

Fordham Journal of Corporate & Financial Law

Volume 23, Number 2

2018

Article 1

What Would We Do Without Them: Whistleblowers in the Era of Sarbanes-Oxley and Dodd-Frank

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SYMPOSIUM

WHAT WOULD WE DO WITHOUT THEM: WHISTLEBLOWERS IN THE ERA OF SARBANES- OXLEY AND DODD-FRANK[†]

WELCOME AND INTRODUCTORY REMARKS

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KEYNOTE ADDRESS

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[†] The symposium was held at Fordham University School of Law on October 27, 2017. It has been edited to remove minor cadences of speech that appear awkward in writing and to provide sources and references to other explanatory materials in respect to certain statements made by the speakers.

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ii. Jane A. Norberg is the Chief of the Office of the Whistleblower in the Division of Enforcement of the U.S. Securities and Exchange Commission. She joined the SEC in January 2012 as Deputy Chief and was promoted to Chief in September 2016. In her capacity as Chief, Ms. Norberg helps administer the whistleblower program including working with whistleblowers and their counsel, reviewing and analyzing whistleblower applications for award, and engaging in public outreach to educate potential whistleblowers and other interested parties about the program. Prior to joining the SEC staff, Ms. Norberg was engaged in private law practice for 14 years, including at Shearman & Sterling LLP.

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Fordham Journal of Corporate & Financial Law

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v. Tracey McNeil is the first Ombudsman at the U.S. Securities and Exchange Commission. In this capacity, Ms. McNeil acts as a liaison in resolving problems that retail investors may have with the Commission or self-regulatory organizations and establishes safeguards to maintain the confidentiality of communications with investors, among other duties. The Securities and Exchange Commission disclaims responsibility for any private publication or statement of any SEC employee or Commissioner. This article expresses the speaker's views and does not necessarily reflect those of the Commission, the Commissioners, or other members of the staff.

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Pacella served as a law clerk to the Honorable Julio M. Fuentes of the United States Court of Appeals for the Third Circuit, and also practiced securities and commercial law for several years in Shearman & Sterling LLP's New York office. She is admitted as an attorney to both the New York and California state bars.

vii. Judith Weinstock is an Assistant Regional Director in the Enforcement Division of the U.S. Securities and Exchange Commission. The Securities and Exchange Commission disclaims responsibility for any private publication or statement of any SEC employee or Commissioner. This article expresses the speaker's views and does not necessarily reflect those of the Commission, the Commissioners, or other members of the staff.

viii. Jason Zuckerman is Principal of Zuckerman Law, a firm based in Washington, D.C. that represents whistleblowers in whistleblower rewards and retaliation claims. Prior to founding Zuckerman Law, Zuckerman served as Senior Legal Advisor to the Special Counsel at the U.S. Office of Special Counsel, the federal agency charged with protecting whistleblowers in the federal government.

WELCOME AND INTRODUCTORY REMARKS

SEAN GRIFFITH: Welcome. Good afternoon and welcome to Fordham Law School.

I am Sean Griffith and I am a professor here. I am also the T.J. Maloney Chair in Business Law, and I have the pleasure of being one of the faculty moderators of the *Fordham Journal of Corporate & Financial Law*. It is my pleasure to thank you all for joining us and to welcome you here for the annual symposium of our Fordham Law School *Journal of Corporate & Financial Law*.

Today we are discussing whistleblowers in the era of Sarbanes-Oxley and Dodd-Frank. We all know, or we have all come to know, the important role of whistleblowers in protecting the integrity of the U.S. financial system, and we have all also become acutely aware of the need of the U.S. financial system to have its integrity protected. The number of corporate scandals that we see—there seem to be several a week, the most recent scandals including Wells Fargo¹ and Volkswagen,² as well as many others.³

Since the collapse of Enron in the early 2000s,⁴ whistleblowers have assumed an increasingly important role in ensuring the integrity of corporate America. The Securities and Exchange Commission (SEC), for example, has developed a comprehensive whistleblower program.⁵

Just this morning, I was reading a news blog and there was an article about a Government Accountability Project (GAP) report on how to work

1. Matt Egan, *Wells Fargo Uncovers Up To 1.4 Million More Fake Accounts*, CNN MONEY (Aug. 31, 2017, 12:34 PM), <http://money.cnn.com/2017/08/31/investing/wells-fargo-fake-accounts/index.html> [<https://perma.cc/Z6RC-NRUG>].

2. Russell Hotten, *Volkswagen: The Scandal Explained*, BBC NEWS (Dec. 10, 2015), <http://www.bbc.com/news/business-34324772> [<https://perma.cc/X67W-9HYD>].

3. See, e.g., Ross Kohan, *Three of 2017's Biggest Corporate Scandals*, FORTUNE (Dec. 21, 2017), <http://fortune.com/video/2017/12/21/three-of-2017s-biggest-corporate-scandals/> [<https://perma.cc/LHL6-UPAZ>].

4. Richard A. Opiel Jr. & Andrew Ross Sorkin, *Enron's Collapse: The Overview; Enron Corp. Files Largest U.S. Claim for Bankruptcy*, N.Y. TIMES (Dec. 3, 2001), <http://www.nytimes.com/2001/12/03/business/enron-s-collapse-the-overview-enron-corp-files-largest-us-claim-for-bankruptcy.html?mcubz=0> [<https://perma.cc/QBJ6-J9A6>].

5. U.S. SEC. & EXCH. COMM'N, 2016 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 1 (2016), <https://www.sec.gov/files/owb-annual-report-2016.pdf> [<https://perma.cc/KF68-66LC>].

with whistleblowers, which provided a number of tips for journalists working with whistleblowers and the kinds of things that journalists should advise their whistleblower sources.⁶ Its suggestions included:

- Before exposing themselves to risk, journalists should counsel their whistleblowers to talk to a lawyer who is experienced in assisting whistleblowers.⁷ That is now all of us, or will be by the end of the afternoon.

- Whistleblowers should consult their loved ones before taking the risk and exposing their family to risk.⁸

- Whistleblowers should create a contemporaneous paper trail or diary of everything that happens, including when they raise the complaints and issues and whether they faced any retaliation.⁹

- They should keep their evidence in a safe place.¹⁰

- They should organize support for themselves among their colleagues as much as possible.¹¹

- They should always communicate with journalists and other outsiders through secure means, such as Signal or WhatsApp,¹² instead of communicating through regular texting and other technological means that I do not fully understand.

But the message here is that this is an important topic and that journalists and others who work with insiders who are exposing potentially bad acts inside a corporation need to treat their subjects with care, and that is what we are going to learn about today.

We have a terrific group of speakers, and I have a number of people to thank, including Professor Caroline Gentile, who is my co-advisor on the wonderful *Journal of Corporate & Financial Law*.

The *Journal of Corporate & Financial Law* is a leading journal here at Fordham Law School. It was founded in 1995 and is one of the leading student-edited journals on business law in the entire country. In fact, the *Corporate Journal* is ranked as the number one most-cited specialty

6. GOV'T ACCOUNTABILITY PROJECT, WORKING WITH WHISTLEBLOWERS: A GUIDE FOR JOURNALISTS (2017), https://www.whistleblower.org/sites/default/files/GUIDE%20TO%20UPLOAD_2.pdf [<https://perma.cc/FRV8-935E>].

7. *Id.* at 20.

8. *Id.* at 21.

9. *Id.*

10. *Id.*

11. *Id.* at 21–22.

12. *Id.* at 22.

journal in the fields of banking and finance.¹³ Fordham Law takes great pride in the *Corporate Journal*, and indeed in all of our student-edited publications.

I want to thank each of our panelists; all of our alumni who have come back, including our alumna Tracey McNeil, who is one of our panelists; thanks to the staff members of the *Fordham Journal of Corporate & Financial Law* for organizing the event; and a special thanks to Ian Engoron, the *Journal's* Symposium Editor, who has shouldered much of the organizational labor for this event.

I will turn it over to Ian to introduce our keynote speaker.

IAN ENGORON: Thank you, Professor Griffith, for that kind introduction, and good afternoon to everyone. As the Symposium Editor for the *Fordham Journal of Corporate & Financial Law*, I am honored and thrilled to welcome you here for our annual symposium entitled, “What Would We Do Without Them: Whistleblowers in the Era of Sarbanes-Oxley and Dodd-Frank.”

As Professor Griffith noted, we are honored to have a fantastic group of prominent academics and practitioners here to share their knowledge on the subject of whistleblowers.

Our keynote speaker is Jane Norberg, Chief of the Office of the Whistleblower in the Division of Enforcement at the Securities and Exchange Commission,¹⁴ and we are extremely grateful and fortunate to have her here today.

On the panel we are excited to hear from Alice BrightSky, Senior Director of Compliance Programs here at Fordham Law School;¹⁵ Tracey McNeil, Class of ‘99, who is the first ever Ombudsman at the Securities

13. According to the ranking system maintained by the Law Library at Washington & Lee University School of Law. See *Law Journals: Submissions and Ranking, 2009 – 2016*, WASH. & LEE U. SCH. L., <http://lawlib.wlu.edu/LJ/index.aspx> [<https://perma.cc/V2PS-GFTG>] (last visited Dec. 20, 2017) (to replicate the search results, search “Subject: Banking and Finance;” then “Edit type: Student-edited;” and “Ranking Criteria: Journal cites”).

14. Press Release, U.S. Sec. & Exch. Comm’n, Jane Norberg Named Chief of SEC Whistleblower Office (Sept. 28, 2016), <https://www.sec.gov/news/pressrelease/2016-201.html> [<https://perma.cc/RA78-45LJ>].

15. *Alice BrightSky*, FORDHAM U. SCH. L., https://www.fordham.edu/info/23642/a_-_b/9500/alice_brightsky [<https://perma.cc/2CBR-U4GQ>] (last visited Dec. 20, 2017).

and Exchange Commission;¹⁶ Jennifer M. Pacella, Assistant Professor of Law at the Zicklin School of Business at Baruch College, City University of New York, who specializes in whistleblower law;¹⁷ we are also joined by Judith Weinstock, Assistant Regional Director at the Securities and Exchange Commission New York Regional office; and finally Jason Zuckerman, Principal of Zuckerman Law and leading whistleblower award and retaliation attorney.¹⁸

As anyone who keeps up with financial news can tell you, both traditional and new forms of corporate fraud are committed on a frequent basis. As corporations and regulators push forward in an increasingly high-stakes, fast-paced, and technological world, they would do well to recognize the potential benefits—or downfalls—of embracing whistleblowers to help in their fight against corporate fraud.

Today we aim to foster a meaningful discussion regarding the increasingly predominant world of corporate whistleblowers and their evolving role under the regulatory regimes in force pursuant to the Sarbanes-Oxley Act (SOX or Sarbanes-Oxley) of 2002¹⁹ and the Dodd-Frank Act of 2010.²⁰

On that note, please join me in welcoming our keynote speaker, Chief Jane Norberg.

16. *Biography: Tracey L. McNeil*, U.S. SEC. & EXCH. COMMISSION, <https://www.sec.gov/biography/mcneil-tracey-l> [<https://perma.cc/R624-HHB4>] (last visited Dec. 20, 2017).

17. *Jennifer M. Pacella*, BARUCH C.: ZICKLIN SCH. BUS., <https://zicklin.baruch.cuny.edu/faculty-profile/jennifer-m-pacella/> [<https://perma.cc/JSH7-6QLP>] (last visited Apr. 14, 2018).

18. *Jason Zuckerman*, ZUCKERMAN L., <https://www.zuckermanlaw.com/attorneys-profile/jason-zuckerman/> [<https://perma.cc/C2CQ-2W5Z>] (last updated Dec. 10, 2017).

19. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified at 18 U.S.C. § 1514A (2012)).

20. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010).

KEYNOTE ADDRESS

JANE NORBERG: Thank you. Good afternoon, and thank you very much for inviting me to speak with you today.

Before I begin my remarks, I have to give a requisite disclaimer that anything I say here today is my own view and do not necessarily reflect the views of the Commission and its staff.²¹

I am pleased that Fordham's *Journal of Corporate & Financial Law* is holding today's symposium. When it comes to the topic of the importance of whistleblowers, the staff of the *Journal* hit the proverbial nail on the head when they came up with the title of today's symposium, "Whistleblowers: What Would We Do Without Them?"

Whistleblowers provide an invaluable public service, often at great personal and professional sacrifice and peril. I cannot overstate the appreciation that the Office of the Whistleblower staff has and that I personally have for the willingness of whistleblowers to come forward with evidence of possible securities laws violations. Whistleblowers have had a transformative impact on the SEC's enforcement program, both in terms of the detection of illegal conduct and moving our investigations forward quicker and through the use of fewer resources.

A significant reason for the success of the program is the efforts we have undertaken to protect whistleblowers from retaliation and from removing roadblocks from whistleblowers' paths.

Truly, a key function of the SEC's whistleblower program is whistleblower protection. I am attuned to the risks whistleblowers take in their careers and their professional livelihoods. My colleagues and I in the Office of the Whistleblower hear their stories every day, the risks they take and the sacrifices they make to help the Commission hold wrongdoers accountable. We also have heard stories from whistleblowers about their passion and dedication to the best interests of the investor and for standing up when they see a wrong.

Today, the first area I will focus on is the intersection between the SEC's whistleblower program and the Agency's efforts to stop fraud and wrongdoing, especially when it targets vulnerable and unsophisticated

21. The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author's colleagues on the staff of the Commission.

investors; second, I want to focus on how whistleblowers help the Agency return money to harmed investors; and finally, I will discuss efforts to protect whistleblowers who report wrongdoing.

Protecting the Main Street investor—or “Mr. and Ms. 401(k)” as our Chairman calls them—is one of the guiding principles of the Commission.²² Whistleblowers are key components in our enforcement arsenal. The value of whistleblower information in protecting the Main Street investor is displayed in the violations that were uncovered and halted based on actionable information provided by whistleblowers.

In the past year, we have seen how whistleblower information has aided SEC staff in detecting and stopping violations that impacted ordinary investors, including in some instances through active ongoing investment schemes that directly targeted and victimized unsophisticated investors.

In January, the Commission awarded a whistleblower who provided information that helped end an ongoing fraud that predominately targeted a more vulnerable investor community.²³ In January, again, the Commission awarded three whistleblowers whose information halted a scheme through which hundreds of investors had fallen victim, many of whom were unsophisticated.²⁴ Just one week ago, the Commission awarded a whistleblower who provided new information and substantial corroborating documentation of a securities law violation by a registered entity that impacted retail investors.²⁵

A second area where whistleblowers add demonstrable value is in the return of funds to harmed investors. This is exhibited most critically by the hundreds of millions of dollars returned to victimized investors as

22. Jay Clayton, Chairman, U.S. Sec. & Exch. Comm’n, Remarks at the Economic Club of New York (July 12, 2017), <https://www.sec.gov/news/speech/remarks-economic-club-new-york> [<https://perma.cc/7QZR-TX5Q>].

23. Order Determining Whistleblower Award Claim, Exchange Act Release No. 79,747 (Jan. 6, 2017) <https://www.sec.gov/rules/other/2017/34-79747.pdf> [<https://perma.cc/6WZP-S9DB>].

24. Order Determining Whistleblower Award Claim, Exchange Act Release No. 79,853 (Jan. 23, 2017), <https://www.sec.gov/rules/other/2017/34-79853.pdf> [<https://perma.cc/F6F5-595P>].

25. Order Determining Whistleblower Award Claim, Exchange Act Release No. 81,857 (Oct. 12, 2017), <https://www.sec.gov/rules/other/2017/34-81857.pdf> [<https://perma.cc/2LBH-38RW>].

a result of actionable information that whistleblowers have reported to the Agency.²⁶

Since the inception of the whistleblower program through the present day, more than \$975 million in sanctions have been ordered against wrongdoers in cases brought using information from whistleblowers who have received awards under the program, including approximately \$670 million in disgorgement and interest, the majority of which has been or will be distributed to harmed investors.²⁷ Indeed, two of the Commission's larger awards specifically cited the speed with which the whistleblower tip enabled our staff to move and secure funds for harmed investors.²⁸

There are several cases brought by the Commission with the aid of whistleblower information that illustrate this concept.

In July of this year, the Commission announced an award to a company insider who provided the Agency with critical information that helped stop a fraud that would have otherwise been difficult to detect.²⁹ Millions of dollars were returned to harmed investors as a result of the SEC's ensuing investigation and enforcement action.³⁰

In November of 2016, the Commission announced an award to a whistleblower who promptly came forward with valuable information that enabled the SEC to move quickly and initiate an enforcement action against wrongdoers before they could squander the money, leading to a near total recovery of investor funds.³¹

In October of 2013, the Commission announced it had made an award to a whistleblower whose information led to an enforcement action that recovered substantial investor funds.³² Less than six months after

26. U.S. SEC. & EXCH. COMM'N, *supra* note 5, at 1.

27. U.S. SEC. & EXCH. COMM'N, 2017 ANNUAL REPORT TO CONGRESS: WHISTLEBLOWER PROGRAM 1 (2017), <https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf> [<https://perma.cc/JY9K-T69G>].

28. *Id.*

29. Order Determining Whistleblower Award Claim, Exchange Act Release No. 81,227 (July 27, 2017), <https://www.sec.gov/rules/other/2017/34-81227.pdf> [<https://perma.cc/44CC-548S>].

30. *Id.*

31. Order Determining Whistleblower Award Claim, Exchange Act Release No. 79,294 (Nov. 14, 2016), https://www.sec.gov/files/34-79294_0.pdf [<https://perma.cc/NU9T-BXKC>].

32. Order Determining Whistleblower Award Claim, Exchange Act Release No. 70,554 (Sept. 30, 2013), <https://www.sec.gov/rules/other/2013/34-70554.pdf> [<https://perma.cc/44CC-548S>].

receiving this whistleblower's tip, the Commission was able to bring an enforcement action against the perpetrators and secure investor funds.³³

Another measure of the impact of the whistleblower program is in the increased volume of information that the Commission has received since the program has been operational. Awareness of the program has grown tremendously over the years, and the number of whistleblower tips and complaints received by the SEC has steadily increased each year.

Since the inception of the program through the end of fiscal year 2016, the Office has received more than 18,000 tips³⁴ from whistleblowers in every state in the United States³⁵ as well as from 103 foreign countries.³⁶ In fiscal year 2016, the Commission received over 4,200 tips, which is more than a forty percent increase in tips since fiscal year 2012, the first year for which we have full data.³⁷

And, of course, the success of the program can be seen, in part, in the approximately \$160 million we have paid to forty-seven whistleblowers for their valuable information and assistance since the program's inception.³⁸ In fiscal year 2016 alone, the SEC issued awards totaling over \$57 million, higher than all award amounts issued in previous years combined.³⁹

I want to pause here for a minute to talk about the source of the funds that we use to pay whistleblowers. This is an area where we frequently get questions.

Whistleblower awards are paid from the SEC's Investor Protection Fund, which was established by Congress.⁴⁰ The Fund is financed through monetary sanctions paid by securities law violators in actions brought by

perma.cc/Q3Z9-GDXB]; Press Release, U.S. Sec. & Exch. Comm'n, SEC Awards More Than \$14 Million to Whistleblower (Oct. 1, 2013), <https://www.sec.gov/news/press-release/2013-209> [<https://perma.cc/QW7F-NKFD>].

33. Press Release, U.S. Sec. & Exch. Comm'n, *supra* note 32.

34. U.S. SEC. & EXCH. COMM'N, *supra* note 5, at 34.

35. *Id.* at app. B; U.S. SEC. & EXCH. COMM'N, 2015 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM app. B (2015), <https://www.sec.gov/files/owb-annual-report-2015.pdf> [<https://perma.cc/X6F6-LM2K>].

36. U.S. SEC. & EXCH. COMM'N, *supra* note 5, at 26.

37. *Id.* at 23.

38. Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Whistleblower Award of More Than a Million Dollars (Oct. 12, 2017), <https://www.sec.gov/news/press-release/2017-195> [<https://perma.cc/FET6-XPY6>].

39. U.S. SEC. & EXCH. COMM'N, *supra* note 5, at 1.

40. *Id.* at 29 (citing 15 U.S.C. § 78u-6(g)(2)(A) (2012)).

the SEC.⁴¹ Money has not been taken or withheld from harmed investors to pay whistleblower awards.⁴² So, the whistleblowers' awards have not reduced any money that we have returned to harmed investors.

As you can see from the examples noted, whistleblowers do provide a valuable service, and, as I mentioned in my opening remarks, the service can come at great personal sacrifice and professional peril.

This is particularly true for corporate insiders. Corporate insiders are an extremely valuable category of whistleblower because they often have firsthand knowledge of wrongdoing and can help propel an investigation with their evidence and their insights. However, I do want to note that you do not have to be an insider to participate in the SEC's whistleblower program.⁴³

In general, corporate whistleblowers are coming forward to us. Approximately sixty-five percent of award recipients were insiders of the entity about which they reported.⁴⁴ I should also mention that eighty percent of those award recipients who were employees raised their concerns internally or were aware that their supervisor was aware of the violation before or at the same time that they reported to the Commission.⁴⁵

But the possibility of receiving an award is not the only reason that corporate insiders are blowing the whistle. They are doing so because of the comfort that the Commission's actions in the whistleblower protection area has provided. In other words, these actions show whistleblowers that we will protect them and take actions against their employers when appropriate.

The Commission's whistleblower protection efforts to date can be divided into three different categories. The first two categories, anti-retaliation actions and actions against attempts to impede reporting, grow out of the statutory framework that shaped the Commission's whistleblower program.⁴⁶ The third category has involved participating as *amicus curiae* in private retaliation lawsuits in federal courts.⁴⁷

41. *Id.*

42. *Id.*

43. *Id.* at 18.

44. *Id.*

45. *Id.*

46. *Id.* at 19–21.

47. *Id.* at 22.

The Commission's authority to bring actions for retaliation against a whistleblower derives from Section 21F(h)(1) of the Securities Exchange Act of 1934, which states in plain terms that no employer shall retaliate against an employee in the terms and conditions of employment simply because the employee has exercised his or her rights as a whistleblower and lawfully reported possible evidence of wrongdoing regarding a securities law violation.⁴⁸

We in the Commission's Office of the Whistleblower identify and monitor whistleblower complaints alleging retaliation by employers or former employers in response to an employee's reporting of possible securities law violations. We also serve as subject matter experts to Enforcement Division staff on investigations into these types of violations. From these efforts the Commission has brought three successful administrative proceedings, all of which provide important themes for employers and prospective whistleblowers alike.

Last year, oil and gas company SandRidge Energy agreed to settle Commission charges that it used illegal separation agreements and retaliated against a whistleblower who expressed concerns internally about how its reserves were being calculated.⁴⁹ Specifically, the whistleblower was one of several employees who were offered promotions on condition that they would assure the company that they supported management and were committed to the company.⁵⁰ The whistleblower declined the promotion and declined to provide assurances sought by management due to the whistleblower's ongoing concerns about the reserve's process.⁵¹ Ultimately, the whistleblower was terminated after a discussion amongst senior management about the disruptive nature of the whistleblower's internal report.⁵²

Also last year, the Commission charged casino gaming company International Game Technology with violating the prohibition against

48. 15 U.S.C. § 78u-6(h)(1) (2012).

49. *In re SandRidge Energy, Inc.*, Exchange Act Release No. 79,607, at 5 (Dec. 20, 2016), <https://www.sec.gov/litigation/admin/2016/34-79607.pdf> [[https://perma.cc/ ND R2-7QSV](https://perma.cc/NDR2-7QSV)].

50. *Id.*

51. *Id.*

52. *Id.* at 6.

retaliating against a whistleblower.⁵³ The whistleblower had received positive performance evaluations throughout the whistleblower's tenure with the company⁵⁴ and a special retention bonus was discussed to retain the whistleblower.⁵⁵ Shortly after the whistleblower received a favorable midyear review, the whistleblower raised concerns to senior managers, to the company's internal compliance hotline, and to the SEC that the company's publicly reported financials may have been misstated.⁵⁶ The whistleblower became concerned that the company's cost accounting model could result in inaccuracies in the company's financial statements and reported these concerns to management and the Commission.⁵⁷ Within weeks of raising the concerns, the whistleblower was slated for termination and removed from significant work assignments.⁵⁸ The company conducted an internal investigation into the whistleblower's allegations and determined that its reported financial statements were not inaccurate.⁵⁹ Shortly thereafter, the company fired the whistleblower.⁶⁰

In 2014, the Commission charged hedge fund advisory firm Paradigm Capital Management for retaliating against their head trader for reporting trading activity to the SEC that demonstrated that the firm was engaged in prohibited principal transactions.⁶¹ After the trader notified the company of the report to the Commission, the company immediately began retaliating, including by removing the whistleblower from the head trader position, stripping the whistleblower of supervisory responsibility, and, ironically, changing the whistleblower's job function from head trader to full-time compliance assistant.⁶² The Commission charged the firm and its principal with engaging in prohibited principal transactions and charged the firm with making a false filing with the Commission and

53. *In re Int'l Game Tech.*, Exchange Act Release No. 78,991, at 2 (Sept. 29, 2016), <https://www.sec.gov/litigation/admin/2016/34-78991.pdf> [<https://perma.cc/K9AH-99CG>].

54. *Id.*

55. *Id.* at 3.

56. *Id.* at 4.

57. *Id.*

58. *Id.* at 4–5.

59. *Id.* at 5.

60. *Id.*

61. *In re Paradigm Capital Mgmt., Inc.*, Exchange Act Release No. 72,393, Investment Advisers Act Release No. 3857, at 2 (June 16, 2014), <https://www.sec.gov/litigation/admin/2014/34-72393.pdf> [<https://perma.cc/X4UG-VC9P>].

62. *Id.* at 6.

retaliating against the employee.⁶³ Among other relief, the hedge fund and its principal paid over \$2 million in combined monetary sanctions for all of the violations.⁶⁴ And, at the end of the day, we awarded the whistleblower over \$600,000.⁶⁵

Several themes emerge from these retaliation cases that are worth noting.

- First, the company does not need to be charged with violating the underlying securities law violation reported by the whistleblower to be charged with retaliation. The charges against International Game Technology were standalone retaliation charges.⁶⁶ All that is necessary is that the whistleblower reasonably believe that he or she is reporting a possible securities law violation.

- Second, retaliation can take many forms short of outright firing, such as a reduction of responsibilities without justification or explanation. Section 21F(h)(1) expressly covers not just discharging, but any act to demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment.⁶⁷

- Third, strong enforcement of the anti-retaliation protections is critical to the success of the SEC's whistleblower program. Reviewing fact patterns of retaliation will continue to be a priority for the Office of the Whistleblower.

In addition to protecting whistleblowers from retaliation once they have reported to the Commission, Rule 21F-17 of the Exchange Act also prevents individuals and entities from taking steps to silence potential whistleblowers before they contact us, including through the threatened enforcement of confidentiality agreements.⁶⁸ The Commission has brought nine settled actions against companies for actions that violated Rule 21F-17, the majority of which were in connection with companies' separation and severance agreements.⁶⁹

63. *Id.* at 9.

64. *Id.* at 12.

65. Order Determining Whistleblower Award Claim, Exchange Act Release No. 74,826 (Apr. 28, 2015), <https://www.sec.gov/rules/other/2015/34-74826.pdf> [<https://perma.cc/UEF5-QH2Q>].

66. U.S. SEC. & EXCH. COMM'N, *supra* note 5, at 21.

67. 15 U.S.C. § 78u-6(h)(1) (2012).

68. 17 C.F.R. § 240.21F-17 (2012).

69. *In re HomeStreet, Inc.*, Exchange Act Release No. 79,844 (Jan. 19, 2017), <https://www.sec.gov/litigation/admin/2017/34-79844.pdf> [<https://perma.cc/3AQF-PB>].

The Commission has brought three actions against companies where the evidence shows that the restrictive agreements either targeted communications with the SEC or were used in circumstances that, in effect, chilled whistleblowers from coming forward or from continuing to communicate with the Commission.

For example, in the Commission's 2016 action against Anheuser-Busch InBev SA/NV for violations of Rule 21F-17, as well as violations of the books and records and internal controls provisions of the Foreign Corrupt Practices Act, the company entered into a separation agreement including strict confidentiality provisions with an employee who had reported internally concerns about improper payments to government officials.⁷⁰ After signing the agreement, the employee, who had been communicating with the Commission, stopped doing so because that person believed that the separation agreement prohibited such communications with the Commission and that they could risk being liable to the company under the agreement for liquidated damages.⁷¹

In another instance, in 2016 the Commission announced that Virginia-based technology company Neustar, Inc., had agreed to settle charges involving severance agreements that impeded at least one former employee from communicating with the Commission.⁷² The order found

NX]; *In re* BlackRock, Inc., Exchange Act Release No. 79,804 (Jan. 17, 2017), <https://www.sec.gov/litigation/admin/2017/34-79804.pdf> [<https://perma.cc/FU78-5UP9>]; *In re* SandRidge Energy, Inc., Exchange Act Release No. 79,607 (Dec. 20, 2016), <https://www.sec.gov/litigation/admin/2016/34-79607.pdf> [<https://perma.cc/NDR2-7QSV>]; *In re* NeuStar, Inc., Exchange Act Release No. 79,593 (Dec. 19, 2016), <https://www.sec.gov/litigation/admin/2016/34-79593.pdf> [<https://perma.cc/49NE-ACUH>]; *In re* Anheuser-Busch InBev SA/NV, Exchange Act Release No. 78,957 (Sept. 28, 2016), <https://www.sec.gov/litigation/admin/2016/34-78957.pdf> [<https://perma.cc/CG37-UAJ2>]; *In re* Health Net, Inc., Exchange Act Release No. 78,590 (Aug. 16, 2016), <https://www.sec.gov/litigation/admin/2016/34-78590.pdf> [<https://perma.cc/X6XQ-4RX3>]; *In re* BlueLinx Holdings, Inc., Exchange Act Release No. 78,528 (Aug. 10, 2016), <https://www.sec.gov/litigation/admin/2016/34-78528.pdf> [<https://perma.cc/PS8Q-LDF4>]; *In re* Merrill Lynch, Pierce, Fenner & Smith Inc., Exchange Act Release No. 78,141 (June 23, 2016), <https://www.sec.gov/litigation/admin/2016/34-78141.pdf> [<https://perma.cc/5JNN-TLHP>]; *In re* KBR, Inc., Exchange Act Release No. 74,619 (Apr. 1, 2015), <https://www.sec.gov/litigation/admin/2015/34-74619.pdf> [<https://perma.cc/48ZL-2N2V>].

70. *Anheuser-Busch*, Exchange Act Release No. 78,957, at 6–7.

71. *Id.* at 7.

72. *NeuStar*, Exchange Act Release No. 79,593, at 2–3.

that Neustar had violated Rule 21F-17 by routinely entering into severance agreements that contained a broad non-disparagement clause that forbade former employees from disparaging the company specifically to the SEC and to other regulators.⁷³ Former employees could be compelled to forfeit all but \$100 of their severance pay for breaching the clause.⁷⁴

In the third instance, the Commission announced a settled action against Seattle-based financial services company HomeStreet for conducting improper hedge accounting and later taking steps to impede potential whistleblowers.⁷⁵ After the SEC contacted the company to seek documents related to the hedge accounting, HomeStreet presumed it was in response to a whistleblower complaint and began taking actions to determine the identity of the whistleblower.⁷⁶ The company asked an individual who they presumed was the whistleblower to reaffirm the denial of their status as a whistleblower on several occasions.⁷⁷ The company went so far as to suggest to the presumed whistleblower that the terms of an indemnification agreement could allow HomeStreet to deny payment to them for any legal costs they incurred as a witness during the SEC's investigation.⁷⁸ Additionally, HomeStreet was also requiring former employees to sign severance agreements requiring them to waive potential whistleblower awards or risk losing their severance payments and other post-employment benefits.⁷⁹

We are also on the lookout for instances where agreements specifically target the Commission's whistleblower program. These circumstances arose in the Commission's actions against BlackRock, Health Net, and BlueLinx. In all three cases, the companies added restrictive language that required separating employees to waive any right to recovery of incentives for reporting misconduct, including under the

73. *Id.*

74. *Id.* at 3.

75. *In re HomeStreet, Inc.*, Exchange Act Release No. 79,844, at 2 (Jan. 19, 2017), <https://www.sec.gov/litigation/admin/2017/34-79844.pdf> [<https://perma.cc/3AQF-PB NX>].

76. *Id.* at 7.

77. *Id.* at 7–8.

78. *Id.* at 8.

79. *Id.* at 9.

SEC's whistleblower program, to receive their monetary separation payments from the firm.⁸⁰

Finally, we are looking at agreements that contain broad restrictive language that, while it does not single out the SEC's whistleblower program, it has the clear effect of precluding participation in the SEC's whistleblower regime. These circumstances were present in the Commission's actions against KBR, SandRidge Energy, and Merrill Lynch.

The agreement at issue in *KBR* required witnesses in certain internal investigation interviews, including those involving allegations of possible securities laws violations, to sign confidentiality statements with language warning that they could face discipline, and even be terminated, if they discussed the matters with outside parties without the prior approval of KBR's legal department.⁸¹

The agreements at issue in *SandRidge* did not permit employees to voluntarily cooperate with any government agency in connection with any complaint or investigation of the company.⁸²

The agreements used by Merrill Lynch used language for certain departing employees that prohibited them from disclosing any aspect of the confidential information or trade secrets of Merrill Lynch except pursuant to formal legal process or written company approval.⁸³

To settle these actions, all of the entities agreed to pay penalties and to take reasonable efforts to contact separated employees who signed the agreements to inform them that they are not prohibited from providing

80. *In re* BlackRock, Inc., Exchange Act Release No. 79,804, at 3 (Jan. 17, 2017), <https://www.sec.gov/litigation/admin/2017/34-79804.pdf> [<https://perma.cc/FU78-5UP9>]; *In re* Health Net, Inc., Exchange Act Release No. 78,590, at 3 (Aug. 16, 2016), <https://www.sec.gov/litigation/admin/2016/34-78590.pdf> [<https://perma.cc/X6XQ-4RX3>]; *In re* BlueLinx Holdings, Inc., Exchange Act Release No. 78,528, at 4 (Aug. 10, 2016), <https://www.sec.gov/litigation/admin/2016/34-78528.pdf> [<https://perma.cc/PS8Q-LDF4>].

81. *In re* KBR, Inc., Exchange Act Release No. 74,619, at 2 (Apr. 1, 2015), <https://www.sec.gov/litigation/admin/2015/34-74619.pdf> [<https://perma.cc/48ZL-2N2V>].

82. *In re* SandRidge Energy, Inc., Exchange Act Release No. 79,607, at 3 (Dec. 20, 2016), <https://www.sec.gov/litigation/admin/2016/34-79607.pdf> [<https://perma.cc/NDR2-7QSV>].

83. *In re* Merrill Lynch, Pierce, Fenner & Smith Inc., Exchange Act Release No. 78,141, at 19 (June 23, 2016), <https://www.sec.gov/litigation/admin/2016/34-78141.pdf> [<https://perma.cc/5JNN-TLHP>].

information to the SEC or from receiving an SEC whistleblower award for doing so.⁸⁴

The lessons from these actions are simple. The SEC is not trying to dictate the language of agreements or warnings—that is the company’s responsibility—but a company needs to speak clearly in and about confidentiality provisions so that employees, most of whom are not attorneys, understand that it is always permissible to report possible securities laws violations to the SEC.

The final way that the Commission has protected whistleblowers is by participating as *amicus curiae* in private retaliation lawsuits. The Office of the Whistleblower works with the Commission’s Office of General Counsel to monitor cases in which the defendant, often a former employer, challenges the Commission’s interpretation of the anti-retaliation provisions of the Dodd-Frank Act.⁸⁵

To cite one prominent example, the Commission has filed numerous *amicus* briefs in support of whistleblowers in federal district and appellate courts across the country urging the courts to defer to the Commission’s Rule that individuals are entitled to employment retaliation protection if they report information of a possible securities law violation internally at a publicly traded company regardless of whether they then separately report that information to the Commission.⁸⁶

As the SEC has explained in these *amicus* filings, ensuring that employees are protected from employment retaliation whenever they report possible securities laws violations, whether internally or to the SEC, is critical to the SEC’s enforcement efforts. Put simply, if individuals are not assured that they will be protected from retaliation if they report internally, they will be less likely to report internally, which could undermine the important role that internal compliance programs play in helping the Commission prevent, detect, and stop securities law violations.

To date, however, federal courts have reached different conclusions as to whether an employee who reports violations internally to his or her

84. *SandRidge Energy*, Exchange Act Release No. 79,607, at 7–8; *Merrill Lynch*, Exchange Act Release No. 78,141, at 22–23; *KBR*, Exchange Act Release No. 74,619, at 4.

85. This discussion pre-dates the Supreme Court’s decision in *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018). Please review the decision for updated information.

86. U.S. SEC. & EXCH. COMM’N, *supra* note 5, at 22.

company and not to the SEC is covered by the Dodd-Frank anti-retaliation protections.

Most recently, in *Somers v. Digital Realty Trust*,⁸⁷ the U.S. Court of Appeals for the Ninth Circuit agreed with a Second Circuit decision⁸⁸ by finding that Congress did not intend to limit protections to only those whistleblowers who report information to the SEC by inserting the word “whistleblower” in the statutory language.⁸⁹ Rather, the anti-retaliation provisions also protect those who are retaliated against after making internal disclosures and reports of alleged unlawful activity under the Sarbanes-Oxley Act and other laws, rules, and regulations expressly cross-referenced in the Dodd-Frank Act.⁹⁰ The panel agreed with the Second Circuit that, even if the use of the word “whistleblower” in the statute created uncertainty, the SEC’s regulation resolved any ambiguity and is entitled to deference.⁹¹

The Fifth Circuit, in *Asadi v. G.E. Energy (USA)*, however, had previously found to the contrary.⁹²

On June 26, 2017, the Supreme Court granted cert. in *Somers* to address the scope of Dodd-Frank’s anti-retaliation protections.⁹³ The Commission joined an amicus brief filed by the Department of Justice’s Office of the Solicitor General.⁹⁴ The brief continues the Commission’s support and advocacy that whistleblowers who report internally should be protected from retaliation and defends the Commission’s Rules saying as much. Oral argument is scheduled for November 28th,⁹⁵ and we anticipate a ruling in early 2018.

In closing, the value that whistleblowers add to the SEC’s enforcement efforts and their ability to protect investors cannot be overstated, and the Office of the Whistleblower will continue to review fact patterns of retaliation to protect them.

87. *Somers v. Dig. Realty Tr. Inc.*, 850 F.3d 1045 (9th Cir. 2017), *cert. granted*, 137 S. Ct. 2300 (2017).

88. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015).

89. *Somers*, 850 F.3d at 1049.

90. *Id.* at 1050.

91. *Id.*

92. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 625 (5th Cir. 2013).

93. *Dig. Realty Tr., Inc. v. Somers*, 137 S. Ct. 2300 (2017).

94. Brief of the United States as Amicus Curiae Supporting Respondent, *Somers*, No. 16-1276 (S. Ct. Oct. 17, 2017), 2017 WL 4676666.

95. Transcript of Oral Argument, *Somers*, No. 16-1276 (S. Ct. Nov. 28, 2017).

I am proud that the whistleblower program continues to positively impact the SEC's enforcement of the federal securities laws, and I am confident that it will continue to bolster the agency's mission of the protection of investors and the markets in the years ahead.

And I am exceedingly grateful for the truly courageous whistleblowers who step forward to report wrongdoing. They have a lasting and critical impact on our mission and we truly could not do without them.

Thank you.

IAN ENGORON: Thank you, Chief Norberg, for that wonderful keynote address.

Please join me in thanking Chief Norberg for speaking here today.

We will now take a short break and when we return we will hear from our five terrific panel members.

PANEL DISCUSSION

IAN ENGORON: Welcome back, everyone. We are going to begin the panel discussion in a moment, but first I want to introduce our speakers again.

With us today we have Alice BrightSky, Senior Director of Compliance Programs here at Fordham Law; Tracey McNeil, a Fordham alumna, who is the first-ever Ombudsman of the SEC; Jennifer M. Pacella, Assistant Professor of Law at the Zicklin School of Business; Judith Weinstock, Assistant Regional Director at the SEC, New York Regional Office; and Jason Zuckerman, Whistleblower Retaliation & Award Attorney and Principal of Zuckerman Law.⁹⁶

As Chief Norberg noted in her keynote address, currently the Second,⁹⁷ Fifth,⁹⁸ and Ninth⁹⁹ Circuits are split regarding whether or not the Dodd-Frank Act's whistleblower protections extend to employees who report internally to their company rather than directly to the SEC.

Can you please comment on whether or not you think internal reporters are covered by the Act and why? Ms. Weinstock, would you like to start us off?

JUDITH WEINSTOCK: Sure. I will certainly echo Jane Norberg's comments.

First, I want to thank you for having me here today. I am very pleased to be here.

I also need to give the same disclaimer that Jane gave: the views I express are my own, not of the Commission or any of the staff thereof.

However, that being said, my view in this area is, obviously, consistent with the Commission's view. As Jane noted, the Commission has filed numerous amicus briefs in this area,¹⁰⁰ and I think that some of the language in the briefs really tells the story; and I would like to talk a little bit about the legislative history and why the SEC believes that internal whistleblowers are included.

There is some language in the SEC's Ninth Circuit amicus brief in the *Somers* case on the rulemaking process that I think is worth noting:

96. See sources cited *supra* notes 15–18.

97. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015).

98. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013).

99. *Somers v. Dig. Realty Tr. Inc.*, 850 F.3d 1045 (9th Cir. 2017), *cert. granted*, 137 S. Ct. 2300 (2017).

100. See *supra* note 47 and accompanying text.

Throughout the rulemaking process, the Commission considered the “significant issue” of how to ensure that the whistleblower program does not undermine the willingness of individuals to make whistleblower reports internally at their companies before they make reports to the Commission. The Commission’s final rules were carefully calibrated to achieve this objective by providing “strong incentives” for individuals in appropriate circumstances to report internally in the first instance. The Commission recognized that internal reporting is not always appropriate, and the decision whether to do so, either prior to reporting to the Commission or at all, is best left for whistleblowers to determine based on the particular facts and circumstances. . . . The Commission also recognized that “reporting through internal compliance procedures can complement or otherwise appreciably enhance [its] enforcement efforts in appropriate circumstances.” “For instance, the subject company may at times be better able to distinguish between meritorious and frivolous claims and may make such findings available for the Commission. This would be particularly true in instances where the reported matter entails a high level of institutional or company-specific knowledge and/or the company has a well-functioning internal compliance program in place. Screening allegations through internal compliance programs may limit false or frivolous claims, provide the entity an opportunity to resolve the violation and report the result to the Commission, and allow the Commission to use its resources more efficiently.”¹⁰¹

IAN ENGORON: Great.

Perhaps, Mr. Zuckerman, would you like to follow up?

JASON ZUCKERMAN: I agree with what Jane said. Going beyond the legal arguments, I would ask: why is it that so many large corporations and all of the lobbyists who advocate on their behalf—who thought that this SEC reward program is a horrible idea because it is going to undermine their own ethics programs—why have they fought so hard to undermine the anti-retaliation aspect of the program? If you go on the SEC website, you can see the arguments that big business made¹⁰²—which I am happy to say did not ultimately prevail—that in order to be

101. Brief of the Securities and Exchange Commission, *Amicus Curiae in Support of the Appellee* at 3, 10–11, *Somers*, 850 F.3d 1045 (No. 15-17352), 2016 WL 3088310, at *4, *11 (alteration in original) (citations omitted).

102. *Comments on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, U.S. SEC. & EXCH. COMMISSION, <https://www.sec.gov/comments/s7-33-10/s73310.shtml> [<https://perma.cc/TRC3-85Y4>] (last modified Apr. 27, 2015).

eligible for an award, a whistleblower must show that they blew the whistle to their employer before blowing the whistle to the SEC. They fought very hard for that. The SEC ultimately rejected their proposal.

But they argued, again and again: “Look, our employees can raise concerns internally. We have strong internal ethics programs and anti-retaliation policies.” But at the end of the day, this argument is largely nonsense. They do not want people to speak up.

And now they are arguing in *Somers*¹⁰³: “If you speak up and you suffer retaliation, you do not have any retaliation claim.” Their argument may backfire because more and more employees will blow the whistle directly to the SEC, thereby depriving companies of an early warning about potential fraud.

If the Court holds that Dodd-Frank does not protect internal whistleblowing, some corporate whistleblowers will still be able to bring claims under the anti-retaliation provision of SOX.¹⁰⁴ Note that when Congress included an anti-retaliation provision in SOX in 2002, the Chamber of Commerce and big business opposed it, and when it was enacted, they tried to narrow SOX protection. Based on my experience representing whistleblowers, it appears that the instinct of corporate management is that whistleblowers should not be protected. The core issue is the flow of information about fraud, i.e., corporate whistleblowers pose a threat to corporate America because they can reveal the fraud that would otherwise be kept secret. My sense is that the culture at too many companies continues to be such that “if there is a violation of the securities laws, we want to sweep it under the rug, and if you speak out about it, you are out.”

One of the things that we heard from Ms. Norberg that I think is so key is that the SEC, to its credit, has made it a high priority to ensure that whistleblowers can come forward with information about fraud, that employers cannot stop their employees from blowing the whistle.

Before the enactment of the Dodd-Frank Act, I brought many claims on behalf of corporate whistleblowers under the anti-retaliation provision of Sarbanes-Oxley, and in some instances, the employer would sue the hell out of my client or other corporate whistleblowers. What was the basis for suing the whistleblower? Because the whistleblower had the gall to hand over information to the SEC or pursue a SOX retaliation claim.

103. *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018).

104. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 802–04 (codified at 18 U.S.C. § 1514A (2012)).

When my client is unemployed, and likely unemployable, it just seems absurd that the employer is permitted to further retaliate against my client by suing to try to dissuade my client from prosecuting their claim.

I do not see as many of those retaliatory lawsuits now, in part because of the hard work of the SEC in enforcing Rule 21F-17.

Now, I do not want to show any disrespect for people who do work in ethics and compliance. There are folks who work hard to build strong ethics programs. My firm is usually not contacted by folks who work at companies with strong ethics programs. My perspective is based on the many corporate whistleblowers I hear from who find themselves unemployed because they spoke out.

IAN ENGORON: On that note—Chief Norberg spoke a good amount about this in her keynote address—can you please comment on the legality under Dodd-Frank of using confidentiality agreements, severance agreements, separation agreements, and other contracts that employers use to stifle whistleblower efforts; and, additionally, can you also comment on the legality under Dodd-Frank of physically prohibiting employees from sending the Commission those types of documents that might implicate them?

Professor Pacella, would you like to start?

JENNIFER M. PACELLA: Sure. Thank you, and thanks for having me as well.

As Chief Norberg mentioned, a very active enforcement mechanism that the SEC is relying on now is its enforcement authority under Rule 21F-17 of Dodd-Frank, which states that employers or any other person cannot impede an individual from blowing the whistle to the SEC.¹⁰⁵

We have been seeing a lot of regulatory action pursuant to this authority. Rule 21F-17 bars the use of confidentiality agreements to silence whistleblowers.¹⁰⁶ All too commonly, signing one of these agreements is a condition to employment. The employer requires a promise by the employee not to report “confidential information,” which is defined very broadly, and which should not incorporate instances of wrongdoing, crimes, or fraud.

It is also common that the employee is made to promise to forfeit bounty rewards.¹⁰⁷ All of these actions would fall into what is considered

105. 17 C.F.R. § 240.21F-17 (2012).

106. See, e.g., cases cited *supra* notes 81–83.

107. See, e.g., cases cited *supra* note 80.

to be unlawful activity that employers cannot take against would-be whistleblowers pursuant to Rule 21F-17.

I think one issue here that is not spoken about as much under this particular Rule that I have recently researched is that, while we are aware that employers cannot stop a whistleblower from contacting the SEC to orally blow the whistle, how much can they stop whistleblowers from turning over internal confidential documents to build a strong documentary case?¹⁰⁸ Given the availability of bounty rewards under Dodd-Frank, the incentive to provide as strong of a case as possible on the part of the whistleblower may exist but often the whistleblower is simply concerned about the wrongdoing. They are awake at night about it, and really just want to build a strong case to inform the SEC about what has been occurring. I think we need to see more information about this issue coming through, including more clarity from the SEC.

To date, there has not been any case law, and there is nothing addressed in the Rule itself as to what extent employers can stop employee-whistleblowers from turning over to the SEC physical documentation as they build their cases. But if you were to look to the SEC's tips, complaints, and referrals (TCR) system, there are many opportunities to attach those documents to the SEC, to transmit them over as part of the whistleblower's case. I think more attention should be given to this particular issue to clarify from a regulatory standpoint the extent to which employers may lawfully stop employee-whistleblowers from making these transmissions.

IAN ENGORON: Thank you.

Mr. Zuckerman, you look like you are ready to say something.

JASON ZUCKERMAN: I would like to add to that and just give you some examples of what I see.

When I resolve an employment claim, for example, under SOX, many employers are smart enough to omit a clause saying "You cannot speak to the SEC," but they include other provisions that at the end of the day have a similar effect.

I had a matter in which the employer demanded that my client affirm or represent in a settlement agreement that his disclosure was baseless. The company never offered any evidence that my client's disclosure was not well-founded.

108. For a thorough discussion of this issue, see Jennifer M. Pacella, *Silencing Whistleblowers by Contract*, 55 AM. BUS. L.J. (forthcoming Summer 2018).

In another matter, the employer tried to add to a settlement agreement an affidavit that my client would sign denying that he suffered retaliation. I see this nonsense—trying to silence whistleblowers with de facto gag provisions—more often than you would believe, including onerous non-disparagement provisions that threaten draconian sanctions for saying anything negative about the company.

On the one hand, I do not object to a non-disparagement provision barring an employee from disparaging their former employer to *The New York Times* or *The Wall Street Journal*. But we need to be careful to ensure that a non-disparagement provision is not written in a manner that would deter whistleblowing to the SEC or other regulators.

Let me also note that I try to be careful in advising clients what they can provide to the SEC. For example, it is a bad idea to turn over a company laptop to the SEC or for an employee on their way out of the company to download all their work emails onto a flash drive.

My recommendation to whistleblowers is to ask themselves, “What is the strongest evidence that you have that would suffice to persuade the SEC to open an investigation. But make sure it does not include privileged material.” I am careful to advise clients, “If you have anything from an in-house lawyer or an outside lawyer, I cannot see it, and the SEC cannot see it.” And I advise clients to be careful in handling information that is truly proprietary.

Again, my goal is to do what I can to get the SEC to open up an investigation and to give the SEC a lot of strong investigative leads and say, “Here is where the information is.” But I think it is a bad idea for an employee to take a lot of documents that they do not have access to in the course of performing their ordinary job duties.

I would also add that it is a terrible idea to access information from an employer’s network once the employee no longer works for that employer. Doing so could violate the Computer Fraud and Abuse Act (CFAA).¹⁰⁹ Once you do not work at the company anymore, you are not authorized to access their network.

A typical whistleblower client learns about a violation in the course of performing their ordinary job duties and when they blew the whistle to their employer, the employer ignored them and now the client is seeking to report the issue to the SEC.

IAN ENGORON: Okay, great.

109. 18 U.S.C. § 1030 (2012).

Ms. Weinstock?

JUDITH WEINSTOCK: I just wanted to make a point about the *Neustar* case,¹¹⁰ which Jane referred to. In the *Neustar* case, the severance agreements included a non-disparagement clause.¹¹¹ A separate provision of each agreement required the former employee to acknowledge that a breach of the non-disparagement clause would cause irreparable injury and damage to Neustar, and it also compelled the former employee to forfeit all but \$100 of any severance compensation paid to the former employee in the event of such a breach of the disparagement.¹¹² So we have brought cases in this area.

JASON ZUCKERMAN: When I hear corporate law firms criticize the SEC for actively enforcing Rule 21F-17 and assert that such enforcement actions are beyond the scope of the SEC's jurisdiction or mandate, I would say that this work is critical because nondisclosure agreements (NDAs) have been used for too long to conceal information from shareholders and the SEC. The threat of a lawsuit silences corporate whistleblowers, thereby putting investors at risk.

The hard work of the SEC in enforcing Rule 21F-17 is having a real impact. Whenever I settle an employment case now, I usually see a provision in the agreement clarifying that my client is not waiving the right to provide information to the SEC.

IAN ENGORON: Great. Thank you.

Can you please comment on the inherent difficulties in developing a comprehensive and effective program to receive whistleblower complaints or complaints from retail investors who are having problems with their employers or the Commission?

Ms. McNeil, would you like to start us off, and maybe help everyone in the audience understand what an ombudsman does first?

TRACEY McNEIL: Yes.

First, let me give the SEC disclaimer, that the views I express are my own and do not necessarily reflect those of the Commission, the Commissioners, or the staff of the Commission.

110. *In re* NeuStar, Inc., Exchange Act Release No. 79,593 (Dec. 19, 2016), <https://www.sec.gov/litigation/admin/2016/34-79593.pdf> [<https://perma.cc/49NE-ACUH>].

111. *Id.* at 2–3.

112. *Id.* at 3.

It is great to be here. I am a proud alumna of Fordham Law School. I am dating myself, but I am thankful to Dean Feerick, who was the Dean of the Law School while I was here, and for Professors Perillo and Fogelman, who really sparked my interest in contracts and corporations, which ultimately led me to the securities law field. So, thank you, Fordham.

I am the first Ombudsman at the SEC.¹¹³ Most people ask, “Well, what is that? How do you spell that? What do you do?”

I was appointed as Ombudsman in September 2014. I have some fairly broad statutory responsibilities.

First, I serve as a liaison between retail investors and the Commission and the self-regulatory organizations (SROs) that we oversee. I am there to act as a liaison to help resolve problems and field any questions or complaints retail investors may have about the Commission or SROs.

Second, I work with the Investor Advocate to create processes to make it easier for retail investors to present questions they may have about the securities laws.

Third, I maintain the confidentiality of communications between myself and retail investors.

Fourth, I submit reports to Congress twice a year, included in the Investor Advocate’s reports to Congress.

So that is what I do in a nutshell.

One of the big issues I address with retail investors, a fundamental issue that arises in most of the complaints they bring to me, is the gap between their understanding of what the SEC’s mission means and their expectations of what the SEC can do for them. The mission of our agency is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.

For retail investors—or, as our Chairman refers to them, “Mr. and Ms. 401(k)”¹¹⁴—they are really focused on that protect investors piece of our mission statement.

The news that I have to deliver to them on a daily basis is what that really means. When the SEC says “we protect investors,” it does not mean, as a lot of investors and other persons say to me, “The SEC will give me my money back” or “I have figured out the problem. Here it is. SEC, now what are you going to do to get my money back? What is the

113. *Biography: Tracey L. McNeil, supra* note 16.

114. *See Clayton, supra* note 22.

status of my investigation? Did you launch an investigation on my behalf?"

I am giving you those examples because one of the most important things I have to do as Ombudsman is listen to complaints as they come in, fresh from the investor's point of view. I have to say to myself, "I may have been a person who would bring a similar complaint if I did not know what I know. If I had not been to Fordham Law School, and Shearman & Sterling, and the SEC, I might formulate my questions or complaints that same way."

So every day—and I would encourage you all, too, if you get into this field—you have to have two trains of thought. You are the expert. You always have more to learn, but you are the expert. But then, likewise, you have to take people where they are at the time and really listen to what they have to say. That was a challenge early on, because I had to train myself and train my team to exercise a different set of muscles when listening to retail investors.

I have been the Ombudsman now under two different chairpersons, both interested in the details of what I hear from investors. I have to make certain that I am presenting investors' complaints and concerns in a way that is meaningful to our leadership and that adds value to the work of the agency.

One important thing I did from the beginning was to not bean-count for the sake of the numbers only. I am at a federal agency, so I do count things, and I do track my numbers and statistics.

But I did not want to put myself in a position of having to justify the value of what I do solely by the number of people that I communicate with, because talking to one person about one issue can change the world for that person, for their family, for the industry. Although I am really proud to say that in these three years, my small team and I have fielded more than 3,500 contacts and complaints from investors, I do not equate the value of what I do solely with the number of investors who contact me.

One important tool that I recently launched to the public is what we are calling our "Ombudsman Matter Management System." That was a working title that happened to stick, so people are also calling it OMMS.

If you go to sec.gov/ombudsman, there is a button for OMMS and the user-friendly electronic form that anyone can fill out,¹¹⁵ even on a mobile device. Any questions or comments that you may have about the Commission or SROs or our relationship to them, or the types of resources the SEC can provide; or if you just have a problem and you do not know where to go at the SEC; or you have a problem and you contacted several offices at the SEC and you have not heard anything yet—if you go to sec.gov/ombudsman and fill out the OMMS form, it comes directly to me and I am there to help you figure out where to go and the options that are available to you.

Thanks.

IAN ENGORON: Ms. Weinstock?

JUDITH WEINSTOCK: I would just add that there are a lot of different options at the SEC. Tracey's work is complemented by, as Jane mentioned, our Office of Market Intelligence, where you can submit a tip, complaint, or referral.¹¹⁶ We also have the Office of Investor Education and Advocacy, and if you look at their website, their mission statement is they can help you invest wisely and avoid fraud,¹¹⁷ so they put out a lot of investor alerts.¹¹⁸

But you can file a complaint or you can ask a question. In the New York Regional Office, among other things, I supervise our investor assistance specialist. I can tell you firsthand that we get questions in the New York office—questions about brokers, for example, people's brokerage accounts and we, to the extent that we can, respond to those. We respond to every single one that comes to New York. Sometimes we are writing a letter to the broker/dealer; sometimes we are just answering a question, we are referring someone to another agency; but we do have that hands-on approach at the SEC.

IAN ENGORON: Great. All right.

How do you think that the relationship between corporations, and specifically their compliance departments, and the SEC would be affected

115. *Ombudsman Matter Management System (OMMS) Submission Form*, U.S. SEC. & EXCH. COMMISSION, <https://secir.secure.force.com/ombudsman/> [<https://perma.cc/H5V4-29HX>] (last visited Dec. 21, 2017).

116. *See supra* notes 97–98 and accompanying text.

117. *The SEC's Office of Investor Education and Advocacy*, U.S. SEC. & EXCH. COMMISSION (Feb. 16, 2011), <https://www.sec.gov/reportspubs/investor-publications/investor-pubs-aboutioeahm.html> [<https://perma.cc/656Q-PRZQ>].

118. *Investor Alerts and Bulletins*, U.S. SEC. & EXCH. COMMISSION, <https://www.sec.gov/investor/alerts> [<https://perma.cc/X7AJ-5ZF7>] (last visited Dec. 21, 2017).

if employees were required under Dodd-Frank to actually report directly to the SEC, as opposed to being allowed to report internally?

Ms. BrightSky, would you like to start us off?

ALICE BRIGHTSKY: Sure. I think, in a word, “strained” would be my answer.

Let me back up for a second. I think you may have picked up on a theme here. There are two really sort of key components to a whistleblowing program: one is having the controls available—so I am talking from the perspective of a corporation or a financial institution—for employees to escalate their concerns anonymously or otherwise; but also having the control environment, which I will use the word “culture” as a proxy for, that is supportive of enabling employees to raise their concerns.

I think what we have been talking about, especially as we delve into the anti-retaliation provisions and we think about the pending Supreme Court decision on *Digital Realty*, is that we really are talking about issues of culture, to my mind, issues of the control environment.

Why is it that corporations take such a defensive posture and craft these types of NDAs and severance agreements that we have been talking about? I think this is an issue of culture.

Compliance departments and ethics groups are there to sort of help right the ship. I think we take it as one of our charges—especially now in post-Yates memo¹¹⁹ and personal liability environment—we really take it as part of our mandate and charge not to just be there to protect the organization, but we have the public interest at heart as well. So we are all sort of marching to what I consider the common policy objective of rooting out misconduct, identifying and escalating it, and hopefully deterring it in the future.

So, when I think about what mandating employees reporting directly to the Commission means to compliance programs, I think it would be unfortunate, because I think there is a lot of opportunity for collaboration here.

119. Memorandum from Sally Quillian Yates, Deputy Attorney Gen., U.S. Dep’t of Justice to Assistant Attorney Gen., Antitrust Div., Assistant Attorney Gen., Civil Div., Assistant Attorney General, Criminal Div., Assistant Attorney Gen., Env’t & Nat. Res. Div., Assistant Attorney Gen., Nat’l Sec. Div., Assistant Attorney Gen., Tax Div., Dir., Fed. Bureau of Investigation, Dir., Exec. Office for U.S. Trs., and all U.S. Attorneys (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download> [<https://perma.cc/PG8A-BY49>].

I actually think that the balance of the incentives that are written into the Rules right now strike a fairly good balance.

There is incentivization for the employee to first go through their internal control structure. They can do that and have a 120-day grace period before actually reporting to the Commission, and they still hold their line and avail themselves of the award.¹²⁰ They get credit for the additional information that is uncovered as a result of the organization's investigation.

So, in a sense, you have this opportunity to really deploy all of the internal resources of the organization, specifically the risk management function and the compliance function, and, if they are doing their jobs right, that should be to the benefit of everybody involved.

Now, actually executing on that and turning the tide of culture and getting our corporations to be more supportive of this, I think the SEC program is doing a good job of incentivizing that, and I think the two working collaboratively is the best way forward.

So my answer to that question would be I would not want to see employees pressured to only report through the Commission. A statistic that supports that opinion is that, despite all of the retaliation, eighty percent or something thereabouts—I think there was a survey put out by the Ethics Resource Center that stated that eighty percent of whistleblowers actually first attempt to escalate their concerns internally,¹²¹ and that is in the poor cultural environment that we have been talking about. So what is going to happen when those cultural environments improve, those control environments improve? I think we can only go up from here.

So that is my answer.

JASON ZUCKERMAN: Just to pull something out of the headlines, look at what happened to Harvey Weinstein.¹²² How the heck did he get away with it all those years? Those were not small acts of harassment. If half of the allegations are true, this guy should be locked up for the rest of his life.

120. 17 C.F.R. § 240.21F-4(c)(3) (2012).

121. U.S. SEC. & EXCH. COMM'N, 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 16 (2014), https://www.sec.gov/files/owb-annual-report-2014_2.pdf [<https://perma.cc/9XBZ-V68M>].

122. *Harvey Weinstein Timeline: How the Scandal Unfolded*, BBC NEWS (Dec. 20, 2017), <http://www.bbc.com/news/entertainment-arts-41594672> [<https://perma.cc/FEM8-SPN4>].

How did it go on for so long? How did it go on for so long with Ailes?¹²³ How is it that these powerful people are able to get away with it, and are not held accountable? It is because people are afraid to report the misconduct.

The Ethics Resource Center did a survey in 2013 in which they found that approximately forty-one percent of employees observed some form of misconduct in the workplace, and approximately thirty-three percent did not say anything about it.¹²⁴ They remained completely silent.

I agree with Ms. BrightSky, that if employers prevail in the *Somers* case at the Supreme Court, employees are more likely to blow the whistle directly to the SEC rather than to corporate compliance.

Why did more people not speak out about Ailes, or about Harvey Weinstein? That is an issue that every employer should consider, i.e., do we have an environment in which employees feel comfortable speaking up?

But unfortunately, some folks have risen to the top of corporations because they have a certain personality type, folks who believe, “I built this entity, and if you are going to speak out and say I have done anything wrong, you are out.” I see that in a lot of the cases I bring, where a client blew the whistle about a senior company official’s misconduct, and doing so doomed their career at that company.

So we should look beyond just whether employees are blowing the whistle internally or alternatively, to the SEC. Instead, the question should be whether they will speak out at all; and if they are not reporting misconduct, who is harmed by failing to bring the misconduct to light? People who knew what Harvey Weinstein was up to—and there are a lot of them¹²⁵—and did not say anything, did not intervene—because Weinstein is powerful—essentially allowed or enabled Weinstein to continue harassing women.

IAN ENGORON: Thank you.

123. Jill Disis & Frank Pallotta, *The Last Year of Roger Ailes’ Life was Consumed by Scandal*, CNN MONEY (May 18, 2017, 11:37 AM), <http://money.cnn.com/2017/05/18/media/timeline-roger-ailes-last-year/index.html> [<https://perma.cc/GU6X-M7PG>].

124. ETHICS RES. CTR., NATIONAL BUSINESS ETHICS SURVEY OF THE U.S. WORKFORCE 14 (2013), <https://www.ibe.org.uk/userassets/surveys/nbes2013.pdf> [<https://perma.cc/T3HS-EEUX>].

125. Megan Twohey et al., *Weinstein’s Complicity Machine*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/interactive/2017/12/05/us/harvey-weinstein-complicity.html> [<https://perma.cc/Z68J-HYBL>].

How do you think whistleblower awards either encourage or discourage employees to blow the whistle on corporate fraud? Is the SEC whistleblower award program encouraging action, or is it perhaps providing a perverse incentive to wait until the fraud grows larger and therefore the reward grows larger?

Mr. Zuckerman, I will let you continue.

JASON ZUCKERMAN: One, if I speak to a prospective client who is aware of a violation, I try to act quickly to help the client report the fraud or other wrongdoing. (A) I want to get to the SEC before anyone else who knows about the fraud gets to the SEC so that my client will be eligible for an award; and (B) if my client were to delay reporting fraud, he or she will be asked by the SEC—as almost all of my clients who I have brought to the SEC have been asked—“When did you first become aware of the violation and why did you not report it then?”

And, if you look at all of the orders issued by the SEC Office of the Whistleblower, there are several instances where the whistleblower award was lowered because of a delay in reporting the fraud.

So I do not buy this argument that an employee who is aware of a violation is likely to delay reporting in an effort to get a higher award.

To your earlier issue—which is why do employees report? When my clients call me, it really is because they brought up an issue, they saw something that was wrong, they went to the employer in the hopes that it would be acted upon; it was not acted upon, and that is why they are considering reporting the violation to the SEC. They want to see that their issue will be addressed and feel that they have an ethical duty to blow the whistle.

For a lot of my clients it is very helpful that there is the incentive of potentially recovering an award, especially because of the risk of retaliation and blacklisting, but I do not think that the reward is the sole reason why they blow the whistle.

So you might ask, why do they need to have an award? The award is very helpful because they have to put a lot on the line when they come forward.

My typical client is in a high-level position in the midpoint of their professional career, and they worked really hard in order to get to that level and there are not many comparable job opportunities. Where a whistleblower client is a corporate officer, he or she is not likely to just move to another C-suite position at another company. That client might never again have a position at that level and never earn as much. If you compare what they would earn if they look the other way and keep their

senior level position long-term, that is usually far greater than the value of a whistleblower award.

What happens to some of my clients when they speak out is that word spreads about their whistleblowing and it gets very difficult to get reemployed in a particular industry. But it is very hard to prove that an employer did not hire you because of your whistleblowing at a prior employer. That is why I think it is important to offer whistleblowers a financial incentive.

IAN ENGORON: Professor Pacella, in answering the question, if you might also comment on an area that Mr. Zuckerman just touched on, why someone might blow the whistle besides the award, what might encourage someone to do that.

JENNIFER M. PACELLA: I definitely agree with what was just mentioned.

There have been empirical studies done to show that the underlying motivation of whistleblowers is not necessarily a financial incentive.¹²⁶ Rather, very loyal employees who are extremely concerned about wrongdoing going on in the workplace and want to alert upper management to those concerns are motivated to report on their own. So, I do feel that, even without the financial incentive of the bounty program, whistleblowing would still take place.

I absolutely agree, though, that it is a positive development that the statute offers bounties and that it is beneficial to offset the negative effects of whistleblowing, as most whistleblowers unfortunately face a terrible fate, either having been terminated from employment, suffering from a loss of promotion, or facing harassment in their offices after making a report—it is common that they experience a real loss of livelihood from blowing the whistle.

I have personally spoken with many whistleblowers who have expressed that they are just out of their industry forever and have to turn to alternative employment options due to a stigma they experience in their field. They may have children, homes to pay for, etc. and the bounty program helps to offset those concerns and costs that they might incur

126. See, e.g., Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1200–03 (2010); Adam Waytz, *Whistleblowers are Motivated by Moral Reasons Above Monetary Ones*, U. CHI. BOOTH SCH. BUS. STIGLER CTR.: PROMARKET (Aug. 30, 2016), <https://promarket.org/whistleblowers-motivated-moral-reasons-monetary-ones/> [<https://perma.cc/G78Z-2NQY>].

from whistleblowing. For that reason, I do not think that bounty rewards are a perverse incentive at all.

I also think it is important to remember that the SEC does have limitations as to who can receive a bounty reward. I often get asked, “Will people just engage in wrongdoing themselves and then bring all of this valuable inside information to the SEC just to receive a bounty reward?”

Well, it is important to remember that the SEC will not give a bounty to anyone who has been convicted of a criminal violation associated with that underlying action.¹²⁷ So, it is limited as to eligibility. Congress, through the statute, has implemented these restrictions on eligibility for bounties, so I do not think it has the effect of encouraging wrongdoing merely to be eligible for a reward.

I think, at the end of the day, most whistleblowers are really just loyal employees concerned about wrongdoing that they are seeing take place and they want to do something to stop it.

And, of course, too, I think some may have a fear of personal liability as well, that if the wrongdoing goes on and they do not speak up about it, will they be personally liable somehow?

IAN ENGORON: All right. Great.

This next question will largely depend upon how the Supreme Court comes down on the *Somers* case coming November 28th: how do you think whistleblower awards impact the worker compliance departments? Although SEC rules provide that a whistleblower may be subject to an increased award for reporting to and assisting internal compliance departments, employees may feel a lot less intimidated going directly to the SEC and not facing a lot of those retaliations that we have been talking about the whole day.

Ms. Weinstock, would you maybe want to start us off?

JUDITH WEINSTOCK: I think that some people may prefer to go to their employer because, as has been noted in some of the case law, they may think that reporting only to their employer offers the prospect of having the wrongdoing ended with little chance of retaliation, whereas reporting to a government agency creates substantial risk of retaliation.

But I hope that whistleblower awards create incentives for employees to self-report to their compliance departments and for companies to remediate.

At the end of the day, we want companies to do the right thing. But to the extent that companies may not be motivated to do the right thing on

127. See 17 C.F.R. § 240.21F-8(c)(3) (2012).

their own, we hope that knowing that employees have the power and the incentive to go to the SEC provides the company with a financial incentive to remediate or to doing the right thing in the first place.

IAN ENGORON: Ms. BrightSky, how do whistleblower awards impact the work of compliance departments?

ALICE BRIGHTSKY: I think I will echo that somewhat. I have four categories here in terms of how I think about this question.

I think the whistleblower awards, first and foremost to my mind, incentivize compliance departments to establish stronger internal controls, so I think that is a good thing.

It has been proffered in a few white papers,¹²⁸ and certainly in the arguments that I think Mr. Zuckerman referred to in the comment period on the rulemaking,¹²⁹ that the awards program creates this competition between compliance departments and the SEC in terms of vying for that reporting mechanism.

I do not think that is the case, and I do not think the statistics or the reality support that as the case. As we have already said, the reality in the worst-case scenario, where the culture is really not one that is supportive of whistleblowing, even in those cases, whistleblowers tend to report internally first.

Now, to my mind, we are moving in the direction, and compliance departments are moving in the direction, of being much more supportive, and really compliance officers now have to face personal liability as well if their programs are failing, and that includes whistleblower programs being key internal controls for them. So I think everyone is mutually incentivized to make this work and to support whistleblowing.

The long and short of it is that I think it incentivizes compliance programs.

IAN ENGORON: Professor Pacella, would you like to add anything?

JENNIFER M. PACELLA: I absolutely agree with that.

128. *See, e.g.*, COURTNEY BOECKMAN, CONVERCENT, HOW TO INCENTIVIZE WHISTLEBLOWERS TO FIRST USE INTERNAL REPORTING TOOLS (2015), <https://www.convercent.com/resource/convercent-white-paper-how-to-incentivize-whistleblowers-to-first-use-internal-reporting-tools.pdf> [<https://perma.cc/PZ6E-6Q4E>].

129. *See, e.g.*, Letter from Jones Day to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n (Dec. 17, 2010), <https://www.sec.gov/comments/s7-33-10/s73310-185.pdf> [<https://perma.cc/WW4M-R8W5>].

One of the arguments I regularly make in my research is that whistleblowers are key players in compliance.¹³⁰ I would even define them as “internal reporters.” As has been established, most are reporting on the inside, “up-the-ladder,” often all the way to the board of directors.¹³¹

When you have this kind of internal reporting, you are able to catch red flags and problems in their earliest stages, ideally. At that point, upper management has a decision to make: will they utilize some sort of resource to look into this and further investigate? They should.

It would be to their benefit, from a compliance standpoint, to then make the decision to self-report to the SEC or to a government agency if violations are uncovered because that would eventually lead to more cooperation and potential leniency for rectifying the problem.

So I always make the argument that an internal whistleblower is a key player in compliance. Hopefully, times are changing a bit to recognize that. I definitely agree it has been traditionally a corporate culture problem, and a lot of times people do not want to hear what is bad news, right? If we could succeed at changing the tone at the top and the corporate culture to encourage and value whistleblowers, then I think that in the next generation of business managers, hopefully people will view whistleblowers as very beneficial members of the entity.

ALICE BRIGHTSKY: Can I just interject one other thing? From my personal experience as an anti-money laundering (AML) compliance officer, if you appreciate the nuanced differences between monitoring for AML program violations versus monitoring for everything else in a compliance program, you have looking at your customers and being suspicious of what they are doing through your institution versus looking at your employees and being potentially suspicious of what they are doing to put the consumers marketplace and business at risk.

We are starting to see a trend of really talking about this nexus now between AML and conduct risk. The way it sort of operates in practice

130. See, e.g., Jennifer M. Pacella, *Conflicted Counselors: Retaliation Protections for Attorney-Whistleblowers in an Inconsistent Regulatory Regime*, 33 YALE J. ON REG. 491, 492–93 (2016) [hereinafter Pacella, *Conflicted Counselors*]; Jennifer M. Pacella, *The Cybersecurity Threat: Compliance and the Role of Whistleblowers*, 11 BROOK. J. CORP., FIN. & COM. L. 39, 40 (2016).

131. Pacella, *Conflicted Counselors*, *supra* note 130, at 494.

today is that a lot of times there is not a lot of synergy or communication between those two somewhat siloed areas of risk in an organization.

But if you look at the recent enforcement actions—or not even recent; go back to Riggs Bank¹³² or go back to Bank of New York and Lucy Edwards, an insider who helped orchestrate a money laundering scheme through the institution¹³³—you recognize that a lot of the biggest, most egregious incidents of money laundering involved insiders.

If we can channel internal reporting and really support it, we may get an early warning mechanism in place for these other areas of risk, which could be really priceless and stave off some of these bigger violations, and, more importantly, stop the illicit activity from occurring.

So from an AML perspective I want to see this succeed, and I want compliance programs to really work on this and to see this as a collaborative effort and help turn the tide of corporate culture so that it is more supportive of whistleblowers.

JASON ZUCKERMAN: One of the ways I think the SEC program has had a real impact is that I see more often that employers know they cannot ignore a compliance issue; they need to investigate it and write a report.

For example, I have had some clients who were fired for blowing the whistle internally and I was able to resolve their matters before initiating litigation. But as part of a settlement in some of those matters, the employer required that my client agree to be interviewed about their disclosures, which I think is good for both parties. Even though my client is not pursuing a retaliation claim, the employer knows that the issue cannot be ignored and could potentially come before the SEC and therefore they need to be in a position to show that they investigated the issue.

Ideally, employees would not need to contact an anonymous ethics hotline to blow the whistle. Employees should feel comfortable raising concerns directly with their supervisory chain.

IAN ENGORON: Okay. Thank you for all those great answers.

132. Eric Dash, *Riggs Bank is Penalized \$16 Million*, N.Y. TIMES (Jan. 27, 2005), <http://www.nytimes.com/2005/01/27/business/riggs-bank-is-penalized-16-million.html> [<https://perma.cc/AD36-P4VN>].

133. Timothy L. O'Brien & Raymond Bonner, *Banker and Husband Tell of Role in Laundering Case*, N.Y. TIMES (Feb. 17, 2000), <http://www.nytimes.com/2000/02/17/world/banker-and-husband-tell-of-role-in-laundering-case.html> [<https://perma.cc/R232-ZY27>].

Next question: Why might someone choose to file a whistleblower complaint under Sarbanes-Oxley rather than Dodd-Frank?

Professor Pacella?

JENNIFER M. PACELLA: I would be happy to answer that, sure.

There are many differences between the whistleblower protection programs under Sarbanes-Oxley and under Dodd-Frank. Many people argue that Dodd-Frank is a better program because it allows the whistleblower the right to bring a cause of action to federal court directly,¹³⁴ whereas under Sarbanes-Oxley a whistleblower must file an administrative remedy with the Secretary of Labor through the Occupational Health and Safety Administration (OSHA).¹³⁵

The statute of limitations is much longer under Dodd-Frank; it is six years as opposed to six months under Sarbanes-Oxley.¹³⁶ Therefore, many people have argued that Dodd-Frank is a better program—not to mention it has the bounty reward program as well, which is separate from its retaliation protections, of course.

Sarbanes-Oxley offers to whistleblowers relief such as reinstatement of your employment if you are successful in your retaliation claim, as well as back pay. Dodd-Frank offers the same things; it actually offers double back pay; so that is a further benefit to Dodd-Frank.¹³⁷

But one reason, in thinking about this further, that a whistleblower might opt to utilize Sarbanes-Oxley is for compensation for special damages as well.¹³⁸ That would be anything that would make the whistleblower whole. Courts have looked at this provision and found that this would allow whistleblowers to receive damages for noneconomic harms, so that would include pain and suffering.¹³⁹ Often, that kind of relief pinpoints the exact problem that the whistleblower has suffered. You cannot put a monetary number on that because of all these reasons we mentioned—retaliation, loss of livelihood, inability to get a new job, etc.

Dodd-Frank, although it offers a bounty reward and double back pay, actually does not offer those types of special damages that could amount to more compensation at the end of the day for the whistleblower. That

134. See 15 U.S.C. § 78u-6(h) (2012).

135. See 18 U.S.C. § 1514A(b)(1) (2012).

136. Compare 15 U.S.C. § 78u-6(h)(1)(B)(iii) with 18 U.S.C. § 1514A(b)(2)(D).

137. Compare 15 U.S.C. § 78u-6(h)(1)(C)(ii) with 18 U.S.C. § 1514A(c)(2).

138. See 18 U.S.C. § 1514A(c)(2)(C).

139. See, e.g., *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 266 (5th Cir. 2014).

may be one reason that a whistleblower might opt to pursue a remedy under Sarbanes-Oxley.

IAN ENGORON: I believe that the Department of Labor, the Secretary of Labor, covers the cost of the litigation as well, correct?

JENNIFER M. PACELLA: Yes. There is a provision in the statute that the whistleblower may be reimbursed for litigation costs and attorney's fees as well.¹⁴⁰ Dodd-Frank offers that, too,¹⁴¹ but the difference is the special damages clause.

JASON ZUCKERMAN: Can I add a few things to that?

The Dodd-Frank Act amended Section 806 of SOX to clarify that SOX claims are exempt from mandatory arbitration agreements.¹⁴² Oddly enough, that same provision was not included in the anti-retaliation provision of the Dodd-Frank Act.¹⁴³

If you are on the plaintiff side, generally you want to avoid arbitration. Discovery is limited, and the proceeding is confidential. Also, the fact that the employer is often paying a lot of the arbitrator's fee can influence the outcome. Therefore, I would prefer to bring a SOX claim to avoid arbitration.

Another advantage of pursuing a SOX claim is that the whistleblower is likely to get a hearing on the merits, especially where the claim is prosecuted at the Office of Administrative Law Judges at the Department of Labor. In contrast, prosecuting the claim in federal court increases the risk of dismissal on summary judgment. Some federal judges go out of their way to dismiss employment claims on summary judgment. That is a bit of a bold statement, but there is a lot of research on it.¹⁴⁴

I will not go into other nuances, but in order to prove the main element of a SOX claim—i.e., that you blew the whistle—you just have to show that you had a reasonable belief that there was a violation of an SEC rule or one of the other categories of SOX protected disclosures.¹⁴⁵

140. See 18 U.S.C. § 1514A(c)(2)(C).

141. See 15 U.S.C. § 78u-6(h)(1)(C)(iii).

142. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(c)(2), 124 Stat. 1376, 1848 (codified at 18 U.S.C. § 1514A(e)).

143. *Id.* § 922(a), 124 Stat. at 1841–48 (codified at 15 U.S.C. § 78u-6).

144. See, e.g., Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 112 (2011); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 95 (2010).

145. See 18 U.S.C. § 1514A(a)(1).

A SOX retaliation plaintiff need not prove that they blew the whistle on an actual violation. That is a helpful standard that makes it harder for employers to prevail on a motion for summary judgment.

By the way, why should the standard be “reasonable belief” as opposed to proving an actual violation? Because Section 806 of SOX is a prophylactic statute—the goal is to encourage employees to report early on, before there is actual harm to shareholders.

IAN ENGORON: Ms. Weinstock, the SEC is the agency that administers the Dodd-Frank Act, so you might be a little biased, but why would someone choose to file a complaint under Dodd-Frank as opposed to SOX?

JUDITH WEINSTOCK: I think the panel has basically covered this.

I guess one of the things to think about is, are you bringing a private action in federal court or are you bringing something to the SEC? You do not actually—I am sorry to say this in front of my colleague—need an attorney to file a whistleblower claim through the SEC. That is something that you can do on your own.

One advantage to getting an attorney and filing a whistleblower complaint with the SEC is that you can file it anonymously. So you file it anonymously through your attorney and all we see as the SEC is the attorney’s name on it. That is something that the person—they can keep themselves anonymous pretty much forever, unless and until the award process comes through, and that is really something that is up to them.

If the SEC successfully brings a case and it is over \$1 million, there may come a time when the whistleblower has to identify themselves to actually get paid, but, other than that, they can choose to be anonymous the whole time.

There may be a decision to make for that person along the way, because if you remain anonymous, you may in some way be less helpful to the SEC, but that is something that is available to that person. They can remain anonymous throughout the process.

IAN ENGORON: Great.

This was one of the questions posed to Chief Norberg, but I would like to hear all of your insights on it: how does and how can the SEC or a corporation encourage legitimate complaints, and in what ways can the SEC or corporations investigate these complaints to make sure that they are legitimate and not from disgruntled employees, or investors in the case of the Ombudsman’s Office?

If you would like to lead us?

TRACEY McNEIL: I do have some thoughts about how the SEC can encourage complaints. I will leave it to my colleague to talk about how we investigate complaints.

As far as encouraging complaints, being in a new role at the SEC, I get to hear a lot from investors about what they do not like about the SEC. So one of the things that I let them know is that I follow three common standards of practice across the ombudsman field, and those are the standards of confidentiality, informality, and independence.

When they come to me, by statute I have to maintain the confidentiality of our communications.¹⁴⁶ So immediately, investors or potential whistleblowers or just an interested person who has an issue, knowing that it is confidential helps set a different tone. They are talking to me, I am at the regulator, but I have this responsibility to keep our communications, in most instances, confidential, unless the investor tells me otherwise.

The informal aspect of my standards of practice can cut both ways, depending upon what the person wants from me. For example, I am not an office of notice. So again, when they are talking to me in this informal capacity, while I cannot take formal legal action or give them personalized legal or financial advice, I am able to have a broad, and I feel, a more relaxed and intuitive, conversation with them about their issues and concerns.

Once they understand what I am there to do and we establish a rapport, investors tell me a lot of things, some things that, depending upon the circumstances, are really tough to hear. What I am doing in those moments is not just establishing trust so that they tell me the whole story from their perspective and understanding, but I am also listening to their issues as a person with securities law expertise.

I am also going through questions and scenarios in my head: is the investor ticking off some elements of a securities law violation? Is there something in, for example, the Financial Industry Regulatory Authority's (FINRA's) SRO rules that this investor is not aware of that I should clarify? Do I need to end this call and contact our Office of Market Intelligence? Is the investor a potential fraud victim?

Most investors who call me, after we have established trust and rapport, may then say, "Oh, sure, you can talk to the Division of Enforcement about my issue, or you can give them my information and they can reach out to me." So, in that way, there have been several

146. See 15 U.S.C. § 78d(g)(8)(B)(iii).

occasions that I am glad I was there as the Ombudsman to facilitate that level of trust and communication.

As for the third standard of practice, independence, I sit in the Office of the Investor Advocate at the SEC.

The Office of the Investor Advocate was specifically designed to be somewhat independent¹⁴⁷— so we do have a certain measure of independence in being able to do the work that we feel is necessary to fulfill our statutory mandate.

One example of that independence is, since it is congressional report season for me, unlike a lot of other offices and divisions at the agency, we do not have to have our reports reviewed or approved by the Commission before they go to Congress.¹⁴⁸

I am usually not the last stop for investors. But I do feel that I add value in helping investors navigate when they do not know where to go at the SEC. They can call me. I can say, “Here you go. There is a real person that you can contact there, or give me your information and I will go talk to that person and call you back.”

I keep saying “real person” because on one of my very first calls as Ombudsman, an investor called, and I answered, “Tracey McNeil.”

He said, “I want to speak to the Ombudsman.”

I said, “Tracey McNeil. I am the Ombudsman.”

He said, “I want to speak to the Ombudsman.”

I said, “I am Tracey McNeil. I am the Ombudsman.”

He said, “Oh, you are a real person!”

I said, “Yes, I am. I believe so.”

That call was a great learning experience as Ombudsman, because it pointed out a fundamental customer service and investor experience gap that I am able to fill. So now I am the Ombudsman, a real person at the SEC here to help retail investors. I am proud to be a member of the staff of the agency, and I feel that my colleagues and I are dedicated to doing our very best to fulfill the agency’s mission.

So, for my role, I hope that investors understand that they do have a measure of confidentiality, that when they are talking to me it is informal—that they can talk to me and I am going to do my best to try to get them the information or resources they need.

147. *Office of the Investor Advocate*, U.S. SEC. & EXCH. COMMISSION, <https://www.sec.gov/page/investor-advocate-landing-page> [<https://perma.cc/3HKH-2KRF>] (last modified Feb. 8, 2017).

148. *See* 15 U.S.C. § 78d(g)(6)(B)(iii).

As the Ombudsman is a new role and resource at the agency, I feel I am providing a needed service by helping investors and other persons feel more comfortable in coming to us with information, questions, and concerns.

IAN ENGORON: Ms. Weinstock and then Mr. Zuckerman.

JUDITH WEINSTOCK: A couple of things.

Whistleblowers have to voluntarily provide the SEC with original information that leads to a successful enforcement action yielding monetary sanctions of over a million dollars in order to get an award.¹⁴⁹ With respect to how do we encourage people to bring meritorious claims, well, to the extent that people are motivated by the financial incentives, they are not going to get that award unless we can successfully bring a case. So it may just be a waste of someone's time to bring something frivolous to us.

In terms of original information, I think, as Jason mentioned, there is an incentive to come forward early because you have to come forward with original information, which is any information that the SEC does not already have.¹⁵⁰ The investigation can be open already, but if the information leads us to different conduct, or even if the information significantly contributed to bringing the matter, that also can be eligible for an award.¹⁵¹

Our prior Enforcement Director, Andrew Ceresney, had encouraged prompt reporting in a speech that he made. He said, "My general message to whistleblowers is to report as soon as you learn of misconduct, as you never know whether someone else will report, whether the information will become stale, or whether the statute of limitations will run."¹⁵²

But, in terms of how to investigate these complaints, I am not sure that these whistleblower complaints are really any different from a non-whistleblower complaint. Whenever you have a witness in a case—now, obviously, it tends to be helpful to have a whistleblower, to have an insider, to have a witness—I mean that is invaluable, as Jane mentioned—but whenever you have a witness in a case, everything that he or she says

149. *See id.* § 78u-6(b)(1).

150. *See id.* § 78u-6(a)(3).

151. *See id.*

152. Andrew Ceresney, Dir., Div. of Enf't, U.S. Sec. & Exch. Comm'n, Speech at the Sixteenth Annual Taxpayers Against Fraud Conference in Washington, D.C.: The SEC's Whistleblower Program: The Successful Early Years (Sept. 14, 2016), <https://www.sec.gov/news/speech/ceresney-sec-whistleblower-program.html> [<https://perma.cc/ATF4-WG24>].

has to be corroborated. Can you prove the case without this person's information? Can you corroborate it? Can you back it up?

You do not necessarily want to be in a situation—although we have certainly brought cases before reliant on one person's word, but realistically we are talking about corporate fraud; we are talking about fraud that involves documents. There should be some documents that relate to this situation and you should be able to corroborate what the person is telling you with those documents. Are there emails that support it?

And, as Jason mentioned, you are going to make a credibility determination. You are going to ask these questions: did they delay in reporting? Did they participate in the conduct? Are there other witnesses? These are all questions that you would want to ask in any case. We really encourage whistleblowers to come forward because we really want that help.

But, in terms of the way we investigate it—and the whistleblower may bring us something that is difficult to understand. That is always really helpful, but you still have to do a fulsome investigation in many of the same ways you would do in another case. You have to corroborate what the witness is saying, you have to make a credibility determination, and you really have to be able to prove the case.

We like to try to prove the case in multiple ways. Now, I am not saying you could never do it based on one witness, but, again, you are talking about the corporate fraud area and there should be some other evidence to corroborate what the person is saying.

JASON ZUCKERMAN: So just a few observations really quickly.

My concern is the opposite, i.e., that due to a lack of resources, they cannot act on certain tips. The risk of overlooking credible tips about ongoing fraud schemes will increase due to a hiring freeze.¹⁵³

Eighteen thousand people have provided information to the SEC Office of the Whistleblower.¹⁵⁴ Less than one hundred received an award.¹⁵⁵ So, even if it that number was one hundred, look at those odds.

153. Matt Robinson & Benjamin Bain, *Wall Street Penalties Have Fallen in Trump's First Year, Study Says*, BLOOMBERG: POL. (Nov. 11, 2017, 11:36 AM), <https://www.bloomberg.com/news/articles/2017-11-14/wall-street-penalties-fall-in-trump-s-first-year-study-shows> [<https://perma.cc/MB3P-CP54>].

154. Carmen Germaine, *SEC Whistleblower Program Is Business As Usual, Chief Says*, LAW360 (June 28, 2017, 9:39 PM), <https://www.law360.com/articles/939700/sec-whistleblower-program-is-business-as-usual-chief-says> [<https://perma.cc/7UQF-V84U>].

155. *Id.*

The SEC will investigate a whistleblower disclosure only if it is very strong.

Number two, I think it would be helpful for the SEC to work more collaboratively with whistleblowers on an ongoing basis. Some of the schemes the SEC investigates are very complex, and the whistleblower could offer important insights into the documents and other evidence.

In some matters I have at the SEC, the staff has some ongoing interaction with the whistleblower, but usually the staff says: “We cannot say anything about an ongoing investigation.”

JUDITH WEINSTOCK: I just would say that our investigations are confidential and nonpublic, and so we are prevented from giving that information. We spend a lot of time in the New York Office and elsewhere within the SEC telling people that, sending people letters saying that.

I think that in terms of—it sounds like you tell your clients, “Okay, the SEC is calling us; that is a good sign.” When we are continuing to work with someone, we cannot really tell them anything. But I could see how a private attorney would tell their client, “Yeah, that is a good sign,” because obviously we are gathering more information, we at least have a preliminary interest in the matter.

But I think that everybody—we have a lot of different staff attorneys—conducts their investigations in different ways. Each investigation is different and it calls for different methods. That might mean a year poring over documents.

Can it be helpful sometimes to have someone walk through it? Sure. But maybe there are situations where, for a variety of reasons—maybe there is another person involved that the SEC is talking to—and I just think that each investigation is very different from another and we are prevented from giving information.

I would note that if we subpoena someone for information, which I guess is not your situation, they can request a copy of the Formal Order of Investigation in a case. But I guess that would not apply to a whistleblower because they are voluntarily providing information. But that would be an exception to the fact that our investigations are confidential and nonpublic, is if we give someone a subpoena, they can ask for the Formal Order of Investigation, and that would tell them that we have an investigation open.

IAN ENGORON: And, Ms. BrightSky, from the compliance or corporation’s perspective?

ALICE BRIGHTSKY: I think, contrary to what you guys have said—and it does not sound like a lot of nonmeritorious claims is the issue necessarily for the Commission—I think it is an issue for corporations and compliance departments. But I do not know that it is one that we can solve necessarily.

It may just be part of having a really open speak-up culture and open reporting system. You are going to necessarily get complaints or claims, allegations, from employees who do not fully understand whether or not a violation has occurred or necessarily the seriousness of the situation they are reporting on.

I mean, are there instances of “I was in a meeting and everybody got a red pen and I got a black pen and I am upset about it.” Those things occur, right?

I think the way you address it internally from a corporation perspective is to educate on what the purpose of those hotlines is, how to best assess a situation, but also encourage and accept that some of those claims coming through are going to be nonmeritorious, and that is just the price you pay to have a speak-up culture and to encourage open reporting.

So for every five or six claims that are baseless, at the end of the day—you treat everything seriously and you investigate with the same protocol as you would anything else—but if at the end of the day one in five claims or five in ten claims are baseless—well, we are thinking about the ones that are not baseless, and that we have encouraged everybody to raise a hand, and we are supporting those as we should. So I think it might be the price we have to pay internally in corporations in order to get that one in however many merit-based claims.

JASON ZUCKERMAN: If I could add one thing to that, which is, how do you get employees to speak up to their employer? Do not focus on the employee’s motive. I see all too often an instinct to say, “Why did he or she make a report? The employee is speaking up because they got a bad performance review, because they want to get an edge over someone else, etc.” Questioning the whistleblower’s motive can backfire. The employer should focus on the disclosure, not on the whistleblower’s motive.

ALICE BRIGHTSKY: Yes, I agree with that.

IAN ENGORON: Thank you for all those great answers.

We have one more question before we head to Q&A from the audience.

I recently wrote a Student Note on whistleblowing and specifically about the definition of a whistleblower under Dodd-Frank.¹⁵⁶ I am paraphrasing a little bit here, but a whistleblower is basically “any individual or someone acting jointly with others who provides information of possible securities violations to the Commission in a manner established by rule or regulation by the Commission.”

Right now, the Second, Fifth, and Ninth Circuits all agree that definition means a whistleblower must provide information directly to the Commission.¹⁵⁷ The source of the tension is how that definition interacts with the anti-retaliation protections provided in Subsection (h), which states that Sarbanes-Oxley internal reporters should be protected.¹⁵⁸ So my Note aims to resolve some of that tension by redefining Section (a)(6) as an express grant of authority by Congress through the SEC to decide how someone reports information to the Commission.¹⁵⁹ So if the SEC decides that by reporting to your employer by regulation that is reporting to the Commission, then that is their prerogative.¹⁶⁰

None of the courts, unfortunately, spend much time addressing Section (a)(6), and it is mostly the interplay between (a)(6) and (h)(3), but I wonder if you can comment on whether or not you think this argument holds any weight?

Anyone can start us off.

JENNIFER M. PACELLA: I think that is a great argument, and good for you for writing about that. That is wonderful.

IAN ENGORON: Thank you.

JENNIFER M. PACELLA: That could certainly be a way to interpret it. I have not seen others make that argument, either. I think that the definition of whistleblower is problematic for many reasons. It does contain those words—to report by rule or regulation in a manner established by the SEC¹⁶¹—so I think the meaning may be open for interpretation.

The word “whistleblower” itself is used elsewhere in Dodd-Frank. The conflict here, of course, as was mentioned, is with the retaliation

156. Ian Engoron, Note, *A Novel Approach to Defining “Whistleblower” in Dodd-Frank*, 23 FORDHAM J. CORP. & FIN. L. 257 (2017).

157. See cases cited *supra* notes 97–99.

158. 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2012).

159. Engoron, *supra* note 156, at 263–64.

160. *Id.*

161. 15 U.S.C. § 78u-6(a)(6), (h).

piece. There is protection for retaliation if a “whistleblower” makes a report that is required or protected under Sarbanes-Oxley—and, as we know, Sarbanes-Oxley does protect internal whistleblowers.¹⁶²

Some would argue that the problem relates to how and when this language came through congressional committees and how the defined terms may have changed along the way before reaching the final version of the statute. I think you make a valid argument, that it could possibly be interpreted as how the SEC will receive the information, whether it is through an internal report that goes up the chain within the company or if it is from the whistleblower externally reporting to the agency. I cannot wait to read the Supreme Court’s decision on this exact matter, but I think that is a very good argument.

IAN ENGORON: Great. Thank you to all the panelists for a great panel.

We are going to open the floor up to questions and answers from the audience. Does anybody have any questions?

AUDIENCE MEMBER: Let me address this question to Jason—or maybe more of a comment—and that is: in terms of the Justice Department not going after Wall Street executives for taking down the global financial system, and the recent book, *The Chickenshit Club*,¹⁶³ which I believe refers to Eric Holder and his administration, what are your thoughts, Jason?

JASON ZUCKERMAN: I am right next to someone who worked for years as a high-level prosecutor. The reality is that—and I would be interested in getting her insights—it is very difficult to prosecute individuals, to prove the requisite level of knowledge, for example, that they knew they were making a false statement about a toxic subprime mortgage security.

Yes, I agree that the revolving door is a big problem in prosecuting white collar crime. Eric Holder is an honorable person. But where was he coming from when President Obama appointed him as Attorney General? He came from a big corporate law firm¹⁶⁴ where he did work on behalf of

162. See 18 U.S.C. § 1514A(a) (2012).

163. JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* (2017).

164. *Eric H. Holder, Jr.*, COVINGTON & BURLING LLP, <https://www.cov.com/en/professionals/h/eric-holder> [<https://perma.cc/4WMZ-GVNW>] (last visited Dec. 22, 2017).

pharmaceutical companies, defending claims brought under the False Claims Act.

The new SEC Chair, as you had argued earlier, is coming from one of the most prestigious Wall Street law firms,¹⁶⁵ and represented many of the large New York banks.

The SEC and DOJ have a revolving door problem, and I think we need to do something about it.

When you bring people in whose primary work experience consists of representing large and powerful corporations, that experience or perspective will certainly influence their viewpoint. When they have made millions and millions of dollars defending or advancing the interests of large banks, those earnings will likely affect their perspective.

I respect former Chair Mary Jo White and believe she did an unbelievable job at the SEC. When she was at the helm, the SEC was more active in enforcing the securities law than it ever was in its history. And she had been at a big firm before coming to the SEC as Chair.¹⁶⁶

So there are people who go to the SEC or to other agencies out of these big firms who are there for the right reason. But some of them, at least in my view, are there for just a few years to get very good experience and then return to a lucrative position at a law firm or in-house.

I am concerned that even though large banks have paid huge fines,¹⁶⁷ they might determine that it is more profitable to violate the law and pay a fine later.

And the new SEC Chair has made it clear at his confirmation hearing that he wants to avoid imposing large penalties for securities law violations because such penalties are harmful to shareholders.¹⁶⁸ I

165. *Biography: Jay Clayton*, U.S. SEC. & EXCH. COMMISSION, <https://www.sec.gov/biography/jay-clayton> [<https://perma.cc/Q3A9-ZP36>] (last visited Dec. 22, 2017).

166. *Mary Jo White*, DEBEVOISE & PLIMPTON LLP, <https://www.debevoise.com/maryjowhite?tab=biography> [<https://perma.cc/K7GS-VTGH>] (last visited Dec. 22, 2017).

167. John W. Schoen, *7 Years on from Crisis, \$150 Billion in Bank Fines and Penalties*, CNBC (Apr. 30, 2015, 2:32 PM), <https://www.cnbc.com/2015/04/30/7-years-on-from-crisis-150-billion-in-bank-fines-and-penalties.html> [<https://perma.cc/Q8XM-JT8Y>].

168. Dave Michaels & Andrew Ackerman, *SEC Chairman Nominee Jay Clayton Calls for Scaling Back Regulations to Encourage IPOs*, WALL STREET J. (Mar. 23, 2017, 5:19 PM), <https://www.wsj.com/articles/sec-chairman-nominee-jay-clayton-says-past-wall-street-work-is-a-strength-1490281093> [<https://perma.cc/VWU9-N25V>].

disagree. Why should shareholders get off the hook if they profited from the fraud?

I am concerned about an article I saw in today's *Wall Street Journal* reporting that the SEC will lose staff in the Division of Enforcement.¹⁶⁹ They will likely have to cut at least one hundred people.¹⁷⁰ The SEC's annual budget is \$1.4 to 1.6 billion.¹⁷¹ There are hedge fund CEOs who make over \$1 billion per year.¹⁷² How is the SEC supposed to hold Wall Street accountable when the SEC is so understaffed?

The large banks likely realize that they cannot repeal most of the anti-fraud laws, so instead they ensure that regulators lack the resources to enforce those laws.

There are not a lot of folks on Capitol Hill who are arguing to increase the SEC's budget, but the lobbyists for the banks are effective in ensuring that the SEC is understaffed.

It was not that long ago that we had a massive financial crisis because the SEC and other regulators were asleep at the wheel. If you add up all of the lost economic output and all of the other costs associated with the Great Recession, it ranges anywhere from about \$9 trillion to about \$18 trillion.¹⁷³

That was not that long ago. How is it that we are doing the same thing again, undermining the regulators, and easing regulation of the large banks?

The big banks are very profitable now. I do not see why we need to deregulate the financial services industry.

169. Dave Michaels, *SEC Signals Pullback from Prosecutorial Approach to Enforcement*, WALL STREET J. (Oct. 26, 2017, 6:00 PM), <https://www.wsj.com/articles/sec-signals-pullback-from-prosecutorial-approach-to-enforcement-1509055200> [<https://perma.cc/S7QC-6K4E>].

170. *Id.*

171. U.S. SEC. & EXCH. COMM'N, FY 2018 CONGRESSIONAL BUDGET JUSTIFICATION, FY 2018 ANNUAL PERFORMANCE PLAN, FY 2016 ANNUAL PERFORMANCE REPORT 14–15 (2017), <https://www.sec.gov/files/secfy18congbudgjust.pdf> [<https://perma.cc/9M8A-LRH3>].

172. Nathan Vardi, *The 25 Highest-Earning Hedge Fund Managers and Traders*, FORBES (Mar. 14, 2017, 9:45 AM), <https://www.forbes.com/sites/nathanvardi/2017/03/14/hedge-fund-managers/#34ede12b6e79> [<https://perma.cc/FBT3-GL4F>].

173. Eduardo Porter, *Recession's True Cost Is Still Being Tallied*, N.Y. TIMES (Jan. 21, 2014), <https://www.nytimes.com/2014/01/22/business/economy/the-cost-of-the-financial-crisis-is-still-being-tallied.html> [<https://perma.cc/7AHB-LH5H>].

ALICE BRIGHTSKY: I want to interject because I love that book. My students know I love that book. Whether you agree with the premise or not, it is just an excellent book. Everyone should read it. It should be required reading.

One of the greatest ironies, though, that the book is really premised on is that in one of the few instances in which we did go after account executives and we did not have the policy of “too big to fail,” the DOJ learned the wrong lesson from that. Jesse Eisinger really bases the whole book on this, that the fall of Arthur Andersen¹⁷⁴ and the public outcry as a result of that, of ordinary people losing their jobs and what that meant for society, that the DOJ really—and these are not my words and this is not necessarily my opinion, but the premise of the book is that the DOJ took the wrong message from that, and it trickled throughout, at least from his perspective, the entire enforcement community.

It was the last time that all of the agencies really sort of rallied together in an organized fashion to conduct this large-scale investigation. It was not a foregone conclusion that Ken Lay and Jeff Skilling would get prosecuted or that the prosecutions would succeed.¹⁷⁵ It took a lot of hard work and a lot of coordination between the agencies.

So his argument is that where that should have been a raging success and considered as such, the exact opposite got communicated to them, and as a result of lots of other things that happened politically, etc., the agency kind of lost its mojo, if you will, and lost its skills in prosecuting these really complicated financial crimes cases.

That is a really interesting irony to me, and it is one that I had not thought about until I really read the book and was forced to kind of go back to 2002 or 2001 and think back on what it was like, especially in New York City at that time.

IAN ENGORON: Ms. Weinstock?

JUDITH WEINSTOCK: I am feeling a little defensive. I feel it necessary to say that I have worked for the government for my entire legal career. I started at the Manhattan DA’s office in 1997. In 2014, after the financial crisis, I moved over to the SEC. I think my colleague also has been there for four years.

174. *The Fall of Andersen*, CHI. TRIB. (Sept. 1, 2002), <http://www.chicago.tribune.com/news/chi-0209010315sep01-story.html> [<https://perma.cc/KS4S-2AXQ>].

175. Gina Sunseri & Sylvie Rottman, *Enron Verdict: Ken Lay Guilty on All Counts, Skilling on 19 Counts*, ABC NEWS (May 25, 2006), <http://abcnews.go.com/Business/LegalCenter/story?id=2003728&page=1> [<https://perma.cc/E959-7Y7H>].

TRACEY McNEIL: No, nine years.

JUDITH WEINSTOCK: Nine years, okay.

So I do not consider myself, obviously, part of the revolving door.

I have not read the book. Sometimes some of these books are a little too close to home. I have only seen the highest level of integrity in government. I have seen people wanting to do the right thing. I think that, as I think someone noted, high-level executives can sometimes insulate themselves. There may not be a paper trail. There may be conduct that is bad but does not rise to the level of intentional conduct.

I take issue with the notion that, because of the revolving-door policy, certain people did not get prosecuted. That has not been my experience. It is certainly not an observation that I have made.

With respect to the SEC Enforcement staff going down, it is not that it is being cut. It is that there is attrition and the federal government is in a hiring freeze. We will see what fiscal year 2018 brings.

I think the article in the *Journal* was—I was not at Steve Peikin's speech, so I cannot speak to everything that he was saying, but I think it is a recognition that we are in a different administration now and there are hiring freezes and we may have to make certain choices based on that.

But being where I sit and reviewing tips, complaints, and referrals that come into the New York Office, I believe that cases that need to be pursued are getting pursued. That is my spiel.

JASON ZUCKERMAN: I just want to clarify something. I interact with a lot of dedicated public servants at the SEC and other agencies, and have the highest respect for them.

But there is a real issue with the revolving door. It is important to evaluate the potential impact of enforcement attorneys at the SEC knowing that they will likely take lucrative positions on the other side.

But I believe that most folks working at the SEC and at other regulators are there for the right reason, i.e., to vindicate the public interest.

TRACEY McNEIL: Just one comment to echo what you were saying, Judith. I am not feeling defensive at all. I am pleased and proud to be at the SEC. I came over in 2008, so I have been there a while.

There were a lot of us who came over in 2008. I think they lifted a hiring freeze at the time, and there were a lot of us leaving large firms or corporations and coming to the SEC. We came to the SEC to do the good work and not to make money, because we were making much more in the private sector.

The other thing I want to point out is the scope of the SEC's mission alongside our workforce statistics. We are the agency that regulates the U.S. capital markets. We are there to protect investors, facilitate capital formation, and make sure the markets run as they should.

We are headquartered in D.C. and we have eleven regional offices around the country. We have about 4,500 employees across headquarters and the regional offices. I might be a little low on this number, but we conduct examinations or review filings covering somewhere around 30,000 registrants and entities every year.

So I do feel we are underfunded; I do feel we are understaffed. That is my plug for all of you. When the hiring freeze is over, I hope you consider a career at the SEC as an option.

We have a serious mission and mandate, and I feel that all of us walk through those turnstiles every day trying to do the absolute best that we can.

I have not read that book, but I may. You read the books, you see the headlines, but it is rare that I hear anyone articulate what our small but mighty workforce is here to do and how much we have to do. I want to commend my SEC colleagues for the good work that we do with the resources that we have.

JUDITH WEINSTOCK: I strongly agree with that.

I have to make one plug for the New York Office because the New York Office recently started a Twitter account. We want to get as many followers as we can. I want you to know it is [newyork_sec](https://twitter.com/newyork_sec).¹⁷⁶ We need to get more followers than our Fort Worth Regional Office.

TRACEY McNEIL: I encourage you all to look at the SEC's Fort Worth Regional Office Twitter feed also.¹⁷⁷ Follow New York, but Fort Worth, once they get wind of this, might step up their Twitter game. They are pretty good.

IAN ENGORON: Thank you, sir, for that great question. It spawned some great discussion.

All right. Thank you, everyone. On behalf of the *Fordham Journal of Corporate & Financial Law*, I want to thank everyone for attending today's symposium. I would especially like to thank Chief Norberg and

176. @NewYork_SEC, TWITTER, https://twitter.com/newyork_sec?lang=en [<https://perma.cc/T43Y-3X6L>] (last visited Dec. 22, 2017).

177. @FortWorth_SEC, TWITTER, https://twitter.com/FortWorth_SEC?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor [<https://perma.cc/47F9-NRGY>] (last visited Dec. 22, 2017).

all of our panelists for their contributions and for engendering an in-depth discussion on whistleblowers in the era of Sarbanes-Oxley and Dodd-Frank.

I would also like to thank Professors Sean Griffith and Caroline Gentile, the *Corporate Journal's* faculty advisors, for their help and efforts organizing this event. It would not have been possible without them. The *Journal* is lucky to have such wonderful faculty to work with.

I would also like to thank Shanelle Holley for all of her assistance, and everyone from her office for making today possible.

Finally, I would like to recognize our Editor-in-Chief, Tess Sadler, and the *Journal's* Symposium Committee for their help as well.

On behalf of the *Journal*, thank you absolutely everyone for making this such a great and successful event.