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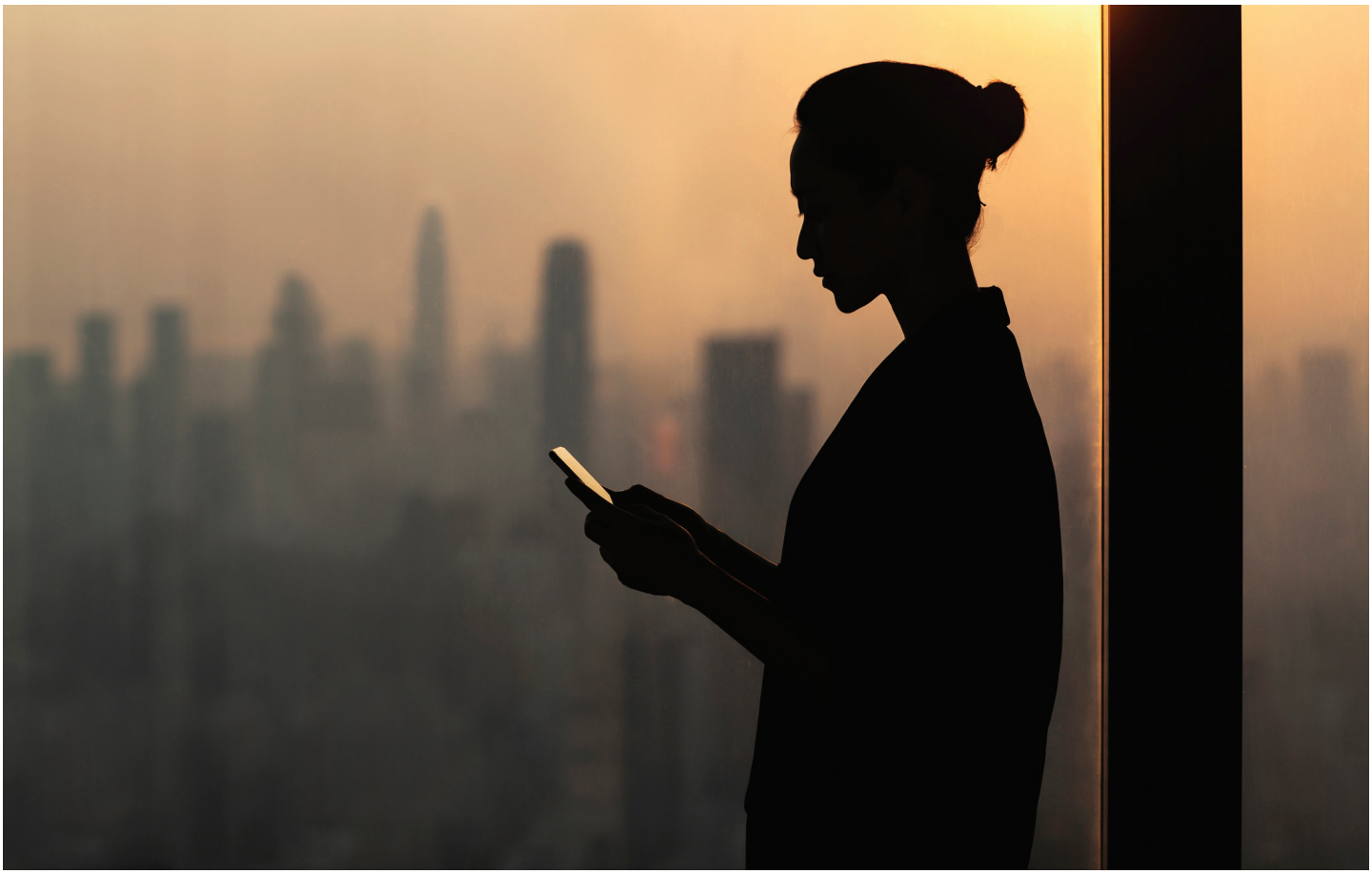

Is my client sitting on a gold mine?

A HIGH-LEVEL GUIDE TO WHISTLEBLOWER STATUTES

Over the past several decades, whistleblowers have proven to be the most effective tool in combating corporate misconduct, fraud, and corruption. Government agencies, including the Department of Justice, IRS, and SEC, have recovered billions of dollars based on information from whistleblowers – and paid billions of dollars in whistleblower awards as well. Whistleblowers are often exactly the people plaintiffs' lawyers help every day as they face retaliation in the form of pretextual firings, demotions, harassment, or blacklisting across their industry.

Lawyers are well versed in fighting for their client's best interest, yet many practitioners fail to leverage the power of the United States government and utilize both the protections of whistleblower statutes and the often-substantial awards for successful government investigations. This article provides a high-level summary of the most prominent and lucrative whistleblower programs and outlines other key, practical considerations to be aware of when weighing whether a client should come forward as a corporate whistleblower. It is essential to know the idiosyncratic procedures built into the relevant whistleblower statutes and to navigate the applicable programs with due care.

Understanding the scope of available whistleblower programs is critical to positioning your client to receive the maximum recovery available. There are numerous state and federal statutes that you should be aware of as you analyze any

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given case. The ones described below are the most common.

The False Claims Act

The federal False Claims Act, Title 31 United States Code section 3729 et seq., commonly known as the "Lincoln Law," was enacted in 1863 as a result of the widespread fraud during the Civil War. The FCA is the Department of Justice's primary tool in pursuing fraud against the government, and DOJ recovers $3- to $6 billion a year through the FCA.

Originally, FCA enforcement was focused on procurement or defense-related fraud, but, as federal healthcare spending expanded, FCA cases related to healthcare fraud (in its many forms) have skyrocketed, and now regularly account for 50% or more of DOJ's FCA recoveries. (See *Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019*, https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019 (last visited Aug. 17, 2021).)

After the financial crisis of 2008, the Department of Justice focused heavily on financial and mortgage-related fraud, demonstrating the breadth of the FCA for any use of federal funds. Stated simply, the ways in which the government can be defrauded are as numerous as the programs enacted by the government, and every company or individual that causes federal funds to be misused may be liable and a potential defendant in a whistleblower case.

Common examples include healthcare providers providing unnecessary services, government contractors failing to fulfill federal contract obligations, or failures to perform routine internal compliance required by the government. As the FCA is a civil statute that requires proof by a preponderance of the evidence and has a definition of scienter that is less stringent than specific intent that includes reckless disregard and deliberate ignorance, FCA cases can involve violations that are more akin to contract disputes than criminal prosecutions.

The FCA is a "*qui tam*" statute, which means that although FCA cases can be initiated by individuals (or entities), they are brought on the government's behalf. *Qui tam* cases are not public when filed. Instead, they are filed in federal district court under seal, and the whistleblower's complaint and required submission of evidence are served only on DOJ.

Because the case is not made public initially, the defendant and the public do not know a case has been filed – indeed, it would be a violation of the court-ordered seal for the whistleblower or his counsel to disclose the existence of the complaint. In fact, unlike the typical course of litigation, a defendant may not know the existence of the *qui tam* or the identity of the whistleblower for years, as courts will regularly extend the seal throughout the government's investigation.

While the case is under seal, DOJ and law-enforcement partners from other agencies will investigate the case, which may include issuing a subpoena to relevant parties, interviewing the whistleblower and other witnesses, and taking sworn testimony from individuals. After investigation, DOJ may settle the case, intervene and take over the case, or decline intervention, after which the whistleblower may proceed with the case on his own (still on behalf of the government).

If the government does intervene, it will typically take full control of the case in litigation, acting as lead counsel for the case, though occasionally, the whistleblower may also proceed on certain portions of the case which the government is not pursuing, as well as any personal claims of the whistleblower for retaliation. If the government declines, the whistleblower is entitled to proceed with the action and litigate the case. In this situation, the government remains the real party in interest and maintains certain rights – such as the right to move to dismiss or settle the case – but acts as a third party in discovery.

A whistleblower is entitled to a share of any recovery the government receives in an FCA case. The share is calculated as a direct percentage of the amount recovered: between 15% and 25% if the government intervenes, and between 25% and 30% if it declines. (See 31 U.S.C. § 3730(d).) This award can be substantial, sometimes totaling in the tens of millions of dollars.

It is critical to know the requirements to properly file a *qui tam* suit, as many cases fall apart for procedural reasons, and the whistleblower is entitled to nothing. Many *qui tam* cases involve fraudulent activity known only to company insiders, however these employees are often unaware of the ability to file a whistleblower complaint. It is therefore incumbent on counsel to advise their clients on whether they may have a meritorious whistleblower claim.

California's False Claims Act

Of note, California, like many other states, has a largely equivalent false claims act designed to remedy situations where funds allocated by California's state government are misused. (Cal. Stat. § 12650 et seq.) This might include, for instance, California Medicaid funds or money allocated to state contractors to build necessary infrastructure. California's FCA also allows private individuals to file suit on behalf of the State and covers a wide range of fraud, though like the federal FCA, specifically exempts tax fraud. (Cal. Stat. § 12651(f).)

Often, state and federal FCA matters can overlap and may be filed as one action. Similar to the federal FCA, a successful whistleblower receives between 15% and 33% of the recovery if the State settles or intervenes; and between 25% and 50% of any recovery if the State declines and the whistleblower pursues the case on their own. These amounts may be reduced if the whistleblower planned or initiated the violation. Additionally, under the California FCA, both the State Attorney General and a local affected prosecuting authority (i.e., a district attorney's office) may intervene

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and take over the case after investigating the allegations.

Further, California has the California Insurance Fraud Prevention Act (IFPA). (Ins. Code, § 1871.7.) Unlike the FCA, the IFPA allows whistleblower complaints for fraud on private insurance companies in California. This expands the scope of whistleblower claims in California beyond both government programs and healthcare insurance. Much like the FCA, IFPA provides for treble damages plus a penalty of $5,000 to $10,000 for each false claim. Additionally, the cases are initially filed under seal and investigated by the California Attorney General. A whistleblower is entitled to 30% to 50% of any amount paid by the defendants. This amount is reduced to 0-10% if the court finds the complaint is based primarily on public information. Similarly, the IFPA provides for protections from retaliation.

SEC whistleblower program

When an individual, such as an employee, is aware of corporate misconduct, practitioners should evaluate the circumstances of the employment case with federal securities laws. As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Congress enacted the Securities and Exchange Commission Whistleblower Program, designed to expand protections for whistleblowers and encourage individuals with knowledge of securities law violations to bring that information to the SEC.

The scope of the SEC's authority is broad and covers many classic fraud schemes employees uncover in the course of their duties. Most misconduct at companies governed by the SEC concerns the company's income or revenue and therefore directly relates to potential securities law violations. Because individuals may be unaware of the downstream effects such conduct can have at a company, lawyers should assess whether any complained-of internal activity may violate securities laws.

A recent example of the reporting of such corporate malfeasance was former Facebook product manager Frances Haugen. Haugen has made clear she filed whistleblower tips as Facebook's alleged misconduct could represent material misstatements on Facebook's SEC filings. (See Washington Post, *Former Facebook employee Frances Haugen revealed as 'whistleblower' behind leaked documents that plunged the company into scandal,* Oct. 4, 2021 https://www.washingtonpost.com/technology/2021/10/03/facebook-whistleblower-frances-haugen-revealed/ (last visited Oct. 25, 2021).)

Whistleblower cases are filed as a "tip, complaint, or referral" using the SEC's TCR forms and procedures. SEC whistleblower cases are not filed in court. The SEC receives thousands of tips a year, the majority of which are filed by unrepresented individuals – and most do not result in either significant investigation or penalties levied against the defendant. If represented by an attorney, SEC whistleblowers may remain anonymous, though if there is a lawsuit related to the tip, the SEC may request that the whistleblower provide evidence at trial.

If a whistleblower's information leads to a monetary sanction of $1 million or more, the whistleblower is entitled to an award of between 10% and 30% of the amount, and whistleblower counsel is typically paid a contingency fee from this award. Critically, a whistleblower must affirmatively apply for such an award, so it is of the utmost importance that whistleblower counsel monitors the SEC's published covered actions to protect the client's interests and potential for an award.

IRS Whistleblower Program

The Tax Relief and Health Care Act of 2006 expanded the existing IRS whistleblower program to establish a dedicated office within the IRS to work with whistleblowers and to provide eligible whistleblowers with a share of government recoveries. (See Internal Revenue Code § 7623(b).) The IRS Whistleblower Office requires tipsters to use IRS Form 211 to submit a referral and apply for an award for original information. (See https://www.irs.gov/pub/irs-pdf/f211.pdf.) As with an SEC tip, an IRS whistleblower does not file a case in court. Likewise, a whistleblower must disclose his identity to the SEC but may remain publicly anonymous as long as he is represented by an attorney. If, however, the IRS pursues the case in court, the identity of the whistleblower may be disclosed as part of those proceedings.

The IRS pays monetary awards of between 15% and 30% of the total proceeds the IRS collects if the IRS receives a recovery based on information provided by a whistleblower. The IRS must pay an award if the amount of fraud identified by the whistleblower exceeds $2,000,000. If the taxpayer committing fraud is an individual, he or she must have at least $200,000 in gross income. No reward is paid to the whistleblower until the IRS actually collects the taxes, penalties, and interest owed, and all the statutory periods for a taxpayer to file a claim for a refund have expired.

FIAFEA/FIRREA

The Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), passed following the savings and loan crisis of the 1980s, provides civil penalties for the violation of certain predicate criminal statutes, including mail and wire fraud, if the violation effects a federally insured financial institution. DOJ has used FIRREA as a primary tool in combating financial fraud over the past ten years – the multi-billion-dollar cases related to residential mortgage-backed securities (RMBS) fraud were all pursued by DOJ as FIRREA cases. (See e.g., https://www.justice.gov/opa/pr/general-electric- agrees-pay-15-billion-penalty-alleged-misrepresentations-concerning-subprime (last visited Aug. 17, 2021).)

But FIRREA can implicate any fraud that utilizes federally insured financial institutions in some way; for example, Volkswagen's diesel emission settlement included a $50 million FIRREA penalty. (See https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-

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six (last visited Aug. 17, 2021).) Whistleblowers can bring claims under FIRREA pursuant to a companion statute, the Financial Institutions Anti-Fraud Enforcement Act (FIAFEA). (12 U.S.C. § 4201 et seq.)

Whistleblower cases under FIAFEA are unique. They are not filed as federal cases as in the FCA, nor are they filed as comparatively informal tips. Instead, the whistleblower serves DOJ with a sworn declaration outlining the evidence and facts supporting the allegations of fraud.

A FIAFEA whistleblower may receive a reward of between 20% and 30% of the first $1,000,000 recovered, 10% to 20% of the next $4,000,000 recovered, and 5% to 10% of the next $5,000,000 recovered, up to a maximum of $1.6 million. (*Id.* § 4205(d).) FIAFEA contains many of the same limitations for recovery as the FCA, so it is important to investigate these requirements before submitting your client's sworn declaration.

NHTSA Whistleblower Program

The National Highway Traffic Safety Administration (NHTSA) also has a whistleblower program. (49 U.S.C. § 30172.) Unlike other whistleblower programs, whistleblowers must be an "employee or contractor of a motor vehicle manufacturer, part supplier, or dealership." NHSTA will keep the whistleblower's information confidential. The whistleblower tips can be for vehicle safety defects, noncompliance with the Federal Motor Vehicle Safety Standards, and violations of the Vehicle Safety Act. This includes both safety defects that are unknown to NHTSA or the failure to properly report or recall a known safety defect. A successful whistleblower is entitled to 10% to 30% of any recovery. Additionally, whistleblowers receive protection from retaliation. NHTSA has yet to issue regulations and has only issued one whistleblower award, so many nuances of the program are not yet set.

FinCEN Whistleblower Program

The newest whistleblower program is so new that it's not yet clear whether it's fully operational. As part of the Anti-Money Laundering Act of 2020 (AMLA), the government established within the Treasury Department's Financial Crimes Enforcement Network (FinCEN) a whistleblower program (see NDAA Section 6314) incentivizing whistleblowers to bring forward information about violations of the Bank Secrecy Act. The BSA is generally comprised of the following parts of the U.S. Code: (i) 12 U.S.C. § 1829b ("retention of records by insured depository institutions"); (ii) 12 U.S.C. Part 21 ("financial recordkeeping," sections 1951-1959); and (iii) 31 U.S.C. subchapter II ("records and reports on monetary instruments and transactions," sections 5311-5314, 5316-5322).

Potential whistleblowers may include bank employees or victims of fraudulent schemes and often relate to failures by banks to have effective anti-money-laundering compliance and/or "know your customer" programs. For instance, a bank employee fired for raising internally a bank's failure to fulfill its "Know Your Customer" and "Anti-Money Laundering" obligations may have an employment case as well as a colorable claim under the FinCEN whistleblower program.

Under the new FinCEN Whistleblower Program, an eligible whistleblower can receive an award of up to 30% of the net fines or penalties levied against the defendant over $1 million based on information provided by the whistleblower. Although awards of *up to* 30% are authorized, the exact percentage is discretionary. Like Dodd-Frank, the AMLA directs FinCEN to determine award amounts based on several factors designed to maximize the awards given to those that provided substantial assistance.

Treasury has not yet issued guidance or regulations outlining all aspects of the program, but certain features have been established by statute. Of note to practitioners, whistleblowers may remain anonymous, but to do so, they must be represented by an attorney. As this program develops, it will almost certainly prove both critical to curbing financial fraud schemes and extremely lucrative for courageous whistleblowers.

Who can be a whistleblower?

The central-casting version of a whistleblower is a company insider who, by either happenstance or personal investigation, uncovers evidence of corporate wrongdoing by his employer. While this situation can and does happen (often), it by no means covers the gamut of whistleblower cases. Under most whistleblower statutes, a whistleblower can be anyone with information about fraud. He need not be an "insider," or a former employee; nor does a whistleblower need to be a personal victim of fraud to bring a successful case or tip.

For example, there have been successful FCA whistleblowers that analyze publicly available data to find instances of fraud. He does not need to be an American citizen or even an individual – entities (including competitor companies or unions) can and do become whistleblowers under certain statutes. Even someone involved in the misconduct may be eligible for a whistleblower award under certain circumstances. The most common situation, however, is an individual at a company who becomes aware that fraudulent activity has taken place. While often this may mean he or she has access to documentary evidence, it is not necessary. Many successful whistleblower cases have been brought by individuals who heard information "at the watercooler."

That is not to say there are no limitations on becoming a whistleblower. Each statute bears its own set of procedural requirements to ensure a whistleblower is eligible for a share of the recovery. For instance, the FCA places certain limitations on cases based on information that was "publicly disclosed" – unless the whistleblower is an "original source" of that information. Likewise, if a whistleblower is second-in-time to file an FCA complaint, he is barred from recovering under the statute regardless of the quality of information brought forward.

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Retaliation and other risks

Becoming a whistleblower is not without risk, chief of which is retaliation by the defendant. Retaliation against current employees is the most common, and it can take many forms: being fired, demoted, transferred, or harassed by superiors. Similarly, even non-employees may suffer industry blacklisting or similar attacks designed to punish someone for bringing forward information about corporate fraud.

Thankfully, most federal and state whistleblower laws offer protections to whistleblowers in the form of both economic and non-economic remuneration. In fact, if your client is experiencing retaliation for raising issues of fraud, your best protection may be to file a whistleblower complaint. For instance, Dodd-Frank offers robust protections for whistleblowers, but the protections only take hold once a tip is filed. Employees subject to retaliation may be entitled to significant statutory awards, including double back pay, reinstatement to the employee's previous position, a promotion which was unfairly denied, and other remedies such as pain and suffering. (See Dodd-Frank section 921.)

Retaliation is unfortunately not the end of the risks potential whistleblowers must consider. Practitioners must be mindful to not inadvertently engage in defamation or extortion when negotiating a whistleblower's employment claims. Additionally, attorneys must consider protections that companies may impose against theft of corporate information, though most courts will recognize a public policy interest in providing evidence of fraud to the government. It is also critically important to consider the defendant's attorney-client privilege when assessing the evidence a client brings to the table. It is important to consult with an experienced whistleblower attorney to assist in navigating these challenging issues.

Successful whistleblowing cases

It is important to recognize that whistleblowing is unlike most other areas of the law. The lawyer is not starting the adversarial process; rather, the lawyer is trying to get a party that should be friendly, government prosecutors, interested and motivated. Therefore, the way a case is framed, including appropriate candor on the limitations and risks, as well as to whom the case is pitched, are unique but critical strategic considerations. Whistleblowing cases may seem easy. You put together allegations, give them to the government, let the government do all the work, and share a large recovery with your client. While that certainly can happen, it is not uncommon for the government to not pursue potential significant claims because they were presented improperly or framed incorrectly. Given the large upside as well as potential negative repercussions for the client, it is important to fully consider the numerous strategic decisions that go into filing a whistleblower case.

Conclusion

When leveraged correctly, federal and state law enforcement can bring to bear incomparable power to fight corporate fraud and vindicate the rights of whistleblowing clients. Yet whistleblower programs are fraught with procedural landmines that can derail a fraud case before it starts. Don't leave money on the table – make sure to assess all avenues to help your client receive the largest award possible for blowing the whistle on fraud.

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