

## The SEC Whistleblower Program - What Employers Need to Know

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### **Executive Summary**

After Lehman Brothers, Bernie Madoff, and the mortgage-backed securities meltdown of 2008, Dodd-Frank and the public have charged the U.S. Securities & Exchange Commission (“SEC” or “Commission”) with doing its part to help prevent another financial and economic catastrophe by regulating with more authority various securities products and industries. From money market funds, to private equity funds, to foreign private issuers, the SEC has stepped up its efforts to effectively examine, investigate, and charge securities violations that it views as endangering investors. However, it appears the Commission’s budget has not kept up with the increased scope of its duties.[1] So the Commission must be effective and judicious with its resources, which has resulted in a reorganization of the SEC’s divisions and reporting structure, enactment and implementation of new examination and investigation procedures and protocols, and increased cooperation with settling defendants and other state, federal, and international regulators and authorities.[2]

One of the primary tools developed for the SEC to carry out the increased scope of its duties, with the relatively modest budget provided to do so, is the creation by Congress of the “Securities Whistleblower Incentives and Protection” Section in the Dodd Frank Act (“Section 21F” or “the Whistleblower Act”).[3] Section 21F directs the SEC to provide monetary awards to individuals who provide “voluntary,” “original” information that leads to a successful enforcement action which results in a sanction over \$1 million. Congress established the Investor Protection Fund to ensure enough money to pay whistleblowers without diminishing the amount of recovery for victims of securities fraud. The Commission established the Office of the Whistleblower to administer the whistleblower program. “It is [the Office of the Whistleblower’s] mission to administer a vigorous whistleblower program that will help the Commission identify and halt frauds early and quickly to minimize investor losses.”[4]

Equally important to Congress and the SEC is protecting whistleblowers from retaliation by their employers. Section 21F provides whistleblowers with a statutory cause of action and significant remedies for retaliation, which can include reinstatement, two times the back pay owed, and payment of their attorney fees. Moreover, Section 21F and its implementing regulations do not permit companies to use confidentiality or severance provisions in employment agreements to prevent whistleblowers from providing tips or information to the SEC, and permits whistleblower employees to secretly communicate with the SEC even if the employee is represented by corporate counsel. These laws and rules create new challenges for corporate counsel managing an internal or other investigation involving a whistleblower.

This Article provides an overview of the SEC’s whistleblower rule, provides some whistleblower compliance tips for employers, and an overview of how courts are interpreting and enforcing the whistleblower provisions.

### **The SEC Whistleblower Program**

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The Whistleblower provisions of the 2010 Dodd-Frank legislation were enacted to empower the SEC to financially reward, and protect from retaliation, securities fraud whistleblowers. Congress legislated the parameters for the SEC whistleblower program, created an Office of the Whistleblower, and directed the SEC to issue final regulations implementing the whistleblower legislation no later than mid-2011.[5] In May 2011, the SEC issued its final whistleblower program and rules, which became effective on August 12, 2011 and are embodied in SEC Rule 21F.[6]

Former SEC Chairman Mary Shapiro remarked that the SEC's whistleblower program has already "proven to be a valuable tool in helping us ferret out financial fraud. . . . When insiders provide us with high-quality road maps of fraudulent wrongdoing, it reduces the length of time we spend investigating and saves the agency substantial resources." [7]

The SEC interim Commissioner after Chairman Shapiro left, Elisse Walter, commented in December 2012 that she was "bothered" by two issues with the whistleblower rules: (1) the impact of the program on internal corporate compliance processes; and (2) that culpable whistleblowers may receive an award as long as they are not criminally convicted.[8]

In 2013, President Obama nominated as SEC Chairman the former U.S. Attorney for the Southern District of New York, Mary Jo White, who has implemented an aggressive SEC enforcement agenda.[9] Unlike her predecessor, Chairman White sees the whistleblower rules augmenting, not inhibiting, corporate internal compliance programs:

When our whistleblower program was being set up, many in the securities bar . . . worried that the program would undermine internal compliance efforts. It seems, however, that the program may be having the opposite effect. Today, we hear that companies are beefing up their internal compliance function and making it clear to their own employees that internal reporting will be treated seriously and fairly. And most in-house whistleblowers that come to us went the internal route first.[10]

Chairman White's comments indicate that more whistleblower awards will be made, and that the whistleblower program will be used to "dramatically broaden [the Commission's] presence." [11] This Section provides the following information about the SEC's whistleblower program: (A) summary of some of the more relevant provisions of Rule 21F; (B) statistics from the SEC's whistleblower reports for 2012 and 2013, the first two full operational years of the whistleblower program; (C) whistleblower compliance suggestions and issues for companies and counsel to consider; and (D) an analysis of important court decisions interpreting the Whistleblower Act provisions and SEC implementing rules.

### **A. Summary of Salient Provisions of Rule 21F[12]**

#### **Rule 21F-3:**

SEC will pay an award to one or more whistleblowers who:

1. "Voluntarily provide" the SEC
2. "original information"
3. "that leads to the successful enforcement" by the SEC in court or in an administrative action
4. where SEC "obtains monetary sanctions totaling more than \$1 million" ("1M")

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Whistleblowers can also receive an award in a “related action” (such as DOJ, CFTC, FINRA, IRS parallel proceedings) if the whistleblower satisfies Rule 21F.

### **Rule 21F-4: Definitions of Key Terms**

- *Voluntary submission of information:* Provide information “before a request, inquiry, or demand that relates to the subject matter of your submission is directed to you or anyone representing you” by the SEC, PCAOB or any other SRO, or any federal government branch or agency. It will not be voluntary even if your response is not compelled by a subpoena; any inquiry counts. But it will be voluntary if you provide original information to another agency prior to the SEC request or inquiry. It will not be voluntary if your submission is required as part of a pre-existing duty.
- *Original information:* Information that is “derived from your independent knowledge or independent analysis,” not already known to the SEC from another source (unless you are the original source of that information), not derived from a public allegation, reports, news story, etc., and provided after the 7/21/10 date of the Dodd-Frank enactment.
- *“Independent analysis”* can mean your evaluation of public information which reveals information not generally known or available to the public. Company officers, directors, compliance, accountants, auditors, and lawyers cannot be whistleblowers UNLESS 120 days elapses after they report a violation to the responsible person or committee and nothing happens or no action is taken.
- *When internal reporting still counts as original information:* If you provide original information through your company’s internal compliance reporting procedures, you can submit the same information to the SEC within 120 days of your internal report and still receive credit as the source of the original information, with the date you internally reported counting as the date you reported to the SEC, even if the Company voluntarily discloses your information to the SEC before you within that 120-day period.
- *Leads to successful enforcement:* When you provide “sufficiently specific, credible, and timely” original information that “significantly contributes” to a “successful judicial or administrative action”
- *Monetary sanctions of more than \$1M:* SEC will count two or more administrative or judicial proceedings together towards the \$1M number, even if their individual penalties are less than \$1M, if the proceedings “arise out of the same nucleus of operative facts”

### **Rule 21F-5: Amount of Award**

- SEC has discretion to award an amount “at least 10% and no more than 30% of the monetary sanctions” the SEC “and other authorities are able to collect.”
- Amounts paid to multiple whistleblowers in the same action will not in the aggregate be less than 10% or more than 30% of the amount the SEC or other authorities “collect.”

### **Rule 21F-6: Criteria for Determining Amount of Award**

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*Factors that increase the amount of the award:*

- Significance of the information
- Assistance provided by the whistleblower
- Law enforcement interest in case.
- Participation in internal compliance systems

*Factors that decrease the amount of the award*

- Culpability of whistleblower in infraction
- Unreasonable reporting delays
- Interference with internal compliance and reporting systems

### **Rule 21F-8: Eligibility**

You are ineligible if “you are convicted of a criminal violation that is related to the Commission action for which you otherwise could receive an award.”

### **Rule 21F-14: Procedures Applicable to Payment of Awards**

- You are only entitled to an award amount “to the extent that a monetary sanction is collected in the Commission action or in a related action upon which the award is based.”

### **Rule 21F-15: No Amnesty**

- Your status as a whistleblower does not preclude enforcement action against you by the SEC for your own conduct in connection with the securities violations.
- But if the SEC brings such an action against you, it will “take your cooperation into consideration” in accordance with its Statement Concerning Cooperation by Individuals.
- Only a criminal conviction will make the whistleblower ineligible for an award.

### **Rule 21F-16: Awards to Whistleblowers Who Engage in Culpable Conduct**

- SEC will not count towards the \$1M penalty threshold amount any sanctions for violations that are “based substantially on conduct that the whistleblower directed, planned, or initiated.”
- If the whistleblower is entitled to an award, the amount of the sanction upon which the award is calculated will be reduced by any amount the whistleblower is required to pay for his or its own culpable conduct.

### **Rule 21F-17: Staff Communications with Individuals Employed by Companies**

- “No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, *including enforcing, or threatening to enforce, a confidentiality agreement with respect to such communications.*”

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- The SEC staff is authorized to communicate directly with an entity’s director, officer, member, agent or employee that has initiated communication with the SEC, even if that entity has counsel, without the SEC seeking the consent of the entity’s counsel.

**Section 78u-6(h):[13] Protections and Remedies for Whistleblowers and Their Lawyers**

- “No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by whistleblower.”
- Retaliation plaintiffs are entitled to nationwide service of process in prosecuting whistleblower retaliation claims.
- Remedies available to whistleblowers include:
  - “reinstatement with the same seniority status that the individual would have had, but for the discrimination”;
  - “2 times the amount of back pay otherwise owed to the individual; and”
  - “compensation for litigation costs, expert witness fees, and reasonable attorneys’ fees.”

**B. 2012 and 2013 Statistics from the SEC Office of the Whistleblower**

2012 was the first full year for which data was available to begin to assess the SEC’s whistleblower program. On November 15, 2012, the SEC released its Annual Report on the Dodd-Frank Whistleblower Program (“2012 Annual Report”), a requirement of the Dodd-Frank legislation. Some of the data revealed in the 2012 Annual Report include:

- 3,050 hotline calls from members of the public;
- The SEC Office of the Whistleblower received 3,001 formal whistleblower tips via submission of Form-TCR (tips, complaints, and referrals);
- The most frequent tips concerned corporate disclosures (547 tips, 18.2 percent), offering fraud (465 tips, 15.5 percent), and manipulation (457 tips, 15.2 percent);
- 115 complaints, or 3.8 percent, related to the Foreign Corrupt Practices Act;
- The state from which the largest number of tips emanated was California (435 tips, 17.4 percent), followed by New York (246 tips, 9.8 percent) and Florida (202 tips, 8.1 percent); and
- The Office of the Whistleblower received tips from whistleblowers from 49 countries outside the US, including 74 tips from the United Kingdom, 46 tips from Canada, 33 tips from India, and 27 tips from China.

The SEC posted notices of 143 “covered actions” in 2012 — SEC enforcement actions in which a final judgment or order resulted in monetary sanctions exceeding \$1 million. In 2012, the SEC issued only one award under the whistleblower program — a \$50,000 award to an anonymous tipster who revealed a multi-million dollar fraud.[14]

The 2013 Annual Report indicates that the Whistleblower Program is gaining momentum in its second full year of operation. In 2013, the SEC:

- Paid over \$14 million to whistleblowers as a result of tips;

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- Has over \$439 million available in the Investor Protection Fund for whistleblower awards;
- Has received 3,238 formal tips (8 percent increase from 2012);
- Received the most common tip relating to “Corporate Disclosures and Financials”;
- Received the most tips from outside the U.S. from the United Kingdom, followed closely by China and Canada;
- Received 18 percent more international tips in 2013 compared to last year and a 12 percent increase in countries that submitted tips;
- Returned over 2,810 phone calls from members of the public to its whistleblower hotline; and
- Created an on-line portal for submission of formal tips to the SEC at [www.sec.gov/whistleblower](http://www.sec.gov/whistleblower).<sup>[15]</sup>

The Chief of the SEC Office of the Whistleblower, Sean McKessy, noted in the 2013 Annual Report that the Commission will focus on protecting whistleblowers from retaliation by employers, noting that the “protection of whistleblowers from retaliation by their employers is important to the success of the whistleblower program,” and that retaliating employers will face SEC enforcement for such conduct:

[The Office of the Whistleblower] is coordinating actively with Enforcement Division staff to identify matters where employers may have taken retaliatory measures against individuals who reported potential securities law violations or have utilized confidentiality, severance, or other agreements in an effort to prohibit their employees from voicing concerns about potential wrongdoing.<sup>[16]</sup>

McKessy and his Office have said “[w]e’re keeping our eyes open for the right fact pattern’ with which to bring an action” under the anti-retaliation provisions.<sup>[17]</sup> In light of this focus by the Commission, employers may want to develop whistleblower compliance guidelines. Part C below provides tips for companies to get started.

### **C. Whistleblower Compliance Tips for Companies**

The following are general tips and considerations for companies and compliance personnel considering Rule 21F, the SEC Annual Reports, and relevant case law and regulatory reports and notices:

- Craft a compliance investigation plan that can be immediately customized as needed;
- Publicize remediation and resultant disciplinary action when appropriate to demonstrate that the company is serious about compliance and expects no less from its employees;
- Construct a formal whistleblower hotline that is well-known within the company;
- Publicize in compliance program that internal compliance reporting first can still qualify the whistleblower for an award under the whistleblower law, and that internal reporting first is an element that may increase the award paid by the SEC;
- Incentivize internal whistleblowing by making it the easiest course, with flexible reporting mechanisms, prompt investigations, regular briefings to whistleblowers, and internal recognition for bringing compliance issues to management;
- To incentivize internal reporting consider setting up an internal award scheme but perhaps with less hurdles than Rule 21F (to support perhaps less generous company awards);

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- Consider making valid whistleblower reports part of the company's compensation or bonus scheme;
- Multi-national companies with potential non-US whistleblowers must be mindful that any whistleblower compliance program should account for potential civil or criminal liability under privacy and secrecy laws of some non-US countries for sharing certain information with the SEC. It is relevant to note that the SEC may share the information from a whistleblower with foreign law enforcement or regulators;
- Multi-national compliance programs should also account for the cultural stigmas or biases that may attach to whistleblowers in certain cultures, countries, or regions;
- Be mindful of Rule 21F-17 and the right it provides the SEC to speak directly with company employee whistleblowers, even if the company has counsel, without the SEC seeking the consent of the company's counsel; and
- Be mindful of the harsh whistleblower retaliation laws and procedures and that sub-par or non-performing employees may use this law to try and protect themselves from termination.

### D. What the Courts Are Saying about the Whistleblower Act

#### 1. Handling Conflicts Between Congressional Statutory Provisions of the Whistleblower Act and The SEC's Implementing Rules

In *Asadi v GE Energy (USA), LLC*,<sup>[18]</sup> the U.S. Court of Appeals for the Fifth Circuit held that an employee must report potential securities law violations to the SEC, not just to his employer, in order to have standing to bring a lawsuit under the anti-retaliation provisions of the Whistleblower Act. In so ruling, the court invalidated an SEC administration definition of "whistleblower" that impermissibly broadened the definition by Congress to include employees who do not report securities law violations to the SEC.

Asadi was employed by GE Energy and sent to Ammon, Jordan to serve as the Iraq Country Executive. Asadi informed his supervisor about concerns raised by an Iraqi official about the Company's potential violations of the Foreign Corrupt Practices Act. Asadi did not report this tip to the SEC. Asadi was terminated one year later and sued his employer under the anti-retaliation provisions of the Whistleblower Act, arguing he was fired in retaliation for reporting his concerns about the FCPA.

In Section 78u-6(a) of the Whistleblower Act, Congress defines "whistleblower" as someone who "provides . . . information relating to a violation of the securities laws to the Commission."<sup>[19]</sup>

However, the anti-retaliation provision, Section 78u-6(h), contains a subsection — 78u-6(h)(1)(A)(iii) — that prohibits retaliation for an employee making disclosures required by the Sarbanes Oxley Act ("SOX") which do not require disclosure of information to the SEC.<sup>[20]</sup>

Asadi argued that persons who take action that fall within this category of the anti-retaliation Section 78u-6(h)(1)(A)(iii) — which does not require reporting to the SEC — are protected even if they do not fall within the Section 78u-6(a) definition of "whistleblower" — which requires reporting to the SEC as part of the definition. Asadi interpreted a conflict between 78u-6(a) and 78u-6(h), which he said created an ambiguity that should be cured in his favor. The court cited several U.S. District Court opinions that accepted Asadi's analysis and permitted retaliation claims by employees who did not report alleged securities violations to the SEC.<sup>[21]</sup>

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The Fifth Circuit in *Asadi* found no conflict or ambiguity with Sections 78u-6(a) and 78u-6(h). To the court, Section 78u-6(a) unambiguously defines “whistleblower” as an individual who provides “information relating to a securities law violation to the SEC.”[22] Section 78u-6(h)(1)(A) represents protected activity in a whistleblower retaliation claim, but it does “not define which individuals qualify as whistleblowers.”[23] Indeed, the anti-retaliation Section 78u-6(h) unambiguously provides protection to “whistleblowers,” which is unambiguously defined in Section 78u-6(a) as someone who reports a securities law violation to the SEC. Congress did not provide anti-retaliation protection to any “employee” or “individual,” it provided protection for a “whistleblower” previously defined as someone who reports violations to the SEC.[24] Merely because someone may take protected activity under 78u-6(h)(1)(A)(iii) yet not qualify as a “whistleblower” “does not render [Section] 78u-6(h)(1)(A)(iii) conflicting or superfluous.”[25]

The court provided an example of an employee who reports a securities law violation to his CEO and the SEC, and is fired by the CEO when the CEO was not aware the employee also reported to the SEC. Because the employee was not fired for reporting a violation to the SEC, the employee could not pursue a retaliation claim under 78u-6(h)(1)(A)(i) or (ii). But the disclosure to the CEO is protected under SOX, which is protected under 78u-6(h)(1)(A)(iii). And because the employee also reported the violation to the SEC, he qualifies as a whistleblower under

Section 78u-6(a) and is eligible for the more generous remedies and limitations period provided in the Whistleblower Act as compared to the SOX whistleblower provisions.[26] *Asadi*’s interpretation of Section 78u-6(h)(1)(A)(iii) would render the SOX whistleblower provisions moot because both could be used without reporting violations to the SEC.[27]

The court rejected *Asadi*’s reliance on Rule 21F-2(b)(1),[28] wherein the SEC redefined “whistleblower” to include individuals who engage in protected activity under Section 78u-6(h) but do not report the securities law violation to the SEC. Because the court found Congress’ definition of “whistleblower” in Section 78u-6(a) unambiguous, the court rejected “the SEC’s expansive interpretation of the term ‘whistleblower’ [in Rule 21-F(b)(1)] for purposes of the whistleblower protection provision” under the Chevron doctrine.[29]

U.S. district courts in other circuits since *Asadi* was decided have declined to follow *Asadi*, have found a conflict between Section 78u-6(a) and 78u-6(h)(1)(A)(iii), and resolved the stated ambiguity by deferring to the SEC’s broadened definition of “whistleblower” in Rule 21-F(b)(1).[30] Stay tuned.

### 2. Extraterritorial Application of The Whistleblower Act Provisions

In *Liu v Siemens AG*,[31] the U.S. District Court for the Southern District of New York held that the Whistleblower Act’s anti-retaliation provisions did not apply to acts of retaliation occurring outside of the United States. Liu was a resident of Taiwan, working for a Chinese subsidiary (Siemens China) of a German company (Siemens). Liu made an internal report that Siemens China was involved in a kickback scheme in violation of the FCPA in its sales of equipment to public hospitals in North Korea and China. Liu was terminated after his persistent internal reports and presentations about the issue. Citing the Supreme Court’s decision in *Morrison v National Austl Bank Ltd*,[32] the court held that the anti-retaliation provisions did not apply extraterritorially because Congress gave no clear indication that they had extraterritorial application: “When a statute gives no clear indication of an extraterritorial application, it has none.”[33]

The court found this was so even though Siemens AG securities traded on the New York Stock Exchange, noting that this was no replacement for the required express congressional intent for extraterritorial application, and that the Supreme Court did not require total disconnect with the U.S. for the ban on extraterritorial application of U.S. laws to

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apply:

The [Supreme] Court acknowledged that “it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case.” This is a case brought by a Taiwanese resident against a German corporation for acts concerning its Chinese subsidiary relating to alleged corruption in China and North Korea. The only connection to the United States is the fact that Siemens has [securities] that are traded on an American exchange, just as in Morrison. There is simply no indication that Congress intended the Anti-Retaliation Provision to apply extraterritorially.[34]

Liu appealed this ruling to the Second Circuit Court of Appeals.[35] Stay tuned.

## Conclusion

The SEC’s whistleblower program is gaining steam, and the SEC Chairman Mary Jo White views it as an indispensable part of enforcing the nation’s securities laws. Companies may want to become familiar with the SEC whistleblower rules and incentives, and how courts are interpreting them, to understand their effect on various issues that arise in any internal or other investigation of securities fraud: parallel criminal proceedings, the witness’s Fifth Amendment privilege (a company does not have one), and how the program affects attorney-client privileges of the company, the employee, and other witnesses. Hopefully this Article helps identify some of the issues you or your client may need to consider in these circumstances.

*Matthew P. Allen is a securities, IP, and business lawyer with the international law firm of Miller, Canfield, Paddock and Stone. Mr. Allen is licensed in Illinois, Michigan, and New York, and practices out of Miller Canfield’s Detroit and Troy, Michigan offices, as well as Miller Canfield’s offices in Chicago and New York. Mr. Allen is grateful for the opportunity to Chair the Commercial Litigation Section of the Michigan Defense Trial Counsel. Mr. Allen also serves as Vice-Chair of the ABA Securities Litigation Committee.*

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[1] See, e.g., Sarah N. Lynch, SEC Chairman to Request Budget Boost As Sequestration Looms, Reuters, Feb 13, 2013.

[2] See Matthew P. Allen, The SEC Cooperation Initiative and Its Criminal Roots, ABA Section of Litigation Annual Meeting (2013) ([www.millercanfield.com/assets/attachments/The%20New%20SEC%20Cooperation%20Program%20And%20Its%20Criminal%20Roots.pdf](http://www.millercanfield.com/assets/attachments/The%20New%20SEC%20Cooperation%20Program%20And%20Its%20Criminal%20Roots.pdf)).

[3] 15 USC 78u-6 (“Section 21F”).

[4] SEC 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program (Nov 2013), at 2.

[5] See 15 USC 78u-6, 78u-7.

[6] See SEC Release No 34-64545 (May 25, 2011). The whistleblower rules are published in 17 CFR 240.21F-1 – 21F-17.

[7] SEC’s Whistleblower Office Received 3,001 Tips in Fiscal Year 2012, Report Says, Secs Reg

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& Law Rpt, (BNA) Vol 44, No 46 at 2109 (Nov 19, 2012).

[8] See Yin Wilczek, SEC Seeing Poor Controls Over Fees During Exams of Private Fund Advisers, secs Reg & Law Rpt (BNA) at 2227-2228 (Dec 10, 2012).

[9] See SEC Nominee Signals Shift: Obama Taps Ex Prosecutor Mary Jo White, Portending Increased Policing of Wall Street, Wall St J, Jan 25, 2013 at A1.

[10] SEC Chair Mary Jo White Remarks at the Securities Enforcement Forum, Washington DC (Oct 9, 2013).

[11] Id.

[12] 17 CFR 240.21F-1 – 21F-17.

[13] 15 USC 78u-6(h).

[14] See generally SEC Annual Report on the Dodd Frank Whistleblower Program, Fiscal Year

2012 (Nov 2012); SEC's Whistleblower Office Received 3,001 Tips in Fiscal Year 2012, Report Says, secs Reg & Law Rpt (BNA) Vol 44, No 46 at 2109; Lessons From the Whistleblower

Report, Law360 (Nov 12, 2012); \$104M Whistleblower Award — A Sign of Things to Come, Law360 (Dec 6, 2012); Cross-Border Implications of the SEC Whistleblower Report, Law360 (Nov 15, 2012).

[15] See generally, SEC Annual Report on the Dodd Frank Whistleblower Program, Fiscal Year 2013 (Nov 2013) ("2013 Annual Report"); Walter Pavlo, What the SEC Whistleblower Report Means for Companies, Forbes (Nov 18, 2013).

[16] 2013 Annual Report at 2.

[17] See Yin Wilczek, SEC Received More Than 3,200 Tips in FY2013, Whistle-Blower Official Says, secs Reg & Law Rpt (BNA) (Nov 18, 2013).

[18] 720 F3d 620 (CA 5, 2013).

[19] 15 USC 78u-6(a)(6) (emphasis added).

[20] 15 USC 78u-6(h)(1)(A)(iii).

[21] See Asadi, 720 F3d at 625 n6.

[22] Id. at 625.

[23] Id.

[24] See id. at 626.

[25] Id.

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[26] *Id.* at 627-628& n11, 629.

[27] See *id.* at 628.

[28] 27 CFR 240.21F-2(b)(1).

[29] See *Asadi*, 720 F3d at 629-630 (citing *Chevron USA, Inc v Natural Res Def Council, Inc*, 467 US 837, 842-44 (1984) (finding that an administrative agency like the SEC must give effect to the unambiguous intent of Congress and not make rules that contradict that intent)). See also Rachel Louise Ensign, *The Whistleblower Debate: Companies Say Protections Apply Only When Tipsters Raise Concerns With the SEC*, *waLL st J*, Aug 12, 2013 at B4.

[30] See, e.g., *Rosenblum v Thomson Reuters, LLC*, \_\_\_\_ F Supp 2d \_\_\_, 2013 WL 5780775 (SDNY, oct 25, 2013).

[31] \_\_\_\_ FSupp2d \_\_\_, 2013 WL 5692504 (SDNY, oct 21, 2013).

[32] 561 US 247, 130 SCt 2869 (2010).

[33] *Liu*, *supra* at \*2 (quoting *Morrison*, 130 S Ct at 2878).

[34] *Id.* at \*3-4 (quoting *Morrison*, 130 S Ct at 2884) (internal citation omitted).

[35] See *Whistle-Blower Appeals Dismissal of Retaliation Suit*, *secs Reg & Law RepoRt (BNA)* (Nov 18, 2013).