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# Confidentiality and Whistleblowing

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# CONFIDENTIALITY AND WHISTLEBLOWING\*

RICHARD MOBERLY\*\*

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## INTRODUCTION

Companies often require confidentiality from their employees. Maintaining corporate secrets helps protect intellectual property and gives a company an edge in a competitive marketplace.<sup>1</sup> The law generally supports this corporate desire for secrecy through statutes that prohibit disclosing trade secrets and by enforcing agreements requiring confidentiality from employees, even if those agreements bar employees from working for a competitor in order to keep the employees from revealing secrets.<sup>2</sup> As a result, companies have

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1. See Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 634–39 (1999); Stephen E. Darling, *Confidential Settlements: The Defense Perspective*, 55 S.C. L. REV. 785, 786–87 (2004).

2. See Bast, *supra* note 1, at 634–39.

utilized this legal structure aggressively to enforce trade secret laws, confidentiality agreements, and non-competition provisions.<sup>3</sup>

Whistleblowing can undermine confidentiality. An employee blows the whistle by revealing inside information—often organizational misconduct—to an outsider, such as a government regulator.<sup>4</sup> This disclosure, by definition, contains information the corporation would rather keep secret. Even if a company intends to correct and punish the underlying misconduct internally, whistleblowing can cause significant disruption because the company has to manage increased oversight from the government, bad publicity, and heightened public scrutiny.<sup>5</sup> Once the information is revealed externally, companies can have a harder time fixing the underlying problem because battle lines are drawn and positions become entrenched. Nevertheless, over the last fifteen years, the law—in particular federal law—has increasingly encouraged whistleblowing as a means of corporate oversight.<sup>6</sup> Newly enacted federal statutes broadly protect whistleblowers from retaliation, require corporate structures that make whistleblowing easier, and

3. Although no one disputes, for example, the right of Apple to keep the inner workings of the iPhone secret from its competitors, companies have claimed confidentiality over even the most mundane information. One extreme example might be the sandwich restaurant chain, Jimmy John's, which for years included a provision in its non-compete agreement claiming that items such as its menus and recipes were "Confidential Information" and prohibited its minimum-wage employees from working for another sandwich shop for two years after leaving Jimmy John's. See Emp. Confidentiality & Non-Competition Agreement, Jimmy John's (Nov. 29, 2013), <http://big.assets.huffingtonpost.com/FACExhibitA.pdf> [<https://perma.cc/N4DU-SKGG>] (providing a copy of Jimmy John's employment agreement). Notably, Jimmy John's states that it will not enforce these agreements anymore. *Jimmy John's Will Stop Making Low-Wage Employees Sign Non-Compete Agreements*, FORTUNE (June 22, 2016), <http://fortune.com/2016/06/22/jimmy-johns-non-compete-agreements/> [<https://perma.cc/J68Y-J8VT> (staff-uploaded archive)]. Other examples of non-compete agreements required of low-wage workers include restrictions on both pet sitters at Camp Bow Wow and warehouse workers Amazon. See Dave Jamieson, *Jimmy John's 'Oppressive' Noncompete Agreement Survives Court Challenge*, HUFFPOST (Apr. 10, 2015), [http://www.huffingtonpost.com/2015/04/10/jimmy-johns-noncompete-agreement\\_n\\_7042112.html](http://www.huffingtonpost.com/2015/04/10/jimmy-johns-noncompete-agreement_n_7042112.html) [<https://perma.cc/R28B-HXQS>].

4. See Janet P. Near & Marcia P. Miceli, *Organizational Dissidence: The Case of Whistle-Blowing*, 4 J. BUS. ETHICS 1, 4 (1985) (articulating the definition of whistleblowing that has since become widely adopted: "the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action").

5. See Richard Moberly, *To Persons or Organizations That May be Able to Effect Action: Whistleblowing Recipients*, in INTERNATIONAL HANDBOOK ON WHISTLEBLOWING RESEARCH 273, 277–78 (A.J. Brown et al. eds., 2014).

6. See *infra* Part I.

even reward employees who reveal certain types of corporate misconduct.<sup>7</sup>

In short, the federal government has aggressively encouraged employees to become whistleblowers. In response, corporations have tried to mitigate potential damage by relying on broad confidentiality provisions to discourage employees from revealing insider information. As a result, uncertainty abounds when the corporate desire for confidentiality clashes with the government's desire for employees to blow the whistle.

This Article is about the increasing tension between these countervailing trends. Part I describes the government's increased encouragement of whistleblowing during the last fifteen years. Part II demonstrates that corporations have responded to this trend by including in employment agreements broad confidentiality provisions that potentially limit the ability of employees to become whistleblowers. Finally, Part III explains recent moves by government agencies to regulate the breadth of these confidentiality provisions in order to mitigate their impact on whistleblowing. Ultimately, the Article concludes that the government's ability to rely on insiders to monitor organizational behavior by blowing the whistle will depend on the government's willingness to regulate the ability of an organization to protect its secrets through contract.

#### I. A (BRIEF) HISTORY OF WHISTLEBLOWING IN THE LAST FIFTEEN YEARS

Congress passed the Sarbanes-Oxley Act of 2002 in response to the corporate accounting scandals at companies such as Enron and WorldCom.<sup>8</sup> Because whistleblowers played a crucial role in revealing corporate misconduct at these companies (and because of the silence of many other employees in the face of clear illegalities), Sarbanes-Oxley included a number of provisions that, when taken together, clearly attempted to more assertively encourage whistleblowers.<sup>9</sup>

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7. See generally Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 11–21, 45–53 (2012) (giving examples of newly enacted federal statutes protecting whistleblowers).

8. See *id.* at 2–3.

9. See S. REP. NO. 107-146, at 4–5 (2002) (noting that Sarbanes-Oxley would address the “corporate code of silence” that contributed to the accounting scandals); Moberly, *supra* note 7, at 2–3; Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 75–76 (2007) (noting four separate provisions aimed at encouraging and protecting whistleblowers). Sarbanes-Oxley's antiretaliation protections later proved to be strong on paper but not in reality. After reviewing over 700 administrative decisions under the Act, I

First, the Act contained antiretaliation protections that applied to more employees than other whistleblower statutes—under Sarbanes-Oxley all employees of publicly traded companies were now included, unlike previous statutes.<sup>10</sup> Second, the standard for antiretaliation provisions was employee-friendly: whistleblowers needed only to prove their protected conduct was a “contributing factor” to an adverse employment decision, and then employers could only escape liability by proving a legitimate business justification with “clear and convincing” evidence.<sup>11</sup> Third, employees could be protected for a wide range of conduct: the defined scope of “protected activity” covered by the Act was potentially enormous.<sup>12</sup> Fourth, the Act required companies to change the way they engaged with their employees as potential whistleblowers by implementing internal “disclosure channels” for whistleblowers to report to their board of directors.<sup>13</sup>

Ultimately, Sarbanes-Oxley’s whistleblower provisions altered the conversation about the role of whistleblowers as organizational monitors and began a sixteen-year period in which the federal government increasingly sought to encourage insiders to disclose wrongdoing in a variety of ways.<sup>14</sup> As discussed below, the

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found that whistleblowers won only 3.6% of the time when an investigator decided the case and only 6.5% of the time when the case was resolved by an administrative law judge. See Moberly, *supra*, at 67.

10. See 18 U.S.C. § 1514A(b)(1) (2012); Moberly, *supra* note 7, at 7. The Supreme Court later determined that Sarbanes-Oxley also protected employees of *contractors* of publicly traded companies. See *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1176 (2014).

11. See Moberly, *supra* note 7, at 8–9.

12. As I have noted previously,

[t]he statute protects activity related to violations of §§ 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), and 1348 (securities fraud) of Title 18 of the U.S. Code, or “any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.” 18 U.S.C. § 1514A(a)(1), (a)(2). Reports can be made to a broad range of recipients, including Congress, law enforcement agencies, and any person internally who has supervisory authority over the employee. *Id.* § 1514(a)(1)(A)–(C).

*Id.* at 7, n.34.

13. See *id.* at 10.

14. On the tenth anniversary of its enactment, I noted,

[i]n many ways, Sarbanes-Oxley represents a great leap forward for whistleblowers in the United States, and the Act served as the model for subsequent reform. Indeed, in the decade after its enactment, legislatures and regulators unleashed a torrent of formal encouragement for whistleblowers. Federal and state governments passed an impressive array of broad antiretaliation statutes and regulators mandated the widespread use of corporate codes of ethics that explicitly protect whistleblowers and implement whistleblower hotlines.

government's efforts included increasing statutory antiretaliation protections and providing "bounties" (or rewards) for whistleblowers, as well as mandating that organizations incorporate structural disclosure channels into their internal compliance systems.

A. *Antiretaliation Protections*

In the time since Sarbanes-Oxley was passed, each of the three branches of the federal government has taken steps to further encourage and protect whistleblowers. Other statutes before Sarbanes-Oxley provided antiretaliation protections for whistleblowers; however, as noted above, Sarbanes-Oxley raised the bar through wider application and broader protection. Since 2002, the number of statutes including similarly strong antiretaliation protections has increased dramatically. At least nine new federal statutes have included similar whistleblower provisions and other statutes updated many older antiretaliation protections.<sup>15</sup> The three signature laws of the Obama era—health care, the economic stimulus package, and Wall Street reform—all contained antiretaliation provisions.<sup>16</sup>

The Executive Branch's oversight of whistleblower protections has also increased during this time period. For example, in 2002, the Occupational Safety and Health Administration ("OSHA") in the Department of Labor enforced fourteen whistleblower laws.<sup>17</sup> In 2017, OSHA administered twenty-two such laws.<sup>18</sup> Indeed, OSHA created a new Whistleblower Directorate and a Whistleblower Protection Advisory Committee to ensure that it was meeting its new, heightened obligations to whistleblowers appropriately.<sup>19</sup>

Significantly, in 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-

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*See id.* at 11.

15. *See id.* at 12–17.

16. *See id.* at 17.

17. *See* Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1127 n.83 (2006).

18. *See The Whistleblower Protection Programs: Statutes*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, [https://www.whistleblowers.gov/statutes\\_page.html](https://www.whistleblowers.gov/statutes_page.html) [<https://perma.cc/HSL8-V2WB>] (listing whistleblower statutes enforced by OSHA).

19. *See* Moberly, *supra* note 7, at 40; *The Whistleblower Protection Programs: Whistleblower Protection Advisory Committee*, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, <https://www.whistleblowers.gov/wpac.html> [<https://perma.cc/ZND7-6C33>] (describing OSHA Whistleblower Protection Advisory Committee). I served on OSHA's Whistleblower Protection Advisory Committee from 2012 to 2016.

Frank”)<sup>20</sup> to address the financial crisis of 2008. Dodd-Frank improved upon the Sarbanes-Oxley model by fixing problems with Sarbanes-Oxley’s whistleblower protections and by including its own strong provisions.<sup>21</sup> In particular, Dodd-Frank permitted whistleblowers to report misconduct anonymously to the Securities and Exchange Commission (“SEC”).<sup>22</sup> Moreover, while previous laws required whistleblowers to bring private claims if they felt retaliated against, Dodd-Frank empowered the SEC to enforce antiretaliation protection.<sup>23</sup> This new power is significant: in September 2016, the SEC brought its first stand-alone retaliation case, which resulted in International Game Technology agreeing to pay a \$500,000 penalty for retaliating against an employee who reported to senior management and the SEC about improprieties related to the company’s financial statements.<sup>24</sup> The SEC has aggressively pushed for a broad reading of Dodd-Frank’s antiretaliation provision. It has filed numerous amicus briefs in federal courts arguing that an “internal whistleblower” should be protected from retaliation under Dodd-Frank, even though the statutory language can be read to include protections only for whistleblowers who report directly to the SEC.<sup>25</sup>

The Supreme Court has even joined the trend of supporting antiretaliation protection for whistleblowers. Since 2006, the Court has decided nine of the ten cases involving statutory retaliation claims

20. Pub. L. No. 111-203, § 922(a), 124 Stat. 1841, 1841 (2010) (codified at 12 U.S.C. § 5301 (2012)).

21. See Moberly, *supra* note 7, at 16–17 (describing amendments to Sarbanes-Oxley); see also 15 U.S.C. § 78u-6 (2012).

22. See § 78u-6(d)(2)(A), (h)(2)(A); 17 C.F.R. §§ 240.21F-7, -9(c) (2017).

23. See 15 U.S.C. § 78u-6(h)(1)(A).

24. See Int’l Game Tech., Exchange Act Release No. 78991, 2016 WL 5464611, at \*5 (Sept. 29, 2016). In June 2014, the SEC settled a case involving a number of charges, one of which was retaliation, for \$2.2 million after it accused a hedge fund of retaliating against one of its traders who reported securities violations to the SEC. See Paradigm Cap. Mgmt., Inc., Exchange Act Release No. 72393, 109 SEC Docket 430, 2014 WL 2704311, at \*9 (June 16, 2014).

25. See OFFICE OF THE WHISTLEBLOWER, U.S. SEC. & EXCH. COMM’N, 2016 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 22 (2016), <https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf> [perma.cc/2XAK-D59R]. A circuit split has developed on this issue, with the Fifth Circuit Court of Appeals requiring reports to the SEC, see *Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620, 630 (5th Cir. 2013), and the Ninth and Second Circuits permitting protection for whistleblowers who report internally, see *Somers v. Digital Realty Trust, Inc.*, 850 F.3d 1045, 1050–51 (9th Cir. 2017); *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015). The U.S. Supreme Court should resolve this issue in the 2017–18 Term. See *Digital Realty Tr., Inc. v. Somers*, 137 S. Ct. 2300 (mem.) (June 26, 2016) (No-16-1276) (granting certiorari).

in favor of the employee.<sup>26</sup> In 2014, the Court decided its first Sarbanes-Oxley whistleblower case and allowed an employee of a contractor of a public company to assert a retaliation claim, which dramatically extended the reach of Sarbanes-Oxley's whistleblower protection.<sup>27</sup> Most recently, in 2015, the Court found in favor of a government whistleblower who claimed he was retaliated against for reporting problems with the way air marshals were being assigned flights such that national security was endangered.<sup>28</sup>

All three branches of the federal government, then, have increasingly used antiretaliation protections to encourage whistleblowers. Congress has passed an ever-growing number of laws that include antiretaliation provisions. The executive branch administrative agencies—most visibly OSHA and the SEC—have aggressively enforced those provisions through regulation and enforcement actions.<sup>29</sup> And, finally, the Supreme Court has signaled that it believes “protecting employees from retaliation will enhance the enforcement of the nation’s laws.”<sup>30</sup>

### B. Bounty Provisions

This trend of emphasizing the important role of whistleblowing includes more than enhanced antiretaliation protections. The federal government has increased the use of “bounties” to reward

26. See *Dep't Homeland Sec. v. MacLean*, 135 S. Ct. 913, 920 (2015) (interpreting the Civil Service Reform Act); *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1176 (2014) (interpreting Sarbanes-Oxley); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 4 (2011) (interpreting the Fair Labor Standards Act); *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 175–78 (2011) (interpreting Title VII of the Civil Rights Act of 1964); *Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 278–80 (2009) (interpreting Title VII of the Civil Rights Act of 1964); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 456–57 (2008) (interpreting 42 U.S.C. § 1981); *Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008) (interpreting the Age Discrimination in Employment Act of 1967); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 56–57 (2006) (interpreting Title VII of the Civil Rights Act of 1964); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005) (interpreting Title IX of the Education Amendments of 1972). The one outlier is *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517 (2013), which examined the standard of causation for Title VII retaliation. However, even this case can be viewed as more of a burden of proof claim in an employment case rather than a case examining the merits of retaliation protection. See *id.* at 2522.

27. See *Lawson*, 134 S. Ct. at 1176.

28. See *MacLean*, 135 S. Ct. at 917.

29. Although I have been critical of the state of OSHA's whistleblower protection in the 2000s, under recent leadership OSHA has focused more energy and resources toward its whistleblower protection programs. See Moberly, *supra* note 7, at 39–42.

30. See Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 378 (2011).



whistleblowers in addition to simply protecting them from retaliation. The government has aggressively utilized the False Claims Act,<sup>31</sup> the oldest bounty statute, which encourages whistleblowers to report fraud on the federal government by providing rewards of between fifteen and thirty percent of money collected from fraudsters.<sup>32</sup> In fiscal year 2016, the federal government recovered \$2.9 billion from whistleblower *qui tam* suits and awarded whistleblowers \$519 million.<sup>33</sup> Since 2009, the federal government has “recovered nearly \$24 billion in settlements and judgments related to *qui tam* suits and paid more than \$4 billion in whistleblower awards.”<sup>34</sup>

Significantly, in 2010, Dodd-Frank included a bounty provision for whistleblowers who report securities fraud.<sup>35</sup> A person who provides information about a publicly traded company to the SEC that leads to penalties or fines exceeding \$1 million may receive an award of between ten and thirty percent of the money received by the SEC.<sup>36</sup> Since 2011, the SEC has awarded over \$111 million to thirty-four whistleblowers.<sup>37</sup> The awards have increased in both number and size since the program began: in fiscal year 2016, the SEC awarded over \$57 million to thirteen whistleblowers, and six of the ten largest awards made under the program were made in fiscal year 2016.<sup>38</sup> Moreover, the SEC is receiving an increasing number of tips—in fiscal year 2016, it received over 4,200 tips, an increase of over forty percent from 2012.<sup>39</sup>

### C. Structural Disclosure Channels

Sarbanes-Oxley also utilized what I have previously called a “structural model” of encouraging whistleblowers.<sup>40</sup> The Act required each publicly traded company to implement an internal disclosure channel for employees to report misconduct directly to the company’s board of directors.<sup>41</sup> This channel allows whistleblowers to bypass the

31. 31 U.S.C. §§ 3729–3733 (2012).

32. § 3730(d).

33. Press Release, U.S. Dep’t. of Justice, Justice Department Recovers Over \$4.7 Billion From False Claims Act Cases in Fiscal Year 2016: Third Highest Annual Recovery in FCA History (Dec. 14, 2016) <https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016> [perma.cc/XJ93-5NEH].

34. *Id.*

35. See 15 U.S.C. § 78u-6.

36. See *id.*; 17 C.F.R. § 240.21F-5 (2017).

37. OFFICE OF THE WHISTLEBLOWER, U.S. SEC. & EXCH. COMM’N, *supra* note 25, at 1.

38. See *id.* at 13.

39. See *id.* at 1.

40. See Moberly, *supra* note 17, at 1109.

41. 15 U.S.C. § 78j-1(m)(4)(A).

blocking and filtering of the report that often occurs when lower-level supervisors and managers receive reports.<sup>42</sup>

Similarly, in the 2000s, the federal organizational sentencing guidelines encouraged structural disclosure channels by dramatically reducing potential criminal penalties for corporations that can demonstrate they had implemented “an effective program to prevent and detect violations of law.”<sup>43</sup> Effective programs required that companies exercise due diligence, which, according to the guidelines at the time, required “having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.”<sup>44</sup> Although this version of the guidelines was repealed, the 2016 version included similar language: “The organization shall take reasonable steps . . . to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization’s employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.”<sup>45</sup>

In today’s corporate America, companies commonly use whistleblower hotlines as well as other policies and procedures set up to encourage whistleblowers to report misconduct internally.<sup>46</sup> Indeed, because of rules of various stock-listing exchanges, many companies even explicitly promise not to retaliate against employees who report misconduct internally.<sup>47</sup>

42. See Moberly, *supra* note 17, at 1149–50.

43. See U.S. SENTENCING GUIDELINES MANUAL § 8A1.2 cmt. 3(k) (U.S. SENTENCING COMM’N 2003).

44. See *id.* § 8A1.2 cmt. 3(k)(5).

45. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(5)(C) (U.S. SENTENCING COMM’N 2016).

46. See Moberly, *supra* note 7, at 18; *Impact of Dodd-Frank Whistleblower Provisions: What Companies are Doing*, SOC’Y OF CORP. COMPLIANCE & ETHICS (Sept. 15, 2011), <http://www.corporatecompliance.org/Resources/View/tabid/531/ArticleId/329/Impact-of-Dodd-Frank-Whistleblower-Provisions-What-Companies-Are-Doing-1.aspx> [perma.cc/X6XQ-AYHJ] (noting results of recent survey that 99% of publicly traded companies operated a whistleblower hotline); OFFICE OF INSPECTOR GEN., U.S. DEP’T OF STATE, ESP-15-03, REVIEW OF THE USE OF CONFIDENTIALITY AGREEMENTS BY DEPARTMENT OF STATE CONTRACTORS (2015), <https://oig.state.gov/system/files/esp-15-03.pdf> [perma.cc/K7BR-J3ZJ] (finding that twenty-five of thirty federal contractors reported having an internal hotline for employees to confidentially report fraud, illegality, or violations of company policy).

47. See OFFICE OF INSPECTOR GEN., U.S. DEP’T OF STATE, *supra* note 46, at 7 (noting that twenty-seven of thirty federal contractors reported having internal company policies specifically prohibiting retaliation against whistleblowers); Richard Moberly & Lindsey E. Wylie, *An Empirical Study of Whistleblower Policies in United States Corporate Codes of Ethics*, in WHISTLEBLOWING AND DEMOCRATIC VALUES 27, 29–35 (David

Other laws incorporate a structural model of sorts. Dodd-Frank, for example, identifies a specific reporting channel for whistleblowers who want to receive a bounty: they must provide information directly to the SEC.<sup>48</sup> Pursuant to Dodd-Frank, the SEC also established the Office of the Whistleblower to receive disclosures from whistleblowers.<sup>49</sup>

At the risk of overstatement, the last sixteen years have ushered in a sea change in society's approach to whistleblowers. The law more broadly protects employees who disclose misconduct, and it encourages such disclosures more effectively through the use of rewards. Companies appear to invite whistleblowing through the use of hotlines and codes of conduct that promise to protect employees who blow the whistle. Although whistleblowing is still a long and difficult path to choose—and one should not engage in it without thinking through the very real likelihood of negative consequences—the country as a whole has a different attitude towards whistleblowing in 2018 than it did prior to the enactment of Sarbanes-Oxley in 2002.<sup>50</sup>

## II. THE CORPORATE RESPONSE

Despite efforts to encourage whistleblowing, organizations such as corporations and governments might believe they have much to lose from this increased emphasis on whistleblowing. Most obviously, as whistleblowers accrue more legal rights, organizations have more exposure to liability for retaliation or for engaging in misconduct generally. Public relations disasters such as the 2016 scandal at Wells Fargo can engulf a company.<sup>51</sup> Organizational secrets can be exposed publicly: national security disclosures by Chelsea Manning, Edward

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Lewis & Wim Vandekerckhove eds., 2011); Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 988–95 (2008); Moberly, *supra* note 7, at 18–20.

48. See 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. LAB. & EMP. L. 87, 90–91 (2014).

49. See 15 U.S.C. § 78u-7(d) (2012); 17 C.F.R. § 240.21F-1 (2017).

50. See, e.g., *The Age of the Whistleblower*, ECONOMIST (Dec. 3, 2015), <http://www.economist.com/news/business/21679455-life-getting-better-those-who-expose-wrongdoing-companies-continue-fight> [<https://perma.cc/94KG-DYCL>] (noting that this is the “age of the whistleblower” and that “[w]histleblowing has been on the increase since the 2007–08 financial crisis sparked a crackdown on corporate corruption and collusion”); see also Moberly, *supra* note 7, at 20–21 (noting that the “culture around whistleblowing has changed in the last decade, making it more acceptable and formally encouraged”).

51. See, e.g., Chris Arnold, *Reports on Wells Fargo Whistleblowers Spark Inquiry in Congress*, NAT'L PUB. RADIO (Dec. 30, 2016), <http://www.npr.org/2016/12/30/507597691/for-whistleblowers-repercussions-are-felt-beyond-wells-fargo> [<https://perma.cc/3DDJ-STP2>] (describing how Wells Fargo pressured employees to “open[] as many as 2 million credit card and checking accounts in customers' names without their approval”).

Snowden, and others have forever changed the way we think about whistleblowing's relationship with secrecy and confidentiality.<sup>52</sup> One way that corporations have responded to the federal government's increased encouragement of whistleblowers is by using confidentiality provisions that undermine the employees' willingness to blow the whistle.<sup>53</sup> As shown below, an empirical study of such provisions indicates that corporations use such provisions frequently to target and limit whistleblowing.

#### A. *Using Confidentiality Provisions*

Confidentiality provisions can appear in severance agreements, policy handbooks, and settlement agreements, among other things. To be clear, it would be unusual for an employer to explicitly restrict an employee's ability to report illegality to the government—such a provision would clearly be unenforceable and violate public policy constraints on contracting.<sup>54</sup>

However, employers have devised other ways to disincentivize employees from blowing the whistle through “de facto gag clauses” that seem directly aimed at undermining new whistleblowing incentives built into the Dodd-Frank Act.<sup>55</sup> For example, Dodd-Frank expressly permits whistleblowers to report misconduct to the SEC anonymously.<sup>56</sup> Despite that statutory mandate, employers use provisions in agreements that require employees to notify the employer anytime the employee discloses information to a government agency.<sup>57</sup>

Employers use another provision that permits an employee to report misconduct to the government but that also waives the

52. See Richard Moberly, *Whistleblowers and the Obama Presidency: The National Security Dilemma*, 16 EMP. RTS. & EMP. POL'Y J. 51, 75–80 (2012).

53. See, e.g., THE ECONOMIST, *supra* note 50 (noting that confidentiality agreements are “another disincentive” to whistleblowing and citing the results of a survey indicating that one-fifth of respondents “felt their employer’s confidentiality policies obstructed the reporting of potentially illegal activity to law enforcers”).

54. See *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) (holding that private contracts may be unenforceable when public policy considerations outweigh any interests that would support enforcement); Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 294–95 (1998); Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 HOFSTRA L. REV. 1, 15 (2002) (arguing that a contract that conceals a crime may constitute the crimes of “compounding” or obstruction of justice).

55. See Moberly et al., *supra* note 48, at 88.

56. See 15 U.S.C. § 78u-6(d)(2), (h)(2) (2012); 17 C.F.R. §§ 240.21F-7, -9(c) (2017).

57. See Moberly et al., *supra* note 48, at 88.

employee's ability to collect an award for such reporting.<sup>58</sup> This type of provision would also undermine Dodd-Frank by waiving the employee's right to collect a bounty under the statute's unique reward provision.<sup>59</sup>

Employers often put non-disparagement provisions in agreements with their employees.<sup>60</sup> When these provisions include specific bars on negative communications to government agencies, however, such provisions appear to be aimed at reducing the ability of an employee to blow the whistle because those sorts of communications would be inherently disparaging. When such agreements include unusually large liquidated damages provisions, employees will be even less willing to report misconduct.<sup>61</sup>

Even widely utilized and relatively uncontroversial confidentiality provisions can undermine whistleblowing if employers enforce them aggressively. For example, employers have brought breach of contract claims based on broad confidentiality agreements against whistleblowers who have used confidential information as part of their disclosure to the government.<sup>62</sup> This tactic has been used in the False Claims Act context for years, and courts have had difficulty discerning the circumstances when a whistleblower should or should not use confidential information to disclose misconduct publicly.<sup>63</sup>

Similarly, employers have objected to whistleblowers using confidential information to support their claims of retaliation. However, in the Sarbanes-Oxley context at least, courts have found that the federal interest in whistleblowing can outweigh an employer's otherwise legitimate interest in maintaining confidentiality. One court noted that Sarbanes-Oxley "demonstrates the public policy in favor of allowing even current employees to assist in securities fraud investigations. It certainly does not establish a public policy in favor of allowing employers to muzzle their employees with overbroad

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58. *See id.*

59. *See* 15 U.S.C. § 78u-6(b); *supra* text accompanying notes 35–39.

60. *See, e.g.,* NeuStar, Inc., Exchange Act Release No. 79593, 2016 WL 7335658 at \*2 (Dec. 19, 2016) (noting the company's severance agreement contained a non-disparagement clause stating that the employee could not engage in communication with the SEC or other regulators "that disparages, denigrates, maligns or impugns" the company).

61. *See, e.g.,* Anheuser-Busch InBev SA/NV, Exchange Act Release No. 78957, 2016 WL 5404890 at \*5 (Sept. 28, 2016) (noting that company's separation agreement with employee contained a confidentiality provision with a \$250,000 liquidated damages provision if the employee violated the provision).

62. *See* Moberly et al., *supra* note 48, at 108.

63. *See id.* at 108–16.

confidentiality agreements.”<sup>64</sup> In 2014, two co-authors and I surveyed the landscape of False Claims Act and Sarbanes-Oxley cases dealing with confidentiality agreements and whistleblowing and concluded:

A rule that allows whistleblowers to provide the SEC with documents relevant to understanding and investigating a possible securities violation strikes an appropriate balance between employers’ legitimate interests in confidentiality and data security, while ensuring that the SEC retains access to potentially valuable sources of evidence and supporting background information. While employers and employees may disagree about whether certain documents are relevant to a possible securities violation, this rule also has the benefit of being relatively easy to understand and intuitive, reducing the risk that whistleblowers will inadvertently expose themselves to personal liability while making a good-faith effort to report possible misconduct.<sup>65</sup>

Recently, the Southern District of California relied on this standard when it resolved litigation over the extent to which an employee could rely on confidential information to support his claim of retaliation. In *Erhart v. BofI Holding, Inc.*,<sup>66</sup> Erhart was an internal auditor of BofI Holding, Inc.<sup>67</sup> Erhart signed a confidentiality agreement when his employment started.<sup>68</sup> In the course of his job, Erhart found conduct he believed violated securities laws and, concerned that documents about the misconduct were going to be destroyed, Erhart emailed the confidential documents to his mother to preserve them.<sup>69</sup> After Erhart sued BofI for retaliation, BofI filed counterclaims alleging that Erhart violated the confidentiality agreement.<sup>70</sup>

Erhart defended against the breach of contract claims by asserting that his release of confidential information was for the limited purpose of whistleblowing, so it was protected conduct under numerous whistleblower provisions (including Sarbanes-Oxley) and, therefore, enforcing the confidentiality agreement would be against public policy supporting whistleblowing.<sup>71</sup> Although the court found

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64. *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127, 1136 (N.D. Cal. 2002).

65. *See Moberly et al.*, *supra* note 48, at 116.

66. No. 15-cv-02287-BAS-NLS, 2017 WL 588390 (S.D. Cal. Feb. 14, 2017).

67. *See id.* at \*2.

68. *See id.* at \*3.

69. *See id.* at \*5.

70. *See id.* at \*3.

71. *See id.* at \*9–10.

important interests favored enforcing the agreement,<sup>72</sup> it ultimately determined that the public policy in favor of whistleblowing outweighed those interests.<sup>73</sup> The court focused on “the nexus between the confidential documents in question and the misconduct alleged by the whistleblower,”<sup>74</sup> thereby adopting the “nuanced” approach for which my co-authors and I advocated in 2014.<sup>75</sup> Ultimately, the court determined that Erhart had reasonably chosen only documents directly related to the wrongdoing he observed and that he had only emailed them to protect them from destruction.<sup>76</sup> Accordingly, Erhart could use his whistleblowing to defend against the claim he breached his confidentiality agreement.<sup>77</sup>

In all, some employers use specific agreements that appear to limit whistleblowing and some employers utilize broader confidentiality agreements in litigation to silence whistleblowers who bring retaliation claims. Anecdotal examples of each of these provisions exist.<sup>78</sup> However, is this practice prevalent in corporate America? This is a difficult question because, on the whole, researchers know very little about the content of the vast majority of confidentiality provisions used by corporations. When corporations put such provisions in employment agreements, severance agreements, or settlement agreements, it is often part of the agreement to keep the agreement itself confidential, in addition to the substantive information at the core of the agreement.<sup>79</sup> Confidentiality provisions only rarely become publicly available for inspection.

However, they do surface, and the next Section describes an empirical study of confidentiality provisions that can help shed light on common corporate practices.

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72. *See id.* at \*8–9 (noting that legitimate interests in favor of enforcement include the “freedom of private parties to contract,” the “legal protection of trade secrets,” “protecting nonpublic personal information,” and “protecting confidential business information that may not qualify for trade secret protection”).

73. *See id.* at \*17–18.

74. *See id.* at \*12 (quoting Moberly et al., *supra* note 48, at 110) (internal quotation marks omitted).

75. *See id.* (quoting Moberly et al., *supra* note 48, at 110).

76. *See id.*

77. *See id.*

78. *See supra* notes 55–75 and accompanying text.

79. *See infra* Table 1 (finding that 81.7% of settlement agreements in a study of Sarbanes-Oxley whistleblower retaliation cases contained such a confidentiality provision).

*B. Results from Broad Study of Settlement Agreements*

Recently, I have been able to empirically examine the contents of 290 settlement agreements from Sarbanes-Oxley whistleblower cases. This examination found unsurprising evidence that broad confidentiality agreements are commonplace. Additionally, it revealed that specific and problematic provisions exist in a nontrivial way. Finally, the study confirmed that, when required by the government, settlement agreements often contain “carve-out” provisions indicating that employees retain certain whistleblower rights, even if a specific provision appearing to limit those rights exists elsewhere in the agreement.

## 1. Brief Background on the Study

Beginning in 2006, I submitted numerous Freedom of Information Act (“FOIA”) requests to OSHA and the Office of Administrative Law Judges (“OALJ”) requesting documents related to settlements of Sarbanes-Oxley retaliation cases. To claim retaliation under Sarbanes-Oxley, whistleblowers must first file a complaint with OSHA, which will then investigate the complaint.<sup>80</sup> After OSHA issues a finding, either party may appeal to the OALJ, which will conduct a full hearing on the allegation.<sup>81</sup> Of course, at any point in the process, the parties may settle the case.<sup>82</sup>

Interestingly for the study, OSHA and OALJ retain copies of settlement agreements in cases filed with the agencies because the Department of Labor’s Sarbanes-Oxley regulations require parties to submit settlement agreements to the agencies for approval.<sup>83</sup> Parties to a Sarbanes-Oxley whistleblower dispute must disclose any settlement agreement, including its financial terms, to OSHA or OALJ, depending on when the settlement is made in the complaint process.<sup>84</sup> In these instances, the agency is required to find that the settlement agreement is “fair, adequate, reasonable, and consistent with the purpose and intent of the relevant whistleblower statute in the public interest.”<sup>85</sup> A withdrawal of a complaint because of a

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80. See 29 C.F.R. § 1980.104 (2017).

81. See §§ 1980.105–106.

82. See Moberly, *supra* note 9, at 96–98 (discussing Sarbanes-Oxley settlements).

83. See § 1980.111(d)(2).

84. See *id.*

85. OCCUPATIONAL SAFETY & HEALTH ADMIN., WHISTLEBLOWER INVESTIGATIONS MANUAL 6-10 (2011) [hereinafter WHISTLEBLOWER INVESTIGATIONS MANUAL 2011]. Prior to 2011, OSHA’s standard for approving settlement agreements was that it should “provide fair and equitable relief for the complainant.” OCCUPATIONAL



settlement is only effective if the settlement is approved by the agency.<sup>86</sup>

I spent eight years attempting to obtain these settlement agreements from my initial FOIA requests to both agencies, which included appeals all the way up to the Department of Labor's solicitor general's office and then ultimately a negotiated resolution to receive copies of agreements from Sarbanes-Oxley's effective date until 2013. It was not until over a year later that I received all of the agreements from the agencies. Even then, the Department of Labor redacted the amounts of the settlements and the names of the parties from some of the agreements. However, the confidentiality provisions were left untouched and, ultimately, the study analyzed a total of 290 settlement agreements, 173 of which were settled at the OSHA stage and 117 that were settled while in front of the OALJ.<sup>87</sup>

To analyze the agreements, I created a code book that defined the provisions I was interested in examining. Two law student research assistants then coded the 290 agreements to determine whether an agreement included any of the provisions. I then coded the agreements on my own to confirm their coding and correct any mistakes. Further, editors at the *North Carolina Law Review* did one final review of the accuracy of the coding.

## 2. The Prevalence of Confidentiality Provisions

Table 1 contains the percentage of the 290 settlement agreements which include provisions that could potentially impede an employee from blowing the whistle to a government agency. These provisions are explained in more detail below.

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SAFETY & HEALTH ADMIN., WHISTLEBLOWER INVESTIGATIONS MANUAL 6-1 (2003) [hereinafter WHISTLEBLOWER INVESTIGATIONS MANUAL 2003].

86. *See* § 1980.111(c).

87. I originally received 182 OSHA agreements and 123 OALJ agreements. However, nine OSHA agreements and six OALJ agreements were not usable because they were incomplete in some way, such as pages that were missing or not included in the file sent by the agency. OSHA gives statistics on the outcomes of its cases. OCCUPATIONAL SAFETY & HEALTH ADMIN., THE WHISTLEBLOWER PROTECTION PROGRAMS: STATISTICS, <https://www.whistleblowers.gov/3DCharts-FY2006-FY2016.pdf>. [<https://perma.cc/FAY5-9JR6>]. From fiscal year 2006 through fiscal year 2014, OSHA states that 356 Sarbanes-Oxley cases settled. *See id.* It is impossible to directly compare my data with OSHA statistics because I relied on calendar year information and not the fiscal year, and the dates do not exactly overlap. That said, it is interesting to note that I examined 115 agreements from OSHA dated from 2006–2013, which would be 32.3% of the OSHA claims that were settled from fiscal year 2006 through fiscal year 2014. The OALJ does not publish the number of cases settled while pending review at the OALJ level.

Type of Provision	Percentage of Agreements
<i>Confidentiality Provision</i> : employee is restricted from disclosure of terms of settlement and underlying facts	81.7
<i>Non-Disparagement Provision</i> : employee is restricted from making negative statements about employer	64.1
<i>Non-Disclosure Provision</i> : employee is prohibited from disclosure except as required by law or subpoena	60.0
<i>Waiver Provision</i> : employee waives any future award or recovery	43.8
<i>Provision Related to Anonymity</i> : employee must inform employer whether employee has filed any other claim or disclosed information to the government prior to execution of agreement	42.4
<i>Carve-out Provision</i> : permits employee to participate in a government investigation	41.7
<i>Trade Secrets Provision</i> : employee is required to maintain confidentiality of employer's trade secrets	35.5
<i>Subpoena Disclosure Provision</i> : employee must inform employer if employee receives a subpoena to disclose information	32.8
<i>Provision Related to Participation in Government Investigation</i> : employee is prohibited from participating in a government investigation, except as required by law or subpoena	22.4
<i>Carve-out Provision</i> : permits employee to report misconduct to the government	22.4
<i>Government Disclosure Provision</i> : employee must inform employer if employee discloses information to the government after the execution of the agreement	2.1

**Table 1**

*Broad Confidentiality Provisions*: Most of the agreements (81.7%) contained a broad confidentiality provision that required the employees to keep the facts of the case and the terms of the settlement confidential. Substantially fewer (35.5%) contained provisions specifically related to trade secrets or confidential information. Interestingly, over half (60.0%) limited employees from disclosing anything about the settlement or the underlying facts of the

case *unless the employee was required by law to disclose, such as by a subpoena*. In other words, the message is clear: employees may not disclose information voluntarily to the government. The only disclosure permitted is when one is forced by law to disclose. Indeed, 71.7% of the agreements that had a broad confidentiality provision *also* specifically limited any disclosure to those required by law, such as in response to a subpoena. Similarly, another type of provision purports to prohibit an employee from voluntarily *participating* in a government investigation; 22.4% of agreements contained that provision.

*Provisions Related to Anonymity:* Another potentially problematic provision requires the employee to inform the employer if the employee has filed any other claim or if the employee has already disclosed any information to the government. Almost half (42.4%) of the agreements contained this type of provision. Another provision that has caused some concern would require an employee to affirmatively inform the employer if the employee discloses any information to the government going forward. These types of provisions would clearly undermine the anonymity protection of Dodd-Frank.<sup>88</sup>

A very small percentage of agreements (2.1%) contained a provision which would require the employee to inform the employer if the employee discloses information to the government. Even more encouragingly, only one of the ninety-three agreements dated from 2010 to 2013 contained that sort of provision.<sup>89</sup> The 2010 date is important because, of course, that is the year Dodd-Frank was enacted and the anonymity guarantee was added to federal securities whistleblower law. That said, 32.8% of the agreements did require the employee to inform the employer if the employee received a subpoena to disclose any information related to the settlement or the underlying facts. Interestingly, after 2010, a significantly higher percentage of agreements contained this provision than prior to 2010.<sup>90</sup>

*Waivers of Rewards:* Another problematic provision requires employees to waive any future award or recovery should the government further investigate their complaint. This provision would

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88. See 15 U.S.C. § 78u-6(d)(2), (h)(2) (2012); 17 C.F.R. §§ 240.21F-7, -9(c); Moberly et al., *supra* note 48, at 98–102.

89. The dates of fifty-one of the 290 agreements were not identifiable.

90. Before 2010, 30.1% of the agreements required employees to inform the employer if they received a subpoena. From 2010–2013, 46.2% of the agreements had that provision. This difference is significant, with an alpha score (p-value) of .008.

undermine the Dodd-Frank “bounty” model and discourage future reporting.<sup>91</sup> A large portion of the agreements (43.8%) contained this provision. Of the ninety-three agreements dated from 2010 to 2013, over half (55.9%) contained a waiver provision. Interestingly, this is a slight increase from the 43.8% of agreements dated prior to 2010 that contained a waiver provision.<sup>92</sup> One conclusion from this difference may be that some employers responded to Dodd-Frank by attempting to have employees affirmatively waive their ability to receive the new bounties; however, the difference is not statistically significant.<sup>93</sup>

*Non-Disparagement:* A final potentially problematic provision could be an overly broad non-disparagement clause. Of the 290 agreements collected, the study found that 64.1% contained non-disparagement provisions. However, the original coding I completed did not evaluate the breadth of those provisions and whether they explicitly prohibited disparaging statements to the government.

*Carve-Out Provisions:* Lastly, it should be noted that some agreements did contain an explicit “carve-out” provision, which attempted to inform the employee that, notwithstanding any other provision in the agreement, the employee was permitted either to disclose information to the government (22.4%) or to participate in a government investigation (41.7%).

In sum, both anecdotal and empirical evidence demonstrate that employers use various confidentiality provisions in employment, severance, and settlement agreements. These provisions may serve legitimate employer interests, but they also may be used to undermine an employee’s willingness to blow the whistle, depending upon how they are framed, interpreted, and enforced.

### III. GOVERNMENT COUNTERMOVES

Within the last few years, the federal government has begun examining such provisions to determine whether they inappropriately discourage whistleblowing even if they might serve some legitimate employer interest in confidentiality. This Part identifies three different federal government efforts to dissuade corporations from

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91. See 15 U.S.C. § 78u-6(b); Moberly et al., *supra* note 48, at 102–08.

92. It is an odd coincidence that the total percentage of agreements with the waiver matches the percentage of agreements before 2010 that had the waiver provision. Both percentages equal 43.8%, even though the percentage of agreements post-2010 with the provision equals 55.9%. This is explained by the fact that fifty-one agreements were not dated, and eleven of those non-dated agreements contained the waiver.

93. The difference between agreements from before 2010 and from 2010–2013 has an alpha score (p-value) of .0685.

discouraging whistleblowing through confidentiality provisions. These programs are interesting for two reasons. First, collectively they signal the important role whistleblowers play in the federal government's law enforcement program. Second, they provide further evidence of the creative ways companies attempt to enforce confidentiality norms and, perhaps, circumvent the government's efforts to encourage more whistleblowing. Ultimately, these actions demonstrate that the federal government will not allow companies to undermine its efforts to promote whistleblowing, and it will monitor companies' agreements to catch and stop new derivations of improper confidentiality provisions.

A. *SEC Rule 21F-17*

After the Dodd-Frank Act created the SEC's Whistleblower Program discussed above,<sup>94</sup> the SEC promulgated regulations to implement it.<sup>95</sup> One of those regulations, Rule 21F-17, expressly prohibited employers from interfering with the whistleblower programs enacted under Dodd-Frank, stating "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications."<sup>96</sup> The regulation sat dormant, with little public attention, from its enactment in 2011 until 2014. At that point, the head of the SEC's Office of the Whistleblower, Sean McKessy, began making public statements about the importance of the provision and he warned companies that the SEC would take seriously the prohibition on overly broad confidentiality agreements that impeded whistleblowing.<sup>97</sup> He noted that the SEC was "actively looking for examples of confidentiality agreements, separat[ion] agreements, employee agreements that . . . in substance say 'as a prerequisite to get this benefit you agree you're not going to come to the Commission or you're not going to report anything to a regulator.'"<sup>98</sup> McKessy further cautioned that "if we find that kind of language, not only are we going to go to the companies,

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94. *See supra* notes 35–39 and accompanying text.

95. Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 101 SEC Docket 630 (Aug. 12, 2011).

96. 17 C.F.R. § 240.21F-17(A) (2017).

97. Brian Mahoney, *SEC Warns In-House Attys Against Whistleblower Contracts*, LAW360 (Mar. 14, 2014), <http://www.law360.com/articles/518815/sec-warns-in-house-attys-against-whistleblower-contracts> [https://perma.cc/K7BJ-46QY].

98. *Id.*

we are going to go after the lawyers who drafted it,” possibly by revoking those attorneys’ right to practice before the Commission.<sup>99</sup>

In January of the following year, Mary Jo White, the Chairman of the SEC, wrote U.S. Representative Maxine Waters to say that she was worried about agreements that impede whistleblowers from coming forward.<sup>100</sup> Then, a month later, the *Wall Street Journal* reported that the SEC sent letters to a number of companies asking for “every nondisclosure agreement, confidentiality agreement, severance agreement and settlement agreement they entered into with employees since Dodd-Frank went into effect, as well as documents related to corporate training on confidentiality[,] . . . ‘all documents that refer or relate to whistleblowing’ and a list of terminated employees.”<sup>101</sup>

Shortly thereafter, in April 2015, the SEC announced a settlement with KBR, Inc., in which KBR agreed to stop including certain language in the confidentiality agreements it used when it internally investigated claims of misconduct.<sup>102</sup> Employees interviewed as witnesses for an internal KBR investigation were required to sign an agreement not to discuss the interview “and the subject matter discussed during the interview” without receiving permission from the company.<sup>103</sup> If the witness violated the nondisclosure agreement, the person was subject to discipline and possible termination of employment.<sup>104</sup> Although the SEC acknowledged it was unaware of any attempts by KBR to enforce the provision, the SEC determined that it undermined the purpose of Rule 21F-17 and sufficiently impeded employees from reporting misconduct to the SEC.<sup>105</sup>

As part of the settlement, KBR agreed to contact employees who signed the agreement to tell them that that they did not need to seek permission from KBR before communicating with the government about illegal conduct.<sup>106</sup> Additionally, KBR amended its confidentiality statement to include this provision:

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99. *Id.*

100. See Rachel Louise Ensign, *SEC Probes Companies’ Treatment of Whistleblowers*, WALL ST. J. (Feb. 25, 2015), <https://www.wsj.com/articles/sec-probes-companies-treatment-of-whistleblowers-1424916002> [<https://perma.cc/LA94-WJVR> (dark archive)].

101. *Id.*

102. See KBR, Inc., Exchange Act Release No. 74619, 111 SEC Docket 917, 2015 WL 1456619, at \*2 (Apr. 1, 2015).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at \*3.

Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures.<sup>107</sup>

KBR also agreed to pay a penalty of \$130,000.<sup>108</sup>

It would take another year before a second enforcement action was announced. In June 2016, the SEC settled a case against Merrill Lynch and related companies (collectively, “Merrill Lynch”) involving a number of securities laws violations.<sup>109</sup> As part of the settlement, the SEC determined that Merrill Lynch used language in its policies, procedures, and agreements that impeded communications from its employees to the government about misconduct.<sup>110</sup> For example, the SEC took issue with two aspects of Merrill Lynch’s form severance agreements that contained typical promises not to reveal confidential information or trade secrets without legal process or written approval from the company. First, although the agreement expressly permitted the employee to reveal information pursuant to a court order or other legal requirement, the language “did not permit the employee to *voluntarily* disclose confidential information to [the government].”<sup>111</sup> Second, in addition to the form severance agreement made after 2014, Merrill Lynch advised departing employees that they were permitted to initiate communications directly with the SEC, but the type of information they could communicate was limited to “information relating to the

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107. *Id.* at \*2.

108. *See id.*

109. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc., Exchange Act Release No. 78141, 2016 WL 4363431, at \*1 (June 23, 2016).

110. *See id.* at \*19.

111. *Id.* (emphasis added).

severance agreement itself or ‘its underlying facts and circumstances.’”<sup>112</sup>

Even though the SEC was, once again, unaware of any times that Merrill Lynch actually attempted to enforce these provisions, the SEC determined that such provisions violated Rule 21F-17 because the company “operated to impede such communications by prohibiting employees from voluntarily providing information to the Commission without prior approval from” Merrill Lynch.<sup>113</sup> The company agreed to change the language, and the SEC approved a substitution, stating that

with the exception of information that is protected from disclosure by any applicable law or privilege, nothing in the agreement prohibits or limits the employee or his counsel from initiating communications directly with, responding to any inquiry from, volunteering information to, or providing testimony before, among others, the Commission in connection with any reporting of, investigation into, or proceeding regarding suspected violations of law. The language also makes clear that the employee is not required to advise or seek permission from any of the [Corporate] Entities before engaging in any such activity.<sup>114</sup>

Additionally, Merrill Lynch began providing all employees with mandatory annual training that includes a written “21F-17 Notice,” setting forth the employee’s rights to

(i) report potential violations of law to the Commission or other government or self-regulatory authorities without permission from or notice to his or her employer, (ii) report possible violations anonymously and to provide disclosures that are protected or required under whistleblower laws, and (iii) cooperate voluntarily with or respond to any inquiry from the Commission or other federal or state agencies or self-regulatory organizations. The 21F-17 Notice also summarizes several of the rights the employee possesses under the Commission’s Whistleblower Program and states that employees have the right to not be retaliated against for reporting possible securities law violations.<sup>115</sup>

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112. *Id.*

113. *Id.*

114. *Id.* at \*20.

115. *Id.*



Finally, Merrill Lynch updated its Code of Conduct and other agreements, policies, and procedures to make clear that employees are not restricted from exercising their rights under Rule 21F-17.<sup>116</sup>

Shortly thereafter the floodgates opened. From August 2016 to January 2017, the SEC announced seven more settlements involving Rule 21F-17.

*BlueLinx Holdings*—August 10, 2016: The SEC found provisions in BlueLinx’s severance agreements that were similar to those it found violated Rule 21F-17 in *Merrill Lynch*—the employee agreed to hold information confidential except as required by law or after informing the company.<sup>117</sup> No exception was made for disclosing information about illegality to the government or the SEC.<sup>118</sup> Unsurprisingly, the SEC found that this language violated Rule 21F-17.<sup>119</sup>

Importantly, the *BlueLinx* enforcement action also condemned a provision in which an employee was required to waive any monetary recovery that might be connected to an employee complaint to an administrative agency.<sup>120</sup> This provision also violated Rule 21F-17 because it “removed the critically important financial incentives that are intended to encourage persons to communicate directly with the Commission staff about possible securities law violations.”<sup>121</sup>

As a result of the enforcement action, the SEC required BlueLinx to include a statement acknowledging that nothing in the agreement limited the employee’s right to file a charge or complaint with the government, to communicate with the government, to participate in any investigation or proceeding conducted by the government, to provide documents to the government, nor to receive an award for providing information to the government.<sup>122</sup> Additionally, BlueLinx agreed to pay a \$265,000 penalty.<sup>123</sup>

*Health Net, Inc.*—August 16, 2016: In its case against Health Net, the SEC continued to focus on the ability of an employee to receive a whistleblower award. After Rule 21F-17 was promulgated in 2011, Health Net prohibited an employee who signed a severance agreement with the company from filing an application for, or

116. *Id.* at \*21.

117. *See* BlueLinx Holdings, Inc., Exchange Act Release No. 78528, 2016 WL 4363864, at \*3 (Aug. 10, 2016).

118. *See id.*

119. *See id.* at \*4–5.

120. *See id.* at \*4.

121. *Id.*

122. *See id.* at \*5.

123. *See id.* at \*6.

accepting, a whistleblower award from the SEC.<sup>124</sup> The SEC again noted that such a provision undermines the purpose of the Dodd-Frank whistleblower program, which is to encourage persons to communicate directly with the SEC regarding securities law violations.<sup>125</sup> Accordingly, Health Net agreed to remove the provision, contact the employees who signed the agreement to inform them that the provision was unenforceable, and pay a \$340,000 penalty.<sup>126</sup>

*Anheuser-Busch InBev SA/NV*—September 28, 2016: While the *BlueLinx* and *Health Net* consent orders focused entirely on agreements that violated Rule 21F-17, the consent order in *Anheuser-Busch* was similar to the *Merrill Lynch* order in that the SEC came across a Rule 21F-17 violation while it was investigating other violations.<sup>127</sup> In *Anheuser-Busch*, the SEC was investigating allegations that the company had violated accounting procedures and internal controls provisions of the Foreign Corrupt Practices Act of 1977.<sup>128</sup> An employee began giving information to the SEC as part of the investigation, was later discharged, and then entered into a separation agreement that contained general confidentiality provisions prohibiting the employee from disclosing confidential and proprietary information as well as information regarding the substance of the agreement.<sup>129</sup> These restrictions might have been acceptable by themselves; however, the agreement also contained a substantial liquidated damages provision that required a \$250,000 payment if the employee violated the confidentiality provisions.<sup>130</sup> After signing the agreement, the employee refused to cooperate with the SEC any further out of fear that further cooperation would trigger the liquidated damages provision.<sup>131</sup>

The SEC found that these provisions together violated Rule 21F-17.<sup>132</sup> However, the ruling was limited to that single employee's agreement because in 2015, *Anheuser-Busch* amended its form separation agreement to include language clarifying that employees

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124. See *Health Net, Inc.*, Exchange Act Release No. 78590, 2016 WL 4474755, at \*3 (Aug. 16, 2016).

125. *Id.* at \*4.

126. *Id.*

127. See *Anheuser-Busch InBev SA/NV*, Exchange Act Release No. 78957, 2016 WL 5404890, at \*2 (Sept. 28, 2016).

128. *Id.*

129. *Id.* at \*6.

130. See *id.* at \*6-7.

131. *Id.* at \*7.

132. See *id.* at \*9.

can report possible illegalities to government agencies.<sup>133</sup> The SEC did not take issue with the new language added to the provision, which stated, “I understand and acknowledge that notwithstanding any other provision in this Agreement, I am not prohibited or in any way restricted from reporting possible violations of law to a governmental agency or entity, and I am not required to inform the Company if I make such reports.”<sup>134</sup>

*NeuStar, Inc.*—December 19, 2016: The SEC found that NeuStar violated Rule 21F-17 by including a broad non-disparagement clause in its severance agreements.<sup>135</sup> The clause prohibited employees from engaging in communication “that disparages, denigrates, maligns or impugns NeuStar” with the SEC as an entity, along with “regulators” more generally.<sup>136</sup> An employee who violated the clause agreed to forfeit all but \$100 of any severance compensation.<sup>137</sup>

After the SEC began investigating, NeuStar altered its agreements to include a proviso allowing for communication, “without notice to or approval by NeuStar, with any federal government agency about a potential violation of a federal law or regulation.”<sup>138</sup> The SEC appeared to accept that change and then also fined NeuStar \$180,000.<sup>139</sup>

*SandRidge Energy, Inc.*—December 20, 2016: SandRidge entered into separation agreements with employees who left the company that prohibited voluntary, direct communication with the SEC.<sup>140</sup> The agreements also contained a provision prohibiting the disclosure of confidential information to “any government agency” without the company’s prior written consent.<sup>141</sup> Finally, the agreement prohibited making disparaging remarks about the company to a variety of people and entities, including “to any governmental or regulatory agency.”<sup>142</sup> Interestingly, SandRidge would modify the language when specifically requested by an employee, but left in the language when an employee did not identify the provision as problematic.<sup>143</sup>

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133. *Id.* at \*8.

134. *Id.*

135. *See* NeuStar, Inc., Exchange Act Release No. 79593, 2016 WL 7335658, at \*2–3 (Dec. 19, 2016).

136. *See id.* at \*2.

137. *Id.* at \*3.

138. *Id.* at \*3.

139. *See id.*

140. SandRidge Energy, Inc., Exchange Act Release No. 79607, 2016 WL 7368270, at \*2 (Dec. 20, 2016).

141. *Id.*

142. *Id.*

143. *Id.* at \*3.

In prior consent orders, the SEC often noted how many employees had signed improper agreements since the enactment of the regulation on August 12, 2011.<sup>144</sup> In the *SandRidge* agreement, for the first time the SEC noted the number of employees who had signed such an agreement since the *KBR* consent order on April 1, 2015.<sup>145</sup> The order also noted that SandRidge's in-house counsel "received multiple client alerts and other information about the [KBR] enforcement matter," clearly indicating that companies should have taken notice of the SEC's enforcement actions related to Rule 21F-17 and altered their practices accordingly.<sup>146</sup>

The SEC was also troubled that the agreements were signed while the company was under investigation. The Order noted the potential for SandRidge officers and employees to communicate with the SEC was "not merely a hypothetical concern" for SandRidge because of this context.<sup>147</sup> To remediate the problem after the SEC noted the likely violation, SandRidge removed the references to government agencies in its confidentiality and defamation clauses and added a new provision specifically excepting contact with the government to report illegality from any prohibition contained in the agreement.<sup>148</sup> The SEC imposed a \$1.4 million penalty.<sup>149</sup>

*BlackRock, Inc.*—January 17, 2017: Shortly after Rule 21F-17 was promulgated, BlackRock revised its form separation agreement to add a provision requiring a departing employee to waive the ability to recover an award for reporting misconduct pursuant to Dodd-Frank, among other statutes.<sup>150</sup> Then, over four-and-a-half years later, on March 31, 2016, BlackRock revised the agreement again to remove the waiver provision.<sup>151</sup> The company now also provides all employees with mandatory annual training regarding employees'

144. See, e.g., *NeuStar, Inc.*, Exchange Act Release No. 79593, 2016 WL 7335658, at \*2 (Dec. 19, 2016); *Health Net, Inc.*, Exchange Act Release No. 78590, 2016 WL 4474755, at \*3 (Aug. 16, 2016).

145. See *SandRidge*, 2016 WL 7368270, at \*3.

146. *Id.*

147. See *id.* at \*4.

148. *Id.* at \*5–6.

149. *Id.* at \*7. The SEC also found a violation of Dodd-Frank's prohibition on retaliation against whistleblowers, which likely played a role in the size of the penalty. See *id.* at \*5–7. The \$1.4 million penalty is subject to SandRidge's bankruptcy plan, which may discount the payment to approximately \$100,000. See Andrew Ackerman, *Regulators Rap Firms Using Severance to Silence Whistleblowers*, WALL ST. J. (Dec. 20, 2016), <https://www.wsj.com/articles/regulators-rap-firms-using-severance-to-silence-whistleblowers-1482267305> [<https://perma.cc/B2MJ-9FAT>].

150. *BlackRock, Inc.*, Exchange Act Release No. 79804, 2017 WL 164091, at \*9 (Jan. 17, 2017).

151. See *id.* at \*3.

rights to report misconduct to the government, to do so anonymously, and to not be retaliated against if they do report.<sup>152</sup> Nevertheless, because of the violations that occurred between 2011 and 2016, the SEC fined BlackRock \$340,000.<sup>153</sup>

*HomeStreet, Inc.*—January 19, 2017: The SEC investigated HomeStreet because of alleged accounting control violations related to commercial loans, among other things.<sup>154</sup> As part of that investigation, the SEC learned that HomeStreet’s severance agreements contained a waiver of potential awards if the employee filed a charge or communicated with any government agency.<sup>155</sup> The interesting difference between HomeStreet’s award-waiver provision and BlackRock’s provision is that BlackRock specifically identified potential whistleblower awards under Dodd-Frank, while HomeStreet actually referenced the Equal Employment Opportunity Commission (“EEOC”), indicating that its intent was for something entirely different than the Dodd-Frank reward program.<sup>156</sup> Before Dodd-Frank, such waiver clauses were relatively common and were included to ensure an employee did not receive a “double-recovery” by settling an EEOC claim with the company and then reporting it to the EEOC and recovering again if the EEOC settled a pattern and practice claim.<sup>157</sup> Courts have routinely indicated such a waiver provision was permissible.<sup>158</sup> However, the SEC asserted in the *HomeStreet* order that such provisions undermined *Dodd-Frank*’s incentive program, and therefore violated Rule 21F-17.<sup>159</sup> As a result, HomeStreet revised its standard severance agreement to include a series of statements reaffirming an employee’s right to report misconduct to the government and to recover an award for information provided to the government.<sup>160</sup> The SEC also fined HomeStreet \$500,000.<sup>161</sup>

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152. *See id.* at \*4.

153. *See id.* at \*10.

154. HomeStreet, Inc., Exchange Act Release No. 79844, 2017 WL 218847, at \*1–2 (Jan. 19, 2017).

155. *See id.* at \*2, \*8.

156. *Id.* at \*9.

157. Moberly et al., *supra* note 48, at 103–04.

158. *See, e.g.,* EEOC v. Cosmair, Inc., L’Oreal Hair Care Div., 821 F.2d 1085, 1091 (5th Cir. 1987) (“[A]lthough an employee cannot waive the right to file a charge with the EEOC, the employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee’s behalf.”); EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1543 (9th Cir. 1987).

159. *See HomeStreet*, 2017 WL 218847, at \*9.

160. *Id.*

161. *Id.* at \*11.

Thus, after two years and over \$3 million in SEC fines, what do we know about the scope of Rule 21F-17? Examining these enforcement actions and consent orders collectively reveals a number of important lessons.

First, the SEC believes that agreements limiting communication with government agencies, such as the SEC, violate Rule 21F-17. One clearly unacceptable limitation is a requirement that an employee must notify the company before disclosing information to a government agency.<sup>162</sup> This notification undermines Dodd-Frank's guarantee of anonymity to whistleblowers. Moreover, language in an agreement permitting disclosure to the government only if legally required or if compelled by a subpoena is not sufficient.<sup>163</sup> The language of a confidentiality agreement must also state that the employee may *voluntarily* disclose illegal conduct to the government.<sup>164</sup>

Second, the SEC considers overly broad non-disparagement clauses to potentially violate Rule 21F-17 just as much as overly broad confidentiality agreements. Specifically, the SEC would frown upon companies equating whistleblowing with disparagement because reporting wrongdoing would reflect negatively on the company.<sup>165</sup>

Third, broad confidentiality and disclosure provisions are not acceptable if they contain significant liquidated damages provisions. In *Anheuser Busch*, the penalty for violating the confidentiality provisions was \$250,000.<sup>166</sup> In *NeuStar*, violating the broad non-disparagement clause could have led to forfeiting all but \$100 of any severance compensation.<sup>167</sup> The SEC found that both provisions violated Rule 21F-17.

Fourth, despite the aforementioned lessons, the SEC *will* accept broad confidentiality language as long as the company also includes a

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162. See *SandRidge Energy, Inc.*, Exchange Act Release No. 79607, 2016 WL 7368270, at \*4 (Dec. 20, 2016); *KBR, Inc.*, Exchange Act Release No. 74619, 111 SEC Docket 917, 2015 WL 1456619 (Apr. 1, 2015).

163. See, e.g., *SandRidge*, 2016 WL 7368270, at \*4; *BlueLinx Holdings, Inc.*, Exchange Act Release No. 78528, 2016 WL 4363984, at \*2 (Aug. 10, 2016); *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Exchange Act Release No. 78141, 2016 WL 4363431, at \*17 (June 23, 2016).

164. See *SandRidge*, 2016 WL 7368270, at \*2; *BlueLinx*, 2016 WL 4363984, at \*2-3 (noting that no exception was made for disclosing to the government); *Merrill Lynch*, 2016 WL 4363431, at \*17.

165. See *SandRidge*, 2016 WL 7368270, at \*2.

166. *Anheuser-Busch InBev SA/NV*, Exchange Act Release No. 78957, 2016 WL 5404890, at \*5 (Sept. 28, 2016).

167. See *NeuStar, Inc.*, Exchange Act Release No. 79593, 2016 WL 7335658, at \*2 (Dec. 19, 2016).

carve-out provision explicitly noting that the employee may contact a government agency with information about violations of federal law.<sup>168</sup> Moreover, several companies began annual training sessions for its employees to inform them of their rights to disclose information to the government.<sup>169</sup> They also amended their Codes of Conduct and other policies to consistently send this same message.<sup>170</sup>

Fifth, a company may not require an employee to waive a reward for blowing the whistle. The SEC first made this clear in *BlueLinx*,<sup>171</sup> and then found violations in several other cases involving such waivers.<sup>172</sup> This likely applies to agreements with such waivers even if they are holdovers from a pre-Dodd Frank time when such waivers applied primarily to EEOC complaints.<sup>173</sup>

Sixth, the SEC will find a violation based solely on the language of a provision, even if there is not any evidence that the provision actually dissuaded employees from communicating with the government. Admittedly, this would be a very difficult point to prove (although the SEC in at least three consent orders identified such an employee<sup>174</sup>); nevertheless, it is notable how many of the Rule 21F-17 consent orders with significant penalties indicate that no concrete “harm” could be found.<sup>175</sup>

Seventh, the SEC will examine severance and separation agreements as part of its regular course of investigating other potential violations. The enforcement actions against Merrill Lynch, Anheuser-Busch, SandRidge, and HomeStreet all involved learning of the Rule 21F-17 violations by investigating violations of other securities laws. Additionally, in *SandRidge* and *HomeStreet*, the SEC

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168. See, e.g., *HomeStreet, Inc.*, Exchange Act Release No. 79844, 2017 WL 218847, at \*9 (Jan. 19, 2017); *SandRidge*, 2016 WL 7368270, at \*4; *NeuStar*, 2016 WL 7335658, at \*3; *Anheuser-Busch*, 2016 WL 5404890, at \*7; *Health Net, Inc.*, Exchange Act Release No. 78590, 2016 WL 4474755, at \*3 (Aug. 16, 2016); *BlueLinx*, 2016 WL 4363984, at \*4; *Merrill Lynch*, 2016 WL 4363431, at \*18.

169. See, e.g., *BlackRock, Inc.*, Exchange Act Release No. 79804, 2017 WL 164091, at \*3 (Jan. 17, 2017); *Merrill Lynch*, 2016 WL 4363431, at \*18.

170. See, e.g., *Merrill Lynch*, 2016 WL 4363431, at \*18.

171. See *BlueLinx*, 2016 WL 4363984, at \*4.

172. See *BlackRock*, 2017 WL 164091, at \*2; *HomeStreet*, 2017 WL 218847, at \*9.

173. See *HomeStreet*, 2017 WL 218847, at \*9.

174. See *SandRidge Energy, Inc.*, Exchange Act Release No. 79607, 2016 WL 7368270, at \*5 (Dec. 20, 2016); *NeuStar, Inc.*, Exchange Act Release No. 79593, 2016 WL 7335658, at \*2 (Dec. 19, 2016); *Anheuser-Busch InBev SA/NV*, Exchange Act Release No. 78957, 2016 WL 5404890, at \*6 (Sept. 28, 2016).

175. See, e.g., *HomeStreet*, 2017 WL 218847, at \*9; *Health Net, Inc.*, Exchange Act Release No. 78590, 2016 WL 4474755, at \*3 (Aug. 16, 2016); *Merrill Lynch*, 2016 WL 4363431, at \*17; *KBR, Inc.*, Exchange Act Release No. 74619, 111 SEC Docket 917, 2015 WL 1456619, at \*2 (Apr. 1, 2015).

found that the companies were actively impeding whistleblowers in more ways than simply using overly broad agreements. In *SandRidge*, the SEC found that the company retaliated against a whistleblower<sup>176</sup> and in *HomeStreet*, the SEC determined that the company attempted to identify an internal whistleblower and threatened not to advance costs under an indemnification agreement to a suspected whistleblower.<sup>177</sup>

Finally, the SEC clearly expects companies to have received the message that these provisions potentially violate Rule 21F-17.<sup>178</sup> Although it may not ameliorate past violations (at least since the Rule was promulgated on August 12, 2011), changing form agreements now might still bring leniency in later enforcement actions.

Indeed, to ensure that the message is clear, on October 24, 2016, the Office of Compliance Inspections and Examinations (part of the SEC) issued a Risk Alert to highlight these enforcement actions and to inform issuers of securities that the compliance office is examining “compliance manuals, codes of ethics, employment agreements, severance agreements, and other documents” to evaluate whether they may contain provisions that undermine Rule 21F-17.<sup>179</sup> Moreover, in December 2016, the new Chief of the SEC’s Office of Whistleblower told the *Wall Street Journal* that Rule 21F-17 “is going to remain a focus for my office in 2017 and I expect you will see additional cases brought under this authority.”<sup>180</sup>

### B. OSHA Guidance

OSHA also attempted to limit the ability of confidentiality agreements to undermine whistleblowing. As noted above, under Sarbanes-Oxley, the Department of Labor must review all settlement agreements of whistleblower retaliation claims to ensure that they are “fair, adequate, and reasonable, and consistent with the purpose and intent of the relevant whistleblower statute in the public interest.”<sup>181</sup>

176. See *SandRidge*, 2016 WL 7368270, at \*5–6.

177. See *HomeStreet*, 2017 WL 218847, at \*7–9.

178. See *SandRidge*, 2016 WL 7368270, at \*3 (noting how many employees had signed settlement agreements that violated the Rule since April 1, 2015, the date the first Rule 21F-17 enforcement action and consent order was made public).

179. *Examining Whistleblower Rule Compliance*, NAT’L EXAM PROGRAM: RISK ALERT (Office of Compliance Inspections & Examinations, Sec. Exch. Comm’n, Washington, D.C.), Oct. 24, 2016, at 3, <https://www.sec.gov/files/ocie-2016-risk-alert-examining-whistleblower-rule-compliance.pdf> [<https://perma.cc/SE6M-XW9U>].

180. Ackerman, *supra* note 149.

181. WHISTLEBLOWER INVESTIGATIONS MANUAL 2011, *supra* note 85, at 6-11. Prior to 2011, OSHA’s standard for approving settlement agreements was that it should



Additionally, since 2011, OSHA has declared in its Investigations Manual that it

will not approve a provision that prohibits, restricts, or otherwise discourages an employee from participating in protected activity in the future. Accordingly, although a complainant may waive the right to recover future or additional benefits from actions that occurred prior to the date of the settlement agreement, a complainant cannot waive the right to file a complaint based either on those actions or on future actions of the employer. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: “Nothing in this Agreement is intended to or shall prevent or interfere with Complainant’s nonwaivable right to engage in any future activities protected under the whistleblower statutes administered by OSHA.”<sup>182</sup>

Further, OSHA’s Investigations Manual instructed that investigators should review Sarbanes-Oxley settlement agreements to check for “gag” clauses prohibiting the employee’s ability to participate in investigations or testify in proceedings related to their employment.<sup>183</sup> If such a provision existed,

the parties should be asked to remove it or to replace it with the following: “Nothing in this Agreement is intended to or must *prevent, impede or interfere* with Complainant’s providing truthful testimony and information in the course of an investigation or proceeding authorized by law and conducted by a government agency.”<sup>184</sup>

There is mixed evidence regarding whether the new OSHA Investigations Manual has made a difference in the behavior of parties when they settle Sarbanes-Oxley cases. In the empirical study detailed above, I examined whether OSHA Sarbanes-Oxley settlement agreements contained the OSHA-required carve-out provisions.<sup>185</sup> Only 22% of the agreements included OSHA-mandated language from the Investigations Manual.<sup>186</sup> Moreover, of the agreements put in place in 2011 or after, 40.3% contained the OSHA carve-out. Interestingly, settlement agreements arising out of the

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“provide fair and equitable relief for the complainant.” WHISTLEBLOWER INVESTIGATIONS MANUAL 2003, *supra* note 85, at 6-1.

182. See WHISTLEBLOWER INVESTIGATIONS MANUAL 2011, *supra* note 85, at 6-11.

183. See *id.*

184. *Id.* (emphasis added).

185. See *supra* Section II.B.

186. See *supra* Section II.B.

OSHA process are statistically significantly more likely to have the carve-out provision from the Manual than agreements approved by the OALJ.<sup>187</sup>

However, this does not quite tell the whole story. Of the twenty-two agreements from 2011–2013 that had provisions limiting participation in government investigations to those required by law or subpoena (i.e., the type of provision that might “prevent, impede or interfere” with OSHA whistleblowing), 81.8% had a carve-out provision either identical or similar to the OSHA language. In those types of agreements prior to 2011, only 33.3% had a carve-out provision. The increase between the pre- and post-2011 agreements is statistically significant.<sup>188</sup> The difference may have occurred because it appears that after the Investigations Manual changed either the Department of Labor began scrutinizing these agreements more rigorously or employers affirmatively began including such carve-out provisions in their agreements.<sup>189</sup>

A similar pattern exists for agreements that contain broad confidentiality provisions. Agreements dated 2011 or after are far more likely to have carve-out provisions. Provisions specifically permitting participating in government investigations appear in 65.1% of the 2011–2013 agreements, but only appear in 36.1% of agreements before 2011.<sup>190</sup> A difference for carve-out provisions specifically permitting reporting also appears (33.3% have them from 2011–2013, while 24.5% have them before 2011); however, the difference is not statistically significant.<sup>191</sup>

Thus, the 2011 Investigations Manual seemed to have limited impact. However, the meaning of “prevent, impede or interfere” remained unclear in Sarbanes-Oxley cases settled by OSHA. Additionally, like the SEC, OSHA continued to encounter provisions in settlement agreements that “prohibit, restrict, or otherwise discourage a complainant from participating in protected activity related to matters that arose during his or her employment.”<sup>192</sup>

187. The alpha score (p-value) is 0.00000003.

188. The alpha score (p-value) is 0.0004.

189. Interestingly, for agreements with restrictions on *reporting*, from 2011–2013, 31.9% (fifteen out of forty-seven) also had carve-out provisions similar to that required by the OSHA Investigations Manual. Before 2011, only 21 (20.0%) of the 105 agreements contained that carve-out. However, this difference is not statistically significant ( $p = 0.16$ ).

190. This result is significant ( $p = 0.00009$ ).

191. The alpha score (p-value) is 0.27.

192. Memorandum from MaryAnn Garrahan, Dir., Directorate of Whistleblower Prot. Programs to the Reg'l Adm'rs & Whistleblower Program Managers 1 (Aug. 23, 2016),

Accordingly, on August 23, 2016, OSHA issued new policy guidelines for addressing such provisions.<sup>193</sup>

In the 2016 policy guidelines, OSHA noted that provisions that prohibit, restrict, or otherwise discourage a complainant from engaging in protected activity can arise in a variety of forms, including broad confidentiality or non-disparagement clauses “that complainants may interpret as restricting their ability to engage in protected activity.”<sup>194</sup> These broad provisions may be unenforceable even if they contain the proviso “except as provided by law,” because employees may not understand their legal rights that are being excepted from inclusion in the broader provision.<sup>195</sup>

In addition to broad confidentiality and non-disparagement provisions, in its guidelines OSHA identified four types of specific provisions that might impede whistleblowers:

- a. A provision that restricts the complainant’s ability to provide information to the government, participate in investigations, file a complaint, or testify in proceedings based on a respondent’s past or future conduct. For example, OSHA will not approve a provision that restricts a complainant’s right to provide information to the government related to an occupational injury or exposure.
- b. A provision that requires a complainant to notify his or her employer before filing a complaint or voluntarily communicating with the government regarding the employer’s past or future conduct.
- c. A provision that requires a complainant to affirm that he or she has not previously provided information to the government or engaged in other protected activity, or to disclaim any knowledge that the employer has violated the law. Such requirements may compromise statutory and regulatory mechanisms for allowing individuals to provide information confidentially to the government, and thereby discourage complainants from engaging in protected activity.
- d. A provision that requires a complainant to waive his or her right to receive a monetary award (sometimes referred to in settlement agreements as a “reward”) from a government-administered whistleblower award program for providing information to a government agency. For example, OSHA will

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<https://www.whistleblowers.gov/sites/default/files/2017-10/InterimGuidance-DeFactoGagOrderProvisions.pdf> [<https://perma.cc/KD8T-XU8B>].

193. *See id.*

194. *Id.*

195. *See id.* at 3.

not approve a provision that requires a complainant to waive his or her right to receive a monetary award from the Securities and Exchange Commission, under Section 21F of the Securities Exchange Act, for providing information to the government related to a potential violation of securities laws. Such an award waiver may discourage a complainant from engaging in protected activity under the Sarbanes-Oxley Act, such as providing information to the Commission about a possible securities law violation. For the same reason, OSHA will also not approve a provision that requires a complainant to remit any portion of such an award to respondent. For example, OSHA will not approve a provision that requires a complainant to transfer award funds to respondent to offset payments made to the complainant under the settlement agreement.<sup>196</sup>

Finally, OSHA noted that settlements requiring liquidated damages when a breach of the agreement occurs might be unenforceable if the damages amount is “clearly disproportionate to the anticipated loss to the respondent of a breach.”<sup>197</sup>

When OSHA comes across such provisions in its review of whistleblower retaliation settlement agreements, OSHA will now ask employers to remove offending provisions

and/or add the following language prominently positioned within the settlement: “Nothing in this Agreement is intended to or shall prevent, impede or interfere with complainant’s non-waivable right, without prior notice to Respondent, to provide information to the government, participate in investigations, file a complaint, testify in proceedings regarding Respondent’s past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA, or to receive and fully retain a monetary award from a government-administered whistleblower award program for providing information directly to a government agency.”<sup>198</sup>

Notably, many of the problematic provisions OSHA identified in the policy guidelines mirror provisions the SEC found violate Rule 21F-17.<sup>199</sup> For example, most obviously, neither entity will tolerate contractual limitations on the right of an employee to disclose misconduct to the government. Similarly, both OSHA and the SEC now find waivers of any whistleblower reward to be problematic.

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196. *Id.* at 2 (footnote omitted).

197. *Id.*

198. *Id.* at 3 (emphasis removed).

199. *See supra* text accompanying notes 162–78.

Moreover, provisions that require an employee to notify an employer when reporting illegality to the government seem unenforceable because they undermine statutory protections for anonymous and confidential reporting to the government. Finally, the government agencies recognize that otherwise acceptable confidentiality and non-disparagement provisions may nevertheless discourage employees from blowing the whistle, and therefore they will require provisions to be added to agreements that clarify an employee's non-negotiable right to communicate with the government.

### C. *Government Contractors*

Finally, the federal government is examining the use of confidentiality agreements by federal contractors that chill whistleblowing. Specifically, in March 2015, the Office of Inspector General of the U.S. Department of State ("OIG") released a report summarizing its investigation of thirty contractors with the largest dollar volume of contracts with the State Department.<sup>200</sup> The OIG initiated the inquiry because of newspaper reports about the types of overly broad confidentiality provisions described above, as well as a finding that an organization receiving significant funding from the government required employees to enter into non-disparagement agreements prohibiting employees from making any "derogatory, disparaging, negative, critical or defamatory statements" to several parties including "funding agencies" and "officials of any government."<sup>201</sup> The organization had quickly revised its agreement to clarify that the provision was "not meant to preclude former employees from participating in a government audit, review, or investigation."<sup>202</sup>

The OIG sought to determine whether Department of State contractors might have similar provisions that could limit whistleblowing.<sup>203</sup> The OIG inquiry found that all of the thirty contractors had confidentiality agreements with their employees, but that none of the policies specifically precluded disclosures to the government.<sup>204</sup> That said, at least thirteen contractors required employees to notify the company if they are contacted by a

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200. See OFFICE OF INSPECTOR GEN., U.S. DEP'T OF STATE, *supra* note 46, at 1.

201. *Id.* at 1–2.

202. *Id.* at 2.

203. See *id.* at 2–4 (noting that various federal laws and regulations encourage disclosure of fraud by federal contractors and prohibit retaliation against contractor employees who disclose fraud).

204. See *id.* at 5.

government investigator.<sup>205</sup> The OIG found that such provisions “may have a chilling effect on employees who wish to report fraud, waste, or abuse to a Federal official.”<sup>206</sup> Accordingly, the OIG recommended that federal contractors affirmatively inform employees of their right to report wrongdoing to the federal government.<sup>207</sup>

In summary, these three federal agencies—the SEC, OSHA, and the Department of State—all use different procedures to regulate companies who use confidentiality agreements that may silence employees who want to report on potential improprieties. The SEC is using enforcement actions based on its Dodd-Frank regulations. OSHA is using its power to approve settlement agreements. The Department of State is willing to have its Office of Inspector General investigate its contractor companies. Despite these different approaches, the focus remains the same: the government will challenge companies that try to undermine efforts to encourage and protect whistleblowers.

#### CONCLUSION

As two co-authors and I argued previously, confidentiality provisions prove especially troublesome as applied to whistleblowers or would-be whistleblowers.<sup>208</sup> When used as part of a severance or settlement agreement in a whistleblowing case, such provisions can appear as attempts to buy a whistleblower’s silence.<sup>209</sup> An employee receives a severance package or a settlement amount and, in return, the agreement appears to put limitations on the employee’s ability to disclose information to the government.<sup>210</sup>

It is difficult to ascertain how often employers use provisions in agreements that might impede employees from reporting to the government. There is anecdotal evidence that employers use such provisions in *severance* agreements as indicated by the recent SEC enforcement actions. There is also some empirical evidence that *settlement* agreements in whistleblower cases often contain restrictive confidentiality provisions; however, this evidence does not include agreements after 2013. After that year, the SEC and OSHA became

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205. *See id.* at 6.

206. *Id.*

207. *See id.* at 11.

208. *See* Moberly et al., *supra* note 48, at 91–92.

209. *See* Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 AM. BUS. L.J. 151, 170–71 (1998).

210. *See* Bast, *supra* note 1, at 643–44.

more outspoken in their view regarding the impropriety of such measures.

What is clear, however, is that such provisions undermine the recent focus of the federal government on encouraging whistleblowers in order to better monitor corporate behavior. As a result, several federal agencies, such as the SEC, OSHA, and the Department of State OIG, have signaled that they intend to prioritize whistleblowing over corporate confidentiality through aggressive policing of problematic “de facto” gag clauses.

Looking ahead, the next round belongs to the corporate lawyers, who no doubt will respond with even more creative ways to protect their client’s legitimate interests in confidentiality and finality, while trying not to run afoul of the federal watchdogs.<sup>211</sup> And the government’s reaction? It is still too early to tell whether federal agencies in the Trump administration will continue to have a desire to encourage whistleblowers.<sup>212</sup> The laws, regulations, and precedent are in place, but without individuals in government pushing to use them, the sixteen-year trend of encouraging whistleblowing could come to an end.

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211. Cf. Eugene Scalia, Opinion, *Blowing the Whistle on the SEC’s Latest Power Move*, WALL ST. J. (Apr. 5, 2015), <https://www.wsj.com/articles/eugene-scalia-blowing-the-whistle-on-the-secs-latest-power-move-1428271250> [<https://perma.cc/2AXA-LRJS> (dark archive)] (questioning the propriety of the SEC’s limiting confidentiality agreements and suggesting ways in which employers could fight the agency if it demanded confidential information).

212. Cf. Moberly, *supra* note 7, at 45 (“Thus, the experience with Sarbanes-Oxley over the last decade teaches that individual players in the system, such as organizational supervisors, government administrators, and adjudicatory decision makers, impact whistleblowers as much as, if not more than, any formal legal provisions.”).