Sarbanes-Oxley, Dodd-Frank, Retaliation, and Reward: Representing Clients in the Age of the Whistleblower

Daniel J. Hurson*

Introduction

On what now seems a routine basis, we learn of a corporate scandal, a major Securities and Exchange Commission (SEC) settlement, or a large whistleblower award. Whistleblower lawsuits are becoming increasingly common. Employment lawyers may eventually become involved in a whistleblower or retaliation case, representing either the whistleblower or the employer. This Article discusses how whistleblower and retaliation issues affect whether the client should become an SEC whistleblower, pursue a retaliation case, or both. Attorneys representing these clients must be familiar with the complex SEC whistleblower rules and claims process. Attorneys must also understand the judicial conflicts within the federal courts regarding when a whistleblower qualifies as a claimant in Dodd-Frank[1] or Sarbanes-Oxley Act (SOX)[2] retaliation cases. The chances unwittingly to make things more difficult for a client, or to face dismissal over a technical issue, are abundant.

This Article provides employment lawyers facing an SEC whistleblower case the benefit of my experience as a whistleblower lawyer for multiple clients during the first five years of the program. Part I outlines key aspects of the SEC Whistleblower Program from a practitioner's perspective. Part II describes a hypothetical whistleblower client and her story as it might be presented to a lawyer from whom she seeks representation. Part III discusses whether this client should become a whistleblower. Part IV considers whether she should "report

* Daniel J. Hurson's law practice involves representation of whistleblowers. He was formerly an Assistant United States Attorney for Maryland and Assistant Chief Litigation Counsel for the Securities and Exchange Commission (SEC). He is a former Chairman of the Steering Committee of the District of Columbia Bar's Corporation, Finance and Securities Law Section. He primarily represents SEC and Commodity Futures Trading Commission (CFTC) whistleblowers. See more information at http://www.hursonlaw.com.

1. 15 U.S.C. § 78u-6 (2012).
2. 15 U.S.C. § 1514A(a) (2012).

up" internally through her company's legal or compliance process, and Part V considers whether she can remain anonymous. Part VI presents several options the client may pursue, including whether she can file an anonymous SEC whistleblower complaint, file a whistleblower lawsuit in federal court, or "report up" and consider pursuing a retaliation case in the future. Part VII reviews the merits of filing a SOX retaliation case, a Dodd-Frank retaliation case, or both.

I. The SEC Whistleblower Process: Big Money for a Patient Few, Frustration for Others[3]

Employment whistleblowing and retaliation law has changed dramatically since Dodd-Frank launched the "age of the whistleblower" in 2011.[4] The SEC program has, as of January 2017, awarded more than $149 million to forty-one whistleblowers, and reached settlements worth $900 million in those cases.[5] Since August 2011, 18,334 tips have poured into the agency, and multimillion-dollar awards now seem more frequent than lottery jackpots.[6]

However, as an attorney who has represented SEC whistleblowers since the beginning of the program, I am well aware that tips resulting in awards are vastly outnumbered by those never acted upon (many for good reason) or those waiting for the seemingly endless process of evaluation, investigation, settlement, claim submission, and award decisions by the SEC.[7] In my experience, this process can take years. The SEC, as a law enforcement agency, welcomes and encourages tips and

3. The CFTC could also factor into the SEC whistleblower facts because the commissions have nearly identical whistleblower programs. *Compare* 7 U.S.C. § 26 (2012), *with* 15 U.S.C. § 78u-6 (2012). To date, the SEC has made far more awards, but the CFTC's wide jurisdiction over commodities and derivatives should not be overlooked. Its massive settlements in benchmark fixing cases suggest the potential of enormous awards for future whistleblowers in similar cases. *Compare* Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Announced Fourth Whistleblower Award (July 26, 2016), http://www.cftc.gov/PressRoom/PressReleases/pr7411-16 (CFTC issued fourth award in July 2016), *with* U.S. SECURITIES EXCHANGE COMMISSION, 2015 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf (last visited Mar. 23, 2017) (SEC paid out 30 awards in 2015).

4. *See Corporate Crime, The Age of the Whistleblower*, ECONOMIST (Dec. 3, 2015), http://www.economist.com/news/business/21679455-life-getting-better-those-who-expose-wrongdoing-companies-continue-fight (discussing the changing landscape for whistleblowers after Dodd-Frank).

5. Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces $7 Million Whistleblower Award (Jan. 23, 2017), https://www.sec.gov/news/pressrelease/2017-27.html.

6. 2016 SEC ANN. REP. TO CONG. ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 23, https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf. [hereinafter 2016 ANNUAL REPORT].

7. In its 2016 Annual Report, the SEC Office of the Whistleblower indicated it "[wa]s tracking over 800 matters in which a whistleblower's tip has caused a Matter Under Inquiry or investigation to be opened or which have been forwarded to Enforcement staff for review and consideration in connection with an ongoing investigation." *Id.* at 27.

vigorously supports whistleblowers. The whistleblower, however, is not exactly a partner in the process, but instead is an important provider of evidence, one piece of a much larger picture.

Moreover, the whistleblower rules are complex, with many "off ramps" that can derail a potential award.[8] The agency's lawyers, while welcoming to whistleblowers, can share neither their strategy nor progress. Nor can they provide much information about whether the matter is moving toward a favorable conclusion, has been put on the shelf, or was dead on arrival.[9] It is largely a one-sided process in which the whistleblower provides the SEC with information, and the commission proceeds without communicating with the whistleblower unless more information is needed. Then, another set of senior Enforcement Division lawyers (Claims Review staff) determines if the whistleblower's tip meets all necessary conditions for an award, and if so, what percentage of sanctions the whistleblower will be awarded. The SEC itself makes the final determination.[10] The Preliminary Determination is made with input from the Enforcement Division lawyers who handled the case and the SEC Office of the Whistleblower,[11] but neither you nor your client will likely ever meet those serving as the "judge and jury" for the claim. When providing advice, an attorney representing a client deciding whether to become a whistleblower, file a retaliation lawsuit, or both should consider how these decisions could have a life-altering impact for the client.

Whistleblowers face key decisions early in the process, such as whether to file a retaliation claim under SOX or Dodd-Frank, betting on a whistleblower claim, or both (or neither).[12] If relying on an eventual whistleblower claim, the client must consider whether to remain anonymous. Tricky situations may arise if the SEC conducts an investigation while the whistleblower remains employed at the target company, essentially as a "mole" laying low while fellow employees, includ-

8. *See* 15 U.S.C. § 78u-6 (2012); 17 C.F.R. § 240.21F-1 (2016).

9. My understanding is that SEC staff has been given the authority to inform a whistleblower of a case closure. In several cases, I have asked that question and received an answer. But, generally, SEC staff cannot give the whistleblower or counsel a "progress report" on a case. I have found that the best indicator the investigation is alive is when SEC staff asks to speak to your client and then comes back for more information months, or even years, later. Also, a public company under investigation may disclose that fact, usually through an SEC Form 8-K, or an SEC 10-K or 10-Q filing, but it may not necessarily disclose the nature of the investigation.

10. 17 C.F.R. § 240.21F-5(a) (2016).

11. The whistleblower may contest the SEC's preliminary determination if it initially rejects the claim or issues an award less than the maximum amount available. Before doing so, the whistleblower may request a meeting with the staff of the Office of the Whistleblower, but not the Claims Review staff, to whom only a brief can be presented. 17 C.F.R. § 240.21F-11(e)(1)(ii) (2016).

12. The SOX section 806 anti-retaliation provisions are found at 18 U.S.C. § 1514A (2012). The Dodd-Frank section 922 anti-retaliation provisions are found at 15 U.S.C. § 78u-6.

ing the whistleblower's supervisors and co-workers, are called to testify. The client may also face the prospect of company lawyers seeking to represent everyone involved (unknowingly including the whistleblower) under the umbrella of the company's attorney-client privilege.

II. The Client

To demonstrate the complexities that could arise when representing a whistleblower, consider a hypothetical client, Mary, seeking your legal advice. Mary may be a potential whistleblower or a retaliation victim. Like most clients, she comes with both favorable and unfavorable facts.

Mary, a mid-level manager at Amalgamated Widgets (AW), a mid-size public company, comes to you for advice. Mary has been with the company for seven years and has a family that depends on her income. AW has not been doing well because the Chinese have perfected what may be a superior widget. Employees are worried. Sales have to improve. Some have been laid off. There is talk of a takeover and a possible sale to a foreign-controlled buyer. The stock price is down. Analysts are negative, and short-sellers are beginning to circle overhead and spread rumors. A run-in with the SEC would not be good for the company.

Mary works in retail sales under a senior-level manager named Bill. Mary is not an accountant, but has some background in accounting. Her good friend, Liz, is a recently hired compliance officer. Another friend, Sue, also works at the company. Liz and Sue often ride to work together. Mary has received good performance reviews for years, but for the past six months has noticed that Bill seems stressed. More ominously, she believes he may be "cooking the books."[13]

Bill stays late many evenings, hunched over his computer. He has asked Mary how to access certain files in the company's accounting system, and she noticed while in his office that he appeared to be making various "top side" accounting entries, especially toward quarter-end. This has been going on for about four months. Mary has access to his computer, having learned his password by looking in his desk drawer. She reviewed some of his emails to other managers that suggest he has been reversing some accounting entries, changing others, and in general making AW's performance look better by reducing or deferring expenses. Mary took photos of these entries and made copies

13. Investopedia defines this phrase as "an idiom describing fraudulent activities performed by corporations in order to falsify their financial statements. . . . [C]ooking the books involves augmenting financial data to yield previously nonexistent earnings." *Cook the books*, INVESTOPEDIA, http://www.investopedia.com/terms/c/cookthebooks.asp (last visited Mar. 2, 2017); *see also Cook the books*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/cook%20the%20books (last visited Mar. 2, 2017).

of some emails. She brings these documents to your office in a big brown envelope. She also brings a copy of her employment agreement, which forbids her from disclosing such information outside the company or reporting to the SEC.

Mary mentions that on several occasions, Bill asked her for help making entries on his computer. She admits that because she was unsure of what to do, she reluctantly helped Bill make some entries. Bill seemed nervous and secretive. When she asked him if this was proper, he seemed perturbed and told her simply to help him figure out the process of making entries, and not to ask a lot of questions. Several days later, he referenced Mary's upcoming performance review. Bill's boss, Jerry, called Mary into his office to ask her how things were going with Bill and also emphasized her performance because of the potential upcoming downsizing. She then blurted out to Jerry what she had seen Bill doing with the accounting records, but did not tell him she helped Bill to a limited extent. Jerry replied, "Don't worry about it, Bill has a lot on his plate."

After that, Mary observed Jerry in Bill's office more frequently, and they appeared to be arguing. Mary does not know Jerry well, but he had been pleasant to her until their recent meeting, after which he seemed to avoid her. He has done nothing about their conversation about Bill, as far as she knows. Mary is worried, and she discussed this with her husband. He warned her they need the income from her job.

Mary also told her friend in compliance, Liz, that there may be something afoot in her department relating to accounting records, but she did not tell her about Bill changing entries. Mary says Liz is new to the company, just out of college, and not too sure of herself. Mary does not know if Liz has done anything about Mary's comments. Mary's friend Sue noticed that Liz has not driven home with Sue lately and that Liz has been spending more time with Bill after hours. Sue told Mary not to get too involved with Bill but gave no explanation. Last week, Mary was surprised to hear from the human resources department that Jerry put a note in her personnel file that says "Mary seems to be somewhat anxious of late, and according to her immediate supervisor, her attention to work and concentration on finishing assignments has slipped." Her performance review is due in about two months.

Mary has read about large awards and is considering becoming a whistleblower, but she is concerned she may be prohibited from doing so because of language in her employment agreement forbidding such reporting. She asks if she can be a whistleblower, what that may involve, and about her chances of prevailing. She wonders if her limited assistance to Bill will get her in trouble and whether she should just keep her head down and do nothing, especially because her job already

seems to be in jeopardy. However, she also wonders whether she may have some kind of retaliation case against her employer because of the comments Bill and Jerry made about her upcoming performance review and because of the negative information Jerry already placed in her file. She wants to keep her job. Her husband is nervous about this issue as well and asked her not to do anything that will hurt her position at the company.

Mary is clearly onto something troublesome at AW. Bill is apparently engaged in some kind of accounting fraud. Mary voiced concerns to him, but she also may have abetted his actions and could have some exposure. Senior managers such as Jerry may be involved. She informed Jerry, but he took no action. She appears headed for a bad performance review, possibly in retaliation for questioning Bill's actions.

Should Mary report the situation to legal or compliance? She has already shared some information with Liz, her friend in compliance, and with her friend Sue. Mary tells you she is afraid to report any higher in the company because Bill and Jerry are powerful managers close to the CEO, and she fears the consequences if she surfaces as an in-house whistleblower. The company has a tip line, but others say they have had few results with prior complaints and may even have suffered retaliation after making calls. She fears if she uses the tip line she will not remain anonymous. Mary does not think anyone else knows about the limited help she gave Bill, but in any investigation she would almost surely be asked about her interactions with Bill and any potential involvement.

III. Should Mary Become a Dodd-Frank Whistleblower?

Mary has seen headlines about big SEC whistleblower awards and wants to know if this is an option. On the surface, this looks like a potential securities fraud case. The SEC has pursued many companies for similar practices.[14] Reviewing the SEC's helpful Office of the Whistleblower website, you see that several people have received multimillion-dollar awards.[15] But, having made a quick review of the SEC's Final Rules on Dodd-Frank, you see a complicated labyrinth of rules, exceptions, definitions, and qualifications of who can be a whistleblower and when.[16] You are concerned Mary could get into trouble with the SEC, or even

14. The SEC has formed a Financial Reporting and Audit Group to investigate "securities law violations in the preparation of financial statements and the disclosure of financial information to investors." *Financial Reporting and Audit (FRAud) Group*, SEC OFFICE OF THE WHISTLEBLOWER, https://www.sec.gov/spotlight/financial-reporting-and-audit-task-force.shtml (last visited Mar. 23, 2017). This effort has led to a number of enforcement actions since late 2016. *Id.*

15. *Resources*, SEC OFFICE OF THE WHISTLEBLOWER, https://www.sec.gov/about/offices/owb/owb-resources.shtml#news (last visited Feb. 20, 2017).

16. 17 C.F.R. §§ 240.21F-1 to -17 (2016).

the Department of Justice (DOJ), and you are neither a securities lawyer nor a white-collar criminal defense lawyer.

Doing further research, you review additional SEC rules that further explain the law.[17] You note that as of January 2017, the SEC made only forty-one awards despite receiving 18,000 tips.[18] While many awards were seven figures, it is impossible to tell from the heavily redacted award orders on the SEC website what the facts were in those cases.[19] You also see several cases in which claims were denied, again without much explanation.[20] No body of law exists for evaluating the odds of getting an award. What should you advise Mary about her potential to receive an award?

The whistleblower rules are detailed and specific. For example, the SEC can pay awards to eligible individuals who voluntarily provide original information to the Commission that leads to the successful enforcement of actions brought by the SEC, and potentially other agencies, that result in monetary sanctions of more than $1 million.[21] Note the "voluntary" requirement. The whistleblower must submit information to the SEC before the SEC or other specified government agencies direct any "request, inquiry, or demand [relating] to the subject matter" to the whistleblower or a whistleblower's representative.[22] If Mary waits until the SEC contacts her, she may be too late.

Mary's information must also be "original information."[23] It must come from her independent knowledge or independent analysis and not be known to the SEC from any other source.[24] Even if the information is original and leads to sanctions, Mary will still not get an award if the monetary sanction against the company is less than $1 million.[25] If, for any reason the SEC cannot collect a monetary sanction, there may be no award.[26] Mary also must give "specific, credible, and timely" information that causes the SEC to open or re-open an investigation or "inquire concerning different conduct as part of a current . . . investigation."[27] If the SEC is already investigating the conduct, her information must "significantly contribute[] to the success of the action."[28]

17. 17 C.F.R. §§ 240, 249 (2016).
18. *See* Press Release, *supra* note 5 and accompanying text.
19. *Id.*
20. *See, e.g.*, Order Determining Whistleblower Award Claim, SEC Release No. 79604, File No. 2017-4, Dec. 19, 2016. Other orders can be found at *Final Order of the Commission*, SEC OFFICE OF THE WHISTLEBLOWER, https://www.sec.gov/about/offices/owb/owb-final-orders.shtml (last visited Mar. 23, 2017).
21. 17 C.F.R. § 240.21F-3(a)(1)–(4) (2016).
22. *Id.* § 240.21F-4(a).
23. *Id.* § 240.21F-3(a)(2).
24. *Id.* § 240.21F-4(b).
25. *Id.* § 240.21F-3(a)(4).
26. *Id.* § 240.21F-14(b).
27. *Id.* § 240.21F-4(c)(1).
28. *Id.* § 240.21F-4(c)(2).

There are no judicial opinions construing any of these terms, and the SEC makes all payment determinations on a case-by-case basis, so far offering limited guidance of how the standards are applied.[29] The heavily redacted orders on the agency's website protect whistleblower identity and generally give little insight into the decision-making process.[30]

IV. Should Mary "Report Up" Internally First?

Should Mary first make a full report to the legal or compliance department at her company before she contacts the SEC? The SEC and many companies encourage this.[31] But it requires Mary to identify herself. Mary will be considered to have reported to the SEC on the same date she reported internally if she reports to the SEC herself within 120 days of reporting to the company.[32] Company counsel will also be aware of this deadline, and in the event Mary reports internally, they will likely advise the company to report itself quickly to the SEC to ensure the company will not have to respond to an SEC inquiry before its own disclosure. This has become standard practice for companies wanting to appear cooperative with the SEC but needing time to conduct an internal investigation. The SEC prefers receiving information promptly and then permitting the company to complete its investigation, which can take many months. But if a whistleblower also reports to the SEC, all subsequent company information benefits the whistleblower, who gets full credit as if the whistleblower had reported to the SEC at the same time as to the company.[33]

If, for example, Mary's friend in compliance, Liz, reports Mary's information to her superiors, Mary might not get credit if the SEC contacts Liz first. The SEC might not consider Mary's informal discussion with Liz equivalent to reporting up internally.[34] The same problem would exist with respect to Mary's co-worker Sue, who might decide to go to the SEC or the company with Mary's information about Bill.[35] Even Bill, figuring things could be going south, could become a whistleblower by deciding to turn himself in, claiming he was pressured by Jerry and others to make false entries. Bill, if not convicted of

29. *Id.* § 240.21F-6.

30. *See Final Orders of the Commission*, SEC OFFICE OF THE WHISTLEBLOWER, https://www.sec.gov/about/offices/owb/owb-final-orders.shtml.

31. One factor that may increase a whistleblower award is "[w]hether, and the extent to which, a whistleblower reported the possible securities violations through internal whistleblower, legal or compliance procedures before, or at the same time as, reporting them to the Commission. . . ." 17 C.F.R. § 240.21F-6(a)(4)(i).

32. *Id.* §§ 240.21F-4(b)(7), 240.21F-4(c)(3).

33. *Id.* §§ 240.21F-4(c)(3), 240.21F-4(b)(7).

34. *Id.* § 240.21F-4(b)(7).

35. Mary still might be able to convince the SEC she was the "original source" of the information, but her claim definitely would be weaker. *Id.* § 240.21F-4(b)(1)(ii).

a crime related to the SEC action, may still qualify for an award, albeit probably a reduced one.[36] There are numerous ways in which this information could come to the SEC's, another regulatory agency's, or the company's attention without Mary's involvement. She could easily become a witness, or worse, come under investigation herself. If, however, the company or other employees report to the SEC first, Mary likely could not be regarded as a whistleblower.

As Mary looks to you for advice, you have no way of knowing if the company knows about Bill's actions and is planning to contact the SEC itself. There are powerful incentives for the company to self-report. Likewise, if anyone outside the company learns of Bill's actions and reports it to a state or federal law enforcement agency, including the SEC, and the agency contacts Mary before she makes a report, she will not qualify for an award and may be in trouble herself for her involvement with false entries. In any event, Mary needs to move quickly.

You should review all these issues with her promptly and make a record of your conversation. If Mary does nothing but is later contacted by the SEC after it opens an investigation, she may need a defense attorney, not a whistleblower lawyer. If you did not advise her of her choices early on, or if someone else makes a report and receives a large award, Mary may seek another lawyer to sue you for failing to advise her of all her options.

Attorneys also must be aware of numerous special restrictions affecting employees in legal, accounting, or compliance operations that could disqualify them as whistleblowers.[37] But there are also exceptions to those restrictions that may allow them to become whistleblowers.[38] Although Mary does not appear to fit any of these categories, Liz probably would.

Finally, you should consider the chances of an award when deciding whether to make a Dodd-Frank whistleblowing report. The SEC must recover a penalty exceeding $1 million for the whistleblower to be eligible for an award.[39] If the SEC recovers less than $1 million, as happens with many claims, there will be no award.[40] This could happen here, for example, if the SEC found Bill, or only Bill and Jerry, and no one else at the company, at fault. The company might cooperate quickly and avoid a significant penalty or have insufficient assets to pay a large penalty. Although Mary may have provided helpful

---

36. *Id.* §§ 240.21F-6(b)(1), 240.21F-8(c)(3).

37. *See, e.g.*, *id.* § 240.21F-4(b)(4)(i)–(iv).

38. *Id.* § 240.21F-4(b)(4)(v)(A)–(C). The broadest exception, (C), requires compliance officers and auditors to wait 120 days after they have brought the information to the company (or the company already knows it) to bring the information to the SEC. This makes an initial understanding of your client's job description very important, particularly if your client has compliance duties.

39. *Id.* § 240.21F-3(a)(4).

40. *Id.*

information to the SEC as a whistleblower, she could end up with only an expression of the SEC's appreciation.

Attorneys must also analyze the technical requirements of the SEC rules to avoid learning, perhaps years after the SEC settlement and a whistleblower award claim, that your client does not qualify for any award for some technical reason. The SEC enforcement staff that receives the tip and launches an investigation, while welcoming your client's information, normally will not be concerned whether your client technically qualifies as a whistleblower.[41] The SEC wants information to build its case. It has no obligation to warn whistleblowers that they may not qualify for awards.[42] However, senior lawyers in the SEC's Enforcement Division, who review claims after successful SEC enforcement actions (the Claims Review staff),[43] know these complex rules and can deny or reduce an award on many grounds. With potentially millions of dollars at stake for your client, lawyers must carefully review the SEC's complex rules to ensure they are properly advising clients. It is truly a minefield, paved with good intentions, but full of traps.

The heavy redaction of posted award notices makes it difficult to tell how many awards reached the maximum under Dodd-Frank,[44] thirty percent of the recovered financial penalty. Early in the case, attorneys need to review the factors the Commission considers when increasing or decreasing awards.[45]

Large awards come from cases in which a whistleblower stops a major ongoing fraud scheme that has caused millions of dollars in losses to investors and that would never have been discovered without the whistleblower, or a Foreign Corrupt Practices Act (FCPA)[46] case against a solvent multinational corporation involving millions of dollars in bribes. Such cases take significant investigatory time, but

41. There are few automatic disqualifiers listed on the SEC's Tip, Complaint, or Referral (TCR) form used for initial submissions, but whistleblowers may be disqualified for many other reasons. *See Submit a Tip*, SEC OFFICE OF THE WHISTLEBLOWER, https://www.sec.gov/about/offices/owb/owb-tips.shtml (last visited Mar. 23, 2017).

42. 17 C.F.R § 240.21F-1 ("You should read these procedures carefully because the failure to take certain required steps within the time frames described in these rules may disqualify you from receiving an award for which you otherwise may be eligible.").

43. *Id*. § 240.21F-10(d).

44. *See, e.g.*, Order Determining Whistleblower Award Claim, SEC Release No. 78881, File No. 2016-17 (Sept. 20, 2016); 17 C.F.R. § 240.21F-5(b) ("The amount will be at least 10 percent and no more than 30 percent of the monetary sanctions that the Commission and the other authorities are able to collect.").

45. 17 C.F.R. § 240.21F-6. The commission may increase an award by considering the significance of information or the assistance the whistleblower provided, law enforcement's interest in the information, and the whistleblower's participation in internal compliance systems. The Commission may decrease an award by considering the whistleblower's culpability and interference with internal compliance and reporting systems and whether the report was unreasonably delayed. *Id.*

46. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq. (2012).

often generate large settlements.[47] Whistleblowers can be particularly helpful in such cases that typically require access to foreign-based evidence typically hard to investigate by normal domestic methods.[48]

Negative factors can reduce a whistleblower's award. Besides a whistleblower's serious personal culpability, unreasonable reporting delay is the most significant negative factor reducing awards.[49] This factor occurs often because whistleblowers commonly wait long periods before reporting wrongdoing to the SEC. Some need time to decide whether to report, some wait until they leave the company or are fired, some learn of the wrongdoing long after the fact, and some are just tardy. Regardless of the reason, the SEC frowns on delay and may use it to reduce the award.[50] The SEC dislikes cases in which the statute of limitations (usually five years)[51] has run or is close to running. If the case is well beyond five years old, it is probably not worth its effort unless it involves a large company that has committed significant fraud, in which case the statutory period may be extended.[52] Clients with a good explanation for delayed reporting may still get awards.

The client's expected award is also relevant to the attorney's decision whether to take the case because whistleblower cases are normally handled on a contingency basis.[53] Unlike other types of lawsuits, expenses are rare. Travel may be required if the SEC or DOJ wants to interview your client, especially in an FCPA case overseas. But gener-

47. *See* Daniel J. Hurson, *The FCPA and SEC Whistleblowers: Major Opportunities*, MONDAQ (Jan. 6, 2016), http://www.mondaq.com/unitedstates/x/455536/Whistleblowing/The+Foreign+Corrupt+Practices+Act+FCPA+A+Major+Opportunity+For+SEC+Whistleblowers. *See also, e.g.*, Press Release, U.S. Sec. & Exch. Comm'n, SEC Awards $5.5 Million to Whistleblower (Jan. 6, 2017), https://www.sec.gov/news/pressrelease/2017-1.html.

48. *See* Hurson, *supra* note 47.

49. 17 C.F.R § 240.21F-6(b)(2).

50. *Id.* Cases reported to the SEC after the investigation has begun can also be difficult for counsel to assess at the outset. The whistleblower's contribution has to be "significant," a determination that depends on each case's facts and the Claims Review staff's perception. In one case, my client was originally denied an award, but after further SEC review of its significance, and the receipt of new information, the Commission made an award.

51. *See, e.g.*, Stacey L. McGraw & Stacey E. Rufe, *The Foreign Corrupt Practices Act: An Overview of the Law and Coverage-Related Issues*, INSURANCE COVERAGE (ABA Section of Litig. Mar. 21, 2014), http://apps.americanbar.org/litigation/committees/insurance/articles/janfeb2014-foreign-corrupt-practices-act.html (five-year limitations period on Foreign Corrupt Practices Act (FCPA) actions).

52. *Id.*

53. *See e.g.*, *Whistleblower Protection*, LOEVY & LOEVY, https://www.loevy.com/whistleblower-protection/ (last visited Mar. 2, 2017) (handling whistleblower cases on a contingency-fee basis); *cf.* Zachary Kitts, *Interesting Opinion on Lawyer Contingency Fees . . . and Proof That No Good Deed Goes Unpunished*, VIRGINIA QUI TAM LAW (May 2, 2013), http://vaquitamlaw.com/interesting-opinion-on-lawyer-contingency-fees-and-legal-ethics/ (contingency fees common in False Claims Act whistleblower cases).

ally, a contingency fee is appropriate to account for the limited time you will spend on this type of case.

V. Can Mary Keep Her Name Confidential?

Most whistleblowers want to remain anonymous, and the SEC allows anonymity if the whistleblower has counsel.[54] In such a case, the attorney files the "Tip, Complaint or Referral" form (TCR) with the SEC.[55] If filed electronically,[56] the critical thirteen-digit TCR number is issued immediately, but this takes longer for mail filings. When I file an SEC whistleblower case, I generally do not describe the facts in the limited space provided, but submit a cover letter briefly describing the matter and the client and a detailed document with exhibits fully describing the claim as attachments. When relevant, I provide the government with timelines and emails, taking care to avoid submitting privileged communications.[57]

Depending on the subject matter and the company's location, I may contact SEC attorneys I have previously worked with to alert them to the TCR, hoping to generate interest in the case. New TCR submissions that appear qualified (i.e., involve the securities laws and are not simply claims for losses on stock purchases and the like) are routed by the Office of the Whistleblower to the SEC's Office of Market Intelligence, where attorneys determine to which division and office (Washington, D.C., or regional offices) to refer the submission.[58] Normally, if the company is (or has been) under investigation, the case may be routed to the staff attorney handling that case.[59] It is crucial that the case is assigned to a staff attorney with time and interest to develop the case, but neither the client nor attorney have any control over that decision.

A client also should be cautioned that anonymity is not guaranteed. By law, the SEC has to keep the whistleblowers' names confidential until submission of formal award claims for an award on a second

54. *See* 17 C.F.R § 240.21F-9(c).

55. *Id.*

56. *Id*.

57. If you think the client may have privileged material, you can inform the SEC and offer a brief privilege log. You should wait for the SEC to contact you about sending it to the "taint unit" for review. Or, to be completely safe, if you are certain the material is privileged, return it back to the client and discuss it no further. Of course, companies have been known to mark documents liberally, especially emails, as privileged even though they are not. SEC lawyers are quite knowledgeable about these issues.

58. *See* 2016 ANNUAL REPORT, *supra* note 6, at 23, 27 (describing process in some detail).

59. *Id.* at 27.

form called a WB-APP.[60] On this form, whistleblowers disclose their identity only to the SEC.[61] It is never publicly disclosed.[62]

There are circumstances that may cause a whistleblower's identity to be revealed even before a case is filed or an award is considered. Documents produced by whistleblowers, such as emails, frequently contain names or other identifying information. The TCR form asks the whistleblower to identify such documents in advance.[63] That information can be redacted from copies shown to a company witness during an investigation, but a deleted name on a document may allow the witness (or more likely the company lawyer) to figure out whose name has been removed. In my experience, SEC enforcement attorneys take seriously their legal duty to protect the whistleblower's identity and will work with you and your client to maintain confidentiality throughout the investigation. That said, you should caution your client that the company eventually may deduce the whistleblower's identity unless your client is far removed from those involved in the case.[64]

If the case is litigated, whether in a civil SEC enforcement proceeding or a DOJ criminal case, the defense may be able to obtain the whistleblower's name in discovery.[65] Fortunately, the vast majority of cases settle well before discovery, but the SEC and the DOJ's increased emphasis on bringing charges may lead the defendants to refuse settlement. The government would then have to engage in discovery, potentially revealing the whistleblower's identity.

If the SEC refers the matter to a foreign law enforcement agency,[66] it may be unable to guarantee confidentiality of the whistleblower's identity. Foreign "securities and law enforcement authorities" may receive the information but are not subject to confidentiality provisions binding domestic authorities, such as a self-regulatory organization or state attorney general.[67]

---

60. *Form WB-APP*, U.S. Securities and Exchange Commission, https://www.sec.gov/about/forms/formwb-app.pdf (last visited Mar. 23, 2017).

61. 17 C.F.R. § 240.21F-10(c).

62. *See* 15 U.S.C. § 78u-6(h)(2)(A) (2012) (commission may not disclose whistleblower's identity except as required by public proceeding); *see also* 17 C.F.R. § 240.21F-7 (same).

63. *Form TCR Tip, Complaint or Referral*, U.S. Securities and Exchange Commission, https://www.sec.gov/about/forms/formtcr.pdf (last visited Mar. 23, 2017).

64. Daniel J. Hurson, *Ten "Rules" for Becoming a Successful SEC Whistleblower*, Mondaq (Sept. 11, 2013) http://www.mondaq.com/unitedstates/x/261844/Corporate+Commercial+Law/The+New+Rules+For+Becoming+A+Successful+SEC+Whistleblower.

65. *See* 15 U.S.C. § 78u-6(h)(2)(A); *see also* 17 C.F.R. § 240.21F-7.

66. 17 C.F.R § 240.21F-7(a)(2) (SEC may refer tips to foreign securities and law enforcement authorities).

67. *Id.* However, the statute requires the Commission to "determine what assurances of confidentiality it deems appropriate in providing such information to foreign securities and law enforcement authorities." *Id.*

If an investigation begins in Mary's case, she would probably be suspected as the whistleblower because of her close connection and previous statements to company employees involved in the matter. Fortunately, given the harsh penalties the SEC or DOJ can level against a companies or persons retaliating against a Dodd-Frank whistleblower,[68] the company may never retaliate against Mary.[69] Of course, retaliation can take many forms and raises its ugly head in many contexts. Retaliation from fellow employees, for example, can be a problem for whistleblowers.[70] If your client has already suffered retaliation before coming to you, the issues get more complicated.

VI. Mary's Options

Based on Mary's facts, you should consider the following possibilities:

A. Option One: File an Anonymous SEC Whistleblower Case but No Retaliation Case

Mary has direct evidence of an apparent ongoing accounting fraud orchestrated by a high-level manager, perhaps with knowledge and involvement of higher management. She has documents, including some emails. The case could be significant and relatively easy for the SEC to prove. Accounting fraud is a major target for the SEC because it may involve misrepresentation of financial statements, serious internal control violations, and direct injury to investors. In this case, it appears Mary should get full credit for bringing the fraud to the SEC's attention. If the activity has been ongoing and involves significant monetary amounts, it could exceed $1 million in penalties. Moreover, if Mary does not go to the SEC, someone else might. On balance, I would probably take this case.

Mary has some exposure because she provided limited assistance to Bill. Because she can explain that she was pressured by a superior, she would be a good candidate for non-prosecution, and her actions probably would not significantly reduce her award.[71] It would be prudent to raise

68. 15 U.S.C. § 78u-6(h)(1); *see also* 18 U.S.C. § 1513(e) (2012) (fine and imprisonment for up to ten years for retaliation, including interference with lawful employment or livelihood, against any person who provides law enforcement with truthful information relating to the commission of any federal offense).

69. In my experience, clients are more likely to experience blackballing with other potential employers in ways impossible to prove.

70. *See, e.g.*, Halliburton, Inc. v. Admin. Review Bd., 771 F.3d 254, 256–57 (5th Cir. 2014) (coworkers treated employee negatively after discovering whistleblowing activity).

71. The SEC has a "cooperation program" similar to the Department of Justice (DOJ). *SEC Spotlight—Enforcement Cooperation Program*, U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml (last visited Mar. 2, 2017). The current version of the Financial CHOICE Act (H.R. 10), recently passed by the House Financial Services Committee and expected to pass in the full House of Representatives, contains sweeping changes to the Dodd-Frank Act and curtails SEC enforcement in numerous respects. H.R. 10, 115th Cong. (2017). It would

this concern early with the SEC and seek a non-prosecution deal, an available SEC option. This approach, however, may require Mary to reveal her identity. Even if the SEC does not offer a cooperation deal, on these facts I seriously doubt the SEC or DOJ would charge Mary with aiding and abetting or committing securities fraud.

Mary can try to remain anonymous, at least for the time being, so she can remain at her job. She does not have to identify herself to the company as a whistleblower, although the company could ask her about it if an investigation is opened and she is interviewed, and you should discuss how she should respond. In my opinion, she has a right to deny being a whistleblower if company counsel asks because she is proceeding anonymously under law to report to the SEC.[72] Plus, if she continues to work there, she can supply ongoing information to the SEC regarding Bill, Jerry, and perhaps others, possibly strengthening her case for an award.

Mary can also continue to supply documents and information to the SEC. Federal law and many courts treat providing corporate documents directly related to fraud as protected activity on public policy grounds.[73] A 2016 federal magistrate decision held such materials to be attorney work product protected from discovery in civil litigation.[74] You may choose to supply a limited number of documents with the initial TCR form in hopes of getting the SEC interested in your client's case and then leave it to the SEC to issue a subpoena to the company for documents or request the company to provide them voluntarily. Of course, if the client has a non-privileged "smoking gun" email, it is advantageous to include it in your initial submission.

The whistleblower can also use otherwise confidential company documents to prosecute or defend against an employer retaliation case. The Defend Trade Secrets Act[75] provides immunity from civil or criminal liability under federal and state trade secrets laws for whistleblowers who disclose a trade secret if done in confidence to a government official or an attorney for the purpose of reporting a violation of law.[76] Properly applied, this law should protect whistleblowers who provide confidential documents to the SEC or other enforcement

---

prohibit whistleblower awards to those involved in illegal conduct. *Id.* § 825. This could, in theory, impact Mary if it were currently the law. The bill is expected to have more difficulty in the Senate, but should be watched carefully for its eventual impact on the whistleblower provisions. *See* Brena Swanson, *Financial CHOICE Act narrowly passes committee, next stop full House*, HOUSINGWIRE (May 4, 2017), https://www.housingwire.com/articles/40047-financial-choice-act-passes-through-committee-next-stop-house.

72. *See* 17 C.F.R § 240.21F-9(c) (2016) (whistleblowers can proceed anonymously).

73. *See infra* notes 75–77 and accompanying text.

74. BofI Fed. Bank v. Erhart, No. 15CV2353 BAS (NLS), 2016 WL 4150983, at *5 (S.D. Cal. Aug. 5, 2016).

75. Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (to be codified as amended in scattered sections of 18 U.S.C.).

76. *Id.* § 7, 130 Stat. at 384–85.

agencies, if they relate to illegal activity of any sort and can be considered "trade secrets" under the Act's broad terms.[77]

1. Is Mary's Employment Agreement an Impediment?

If Mary files an SEC whistleblower submission, you should also provide her employment agreement to the SEC if it has language in any way discouraging or forbidding her from providing information to the SEC, or from receiving any whistleblower award, or similar language. Apparently, many companies were a bit too aggressive over the years, figuring they could get employees to give up their federal rights, and tried to undermine the SEC program by using such restrictions.[78] In response, the SEC has aggressively enforced 17 C.F.R. § 240.21F-17(a), which provides that "[n]o person may take any action to impede an individual from communicating directly with the [SEC] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement."[79]

In 2016, the SEC fined a company for severance agreements requiring outgoing employees to waive rights to monetary recovery from complaints filed with the SEC or other federal agencies.[80] It fined another company $265,000 for similar conduct.[81] A 2014 SEC settlement stated Anheuser-Busch InBev violated the FCPA by including language in a separation agreement that stopped employees from voluntarily communicating with the SEC by imposing a financial penalty on employees if they violated the strict non-disclosure terms.[82] A 2017 case fined asset manager BlackRock, Inc. for using separation agreements requiring employees to waive obtaining whistleblower awards.[83]

Based on these decisions, if Mary's employment agreement included language prohibiting her from reporting to the SEC, it would likely be unenforceable. However, most of these cases settle for less

77. *See* Daniel J. Hurson, *The Whistleblower Protections of the Defend Trade Secrets Act Could Have a Broad Impact—But Only if Employees Are Told About Them*, MONDAQ (Sept. 13, 2016), http://www.mondaq.com/unitedstates/x/526468/Whistleblowing/The+Whistleblower+Protections+Of+The+Defend+Trade+Secrets+Act+Could+Have+A+Broad+ImpactBut+Only+If+Employees+Are+Told+About+Them.

78. *See, e.g.*, Health Net, Inc., SEC Release No. 78590, File 3-17396 (Aug. 16, 2016) (administrative proceeding).

79. 17 C.F.R. § 240.21F-17(a) (2016).

80. Health Net, Inc., SEC Release No. 78590, File 3-17396 (Aug. 16, 2016) (administrative proceeding).

81. BlueLinx Holdings, Inc., SEC Release No. 78528, File No. 3-17371 (Aug. 10, 2016) (administrative proceeding).

82. Anheuser-Busch InBev SA/NV, SEC Release No. 78957, File No. 3-17586 (Sept. 28, 2016) (administrative proceeding).

83. BlackRock, Inc., SEC Release No. 79804, File No. 3-17786 (Jan. 17, 2017) (administrative proceeding).

than the $1 million necessary to generate a whistleblower award.[84] Unenforceable employment agreement language, by itself, probably would not justify a whistleblower case. In Mary's case, however, this separate penalty could be combined with a more serious one for the accounting fraud Mary uncovered.

OSHA also has been critical of such language, releasing new policy guidelines for its review of private settlement agreements in whistleblower actions.[85] OSHA guidelines make clear that agreements containing language restricting complainant's ability to assist the government or waive monetary awards for providing information to the government, will be rejected.[86]

2. When Should You File Mary's SEC Whistleblower Case?

If Mary decides to make an SEC whistleblower submission, she should file immediately. In her case, there is no advantage in waiting. If further information or developments arise, you can supplement her submission by contacting the SEC Office of the Whistleblower.[87] Although the SEC encourages it, she need not "report up" within the company before submitting the TCR.[88] Completing a TCR on the SEC website takes about thirty minutes.[89] Attorneys should still file the TCR even if they are uncertain whether securities violations occurred. Normally, attorneys can also allege internal control and "books and records" violations of the securities law (which is, ironically, prohibited under the FCPA).[90] Any corporate practice allowing accounting fraud and misstated financial reports (or just about any other variety of corporate wrongdoing) will probably involve securities violations. Even if the allegation is incorrect and the case goes nowhere, there is an important benefit to having filed with the SEC if the client is also contemplating a Dodd-Frank retaliation case.[91]

Mary will then have to wait to see if the SEC responds to the submission. If nothing happens after a few weeks, you can contact the

84. *See* 2016 ANNUAL REPORT, *supra* note 6 (fiscal year 2016 brought more than 4,200 whistleblower tips, but only thirteen resulted in whistleblower awards that totaled more than $57 million).

85. U.S. Dep't of Labor, OSHA, Memo re: New Policy Guidelines for Approving Settlement Agreements in Whistleblower Cases at 1, https://www.whistleblowers.gov/memo/InterimGuidance-DeFactoGagOrderProvisions.pdf (Aug. 23, 2016) ("OSHA will not approve a 'gag' provision that prohibits, restricts, or otherwise discourages a complainant from participating in protected activity.").

86. *Id.* at 1–2.

87. *See What Happens to Tips*, SEC, https://www.sec.gov/about/offices/owb/owb-what-happens-to-tips.shtml (last visited Mar. 3, 2017).

88. *See* 17 C.F.R. § 240.21F-4(b)(7) (2016).

89. *Submit a Tip*, SEC OFFICE OF THE WHISTLEBLOWER, https://www.sec.gov/about/offices/owb/owb-tips.shtml (last visited Mar. 3, 2017).

90. 15 U.S.C. § 78m (2012).

91. *See infra* Part VII.

SEC Office of the Whistleblower to find out if it has referred the matter to the Enforcement Division. I have had cases with an ongoing investigation that neither my client nor I were aware of, and cases in which months passed before the SEC contacted me about a submission I assumed had gone nowhere. Again, the best indication is a request by SEC staff to talk to your client, but even that does not assure that the SEC will ultimately decide to pursue your case.

If the SEC opens an investigation, the process could take two to four years or longer to reach a conclusion. If the case resolves with an order or settlement, attorneys should carefully read the issued order, which may indicate how much your client's information affected the outcome. After the settlement, it may take several months before the case is posted on the SEC website as one eligible for an award. It is important to follow the announcements on the SEC's website at the end of each month because the Office of the Whistleblower is not required to notify you if it believes your client should apply for an award, although I have been so notified in the past. After the case is posted as eligible, you have ninety days to file an award claim, using form WB-APP.[92] You should receive an acknowledgment from the Office of the Whistleblower that your claim has been received. Then, you must wait again, potentially for many more months, before the SEC makes a preliminary award decision. If your client accepts the Claims Review Staff's decision as to the percentage of the penalty assessed and collected from the company as the client's award, the SEC Commissioners have thirty days to request Commission review.[93] To my knowledge this has never happened, but there is always a chance a Commissioner might want to review an award, potentially adding months to the process. This process apparently has also been slowed by bogus claimants, whose assertions must be investigated and, even after being rejected, are allowed sixty days to request reconsideration.[94]

If Mary suffers retaliation from any quarter after filing the TCR, report it to the SEC. This submission may get SEC attorneys more interested in the case, and if it is already under investigation, the SEC will consider that behavior as part of its case. However, Mary would have to disclose her identity to the SEC, and then presumably to the

92. 17 C.F.R. § 240.21F-10.

93. *Id.* § 240.21F-10(h).

94. Andrew Ceresney, SEC Enforcement Director, The SEC Whistleblower Program: The Successful Early Years (Sept. 14, 2016), https://www.sec.gov/news/speech/ceresney-sec-whistleblower-program.html ("[S]imilar to our investigations, the award process takes time. There are sometimes multiple claimants applying for an award in a matter—we have had up to 16 in one matter. Our Whistleblower Office gives each one the attention and due diligence that it deserves. The award applications also often present unique, first impression issues that require careful review and thought.").

company, if she reported retaliation to the SEC or filed her own retaliation case.

In short, if Mary files a Dodd-Frank whistleblower case, and not a retaliation claim, the case will be much easier because the SEC will do all the "heavy lifting." But you and Mary may both be in for a long wait as the SEC investigates, files, and then settles a case against the company. You may only sporadically be part of that process. This can be very frustrating, and at times your client may question your role as an advocate. On the bright side, you avoid having to litigate a grueling case, conduct and pay for discovery, deal with a hostile judge or adversary, and you have the investigative power of the U.S. government on your side. An attorney may feel genuine pride after watching a major corporation face its wrongdoing, knowing your client had the courage to initiate the process. And, it will be well worth the wait if the SEC settles the case for a substantial amount, and your client gets up to thirty percent of what can be millions of dollars.[95]

3. Interviews, Conflicted Counsel, and Other Close Calls

Although there are benefits of filing a whistleblower complaint anonymously, complications may arise. If Mary files an anonymous whistleblower case while still working at the company, or, even after that, if she leaves voluntarily, her situation could get complicated if the SEC opens an investigation. If the SEC immediately begins conducting the investigation on its own, it will most likely want to interview her, either by phone or in person. She can remain anonymous, and as noted, it is a good sign if the SEC staff does ask for such an interview.

If the company undertakes an internal investigation, as is usually the case, the SEC may leave it to company counsel to interview employees. As Bill's assistant, the company would likely interview Mary and would probably find sooner, rather than later, that she already knows about Bill's activities. If she is a former employee, she could decline the interview and interview only with the SEC.

As a current employee, if Mary declines to interview with the company, it could have a facially legitimate justification to terminate her. If the company terminates Mary not knowing she is the whistleblower, it would be hard for her to prove the firing was retaliation. Assuming she is still employed and agrees to an interview, the company will assume she has no need for counsel. But Mary has a problem. She does not want to discuss her involvement in the accounting manipulation, however minor it may have been. She certainly does not want to reveal she is the whistleblower. You may offer to appear as her counsel, but the company may conclude she is hiding something if she, perhaps

95. 17 C.F.R. § 240.21F-5(b).

alone among employees, brings her own counsel. If she goes to the interview alone, company counsel will probably ask who she has spoken to about these matters, and she will have to decide whether she is willing to disclose her identity as a whistleblower, lie about it, or simply refuse to answer. If she admits she helped Bill change the accounts, she might be fired. Mary is between a rock and a hard place.

Similarly, tricky situations can arise in an SEC investigation if company counsel, unaware of Mary's whistleblower role, want to represent her along with other employees in any SEC interviews, as is often the case. This could happen even if she was a former employee and the company volunteered to provide counsel. For the company, this tactic makes sense because it would want to keep informed of the facts and learn what she is going to tell the SEC if and when interviewed.

SEC enforcement lawyers may indirectly assist Mary by initially not requesting that the company provide her for an interview, but that may just be another red flag to company counsel. Sometimes it may be better for the SEC to include her on a list of interviewees its lawyers will speak with later to make it appear she is not the whistleblower.

Under these circumstances, Mary should not be represented by a company lawyer who assumes Mary is just another employee covered by the company's attorney-client privilege. That lawyer would obviously have a disqualifying conflict representing Mary if the lawyer knew her status as a whistleblower. The SEC would not want such a situation to develop either because it assiduously stays away from attorney-client privilege issues. Instead, Mary could ask for her own counsel (although the company may want her to cover the cost) to handle any situations that may arise with the company. You could offer to represent her yourself, but that might present problems if the company later finds out you were also her "whistleblower lawyer" who was simultaneously working with the SEC. Mary could also simply decline the company's offer of counsel. This option would be easier if she is a former employee, but the company may find it concerning if she is still employed there. There are no easy solutions here.

What is your advice to Mary? You could tell her that if she receives a request for an interview, she could appear with you or another lawyer and explain what she knows and that she is concerned about her exposure and thus felt the need for an independent lawyer. That lawyer could tell the company that as far as Mary and her counsel are concerned, the interview is not covered by the company's attorney-client privilege, and it should proceed accordingly, if at all. Company counsel may not accept this premise, but you have made your record. Of course, she is not obliged to disclose she is an SEC whistleblower. If company counsel is smart, it will not ask that question, and if it

does, Mary can just decline to answer. Indeed, it is my personal view she has every right to say "no" because her identity as a confidential whistleblower is legally protected. If the company forces her to reveal her whistleblower status, the SEC might well consider that an attempt to intimidate or interfere with her right to report wrongdoing to the SEC.[96]

If the company interviews Mary and she is candid, she could lose her job. You could well predict that if she discloses everything, the company will look for a reason to fire her so that it can explain her termination to the SEC without appearing retaliatory, even though the company may not definitively know she is a whistleblower. The company could terminate her and claim it was because of her involvement in the accounting manipulation or could demote her by transferring her to another department. As the internal investigation continues, fellow employees will probably discover her role as Bill's accomplice, in which case she may be seen not as a hero, but as disloyal and self-serving. Are there really any good options for Mary that include outing herself as a whistleblower?

B. Option Two: File an SEC Whistleblower Case, Immediately Report Up Within the Company, and Then Consider Filing a SOX Retaliation Case and a Future Dodd-Frank Retaliation Case If Appropriate

Mary has another option that may allow her to take advantage of Dodd-Frank. First, fill out the TCR form on the SEC website (or by mail) and thus file a whistleblower case. Tell the SEC the entire story in detail. Mary can proceed anonymously or identify herself if she prefers. Then contact the company's office of the General Counsel, the office of the Chief Compliance Officer (CCO), or both, to inform them she is prepared to come in immediately to report serious fraud in the company. Request a meeting with higher-level management. Tell them you will accompany her as her attorney. This approach should get the company's attention. But if it does not, be prepared to deliver promptly a well-written summary of the facts to the General Counsel's office, and confirm receipt.

In the meeting, Mary should inform the General Counsel or CCO of all facts, including the whistleblower case filed with the SEC. She should describe Bill's actions in detail, her meetings with Bill and Jerry, and their attempts to intimidate her, including the note placed in Mary's personnel file. At the meeting, Mary should present her documents and let the company know the SEC now has them, too. Be

96. *See, e.g.*, Williams v. Rosenblatt Sec. Inc., 136 F. Supp. 3d 593, 619 (S.D.N.Y. 2015) ("[T]he Second Circuit Court of Appeals has adopted a 'case-by-case approach to requests for preliminary relief based on witness intimidation.'" (quoting Moore v. Consol. Edison Co. of N.Y., 409 F.3d 506, 512 n.6 (2d Cir. 2005))).

truthful and candid and provide a full description of whatever assistance Mary gave Bill, explaining her reasons for so doing.

Mary then has up to 120 days to file a whistleblower case with the SEC and still get credit for having reported to the SEC as of the date she initially reported to the company.[97] To obtain maximum leverage, she should file with the SEC first and then inform the company. Of course, if Mary has already informed the company, and it disclosed information to the SEC already, you need to file the TCR with the SEC as soon as possible, even if it appears the 120-day grace period has already run out.

Identifying herself as an SEC whistleblower carries some risk for Mary,[98] but after she takes this good faith action, supported by counsel, the company will be reluctant to fire or demote her out of fear of a retaliation claim by her or the SEC. The company may have no choice but to interact with her very carefully. If it does not, start taking notes for a retaliation complaint. Once company counsel hears Mary's story, it will presumably report it to the CEO and the Board. Management should take steps to deal with Bill and Jerry. But if it does not, or instead retaliates against Mary, she can report this to the SEC and bolster her case.

If the company plans strategically, however, it will likely retain experienced outside counsel who will advise it to move quickly to inform the SEC that it will cooperate fully and launch its own investigation. Because the company knows she has filed the TCR and is cooperating with the SEC, she should suffer no negative consequences for reporting information internally, for this is the very action the company should have indicated it expects from its employees.

The company's counsel will want immediately to start building its defense with the SEC, which will require management to cooperate with the SEC and treat Mary fairly. If Mary has been proceeding anonymously, at some point she should consider dropping her anonymity with the SEC. Meanwhile, a document hold order probably will be sent to all employees. In the typical case, Bill, Jerry, and Mary's computers will be confiscated and sent to forensic accountants for analysis.[99] The company will need to consider making a public disclosure

97. 17 C.F.R. § 240.21F-4(b)(7).

98. *See supra* notes 31–36 and accompanying text.

99. You and Mary should consider carefully the possibility that her computer will be seized. If there are privileged emails between you and her saved on it, she should consider deleting them (even if company forensics experts may be able to recover them). Otherwise, nothing should be deleted, particularly emails with others, such as Bill, which will appear on his computer and may eventually go to the SEC. It is vitally important to Mary's status as a whistleblower that she maintain the complete confidence of the SEC staff.

of some kind, and perhaps file a Form 8-K,[100] to offer investors some explanation regarding the SEC and internal investigations. AW's stock may take a temporary hit, but that is normal. For better or worse, the market is used to such announcements.

Mary should be able to keep her job, but may struggle personally when working with fellow employees once word gets out that she is involved in the investigation. Mary should also expect that Bill, and probably Jerry, will retain counsel and possibly try to blame her in some fashion. But Mary has strengthened her position by becoming an SEC whistleblower early on and reporting up through the right channels. She will gain the respect of both the SEC and, one would hope, the senior management of the company, for her forthright actions. Thus, Mary should be protected from adverse action by the company.

VII. Should Mary File a Retaliation Case, and If So, Under What Law?

If Mary files a retaliation case, she has at least three options. She can file a traditional SOX case by filing an OSHA complaint,[101] she can file a Dodd-Frank retaliation case in federal court,[102] or she can do both. Let us first examine the outlook for a Dodd-Frank retaliation case. Dodd-Frank has some obvious advantages over a SOX retaliation case: a much longer statute of limitations (three years as opposed to the 180-day limit to file with OSHA),[103] and double backpay damages.[104] It does not, however, provide for emotional distress damages. It allows for filing the action immediately in federal court, as opposed to waiting 180 days, after which, if OSHA has not issued a final decision, a federal case could be filed.[105]

The elements of a SOX and Dodd-Frank retaliation case are similar. Mary probably has a prima facie retaliation case under either statute. She engaged in "protected activity" because she had both an objective and subjective reasonable basis to believe that Bill's creation of false accounting entries (a specific type of illegal conduct) violated a provision of 18 U.S.C. § 1514A.[106] The courts and the Administrative

100. For information on Form 8-K, see *Form 8-K*, U.S. SECURITIES AND EXCHANGE COMMISSION (Aug. 10, 2012), https://www.sec.gov/answers/form8k.htm.

101. *File a Complaint*, U.S. DEP'T. OF LAB., OSHA, WHISTLEBLOWER PROTECTION PROGRAMS, https://www.whistleblowers.gov/complaint_page.html (last visited Mar. 3, 2017).

102. *See, e.g.*, Egan v. TradingScreen, Inc., No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *1 (S.D.N.Y. May 4, 2011) (plaintiff claimed defendants violated Dodd-Frank's anti-retaliation provision).

103. *Compare* 15 U.S.C. § 78u-6(h)(1)(B) (2012), *with* 18 U.S.C. §1514A(b) (2012).

104. 15 U.S.C. § 78u-6(h)(1)(C).

105. 15 U.S.C. § 78u-6(h)(1)(B).

106. This section is entitled "Civil action to protect against retaliation in fraud cases."

Review Board for SOX cases have relaxed standards for what constitutes reasonable belief. In fact, the pleading standard is more relaxed than in federal court for a Dodd-Frank case.[107] Mary need not identify a specific act of securities fraud, but she must be able to show that a reasonable person, with the same training and experience, under the same circumstances would believe the employer violated securities laws.[108] Mary reported Bill's accounting manipulation to Jerry, a supervisor with authority to investigate such misconduct; the company, through Jerry, knew of her protected activity; she suffered an adverse action (Jerry's personnel file entry); and the circumstances and timing were sufficient to raise the inference that her protected activity likely contributed to the adverse action.

As Mary's counsel, you would need to watch the 180-day OSHA statute of limitations, which began to run when Mary learned Jerry put the unfavorable personnel note in her file.[109] The case would be stronger if Mary had actually received an adverse performance review, likely several months off, before the 180-day limit for a SOX case. There is no way to know how her revelations to the company will affect that review. The company may actually give her a good review for reporting the accounting fraud.

Section 806 of SOX permits uncapped compensatory damages.[110] Section 922 of Dodd-Frank does not.[111] SOX includes an express exemption from mandatory arbitration agreements, while Dodd-Frank claims are subject to such agreements.[112] Mary has some good options if she pursues a retaliation claim. The SOX case must be filed soon, but could later be merged into a Dodd-Frank case in federal court if the company retaliates. On the other hand, a retaliation case may not be worth the effort and expense, especially if she has an ongoing whistleblower claim and is still at the company.

There is currently a circuit split on whether a whistleblower must first file a case with the SEC before bringing a Dodd-Frank case. The Fifth Circuit requires a whistleblower first report to the SEC before

107. Wood v. Dow Chem. Co., 72 F. Supp. 3d 777, 789 (E.D. Mich. 2014) ("But the pleading standard [for reasonable belief] under the Act is not so demanding.").

108. Sylvester v. Parexel Int'l LLC, ARB No. 07-123, 2011 WL 2165854, at *12 (Dep't of Labor May 25, 2011) (en banc).

109. 29 C.F.R. § 1980.103(d) (2016).

110. 18 U.S.C. § 1514A (2012).

111. 15 U.S.C. § 78u-6 (2012).

112. *See* Jason Zuckerman, *The Evolution of SOX: A Powerful Remedy For Retaliation*, LAW360 (May 24, 2016, 11:32 AM), https://www.law360.com/articles/799338/the-evolution-of-sox-a-powerful-remedy-for-retaliation; *see also* Jason Zuckerman & Dallas Hammer, *SOX Whistleblower Protections Are Not Obsolete*, LAW360 (Sept. 21, 2015, 10:45 AM), https://www.law360.com/articles/704629/sox-whistleblower-protections-are-not-obsolete.

bringing a Dodd-Frank claim,[113] but the Second Circuit does not.[114] The SEC addressed this issue in its Final Rule[115] and has filed amicus briefs in several cases supporting the Second Circuit's position that an employee who has reported internally is not required first to file a report with the SEC.[116] The SEC argues that the statute is ambiguous and, under *Chevron*, the SEC's stated interpretation should control.[117] Since 2011, at least twenty-four court decisions reviewed this issue, and at least seventeen have agreed with the SEC's broad interpretation, while at least seven have not.[118]

Fortunately, attorneys can avoid this issue by filing an SEC whistleblower submission before filing a Dodd-Frank retaliation case. If Mary files the TCR the same day she reports internally to the company regarding the accounting fraud, thus becoming a statutory "SEC whis-

---

113. Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620, 623 (5th Cir. 2013).

114. Berman v. Neo@Ogilvy LLC, 801 F.3d 145, 154–55 (2d Cir. 2015).

115. 17 C.F.R. § 240.21F-2 (2016).

116. *See, e.g.*, Brief of the Sec. & Exch. Comm'n, Amicus Curiae in Support of the Appellant at 37, Berman v. Neo@Ogilvy LLC, 801 F.3d 145 (2d Cir. 2015) (No. 14-4626).

117. *Id.* at 7, 12 (citing Chevron USA, Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984)).

118. A Wisconsin federal district court agreed with the Fifth Circuit's position in *Asadi*, holding a whistleblower must first file with the SEC before bringing a Dodd-Frank claim. Lamb v. Rockwell Automation Inc., No. 15-CV-1415-JPS, 2016 WL 4273210 (E.D. Wis. Aug. 12, 2016). In *Lamb*, the plaintiff submitted her SEC complaint long after her internal reporting and termination. She thus failed to meet an element of the prima facie case. "[The employer] is only prohibited from retaliating against a 'whistleblower'—one who has reported to the SEC—and at the time it allegedly retaliated, Lamb was not one. Thus, not only does Lamb fail to state a Section 922 [of the Dodd-Frank Act] claim, she can never do so." *Id.* at *4. *See also* Verble v. Morgan Stanley Smith Barney, LLC, 148 F. Supp. 3d 644, 656 (E.D. Tenn. 2015) (rejecting SEC and Second Circuit positions), *aff'd on other grounds*, No. 15-6397, 2017 WL 129040 (6th Cir. Jan. 13, 2017). More recently, in *Somers v. Digital Realty Trust Inc.*, a divided Ninth Circuit panel sided with the Second Circuit and affirmed the district court's denial of the defendant's motion to dismiss a Dodd-Frank whistleblower claim. 850 F.3d 1045 (9th Cir. 2017). It held that, in using the term "whistleblower," Congress did not intend to limit protections to those who disclose information to the SEC, and thus the Dodd-Frank retaliation provisions also protect those who are fired after making internal disclosures of alleged unlawful activity under SOX and other laws, rules, and regulations. *Id.* at 1048–51. The Court found that any ambiguity in the Dodd-Frank language was resolved by an SEC regulation and thus entitled to *Chevron* deference. *Id.* at 1051. The appellant corporation filed a petition for certiorari. Petition for Writ of Certiorari, *Somers*, 850 F.3d 1045 (No. 16-1276). On June 26, 2017, the Supreme Court granted cert in *Digital Realty Trust*, to be heard in the October term. *Somers*, 2017 WL 1480349 (U.S. June 26, 2017). Presumably, this case will resolve the issue of whether whistleblowers are protected from retaliation under Dodd-Frank if they report alleged misconduct only internally, rather than to the SEC. If the Ninth Circuit's position is upheld, it will probably result in more whistleblowers reporting internally first, and not bypassing that option by going to the SEC initially to ensure they have retaliation protection. So, in this case, it would seem that both whistleblowers and corporations (except perhaps for Digital) should be hoping the Supreme Court affirms the Ninth Circuit. Likewise, if the Supreme Court affirms, it could effectively render the SOX retaliation provision moot, as most whistleblowers would favor using Dodd-Frank as it has important advantages over SOX as discussed above.

tleblower," she could file a Dodd-Frank case without fear. She would qualify under both the Fifth and Second/Ninth Circuit rules and presumably under whatever decision the Supreme Court makes, if and when it decides the issue. Mary would then have at least three years to see if any of her SEC whistleblowing activities, or her earlier reporting to Jerry, lead to retaliation. If the company retaliates against her as a whistleblower, she could file or amend her Dodd-Frank retaliation case.[119] In sum, if you take Mary's case, you should quickly file the TCR with the SEC to ensure that a later retaliation case, if filed, would be safe from dismissal on the grounds that Mary was not an SEC whistleblower at the time of filing.

Conclusion

You likely will never have a potential SEC whistleblower case just like Mary's, but you may encounter cases involving both SEC whistleblower claims and the potential for simultaneous retaliation claims under Dodd-Frank, SOX, or both. This review is designed to assist you by providing the best counsel possible to the "Mary" who comes to you in dire need of sound advice.

119. The Fifth Circuit opinion considered that an employee fired after becoming a whistleblower and reporting up to the General Counsel on the same day could utilize Dodd-Frank even if the employer was unaware of the SEC whistleblower filing. *Asadi*, 720 F.3d at 627–28. In our hypothetical, while Mary is unlikely to be fired on the day she reports up to the General Counsel, she would be protected from any retaliation from that point forward. Also, even if Mary did not tell the company the same day that she went to the SEC, she would still be protected from any retaliation for reporting to the company under SOX, 18 U.S.C. § 1514A (2012), or Dodd-Frank, 15 U.S.C. § 78u-6(h)(1) (2012).