

## Potential Risks from Identifying Whistleblowers

Discovering the identity of an anonymous whistleblower can serve legitimate corporate interests, but those interests are undermined where discovery spawns claims of retaliation or interference with government access to information. This paper briefly discusses examples of such pitfalls in prior cases.<sup>1</sup>

The interests of an employer and an employee whistleblower who reports potential violations of the employer to the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) are rarely perfectly aligned and often adverse. Under the separate whistleblower rules of each agency, a whistleblower who is a source of “original information” about a possible violation that leads to the agency’s collection of a fine is entitled to between 10% and 30% of the fine. Such a whistleblower, accordingly, can have a financial interest in the agency imposing the highest possible fine.<sup>2</sup>

It is natural for the employer to want to learn the identity of a whistleblower. The person could be perceived as a threat to the company’s interests if, for example, he or she is in a position to receive and share with the government confidential and even privileged information regarding the company’s response to the agency’s investigation spawned by the whistleblower’s report. Learning the identity of a whistleblower also may help, for example, to discern the problem that has been reported to the government (if it is not otherwise known), the nature of the reported information, and its credibility.

In circumstances, however, where learning the identity of a whistleblower will not advance any employer interest, careful consideration should be given to whether discovering the identity is desirable.

### Authors

Charles Mills  
+1 202 429 6472  
[cmills@step toe.com](mailto:cmills@step toe.com)

Thomas Kirby  
+1 202 429 6454  
[tkirby@step toe.com](mailto:tkirby@step toe.com)

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<sup>1</sup> This paper does not contain legal advice; should not be relied upon as legal advice, and does not create an attorney-client relationship. Readers desiring legal advice should consult with legal counsel with respect to their particular circumstances.

<sup>2</sup> 17 CFR §§ 165.1 to 165.20 (CFTC); 17 CFR §§ 240.21F-1 to 240.21F-17 (SEC). To qualify for an SEC bounty, a whistleblower must, at a minimum, provide original information directly to the SEC; reporting such information only within the company will not qualify the person for a whistleblower award. *Digital Realty Tr., Inc. v. Somers*, 138 S.Ct. 767 (2018). The same standard for qualifying for a whistleblower award is likely true under the CFTC’s rules, as well.

Discovering the identity of a whistleblower can increase the potential for a claim of retaliation or impeding voluntary communication with the government.<sup>3</sup>

The Commodity Exchange Act (CEA)<sup>4</sup>, the Securities Exchange Act (SEA)<sup>5</sup>, and the CFTC and SEC whistleblower rules broadly provide that an employer may not “discharge, demote, suspend, threaten, harass, directly or indirectly, or in any manner discriminate against a whistleblower in terms or conditions of employment because of any lawful act done by the whistleblower” in providing information to the CFTC and SEC or by assisting in any investigation or action of the Commissions based upon or related to such information. They also create express private rights of action for “discharge or discrimination” in violation of this prohibition. The Sarbanes-Oxley Act<sup>6</sup> also provides a right of action for employees of public companies and their affiliates and privately-held contractors and sub-contractors of publicly-traded companies before the Secretary of Labor and ultimately the federal courts.<sup>7</sup>

Courts have interpreted the standard for “discrimination” against a whistleblower to be at least as broad as the Supreme Court’s interpretation of the term under Title VII of the civil rights statutes in *Burlington Northern*.<sup>8</sup> In that decision, the Supreme Court announced that “[t]he anti-retaliation provision [in Title VII] seeks to prevent employer interference with ‘unfettered access’ to Title VII’s remedial mechanisms. It does so by prohibiting employer actions that are likely ‘to deter victims of discrimination from complaining to the EEOC,’ the courts, and their employers.”<sup>9</sup> The U.S. Court of Appeals for the Fifth Circuit applied the *Burlington Northern* standard to a case under Sarbanes-Oxley. The Fifth Circuit held that a claim of “discrimination” was satisfied by the non-malicious identification of an employee as a whistleblower to his or her colleagues at work when a company policy provided for the whistleblower’s confidentiality.<sup>10</sup>

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<sup>3</sup> 17 CFR § 240.21F-17 (SEC Rule) (providing that “No 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”); 17 CFR §§ 165.1 to 165.20 (CFTC rules). See, e.g., *In the Matter of KBR, Inc.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, SEC Release No. 74619 (Apr. 1, 2015) (agreeing to a penalty of \$130,000 to settle charges of using improperly restrictive language in confidentiality agreements that had the potential to stifle the whistleblower process where employees and former employees involved in internal investigations were prohibited from discussing such matters with outside parties absent prior authorization from the company’s general counsel and making no exception for an employee’s right to communicate directly with the SEC about potential misconduct at the company).

<sup>4</sup> CEA §23(h)(1), 7 U.S.C. §26(h)(1).

<sup>5</sup> SEA §21F(h)(1), 15 U.S.C. §78u-6(h)(1).

<sup>6</sup> 18 U.S.C. §1514A.

<sup>7</sup> *Lawson v. FMR LLC*, 134 S.Ct. 1158, 1176 (2014).

<sup>8</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (“*Burlington Northern*”). See, e.g., *Allen v. Admin. Review Bd.*, 514 F.3d 468, n. 2 (5th Cir. 2008).

<sup>9</sup> *Burlington Northern*, 548 U.S. at 68 (citing *Robinson v. Shell Oil*, 519 U.S. 337, 346 (1997)).

<sup>10</sup> *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 262 (5th Cir. 2014) (the company’s whistleblower policy was established pursuant to 15 U.S.C. § 78j-1(m)(4)(B)) (“*Halliburton*”). Some courts have read *Halliburton* as adopting a standard for Sarbanes-Oxley that is even broader than Title VII’s, reasoning that “mere ostracism” is a basis for a retaliation claim under Sarbanes-Oxley, when it is not under Title VII. See, e.g., *Sobolak v. CW&W Contractors, Inc.*, 2018 WL 522781, at \*5 (W.D. La. 2018).

There, a document preservation email from the company's general counsel stated that "the SEC has opened an investigation into the allegations of Mr. Menendez."<sup>11</sup> The court upheld a claim of discrimination where that email was later forwarded to the whistleblower's (Mr. Menendez') entire work group, who were the subject of the whistleblower complaint. The court of appeals explained that:

The undesirable consequences, from a whistleblower's perspective, of the whistleblower's supervisor telling the whistleblower's colleagues that he reported them to authorities [ . . . ] are obvious. It is inevitable that such a disclosure would result in ostracism [ . . . ] when it is the boss that identifies one of his employees as the whistleblower who has brought an official investigation upon the department, as happened here, the boss could be read as sending a warning, granting his implied imprimatur on differential treatment of the employee, or otherwise expressing a sort of discontent from on high.<sup>12</sup>

The SEC, in a non-adjudicated settlement order, broadly interpreted actions that can constitute impeding the voluntary communication of information to the agency. In *HomeStreet*, the SEC found that a company impeded an employee's ability to directly communicate with the SEC staff by attempting to determine the identity of a suspected whistleblower in multiple interviews and suggesting that advancement of legal fees for his representation in the investigation might be withheld if he were a whistleblower.<sup>13</sup> The SEC's order acknowledged that the company subsequently did advance payment of the employee's costs of legal representation as it did for other employees who had identical indemnification agreements.

The foregoing cases demonstrate that when the identity of an anonymous whistleblower is learned, the company will risk a private claim of discrimination from disclosing his or her identity to the whistleblower's workplace colleagues and that even considering an adverse action based on a person's status as a whistleblower might be interpreted by the SEC and CFTC as a violation of the CEA, SEA and their respective whistleblower rules. These decisions should inform the judgment of employers about when and how to seek to discover the identity of an anonymous whistleblower.

***Charles Mills is a partner with Steptoe & Johnson LLP in Washington, DC. His practice includes representing clients in investigations, enforcement actions, litigation and regulatory matters involving the CFTC, SEC, FERC, DOJ and regulated exchanges.***

***Thomas Kirby is an associate with Steptoe & Johnson LLP in Washington, DC representing energy clients in litigation, enforcement and regulatory matters.***

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<sup>11</sup> *Halliburton*, 771 F.3d at 257.

<sup>12</sup> *Halliburton*, 771 F.3d at 262.

<sup>13</sup> *In the Matter of HomeStreet, Inc. and Darrell Van Amen*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, SEC Release No. 79844 (Jan. 19, 2017) ("*HomeStreet*") ("by taking actions to determine the identity of an individual whom HomeStreet suspected had brought the hedge accounting errors to the Commission staff, including suggesting that the terms of an indemnification agreement could allow them to deny payment to an individual who HomeStreet believed to be a whistleblower, HomeStreet acted to impede individuals from communicating directly with the Commission staff about a possible securities law violation").