioners, on the basis that others can learn much from their approach, and there is a read-across to the position elsewhere.

Volume II takes a granular look at law, regulation, enforcement and best practice in the jurisdictions around the world with the most active corporate investigations spaces, highlighting, among other things, where they vary from the norm.

Online

The Guide is available at www.globalinvestigationsreview.com. Containing the most up-to-date versions of the chapters in Volume I, the website also allows visitors to quickly compare answers to questions in Volume II across all the jurisdictions covered.

The publisher would like to thank the editors for their exceptional energy, vision and intellectual rigour in devising and maintaining this work. Together we welcome any comments or suggestions from readers on how to improve it. Please write to us at: insight@globalinvestigationsreview.com.

Preface

The history of the global investigation

For over a decade, the number and profile of multi-agency, multi-jurisdictional regulatory and criminal investigations have risen exponentially. Naturally, this global phenomenon exposes companies – and their employees – to greater risk of hostile encounters with foreign law enforcers and regulators than ever. This is partly owing to the continued globalisation of commerce, the increasing enthusiasm of some prosecutors to use expansive theories of corporate criminal liability to exact exorbitant penalties as a deterrent and public pressure to hold individuals accountable for the misconduct. The globalisation of corporate law enforcement has also spawned greater coordination between law enforcement agencies, domestically and across borders. As a result, the pace and complexity of cross-border corporate investigations has markedly increased and created an environment in which the potential consequences, direct and collateral, for individuals and businesses, are unprecedented.

The Guide

To aid practitioners faced with the challenges of steering a course through a cross-border investigation, this Guide brings together the perspectives of leading experts from across the globe.

The chapters in Volume I cover, in depth, the broad spectrum of law, practice and procedure applicable to investigations in the United Kingdom and United States. The volume tracks the development of a serious allegation (originating from an internal or external source) through all its stages, flagging the key risks and challenges at each step; it provides expert insight into the fact-gathering phase, document preservation and collection, witness interviews, and the complexities of cross-border privilege issues; it discusses strategies to resolve international probes successfully and manage government enforcers and corporate reputation throughout; and it covers the major regulatory and compliance issues that investigations invariably raise.

In Volume II, local experts from major jurisdictions across the globe respond to a common and comprehensive set of questions designed to identify the local nuances of law and practice that practitioners may encounter in responding to a cross-border investigation.

In the first edition, we signalled our intention to update and expand both parts of the book as the rules evolve and enforcers' appetites change. The Guide continues to grow in substance and geographical scope. By its third edition, it had outgrown the original

single-book format. The two parts of the Guide now have separate covers, but the hard copy should still be viewed – and used – as a single reference work. All chapters are made available online at www.globalinvestigationsreview.com and in other digital formats.

Volume I, which is bracketed by comprehensive tables of law and a thematic index, has been revised to reflect developments during the past year. These range from the introduction of compliance certifications now being required by the US Department of Justice from chief executive officers and chief compliance officers, at the conclusion of a monitorship, to the effect that the company's compliance programme is, broadly speaking, fit for purpose, to the DOJ's recent statements regarding its interest in corporate compensation systems that incentivise compliance by rewarding good behaviour and clawing back compensation for wrongdoing; to changes being brought about in the United Kingdom by the long-awaited Economic Crime (Transparency and Enforcement) Act 2022, whose introduction was accelerated by Russia's invasion of Ukraine on 24 February 2022. Most notable of the changes introduced was the removal of the requirement for the UK sanctions regulator, the Office for Financial Sanctions Implementation, to show that a person knew, or had reasonable cause to suspect, that they were in breach of sanctions, for a civil monetary penalty to be imposed, bringing the UK legal position into line with the position in the United States. Together with the increase in the sanctions targeting Russia, and a sharpened regulatory focus on sanctions controls, we can expect to see greater enforcement for breaches. Having expanded Volume I for the 2022 edition to incorporate ESG, we decided against commissioning further chapters. Instead we have chosen to consolidate and build on some of the newer chapters featuring rapid developments.

The questionnaire for Volume II continues to allow readers to gauge the developments in each jurisdiction profiled. It carries regional overviews that give insight into cultural issues and regional coordination by authorities. The second volume now covers 25 jurisdictions in Africa, the Americas, the Asia-Pacific region and Europe. As corporate investigations and enforcer co-operation cross more borders, we anticipate Volume II will become increasingly valuable to our readers: external and in-house counsel; compliance and accounting professionals; and prosecutors and regulators operating in this complex environment.

Judith Seddon, Eleanor Davison, Christopher J Morvillo, Luke Tolaini, Celeste Koeleveld, F Joseph Warin and Winston Y Chan

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6

Whistleblowers: The US Perspective

Daniel Silver and Benjamin A Berringer[1]

6.1 Overview of US whistleblower statutes

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

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 'a person may not discriminate' against truck drivers and certain other employees 'regarding pay, 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 18 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 of air carriers, their contractors and their subcontractors 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.

relate to specific conduct, such as motor vehicle safety issues,[7] violations of the Clean Air Act,[8] violations of the Clean Water Act,[9] anti-money laundering violations[10] and violations of the Affordable Care Act.[11] 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.[12]

The SEC whistleblower regimes 6.1.1

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'[13] 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

7 The Moving Ahead for Progress in the 21st Century Act prohibits discrimination by motor vehicle manufacturers, part suppliers and 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 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 Anti-Money Laundering Act contains a provision protecting employees from retaliation for reporting violations of the Bank Secrecy Act. 31 U.S.C. § 5323(g).

11 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.

12 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).

13 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 95 to 97 and accompanying text.

action in which the SEC obtains monetary sanctions over US$1 million.[14] The Program has been a significant success for the SEC. From August 2011 to November 2021, the Program received over 52,400 whistleblower reports from individuals in all 50 US states and 133 foreign countries.[15] In fiscal year 2022 alone, the SEC received over 12,300 whistleblower reports, the largest number of whistleblower tip-offs received in a fiscal year to date.[16] As a result of these reports, the SEC has instituted enforcement actions that have resulted in penalties of nearly US$6.5 billion and awarded over US$1.5 billion to 214 different whistleblowers.[17]

The Program rewards individuals for making reports pursuant to both SOX and DFA whistleblower provisions. Under both statutes, individuals qualify as whistleblowers if they report alleged misconduct and 'reasonably believe that the information [they] provide to the Commission . . . relates to a possible violation of the federal securities law'.[18] A belief is reasonable if it is both

14 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. However, putative whistleblowers should be aware that if their information leads to another agency bringing an action, the whistleblower may not be entitled to an award under the programme. *Hong v. SEC*, 2022 WL 2837385 (2d Cir. 2022) (upholding denial of whistleblower award because, though other agencies relied on the whistleblower's information, no related action had been brought by the SEC).

15 SEC, 2021 Annual Report to Congress – Whistleblower Program, 28, 31 (2021), https://www.sec.gov/files/owb-2021-annual-report.pdf.

16 SEC, SEC Whistleblower Office Announces Results for FY 2022, 1 (2022), https://www.sec.gov/files/2022_ow_ar.pdf..

17 Id..

18 17 C.F.R. § 240.21F-2(d)(ii). 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 Corp.*, 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, -042, 2011 WL 2165854, at *11 (ARB 25 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, Exchange Act Release No. 64545, 101 SEC 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, Nat. Ass'n*, 497 F. App'x. 588, 595 (6th Cir. 2012) ('an 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).

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'.[19]

To satisfy the subjective component of this standard, the employee must have 'actually believed the conduct complained of constituted a violation of pertinent law'.[20] 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"'.[21] 'A belief is objectively reasonable when a reasonable person with the same training and experience as the employee would believe that the conduct implicated in the employee's communication could rise to the level of a violation of' the securities laws.[22]

Although 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[23] 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.[24] The DFA, on the other hand, prohibits any

19 *Ott v. Fred Alger Mgmt., Inc.*, No. 11 Civ. 4418, 2012 WL 4767200, at *4 (S.D.N.Y. 27 Sep. 2012) (quoting DFA Implementation Release, at *7).

20 *Welch v. Chao*, 536 F.3d 269, 277 n.4 (4th Cir. 2008) (interpreting whether a plaintiff qualified for whistleblower status under SOX). See also *Ngai v. Urban Outfitters, Inc.*, No. 19-1480, 2021 WL 1175155, at *17 (E.D. Pa. 29 Mar. 2021) (finding that plaintiff did not demonstrate a subjectively reasonable belief that company had violated certain SOX provisions where his actions tended to show that he believed he was 'reporting violations of the company's own internal polices, rather than violations of federal law').

21 *Stewart v. Doral Fin. Corp.*, 997 F. Supp. 2d 129, 137 (D.P.R. 2014) (quoting *Sylvester*, 2011 WL 2165854, at *13).

22 *Wiest*, 710 F.3d at 132. See also *Yang v. Bank of New York Mellon Corp.*, No. 20-cv-3179, 2021 WL 1226661 (S.D.N.Y. 31 Mar. 2021) (interpreting whether a plaintiff demonstrated an objectively reasonable belief that company had violated SOX to qualify as a whistleblower).

23 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*, No. 15 CV 8984, 2019 WL 2343202, at *4 (S.D.N.Y. 3 Jun. 2019).

24 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 *5–6 (S.D.N.Y. 14 Jan. 2011) (finding that the plaintiff properly pleaded that a report concerning a third-party client's illegal activity constituted a protected activity under SOX).

employer from taking adverse employment actions against employees who report potential violations of the securities laws to the SEC.[25]

Second, there are differences in the misconduct that can be reported. DFA protections only apply to whistleblowers who report potential violations of the securities laws, whereas 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'.[26] The SOX prohibition is substantially similar, but it does not specifically prohibit indirect action against employees.[27]

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 federal regulatory or law enforcement agency, or to the US Congress.[28] 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.[29] 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

25 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).

26 15 U.S.C. § 78u-6(h)(1)(A).

27 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').

28 18 U.S.C. § 1514A(a)(1)(A)–(C). Administrative decisions have made clear that disclosures to other entities, including the Internal Revenue Service (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 Sep. 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 Jul. 2011) (finding that reports to local law enforcement constituted protected activity).

29 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).

SOX.[30] This interpretation, however, was unanimously rejected by the Supreme Court, which held that the DFA only protects employees who report misconduct to the SEC.[31]

Fifth, the statutes of limitations differ. To recover for retaliation under SOX, a whistleblower must file a complaint within 180 days of the violation.[32] The DFA, however, allows an action to be brought up to six years after the violation occurs.[33]

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.[34] Once a whistleblower makes a claim, OSHA will conduct an initial investigation to determine whether the whistleblower has made a *prima facie* showing that his or her whistleblower report was a contributing factor in an unfavourable employment decision.[35] If OSHA comes to this determination, the employer can then rebut the claim with clear and convincing evidence.[36] Once OSHA makes a final finding, either party may appeal to the Department of Labor's Office of Administrative Law Judges (ALJs).[37] The regulations then allow for limited discovery, after which an ALJ will conduct a hearing and render a decision.[38] The ALJ's decision can be appealed by the unsuccessful party to the Department of Labor's Administrative Review Board,[39] with further appeal to the United States Circuit Court of Appeals for the circuit in which the employee resided or the violation allegedly occurred.[40] 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 filing of [a] complaint and there is no showing that such delay is due to the bad faith of the claimant'.[41]

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'.[42] Once the employee has made this

30 17 C.F.R. § 240.21F-2.

31 *Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018).

32 18 U.S.C.A. § 1514A(b)(2)(D). See also *Xanthopoulos v. U.S. Dep't of Lab.*, 991 F.3d 823 (7th Cir. 2021) (rejecting equitable tolling of SOX claims).

33 15 U.S.C.A. § 78u-6(h)(1)(B)(iii)(I)(aa).

34 See 29 C.F.R. § 1980.104(e).

35 Id.

36 29 C.F.R. § 1980.104(e)(4).

37 29 C.F.R. § 1980.106.

38 29 C.F.R. §§ 1980.107, 1980.109.

39 29 C.F.R. § 1980.110.

40 29 C.F.R. § 1980.112.

41 18 U.S.C. § 1514A(b)(1)(B).

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

prima facie showing of retaliation, the burden shifts to the employer to prove that there was a legitimate non-retaliatory reason for the decision.[43] 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.[44]

6.1.2 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.[45]

6.1.3 AMLA whistleblower regime

The Anti-Money Laundering Act (AMLA), which Congress enacted in January 2021, amended the whistleblowing provisions of the Bank Secrecy Act (BSA) to encourage more whistleblowers to report suspected money laundering or other violations of the BSA. Prior to AMLA, the BSA's whistleblowing provisions were rarely invoked. AMLA aimed to enhance the BSA whistleblower programme through two significant amendments. First, AMLA increased financial incentives for whistleblowers to report BSA violations to federal authorities by removing the US$150,000 cap on payments and mandating that the Secretary of the Treasury 'shall' pay awards to whistleblowers whose information leads to successful enforcement.[46] Under AMLA, whistleblower awards are capped at 30 per cent of the monetary sanctions obtained as a result of the disclosure, provided that the penalty exceeds US$1 million.[47] The awards remain discretionary with regard to their size.[48] The Secretary of the Treasury must consider four factors when deciding how much to award to a

43 DFA Implementation Release, at *8, n. 41.

44 Id.

45 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*, CFTC Whistleblower Award Determination No. 18-WB-5 (2 Aug. 2018) (The Commodity Futures Trading Commission (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'.

46 31 U.S.C. § 5323(b)(1) (2021).

47 31 U.S.C. §§ 5323(a)(1), 5323(b)(1) (2021).

48 31 U.S.C. § 5323(c)(1)(A) (2021).

whistleblower: (1) the significance of the information provided by the whistleblower to the success of the action; (2) the degree of assistance provided by the whistleblower or the whistleblower's counsel during the covered action; (3) the programmatic interest of the Treasury in deterring violations by making awards to whistleblowers who provide information leading to successful enforcements; and (4) such additional relevant factors as the Secretary, in consultation with the Attorney General, may prescribe by rule or regulation.[49] Additionally, eligibility for an award under AMLA is not subject to the same restrictions as other SEC regulations.[50] Notably, AMLA does not expressly prohibit the payment of awards to compliance and audit professionals who acquire information on AMLA violations in connection with their professional duties.

Second, AMLA bars employers from discharging, demoting, threatening, harassing or otherwise retaliating against employees who provide information relating to BSA violations to the Attorney General, Secretary of the Treasury or other regulators, or who internally report violations to their own employer.[51] This provision protects both whistleblowers who report actual violations of the BSA as well as conduct the whistleblower reasonably believes is a violation of the law.[52] Like the DFA and SOX, the AMLA also contains a reasonable belief standard. There is no federal case law addressing what is required to meet this standard; however, commentators have suggested that courts will use the same two-pronged standard that is used for the DFA and SOX.[53] If putative whistleblowers believe retaliation has occurred, AMLA requires them to file a complaint with the Secretary of Labor. If the Secretary of Labor does not act on the complaint within 180 days, the whistleblower may file suit against the employer in federal district court.[54] These claims are governed by a low-threshold causation standard requiring only that the protected activity was a 'contributing factor' in the retaliatory employment action.[55] If the whistleblower prevails, the statute authorises comprehensive relief including full reinstatement, two times the amount of back pay owed with interest, and compensatory damages, including litigation costs, expert witness fees and reasonable attorneys' fees, as well as any other appropriate remedy.[56]

49 31 U.S.C. § 5323(c)(1)(B) (2021).

50 Compare CFR 240.21F-4(b)(4)(iii)(B) with 31 U.S.C. § 5323.

51 31 U.S.C. § 5323(g)(1) (2021). However, subsection g(6) exempts employers who are Federal Deposit Insurance Corporation and Federal Credit Union Act insured financial institutions from these retaliation provisions as they are covered under other whistleblower anti-retaliation programmes established under the Federal Deposit Insurance Act and Federal Credit Union Act.

52 31 U.S.C. § 5323(g)(1)(C) (2021).

53 See supra notes 18 to 22 and accompanying text.

54 31 U.S.C. §§ 5323(g)(2) (2021).

55 31 U.S.C. § 5323(g)(3)(A)(i) (2021); § 42121(b)(2)(B).

56 31 U.S.C. § 5323(g)(3)(C) (2021).

6.1.4 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 that 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 any law, so long as the employee first brings the potential violation to the attention of their employer.[57] Section 740 was amended in January 2022 to expand the scope of protected activity. The amended law prohibits an employer from retaliating against an employee that discloses a practice or policy done by the employer that: '(i) [t]he employee reasonably believes is in violation of any law, rule, or regulation; or (ii) [t]he employee reasonably believes poses a substantial and specific danger to the public health or safety'.[58] The amendment also expanded the definition of 'employee' to include former employees.[59] Healthcare 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 issue to their employer.[60] 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 that they reasonably believe to have occurred.[61]

Similarly, California's Labor Code Section 1102.5 protects employees who disclose what they reasonably believe to be an employer's violation of law or regulation to a government agency, public body conducting an investigation, or to a supervisor or person with authority to investigate violations within the employer. The statute permits employees who believe they have suffered retaliation to bring a private lawsuit for damages. In January 2022, the Supreme Court of California clarified the standard for retaliation in *Lawson v. PPG Architectural Finishes, Inc.* The court held that employees must first demonstrate that their whistleblowing was a contributing factor to their termination, demotion or other adverse employment action. Once an employee has made this demonstration, the burden then shifts to the employer to prove that the adverse action would have occurred for legitimate independent reasons, making it easier for plaintiffs to survive summary judgment.[62]

57 N.Y. Lab. Law § 740(2)–(3).

58 Id.

59 'Notice of Employee Rights, Protections, and Obligations under Labor Law Section 740' https://dol.ny.gov/system/files/documents/2022/02/ls740_1.pdf.

60 Id. § 741(2)–(3).

61 N.Y. Civ. Serv. § 75-b.

62 *Lawson v. PPG Architectural Finishes, Inc.*, 503 P.3d 659 (Cal. 2022).

The corporate perspective: preparation and response 6.2

Preparing for a whistleblower report 6.2.1

There is no general legal requirement to create whistleblower policies, but companies that are potentially subject to SOX, DFA, AMLA or other federal or state 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 the legal or compliance functions, 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.

Responding to a whistleblower report 6.2.2

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 makes 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.[63]

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, and adhere to consistent disciplinary procedures. Such documentation and adherence will, if necessary, support the company's position that a whistleblower employee was disciplined or dismissed for conduct unrelated to a whistleblower report.

6.2.3 Defending anti-retaliation suits

If a whistleblower brings a retaliation action, it will often 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',[64] which has been interpreted by courts to reflect a 'congressional intent to prohibit a very broad spectrum of adverse action against . . . whistleblowers'.[65] 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.[66] While any action can be construed by an employee as retaliatory, in

63 See, e.g., *In re KBR, Inc.*, Exchange Act Release No. 74619 , 111 SEC Docket 917, 2015 WL 1456619, at *2 (1 Apr. 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.

64 DFA Implementation Release, at *8.

65 *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, -003, ALJ No. 2007-SOX-005, 2011 WL 4915750, at *10 (ARB 13 Sep. 2011) (SOX anti-retaliation claim).

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

practice, whistleblower claims are generally predicated on conduct, such as dismissals,[67] demotions[68] or decreased compensation.[69]

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.[70] 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 reporting and being dismissed can demonstrate that the adverse action was not retaliatory. The Second Circuit has declined to establish a bright-line rule,[71] 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.[72] However, to the extent that there is evidence of other retaliatory actions against a whistleblower, courts will allow for a longer gap between the protected activity and termination.[73] Similarly, a legitimate intervening event that occurs after a whistleblower's disclosure to the SEC will sever the causal connection and create a non-retaliatory justification for dismissal. 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.[74] 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.[75]

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67 See, e.g., *Ott*, 2012 WL 4767200, at *7 (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).

68 See, e.g., *In re Paradigm Capital Mgmt., Inc.*, Exchange Act Release No. 72393, 109 SEC Docket 430, 2014 WL 2704311 (16 Jun. 2014) (hedge fund settled claims by SEC that it retaliated against an employee who was relieved of his responsibilities following complaint).

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

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

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

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

73 See, e.g., *Mahony v. KeySpan Corp.*, No. 04 CV 554, 2007 WL 805813, at *6 (E.D.N.Y. 12 Mar. 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').

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

75 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

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'[76] or 'bald statement[s]'[77] 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'[78] and statutory claims may be submitted to arbitration unless the statute explicitly prohibits arbitration.[79] 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.[80] 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]'.[81] 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.[82]

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 dismiss him, had a sufficient connection to the United States to treat it as a domestic application of the statute.[83] The Second Circuit declined to define

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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.').

76 *Livingston v. Wyeth Inc.*, No. 1:03CV00919, 2006 WL 2129794, at *10 (M.D.N.C. 28 Jul. 2006).

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

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

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

80 See, e.g., *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914, 2014 WL 285093, at *11 (S.D.N.Y. 27 Jan. 2014) (holding SOX's prohibition on pre-dispute arbitration does not apply to DFA retaliation claims); *Ruhe v. Masimo Corp.*, No. SACV 11-00734, 2011 WL 4442790, at *5 (C.D. Cal. 16 Sep. 2011) (refusing to read an anti-arbitration provision into 15 U.S.C. § 78u).

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

82 18 U.S.C. § 1514A(e)(2).

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

the precise boundary between extraterritorial and domestic applications of the anti-retaliation provision because the case was 'extraterritorial by any reasonable definition',[84] but the Second Circuit affirmed the dismissal of foreign whistleblower claims again in *Ulrich v. Moody's Corp*, in which the alleged whistleblower was a US citizen and occasionally interacted with the company's US managers.[85] This suggests that many foreign whistleblowers may not be protected by the DFA.[86]

Anti-retaliation suits by the SEC 6.2.4

In addition to potential suits by a whistleblower, the SEC has asserted an independent right to bring retaliation claims and has brought claims against publicly traded and privately held companies. In June 2014, the SEC brought its first enforcement action against a registered investment adviser for retaliation.[87] Subsequent actions show that this remains an enforcement priority for the SEC.[88] Moreover, private companies are not out of the SEC's reach with respect to whistleblower retaliation. In the relevant case, while the SEC's order did not articulate a specific jurisdictional basis, it appears that the SEC asserted jurisdiction over the retaliation after the whistleblower made a complaint to the SEC, regardless of whether the underlying tip was actionable. In April 2022, the SEC settled an enforcement action against the co-founder and chief information officer at a privately held company who allegedly retaliated

84 *Liu Meng-Lin*, 763 F.3d at 179.

85 *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').

86 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 Jun. 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*, ARB No. 2017-0068, ALJ No. 2017-SOX-00019, 2019 WL 5089597, at *6 (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 United States and the misconduct may have affected the US market). But see *Walters v. Deutsche Bank*, 2008-SOX-70, slip op. at 41 (ALJ 23 Mar. 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').

87 *In re Paradigm Capital Mgmt., Inc.*, 2014 WL 2704311.

88 See, e.g., *In re KBR, Inc.*, 2015 WL 1456619, at *3 (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).

against a whistleblower. In that case, the SEC alleged that the co-founder retaliated by, *inter alia*, removing the whistleblower's administrator access privileges, accessing the employee's computer password, and giving the employee's personal passwords to the chief executive officer. Ultimately, the SEC found that retaliation had occurred and imposed a cease-and-desist order and a monetary penalty.[89]

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'.[90] 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.

6.3 The whistleblower's perspective: representing whistleblowers

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 affect 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 enforcement actions'.[91] 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.[92] 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.[93] In ordering this relief, the SEC noted that the whistleblower had previously been advised of the potential offset and did not object.[94]

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

89 Order, *In the Matter of David Hansen*, File No. 3-20820, (5 Apr. 2022).

90 15 U.S.C. § 78aa(b)(2).

91 DFA Implementation Release, at *89.

92 17 C.F.R. § 240.21F-6(b)(1).

93 *In re the Claims for an Award in Connection with [Redacted]*, Exchange Act Release No. 77530, 113 SEC Docket 4529, 2016 WL 1328926, at *1 (5 Apr. 2016).

94 Id.

information'.[95] 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'.[96] 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.[97] However, there is no general bar on the use of information that is otherwise deemed confidential by a company.

Disclosing to the SEC 6.3.1

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.[98] Therefore, delaying SEC disclosure to make

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

96 See DFA Implementation Release, at *27. The SEC has provided, however, 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.

97 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.

98 17 C.F.R. § 240.21F-4(b)(7); see also, *In re the Claim for an Award in Connection with [Redacted]*, Exchange Act Release No. 82996, 2018 WL 1693006 (5 Apr. 2018) (awarding US$2.2 million to whistleblower who initially provided notification to another federal agency).

an internal report first will not affect whether the whistleblower is the first person to provide original information and thereby qualifies for an award.[99]

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.[100] Therefore, reporting directly to the SEC could reduce an award if a 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.[101] Therefore, if an employee only makes an internal report, the employee will not benefit from the anti-retaliation protection provided by the DFA.[102] Moreover, because the SEC treats all whistleblower complaints confidentially and the Program provides additional confidentiality protections to ensure that a whistleblower's identity is protected, whistleblowers receive added protection through SEC disclosure.[103]

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.[104] 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.[105] 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.[106]

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

100 See 17 C.F.R. § 240.21F-6(a)(4).

101 *Digit. Realty*, 138 S. Ct. at 769; see also *Verble v. Morgan Stanley Smith Barney, LLC*, No. 3:14-CV-74, 2015 WL 8328561, at *5 (E.D. Tenn. 8 Dec. 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).

102 *Digit. Realty*, 137 S. Ct. at 769.

103 17 C.F.R. § 240.21F-7. For added protection, a whistleblower may also submit a complaint anonymously through an attorney. See SEC, 2020 Annual Report to Congress – Whistleblower Program (2020), at 4, https://www.sec.gov/files/2020%20Annual%20Report_0.pdf.

104 See SEC, Office of the Whistleblower, Submit a Tip, https://www.sec.gov/about/offices/owb/owb-tips.shtml.

105 See SEC, Division of Enforcement, Enforcement Manual, at 8 (28 Nov. 2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

106 Id.

Whistleblower awards under the DFA 6.3.2

Under the DFA, qualifying whistleblowers who provide information to the SEC leading to a successful enforcement action are entitled to an award of between 10 and 30 per cent of the funds recovered by the Commission.[107] In setting the award amount, the SEC may consider seven factors:

- the significance of information provided by the whistleblower;
- the assistance provided by the whistleblower;
- the law enforcement interest in deterring violations of securities laws;
- whistleblower participation in internal compliance systems;
- culpability;
- unreasonable reporting delay; and
- interference with internal compliance systems.[108]

The SEC also has the discretion to consider the potential dollar amount of the final award in its calculations.[109] In addition to the award resulting from a successful SEC action, a whistleblower whose disclosure to the SEC results in a successful action by another agency – a 'related action'[110] – may be entitled to an award of between 10 and 30 per cent of the funds collected in that action.[111] However, the SEC recently implemented a provision clarifying that a separate action may not qualify as a related action if it 'is subject to a separate monetary award program' unless the SEC determines that 'its whistleblower program has the more direct or relevant connection to the action'.[112]

107 17 C.F.R. § 240.21F-5(b).

108 17 C.F.R. § 240.21F-6.

109 17 C.F.R. § 240.21F-6. But see SEC, Chair Gary Gensler, public statement, 'Statement in Connection with the SEC's Whistleblower Program' (2 Aug. 2021), https://www.sec.gov/news/public-statement/gensler-sec-whistleblower-program-2021-08-02 (announcing directive made to SEC staff to consider whether 17 C.F.R. § 240.21F-6 'should be revised . . . to clarify that the Commission will not lower an award based on its dollar amount').

110 A related action is 'a judicial or administrative action that is brought by [certain] governmental entities . . . that yields monetary sanctions, and that is based upon information that either the whistleblower [or the SEC] provided . . . to [the governmental] entity . . . and which is the same original information that the whistleblower voluntarily provided to the Commission and that led the Commission to obtain monetary sanctions totaling more than $1,000,000'. 17 C.F.R. § 240.21F-3(b)(3).

111 17 C.F.R. § 240.21F-3.

112 17 C.F.R. § 240.21F-3(b)(3)(i). But see SEC, Chair Gary Gensler, public statement, 'Statement in Connection with the SEC's Whistleblower Program' (2 Aug. 2021), https://www.sec.gov/news/public-statement/gensler-sec-whistleblower-program-2021-08-02 (announcing directive made to SEC staff to consider whether 17 C.F.R. § 240.21F-3 'should be revised to permit the Commission to make awards for related actions that might otherwise be covered by an alternative whistleblower program that is not comparable to the SEC's own program').

6.3.3 Recent SEC and CFTC awards

The SEC awarded over US$168 million in whistleblower awards to 13 individuals in fiscal year 2018,[113] over US$60 million to eight individuals in fiscal year 2019,[114] over US$175 million to 39 individuals in fiscal year 2020,[115] over US$500 million to 108 individuals in fiscal year 2021, including the largest award ever given to an individual,[116] and and approximately US$230 million to 103 individuals in fiscal year 2022.[117] On 19 March 2018, the SEC awarded US$83 million to three whistleblowers in connection with the SEC's US$415 million 2016 settlement with Merrill Lynch, with two whistleblowers sharing approximately US$50 million and the third receiving US$33 million for providing significant information.[118] On 26 March 2019, the SEC awarded US$50 million to two whistleblowers in connection with the SEC's US$367 million 2015 settlement with JPMorgan Chase & Co with one whistleblower receiving US$37 million and the other US$13 million for their information and assistance.[119] On 15 September 2021, two whistleblowers received US$114 million collectively after providing significant, independent analysis that advanced the SEC and another agency's investigations.[120] On 15 October 2021, the SEC awarded US$40 million to two whistleblowers, with one receiving US$32 million for providing substantial assistance, including identifying witnesses and explaining complex fact patterns, and the other receiving US$8 million for submitting new information (after waiting several

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

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

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

116 Order Determining Whistleblower Award, Exchange Act Release No. 90247, File No. 2021-2 (22 Oct. 2020). See SEC, Division of Enforcement, 2021 Annual Report, at 2 (2021), https://www.sec.gov/files/owb-2021-annual-report.pdf.

117 SEC, SEC Whistleblower Office Announces Results for FY 2022, at 1 (2022), https://www.sec.gov/files/2022_ow_ar.pdf.

118 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 Mar. 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 113, at 10.

119 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 Mar. 2019), https://www.bloomberg.com/news/articles/2019-03-26/two-whistleblowers-awarded-50-million-for-aiding-sec-case.

120 Order Determining Whistleblower Award, Exchange Act Release No. 90247 (22 Oct. 2020).

years to come forward).[121] In total, the SEC has awarded 278 whistleblowers approximately US$1.3 billion since 2012.[122]

In addition to this trend towards larger awards, on 24 May 2019, the SEC granted its first award specifically citing the internal reporting provision of the Program.[123] 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 action. 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'.[124] Similarly, on 26 March 2019, the SEC awarded a whistleblower an unreported sum despite the whistleblower's participation in the reported misconduct.[125]

CFTC awards also reflect a trend towards 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 totalling US$11,551,320 in 2016, five awards totalling US$75,575,113 in 2018 and five awards totalling approximately US$15 million in fiscal year 2019.[126] In 2021, the CFTC awarded a whistleblower almost US$200 million.[127]

Three notable CFTC whistleblower awards to date took place in 2018. On 12 July 2018, the CFTC granted approximately US$30 million to a

121 SEC, press release, 'SEC Awards $40 Million to Two Whistleblowers', https://www.sec.gov/news/press-release/2021-211.

122 SEC, press release, 'SEC Issues More than $17 Million Award to a Whistleblower', https://www.sec.gov/news/press-release/2022-125.

123 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.

124 *In re the Claim for Award in Connection with [Redacted]*, Exchange Act Release No. 84125, 2018 WL 4382861, at *1 (14 Sep. 2018).

125 *In re the Claims for Award in Connection with [Redacted]*, Exchange Act Release No. 85412, 2019 WL 1353776, at *2 (26 Mar. 2019). Claimant 1's reward was reduced because Claimant 1 delayed reporting and continued to passively benefit financially from the 'underlying misconduct during a portion of the period of delay'.

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

127 CFTC, 'Largest Award to a Single Whistleblower', https://www.cftc.gov/PressRoom/PressReleases/8453-21.

whistleblower who provided key information relating to the 2015 settlement with JPMorgan Chase & Co, which also resulted in a parallel settlement with the SEC.[128] 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 a CFTC investigation and demonstrating the international reach of the whistleblower programme through an online reporting system.[129] On 2 August 2018, the CFTC granted multiple whistleblower awards totalling more than US$45 million.[130] Although the awards in fiscal year 2020 were not as large as those handed down in 2018, the CFTC released its largest award yet in 2021 with a US$200 million award to a whistleblower whose specific, credible information contributed to an open investigation and led to three enforcement actions.[131] The CFTC has continued awarding whistleblowers, granting a US$10 million award in March 2022 to a whistleblower who voluntarily provided original information that led the CFTC to open an investigation, along with several smaller awards.[132]

6.4 Filing a qui tam action under the False Claims Act

Individuals who report fraud against the United States government have another avenue 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.[133] Since the statute was enhanced in 1986, there has been significant growth in False Claims Act suits, from 30 in

128 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 Jul. 2018), https://www.wsj.com/articles/jpmorgan-whistleblower-set-to-get-largest-payout-from-cftc-1531421603?mod=djemRiskCompliance&ns=prod/accounts-wsj.

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

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

131 CFTC, press release, 'CFTC Awards Nearly $200 Million to a Whistleblower', https://www.cftc.gov/PressRoom/PressReleases/8453-21.

132 CFTC, press release, 'CFTC Awards Approximately $10 Million to a Whistleblower', https://www.cftc.gov/PressRoom/PressReleases/8502-22; CFTC, press release, 'CFTC Awards Approximately $500,000 to Two Whistleblowers', https://www.cftc.gov/PressRoom/PressReleases/8500-22; CFTC, press release, 'CFTC Awards Approximately $625,000 to Four Whistleblowers', https://www.cftc.gov/PressRoom/PressReleases/8506-22.

133 *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 1986 – 30 September 2017 (19 Dec. 2017), https://www.justice.gov/opa/press-release/file/1020126/download.

1987 to 598 in 2021.[134] As a result of these suits, the US Department of Justice (DOJ) collected more than US$70 billion between 1986 and 2021, including over US$5.6 billion in fiscal year 2021 alone.[135]

The False Claims Act can be used to pursue actions 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.[136] 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.[137] If the prosecution of the *qui tam* claim is successful, the relator may receive between 15 and 30 per cent of the recovery.[138] 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.[139]

How a qui tam action operates 6.4.1

To bring a *qui tam* action, the relator must file their complaint in federal court under seal.[140] The initial complaint is only served on the DOJ, which has 60 days to examine the merits of the claim.[141] During this 60-day period (which is often extended), 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.[142] 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'.[143] 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.[144] The precise amount will 'depend[] upon the extent to which the

134 Id. DOJ, press release, 'Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021', https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year.

135 DOJ, 'The False Claims Act', (Updated 2 Feb. 2022), https://www.justice.gov/civil/false-claims-act; 'Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021', supra note 134.

136 31 U.S.C. § 3729.

137 31 U.S.C. § 3730(b).

138 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 144 to 150 and accompanying text.

139 31 U.S.C. § 3729(a)(1).

140 31 U.S.C. § 3730(b).

141 Id.

142 31 U.S.C. § 3730(b)–(c).

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

144 31 U.S.C. § 3730(d)(1).

person substantially contributed to the prosecution of the action'.[145] 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'.[146] However, one study has revealed that the majority of plaintiffs voluntarily dismiss the *qui tam* action if the DOJ declines to intervene,[147] 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.[148] Second, if the court determines that the information is 'based primarily on disclosures of specific information' relating to government 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'.[149] Finally, a relator is entitled to no award if they are 'convicted of criminal conduct arising from his or her role in the violation'.[150] Additionally, there are provisions that preclude filing additional suits based on substantially similar *qui tam* or government enforcement proceedings.[151] 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'.[152]

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.

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145 Id.

146 Id.

147 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 subsamples 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').

148 31 U.S.C. § 3730(d)(3).

149 31 U.S.C. § 3730(d)(1).

150 31 U.S.C. § 3730(d)(3).

151 31 U.S.C. § 3730(e)(4)(A).

152 *Springfield Terminal Ry. Co.*, 14 F.3d, at 649. In addition, another FCA case is currently before the Supreme Court awaiting a determination on whether the Court will grant *certiorari* concerning how specific relators must be in their complaints regarding the alleged false claims. See *Johnson v. Bethany Hospice and Palliative Care LLC*, No. 20-11624 (11th Cir. 26 Apr. 2021) petition for cert. filed, (23 Sep. 2021) (No. 21-462). The Solicitor General has weighed in on this petition, arguing that the Circuit courts have largely agreed, finding in favour of more relaxed pleading standards. Brief for the United States as Amicus Curiae, *Jolie Johnson v. Bethany Hospice and Pallative Care LLC*, No. 20-11624 (11th Cir. 26 Apr. 2021) petition for cert. filed (23 Sep. 2021) (No. 21-462).

Statistics published by the DOJ show that cases where the DOJ intervenes are substantially more likely to generate recoveries than declined cases.[153] DOJ declination may also signal a lack of merit to the court.[154]

DOJ policy enacted in 2020 also encourages DOJ attorneys to 'consider whether the government's interests are served' by seeking dismissal of the *qui tam* action.[155] Pursuant to this policy, DOJ attorneys are encouraged to seek dismissal to:

- curb meritless *qui tam* actions;
- prevent 'parasitic or opportunistic' actions that duplicate a pre-existing investigation;
- prevent interference with government programmes;
- preserve the DOJ's litigation prerogatives;
- safeguard national security;
- preserve government resources; or
- address 'egregious procedural errors' that would frustrate a proper investigation.[156]

However, even if the DOJ decides not to intervene in 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,[157] although this issue is pending review by the Supreme Court,[158] and at least some courts have

153 See DOJ, Fraud Statistics – Overview: 1 October 1987 – 30 September 2015 (12 Jul. 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).

154 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 seven 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) ('the 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 'lack of available Assistant United States Attorneys or respect for the skill of the relator's attorneys').

155 DOJ, Justice Manual § 4-4.111 (2020).

156 Id.

157 31 U.S.C. § 3730(c)(2)(b).

158 In June 2022, the Supreme Court granted *certiorari* to *United States ex rel. Polansky v. Executive Health Resources, Inc* where it will determine whether the DOJ had authority

suggested that this is not an absolute right.[159] 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.[160] 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.[161]

6.4.2 Effects of filing a qui tam action

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 the relator as the complainant.[162] 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.[163] 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.[164] Nonetheless, depending on the situation, relators may have legitimate concerns about the impact on their professional reputations.

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to seek dismissal of a False Claims Act suit years after it had declined to intervene. See *Polansky v. Executive Health Resources Inc.*, No. 19-3810 (3rd Cir. 2021), cert. granted, (26 Jan. 2022) (No. 21-1052).

159 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 quotation marks omitted)).

160 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').

161 *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) ('[e]ven where the Government has declined to intervene, relators are required to obtain government approval prior to entering a settlement or voluntarily dismissing the action').

162 *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., *US ex rel. Permison v. Superlative Technologies, Inc.* 492 F.Supp.2d 561, 565 (E.D. Va. 2007) (noting that 'it is doubtful that redaction would provide any protection given the very specific allegations contained in the complaint').

163 881 F. Supp. 2d., 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').

164 31 U.S.C. § 3730(h).

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'.[165]

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.[166] Moreover, defendants also risk debarment from additional federal contracts.[167] 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.[168]

165 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.

166 See, e.g., DOJ, press release, 'GlaxoSmithKline to Plead Guilty and Pay $3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data', 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).

167 48 C.F.R. 9.406-2 (2021).

168 *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

About the Authors of Volume I

Daniel Silver

Clifford Chance US LLP

Daniel Silver is a partner at Clifford Chance US LLP, where he focuses on regulatory enforcement and white-collar criminal defence. Dan represents both individuals and corporations in matters before the Department of Justice and other federal and state enforcement agencies, and counsels clients on risk mitigation strategies with respect to cybersecurity, anti-corruption, sanctions and anti-money laundering issues. Prior to joining Clifford Chance, Dan spent 10 years as a federal prosecutor, serving in several senior leadership positions and overseeing the national security and cybercrime unit within the United States Attorney's Office for the Eastern District of New York. Dan received his undergraduate degree from Brown University and his JD, *magna cum laude*, from New York University School of Law.

Benjamin A Berringer

Clifford Chance US LLP

Benjamin Berringer is an associate at Clifford Chance US LLP, where he focuses on cross-border investigations and complex commercial litigation. Ben represents both corporations and individuals in connection with regulatory investigations before the Commodity Futures Trading Commission, the Department of Justice and the Securities and Exchange Commission. Ben also advises on matters arising under cybersecurity, privacy and data protection laws. Ben received his BA from Williams College, his MSc in economics from SOAS and his JD from New York University School of Law.

Clifford Chance

Clifford Chance US LLP
31 West 52nd Street
New York, NY 10019-6131
United States
Tel: +1 212 878 8000
Fax: +1 212 878 8375
christopher.morvillo@cliffordchance.com
celeste.koeleveld@cliffordchance.com
daniel.silver@cliffordchance.com
benjamin.berringer@cliffordchance.com
meredith.george@cliffordchance.com

www.cliffordchance.com

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