Even Criminals Can Be Whistleblowers:
An Overview of the White Collar Whistleblowing Tightrope in New York

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Famously, Bradley C. Birkenfeld was awarded the largest whistleblower award in U.S. history – a $104 million payout from the IRS in 2012. Birkenfeld was credited with providing information about a UBS program designed to help US taxpayers hide assets in Switzerland to the IRS that reportedly led to the recovery of $5 billion in unpaid taxes and $780 million in fines to UBS to resolve criminal charges. The most shocking part of Birkenfeld's story is not the amount he was paid – it was that he was charged, convicted and sentenced to forty months in prison for his own role in the scheme that he reported to the IRS.

Whistleblowers in New York often have varied reasons to call attention to actions they believe are violative of state or federal laws. Whether for non-monetary or monetary reasons, these individuals may be protected by the anti-retaliatory provisions of New York Labor Law § 740 ("Section 740"), the Sarbanes-Oxley Act of 2002 ("SOX"), Internal Revenue Code 26 U.S.C.S. § 7623 (b) and possibly the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Whistleblower laws without question place a tightrope between employer and employee that can be treacherous for both and potentially lucrative for the employee in a number of ways. The subject companies, on the other hand, may be facing an expensive road ahead.

Though often described as a "whistleblower law," Section 740 provides protection from retaliation for blowing the whistle but does not provide any incentives. New York has a separate False Claims Act, and the Tax Department provides separate incentives for informing of potentially illegal conduct. SOX provides both incentives as well as retaliatory protection, as does Dodd-Frank. This article summarizes relevant provisions of various whistleblower laws for the New York attorney practitioner representing "white collars" by identifying potential laws at issue, analyzing recent case law, and relating "best practices" as well as potential pitfalls.

I. When Crime Pays: Convicted Criminals as Whistleblowers?

The whistleblower statute under which Bradely C. Birkenfeld reported to the IRS does not prohibit payouts to individuals who, like Birkenfeld, were involved in the wrongful conduct. It only limits payouts to those "who planned and initiated actions" that led to a violation of the law and prevents payouts to anyone "who is convicted of criminal conduct arising from" that role. 26 U.S.C.S. § 7623(b)(3) Since, in the IRS's apparent view, Birkenfeld did not plan or initiate the actions that led to the violations, he was permitted to recover.

Dodd-Frank's whistleblower provision is harsher on criminals and casts a wider net in its prohibitions and exclusions. Under Dodd-Frank, "no award . . . shall be made . . . to any whistleblower who is convicted of a criminal violation related to" 15 USCS § 78u-5(c)(2)(B)

securities enforcement proceeding which results in a collection of sanctions. (emphasis added) This language is significantly broader than the IRS's "planned and initiated" language. While the IRS seems to require an element of leadership and/or scienter, the Dodd-Frank language seems to only require involvement. Though it remains to be seen just how this language will be interpreted in prohibiting a whistleblower from collecting an award, it would appear that Birkenfeld has 104 million reasons to feel lucky that he reported on a tax fraud rather than a securities one.

On the other hand, that's not the case with the False Claims Act, which broadly provides several circumstances in which a relator cannot file or pursue a *qui tam* action, including if the relator was convicted of criminal conduct arising from his or her role in the FCA violation. § 3730(d)(3). New York City and New York State False Claims Acts also have numerous broad prohibitions and/or reduction against those criminally charged or convicted from collecting. NYC False Claims Act § 7-804(i)(3). SOX only provides protections, no incentives, so criminal or no criminal, no one gets a whistleblower award from SOX.

II. Incentives and Protections Under Various Statutes Available to New Yorkers

A. Incentives to File

1. False Claims Act Statutes

Federal

The oldest statute under which whistleblowers have been able to obtain an award is the Federal False Claims Act, first established in 1863 and significantly amended in 1986 to provide for more streamlined processing and more generous awards, among other changes. Under the current regime, individuals with "original information" called "relators" must first inform their local U.S. Attorney General of the eminent filing of their *qui tam* action, which they then file under seal in U.S. Federal District Court. If the U.S. Attorney decides to join the action on behalf of the U.S. Government, they are termed to have intervened, and will then prosecute the action. If they choose not to, the relator may prosecute the action on their own. The False Claims Act (FCA), 31 U.S.C. §§ 3729 – 3733.

State

New York has a statutory False Claims Act, N.Y. Financial Law §§ 187-194, which operates similarly to the Federal False Claims Act, imposing

> liability on any person who (1) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval to a state, (2) knowingly makes, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the state, or (3) conspires to defraud the state by getting a false claim allowed or paid.

New York v. Amgen, Inc., 652 F.3d 103, 108 (1st Cir. 2011), *cert. dismissed, Amgen, Inc. v. New York*, 132 S. Ct. 993 (2011). New York City's False Claims Act, which actually predates the State's statutes, Admin. Code §§ 7-801 to 7-810, (Local Law 53 of 2005, amended by Local Law 34 of 2012), is similarly patterned on the Federal statute and was amended in 2012 to br[ing] the City's law into closer conformance with the New York State False Claims Act." *See* The City of New York, NYC False Claims Act (http://www.nyc.gov/html/law/html/fca/fca.shtml, viewed March 18, 2014).

New York's False Claims Act has been significantly limited to issues of primarily workplace health and health care more generally (Medicaid fraud, etc.). Very recently, New York Attorney General Eric Schneiderman has brought an action against Sprint for alleged unpaid state sales tax. It is notable to mention that Mr. Schneiderman initially created the New York False Claims Act legislation.

City

New York City's False Claims Act works in a similar way as the other two regimes, except the District Attorney is informed of the existence of the action. The statute requires that the violator "knowingly" present, cause to present or conspire to present a false claim to the City for payment. *See* § 7-803(a)(1). It provides for treble damages to the City and a civil penalty of $5,000 to $15,000 per violation. *See* § 7-803(a)(7).

The complaint is filed directly with the City's corporation counsel, who then has 180 days to inform whether they will take on the complaint or not. If not, the City may designate the complaintant as a special corporation counsel for purposes of filing the complaint or simply designate the complaintant with permission to file. The City has wide latitude to decline the filing of any complaint, including whether the City determines that the complaint could result in an interpretation of law that would "result in significant cost to the city," and whether filing the complaint would "interfere with a contractual relationship between the city and an entity providing goods and services..." Not surprisingly, as of 2010, the City chose not to pursue any of the 23 proposed complaints the office received. *See* Report of the Governmental Affairs Division: Committee of Governmental Operations, Proposed Int. No. 479-A, pg. 8 (April 16, 2012).

2. SOX

SOX was enacted into law in 2002 after the very public corporate frauds involving Enron, WorldCom and Tyco in an effort to protect investors and the markets that rely on accurate accounting to establish properly valuations. One of the most public events that predated SOX was the failure Enron, where Arthur Andersen (one of the "big five" accounting firms at the time) helped perpetrate wide-spread fraud and was found guilty for criminal charges of crimes that were only realized upon Enron's collapse.

SOX changed the corporate landscape by establishing, among other things, obligations on behalf of individuals with knowledge (including attorneys) to report up and report out to the U.S. Government accounting violations by publicly traded companies and certain other entities and

individuals, who work for such companies. In exchange, SOX provides protection to these whistleblowers in certain circumstances, but provides no monetary incentives, creating a stick but no carrot situation.

3. Dodd-Frank

Dodd-Frank was enacted after the "Great Recession" that spanned 2007 through 2009 and the substantial "bailouts" received from banking entities that were termed "too big to fail." Dodd-Frank provides rewards for individuals who provide "original information" to the SEC Office of the Whistleblower, DOJ or Commodities Futures Trading Commission relating to violations of the securities laws, Foreign Corrupt Practices Act or commodities laws, One of the most important features of Dodd-Frank and the award system for whistleblowers who provide original information to the SEC that leads to a penalty for securities violations under certain circumstances. There are also anti-retaliatory provisions in Dodd-Frank.

The Dodd-Frank Wall Street Reform and Consumer Protection Act contains a whistleblower incentive program, similar in some ways to the Federal False Claims Act. It provides incentives to whistleblowers who provide "original information" regarding violations of the securities laws, under specific circumstances. Section 21F, 15 U.S.C. § 78u-6.

Under Dodd-Frank, whistleblowers who provide the SEC with original information that leads to a successful enforcement action resulting in $1,000,000 or more in monetary sanctions may be eligible for a reward of between 10% and 30% of the amount of the monetary sanction collected. This money is paid from the Investor Protection Fund ("IPF"), which is a separate fund created for the purpose of paying rewards to whistleblowers under this provision. Congress created the IPF to ensure that the rewards paid to whistleblowers would not reduce the amount available to compensate victims of the fraud or other securities law violation, although under Dodd-Frank, a whistleblower does not need to be an employee, independent contractor, or related to the company in any way to blow the whistle.

4. Internal Revenue Code 7623 (a) and (b)

The IRS Whistleblower statute provides for whistleblowers who blow the whistle on persons who fail to pay the tax that they owe. If the IRS uses information provided by the whistleblower, it can award the whistleblower up to 30 percent of the additional tax, penalty and other amounts it collects. Internal Revenue Code 26 U.S.C.S. § 7623.

B. Protection for Whistleblowers

Whether whistleblowers do it for moral reasons or for the money, there are protections in place in case they suffer adverse employment action as a result of their reporting. Depending on which statute an employee chooses to sue under or qualifies for, their rights, remedies and potential costs vary. Nothing in whistleblower laws will protect a person charged with a crime, although it obviously may help with sentencing, as cooperation would help.

1. New York Labor Law § 740 and New York

New York Labor Law § 740 is broadly defined to capture any private employee[1] who works for remuneration for any employer, including any "public body" (federal or state elected body or member, judiciary, administrative or law enforcement agency) who is discharged, suspended, demoted "or other adverse employment action ... in terms and conditions of employment." *See* § 740(1)(a), (b), (d) and (e). However, § 740 actually was intended only to apply to instances where the employer fails or refuses to remediate a violation of law that poses a substantial and present danger to the public health or safety." *Id.* at (2)(a). In *Leibowitz v. Bank Leumi Trust Co.*, the Second Department presented a typical situation where § 740 was intended to apply:

> Section 740 was intended to deal with a situation where, for example, an employee at a hazardous installation notices a dangerous condition, reports it, but finds that no action is taken, then reports the risk to the authorities and is fired for doing so.

Leibowitz v. Bank Leumi Trust Co., 152 A.D.2d 169, 176 (2d Dep't 1989) (internal citations omitted).

The statute of limitations is one year from the date of the alleged retaliatory personnel action. Labor Law § 740(4)(a). Section 740 enumerates the legal defense to any retaliatory action as being that the personnel action was predicated upon grounds other than the employee's exercise of rights pursuant to § 740. 740(4)(c). There is an attorneys' fee shifting provision, for the employee and the employer. *See* §§ 740(5)(e) and (6).

2. SOX

Section 806 or SOX, 18 U.S.C. 1514A, provides whistleblower protection to employees who report up or out regarding accounting violations. § 1514A is limited to companies with publicly registered securities or who are required to file pursuant to Section 15(d) of the Securities Exchange Act of 1934 or are "nationally recognized statistical rating organizations." *See* § 1514A(a). These companies cannot cause adverse employment action upon an employee who acts lawfully to provide information about which the employee "reasonably believes" constitutes a violation of sections 1341, 1343, 1344, or 1348 (18 USCS § 1341, 1343, 1344, or 1348), the SEC rules or regulations or any provision of federal law relating to fraud against shareholders. *See* § 1514A(a)(1).

An employee who believes they have suffered adverse employment action in violation of SOX's whistleblower protection must first file with the Secretary of Labor within 180 days after the adverse employment action. *See* § 1514A(b)(1)(A), (2)(D). The Secretary of Labor has 180 days to issue a decision. *Id.* at § 1514A(b)(1)(B). If no decision is forthcoming within that time, the employee may file the complaint in Federal District Court. *Id.*

[1] Public employees are covered by the similar New York Civil Service Law § 75-b.

Under SOX, the employee may recover "make whole" relief, including compensatory damages, reinstatement, back pay with interest and compensation for costs, expert fees and reasonable attorneys' fees. *Id.* at (c). No provision is made for the employer's attorneys' fees in case an action is dismissed. Importantly, SOX's whistleblower protections do not supersede any other statutory rights or collective bargaining agreement held by the employee. *Id.* at § 1514A(d).

3. Dodd-Frank

Whistleblowers are protected by Dodd-Frank from adverse employment action for providing information to the Commission that are covered by Dodd-Frank or by SOX. *See* 15 U.S.C. § 78u-6(h)(1)(A). Employees may bring their action directly in Federal District Court. Id. at (h)(1)(B)(i). Such an action may be brought within 6 years of the violation or the three years after discovery of "facts material to the right of action are known or reasonably should have been known by the employee." *Id.* at (h)(1)(B)(iii).

An employee who suffers adverse employment action may be entitled reinstatement, double back pay with interest, and their costs, expert fees and reasonable attorneys' fees. *Id.* at (h)(1)(C). No provision is made for the employer's attorneys' fees in case an action is dismissed. These Dodd-Frank provisions do not supersede any other rights held by the employee pursuant to Federal or State law, or by collective bargaining agreement. *Id.* at (h)(3).

4. False Claims Act

Per the False Claims Act statute:

> "Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter."

FCA § 3730 (h).

Relief includes all the typical employment related damages, including 2 times the amount of back pay. *Id.* New York City's False Claims' Act follows this model as well. See § 7-805.

5. Internal Revenue Code 26 U.S.C.S. § 7623

Subject of recent debate and reporting relating to the IRS, unlike other whistleblower statutes, the Internal Revenue's whistleblowing law, 26 U.S.C.S. § 7623, does not protect whistleblowers against retaliation. In some criminal cases, the IRS is prevented by grand jury

secrecy laws from knowing the extent of a whistleblower's contribution. There may be witness tampering protections under Obstruction of Justice and Civil Rights laws.

III. Recent Developments: New York Labor Law Whistleblower Cases

This author is unaware of any reported cases involving successful securities cases brought pursuant to the New York State or New York City whistleblower statutes. The New York State statute overwhelming deal with issues of work place safety, while the analogous Labor Law § 741 relates to employees in the health care industry who provide health care services. *See Reddington v Staten Is. Univ. Hosp.,* 11 N.Y.3d 80, 89 (2008).

IV. Recent Developments: Dodd-Frank Whistleblower Cases

During the 2013 fiscal year, the number of whistleblower tips received by the Commission grew from the year before. According to the Commission, 2013 saw the number of tips increase to 3,238 from 3,001 tips which were received in 2012.

Currently, California, New York, Florida and Texas lead the country in whistleblower tips filed. Californians filed 375 tips to the SEC, while New Yorkers filed 215. Following New York were Florida and Texas with 187 and 135 filings, respectively.

The year 2013 saw substantially more money awarded in gross than did 2012, the inaugural year of the whistleblower reward program. During 2013, the Securities and Exchange Commission awarded whistleblowers $14,831,965, due in large part to the October 1, 2013 award of $14 million to a single whistleblower.

The $14 million award stemmed from the uncovering of an alleged fraud operated by Anshoo Sethi and his two companies operating out of Chicago. Sethi reportedly duped approximately 250 Chinese investors out of more than $155 million. Investors were allegedly told that they were funding the development of a hotel and conference center, but failed to disclose that he lacked the necessary building permits and that his representations of having the support of major hotel chains were false. Supposedly investors were led to believe that their contributions would boost their chances at obtaining a green card through a government program designed to offer U.S. residency in exchange for job-creating investments, even though the documentation that was given to the immigration authorities was fake.

Just this past April, the SEC has announced plans to increase the award paid to the very first whistleblower to collect under the program by $150,000. That individual has been awarded 30% of the amounts recovered, which initially stood at $150,000, yielding a $50,000 payout. However, as additional monies are collected, the whistleblower, who provided information leading to the uncovering of a multi-million dollar fraud, potentially stands to collect significantly more.

V. Recent Developments: SOX Securities Cases

Very recently, the U.S. Supreme Court held that employees of private contractors and subcontractors who provide services to publicly traded companies including mutual funds are protected by the whistleblower provisions of Sarbanes-Oxley Act of 2002 ("Act"), the United States Supreme Court held in its decision dated March 4, 2014. *See* 18 U.S.C. § 1514A; *Lawson v. FMR LLC,* --- S. Ct. ---, 2014 WL 813701, *7, 2014 U.S. LEXIS 1783 (U.S. 2014). The majority decision, written by Justice Ginsburg, relied on the language of the Act, applying "their ordinary meaning." *Lawson*, *7. Separately, the Court in a minority decision cited the legislative history for the Act, but this part was not joined by Justices Scalia and Thomas, and therefore was not a part of the holding of the majority.

The case involved two employees who formerly worked for "privately held companies that provide advisory and management services to" Fidelity funds. *Id.* at *6. One of the employees worked for Fidelity Brokerage Services, LLC, a subsidiary of the Respondents, for 14 years. *Id.* This employee alleged that she suffered a series of adverse employment actions, eventually being constructively discharged, after raising concerns about certain cost accounting methodologies that may have overstated expenses associated with operating the mutual funds. *Id.* The second employee worked for Fidelity Management & Research Co. and later by a different subsidiary, FMR, Co., Inc. for eight years, and alleged he was fired after raising concerns about inaccuracies in a draft SEC registration statement concerning certain Fidelity funds. *Id.*

The holding of the Supreme Court has a significant impact in the area of whistleblower protections. This decision solidifies whistleblower protection to employees of contractors. This is significant for mutual funds, which the Supreme Court noted do not generally employ any of their own employees and are "managed, instead, by independent investment advisors. *Id.* at *12.

The Court held that the plain language of the Act and the treatment of a similar whistleblower provision protecting employees who complain about violations relating to air carrier safety supported its conclusion. The Act stated "[n]o [public] company… or any officer, employee, contractor, or subcontractor … may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against any employee in the terms and conditions of employment because of [whistleblowing or other protected activity]." *Id.* at *3 (citing § 1514A(a) (2006 ed.)).

VI. Best Practices: What is in a Good Whistleblowing Complaint?

SEC whistleblower complaints are filed using SEC Form TCR, meaning "Tip, Complaint or Referral." A copy of the Form TCR is annexed hereto as Exhibit __. While filling out a TCR and submitting it is a relatively simple process, effective filing (like effective advocacy) requires more. An effective filing is to serve the case to the Commission "on a silver platter." The keys to doing this are: 1) presentation of the elements necessary to prove a violation of the applicable law/rule; 2) accumulation, understanding and presentation in a "user- friendly" format as many supporting documents[2] as possible; 3) presenting the damages "at large" caused by the violation;

[2] Though not specifically addressed in this article, one should always consider the potential ethical, civil and criminal ramifications in the accumulation of documents. Though not a whistleblower, it is worthy of note that a

and 4) explaining the location and/or custodian of any other necessary records, record retention policies, employee and supervisory manuals, as well as explaining unique computer systems (by name) and how they work.

A whistleblower can only receive an award if there is a successful action brought against the bad actor, so it is in their best interest to ensure that the Commission is successful. Therefore, (though not literally as with qui tam and the False Claims Act), a strong advocate will put themself in the shoes of the government when preparing the TCR and appreciate what the Commission will need to do to prove its case, as well as if this firm has ever been sanctioned for the conduct previously.

Generally, whistleblowers are rewarded for promptly reporting and awards can be reduced if they delayed reporting, particularly if they did so for personal reasons. Because of record retention policies, the availability of critical documents illustrative of the wrongful conduct may be short lived. Additionally, voice recordings may also be deleted in a matter of weeks or even days. Therefore, the whistleblower's window to collect valuable evidence may be small. Providing the Commission with the physical evidence or its location is a way to provide them with a "treasure map" of where evidence is and how to get it. This will enable the Commission to generate and serve a targeted subpoena quickly and effectively.

Finally, the damages "at large" caused by the violation will be a key factor to determine the sanctions imposed. That makes the "value of the case" very important to the Commission and to the whistleblower. The potential Commission incentive for imposing punitive sanctions is also part of this analysis. If the target firm or company is a recidivist, this fact will more than likely be a factor in the Commissions analysis when determining the amount of sanctions. It is also helpful, after you file, to reach out to a staff member who may have handled previous similar cases involving the target or generally.

VII. Potential Pitfalls to Avoid

A. Labor Law § 740

The employee must choose their remedies when they sue under Labor Law § 740. They must choose this or a different statute, as § 740(7) requires a waiver of these rights. This waiver has been limited by New York Courts to actions arising from the same retaliatory action. *See Strattner v. Cabrini Med. Ctr.*, 257 A.D.2d 549 (1st Dep't 1999); *Pipia v. Nassau County*, 34 A.D.3d 664 (2d Dep't 2006); *Pipas v. Syracuse Home Ass'n*, 226 A.D.2d 1097 (4th Dep't 1996), *app den'd*, 649 N.Y.S.2d 377; *McGrane v. Reader's Digest Ass'n*, 863 F. Supp. 183 (S.D.N.Y. 1994) (plaintiff abandoned rights under contract by choosing to sue under § 740). Federal courts have held, however, that § 740 does not waive federal statutory rights because "an effort by New

former hedge fund analyst was charged with computer trespass, criminal possession of computer related material and unauthorized use of secret scientific material in connection with his alleged theft of documents related to two quantitative trading models. *See*, Nathan Vardi, *Analyst Charged With Stealing Quant Trading Models From Major Hedge Fund*, Forbes.com, February 19, 2012, http://www.forbes.com/sites/nathanvardi/2014/02/19/analyst-charged-with-stealing-quant-trading-models-from-major-hedge-fund.

York to condition a state law right on the waiver of arguably unrelated federal rights would raise serious constitutional questions." *See Reddington v. Staten Island Univ. Hosp.*, 373 F. Supp. 2d 177, 187-188 (E.D.N.Y. 2005); *Collette v. St. Luke's Roosevelt Hosp.*, 132 F. Supp. 2d 256 (S.D.N.Y. 2001).

Secondly, while the whistleblower must merely allege the violation of a law in the complaint, the plaintiff will need to present actual proof that the employer engaged in a violation of law, either through summary judgment or trial. In *Bordell v. GE*, the Court of Appeals affirmed the trial court's grant of partial summary judgment for the plaintiff's claim premised on Labor Law § 740, because the plaintiff did not present "proof of an actual violation" that was complained of and allegedly led to the plaintiff's adverse employment action (discharge in this case). *See Bordell v. GE*, 88 N.Y.2d 869 (N.Y. 1996); *Khan v. State Univ. of N.Y. Health Sci. Ctr.*, 288 A.D.2d 350 (2d Dep't 2001).

The violation of law complained of must rise to the level such that it creates and presents a substantial and specific danger to the public health or safety, or which constitutes health care fraud." § 740(2)(a). The New York Court of Appeals specifically noted that "fraudulent billing is not the type of violation which creates a "substantial and specific danger to the public health and safety." *Remba v. Federation Employment & Guidance Serv.*, 76 N.Y.2d 801, 802 (N.Y. 1990); *See also, Fitzgibbon v. Sanyo Sec. Am., Inc.*, 92 Civ. 2818 (RPP), 1994 U.S. Dist. LEXIS 8386, *15 (S.D.N.Y. June 22, 1994) ("the whistleblower law does not protect threats to disclose unlawful activities, such as violations of securities laws"). However, in 2006 the law was amended to provide for a cause of action for health care fraud, which is defined by the N.Y. Penal Code § 177 to relate to providing false information for the purpose of obtaining payments the person is not entitled to.

B. Dodd-Frank

If a whistleblower provided original information and is eligible for an award, the whistleblower must affirmatively apply for the award. The SEC will NOT come find the whistleblower or their attorney.

The SEC will however post a notice of all Commission actions that resulted in monetary sanctions of more than $1,000,000 and for which a whistleblower provided original information on the website for the Office of the Whistleblower.[3] Such a posting is called a Notice of Covered Action. Following posting of the Notice of Covered Action, it is up to the whistleblower to apply for their award. Failure to apply will result in a whistleblower missing out on their award.

Finally, a whistleblower could potentially run the risk of waiving his or her right to claim an award as the result of a whistleblower action if the whistleblower entered into an agreement with the target firm that provided a full release to all claims. Although it has not been addressed under Dodd Frank, federal courts have addressed the issue of releases repeatedly with respect to *qui tam* actions under the FCA. *See, United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953

[3] The Office of the Whistleblower website address is http://www.sec.gov/whistleblower.

(9th Cir. 1995); *United States ex rel. Radcliffe v. Purdue Pharma L.P.*, 600 F.3d 319, 326 (4th Cir. 2010); *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1168 (10th Cir. 2009); *United States ex. rel. Nowak v. Medtronic, Inc.*, 806 F. Supp. 2d 310, 2011 U.S. Dist. LEXIS 82346 (D. Mass. 2011).

Under prevailing federal law, a release entered into by a relator (akin to a whistleblower) *pre*-filing cannot be enforced. The courts reason that public policy in favor of bringing frauds against the government (in the case of *qui tam*) mandates that such releases entered into *pre*-filing be deemed unenforceable, since enforcement of such agreements would disincentivize relators from bringing such frauds to the attention of the government. However, *pre*-filing releases may also be enforced "when ... the government was aware, prior to the filing of the *qui tam* action, of the fraudulent conduct represented by the relator's allegations." *Radcliffe*, 600 F.3d at 332-33. Generally, a release entered into by a relator *post*-filing would not present such an issue because the government would already be aware of the fraud, so it can be enforced against the whistleblower. This area of the law is ripe for change and should be reviewed carefully each time the situation presents itself.

C. Ethical Considerations for the Whistleblowing Attorney

As an attorney, one will likely be privy to a host of information about one's client, or in the case of in-house counsel, one's direct employer. This information received as a result of the attorney-client relationship is typically required to be held in the strictest of confidences, as required by the Rules of Professional Conduct ("RPC"). Therefore, attorneys who come into knowledge of something that if shared with the SEC, IRS, etc. could entitle them to a significant cash award as a whistleblower, can find themselves in an ethical quagmire. On one hand, the attorney stands to benefit substantially from disclosing this information. On the other hand, disclosure could run afoul of ethical obligations.

Recently, the New York County Lawyers Association's Committee on Professional Ethics (the "NYCLA CPE") tackled this and similar ethical considerations for attorneys who may find themselves in the position of *potential* whistleblower. In their formal opinion, the NYCLA CPE offered a good rule of thumb for practitioners: "[T]he disclosure of confidential information in order to collect a whistleblower bounty is unlikely, in most circumstances, to be ethically justifiable."[4] NYCLA Comm. on Prof'l Ethics, Op. 746 at p. 9. Even with respect to a former client, attorneys are held to owe a fiduciary duty to continue to maintain confidentiality. Attorneys may not breach that fiduciary duty for personal benefit. *Id.* at 14.

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[4] Generally, RPC 1.6 prevents lawyers from disclosing confidential information, even if such disclosure is made "in compliance with the SEC rules, if it does not fit within an exception under New York RPC 1.6 or is necessary to correct a fraud, crime or false evidence within the meaning of RPC 3.3." *Id.* at 10. While not setting out an official bright line, the NYCLA CPE also opined that "the potential payment of an anticipated whistleblower bounty in excess of $100,000 presumptively gives rise to a conflict of interest between the lawyer's personal interest and that of the client." *Id* at 11.

While all attorneys should generally abide by that rule of thumb, there are other considerations as well. Simply because one may be a licensed attorney, it is important to remember that the RPC may not apply if there is not an attorney-client relationship and the attorney is not "representing" the client. For example, the NYCLA CPE notes that "a corporate officer or compliance officer who happens to be a lawyer may not necessarily be representing a client in the performance of his duties, depending on the facts of the individual case." *Id.* at 14.