SILENCING WHISTLEBLOWERS BY CONTRACT

By:
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Abstract:

In 2015, the corporate world was jolted as the Securities and Exchange Commission brought forth the first of a series of enforcement actions against employer-mandated confidentiality agreements to silence would-be whistleblowers. KBR Inc. ("KBR") was the first to incur SEC sanctions for contractually restricting its employees from becoming whistleblowers by requiring them to seek internal approval before making any external disclosures. Contractual restrictions on SEC whistleblowing are made unlawful by Dodd-Frank's Rule 21F-17, which bars any actions taken to impede potential whistleblowers from reporting wrongdoing to the SEC. Lying dormant until the KBR action, Rule 21F-17 now provides the SEC with an active enforcement mechanism through which the agency regularly penalizes employers for imposing similar restrictions. Although it is now clear from a regulatory standpoint that such confidentiality agreements violate the law, Rule 21F-17 is void of any guidance or explanation as to a much thornier question—whether employers may lawfully restrict their employees from turning over to the SEC internal, confidential documents that support their whistleblowing disclosures. Case law interpreting Rule 21F-17 is similarly lacking. While incorporating the results of a request made by the author under the Freedom of Information Act ("FOIA") pertaining to the Dodd-Frank whistleblower submission process and frequency of use, this Article is the first scholarly attempt to fill this void in the law. By integrating law from related legal doctrines, including contract law, employment law, and False Claims Act case law, this Article proposes amendments to Rule 21F-17 in the form of a novel framework that balances the employer's concerns of safeguarding confidential documents with the whistleblower's need for providing documentary support of their claims and in furtherance of public policy. Such clarifications to the law will not only allow the SEC and future courts to point to a clear mechanism to determine the lawfulness of such transmissions, but will, most importantly, provide advance guidance to whistleblowers as to the boundaries of relying on documentary support in their revelations of wrongdoing.

I. INTRODUCTION

In the last decade, the phenomenon of whistleblowing has emerged both domestically and internationally as an important tool to expose wrongdoing and ensure transparency.[1] As individuals in possession of inside information increasingly bring to light problems that may otherwise remain undetected, regulators have heightened their focus on the importance of whistleblowers and their need for ample retaliation protections. The SEC has played a pronounced role in whistleblower advocacy—the agency has urged the corporate world to resolve any "mixed feelings" that they may harbor about whistleblowers by embracing them as critical players in effective corporate culture and compliance.[2]

The whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") of 2010[3] and the SEC regulations promulgated under the statute[4] improve upon those of the earlier Sarbanes-Oxley Act of 2002 ("SOX")[5] by offering whistleblowers a direct cause of action in federal court for retaliation, a lengthy six year statute of limitations to do so, and improved remedies.[6] Dodd-Frank evidences a strong whistleblower-centric policy rationale in that it also mandates the SEC to pay bounty rewards to whistleblowers who have provided the agency with original information leading to successful enforcement actions.[7] The legislative goal of this bounty program is to offset the common negative consequences of blowing the whistle, including risk of reprisal and retaliation.[8]

Until recently, Rule 21F-17, which the SEC promulgated pursuant to Dodd-Frank, was one of the statute's lesser-known whistleblower protection provisions. This rule bars employers or individuals from imposing any impediments on would-be whistleblowers by preventing them

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[1] Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1779 (2007) (noting that whistleblower revelations are increasingly important as "organizations become more complex and disparate"); *see also* Elletta Sangrey Callahan, Terry Morehead Dworkin, Timothy L. Fort & Cindy A. Schipani, *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 40 AM. BUS. L.J. 177, 189 (2002) (discussing the increased prevalence of whistleblowing in society).

[2] Mary Jo White, Former Chair, U.S. SEC. & EXCH. COMM'N, Speech at the Ray Garrett, Jr. Corp. & Sec. Law Inst. at Northwestern Univ. Sch. of Law, The SEC as the Whistleblower's Advocate, (Apr. 30, 2015), *available at* http://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html.

[3] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat 1376.

[4] 17 C.F.R. § 240.21F-2 (2011).

[5] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat 745. The SOX whistleblower program offers aggrieved whistleblowers only an administrative remedy of filing a retaliation compliant with the Occupational Safety and Health Administration and a relatively short statute of limitations of 180 days. *See also* Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV.1, 10 (2012); Richard Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley's Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65 (2007) (each examining the weaknesses of SOX's whistleblower program and low whistleblower success rate).

[6] 15 U.S.C. § 78u-6(h) (2010).

[7] *Id.* § 78u-6(b); Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 445 (2012) (discussing the legislative goals of the Dodd-Frank whistleblower program to protect and encourage whistleblowers to report).

[8] S. REP. NO. 111-176, at 110-11 (2010). *See also* Jamie Darin Prenkert, Julie Manning Magid & Allison Fetter-Harrott, *Retaliatory Disclosure: When Identifying the Complainant Is an Adverse Action*, 91 N.C. L. REV. 889, 928 (2013) (noting that the threat of reprisals, regardless of whether they occur, acts as a disincentive to whistleblower reporting); Gideon Mark, *Recanting Confidential Witnesses in Securities Litigation*, 45 LOY. U. CHI. L.J. 575, 596–97 (2014) (discussing the high prevalence of and various forms of whistleblower retaliation).

from directly communicating with the SEC about possible securities law violations, including "enforcing or threatening to enforce" confidentiality agreements.[9] The SEC first flexed its enforcement muscles under Rule 21F-17 against global technology and engineering firm, KBR Inc., for requiring its current and former employees to sign confidentiality agreements in which they promised to obtain prior approval from the company's legal department before discussing internal investigatory matters with any outside party.[10] Despite the fact that the company never actually enforced this reporting restriction against a single employee, KBR was disciplined under Rule 21F-17 for including restrictive language in its agreements and settled with the SEC by paying a $130,000 penalty[11]—a demonstration that the mere existence of such language in employee contractual arrangements is enough to warrant SEC-imposed penalties. Whistleblower advocates praised the action as a "huge win for corporate accountability and transparency."[12]

Although the KBR action and similar SEC actions that have followed reveal that employers cannot bar whistleblowers from verbally reporting to the SEC, many questions are left unanswered as to the extent of Rule 21F-17's reach. Specifically, the much more complex question of whether employers may restrict employees from physically transmitting internal and confidential company documents to the SEC in support of their whistleblowing disclosures remains an enigma. Rule 21F-17 contains absolutely no substance or commentary on this question, thereby providing no guidance as to the depths of the SEC's enforcement potential or a whistleblower's ability to support his or her claims with such documentation. Currently, there is also no case law interpreting this rule's reach. As will be discussed, it is very common for employer-defendants to object to whistleblower bounty rewards or move to dismiss retaliation cases on the basis that the employee has turned over internal company documents in violation of a confidentiality or non-disclosure agreement.[13]

This Article is the first scholarly attempt to close this gap in the law by proposing a framework for inclusion in Rule 21F-17 that balances the need for the whistleblower's confidential documents and the public policy interest in unveiling the alleged misconduct with the employer's interest in maintaining the sanctity of its internal documents. This framework integrates related doctrines of contract law and employment law, as well as case law under another notable federal whistleblowing statute, the False Claims Act, to propose a three-factor test that the SEC and courts may apply in justifying the lawfulness of the whistleblower's actions. In formulating this framework, this Article will also consider the results of a FOIA request made and analyzed by the author that examine transmission mechanisms of whistleblower information and utilization of the Dodd-Frank whistleblower program.

This Article will proceed in three parts. Part II examines Dodd-Frank's whistleblower provisions, the SEC regulations implementing the statute, and the content and substance of Rule 21F-17. This section also examines SEC enforcement activity pursuant to the rule and the prevalence of various employer efforts generally aimed at stifling whistleblowers. Part II will also analyze the current state of contract law as it pertains to the enforceability of anti-

[9] 17 C.F.R. § 240.21F-17 (2011).

[10] Press Release, U.S. SEC. & EXCH. COMM'N, Agency Announces First Whistleblower Protection Case Involving Restrictive Language (April 1, 2015), *available at* https://www.sec.gov/news/pressrelease/2015-54.html (hereinafter *KBR Press Release*].

[11] KBR Press Release, *supra* note 10.

[12] Scott Higham, *SEC: KBR Put 'Muzzle' on Workers*, WASH. POST, Apr. 1, 2015 (noting that legal experts and whistleblowing attorneys viewed the KBR action as a "powerful signal to corporations" that penalties are inevitable for silencing whistleblowers through confidentiality agreements).

[13] *See infra* Part IIB.

whistleblowing confidentiality agreements while reviewing the historical trends of employers in relying on such contractual provisions. Part III will propose amendments to Rule 21F-17 that seek to balance the competing interests of employers to protect their internal documents with the need for the whistleblower's revelation of wrongdoing. This section proposes draft amendment language and presents a three-factor test that analyzes the key questions of i.) whether the employee has provided internal documents that are directly relevant to his/her claims and to which he/she had reasonable access; ii.) whether the documents are subject to the attorney-client privilege; and iii) whether the whistleblower reasonably believed that the documents provided support his/her claims. It is the author's hope that amendments to Rule 21F-17 to incorporate this framework not only would strengthen the Dodd-Frank whistleblower program but also provide much-needed guidance to would-be whistleblowers as to the lawfulness of documentary transmissions.[14]

II. DODD-FRANK'S WHISTLEBLOWER PROGRAM AND SEC ENFORCEMENT

A. Rule 21F-17

The SEC was tasked with implementing the various whistleblower protections of Dodd-Frank though Rule 21F, which it promulgated in June of 2011.[15] The final regulation seeks to achieve many objectives, including encouraging whistleblowers to utilize their employer's internal compliance reporting channels before externally reporting and clarifying the scope of the statute's retaliation protections.[16] Until recently, one of the lesser-known subsets of Rule 21F was Rule 21F-17, which reads in full as follows:

> (a) No person may take any action to impede an individual from communicating directly with the [SEC] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information [obtained by attorneys in connection with the legal representation of a client] with respect to such communications.
>
> (b) If you are a director, officer, member, agent, or employee of an entity that has counsel, and you have initiated communication with the [SEC] relating to a possible securities law violation, the staff is authorized to communicate directly with you regarding the possible securities law violation without seeking the consent of the entity's counsel.[17]

[14] Outside the context of whistleblower documentary transmissions, others have petitioned the SEC to adopt clarifying amendments to Rule 21F-17 to expand the rule's articulation of unlawful employer impediments to whistleblowing, including employer actions like requiring individuals to waive, release, or assign monetary whistleblowing awards, to disclose future whistleblowing intentions, or to condition one's employment benefits on a promise that they have not communicated with the SEC. *See* Jordan A. Thomas, *Petition for Rulemaking and the Issuance of a Policy Statement Regarding Certain Aspects of the Dodd-Frank Whistleblower Program*, U.S. SEC. & EXCH. COMM'N 17-19 (July 18, 2014), http://www.sec.gov/rules/petitions/2014/petn4-677.pdf.

[15] Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300 (June 13, 2011) (codified at 17 C.F.R. pts. 240–249)) [hereinafter *Final Rules*].

[16] *See id.* at 34,300-01.

[17] 17 C.F.R. § 240.21F-17 (2011).

The SEC's original objective in promulgating this rule is illustrated mainly by subpart (b), which permits the agency to communicate directly with represented whistleblowers without having to first seek the consent of their counsel, which would normally be required pursuant to Model Rule of Professional Responsibility 4.2.[18] The SEC was particularly concerned here about organizational clients represented by attorneys and the difficulty of applying Model Rule 4.2 to the various constituents of such entities, including directors, officers, members, or employees, all of whom may be dissuaded from sharing information freely with the SEC without prior entity approval.[19] The SEC felt that this rule would best achieve the congressional policy of confidentially facilitating whistleblower disclosures by avoiding the possibility that whistleblowers would be "less inclined" to report on possible securities laws violation if they knew that the SEC had to first obtain the consent of their counsel, which could compromise anonymity.[20]

Thus, Rule 21F-17's initial focus was on the proper implementation of Dodd Frank's whistleblower program in a manner that could coexist with state bar ethical rules governing lawyers' professional responsibilities, rather than as a mechanism to bar the use of employee confidentiality agreements, as expressed by subpart (a) of the rule.[21] The SEC adopted Rule 21F-17 as proposed, justifying its position as consistent with state bar ethics rules and, for four years, the rule remained dormant. In the years since Rule 21F-17's promulgation and despite the actual prevalence of confidentiality agreements silencing whistleblowers, the SEC had never taken any enforcement action pursuant to the rule.[22] Despite this inaction, the former Chief of the SEC's Office of the Whistleblower, Sean McKessy, had publicly warned that the agency was on the lookout for examples of contracts including provisions to silence whistleblowers and would impose action against both the employers who mandated them and also the lawyers who drafted them.[23] Finally, on April 1, 2015, the SEC announced its very first enforcement action under Rule 21F-17 against KBR—an action that many viewed as a "game changer."[24]

KBR, an engineering and construction corporation operating in nearly 70 countries, conducts internal investigations after receiving allegations and complaints from employees relating to possible illegal or unethical conduct by the company or its agents—such internal investigations had typically required KBR to interview employees, including those who initially

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[18] *See* Final Rules, *supra* note 15, at 34,351; *see also* MODEL RULES OF PROF'L CONDUCT r. 4.2 (this rule, adopted in some manner by all states, bars a lawyer from communicating with an individual whom the lawyer knows to be represented by counsel, unless consent has been obtained by the other lawyer or as permitted by law or court order.)

[19] *See* Final Rules, *supra* note 15, at 34,351.

[20] *Id*. Dodd-Frank provides for anonymous whistleblower reporting and requires the SEC to keep confidential any information that "could reasonably be expected to reveal the identity of a whistleblower." *See* 15 U.S.C. § 78u-6(h)(2)(2010).

[21] Interestingly, only one commenter expressed support for Rule 21F-17 based on the sole reason that it would protect whistleblowers from signing confidentiality agreements. *See* Final Rules, *supra* note 15, at 34,351.

[22] Richard Moberly, Jordan A. Thomas & Jason Zuckerman, *De Facto Gag Clauses: The Legality of Employment Agreements that Undermine Dodd-Frank's Whistleblower Provisions*, 30 ABA J. OF LABOR & EMP'T. L. 87, 91 (2014) (suggesting that, without any SEC enforcement action under Rule 21F-17 (to date at the time), courts are unlikely to rely on existing contract law to properly balance the competing interests of confidentiality agreements).

[23] *Id.* (citing Brian Mahoney, *SEC Warns In-House Attys Against Whistleblower Contracts*, LAW 360 (Mar. 14, 2014), *available at* http://www.law360.com/articles/518815/sec-warns-in-house-attys-against-whistleblower-contracts).

[24] *See* Higham, *supra* note 12; *see also* Kathryn Hastings, *Keeping Whistleblowers Quiet: Addressing Employer Agreements to Discourage Whistleblowing*, 90 TUL. L. REV. 495, 503 (2015) (citing various sources that praised the KBR action as a whistleblower victory).

reported the misconduct.[25] When conducting these internal investigations and subsequent to the promulgation of Rule 21F-17, KBR had required all interviewed employees to sign a form confidentiality statement that read as follows:

> I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.[26]

KBR's use of such language came to light through a False Claims Act lawsuit filed against the company by an employee, whose lawyer learned that KBR regularly used the confidentiality agreements to stop employees from discussing any details of their internal investigatory interviews.[27] The employee's lawyer then filed a complaint with the SEC and the United States Department of Justice to examine the legality of such agreements, thereby prompting a subsequent SEC investigation.[28] KBR denied that the confidentiality agreements were being used to hide fraud, expressing that they were used to protect privileged communications between the company's attorneys and employees.[29]

Interestingly, although requiring employees to sign such agreements had been routine practice within KBR, there were no known instances in which a KBR employee was actually prevented from communicating information about possible securities law violations directly to the SEC or in which KBR attempted to enforce the agreement's restriction.[30] Regardless, the SEC successfully relied on its authority under Rule 21F-17 to bring an enforcement action against the company for violating the rule due to the "chilling effect" of such a policy on whistleblowers—the action was settled through a cease and desist order in which KBR neither admitted nor denied the charges, and agreed both to pay a $130,000 penalty and amend its confidentiality statement to include explicit language clarifying that prior internal authorizations are not required prior to making any whistleblowing disclosures and that such reports are protected by federal law.[31] As part of the settlement, KBR also agreed to use "reasonable

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[25] In the Matter of KBR, Inc., Exchange Act Release No. 74619, 2015 WL 1456619 (Apr. 1, 2015) [hereainafter *KBR Proceeding*]; KBR Inc. Company Description, BLOOMBERG, *available at* http://www.bloomberg.com/research/stocks/snapshot/snapshot_article.asp?ticker=KBR (last visited May 16, 2017).

[26] *Id.* at *2. This form statement was included as an enclosure to the KBR Code of Business Conduct Investigation Procedures Manual and KBR investigators regularly required interviewees to sign the agreement.

[27] United States ex rel. Barko v. Halliburton Co., 37 F. Supp. 3d 1, 6 (D.D.C. 2014), *vacated;* In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014); *see also* Stewart M. Landefeld, Luis R. Mejia, Eric A. DeJong & Ann Marie Painter, *Whistleblowers, NDAs and the SEC's KBR Enforcement Action*, 29 INSIGHTS, THE CORP. & SEC. L. ADVISOR 2, 19 (discussing origins of the KBR enforcement action). Under the False Claims Act, private persons may bring complaints against those who commit fraud against the U.S. government, thereby acting as whistleblowers, and may receive bounty rewards if successful. *See* 31 U.S.C. § 3730.

[28] Hastings, *supra* note 24, at 501-02 (discussing how the KBR confidentiality agreements came to regulatory scrutiny). In these underlying False Claims Act cases preceding the SEC investigation, the district court ordered that KBR's confidentiality statements and other internal documents were discoverable, despite KBR's arguments that they were subject to the attorney-client privilege. The federal appellate court later vacated the district court's decision to compel discovery of the documents. *See Barko*, 37 F. Supp. 3d at 764; *Kellogg*, 756 F.3d at 762-63.

[29] Hastings, *supra* note 24, at 502.

[30] KBR Proceeding, *supra* note 25, at *2.

[31] *Id.;* KBR Press Release, *supra* note 10.

efforts" to contact all employees who had signed the statement between Rule 21F-17's promulgation in 2011 and the present time to inform them that no prior consent is needed before communicating with any governmental agency or entity.[32]

Reactions to the KBR enforcement action by the corporate community were varied but mostly met with concern. Some noted that the KBR enforcement action demonstrates a trend that is on par with the actions of other governmental agencies, mainly the Equal Employment Opportunity Commission, the National Labor Relations Board, and the Department of Labor, each of which have recently scrutinized similar provisions in confidentiality or severance agreements as they relate to restricting reports of discrimination, wages, hours, or other employment conditions.[33] Several prominent law firms issued client alert warnings of the now-known risk of SEC enforcement action for mandating similar employee agreements and advising clients to review their own agreements for compliance.[34] Whistleblower advocates and practitioners, instead, noted that KBR's practice of mandating silence was "no isolated aberration" and instead reflects a "growing trend of companies trying to silence whistleblowers."[35]

SEC enforcement actions of this kind have shown no signs of halt. Since the KBR action, the agency has settled charges with several other companies pursuant to Rule 21F-17. Nearly all of these cases have involved severance agreements requiring departing employees to waive any potential whistleblower bounties or other incentives available under Dodd-Frank for reporting misconduct—in some cases, forfeiting severance and other post-employment benefits if violated.[36] In one instance, a company had used a form separation agreement that barred all former employees from ever voluntarily cooperating with the government in any investigation concerning the company, transmitting any confidential information without company consent, and requiring the former employee to "preserve [the] name and reputation" by refraining from

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[32] KBR Proceeding, *supra* note 25, at *3.

[33] Rikard D. Lundberg & Lisa Hogan, *Keeping Current: SEC Announces First Enforcement Action Involving Restrictive Language in Confidentiality Agreement under Dodd-Frank Whistleblower Program*, 2015 BUS. L. TODAY 1, 1 (May 2015) (discussing similar EEOC and NLRB actions); Jason Zukerman, *Recent Developments in Whistleblower Law from a Whistleblower Lawyer's Perspective*, SX001 AM. L. INST. CLE MATERIALS 851 (Jul. 2015) (discussing the focus of EEOC, NLRB, and OSHA in this arena).

[34] *See e.g.*, Cravath, Swaine & Moore LLP, *Implications of the SEC's First-Ever Whistleblower Protection Enforcement Action*, FCPA REPORT, Apr. 15, 2015, *available at* https://www.cravath.com/files/uploads/Documents/Publications/3531846_1.pdf; Skadden, Arps, Slate, Meagher & Flom LLP, *SEC Enforces Whistleblower Protection Rule Against Restrictive Confidentiality Agreement*, Apr. 3, 2015, *available at* https://www.skadden.com/insights/sec-enforces-whistleblower-protection-rule-against-restrictive-confidentiality-agreement; Ropes & Gray, *SEC Imposes Fine on KBR for Violating Dodd-Frank Whistleblower Protection Rule*, Apr. 2, 2015, *available at* https://www.ropesgray.com/newsroom/alerts/2015/April/SEC-Imposes-Fine-on-KBR-for-Violating-Dodd-Frank-Whistleblower-Protection-Rule.aspx (each warning clients of the repercussions of the KBR action in light of their own internal investigatory practices).

[35] Jordan Thomas & Tom Devine, *Wall Street's New Enforcers Aim to Muzzle Whistleblowers*, N.Y. TIMES, Jul. 21, 2014, *available at* http://dealbook.nytimes.com/2014/07/21/wall-streets-new-enforcers-aim-to-muzzle-whistle-blowers/?_r=0.

[36] *See, e.g.*, In the Matter of BlackRock, Inc., Exchange Act Release No. 79804, 2017 WL 447219 (Jan. 17, 2017); In the Matter of SandRidge Energy, Inc., Exchange Act Release No. 79607, 2016 WL 8378243 (Dec. 20, 2016); Press Release, U.S. SEC. & EXCH. COMM'N, Company Paying Penalty for Violating Key Whistleblower Protection Rule (Aug. 10, 2016), *available at* https://www.sec.gov/news/pressrelease/2016-157.html; Press Release, U.S. SEC. & EXCH. COMM'N, Company Punished for Severance Agreements That Removed Financial Incentives for Whistleblowing (Aug. 16, 2016), *available at* https://www.sec.gov/news/pressrelease/2016-164.html.

making any disparaging or defamatory remarks about the company.[37] The companies sanctioned under Rule 21F-17 each incurred hefty fines and agreed to remove all impediments restricting current and departing employees from freely reporting securities law violations without prior company approval and without forfeiting whistleblower awards.[38] Employer efforts to seek forfeiture of whistleblower bounties exemplify just one of the many examples of potential violations of Rule 21F-17. Beyond mandating employees to sign explicit confidentiality agreements, corporate players have used a myriad of subtle methods to discourage disclosures, including contractual promises by would-be whistleblowers to forfeit potential bounty awards.

B. General Enforceability of Confidentiality Agreements

Employee efforts to silence whistleblowers run the gamut from the failure to educate employees about the whistleblower protections of Dodd Frank or other federal or state whistleblower programs to requiring employees to sign agreements promising to waive any future bounty reward.[39] Whistleblower scholars and practitioners have described these types of measures as "de facto gag clauses"—actions that effectively counteract the SEC's regulatory efforts to encourage whistleblowers to speak out.[40] In 2015, a survey revealed that discouraging employees from contacting the government about financial wrongdoing "has long been part of Wall Street culture," as one in four Wall Street employees have signed confidentiality agreements restricting them from reporting instances of securities violations to the SEC.[41] The use of such agreements, although unenforceable, remains a long-standing problem, and has thwarted the efforts of whistleblowers to report to federal agencies on a wide range of issues across various sectors.[42]

Confidentiality clauses generally are widely used in various types of employment contracts and are relatively much easier to enforce than non-compete clauses that restrict an employee's mobility.[43] Although there are certainly legitimate reasons for requiring employees

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[37] In the Matter of SandRidge Energy, Inc., Exchange Act Release No. 79607, 2016 WL 8378243 (Dec. 20, 2016).

[38] *See supra* note 36; *see also* Amelia Toy Rudolph, *If A Whistle Blows in-House, Does It Still Make A Sound? Issues Regarding Internal Whistleblowers Under Dodd-Frank (Part 2),* PRAC. LAW., Oct. 2016, at 22, 32 (discussing SEC orders against anti-whistleblowing provisions in severance agreements).

[39] *Id. See also* Norman D. Bishara; Elletta Sangrey Callahan & Terry Morehead Dworkin, *The Mouth of Truth*, 10 N.Y.U. J.L. & BUS. 37, 83 (2013) (discussing the "manifest conflict" between whistleblower protection laws encouraging disclosures of misconduct and contractual protections for employers against damaging disclosures).

[40] Moberly, Thomas & Zuckerman, *supra* note 22, at 88-89.

[41] PR Newswire, *Joseph Piacentile Investigates the Prevalence of Restrictive Language in Confidentiality Agreements*, BUS. J. (June 18, 2015), *available at* http://www.bizjournals.com/prnewswire/
'press_releases/2015/06/18/MN37084 (discussing the survey conducted by the University of Notre Dame and law firm, Labaton Sucharow).

[42] *See, e.g., id*.; Thomas & Devine, *supra* note 35; Moberly, Thomas & Zuckerman, *supra* note 22; Max Johnson, *Whistleblowers Silenced by Non-Disclosure Agreements*, PROJECT ON GOV'T OVERSIGHT, Aug. 8, 2014, *available at* http://www.pogo.org/blog/2014/08/20140808-whistleblowers-silenced-by-nondisclosure-agreements.html. *See also* Jodi L. Short, *Killing the Messenger: The Use of Nondisclosure Agreements to Silence Whistleblowers*, 60 U. PITT. L. REV. 1207 (1999) ("it is not uncommon for employers to draft extremely broad nondisclosure agreements to ensure the most expansive coverage of information").

[43] The scope of this Article pertains only to confidentiality, rather than non-compete, agreements. For a robust discussion of the legality of non-compete agreements, *see* Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 20-21 (2015) (noting the differences between non-disclosure agreements and non-compete clauses that restrict an employee's mobility and the relative ease of enforcement of the former); On Amir & Orly Lobel,

to sign confidentiality agreements such as the protection of trade secrets, customer lists, suppliers, or strategic plans,[44] their use to silence whistleblowers is a problem on the rise. Although the KBR enforcement action has rendered confidentiality agreements unlawful from the SEC's perspective under Rule 21F-17, such agreements would nonetheless be held unenforceable in court based on reasons of public policy. There is ample case law supporting the doctrine of contract unenforceability in circumstances where public policy considerations outweigh the interests of enforcing the contract.[45] The public policy exception to contract enforceability has been widely applied to anti-whistleblowing confidentiality agreements[46] based on the premise that whistleblowers, even though contractually restricted, should not be prevented from exercising their statutorily or constitutionally promised rights to reveal wrongdoing.[47] Dworkin and Callahan have discussed instances of judicial application of the public policy exception to allow whistleblower disclosures in various instances, even including when trade secrets, principal-agent, attorney-client, and physician-patient relationships were at play—each time revealing that duties of confidentiality are never absolute[48] and always allow disclosures that reveal instances of crime, fraud, or other bad behavior.[49]

A court will weigh a public policy against enforcement of a contact term by considering several factors, including the strength of the policy at stake "as manifested by legislation or judicial decisions" and the likelihood that a refusal to enforce the restrictive contact term will further that public policy.[50] Thus, in the context of SEC whistleblowing, a crucial part of this

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Driving Performance: A Growth Theory of Noncompete Law, 16 STAN. TECH. L. REV. 833, 841 (2013) (discussing legal enforcement of non-compete agreements); and Terence Lau, *Executive Noncompetes: Keeping Talent in House or At Bay?* 25 ACAD. OF MGMT. PERSPECTIVES 87-88 (2011) (noting that non-competes are "highly variable" but usually include time and geographic restrictions).

[44] *See* Bishara, Martin & Thomas, *supra* note 43, at 21-24 ("it is understandable that a firm would want to protect its competitive advantage by limiting the use of its valuable business information by a former employee who moves to a competitor."); Lothar Determann & Robert Sprague, *Intrusive Monitoring: Employee Privacy Expectations Are Reasonable in Europe, Destroyed in the United States*, 26 BERKELEY TECH. L.J. 979, 983 (2011) (discussing an employer's interest in avoiding the inadvertent or intentional disclosure by employees of confidential and proprietary information).

[45] Town of Newton v. Rumery, 480 U.S. 386, 386 (1987); Boston Med. Ctr. v. Serv. Employees Int'l Union, Local 285, 260 F.3d 16, 23 (1st Cir. 2001) (citing United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 43 (1987) (holding that, for contract unenforceability to apply, the public policy must be "well-defined and dominant" as opposed to stemming from "general considerations of supposed public interests")).

[46] *See, e.g.*, Carol Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?* 25 WM. MITCHELL L. REV. 627 (1999); Short, supra note 41; Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 AM. BUS. L. J. 151 (1998); Brian Stryker Weinstein, *In Defense of Jeffrey Wigand: A First Amendment Challenge to the Enforcement of Employee Confidentiality Agreements Against Whistleblowers*, 29 S.C. L. REV. 129 (1997) (each discussing the public policy considerations associated with whistleblowing).

[47] *See* Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 517, 539 (2004) ("[d]ismissals against public policy represent the lowest moral ebb of employer conduct," involving cases in which employees are terminated for reasons "so unfair or unreasonable" that the law specifically prohibits them).

[48] Dworkin & Callahan, *supra* note 46, at 158-68 (discussing case law in such instances); *see* MODEL RULES OF PROF'L CONDUCT r. 1.6 (discussing the crime-fraud exception to an attorney's duty of confidentiality); *see also* Jennifer M. Pacella, *Conflicted Counselors: Retaliation Protections for Attorney-Whistleblowers in an Inconsistent Regulatory Regime*, 33 YALE J. ON REG. 491, 519-25 (2016) for a discussion of the various state bar exceptions to an attorney's duty of confidentiality.

[49] RESTATEMENT (THIRD) OF AGENCY § 8.05 (2006) Cmt. "An agent's duty of confidentiality is not absolute. An agent may reveal otherwise privileged information to protect a superior interest of the agent or a third party." The comments thereto provide the example of an agent revealing to law-enforcement authorities a principal's intent to commit a crime and include whistleblowing as a permitted disclosure.

[50] RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

analysis examines the public policy behind Dodd-Frank's whistleblowing program. To evaluate a statute's public policy objective, courts not only examine the general purpose of the statute but also the statutory scheme aimed at furthering that purpose – thus, it must be considered "how" Congress sought to achieve a regulatory objective through the statute's framework.[51] Dodd-Frank's general purpose is to ensure investor protection and hold financial institutions accountable—one way this is achieved is through the implementation of the bounty reward system for bringing information about fraud and possible violations of the federal securities laws to the SEC's attention.[52] Several statutory provisions evidence a strong public policy to encourage and protect whistleblowing, including superior retaliation protections that offer aggrieved whistleblowers a direct right of action in federal court, double back pay, and a lengthy statute of limitations of six years.[53] In addition, Dodd-Frank's generous bounty program rewards whistleblowers up to thirty percent of the collected actions—resulting in a total awards payout of nearly $150 million since the inception of the program.[54] Bounties such as these have been deemed instrumental in convincing a whistleblower, who may otherwise keep quiet due to fear of reprisal, to come forward.[55]

Further insight into Dodd-Frank's statutory scheme is visible through an examination of the statute's legislative history, which discusses the importance of "motivat[ing] those with inside knowledge to come forward to assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud."[56] It also cites statistics revealing that other methods of fraud detection, mainly, external auditing, have a mere 4.1% success rate of uncovering fraudulent schemes, compared to whistleblower tips that are 13 times more effective.[57] The legislative history especially highlights the bounty program as the most conducive to facilitating disclosures about fraud, with the "critical component" being the "minimum payout that any individual could look towards in determining whether to take the enormous risk of blowing the whistle in calling attention to fraud."[58] Given these whistleblower-centric provisions, Dodd-Frank's whistleblower provisions further important public policy interests that help promote the "long-term sustainability of the U.S. financial system."[59]

The strong likelihood that the public policy interests of Dodd-Frank would lead a court to find anti-whistleblowing confidentiality agreements unlawful is further supported by drawing parallels to existing case law under a related whistleblowing statute, the False Claims Act

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[51] Moberly, Thomas & Zuckerman, *supra* note 22, at 95 (citing EEOC v. Astra USA, Inc., 94 F. 3d 738, 744-45 (1st Cir. 1996)).

[52] *Id.* (discussing the public policy objectives of Dodd-Frank). *See also* 15 U.S.C. § 78u-6 (2010) (setting forth provisions by which the SEC will reward valuable whistleblower information), 17 C.F.R. § 240.21F-2 (2011) (explaining the value of whistleblower tips to SEC fraud detection).

[53] *Compare* 15 U.S.C. § 78u-6 (2010) with 18 U.S.C. § 1514A (2010) (SOX offers only an administrative remedy).

[54] 15 U.S.C. § 78u-6(b) (2010).

[55] *See* Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 B.Y.U. L. Rev. 73, 118-19 (2012) (discussing empirical research supporting that financial incentives significantly motivate whistleblowers to report fraud).

[56] S. REP. 111-176, at 110-11 (2010).

[57] *Id*.

[58] *Id*. at 111.

[59] Mary Jo White, Former Chair, U.S. SEC. & EXCH. COMM'N, Statement on the Anniversary of the Dodd-Frank Act (Jul. 16, 2015), *available at* https://www.sec.gov/news/statement/statement-on-the-anniversary-of-the-dodd-frank-act.html

("FCA").[60] The FCA, a long-standing whistleblowing statute, allows private citizens, or "relators," to file a civil *qui tam* action in the name of the U.S. Government in federal district court against those who have defrauded the government, at which point the government has sixty days to intervene in the lawsuit.[61] If the government declines intervention, the relator may proceed alone with the lawsuit and, regardless of government intervention, whistleblowers may receive bounty rewards for bringing forth the wrongdoing.[62] FCA cases in this context have evaluated the enforceability of restrictive contractual provisions in light of public policy considerations, specifically involving cases in which potential FCA whistleblowers have signed releases of claims against employers and have subsequently filed FCA complaints against them.[63] Courts interpreting the FCA have typically refused to enforce the limiting contractual provisions in instances where the government was not already aware of the alleged wrongdoing when the whistleblower filed his/her FCA claim given the strong public interest of allowing the government to more easily detect fraud.[64]

Although no case has yet elaborated on the public policy objectives of Dodd-Frank as they pertain to confidentiality agreements to silence whistleblowers,[65] a balancing test considering the public policy exception to contract enforceability is likely to weigh in favor of allowing employee revelations of wrongdoing despite employer-imposed contractual restrictions. What is less clear, however, and what neither the KBR enforcement action nor Rule 21F-17 convey, is whether an employer, although cognizant of the unlawfulness of contractual provisions that would prevent whistleblowers from reporting to the SEC, may lawfully bar a whistleblower from turning over internal confidential documents to the SEC in support of his/her claims. This particular issue is neither addressed in the rule nor in Dodd-Frank's statutory language. The SEC's vague response to the general concerns of the business community after the KBR enforcement action also provides no guidance that would answer this question.

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[60] *See, e.g.*, United States ex rel. Grandeau v. Cancer Treatment Ctrs. of Am., 350 F.Supp.2d 765, 773 (N.D. Ill. 2004) (holding that employee was not liable for breach of contract because of "the strong public policy supporting whistleblower" reporting); United States ex rel. Ruhe v. Masimo Corp., 929 F. Supp. 2d 1033, 1039 (C.D.Cal.2012) (finding that whistleblowers under the False Claims Act are not liable for violating non-disclosure agreements); Smith v. Mitre Corp., 949 F.Supp. 943, 951 (D.Mass.1997) ("blowing the whistle within the company on fraud and false claims by a government contractor is 'sufficiently important to command the invocation of the [public policy] exception'"); X Corp. v. Doe, 805 F.Supp. 1298, 1310 n.24 (E.D.Va.1992) (protecting whistleblowers on public policy grounds).

[61] 31 U.S.C. § 3730.

[62] *Id.* The FCA grants relators between 15-25% of the proceeds of the action or settlement if the U.S. government intervenes and between 25-30% of the same if the government does not intervene. *Id.* § 3730(d). *See also* David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1456 (2014) (discussing liability under the FCA and the availability of bounties thereunder).

[63] *See* Moberly, Thomas & Zuckerman, *supra* note 22, at 105-106 (citing United States ex. Rel. Hall v. Teledyne Wah Chang Albany, 104 F.3d 230, 233 (9th Cir. 1997)); *see also* Stephen M. Payne, *Let's Be Reasonable: Controlling Self-Help Discovery in False Claims Act Suits*, 81 U. CHI. L. REV. 1297, 1310-17 (2014) (discussing various FCA "self-help" cases).

[64] *See, e.g.,* United States ex rel. Ceas v. Chrysler Grp. LLC, No. 12-CV-2870, 2016 WL 3221125, at *2 (N.D. Ill. June 10, 2016) (holding that public policy trumps the enforceability of confidentiality agreements between relator and employer); United States ex rel. Green v. Northrup Corp., 59 F.3d 953, 965-68 (9th Cir. 1995) (holding that the enforcement of a release of a *qui tam* claim would severely undermine the public policy issues at stake).

[65] One case included the Dodd-Frank whistleblower program as one of the federal laws that would strongly support public policy in favor of whistleblowing over the enforceability of a confidentiality agreement and cited Rule 21F-17 as a relevant example of regulatory law precluding employers from interfering with whistleblowing. Despite this helpful reference, no specific analysis was offered as it pertains to the specific objectives of the Dodd-Frank whistleblower program. *See* Erhart v. BofI Holding, Inc., 2017 WL 588390 at *9 (S.D. Cal. 2017).

Historically, whistleblowers who have attempted to support their claims with confidential documents in other contexts have been met with resistance. In such instances, employers most commonly either seek injunctive relief to mandate compliance with the whistleblower's confidentiality agreement or assert a counterclaim against a whistleblower's retaliation claim alleging breach of contract or breach of fiduciary duty.[66] In some cases, employers have requested protective orders for the return of confidential or privileged documents.[67]

Given the lack of case law interpreting Rule 21F-17, the current state of the law leaves whistleblowers with only half of the necessary protections that they would need in determining whether to come forward to the government and to what extent. Although whistleblowers may be increasingly aware that they are not bound to confidentiality agreements that prevent them from reporting wrongdoing, they are currently uninformed as to the extent to which they may substantiate their claims and provide documentary evidence demonstrating their employer's unlawful actions. Further, as will be discussed, the potential for a significant "carrot" in the form of a bounty reward may be ample motivation on its own to prompt a whistleblower to transmit internal company documents in the hopes of building a case that is as detailed and comprehensive as possible. The framework proposed in the next section incorporates three factors for inclusion in amendments to Rule 21F-17 to provide guidance as to the appropriateness of whistleblower transmissions of internal company documents.

III. WHISTLEBLOWER TRANSMISSION OF INTERNAL DOCUMENTS

A. Building a Whistleblower Case & FOIA Results

Amid the thousands of pages and over 400 rules and mandates that constitute Dodd-Frank,[68] the whistleblower program is one of the statute's most notable components. As discussed, the statute offers whistleblowers a private right of action in federal court for claims of "discharge or other discrimination" that occur when the whistleblower has provided information to the SEC; has initiated, testified, or assisted in an SEC judicial or administrative action; or has made a required or protected disclosure under specified federal laws or SEC regulations.[69] By offering direct access to federal court, Dodd-Frank's retaliation protections are often touted as noticeably stronger than those available under other statutes.[70]

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[66] Dworkin & Callahan, *supra* note 46, at 156-58; Zahodnick v. Int'l Bus. Machines Corp., 135 F.3d 911, 913 (4th Cir. 1997); United States ex rel. Grandeau v. Cancer Treatment Ctrs. of Am., 350 F.Supp.2d 765, 768-69 (N.D. Ill. 2004); X Corp. v. Doe, 805 F.Supp. 1298, 1301-02 (E.D.Va.1992). *See also* Payne, *supra* note 63, at 1304 (noting that injunctive relief is common in FCA suits, which usually includes requests for orders to prevent additional disclosure).

[67] Payne, *supra* note 63, at 1305-06.

[68] *See* Pub. L. No. 111-203, 124 Stat 1376.

[69] 15 U.S.C. § 78u-6(h) (2010). There is currently a circuit split as to whether internal whistleblowers who report up-the-ladder within their organizations, as opposed to directly to the SEC, are protected from retaliation under Dodd-Frank. *Compare* Asadi v. G.E. Energy, 720 F.3d 620 (5th Cir. 2013) (denying internal whistleblowers such protections) *with* Berman v. Neo@Ogilvy LLC, 801 F.3d 145 (2d Cir. 2015) and Somers v. Digital Realty Trust Inc., 850 F.3d 1045 (9th Cir. 2017) (granting these protections)).

[70] Dodd-Frank is noticeably more extensive with respect to retaliation protections than SOX, as the latter grants only an administrative remedy to whistleblowers to pursue retaliation cases by filing a complaint with the Occupational Health and Safety Administration (OSHA) within a relatively short statute of limitations of 180 days. *Compare* 15 U.S.C. § 78u-6(h) (2010) *with* 18 U.S.C. § 1514A(b) (2010). Many scholars have commented on these differences. *See, e.g.*, Beverley H. Earle & Gerald A. Madek, *The Mirage of Whistleblower Protection Under Sarbanes-Oxley: A*

Dodd-Frank's bounty program, however, is particularly illustrative of the extent to which Congress sought to incentivize whistleblowers to come forward. Described as one of the "signal moments in whistleblower law,"[71] Dodd-Frank's bounty provisions require the SEC to pay cash awards to whistleblowers who voluntarily provide the agency with "original information" resulting in a successful judicial, administrative, or related action of $1,000,000 or more.[72] The SEC regulations interpreting the statute explain three requirements for obtaining a bounty. First, the whistleblower's submission must be voluntary, which is defined as "before a request, inquiry, or demand" regarding the subject matter of the submission is made to the whistleblower or his/her lawyer.[73] Second, the submission must contain "original information," which the regulations define as that derived from the "independent knowledge or analysis of a whistleblower," not known to the [SEC] from any other source . . . and "not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information."[74] Third, the whistleblower's information must lead to a successful enforcement action, which the SEC explains would exist in three circumstances. Such instances include when i.) a successful judicial or administrative action results "in whole or in part" from whistleblower information "that was sufficiently specific, credible, and timely to cause the staff to commence an examination, open an investigation, reopen an investigation that [it] had closed, or to inquire concerning different conduct as part of a current examination or investigation;" ii.) the whistleblower has provided information concerning conduct that, although already under SEC or governmental investigation, significantly contributed to the success of the resulting action; or iii.). the whistleblower has reported original information through his/her employer's internal reporting channels before or simultaneously with his/her SEC submission and a successful enforcement action results therefrom or from the employer's subsequent self-report to the SEC.[75]

If the whistleblower satisfies the above criteria, potential payoffs are significant. The SEC pays whistleblowers between 10% and 30% of the total monetary sanctions collected in the action, which the SEC has discretion to consider based on an evaluation of several factors, including the significance of the information provided to the success of the action, the degree of

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Proposal for Change, 44 AM. BUS. L.J. 1, 51-54 (2007) (recommending changes to improve SOX's whistleblower program); Richard Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley's Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 91-99 (2007) (analyzing the low whistleblower success rate of SOX); Dworkin, *supra* note 1, at 1764-66 (discussing the inadequacies of SOX's whistleblower program).

[70] 18 U.S.C. § 1514A(b) (2010).

[71] Geoffrey Christopher Rapp, *Four Signal Moments in Whistleblower Law: 1983-2013*, 30 HOFSTRA LAB. & EMP. L.J. 389, 391 (2013) (describing the Dodd-Frank bounty program as a "major shift in direction toward empowering and incentivizing whistleblowers in the financial arena.").

[72] 15 U.S.C. § 78u-6(a)–(b). "Original information" is defined as that which is "derived from the independent knowledge or analysis of a whistleblower;" not otherwise known to the SEC; and "not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media." *Id.* § 78u-6(a)(3).

[73] 17 C.F.R. § 240.21F-4(a). A submission is also not considered voluntary if the whistleblower has some pre-existing legal duty or contractual duty to report the information.

[74] 15 U.S.C. § 78u-6(a)(3). "Independent knowledge" is defined as "factual information in [a whistleblower's] possession that is not derived from publicly available sources," which may be gained from the whistleblower's "experiences, communications and observations in [his/her] business or social interactions." 17 C.F.R. § 240.21F-4(b). "Independent analysis" means a whistleblower's "own analysis, whether done alone or in combination with others," that is "[one's] examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public." *Id.*

[75] 17 C.F.R. § 240.21F-4(b).

assistance offered, and the "programmatic interest" of the SEC in deterring securities laws violations in making such bounty awards.[76] To date, the SEC has paid out approximately $149 million under the Dodd-Frank bounty program to forty-one different whistleblowers, with the single largest payout amounting to $22 million.[77]

As may be gathered from this statutory and regulatory language, it behooves the whistleblower to submit information to the SEC that is as specific, comprehensive, and detailed as possible, thereby giving way to the likelihood that a whistleblower may be inclined to submit documentary evidence consisting of confidential company documents to bolster and substantiate his/her claim. Not only would such a submission be likely to result in a successful enforcement action qualifying the whistleblower for a bounty, it is also likely to tip the scale in favor of a larger discretionary bounty award as determined by the SEC. The SEC's current whistleblower submission process under Dodd-Frank facilitates the transfer of this type of documentary support. The author's FOIA request sheds light on the logistics of this submission process.

When a whistleblower submits information to the SEC, he/she does so through completion of "Form TCR (Tip, Complaint, or Referral)", which the SEC makes available on an online portal for submission either electronically or by downloading and mailing or faxing the completed form to the SEC Office of the Whistleblower's physical address.[78] Form TCR, both on paper and through the electronic portal, presents multiple opportunities for a whistleblower to transmit supporting confidential documentation. Whistleblowers may submit information to the SEC anonymously, but, if pursuing this option, they must be represented by counsel and provide their attorney's contact information.[79] Whistleblowers may also identify themselves to the agency, at which point the SEC is statutorily obligated to maintain the confidentiality of their submission.[80]

On the paper TCR Form, the whistleblower is asked at numerous junctures to describe or attach supporting documentation for the purpose of substantiating his/her claim. In Section D, entitled "Tell Us About Your Complaint," the whistleblower is asked in Question 9 thereof to "describe all supporting materials in [their] possession and the availability and location of any additional supporting materials not in [their] possession.[81] In Question 10, the whistleblower is asked to describe "how and from whom the complainant obtained the information that supports this claim."[82] Here, Form TCR asks the whistleblower to identify "with as much particularity as possible" any information that either was obtained from an attorney or through a communication with an attorney or through a public source.[83] In providing this information, whistleblowers are asked to supplement their claims by attaching additional sheets if needed. The TCR portal's online questionnaire is even more direct as to the solicitation of documentary support, as it requests the actual documentation associated with the whistleblower's information. The instructions that appear as soon as the online questionnaire is accessed state the following: "We

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[76] 15 U.S.C. § 78u-6(c).

[77] Press Release, U.S. SEC. & EXCH. COMM'N, SEC Announces $7 Million Whistleblower Award (Jan. 23, 2017), *available at* https://www.sec.gov/news/pressrelease/2017-27.html.

[78] *Submit a Tip*, SEC OFFICE OF THE WHISTLEBLOWER, *available at* https://www.sec.gov/about/offices/owb/owb-tips.shtml (last visited May 16, 2017). FOIA request results on file with author.

[79] *Id.; see also* 15 U.S.C. § 78u-6(d)(2) (2010).

[80] 15 U.S.C. § 78u-6(h)(2) (2010).

[81] U.S. SEC. & EXCH. COMM'N, Form TCR (Tip, Complaint, Referral), Part D, 9, *available at* https://www.sec.gov/about/forms/formtcr.pdf (last visited May 14, 2017).

[82] *Id.* at Part D, 10.

[83] *Id.*

encourage you to submit any documents relevant to your information by clicking on the 'Add Documents' button at the top and bottom of each page."[84] As such, there is an upload button on every page of the portal's questionnaire where a whistleblower can easily include and submit to the SEC supporting documentation.[85] The portal also asks a whistleblower to provide the source of their information, choosing from a list that includes account statements, broker dealer records, conversations, internal business documents, publicly available information, SEC filings, social media, or stock tip sheets or newsletters.[86]

The author filed two separate FOIA requests to obtain information about the utilization of the Dodd-Frank whistleblower program and the extent to which whistleblowers provide confidential internal company documents in support of their submissions through TCR. The FOIA request results reveal that, from the inception of the program in August 2011 to July 2016, 14,662 whistleblowers have submitted their information through the TCR online portal rather than by mail or fax.[87] Of this number, 1,887 whistleblowers made anonymous submissions.[88] The total number of whistleblower tips that the SEC has received from August 2011 to fiscal year-end 2016, whether electronically or on paper, was 18,334 in total.[89] This information reveals that most whistleblowers opted to file their tips electronically through TCR, a system that, as discussed, is much more conducive to transmitting supporting documentation.[90] In response to other parts of the author's FOIA request, it was revealed that the TCR portal is encrypted and that the SEC uses several security mechanisms to protect whistleblower identities and other transmitted information, specifically through use of "Secure Sockets Layer," a security mechanism that establishes an encrypted link between the whistleblower's browser and the TCR portal.[91] Despite two FOIA request attempts at gathering statistics as to the actual number of whistleblowers who attach supporting confidential documentation along with their submissions, the SEC was not able to provide an answer, responding that such information is not tracked.[92]

The several opportunities that both the paper and especially the online TCR portal offer to attach confidential documents demonstrate the strong possibility of such transfers occurring, thereby prompting the need for a legal mechanism by which the lawfulness of such transfers is clearly articulated. Further, given the incentive of a significant financial reward through the bounty program, whistleblowers are likely to build their case as strongly as possible with supporting documentation that illustrates the nature of the wrongdoing or misconduct. Thus, it is crucial that the SEC regulations interpreting the Dodd-Frank whistleblower program clarify the extent to which employers may limit individuals from transferring internal documents to the agency in the process of building a whistleblower case.

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[84] U.S. SEC. & EXCH. COMM'N, Tips, Complaints and Referrals Portal, *available at* https://denebleo.sec.gov/TCRExternal/disclaimer.xhtml (last visited May 15, 2017).

[85] *Id.*

[86] *Id.*

[87] FOIA request results on file with author.

[88] *Id.*

[89] *Id.; see also 2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, U.S. SEC. & EXCH. COMM'N 23 (2016) https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf [hereinafter *Annual Report*].

[90] *See Annual Report*, *supra* note 89; *see also Enforcement Manual*, U.S. SEC. & EXCH. COMM'N (June 4, 2015) at 8, *available at* https://www.sec.gov/divisions/enforce/enforcementmanual.pdf [hereinafter *Enforcement Manual*] ("The vast majority of complaints and tips received by the Division are in electronic form and the Division encourages the public to communicate with it through the online web form.")

[91] FOIA request results on file with author.

[92] *Id.*

B. Framework to Amend Rule 21F-17

The following framework proposes amendments to Rule 21F-17 to clarify the lawfulness of documentary whistleblower transmissions to the SEC. This framework centers around questions of reasonableness, relevancy, and the exclusion of information subject to the attorney-client privilege. The first factor considers whether the whistleblower has reasonably accessed the documents or has veered from regular job duties that would have naturally uncovered such documentation. This factor also considers whether the whistleblower has collected documents that are directly relevant to the underlying claim and demonstrative of the actual wrongdoing. The second factor would preclude the whistleblower from transmitting documentary support that is subject to the attorney-client privilege and thus would not be discoverable in a litigation context. Finally, the third factor considers the whistleblower's position both subjectively and objectively by asking whether he/she reasonably believed that the transmitted documents support the underlying claim. Each of these factors will be addressed in turn below.

1. Factor 1: Did the employee-whistleblower provide documents to which he/she had *reasonable access* that are *directly relevant* to his/her whistleblowing claims?

The first consideration as to the lawfulness of the whistleblower's transmission of internal company documents should evaluate whether the whistleblower had reasonable access to the documents or has greatly circumvented his/her regular job duties to obtain them and whether such documentation is directly relevant to the underlying claim. In some cases, whistleblowers may excessively dig around for any and all documentation that may somehow be linked, however tangentially, to their intended reports, thereby harming an employer's legitimate business interests. This type of "self-help discovery," which is conducted outside of a discovery context, consists of an employee unilaterally gathering evidence from his/her employer in anticipation of litigation.[93] A Sixth Circuit Title VII case, *Niswander v. Cincinnati Insurance Company*,[94] exemplifies the hazards of this type of "self-help." In this case, Kathleen Niswander, an employee of the Cincinnati Insurance Company ("CIC"), had opted into a class action lawsuit against her employer alleging that CIC had discriminated against women on the basis of equal pay (collectively known as the "Rochlin suit").[95] Niswander claimed she was retaliated against by her supervisor upon opting into the Rochlin suit, subsequent to which she experienced internal transfers and placement on a job performance problem resolution program.[96] Niswander claimed she was then directed by her lawyers to provide documents that "relate in any way" to the allegations made in the complaint.[97]

While admitting that she had no documents in her possession that directly supported the claims of the Rochlin suit, Niswander instead gathered up an "unspecified number" of

[93] Payne, *supra* note 63, at 1304; *see also* U.S. ex rel. Rector v. Bon Secours Richmond Health Corp., No. 3:11-CV-38, 2014 WL 66714, at *6 (E.D. Va. Jan. 6, 2014) (noting that self-help discovery usually consists of a party misappropriating privileged or confidential information from an employer to establish a prima facie case).
[94] Niswander v. Cincinnatti Ins. Co., 529 F.3d 714 (2008).
[95] *Id.*
[96] *Id.* at 717.
[97] *Id.* at 717-18.

documents from her home office that "she believed were relevant" to CIC's alleged retaliation.[98] Not only did Niswander collect emails from her supervisors related to her job performance, she also gathered and took photographs of claim-file documents and information about CIC's policyholders that were not demonstrative of retaliation but only "jog[ged] her memory" regarding instances of the alleged retaliation.[99] CIC, upon receiving these documents, believed that Niswander's conduct violated several internal privacy policies, each of which expressly prohibited the dissemination of confidential information, including personal information about policyholders.[100] CIC then terminated Niswander.[101]

Niswander filed a wrongful termination claim under Title VII alleging retaliation, to which CIC responded with a counterclaim for conversion of its property. In determining whether Niswander's transmission of documents was protected activity to establish a retaliation claim under Title VII,[102] the court weighed Niswander's actions heavily against her. The court reasoned that delivery of documentation by an employee who "mistakenly or inadvertently deliver[ed] confidential information out of a belief that the documents provided direct proof of discrimination" would be justified.[103] In contrast, Niswander had "intentional[ly] and unnecessar[ily] disseminat[ed] documents that were irrelevant" to her claim.[104] Acknowledging the "paucity of caselaw addressing the production of confidential information in the context of a retaliation claim," the court honed in whether Niswander's actions were reasonable under the circumstances by considering six factors, including how she obtained the documents, to whom the documents were produced, the documents' contents, the reason for their production, the scope of the employer's privacy policy, and the employee's ability to preserve the evidence without violating the employer's privacy policy.[105] Without delving into an analysis of these factors, the court found that Niswander had not "innocently stumbl[ed]" upon documentation demonstrative of retaliation but had "specifically searched" through company documents for the purpose of uncovering evidence, thereby barring a "truly innocent acquisition" of documents.[106]

Here, the Sixth Circuit agreed with the district court that Niswander could have availed herself of "readily available alternatives" to preserve evidence, such as taking notes of the alleged retaliatory incidents instead of taking photographs or collecting documents merely to jog her memory.[107] As this case reveals, the transmission of supplementary documentation not directly demonstrative of the alleged retaliation or claimed wrongdoing, as well as actions resembling self-help discovery, are likely to result in a finding that the employer's need to retain confidential documents outweighs the policy interests of the whistleblower's actions.

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[98] *Id.* at 718.
[99] *Id.* at 718, 726-27.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 720-21. Here, the court considered whether Niswander's actions should be considered under Title VII's opposition clause or participation clause, as the former protects employees who oppose unlawful employment practices while the latter protects employees who have made a charge, testified, assisted, or participated in an investigation under the statute. *See* 42 U.S.C. § 2000e-3(a). CIC contended that the analysis be considered under the opposition clause, which has historically provided less protection to claimants. *Id.* at 720 (citing Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312 (6th Cir.1989)). The court analyzed both options, ultimately finding that Niswander had participated in neither type of activity. *Id.* at 720-28.
[103] *Id.* at 722.
[104] *Id.*
[105] *Id.* at 722, 725-26.
[106] *Id.* at 727.
[107] *Id.* at 727-28.

Judicial opposition to unreasonable access to and transmission of irrelevant documentation may be further illustrated by an additional case out of the Eastern District of Virginia, *JDS Uniphase Corporation v. Jennings*, in which an employer, JDS Uniphase Corporation ("JDSU") filed suit against a former employee, Robert Jennings, for breach of contract after Jennings intentionally blew the whistle on alleged tax and accounting violations to senior management.[108] As a condition to his employment, Jennings had signed a Proprietary Information Agreement ("PIA") prohibiting him from externally disclosing any confidential information or from removing from the company premises any documentation.[109] While Jennings argued that he was wrongfully terminated in violation of SOX as a whistleblower, JDSU claimed that he was fired for improperly hiring an employee without the requisite authorization.[110] JDSU also claimed that Jennings possessed numerous confidential documents in violation of his PIA, including emails between company employees and between outside counsel and management, company valuations, opinion letters from the company's tax attorneys, copies of contracts, business models, and discussions of company meetings.[111] Jennings sought to defend himself by reliance on California law rendering his PIA unenforceable for reasons of public policy.[112]

Acknowledging that Jennings' argument was "not without superficial appeal," the court reasoned that a public policy exception cannot "authorize disgruntled employees to pilfer a wheelbarrow full of an employer's proprietary documents in violation of their contract merely because it might help them blow the whistle on an employer's violations of law, real or imagined."[113] Such actions, the court argued, may be likened to theft or conversion and "would effectively invalidate" nearly all confidentiality agreements, leading employees to "feel free to haul away proprietary documents, computers, or hard drives, in contravention of their confidentiality agreements" and to later justify such actions as necessary to pursue claims against their employers.[114]

Importantly, the court made a distinction between the "oral" transmission of whistleblower information and the "physical appropriation and conversion of documents," reasoning that the former, in contrast to the latter, is justifiable under the law because it provides an outlet to the whistleblower for vindication that would avoid unreasonably accessing irrelevant documentation.[115] Oral transmission of information would allow the whistleblower to consult with an attorney, file suit, and seek the confidential documents by way of a subpoena.[116] This

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[108] 473 F. Supp.2d 697, 698-99 (2007). JDSU also filed a motion for preliminary injunction to recover possession of the confidential materials.

[109] *Id.* at 699.

[110] *Id.* at 700.

[111] *Id.* at 701.

[112] *Id.* (citing 2003 CAL. ADV. LEGISL. SERV. 484 § 1).

[113] *Id.* at 702.

[114] Here, the court noted various statutory provisions that prohibit whistleblower retaliation, including SOX, the False Claims Act, the Fair Labor Standards Act, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. The court went on to state that if it were to adopt Jennings' argument, "litigation would likely blossom like weeds in spring: for every legitimate whistleblower aided by this rule, many more disgruntled employees would help themselves to company files, computers, disks, or hard drives on their way out the door to use for litigation leverage or for mere spite." *Id.* at 702-03.

[115] *Id.* at 703-04.

[116] *Id.* at 704; *see also* Brado v. Vocera Commc'ns, Inc., 14 F. Supp. 3d 1316, 1319 (N.D. Cal. 2014) (in which the defendant's counsel expressed that it did not oppose the plaintiff's use of information that was orally conveyed to an investigator during an interview). *But see JDS*, 473 F. Supp.2d 697 at 704 (waiting to obtain a subpoena, however,

method of building a case, the court argued, avoids actions resembling theft or misappropriation by thwarting employees to engage in "self-help" and "physically cart[ing] away stacks of documents, disks, or computers belonging to the business."[117]

These judicial sentiments have been echoed in several other federal cases. In one Ninth Circuit case, an employee, Dennis O'Day, who brought suit under the Age Discrimination in Employment Act ("ADEA") for denial of a promotion, had "rummage[ed] through" closed files in his supervisor's desk the evening after he was denied promotion.[118] O'Day was looking for his personnel file (to which there was restricted access) and in so looking, stumbled across "other documents he found interesting," which included promotion recommendations and a handwritten list ranking employees for layoff—all constituting documents "clearly not meant for general inspection," as they were "prominently marked 'personal/sensitive.'"[119] O'Day photocopied these documents and showed them to another employee.[120] The Ninth Circuit decided that O'Day's actions were not protected under the ADEA due to the manner in which he had obtained support for his case, finding that he had committed a "serious breach of trust" in both rummaging through his supervisor's desk and copying and showing the documents to an uninvolved coworker.[121] The court held that while the law at play "protects reasonable attempts to contest an employer's discriminatory practices; it is not an insurance policy, a license to flaunt company rules or an invitation to dishonest behavior."[122]

In another case of the Northern District of Illinois, an FCA whistleblower brought a claim against a car manufacturer, alleging that it misrepresented warranty coverage of several vehicles that it sold to the government.[123] The whistleblower based his case on several summary reports that he generated through data entry into the defendant's internal electronic program, prompting the defendant to move for a protective order to return the documents due to alleged unauthorized use of the electronic program in violation of the whistleblower's confidentiality agreement.[124] The court recognized "the policy importance of not discouraging whistleblowers from undertaking investigative efforts that might expose fraud against the government, which extends to the whistleblower's retention of discoverable information albeit in violation of confidentiality agreements."[125] The court emphasized that the whistleblower may only transmit confidential documents that are "reasonably related" to the formation of the case—here, because the summary reports had constituted "the very basis" for the whistleblower's claim and spoke directly to the issues at play, the defendant's motion to return the documents was denied.[126]

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may lead a company to destroy documents in the interim – to mitigate this risk, the whistleblower could always make a "persuasive showing" that such risk is imminent).

[117] *JDS*, 473 F. Supp.2d 697 at 704.

[118] O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 758 (9th Cir. 1996).

[119] *Id*.

[120] *Id*.

[121] *Id*. at 763-64 (citing Silver v. KCA, Inc., 586 F.2d 138, 141 (9th Cir.1978)).

[122] *Id*.

[123] United States ex rel. Ceas v. Chrysler Grp. LLC, 2016 WL 3221125 (N.D. Ill. June 10, 2016).

[124] *Id*. at *1-2.

[125] *Id*. at *2 (citing Fanslow v. Chicago Mfg. Ctr., Inc., 384 F.3d 469, 479 (7th Cir.2004)) ("whistleblowers have broad protection for actions taken in investigating and furthering FCA claims") and United States ex rel. Grandeau v. Cancer Treatment Ctrs. of Am., 350 F.Supp.2d 765, 773 (N.D.Ill.2004) ("holding that an employee could not be held liable for a breach of contract action because of the strong public policy supporting whistleblower action in FCA cases").

[126] *Id*. (emphasis added and internal citations omitted).

Each of these cases reveal that courts unfavorably view whistleblower evidence that is gathered as a result of dishonest, excessive, or unreasonable behavior demonstrative of self-help discovery. If such evidence exemplifies any other purpose besides directly supporting a whistleblowing claim, such as "jogging one's memory," courts are likely to weigh in favor of the employer.

In determining under Rule 21F-17 whether transmitted documents are directly relevant to the whistleblower's claim, the general provisions governing discovery in the Federal Rules of Civil Procedure may offer helpful guidance. Specifically, Federal Rule of Civil Procedure 26(b) outlines the scope and limits of discovery—the rule allows parties to obtain discovery relating to "any non-privileged matter that is *relevant* to any party's claim or defense and *proportional to the needs* of the case."[127] Relevancy is established if the evidence "has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action."[128] Given that relevancy is broadly applied, proportionality serves to rein in the potential universe of information that is discoverable. [129] Relevance and proportionality are judged by several factors on a case-by-case basis. These include a consideration of the importance of the issues at stake to resolving the action, the amount in controversy, the parties' access to relevant information, and the significance of the burden or expense of the proposed discovery.[130] To illustrate relevance and proportionality, federal decisions have favored discovery requests that are "reasonably necessary" to develop a case.[131] In one instance, a discovery request was deemed disproportionate to the needs of the case when the requesting party had already gathered the same information through a deposition, thereby evidencing that requests will be denied when alternate means of obtaining the information are readily available.[132] Discovery has also been denied in instances where a requesting party had asked for "every aspect" of the counterparty's business operations, management structure, finances, and marketing plans that the court deemed "too far afield from the contested issues in this case."[133]

Discovery has been deemed relevant and proportional to the needs of the case in an instance in which the plaintiff requested essentially all of defendants' banking records when investigating an alleged scheme in which the defendants had acquired clients in order to bill their insurer for unperformed medical services.[134] Here, the court found that the requested documents would "illuminate" the extent of the scheme and how it operated, other entities involved in the scheme, and the amount of damages, given that the banking records would allow the plaintiff to

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[127] FED. R. CIV. P. 26(b) (emphasis added).

[128] FED. R. EVID. 401.

[129] Eggleston v. Chicago Journeymen Plumbers' Local Union No., 130, 657 F.2d 890, 905 (7th Cir. 1981); *see also* Agnieszka A. McPeak, *Social Media, Smartphones, and Proportional Privacy in Civil Discovery*, 64 U. KAN. L. REV. 235, 288 (2015) (noting that even relevant information may be excluded if it is disproportionate to the needs of the case).

[130] *Id.*

[131] *See e.g.*, Noble Roman's, Inc. v. Hattenhauer Distrib. Co., 314 F.R.D. 304, 305 (S.D. Ind. 2016); Ashmore v. Allied Energy, Inc., 2015 WL 12837648, at *1 (D.S.C. Dec. 9, 2015) (citing Nat'l Union Fire Ins. Co. of Pittsburgh; P.A. v. Murray Sheet Metal Co., Inc., 967 F.2d 980, 983 (4th Cir. 1992) (discussing that Fed. R. Civ. P. 26 is designed to provide for information that is reasonably necessary to develop a case).

[132] *Noble Roman's*, 314 F.R.D. at 312.

[133] *Id.*

[134] State Farm Mut. Auto. Ins. Co. v. Warren Chiropractic & Rehab Clinic, P.C., 2016 WL 3450834, at *2 (E.D. Mich. May 11, 2016).

properly cross-reference payments made or received by the defendants with those involved in furthering the scheme.[135]

Each of the factors enumerated above would be pertinent to determining whether a whistleblower's submission of documents directly supports their underlying claim or provides extraneous information that may extend beyond what is reasonably necessary. The rule also states that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable."[136] As such, the scope may be broad but is kept in check by allowing the transmission of documents that are non-privileged.[137] The next factor of the proposed framework for inclusion in amendments to Rule 21F-17 will cover questions of privilege.

2. Factor 2: Did the whistleblower intentionally provide documents that are *attorney-client privileged*?

The second factor for determining the appropriateness of documentary transmissions should consider whether the whistleblower has intentionally submitted documents that are subject to the attorney-client privilege. Subsequent to the KBR enforcement action, the corporate world wondered whether business organizations and its lawyers would violate Rule 21F-17 by giving standard "*Upjohn* warnings" or "Corporate *Miranda*" warnings when conducting internal investigations moving forward.[138] Such warnings make clear to employees interviewed during internal investigations that the interview is subject to the attorney-client privilege between the attorney and the company and should remain confidential.[139] In response to these concerns, the SEC expressed that its enforcement action against KBR was not intended to serve as "a sweeping prohibition on the use of confidentiality agreements" generally, informing companies undergoing internal investigations that they may still lawfully give the standard *Upjohn* warnings to employees to explain the scope of the attorney-client privilege.[140] In addition, the SEC explained that corporate employers are entitled to protect confidential information like trade secrets or other confidential information through the use of "properly drawn confidentiality and severance agreements."[141]

The SEC appears most concerned about the restriction of whistleblower disclosures pertaining to information that is non-privileged.[142] This point is illustrated by the fact that the prohibitive KBR language went beyond the standard *Upjohn* warning that employee interviews are subject to the attorney-client privilege and should remain confidential to bar even the factual

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[135] *Id*. at *2.

[136] *Id.*

[137] *See id*.; In re Queen's Univ. at Kingston, 820 F.3d 1287, 1293 (Fed. Cir. Mar. 7, 2016).

[138] *See, e.g.,* Ropes & Gray, *supra* note 34; Skadden, *supra* note 34; WilmerHale, *SEC Applies Whistleblower Interference Rule to Corporate Confidentiality Requirement,* Apr. 28, 2015, *available at* https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179877088.

[139] *See* Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981); In re Processed Egg Products Antitrust Litig., No. 08–md–02002, 2014 WL 6388436, at *11 (E.D. Pa. Nov. 17, 2014); Grace M. Giesel, *Upjohn Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony*, 65 U. MIAMI L. REV. 109, 168 n. 1 (2010) ("[e]stablishing this relationship at the outset precludes the employees from reasonably asserting ownership of the privilege relating to interactions with in-house counsel").

[140] White, *supra* note 2.

[141] *Id.*

[142] *See, e.g., supra* note 34; Wayne M. Carlin, *The SEC Opens a New Front in Whistleblower Protection*, HARV. L. SCH. FORUM CORP. GOV. & FIN. REG., Apr. 6, 2015, *available at* https://corpgov.law.harvard.edu/2015/04/06/the-sec-opens-a-new-front-in-whistleblower-protection/.

"*subject matter* discussed during the interview" as opposed to the communications between the employee and the attorney pertaining to the investigatory interview.[143] The SEC also noted that it "is not trying to dictate the language of these agreements or warnings," which remain within the company's discretion, but that companies must "speak clearly in and about confidentiality provisions, so that employees, most of whom are not lawyers, understand that it is always permissible" to inform the SEC of possible securities laws violations without first obtaining the consent of counsel or their employer.[144] In this way, the SEC portrayed some sensitivity towards the desire of employers to maintain confidentiality outside of instances of wrongdoing.

As the oldest of privileges governing confidential communications, the attorney-client privilege is intended to "encourage full and frank communication" between clients and attorneys for the purpose of obtaining sound legal advice or advocacy.[145] The crime-fraud exception curtails this privilege, which provides that there is no such privilege if the communication was made "to enable anyone to commit a crime or fraud."[146] In instances of whistleblower transmissions of information that is subject to the privilege, if the corporation, as the client, has retained the attorney for the purpose of committing a crime or fraud, the corporation will obviously not be shielded by the privilege, thereby allowing the whistleblower to rely on this exception.[147] In some cases, it may be difficult for the whistleblower to determine whether the privilege applies or would be subject to the exception, as this is a judicial determination made on a case-by-case basis.[148] Given this possible difficulty, the whistleblower should not transmit documents that are clearly marked as privileged or directly result from an actual interview with counsel in which the employee-whistleblower knows the privilege is at stake.[149] As stated earlier, the *subject matter* of the interview, as opposed to explicit communications between employee and attorney during an investigatory interview, would constitute information that the whistleblower may communicate to the SEC.

The manner in which the SEC would handle the receipt of whistleblower transmission of privileged material is currently unclear.[150] Dodd-Frank is silent on this issue and the SEC rules implementing Dodd-Frank address it only indirectly as it pertains to eligibility for a bounty reward.[151] As discussed, to be eligible for a bounty, the whistleblower must have provided

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[143] *See* KBR Proceeding, *supra* note 25; Ropes & Gray, *supra* note 34.

[144] *Id.*

[145] *Upjohn*, 449 U.S. at 389; FED. R. CIV. P. 501.

[146] United States v. Zolin, 491 U.S. 554, 566 (1989) (internal citations omitted).

[147] MODEL RULES OF PROF'L CONDUCT r. 1.6 (2003).

[148] Joel D. Hesch, *The False Claims Act Creates A "Zone of Protection" That Bars Suits Against Employees Who Report Fraud Against the Government*, 62 DRAKE L. REV. 361, 365 (2014).

[149] Although companies may be tempted to mark as many documents as privileged as possible, especially within email communications, practitioners warn against this practice, as it hinders the success of one's argument that a "privileged and confidential" label is meaningful if litigation or investigations ensue. *See* Brenda R. Sharton & Gregory J. Lyons, *The Risks of E-Mail Communication - A Guide to Protecting Privileged Electronic Communications*, 17 A.B.A. Sec. Bus. L. 1 (2007), *available at* https://apps.americanbar.org/buslaw/blt/2007-09-10/lyons.shtml.

[150] *See* 15 U.S.C. § 78u-6 (2010) (failing to address this issue); *see* Sterling Marchand, *The New Dodd-Frank Whistleblower Incentives and the Potential Erosion of the Attorney-Client Privilege*, BAKER BOTTS (Apr. 2012), *available at* http://files.bakerbotts.com/file_upload/CandEUpdateTheNewDoddFrankWhistleblowerIncentives_2012_04.htm#footnote4r (noting that Congress also did not address how privileged material disclosed by whistleblowers would be handled in enacting Dodd-Frank).

[151] *See* 15 U.S.C. § 78u-6 (2010) (failing to address this issue); *see also* Final Rules, *supra* note 15, at 34315 (stating that attorney-client privileged information forming the basis of a whistleblower claim is not eligible for a bounty reward).

"original information," which is defined in the statute as that which is derived from the whistleblower's "independent knowledge or independent analysis," not yet known to the SEC from another source, and not derived from an allegation made in a judicial or administrative hearing or governmental report.[152] The SEC rules further elaborate that information will not be considered derived from "independent knowledge or independent analysis" and thus not bounty-eligible if it was obtained "through a communication that was subject to the attorney-client privilege" or "in connection with the legal representation of a client . . . ."[153] Although it would appear that this restriction exists to avoid that attorneys breach their duty of confidentiality by blowing the whistle on their clients, this language applies just as equally to whistleblowers to remove eligibility for a bounty.[154] It is likely that the SEC might handle privileged documents obtained by whistleblowers in the same manner in which it conducts a "taint review" in regular investigations by examining whether the document(s) provided constitute communications made in confidence to an attorney by a client to seek or obtain legal advice.[155] If this threshold is met, the privilege may be maintained, despite the fact that information was voluntarily shared with the SEC for the purpose of informing the agency of fraud or violations of the law.[156]

As it pertains specifically to whistleblower tips received through TCR, the Office of Market Intelligence ("OMI") within the SEC's Division of Enforcement reviews every such tip and assigns "specific, credible, and timely TCRs" to SEC staff for further investigation.[157] As part of its review, OMI may also evaluate for the existence of privileged documents, portions of which may be redacted prior to transmission to the Division of Enforcement to maintain the privilege.[158] Subsequent to the KBR enforcement action, Sean McKessy, former Chief of the SEC's Office of the Whistleblower, expressed that while a confidentiality agreement barring an employee from transmitting company documents to the SEC (just like one that bars verbal communications) would be unenforceable under Rule 21F-17, the agency is "not interested in getting privileged information."[159] In this context, McKessy stated that the SEC generally

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[152] 15 U.S.C. § 78u-6(a)(3) (2010); 17 C.F.R. § 240.21F-4(b) (2011).

[153] There is an exception to this rule that appears to allow bounties if the privileged information would be permitted pursuant to attorney-reporting obligations under SOX or applicable state attorney conduct rules allowing disclosure. *See* 17 C.F.R. § 240.21F-4(b)(4). *See also* Jennifer M. Pacella, *Advocate or Adversary: When Attorneys Act as Whistleblowers*, 28 GEO. J. LEGAL ETHICS 1027 (2015) for a discussion of the ethical issues pertaining to attorney-whistleblowing under Dodd-Frank.

[154] *See* Final Rules, *supra* note 15, at 34315 (stating that both attorneys and non-attorneys cannot rely on privileged information, unless an exception applies, to form the basis of a bounty reward).

[155] Enforcement Manual, *supra* note 89, at 68-69; King v. Univ. Healthcare Sys., L.C., 645 F.3d 713, 720 (5th Cir. 2011); Mississippi Pub. Employees' Ret. Sys. v. Boston Sci. Corp., 649 F.3d 5, 30 (1st Cir. 2011);
United States v. Constr. Prod. Research, Inc., 73 F.3d 464, 473 (2d Cir. 1996) (each setting forth these same factors as a test for determining whether material is subject to the attorney-client privilege).

[156] *See* Enforcement Manual, *supra* note 89, at 69, 75.

[157] *Annual Report*, supra note 89.

[158] *See* Enforcement Manual, *supra* note 89, at 69, 75; *Annual Report*, supra note 89.

[159] Ada W. Dolph, *Aggressive Enforcement Efforts Will Continue After KBR, Per SEC Whistleblower Chief*, SEYFARTH SHAW (Apr. 22, 2015), *available at* http://www.seyfarth.com/publications/OMM042215-WB. *But see Confidentiality and Settlement Agreements under Siege*, ASSOC. OF CORP. COUNSEL, June 4, 2015, *available at* https://www.acc.com/chapters/ncr/upload/Slides-ConfidSettlement.pdf (noting that, with respect to the value of the "information" that whistleblowers provide to the SEC, the agency noted that it would "go out of business" if it could "not rely on documents provided by whistleblowers.")

discourages whistleblowers and their counsel from transmitting privileged information.[160] If the SEC were alerted to instances of wrongdoing, it could, as an alternative, request or subpoena documents from the company, thereby eliminating the need for a whistleblower to have provided privileged documents in the first instance.[161] Congress has provided the SEC with "significant" investigative and subpoena powers for this very purpose, granting the SEC the power to compel attendance of witnesses, the production of documents and to impose sanctions for non-compliance, which may include a misdemeanor offense, imprisonment, and fines.[162]

Even prior to the subpoena stage, companies may decide to waive the privilege and voluntarily provide the SEC with otherwise privileged information to position themselves for leniency or cooperation credit pursuant to the SEC's 2001 "Seaboard Report."[163] The Seaboard Report outlines the agency's analytical framework in deciding whether to bring an enforcement action against a corporation, providing cooperation credit to entities that self-police and self-report wrongdoing and cooperate with the agency to rectify the problem.[164]

In some instances, transmission of privileged information in this context need not result in a waiver of the privilege. This may be the case when a whistleblower's interests in providing privileged documents to the SEC are aligned with that of the agency, whether in furtherance of pursuing an enforcement action, seeking accountability for retaliation, or in investigating possible wrongdoing. Pursuant to the "common interest doctrine," whistleblowers in FCA cases have been able to provide the government with privileged documents without forfeiting attorney-client privilege in instances in which the two parties' interests in a pending litigation are aligned.[165] Although subject to varying judicial interpretations, the common interest doctrine has been applied to maintain the attorney-client privilege for communications, not necessarily in anticipation of litigation, that are shared between parties who possess a common legal interest (a "community of interests") or where the parties are undertaking a joint effort pertaining to such common interests.[166] In the FCA context, both the relator-whistleblower and the U.S.

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[160] *Id.* McKessy also noted that "while there are 'certain exceptions to privilege,' he would 'hate to leave the impression that [the agency] is looking to create to create an army of lawyers who can ignore their confidentiality requirements because of the possibility of being paid under our [Dodd-Frank bounty] program.'"

[161] Moberly, Thomas & Zuckerman, *supra* note 22, at 110 (noting that employers may raise this argument in defense of protecting their internal confidential documents).

[162] 15 U.S.C. § 78u (2010); Mikah K. Story Thompson, *To Speak or Not to Speak? Navigating the Treacherous Waters of Parallel Investigations Following the Amendment of Federal Rule of Evidence 408*, 76 U. CIN. L. REV. 939, 942 (2008).

[163] *See Should You Waive Privilege in Government Investigations?* Law 360 (May 11, 2015), *available at* http://www.law360.com/articles/651446/should-you-waive-privilege-in-government-investigations.

[164] *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 34-44969 (Oct. 23, 2001); *see also* U.S. SEC. & EXCH. COMM'N., ENFORCEMENT COOPERATION PROGRAM (2015), *available at* http://www.sec.gov/spotlight/enfcoopinitiative.shtml [hereinafter *Enforcement Cooperation Program*]; *see also* Robert W. Tarun, Peter P. Tomczak, *A Proposal for A United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 167-70 (2010) (discussing cooperation policies).

[165] *See, e.g.*, United States ex rel. Minge v. TECT Aerospace, Inc., 2011 WL 1885934 at *7 (D. Kan. May 18, 2011) (finding that relators' sharing of documents with the government in an FCA case did not waive the privilege due to the common interest doctrine); United States ex rel. Schweizer v. Oce, N.V., 577 F. Supp. 2d 169, 173-74 (D.D.C. 2008) (discussing that parties may forfeit privilege by providing materials to a third party who "lacks a common interest with the privilege holder").

[166] United States v. BDO Seidman, LLP, 492 F.3d. 806, 816 n.6 (7th Cir. 2007) (noting that for the doctrine to apply, the parties must "undertake a joint effort with respect to a common legal interest.'"); United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989) (the common interest doctrine "serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has

government as a potential intervenor in the case share a common interest in bringing forth claims of fraud against a defendant.[167] In such cases, relators have produced documents in anticipation of *qui tam* litigation and then shared such documents with the government in furtherance of that litigation without compromising the attorney-client privilege.[168] The judicial rationale behind application of the common interest doctrine in this context ensures that the underlying policies of both the privilege and the FCA are furthered—"the attorney-client privilege encourages the full disclosure of all the facts from the client to the lawyer, while the False Claims Act furthers Congress's intention that the whistleblower inform the government all that he or she knows. 'Both policies would be negated if relator's attorney-client privilege were forfeited.'"[169] Similarly, a Dodd-Frank whistleblower would be revealing possible securities law violations to the SEC, the agency directly tasked with policing such violations and imposing appropriate sanctions.

In whistleblower transmissions of documents not invoking the attorney-client privilege but other proprietary concerns, such as trade secrets, whistleblowers are typically granted much more leeway. A "trade secret" is defined as "a formula, pattern, compilation, program, device, method, technique, or process" that derives actual or potential independent economic value from not generally being known to other persons.[170] Thus, by its nature, trade secret law protects valuable information that is not readily available to the public.[171]

Existing case law reveals that employers have only been successful in establishing misappropriation claims against whistleblowers who disclose information constituting a trade secret when such claims involve independent damages, as opposed to claims for indemnification or contribution.[172] Unlike counterclaims for indemnification or contribution, which have only the effect of offsetting a defendant's liability, counterclaims for independent damages are

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been decided upon and undertaken by the parties and their respective counsel"); Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 447 (S.D.N.Y. 1995) (noting that "in its most extreme form," the common interest doctrine has been found to exist when different persons "have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice.").

[167] *See* 31 U.S.C. § 3730.

[168] Miller v. Holzmann, 240 F.R.D. 20 (D.D.C. 2007); Burroughs v. DeNardi Corporation, 167 F.R.D. 680 (S.D. Cal. 1996).

[169] Mathew Andrews, *The Growth of Litigation Finance in DOJ Whistleblower Suits: Implications and Recommendations*, 123 YALE L.J. 2422, 2444 (2014) (internal citations omitted).

[170] U.T.S.A. § 1(4). *See also* Robert E. Thomas, *Vanquishing Copyright Pirates and Patent Trolls: The Divergent Evolution of Copyright and Patent Laws*, 43 AM. BUS. L.J. 689, 694–95 (2006) (discussing, in general, intellectual property law as conducive to "rent-seeking behavior," as holders seek to maximize economic profits resulting from the exclusivity of their products).

[171] Norman D. Bishara & David Orozco, *Using the Resource-Based Theory to Determine Covenant Not to Compete Legitimacy*, 87 IND. L.J. 979, 990, 1013 (2012) (discussing the use of non-compete agreements as an "additional mechanism [for employers] to assert control over knowledge related to their business beyond the default rules provided by the doctrines of duty of loyalty and trade secret law . . .").

[172] *See, e.g.*, U.S. ex rel. Madden v. Gen. Dynamics Corp., 4 F.3d 827, 831 (9th Cir. 1993); Schanfield v. Sojitz Corp. of Am., 663 F. Supp. 2d 305, 349-50 (S.D.N.Y. 2009). *See also Can a Whistleblower Take Documents from their Employer?* MCELDREW YOUNG, *available at* https://www.mceldrewyoung.com/whistleblower/stolen-documents/ (discussing how whistleblowers who take company documents may be subject to criminal prosecution for theft, exposing trade secrets, or possible violation of the Computer Fraud and Abuse Act due to unauthorized computer systems access). To be successful in a misappropriation of trade secrets claim, a company must demonstrate that it possessed a trade secret and that the defendant used that trade secret in breach of an agreement, confidence, or duty, or acquired the trade secret by improper means. Schanfield v. Sojitz Corp. of Am., 663 F. Supp. 2d 305, 349-50 (S.D.N.Y. 2009).

distinguishable because they are not dependent on the defendant's liability.[173] The Ninth Circuit has ruled, in the FCA whistleblowing context, that defendant counterclaims against relator-whistleblowers for misappropriation are permissible, since they would invoke a separate question of the whistleblower's potential independent liability.[174] Although the merits of this case were not decided, this case law reveals that in such instances in which an FCA defendant is found not liable, whistleblowers may need to respond on a substantive level to employer-defendant counterclaims of misappropriation.[175]

On a statutory scale, a fairly recent piece of legislation provides a whistleblower-friendly mechanism of disclosing information containing trade secrets to the government without fear of liability. The Defend Trade Secrets Act (DTSA) of 2016 creates a new federal cause of action for trade secret misappropriation, allowing plaintiffs, who formerly relied only on state law, to sue in federal court.[176] The federal cause of action under DTSA is largely equivalent to current law under the Uniform Trade Secrets Act ("UTSA"), which has been adopted by nearly all states, in that it authorizes similar remedies, a three-year statute of limitations, and a similar definition of "trade secret" as described above.[177] The DTSA is beneficial to plaintiffs in that it eliminates the requirement that a plaintiff describe its trade secrets with particularity (which is currently required in several states) and offers a remedy not available under the UTSA by allowing ex parte orders that provide for the seizure of property "to prevent the propagation or dissemination of the trade secret."[178]

Although, at first glance, the DTSA appears to be most beneficial to employer-plaintiffs alleging trade secret violations, the statute grants immunity from criminal or civil liability under any federal or state trade secret law to whistleblowers who disclose trade secrets in confidence to either the government or to attorneys for the purpose of investigating a believed violation of the law.[179] The statute also requires employers to give notice of this whistleblower immunity to any employee with whom they may have a contractual agreement governing "the use of a trade secret or other confidential information."[180] There are penalties for non-compliance with this employer notice requirement, including the inability to be awarded exemplary damages or attorneys' fees in connection with any trade secret litigation.[181] In addition, the DTSA contains an anti-retaliation provision, in which an aggrieved whistleblower suing an employer may disclose trade

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[173] *U.S. ex rel. Madden*, 4 F.3d at 830-31.

[174] *Id*.

[175] *Id.* at 831."If a qui tam defendant is found liable, the counterclaims can then be dismissed on the ground that they will have the effect of providing for indemnification or contribution. On the other hand, if a qui tam defendant is found not liable, the counterclaims can be addressed on the merits."

[176] Pub. L. No. 114-153, 130 STAT. 376; *see also* Kenneth Kuwayti, Bryan Wilson & Christian Andreu-von Euw, *The Defend Trade Secrets Act: Some Practical Considerations*, MORRISON FOERSTER, May 11, 2016, a*vailable at* http://www.mofo.com/~/media/Files/ClientAlert/2016/05/160511DefendTradeSecretsAct.pdf.

[177] *Compare* 18 U.S.C. §§ 1832(b), 1836 *with* U.T.S.A. § 1(4); Sebastian Kaplan & Patrick Premo, *The Defend Trade Secrets Act of 2016 Creates Federal Jurisdiction for Trade Secret Litigation*, IP WATCHDOG, May 23, 2016, *available at* http://www.ipwatchdog.com/2016/05/23/defend-trade-secrets-act-2016-creates-federal-jurisdiction-trade-secret-litigation/id=69245/ (discussing DTSA and noting that 48 states have adopted the Uniform Trade Secrets Act).

[178] 18 U.S.C. § 1836 (b)(2); Kuwayti *et al, supra* note 176. Further, the DTSA will not preempt state law, but afford plaintiffs the flexibility to decide whether to pursue federal or state claims. Kaplan & Premo, *supra* note 177.

[179] 18 U.S.C. § 1833(b)(1). This immunity also applies to any complaints or documents filed in a lawsuit or other judicial proceeding, if such filing is made under seal.

[180] *Id.* § 1833(b)(3). This notice requirement is not retroactive.

[181] 18 U.S.C.A. § 1833 (b)(3).

secret information to his/her attorney and use the information in the court proceeding, provided that the whistleblower has filed any documents containing the trade secret under seal and does not disclose the trade secret outside of a court order.[182] As such, this new federal development is highly supportive of a whistleblower's transmission of proprietary information in the context of reporting wrongdoing.

In the context of SEC whistleblowing, trade secret disclosures may be similarly treated more liberally than those concerning attorney-client privilege. While the SEC has publicly expressed its disinterest in receiving privileged information, it has not publicly spoken out against the receipt of disclosures involving trade secrets in the same manner.[183] Whistleblower transmissions of trade secrets may be justifiable given the public policy interests at stake to disclose the underlying wrongdoing. As Dworkin and Callahan have discussed, a whistleblower who discloses trade secrets may avoid tort liability by reliance on the exception of privilege, which is applicable in instances promoting a public interest, such as whistleblowing.[184] In such instances, the employee-whistleblower would not violate any underlying duty of loyalty given exceptions to the duty that permit the revelations of wrongdoing.[185]

To ease the concerns of employers, who also have a legitimate business interest in preserving trade secrets, clear internal policies may help mitigate the likelihood of a whistleblower providing trade secrets in support of their claims. Legal practitioners have suggested that, at a minimum, employers may take some of the following precautions when legitimate business interests are at stake: draft clear company policies outlining what constitutes trade secrets, limit access to trade secret information, explain the consequences of violating confidentiality policies in this context, and ensure that this information is provided to and signed by all employees upon hiring.[186] Additional employer precautions may take the form of securing digital and physical information through encrypted files, passwords, or firewalls; prohibiting downloading to non-work computers; and implementing systems to monitor the access, use, and disclosure of trade secret information, perhaps through the hiring of independent investigatory teams.[187]

3. Factor 3: Did the whistleblower *reasonably believe* that the transmitted documents support his/her claim?

The final factor in considering the legality of whistleblower transmissions of confidential documents is whether the whistleblower reasonably believed that the documents supported his or her claim. The "reasonable belief" standard is commonly applied among various statutory

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[182] *Id.* § 1833 (b)(3).

[183] *See supra* note 160.

[184] Terry Morehead Dworkin & Elletta Sangrey Callahan, *Employee Disclosures to the Media: When Is "Source" A "Sourcerer"?*, 15 HASTINGS COMM. & ENT L.J. 357, 386–89 (1993) (citing THE RESTATEMENT (SECOND) OF AGENCY and THE RESTATEMENT OF TORTS § 395)).

[185] *See id. See also* Peter S. Menell, *Tailoring a Public Policy Exception to Trade Secret Protection*, 105 CAL. L. REV. 1, 52-54 (2017) (discussing public policy exceptions to trade secret protections as they pertain to whistleblowing).

[186] Matthew L. Fornshell, Elizabeth E. Cary & Daniel Culicover, *Protecting Your Company's Assets As Whistleblowing Rises*, 42 J. SECT. ON LITIGATION 52, 56 (Fall 2015), *available at* http://www.americanbar.org/publications/litigation_journal/2015-16/fall/protecting_your_companys_assets_whistleblowing_rises.html

[187] *Id.* (noting the importance of routine reminders to employees of these policies, which helps instances of non-compliance come to light).

retaliation protections, including both SOX and Dodd-Frank.[188] To be protected from retaliation under SOX, the statute requires that an employee "reasonably believes" that the conduct she reports violates one of the enumerated federal statutes or regulations.[189] The same language is applicable to retaliation claims by whistleblowers under Dodd Frank—whistleblowers are eligible for retaliation protection if they "possess a reasonable belief" that the information that they are providing relates to a possible securities law violation.[190] The reasonable belief standard is also consistent with the approach of numerous courts that have interpreted the anti-retaliation provisions of several other federal whistleblowing statutes, including statutes that do not explicitly on their face require such a showing.[191]

The reasonable belief standard is comprised of both subjective and objective components, requiring that the whistleblower hold both a subjectively genuine belief that the information they have reported demonstrates a possible violation as well as a belief that, objectively, a similarly situated employee might reasonably possess.[192] From a subjective standpoint, the whistleblower must have an actual and good faith belief that the employer has committed wrongdoing and must not disclose information that they know to be false.[193] As Robert Vaughn notes, the subjective good faith requirement differs from motive, as a whistleblower with a good faith belief in the veracity of his/her disclosure may be operating under various motives.[194] A whistleblower is not denied protection even if it turns out that the employer has not actually violated the law—a reasonable belief of a violation of the law will suffice.[195] The objective component of this standard considers the perspective of a reasonable person in the same position as the employee with respect to that employee's experience, background, professional training, and access to information.[196] This standard focuses on whether the objective observer with the same training and experience and, set against similar factual circumstances as the aggrieved employee, could

[188] 18 U.S.C. § 1514A (2010); 17 C.F.R. § 240.21F-2 (2011) (each requiring this standard). *See also* David Orozco, *Amending the Economic Espionage Act to Require the Disclosure of National Security-Related Technology Thefts*, 62 CATH. U. L. REV. 877, 909 (2013)(discussing the prevalence of the reasonable belief standard among various whistleblowing statutes).

[189] 18 U.S.C. § 1514A(a)(1).

[190] 17 C.F.R. § 240.21F-2(b) (2011).

[191] *See, e.g.,* U.S. ex rel. Absher v. Momence Meadows Nursing Ctr., Inc., 764 F.3d 699, 715 (7th Cir. 2014) (interpreting the False Claims Act's retaliation provisions to protect whistleblowers who possess a reasonable belief of the occurrence of fraud against the government); Fanslow v. Chicago Mfg. Ctr., Inc., 384 F.3d 469, 480 (7th Cir. 2004) (agreeing with "several of [its] sister circuits" that the subjective and objective "reasonable belief" test is appropriate in evaluating whether whistleblowers are protected under the False Claims Act); Hindsman v. Delta Airlines, ARB CASE NO. 09-023, 2010 WL 2680567 (interpreting the anti-retaliation provisions of the Wendell H. Ford Aviation Investment and Reform Act to incorporate both subjective and objective standards to constitute the "reasonable belief" standard); Knox v. U.S. DOL, 232 Fed. App. 255, 258–59 (4th Cir. 2007) (interpreting the anti-retaliation provisions of the Clean Air Act as requiring a "reasonable belief"). *See also* Timothy J. Fitzmaurice, *The Scope of Protected Activity Under Section 806 of Sox*, 80 FORDHAM L. REV. 2041, 2065 (2012) (noting that courts have relied on the "reasonably believes" standard to decide retaliation cases under Title VII).

[192] Final Rules, *supra* note 15, at 34,303.

[193] Robert G. Vaughn, *America's First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 ADMIN. L. REV. 1, 19 (2005).

[194] *Id.* at 19 n. 56 (noting that Congress has rejected a motive test for whistleblower protections).

[195] Wiest v. Lynch, 710 F. 3d 121, 132-33 (2013).

[196] Vaughn, *supra* note 193, at 16.

reasonably believe that the disclosed conduct is representative of the type of misconduct set forth in the relevant statutory provision.[197]

The SEC has expressed that the reasonable belief standard "strikes the appropriate balance" between encouraging individuals to provide valuable tips without fearing retaliation, while, at the same time, avoiding frivolous or bad faith reports.[198] In this way, the standard is commonly viewed as offering "model" protections for whistleblowers, as good faith ensures that individuals are not blowing the whistle for improper purposes, while the objectivity component guards against meritless allegations.[199] Although incorporation of the subjective element in the reasonable belief standard is whistleblower-friendly,[200] employers may still contest the subjective mindset of the whistleblower. This is common in instances in which it can be demonstrated that employees knew that they were about to face discipline or termination due to poor job performance or when the whistleblower has used "disruptive or grandstanding techniques, such as holding news conferences or arguing cases to the media" to transmit the information pertaining to the wrongdoing.[201]

The reasonable belief standard is just as applicable in instances of whistleblower transmissions of internal confidential documents. The Southern District of California fairly recently determined that issues of material fact existed as to the enforceability of a confidentiality agreement barring a whistleblower from disclosing or transmitting confidential information, thereby denying the employer's summary judgment motion.[202] Here, Erhart, an internal auditor of BofI Federal Bank, who was bound by a confidentiality agreement, discovered internal unlawful conduct and collected documents, including internal audit reports, audit communications, law enforcement inquiries and other related documents demonstrating the wrongdoing, which he later submitted to the SEC.[203] Erhart had used his personal gmail account to email himself files and downloaded various files to his personal computer.[204] Although the court did not decide the substantive issue of whether a whistleblower who transmits such documents could rely on the public policy exception to confidentiality agreements, it provided helpful insight into the factors that would determine the reasonableness of Erhart's actions.[205] The court acknowledged a whistleblower's "need" for documentary evidence "to substantiate

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[197] *Id*.; *see also* Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor, 717 F.3d 1121, 1132 (10th Cir. 2013) ("Objective reasonableness is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee."); Allen v. Admin. Review Bd., 514 F.3d 468, 477 (5th Cir. 2008) (discussing the objective reasonableness standard).

[198] Final Rules, *supra* note 15, at 34,303-04; *see also* Bishara, Callahan & Dworkin, *supra* note 39 at 97 (noting that "individuals who knowingly or recklessly report false information should not be protected.").

[199] *See* Stefan Rutzel, *Snitching for the Common Good: In Search of A Response to the Legal Problems Posed by Environmental Whistleblowing*, 14 TEMP. ENVTL. L. & TECH. J. 1, 48-49 (1995) (discussing the reasonable belief standard); Kristian Soltes, *Facilitating Appropriate Whistleblowing: Examining Various Approaches to What Constitutes "Fact" to Trigger Protection Under Article 33 of the United Nations Convention Against Corruption*, 27 AM. U. INT'L L. REV. 925, 928 (2012) (the reasonable belief approach "encourages appropriate disclosures, acknowledges that whistleblowers might not always have concrete facts to support their concerns, and [] is a clear standard that removes much of the guesswork that plagues whistleblowing.").

[200] *See* Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 447 n. 437 (2010) (noting that the subjective "good faith" component provides more leniency to whistleblowers).

[201] James N. Adler & Mark Daniels, *Managing the Whistleblowing Employee*, 8 LAB. LAW. 19, 48 (1992) (internal citations omitted).

[202] Erhart v. BofI Holding, Inc., 2017 WL 588390 (S.D. Cal. 2017).

[203] *Id*. at *2.

[204] *Id.*

[205] *Id.* at *12.

their allegations," thereby allowing the transmission of valuable evidence of possible violations of the law to the SEC.[206] Further, the court noted that whistleblower transmissions of confidential documents help mitigate the risk that an employer engaged in wrongdoing may destroy any incriminating evidence prior to the onset of an investigation.[207] In light of these factors, the court cited Erhart's statement that he "was very careful in [selecting] the information [he] accessed and turned over. Each document was specifically related to one of the allegations of wrongdoing [he] had discussed with [his supervisor] and then reported to federal law enforcement."[208] The court also looked favorably on the claim that "every document" Erhart used had been "properly accessed in the course of performing [his] work as an internal auditor."[209] When viewed in the light most favorable to Erhart as the non-moving party, the court found the existence of genuine issues for trial regarding whether Ehart's transmission of documents was reasonably necessary to support his whistleblowing claims.[210] These insights into the reasonableness of a whistleblower's actions in gathering and transmitting company documents, including carefulness and discernment as to the strength of the allegations supported, may be indicative of how future courts may substantively decide the issue.

Existing case law in the FCA context also supports the premise that whistleblower transmissions will be justified if based on a reasonable belief of necessity to support the disclosure. The Ninth Circuit's decision in *Cafasso v. General Dynamics* relied on the reasonable belief standard in a whistleblower transmission case.[211] In this case, scientist/technologist Mary Cafasso brought a claim as a relator under the FCA alleging that her former employer, General Dynamics ("GD"), a technology company servicing the military, had defrauded the U.S. government by withholding the disclosure of new inventions that the government had rights to use and license by contract.[212] Cafasso blew the whistle internally and alleged that she was retaliated thereafter, as GD subsequently terminated her.[213] Before leaving the company and with the specific intent to bring a *qui tam* action against GD, Cafasso copied nearly eleven gigabytes of data from GD computers, which amounted to thousands of confidential documents.[214] GD filed a counterclaim, alleging that Cafasso had misappropriated the documents and breached her confidentiality agreement.[215] Cafasso urged the court to adopt a public policy exception to the enforcement of her confidentiality agreement, which she conceded she had violated.[216] The court, although recognizing some merit in the public policy exception argument, decided that it need not decide the issue given that it would not be applicable to

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[206] *Id. (citing* Moberly, Thomas & Zuckerman, *supra* note 22, at 115, who stated that "[r]elevant documents taken from an employer not only can provide potentially valuable evidence of a possible securities violation, but also can help the SEC confirm the veracity of the whistleblower's information and better distinguish between tips that warrant significant attention and those that do not.").

[207] *Id.* at *12 (citing United States v. Arthur Andersen, LLP, 374 F.3d 281, 286 (5th Cir. 2004) and the firm's shredding of two tons of documents just prior to the SEC's Enron investigation)).

[208] *Id.* at *13.

[209] *Id.*

[210] *Id.*

[211] 637 F. 3d 1047 (9th Cir. 2011).

[212] *Id*. at 1051-52.

[213] *Id*. at 1052.

[214] *Id*.

[215] *Id.*

[216] *Id*. at 1062.

Cafasso's actions given her "vast and indiscriminate appropriation" of company files, which had amounted to tens of thousands of pages.[217]

The factors weighing poorly in Cafasso's favor included testimony she had given in which she stated "If I saw something that I thought actually could apply and should be investigated, I just grabbed the whole folder."[218] Further, she testified that she "did not look at any individual documents at all" and instead scanned only file names to indiscriminately gather documents.[219] Acknowledging that "swept up in this unselective taking of documents" were trade secrets belonging to the company, attorney-client privileged material, sensitive government information, and other proprietary information, the court reasoned that a public policy exception broad enough to encompass Cafasso's actions would render all confidentiality agreements unenforceable as long as the employee subsequently filed an FCA action.[220] The court concluded its decision by noting that the only justification for a public policy exception in such cases would be a "particularized showing" that the documents were reasonably necessary to pursue the whistleblowing claim.[221]

In this case, Cafasso's actions were both subjectively and objectively unreasonable. The testimony that she provided reveals insight into her state of mind when gathering the documents, mainly the lack of an actual subjective belief that the documents in question would serve to demonstrate the specific violation of the law that she cited, even indirectly. By simply accumulating any and all documentation without an individual review of each, Cafasso's actions were not reflective of those made in good faith. Similarly, from an objective standpoint, a similarly situated employee with the same experience and background is likely to have exercised some discretion and caution in gathering the documents. Cafasso was not a low-level employee. She worked as the company's chief scientist and technologist and was tasked with identifying, documenting, and protecting GD's intellectual property and ensuring that GD complied with the company's requirements of disclosing new inventions to the U.S. military.[222] Cafasso based her decision of which GD documents to copy by simply browsing through anything and everything related to technology and technology development.[223] Given that she worked in this office as a chief scientist, it is highly likely that someone of her same experience, professional training, and access to information would have been able to discern what documentation would be reflective of evidence that the company was committing fraud against the government. Ensuring that whistleblowers act in a subjectively and objectively reasonable manner when transmitting confidential documentary support strikes an appropriate balance between providing the government with information about legal violations while protecting legitimate employer business interests.

4. Proposed Regulatory Amendment Language

The three-factor framework discussed herein should be incorporated into Rule 21F-17 by way of amendments that adopt the bolded language below or some variation thereof. As such,

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[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.* at 1053.
[223] *Id.* at 1062.

amendments would be necessary to existing subsection (a) of the rule and would prompt the adoption of a new subsection (c), each serving to clarify the extent to which an individual may transmit confidential information to the SEC in support of a whistleblowing claim.

> (a) No person may take any action to impede an individual from communicating directly with the Commission staff, **or from providing such staff documentary support that satisfies the criteria set forth in § 240.21F–17(c) hereof**, about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by § 240.21F–4(b)(4)(i) and § 240.21F–4(b)(4)(ii) of this chapter related to the legal representation of a client) with respect to such communications **or documentary support**.
>
> (b) If you are a director, officer, member, agent, or employee of an entity that has counsel, and you have initiated communication with the Commission relating to a possible securities law violation, the staff is authorized to communicate directly with you regarding the possible securities law violation without seeking the consent of the entity's counsel.
>
> **(c) Individuals may provide the Commission staff with documentary support pertaining to a possible securities law violation, provided that such support (i) was reasonably accessed and is directly relevant to the possible violation; (ii) was not obtained through a communication that was subject to the attorney-client privilege, unless disclosure of that information would otherwise be permitted by an attorney pursuant to § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise;[224] and (iii) was reasonably believed by the individual to support the possible violation.**

The suggested amendments to prong (ii) in subsection (c) mirror language included in an earlier section of the SEC regulations implementing the Dodd-Frank whistleblower program, which preclude a whistleblower from collecting a bounty when the resulting enforcement action is based on information that is subject to the attorney-client privilege.[225] As discussed, the transmission of "original information" is one of the requirements for bounty eligibility, which the SEC defines, in part, as that which is "derived from [the whistleblower's] independent knowledge or independent analysis."[226] The SEC regulations state that information obtained through a communication subject to the attorney-client privilege would not satisfy the independent knowledge or analysis requirement, unless such communication would otherwise be permitted pursuant to Section 205.3(d)(2) or applicable state attorney conduct rules.[227] Section 205.3 permits an attorney who appears and practices before the SEC when representing an issuer-client to reveal to the SEC otherwise confidential client information when the attorney reasonably believes necessary to prevent the client from materially violating the law and causing substantial financial injury to investors; to prevent the client from committing perjury in an SEC

[224] The proposed language of prong (ii) appears elsewhere in the SEC regulations implementing the Dodd-Frank whistleblower program pertaining to bounty eligibility restrictions. *See* 17 C.F.R. § 240.21F-4(b)(4).
[225] *Id.*
[226] *See* § 240.21F-4(b)(2), (3), (4).
[227] *See id.* § 240.21F-4(b)(4).

proceeding, or "[t]o rectify the consequences of a material violation [of securities laws] . . . [in] which the attorney's services were used."[228] As such, an attorney may reveal privileged information pursuant to justifiable exceptions based on client wrongdoing. These exceptions are similarly appropriate for purposes of curtailing a whistleblower's ability to transmit privileged information, as the non-holder of the privilege, thereby allowing such transmissions only in cases in which it is necessary to prevent or rectify misconduct, financial injury, or wrongdoing.

IV. CONCLUSION

Whistleblowers have become increasingly akin to private enforcers uncovering and remediating instances of misconduct. Law under Dodd-Frank has clearly established that employers cannot silence whistleblowers or stifle their ability to report by mandating entry into confidentiality agreements. Recent SEC enforcement activity has shown that the agency will actively police impediments to whistleblowing through reliance on Rule 21F-17. However, Rule 21F1-17 has left holes as to whether whistleblowers may lawfully provide the SEC with internal, confidential documents in support of their disclosures. Given the potential for significant payouts through the Dodd-Frank whistleblower program, would-be whistleblowers may be more likely to build a case as strongly as possible by gathering internal documentation as part of their SEC submission. This Article proposes a three-factor framework for inclusion in suggested amendments to Rule 21F-17, which would balance employer interests of maintaining internal company documents with the need of the whistleblower to provide this documentation in support of their claims. Incorporating judicial trends from contract law, employment law, and False Claims Act case law, this framework serves as a guide to would-be whistleblowers preparing to make their disclosures and also allows the SEC and future courts to determine whether such transmissions are justifiable in light of the various public policy concerns at stake.

[228] 17 C.F.R. § 205.3(d).