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Lions, Tigers, and Bears –
When Compliance Officers or In-House Counsel
Become Whistleblowers

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I. Introduction

Among the most difficult category of cases for employers to defend are whistleblower and other retaliation claims brought by employees. The proliferation of anti-retaliation laws and the difficulty in defending this category of employment cases have forced employers and courts to wrestle with the effects of these laws on employers’ decisions to take adverse employment action against a potential whistleblower. This situation is even further exacerbated when a whistleblower turns out to be a trusted professional such as in-house counsel or even a compliance officer.

On the other side of the court room sit sophisticated plaintiffs pursuing such claims. Consider the following:

• In August, 2014, the Occupational Safety and Health Administration (“OSHA”) ordered reinstatement and a $220,000 back pay award to a terminated environmental specialist who raised nuclear and environmental safety concerns to his employer, Washington River Protection Solutions, a U.S. Department of Energy nuclear waste facility contractor. The environmental specialist was found to have been terminated for voicing his concerns, a violation of the federal whistleblower provisions of the Energy Reorganization Act.¹

• In September, 2014, the Securities and Exchange Commission (“SEC”) handed out the first-ever whistleblower bounty awarded to a compliance professional under the Dodd-Frank Act. The SEC awarded $300,000 to a

compliance and audit staffer who provided a tip to the SEC that ultimately led to an enforcement action. (The Dodd-Frank whistleblower provision requires a 10% to 30% payout to the whistleblower of collected sanctions of more than $1 million dollars.)

- An ex-Vanguard Group, Inc. attorney filed a $1 billion dollar whistleblower lawsuit in August, 2014, alleging that he was terminated by Vanguard after he alleged that the company failed to pay taxes and file tax returns for several years in New York.

- The SEC awarded three whistleblowers nearly $15 million dollars under the Dodd-Frank whistleblower program. A complaint was filed as a result of a dispute amongst the three individuals over the allocation of the award in June, 2014.

- In October 2014, the SEC awarded 30 million dollars to a non-US citizen who reported a fraud that would otherwise have gone undiscovered. The recipient was not a compliance officer, but the award is the largest ever of Dodd-Frank's 14 such awards to date. With this sort of money in play, loyalty may be in short supply.

- An employee sentenced to 2-1/2 years in federal prison still walked away with $104 million dollars after being awarded such by the I.R.S.

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2 Ed Beeson, SEC Strikes Fear with First Award to Compliance Pro, (Sept. 03, 2014), www.law360.com
II. Retaliation Claims Enforced by the Equal Employment Opportunity Commission under Anti-Discrimination Laws

Retaliation claims represent the largest category of claims filed with the Equal Employment Opportunity Commission (“EEOC”). The EEOC is the federal agency which has jurisdiction to investigate charges of discrimination under several federal laws. All of the anti-discrimination laws set forth below also provide anti-retaliation provisions which prohibit employers from taking adverse employment action against an employee because the employee has opposed any practice made unlawful under the relevant laws, or because the employee has made a charge, assisted, or participated in an investigation or proceeding under the respective laws.


4. Title VII of Civil Rights Act of 1964 (“Title VII”). Title VII prohibits discrimination on the basis of sex, race, color, national origin, or religion.

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7 See www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last viewed Dec. 9, 2014).
9 42 U.S.C. § 12203(a).
III. Retaliation Claims Enforced by the Department of Labor

The Fair Labor Standards Act ("FLSA"), which imposes minimum wage and overtime requirements, as well as the Family Medical Leave Act ("FMLA"), which mandates that covered employees be permitted family and medical leave, are enforced by the Department of Labor ("DOL"), Wage & Hour Division. Both of these federal laws contain anti-retaliation provisions.12

IV. Anti-Retaliation Provisions Enforced by the Occupational Safety Health Administration

1. Affordable Care Act13
2. Asbestos Hazard Emergency Response Act14
3. Clean Air Act15
4. Comprehensive Environmental Response, Compensation and Liability Act16
5. Consumer Financial Protection Act of 201017
6. Consumer Product Safety Improvement Act18
7. Energy Reorganization Act19

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13 29 U.S.C. §218C.
8. FDA Food Safety Modernization Act\textsuperscript{20}
9. Federal Railroad Safety Act\textsuperscript{21}
10. Federal Water Pollution Control Act\textsuperscript{22}
11. International Safe Container Act\textsuperscript{23}
12. Moving Ahead for Progress in the 21\textsuperscript{st} Century Act\textsuperscript{24}
13. National Transit Systems Security Act\textsuperscript{25}
14. Occupational Safety and Health Act, Section 11(C)\textsuperscript{26}
15. Pipeline Safety Improvement Act\textsuperscript{27}
16. Safe Drinking Water Act\textsuperscript{28}
17. Sarbanes-Oxley Act\textsuperscript{29}
18. Seaman’s Protection Act\textsuperscript{30}
19. Solid Waste Disposal Act\textsuperscript{31}
20. Surface Transportation Assistance Act\textsuperscript{32}
21. Toxic Substances Control Act\textsuperscript{33}

\textsuperscript{20} 21 U.S.C. §399d.
\textsuperscript{21} 49 U.S.C. §20109.
\textsuperscript{22} 33 U.S.C. §1367.
\textsuperscript{23} 46 U.S.C. §80507.
\textsuperscript{24} 49 U.S.C. §30171.
\textsuperscript{25} 6 U.S.C. §1142.
\textsuperscript{26} 29 U.S.C. §660.
\textsuperscript{27} 49 U.S.C. §60129.
\textsuperscript{28} 42 U.S.C. §300j-9(i).
\textsuperscript{29} 18 U.S.C.A. §1514A.
\textsuperscript{30} 46 U.S.C. §2114.
\textsuperscript{31} 42 U.S.C. §6971.
\textsuperscript{32} 49 U.S.C. §31105.
V. Sarbanes-Oxley Act

Section 806 of the Sarbanes-Oxley Act of 2002 (“SOX”) protects employees of publicly traded companies who provide information, assist in an investigation, or report what the employee “reasonably believes” to be a violation of the Securities and Exchange Act or any provision of federal law relating to fraud against shareholders. Employee whistleblowers who report improper conduct or who participate in related proceedings are protected from retaliatory action including discharge, demotion, suspension or being threatened or harassed or discriminated against for engaging in such protected activity. Successful litigants can recover reinstatement, back pay, and any other compensatory damages, including attorney’s fees.

To obtain relief, whistleblowers must first file a complaint with the Secretary of Labor within 180 days after the alleged violation, or the date on which the employee became aware of the violation, whichever is later. If the DOL does not issue a final decision within 180 days after the employee files the complaint, the employee may file an action in federal court and is entitled to a jury trial.

A company served with a SOX complaint must submit a position statement and supporting documents to OSHA within 20 days of receipt of the notice of complaint. The company’s response is not kept confidential. OSHA will provide copies of the

18 U.S.C. §1514A.
Id.
Id.
response to the complainant. Within 60 days of filing of the complaint, the Assistant Secretary will issue written findings as to whether there is reasonable cause to believe the company has retaliated against the complainant in violation of SOX. If “reasonable cause” is shown, a preliminary order will be issued providing relief for the complainant.\textsuperscript{38}

The parties will be notified of the right to object to findings and/or the order, and to request a hearing. If the preliminary order requires reinstatement, such relief is effective immediately upon the company’s receipt of the preliminary order, regardless of any objections filed by the company.\textsuperscript{39}

If a request for a hearing is made, the Administrative Law Judge (“ALJ”) will make a de-novo determination. The proceedings allow for pre-hearing discovery, including depositions. If the judge concludes that the company violated the law, an order for relief necessary to make the employee whole will be issued. If the judge determines the company did not violate the law, the judge will dismiss the complaint. An employer may file an appeal within 10 business days of the judge’s decision with the DOL’s Administrative Review Board (“Review Board”). The Review Board’s decision should issue its decision within 120 days from the conclusion of the administrative hearing. Within 60 days after the issuance of the final order, an aggrieved party may file a petition for review with the appropriate United States Court of Appeals.\textsuperscript{40}

\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.}
VI. Dodd-Frank Anti-Retaliation Provisions

Section 922 of the Dodd-Frank Act applies to publicly traded companies and provides new incentives to whistleblowers to report corporate malfeasance. The incentives include provisions for bounties and an anti-retaliation provision. The anti-retaliation provision prohibits employers from taking adverse actions against a whistleblower who: (1) provides information to the SEC; (2) initiates, testifies in, or assists in an investigation of the SEC related to such information; or (3) makes disclosures required under SOX or the Securities Exchange Act or other rule or regulation subject to the SEC’s jurisdiction. The bounty provision requires the SEC to pay whistleblowers between 10% and 30% of collected monetary sanctions for voluntarily providing original information in a successful SEC enforcement action which results in the collection of at least $1 million in sanctions.

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41 In October, 2014, the Second Circuit Court of Appeals found that the anti-retaliation provisions of Dodd-Frank do not apply to a non-citizen employed abroad by a foreign company. The case involved a Taiwanese citizen who reported Siemans China for alleged violations of the Foreign Corrupt Practices Act. The employee alleged he was demoted then fired in retaliation for making the complaint. See Liu Meng-Lin v. Siemens AG, 763 F.3d 175 (2d Cir. 2014).

42 There is a debate over whether or not a report made only internally will suffice. See Asaid v. G.E. Energy United States, LLC, 720 F.3d 620 (5th Cir. 2013). In Asaid, the purported whistleblower filed a complaint alleging that G.E. Energy violated Dodd-Frank’s whistleblower protection provision when it fired him following his internal reports of possible Foreign Corrupt Practices Act violations which he made to his supervisor. The Fifth Circuit upheld the dismissal of the complaint, holding that the Dodd-Frank whistleblower protection provision is limited “…to those individuals who provide information relating to a violation of the securities laws to the SEC.” Id. at 630. See also Banko v. Apple Inc., No. 13-CV-02977, 2013 U.S. Dist. LEXIS 149686 (N.D. Cal. Sept. 27, 2013) and Wagner v. Bank of Am Corp., No. 12-CV-00381, 2013 U.S. Dist. LEXIS 101297 (D. Colo. July 19, 2013). But see Yang v. Navigators Group, Inc., 18 F. Supp. 3d 519 (S.D.N.Y. 2014), wherein the court refused to dismiss an action brought by a purported whistleblower who only made an internal report of suspected securities law violations. The court rejected the analysis of the Fifth Circuit, deferring to the SEC’s interpretation and holding that the “…statute does not clearly and unambiguously limit whistleblower protection to individuals who report violations to the SEC…” Id. at 533. See also Azim v. Tortoise Capital Advisors, LLC., No. 13-2267-KHV, 2014 U.S. Dist. LEXIS 22974 (D. Kan. Feb. 24, 2014).

As discussed below, while there are limitations on in-house counsel’s ability to benefit from such bounties, the SEC may actually be encouraging such reports by attorneys. The bounty rules promulgated by the SEC do not preclude attorneys from receiving a bounty for acting as whistleblowers. Indeed, SEC Chair Mary Jo White implied in comments made in 2013 that the SEC will not seek to stop attorneys from actively reporting concerns nor from collecting bounties for reporting their clients’ missteps. 44

That being said, as set forth below, there are ethical limitations on attorneys, as well as limitations under SEC rules, on compliance officers, in-house auditors, risk managers, and other so-called gatekeepers. While other types of insiders do not have an internal reporting requirement, in most cases, the so-called gatekeepers who are tasked with keeping their company above board must wait at least 120 days after they have brought the matter to the attention of a top legal or compliance officer before they may head to the SEC.45

VII. Attorneys Serving as Compliance Officers

Consistent with the Model Rules of Professional Responsibility, the implementing rules for the SEC Whistleblower Program generally prohibit attorneys from using information that is obtained through a communication protected by the attorney-client privilege for whistleblowing purposes. This prohibition applies to both outside counsel representing a company and in-house lawyers. However, the rules do permit an attorney to receive a monetary award under the Whistleblower Program if the privilege has been waived, or if


45 See SEC Rule 21F-4(b)(v)(A) and (C).
the disclosure of the otherwise confidential information is permitted by the applicable attorney conduct rules, or if permitted by SEC Rule 205.3. 46

In this vein, it is vital to the analyses of a whistleblower claim brought by an attorney to address whether or not the disclosure of information is protected by the attorney-client privilege. Disclosures which are permanently protected under the cloak of the attorney-client privilege involve situations where (1) legal advice of any kind is sought from a professional legal advisor in their capacity as such; (2) the communication is related to that purpose; and (3) the communication is made in confidence by the client.47

There are special issues related to in-house lawyers who often serve a company in both legal and non-legal capacities. The lines become more blurred when in-house counsel performs legal services when acting in ostensibly non-legal capacity, such as in the role of compliance officer. In-house counsel should ask themselves: did the company reasonably believe that counsel was performing legal services on behalf of the company? The attorneys should also clarify when they are serving in a legal or non-legal role.

The authors of this article have personal experience handling matters in which the courts have ruled the attorney client privilege either did not apply or was waived. One such case did not involve a whistleblower statute, nevertheless it is instructive. Quite simply, even the attorney-client privilege is not unassailable. In this case an attorney who provided workers' compensation expertise to a client revealed confidences to the client's detriment. The client was speaking to the attorney about an unrelated matter.

46 See SEC Rule 205.3 and Model Rules of Professional Responsibility, Rule 1.6.

The client disclosed information which was against its interest in the unrelated matter. The client believed she was safe because she was seeking the lawyer’s advice with regard to workers’ compensation matters but, also because he was “her attorney.” When the matter later became the subject of an employment law claim, much to the dismay of the corporate client, the workers' compensation lawyer was called as a witness for the plaintiff. The judge ruled that the disclosure made by the client was not protected because the workers' compensation attorney was asked to provide advice on the matter before the Court, thus, the privilege did not apply. Similarly, when a lawyer serves the role of compliance officer, that lawyer may not be engaged to offer professional legal advice, potentially leaving the information the attorney may glean in such a role unprotected.

VIII. ABA Model Rule 1.13 and SEC Rule 205.3

Both Model Rule 1.13 and SEC Rule 205.3 contain special rules for corporate lawyers. As referenced above, SEC Rule 205.3 requires internal, “up-the-ladder” reporting within the company. Both rules allow for making a report to the SEC. Under Model Rule 1.13(c), disclosure beyond that permitted by Model Rule 1.6 is only permitted to prevent harm to the corporation itself and only if the internal report is unsuccessful. SEC Rule 205.3 permits disclosure if the lawyer reasonably believes disclosure is necessary to:

1) prevent a material violation which is likely to cause substantial financial injury to

\[48\] See Section VI Supra

\[49\] Paragraph c of Model Rule 1.13 provides that a lawyer may reveal such information “... only when the organization’s highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of the law.” See www.americanbar.org/groups/professional_conduct/rule_1_13_organization_as_client/comment_on_rule_1_13.html (last viewed Jan. 08, 2015).
issuers or investors, or (2) prevent an issuer from committing or suborning perjury, or perpetuating fraud on the SEC; or (3) rectify the consequences of a material violation, in furtherance of which the attorney’s services were used.

Significantly, state bar rules of professional conduct which have narrower disclosure provisions are preempted by SEC Rule 205.3 under the federal preemption doctrine.\(^{50}\) For example, SEC Rule 205.3 preempts California’s Professional Conduct Rule which prohibits a lawyer from disclosing information to prevent financial harm to others as a result of client fraud.

**IX. Best Practices for Avoiding and Responding to Whistleblower/Retaliation Claims**

**A. Define the Position**

Various state and federal statutes require compliance programs. However, they do not mandate how to prepare a job description for the position of compliance officer. When a company finds itself in the position of having to defend a whistleblower claim, its ability to defend based on attorney-client privilege may be impacted by how it defines the compliance officer’s duties. For example, the duty of loyalty that the officer owes to the company may be a helpful concept in defending a whistleblower claim.

In the *Vanguard* case referenced above, the attorney who asserted False Claims Act violations against Vanguard had sought the protection of the SEC in his defense, as

\(^{50}\) See the Supremacy Clause, U.S. Const. art. VI.
Vanguard has threatened to bring its own suit against him for violating company policy and breaching his ethical duties.\textsuperscript{51}

**B. Policies and Procedures**

The best defense is a good offense. Companies should invest in compliance by considering the following:


2. Implement, communicate and enforce an anti-retaliation policy.

3. The policy should include multiple avenues for internal reporting. The reporting process can include a hotline number to allow for anonymous tips.

4. All employees should sign a written acknowledgement of receipt and understanding of the policy.

5. Keep track of internal reports with a deadline for prompt action.

6. Training. All employees should receive training on the prevention and reporting of suspected wrongdoing. The training should be documented. Training for management should emphasize supervisory responsibility in this area. Supervisors can be a weak link when they do not understand

\textsuperscript{51} \textit{Supra} n. 3. Still, Vanguard's troubles stem from allegations of failure to report a 1.5 billion dollar "contingency fund" which the plaintiff claimed was funded by deductions from the company's mutual fund. The allegation was that the company was well aware of the problem and simply chose not to address the concerns or, as the awardee claimed, fully complicit with the alleged "wrongdoing."
their responsibility to report immediately any allegation of unlawful activity to someone in human resources or compliance.

7. Act on a complaint and provide feedback to the tipster who often worries about what is going to happen as a result of their bringing information to the company’s attention.

8. Create a culture of integrity.

9. Consider self reporting when dealing with a whistleblower. Even in situations where the company believes the complaint is untrue, or immaterial, a company’s reporting of the allegations to the SEC first and explaining why the allegations are unfounded may avoid or shorten what otherwise could be a protracted investigation.

10. Evaluate how to deal with the individual who made the complaint. Take steps to ensure the whistleblower is treated the same as all others under the company’s policies.

11. Review and evaluate company contracts. Some companies require their employees to execute employment agreements or non-competition agreements which contain as a condition of employment a requirement that employees make an internal complaint of wrongdoing prior to going to an outside agency. While there may be situations where such agreements would be considered enforceable, the SEC and other government agencies have taken the stance that such an agreement is an
unlawful constraint on the employee and on the agency’s ability to enforce the law.\textsuperscript{52}

\section*{C. Counterclaims against Whistleblowers}

Following the lead of Vanguard’s counsel in the matter set forth above, a company faced with an SEC whistleblower lawsuit should consider counterclaims against the accusing whistleblower as part of its vigorous defense. In Vanguard, the company announced that it might sue its former attorney for violating the company’s policy and state laws which dictate the attorney’s professional and ethical responsibilities. In support of the potential counterclaims the company stated that its ex-attorney had sent company records to a personal e-mail address while he was still working for the company and that upon a demand that he return the documents, he refused.\textsuperscript{53}

\section*{X. MUCH ADO ABOUT EVERYTHING}

In these post Dodd-Frank days, recent developments have drastically altered the landscape for internal compliance. The once hypothetical scenario that a gatekeeper charged with ensuring compliance by a company could become a whistleblower has arrived. Companies must take proactive steps to implement policies and procedures to address internal reporting and effectively deal with whistleblower.

\textsuperscript{52} See SEC Rule 21F-17 which makes it a separate violation of the law to take 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”. See also EEOC v. CVS, No.1:14-CV-0863 (N.D. Ill. Oct. 07, 2014). While the case was dismissed by the Court, the EEOC continues to argue that attempts to limit an employee’s reporting to the Agency are unlawful.

\textsuperscript{53} Supra n. 3