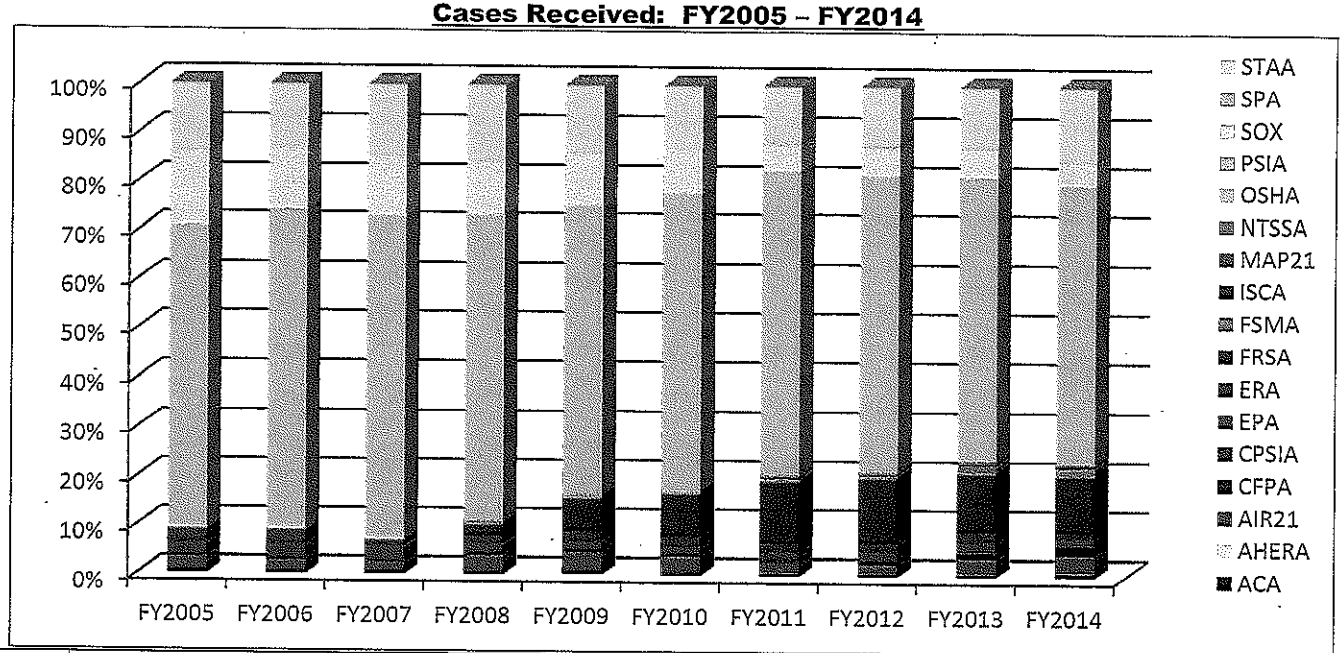
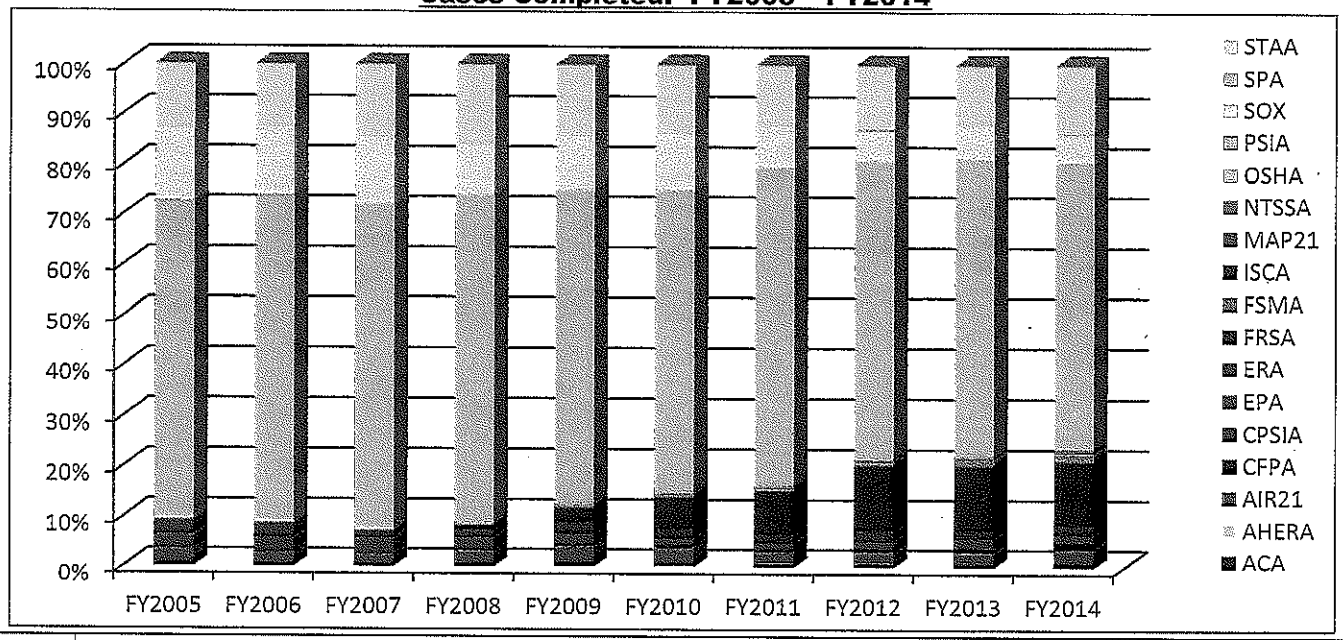
Cases Received: FY2005 – FY2014



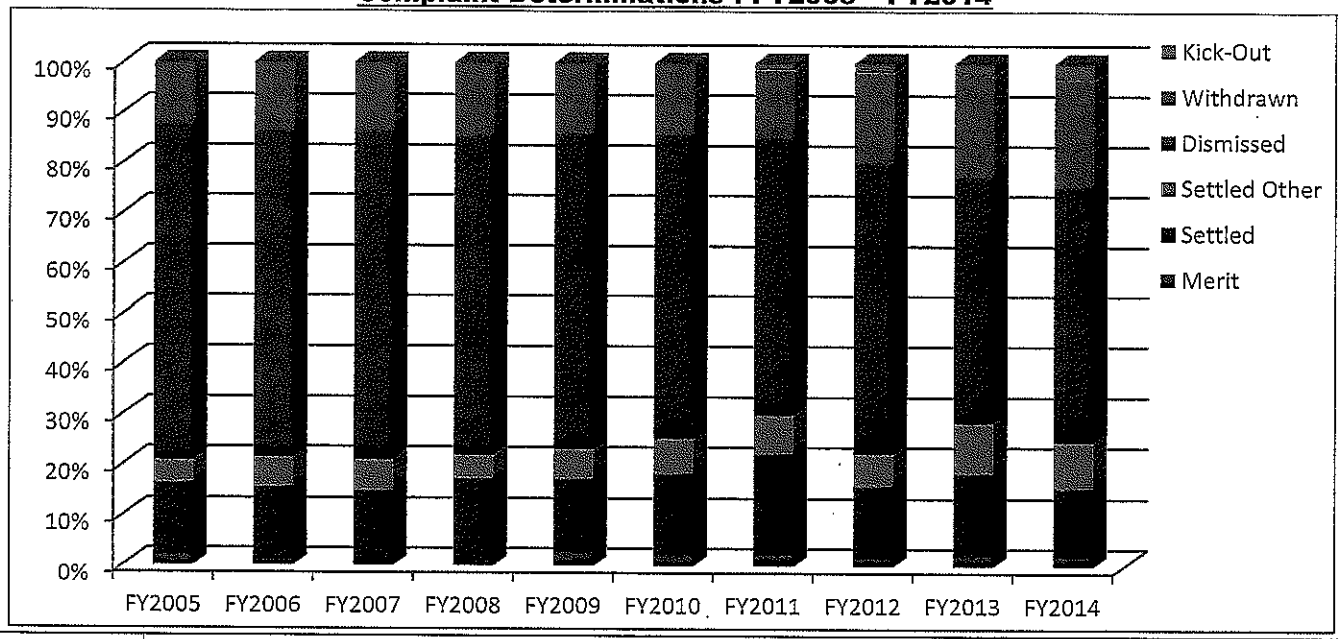
	Cases Received: FY2005 – FY2014									
Statute	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
ACA	0	0	0	0	0	4	14	14	18	26
AHERA	2	0	1	1	6	6	3	4	3	3
AIR21	65	52	50	85	92	75	66	57	91	111
CFPA	0	0	0	0	0	0	6	14	28	47
CPSIA	0	0	0	2	4	6	2	5	4	6
EPA	56	60	61	51	46	46	42	54	67	52
ERA	52	53	23	41	48	50	50	50	64	39
FRSA	0	0	1	45	145	201	340	384	355	351
FSMA	0	0	0	0	0	0	17	22	54	51
ISCA	0	0	0	0	0	1	0	0	0	0
MAP21	0	0	0	0	0	0	0	0	1	10
NTSSA	0	0	0	18	15	14	17	14	17	14
OSHA	1194	1195	1301	1381	1267	1402	1667	1745	1710	1729
PSIA	3	7	1	3	3	2	6	2	7	6
SOX	291	234	231	235	228	201	148	169	177	145
SPA	0	0	0	0	0	0	5	9	5	7
STAA	271	241	297	357	306	306	314	346	368	463
Total	1934	1842	1966	2219	2160	2314	2698	2889	2969	3060

Cases Completed: FY2005 – FY2014



	Cases Completed: FY2005 – FY2014									
Statute	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
ACA	0	0	0	0	0	1	11	18	11	25
AHERA	1	1	1	1	3	7	1	5	1	2
AIR21	66	54	46	65	71	65	49	66	83	93
CFPA	0	0	0	0	0	0	2	12	19	35
CPSIA	0	0	0	0	5	6	1	4	4	4
EPA	55	57	55	51	49	34	34	44	68	56
ERA	52	54	26	31	44	36	35	61	50	61
FRSA	0	0	0	18	53	119	165	354	391	393
FSMA	0	0	0	0	0	0	4	18	41	47
ISCA	0	0	0	0	0	0	1	0	0	0
MAP21	0	0	0	0	0	0	0	0	0	5
NTSSA	0	0	0	6	13	15	13	12	11	20
OSHA	1160	1229	1167	1255	1168	1144	1235	1653	1827	1794
PSIA	5	6	2	1	2	2	3	2	6	7
SOX	252	251	240	191	197	206	153	157	200	171
SPA	0	0	0	0	0	0	0	10	4	9
STAA	248	246	268	320	271	269	241	355	367	425
Total	1839	1898	1805	1938	1876	1904	1948	2771	3083	3147

Complaint Determinations[1]: FY2005 – FY2014



	Complaint Determinations FY2005 – FY2014						
Fiscal Year	Merit	Settled	Settled Other	Dismissed	Kick-Out[2]	Withdrawn	Total Determinations
2005	41	269	87	1270	N/A	235	1902
2006	23	284	117	1275	N/A	272	1971
2007	18	261	112	1217	N/A	253	1861
2008	21	328	95	1280	N/A	296	2020
2009	57	277	116	1221	N/A	272	1943
2010	45	312	138	1182	N/A	278	1955
2011	48	400	157	1110	23	278	2016
2012	48	406	187	1662	48	518	2869
2013	74	527	333	1596	73	669	3272
2014	64	441	305	1652	99	710	3271
Total	439	3505	1647	13465	243	3781	23080

[1] Complaint Determinations gives the total of complainant determinations made in each year. Because determinations are specific to each complainant (i.e. 3 complainants under one docket get 3 different determinations), there are more "determinations" than there are "case closures".

[2] A "kick-out" occurs when the complainant brings an action for *de novo* review of the complaint in a United States district court under the circumstances outlined in the statute.

Complaint Determinations – FY2005						
Statute	Merit	Settled	Settled Other	Dismissed	Withdrawn	Total Determinations
ACA	0	0	0	0	0	0
AHERA	0	0	0	0	2	2
AIR21	5	4	2	47	9	67
CFPA	0	0	0	0	0	0
CPSIA	0	0	0	0	0	0
EPA	1	3	3	45	4	56
ERA	1	2	7	39	5	54
FRSA	0	0	0	0	0	0
FSMA	0	0	0	0	0	0
ISCA	0	0	0	0	0	0
NTSSA	0	0	0	0	0	0
OSHA	23	224	47	760	146	1200
PSIA	0	0	0	4	1	5
SOX	8	9	20	193	38	268
SPA	0	0	0	0	0	0
STAA	3	27	8	182	30	250
Total	41	269	87	1270	235	1902

Complaint Determinations – FY2006						
Statute	Merit	Settled	Settled Other	Dismissed	Withdrawn	Total Determinations
ACA	0	0	0	0	0	0
AHERA	0	0	0	0	1	1
AIR21	0	1	2	49	4	56
CFPA	0	0	0	0	0	0
CPSIA	0	0	0	0	0	0
EPA	4	5	2	42	8	61
ERA	3	1	9	38	5	56
FRSA	0	0	0	0	0	0
FSMA	0	0	0	0	0	0
ISCA	0	0	0	0	0	0
NTSSA	0	0	0	0	0	0
OSHA	14	213	66	787	196	1276
PSIA	0	0	0	8	0	8
SOX	0	17	28	186	30	261
SPA	0	0	0	0	0	0
STAA	2	47	10	165	28	252
Total	23	284	117	1275	272	1971

Complaint Determinations – FY2007						
Statute	Merit	Settled	Settled Other	Dismissed	Withdrawn	Total Determinations
ACA	0	0	0	0	0	0
AHERA	0	0	0	1	0	1
AIR21	1	6	2	30	8	47
CFPA	0	0	0	0	0	0
CPSIA	0	0	0	0	0	0
EPA	1	8	3	44	6	62
ERA	0	0	3	20	3	26
FRSA	0	0	0	0	0	0
FSMA	0	0	0	0	0	0
ISCA	0	0	0	0	0	0
NTSSA	0	0	0	0	0	0
OSHA	14	190	58	766	176	1204
PSIA	0	0	0	2	0	2
SOX	0	13	30	172	31	246
SPA	0	0	0	0	0	0
STAA	2	44	16	182	29	273
Total	18	261	112	1217	253	1861

Complaint Determinations – FY2008						
Statute	Merit	Settled	Settled Other	Dismissed	Withdrawn	Total Determinations
ACA	0	0	0	0	0	0
AHERA	0	0	0	1	0	1
AIR21	2	8	2	50	5	67
CFPA	0	0	0	0	0	0
CPSIA	0	0	0	0	0	0
EPA	1	6	3	38	6	54
ERA	0	1	4	24	2	31
FRSA	1	2	0	13	2	18
FSMA	0	0	0	0	0	0
ISCA	0	0	0	0	0	0
NTSSA	0	0	0	7	0	7
OSHA	14	202	45	830	227	1318
PSIA	0	0	0	1	0	1
SOX	0	15	27	130	24	196
SPA	0	0	0	0	0	0
STAA	3	94	14	186	30	327
Total	21	328	95	1280	296	2020

Complaint Determinations – FY2009						
Statute	Merit	Settled	Settled Other	Dismissed	Withdrawn	Total Determinations
ACA	0	0	0	0	0	0
AHERA	0	0	0	2	1	3
AIR21	15	6	4	48	6	79
CFPA	0	0	0	0	0	0
CPSIA	0	1	0	4	0	5
EPA	0	3	4	42	1	50
ERA	1	0	10	34	3	48
FRSA	9	2	2	31	11	55
FSMA	0	0	0	0	0	0
ISCA	0	0	0	0	0	0
NTSSA	0	1	2	8	3	14
OSHA	22	210	55	726	187	1200
PSIA	0	0	1	0	1	2
SOX	3	12	29	127	35	206
SPA	0	0	0	0	0	0
STAA	7	42	9	199	24	281
Total	57	277	116	1221	272	1943

Complaint Determinations – FY2010						
Statute	Merit	Settled	Settled Other	Dismissed	Withdrawn	Total Determinations
ACA	0	0	0	1	0	1
AHERA	0	1	1	5	0	7
AIR21	1	5	8	49	3	66
CFPA	0	0	0	0	0	0
CPSIA	0	1	0	5	0	6
EPA	0	5	4	24	2	35
ERA	0	1	6	21	9	37
FRSA	8	12	14	69	16	119
FSMA	0	0	0	0	0	0
ISCA	0	0	0	0	0	0
NTSSA	1	1	1	10	2	15
OSHA	24	244	66	672	177	1183
PSIA	0	0	0	2	0	2
SOX	3	17	21	141	27	209
SPA	0	0	0	0	0	0
STAA	8	25	17	183	42	275
Total	45	312	138	1182	278	1955

Complaint Determinations – FY2011							
Statute	Merit	Settled	Settled Other	Dismissed	Kick-Out	Withdrawn	Total Determinations
ACA	0	0	0	6	0	5	11
AHERA	0	0	0	2	N/A	0	2
AIR21	0	3	8	33	N/A	8	52
CFPA	0	0	0	1	0	1	2
CPSIA	0	0	0	0	0	1	1
EPA	1	5	3	22	N/A	3	34
ERA	0	4	6	24	0	6	40
FRSA	16	13	23	77	9	30	168
FSMA	0	1	2	1	0	0	4
ISCA	0	0	0	1	N/A	0	1
NTSSA	0	2	2	8	1	0	13
OSHA	23	314	74	696	N/A	178	1285
PSIA	0	0	0	2	N/A	1	3
SOX	2	7	30	93	9	15	156
SPA	0	0	0	0	0	0	0
STAA	6	51	9	144	4	30	244
Total	48	400	157	1110	23	278	2016

Complaint Determinations – FY2012							
Statute	Merit	Settled	Settled Other	Dismissed	Kick-Out	Withdrawn	Total Determinations
ACA	0	0	0	12	0	6	18
AHERA	0	0	1	4	N/A	0	5
AIR21	2	4	3	54	N/A	4	67
CFPA	0	1	0	4	1	6	12
CPSIA	0	0	0	4	0	0	4
EPA	2	8	3	26	N/A	5	44
ERA	0	4	11	39	3	5	62
FRSA	14	18	37	221	31	50	371
FSMA	0	3	1	7	0	7	18
ISCA	0	0	0	0	N/A	0	0
MAP21	0	0	0	0	0	0	0
NTSSA	0	0	3	8	0	1	12
OSHA	20	294	88	977	N/A	340	1717
PSIA	0	0	0	2	N/A	0	2
SOX	2	10	29	90	10	18	160
SPA	0	4	0	11	0	2	17
STAA	8	59	11	205	3	74	360
Total	48	406	187	1662	48	518	2869

Complaint Determinations – FY2013							
Statute	Merit	Settled	Settled Other	Dismissed	Kick-Out	Withdrawn	Total Determinations
ACA	0	0	0	7	0	4	11
AHERA	0	0	0	1	N/A	0	1
AIR21	2	10	8	53	N/A	15	88
CFPA	0	4	1	8	2	5	20
CPSIA	0	0	0	0	3	1	4
EPA	3	6	8	40	N/A	12	69
ERA	2	0	11	28	2	7	50
FRSA	16	67	43	174	34	65	399
FSMA	0	4	5	21	2	9	41
ISCA	0	0	0	0	N/A	0	0
MAP21	0	0	0	0	0	0	0
NTSSA	0	1	0	5	0	5	11
OSHA	40	369	201	921	N/A	416	1947
PSIA	0	0	0	5	N/A	1	6
SOX	2	9	29	141	24	44	249
SPA	0	1	1	1	1	0	4
STAA	9	56	26	191	5	85	372
Total	74	527	333	1596	73	669	3272

Complaint Determinations – FY2014							
Statute	Merit	Settled	Settled Other	Dismissed	Kick-Out	Withdrawn	Total Determinations
ACA	0	0	0	13	0	13	26
AHERA	0	0	1	2	N/A	0	3
AIR21	0	10	11	48	N/A	28	97
CFPA	1	3	4	15	1	11	35
CPSIA	0	3	0	1	1	0	5
EPA	2	3	7	39	N/A	7	58
ERA	1	3	12	34	3	11	64
FRSA	28	27	31	213	47	56	402
FSMA	0	6	6	26	0	11	49
ISCA	0	0	0	0	N/A	0	0
MAP21	0	0	2	1	1	1	5
NTSSA	1	1	2	12	2	6	24
OSHA	13	310	161	954	N/A	427	1865
PSIA	0	0	5	1	N/A	1	7
SOX	2	3	29	77	30	33	174
SPA	0	3	0	5	1	0	9
STAA	16	69	34	211	13	105	448
Total	64	441	305	1652	99	710	3271

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November 2014

Administrative Review Board Makes Proof of Causation for Complainants in Sarbanes-Oxley Retaliation Cases Substantially Easier

BY KENNETH W. GAGE & LESLIE A. DENT

Often the most crucial and hard-fought issues in any retaliation trial is the question of causation. Did the employer take adverse action against the employee "because of" his protected activity? Invariably, the individual engaged in some form of protected activity and the employer took some form of adverse action, all under circumstances that can lead to competing inferences about the employer's motivation. Temporal proximity between the events may compete with proof that the individual's performance was sub-par or that he engaged in some form of misconduct unrelated to his protected activity. At trial, the fact finder normally must evaluate all relevant evidence, assess the credibility of witnesses, and decide whether the burden of causation has been established.

In a 2-1 decision last month in *Fordham v. Fannie Mae*, ARB No. 12-061 (October 9, 2014), the Administrative Review Board ("ARB") of the U.S. Department of Labor held that for retaliation claims brought under Section 806 of the Sarbanes-Oxley Act, as amended, the approach must be different. The administrative law judge ("ALJ") is not permitted to consider the employer's evidence of motive for the adverse action when assessing whether the complainant has met her burden, according to the ARB's recent decision. The proper time for consideration of that evidence, the ARB explained, is only after a determination has been made that the complainant's protected activity was a contributing factor in the decision.

"[G]iven the widespread impact of the causation issue *Fordham* addressed," eight days later the ARB issued an order in another case, *Powers v. Union Pacific Railroad Company*, ARB No. 13-034, requesting supplemental briefing on the standard announced in *Fordham* and indicating that it would consider the appeal *en banc*. Unless modified in *Powers*, however, the decision in *Fordham* will be binding on ALJs who hear Section 806 retaliation claims. As a practical matter, *the Fordham* decision means that employers will bear an even more substantial burden in hearings before the Department of Labor for disproving a retaliatory motive in most cases. More significantly, the decision may make it more difficult for employers to obtain dismissal of Section 806 claims before hearing. U.S. district courts hearing Section 806 claims pursuant to the kick-out provision of the 2010 amendments[1] will not be bound. So employers will be able to argue in court for a more traditional approach to the consideration of causation evidence, though many courts have given deference to ARB rulings on questions of law under the statute.

Fordham's Claim Fails After a Hearing Before the ALJ

Section 806 of Sarbanes Oxley prohibits public companies from taking adverse employment actions against an employee because he has (a) lawfully "provid[ed] information, cause[d] information to be provided, or otherwise assist[ed] in an investigation (b) regarding any conduct which (c) the employee reasonably believes constitutes a violation of" Federal mail, wire, bank, or securities and commodities fraud statutes, "any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders" when (d) that information or assistance is provided to a federal regulatory or law enforcement agency, a Member of Congress or a person with supervisory authority over the employee.[2] Claims under Section 806 must first be filed with the U.S. Department of Labor. Only where the Secretary of Labor has failed to issue a final decision on such a claim within 180 days may the complainant pursue a claim in U.S. district court, where a jury trial is then available.

In establishing the retaliation claim in Section 806, Congress decided that if an employer takes adverse action against an employee even if only in part "because of" his protected activity, it will bear a substantial burden to avoid liability using an affirmative defense. Claims are governed by the rules set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21").[3] The statute requires that a complainant must prove that her protected activity was "a *contributing factor* in the unfavorable personnel action"[4] in order to establish a violation of the law. This must be proved by a preponderance of the evidence. The statute also provides an affirmative defense to the employer; if the complainant succeeds in proving a violation—that is, that the employer was in part motivated by the protected activity—the employer may avoid liability if it can prove by clear and convincing evidence that it "would have taken the same unfavorable personnel action in the absence of that behavior."[5]

The *Fordham* case proceeded to a final decision in the Department of Labor, after an evidentiary hearing before an ALJ. The complainant proved by a preponderance of the evidence that she had engaged in protected activity over a period of time from late 2008 into the spring of 2009. The ALJ also found that she suffered the following adverse employment actions: (1) a lowered performance rating in March 2009, (2) an involuntary administrative leave starting in late April, and (3) the termination of her employment in July 2009. She failed to prove by a preponderance of the evidence, according to the ALJ, that her protected activity was a contributing factor in any of these adverse actions. Citing "overwhelming evidence of Fordham's unsatisfactory job performance during 2008," the ALJ concluded that Fordham failed to prove that her protected activity was a contributing factor in the lowered performance rating. Next, the ALJ pointed to evidence that the recommendation to terminate Fordham's employment predated her protected activity in late April 2009. From this, the ALJ concluded that the termination decision had already been made and therefore there was insufficient evidence to prove that her protected activity was a contributing factor in the decisions to place her on administrative leave and later terminate her employment. The complaint was dismissed, and Fordham appealed to the ARB.

The ARB's Decision to Reverse and Remand

The ALJ's factual findings, the ARB explained, "will be upheld where supported by substantial evidence even if there is also substantial evidence for the other party, and even if [the ARB] 'would justifiably have made a different choice had the matter been before [it] de novo.'" (Slip Op. at 9.) Indeed, the ARB found that many of the ALJ's factual findings were supported by substantial evidence in the record, including the finding that some of what Fordham claimed were adverse actions were not. On the issue of causation, however, the ARB found reversible error in two respects.

First, the ARB explained that only a "recommendation" to terminate Fordham's employment predated her late April protected activity and that recommendation required additional approvals, which came much later. Therefore, it held that it was error to find that the decision predated the protected activity. Second, and more significantly, the ARB held that "the ALJ committed reversible error . . . [i]n weighing Fannie Mae's causation evidence against Fordham's evidence of causation ...." (Slip Op. at 35.) This conclusion, the ARB explained, is rooted in the proof paradigm dictated by Congress in the statute.

Fordham argued before the ARB that she was not required to prove that the employer "*actually* considered her protected activity" but only that she demonstrate "*an inference* of contributing factor." (Slip Op. 16.) The ARB agreed. "It would thus seem self-evident from this statutory scheme," the ARB explained, that the employer's evidence regarding its reasons for taking the adverse action "is not to be considered at the initial 'contributing factor' causation stage where proof is subject to the 'preponderance of the evidence' test." (Slip Op. 22.) Otherwise, it suggested, the employer would be relieved of the higher, clear and convincing burden, which applies to the causation issue on its affirmative defense. Curiously, the ARB described its holding as an "evidentiary methodology," one that "differs from the traditional evaluation of evidence ...whereby findings of fact are based on the weighing of all the evidence introduced by both parties." (Slip. Op. 35.) Nonetheless, it remanded the case to the ALJ for a new determination consistent with the opinion.

Impact of the ARB's Decision

The ARB's holding in *Fordham* is binding on ALJs unless or until it is reversed or modified, which could happen in *Powers*. If determined by the ARB to be necessary, oral argument in *Powers* will take place in January, 2015. Hopefully, the ARB will act promptly in *Powers* because the decision in *Fordham* is flawed for a variety of reasons, many of which are cogently set forth in the dissent. Fundamentally, the decision "alters the statutory affirmative defense to mean that ALJs cannot consider all the relevant evidence in deciding the question of contributory factor" which, the dissent predicts, "will lead to skewed findings of whistleblower violations." (Slip Op. 38-39 (dissent).)

A violation of Section 806 only occurs if the protected activity was a contributing factor in the adverse employment action. Absent such a finding, there is no need to consider whether the employer can establish its affirmative defense. That is the very nature of an affirmative defense. Suppose, for example, that the employer's evidence were to show conclusively that all of the adverse actions were actually taken before any of the protected conduct. In such a circumstance, it would not be possible for a retaliatory motive to have been "a *contributing factor* in the unfavorable personnel action." And in the absence of such a retaliatory motive, there is no need to consider whether Fannie Mae proved by clear and convincing evidence that it would have acted the same in the *absence* of such a motive. But according to the ARB, the ALJ is not permitted even to consider whether retaliation was, in fact, "a *contributing factor* in the unfavorable personnel action" because it is not permissible for the ALJ to consider evidence of any other possible factors. That is, in making a determination on the "contributing factor" question, the ARB held that the ALJ is not permitted to consider any evidence about what else might have motivated the employer. That "evidentiary" approach leaves the ALJ only with the complainant's evidence and, potentially, a foregone conclusion that a violation occurred.

How this decision will impact Section 806 hearings before ALJs is hard to predict. Despite its length, the decision gives little practical guidance to ALJs for approaching the causation questions in future hearings. It does not clearly explain what constitutes the employer's "causation" evidence, as opposed to other evidence that may properly be considered on the threshold "contributing factor" question. It

thus remains to be seen what type of evidence an ALJ properly can cite to support a conclusion that the complainant has failed to meet her burden by a preponderance of the evidence. Likewise, it is unclear whether a complainant will be able to establish a violation, thus shifting the burden of proof to the employer, merely by showing that his or her protected activity and the adverse employment action occurred in temporal proximity, or whether the employer will even be permitted at this stage to offer substantial proof of poor performance, misconduct, or other legitimate reasons to support the adverse action.

Potentially of greater significance is how this decision may impact pre-hearing proceedings before the DOL. It may lead ALJs to dismiss fewer cases before hearing. Fortunately, the ARB's decision is not binding on U.S. district courts, so for SOX retaliation claims pursued in that forum, employers still will be able to argue for a more traditional approach to assessing the evidence.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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1 Pursuant to 18 U.S.C. § 1514A(b)(1)(B), if the Secretary of Labor has not issued a final decision on the claim within 180 days of filing, the complainant may bring an action in U.S. district court, where she is entitled to a trial by jury.

2 18 U.S.C. § 1514A(a)(1).

3 18 U.S.C. § 1514A(b)(2) ("An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.).

4 49 U.S.C. § 42121(b)(2)(B)(iii) (emphasis added).

5 49 U.S.C. § 42121(b)(2)(B)(iv).

Occupational Safety and Health Administration
Directorate of Whistleblower Protection Programs (DWPP)
Whistleblower Statutes Desk Aid

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Section 11(c) of the Occupational Safety & Health Act (OSHA) (1970) *[29 U.S.C. § 660(c)]. Protects employees from retaliation for exercising a variety of rights guaranteed under the Act, such as filing a S&H complaint with OSHA or their employers, participating in an inspection, etc.* **29 CFR 1977**	30	*Private sector* *U.S. Postal Service* *Certain tribal employers*	90	No	Yes	No	Yes	Yes	15	OSHA	Motivating
Asbestos Hazard Emergency Response Act (AHERA) (1986) *[15 U.S.C. § 2651]. Protects employees from retaliation for reporting violations of the law relating to asbestos in public or private non-profit elementary and secondary school systems.* **29 CFR 1977**	90	*Private sector* *State and local government* *Certain DoD schools* *Certain tribal schools*	90	No	Yes	No	Yes	Yes	15	OSHA	Motivating
International Safe Container Act (ISCA) (1977) *[46 U.S.C. § 80507]. Protects employees from retaliation for reporting to the Coast Guard the existence of an unsafe intermodal cargo container or another violation of the Act.* **29 CFR 1977**	60	*Private sector* *Local government* *Certain state government and interstate compact agencies*	30	No	Yes	No	Yes	Yes	15	OSHA	Motivating
Surface Transportation Assistance Act (STAA) (1982), as amended by the 9/11 Commission Act of 2007 (Public Law No. 110-053) *[49 U.S.C. § 31105]. Protects truck drivers and other covered employees from retaliation for refusing to violate regulations related to the safety or security of commercial motor vehicles or for reporting violations of those regulations, etc.* **29 CFR 1978**	180	*Private sector*	60	210	Yes	Yes	Yes	Yes 250K cap	30	ALJ	Contributing

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Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Safe Drinking Water Act (SDWA) (1974) *[42 U.S.C. § 300j-9(i)]. Protects employees from retaliation for, among other things, reporting violations of the Act, which requires that all drinking water systems assure that their water is potable as determined by the Environmental Protection Agency.* **29 CFR 24**	30	*Private sector Federal, state and municipal Indian tribes*	30	No	Yes	No	Yes	Yes	30	ALJ	Motivating
Federal Water Pollution Control Act (FWPCA) (1972) *[33 U.S.C. § 1367]. Protects employees from retaliation for reporting violations of the law related to water pollution. This statute is also known as the Clean Water Act.* **29 CFR 24**	30	*Private sector State and municipal Indian tribes Federal sovereign immunity bars investigation of FWPCA complaints filed by federal employees*	30	No	Yes	No	Yes	No	30	ALJ	Motivating
Toxic Substances Control Act (TSCA) (1976) *[15 U.S.C. § 2622]. Protects employees from retaliation for reporting alleged violations relating to industrial chemicals currently produced or imported into the United States and supplements the Clean Air Act (CAA) and the Toxic Release Inventory under Emergency Planning & Community Right to Know Act (EPCRA).* **29 CFR 24**	30	*Private sector*	30	No	Yes	No	Yes	Yes	30	ALJ	Motivating
Solid Waste Disposal Act (SWDA) (1976) *[42 U.S.C. § 6971]. Protects employees from retaliation for reporting violations of the law that regulates the disposal of solid waste. This statute is also known as the Resource Conservation and Recovery Act.* **29 CFR 24**	30	*Private sector Federal, state and municipal Indian tribes*	30	No	Yes	No	Yes	No	30	ALJ	Motivating

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Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Clean Air Act (CAA) (1977) *[42 U.S.C. § 7622]. Protects employees from retaliation for reporting violations of the Act, which provides for the development and enforcement of standards regarding air quality and air pollution.* **29 CFR 24**	*30*	*Private sector Federal, state and municipal*	*30*	*No*	*Yes*	*No*	*Yes*	*No*	*30*	*ALJ*	*Motivating*
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (1980) *[42 U.S.C. § 9610] A.k.a. "Superfund," this statute protects employees from retaliation for reporting violations of regulations involving accidents, spills, and other emergency releases of pollutants into the environment. The Act also protects employees who report violations related to the clean up of uncontrolled or abandoned hazardous waste sites.* **29 CFR 24**	*30*	*Private sector Federal, state and municipal*	*30*	*No*	*Yes*	*No*	*Yes*	*No*	*30*	*ALJ*	*Motivating*

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Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Energy Reorganization Act of 1974, as amended by the Energy Policy Act of 2005 (Public Law No. 109-58) (ERA) *[42 U.S.C. § 5851]. Protects certain employees in the nuclear industry from retaliation for reporting violations of the Atomic Energy Act. Protected employees include employees of operators, contractors and subcontractors of nuclear power plants licensed by the Nuclear Regulatory Commission, and employees of contractors working with the Department of Energy under a contract pursuant to the Atomic Energy Act.* **29 CFR 24**	*180*	*Statute provides coverage of NRC and its contractors and subcontractors, NRC licensees and applicants for licenses, including contractors and subcontractors Agreement state licensees Applicants for licenses from agreement states, including their contractors and subcontractors DOE and its contractors and subcontractors. However, ARB case law indicates federal sovereign immunity will bar investigation of ERA complaints filed against many but not all federal agencies.*	*30*	*365*	*Yes*	*No*	*Yes*	*No*	*30*	*ALJ*	*Contributing*
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) (2000) *[49 U.S.C. § 42121]. Protects employees of air carriers and contractors and subcontractors of air carriers from retaliation for, among other things, reporting violations of laws related to aviation safety.* **29 CFR 1979**	*90*	*Air carriers and their contractors and subcontractors*	*60*	*No*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*

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Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Sarbanes-Oxley Act (SOX) (2002), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Public Law No. 111-203) *[18 U.S.C. § 1514A]. Protects employees of certain companies from retaliation for reporting alleged mail, wire, bank or securities fraud; violations of the SEC rules and regulations; or violations of federal laws related to fraud against shareholders. The Act covers employees of publically traded companies, including those companies' subsidiaries, and employees of nationally recognized statistical rating organizations, as well as contractors, subcontractors, and agents of these employers.* **29 CFR 1980**	*180*	*Companies registered under §12 or required to report under §15(d) of the SEA and their consolidated subsidiaries or affiliates, contractors, subcontractors, officers, and agents, and nationally recognized statistical rating organizations*	*60*	*180*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*
Pipeline Safety Improvement Act (PSIA) (2002) *[49 U.S.C. § 60129]. Protects employees from retaliation for reporting violations of federal laws related to pipeline safety and security or for refusing to violate such laws.* **29 CFR 1981**	*180*	*Private sector employers, states, municipalities, and individuals owning or operating pipeline facilities, and their contractors and subcontractors*	*60*	*No*	*Yes*	*Yes*	*Yes*	*No*	*60*	*ALJ*	*Contributing*

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Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Federal Railroad Safety Act (FRSA), as amended by Section 1521 of the 9/11 Commission Act of 2007 (Public Law No. 110-053), and Section 419 of the Rail Safety Improvement Act of 2008 (Public Law No. 110-432) *[49 U.S.C. § 20109]. Protects employees of railroad carriers and their contractors and subcontractors from retaliation for reporting a work-place injury or illness, a hazardous safety or security condition, a violation of any federal law or regulation relating to railroad safety or security, or the abuse of public funds appropriated for railroad safety. In addition, the statute protects employees from retaliation for refusing to work when confronted by a hazardous safety or security condition.* **29 CFR 1982**	*180*	*Railroad carriers and their contractors, subcontractors, and officers*	*60*	*210*	*Yes*	*Yes*	*Yes*	*Yes 250K Cap*	*30*	*ALJ*	*Contributing*
National Transit Systems Security Act (NTSSA), enacted as Section 1413 of the 9/11 Commission Act of 2007 (Public Law No. 110-053) *[6 U.S.C. §1142]. Protects transit employees from retaliation for reporting a hazardous safety or security condition, a violation of any federal law relating to public transportation agency safety, or the abuse of federal grants or other public funds appropriated for public transportation. The Act also protects public transit employees from retaliation for refusing to work when confronted by a hazardous safety or security condition, or refusing to violate a federal law related to public transportation safety.* **29 CFR 1982**	*180*	*Public transportation agencies and their contractors and subcontractors, and officers*	*60*	*210*	*Yes*	*Yes*	*Yes*	*Yes 250K Cap*	*30*	*ALJ*	*Contributing*

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Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Consumer Product Safety Improvement Act (CPSIA) (2008) *[15 U.S.C. § 2087]. Protects employees from retaliation for reporting to their employer, the federal government, or a state attorney general reasonably perceived violations of any statute or regulation within the jurisdiction of the Consumer Product Safety Commission (CPSC). CPSIA covers employees of consumer product manufacturers, importers, distributors, retailers, and private labelers.* **29 CFR 1983**	*180*	*Manufacturing, private labeling, distribution, and retail employers in the United States*	*60*	*210 or within 90 days of OSHA finding*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*
Affordable Care Act (ACA) (2010) *[29 U.S.C. § 218c]. Protects employees from retaliation for reporting violations of any provision of title I of the ACA, including but not limited to discrimination based on an individual's receipt of health insurance subsidies, the denial of coverage based on a preexisting condition, or an insurer's failure to rebate a portion of an excess premium.* **29 CFR 1984**	*180*	*Private and public sector employers*	*60*	*210 or within 90 days of OSHA finding*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*
Seaman's Protection Act, as amended by § 611 of the Coast Guard Authorization Act of 2010 (Public Law No. 111-281) (SPA) *[46 U.S.C. § 2114]. Protects seamen from retaliation for reporting to the Coast Guard or another federal agency a violation of a maritime safety law or regulation. Among other things, the Act also protects seamen from retaliation for refusing to work when they reasonably believe an assigned task would result in serious injury or impairment of health to themselves, other seamen, or the public.* **29 CFR 1986**	*180*	*Private-sector employers—vessel on which seaman was employed must be American-owned, as defined; world-wide coverage*	*60*	*210*	*Yes*	*Yes*	*Yes*	*Yes 250 K Cap*	*30*	*ALJ*	*Contributing*

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Consumer Financial Protection Act (CFPA) (Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203) (2010) *[12 U.S.C. § 5567]. Protects employees performing tasks related to consumer financial products or services from retaliation for reporting reasonably perceived violations of any provision of title X of the Dodd-Frank Act or any other provision of law that is subject to the jurisdiction of the Bureau of Consumer Financial Protection, or any rule, order, standard, or prohibition prescribed by the Bureau.*	*180*	*Any person engaged in offering or providing a consumer financial product or service, a service provider to such person, or such person's affiliate acting as a service provider to it*	*60*	*210 or within 90 days of OSHA finding*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*
FDA Food Safety Modernization Act (FSMA) (2011) *[21 U.S.C. § 1012]. Protects employees of food manufacturers, distributors, packers, and transporters from retaliation for reporting a violation of the Food, Drug, and Cosmetic Act, or a regulation promulgated under the Act. Employees are also protected from retaliation for refusing to participate in a practice that violates the Act.*	*180*	*Any entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food*	*60*	*210 or within 90 days of OSHA finding*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*

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Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Section 31307 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) (a provision of Division C's Title I, the Motor Vehicle and Highway Safety Improvement Act of 2012) (2012). *Protects employees from retaliation by motor vehicle manufacturers, part suppliers, and dealerships for providing information to the employer or the U.S. Department of Transportation about motor vehicle defects, noncompliance, or violations of the notification or reporting requirements enforced by the National Highway Traffic Safety Administration (NHTSA), or for engaging in related protected activities as set forth in the provision.*	*180*	*Motor vehicle manufacturer, part supplier, or dealership*	*60*	*210*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*

PAUL HASTINGS

A Paradigm for Investigating and Defending SEC Whistleblower Claims: Top Ten Tips from the SEC's First-Ever Whistleblower Retaliation Action[1]

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On June 16, 2014, the Securities and Exchange Commission filed the first-ever enforcement action charging whistleblower retaliation. The SEC was empowered to punish retaliation pursuant to a Commission rule adopted in 2011 under the Dodd-Frank Act. In this first exercise of that power, the SEC filed an enforcement action against Paradigm Capital Management, Inc., a New York-based investment adviser, and its owner, Candace King Weir.[2]

According to the SEC's order, from 2009 to 2011, as part of a trading strategy designed to reduce tax liability for its hedge fund clients, Weir directed Paradigm's traders to sell certain securities from the fund to a proprietary trading account that she controlled at her affiliated broker-dealer, C.L. King & Associates, Inc. The sales were pretexted and designed to realize sham trading losses. Paradigm's head trader reported the activity to the SEC in March 2012. In July 2012, the trader disclosed to Paradigm that he/she had reported suspected securities violations to the SEC. Paradigm then made a series of missteps that culminated in an adverse finding of unlawful whistleblower retaliation.[3]

In June 2014, the SEC charged Paradigm and Weir with whistleblower retaliation that Paradigm and Weir settled with the SEC for $2.2 million.[4]

It was clear from the beginning that Paradigm lacked proper policies and compliance programs to appropriately respond to the whistleblower's allegations. Indeed, from the moment Paradigm hired outside counsel, it scrambled to respond in a manner that would both protect its interests and avoid a successful retaliation claim. Paradigm's actions varied from inconsistent and somewhat suspicious to blatantly retaliatory, giving the SEC ample ammunition to prosecute its first anti-retaliation action.

The SEC has long warned that it would bring whistleblower retaliation claims in appropriate cases. "For whistleblowers to come forward, they must feel assured that they're protected from retaliation and the law is on their side should it occur," said Sean McKessy, chief of the SEC's Office of the Whistleblower. "We will continue to exercise our anti-retaliation authority in these and other types of situations where a whistleblower is wrongfully targeted for doing the right thing and reporting a possible securities law violation."

As rewards paid to SEC whistleblowers have increased over the last eighteen months, so have the number of whistleblowers.[5] As a result, employers who receive internal complaints

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[2]A copy of the SEC's Cease and Desist order detailing the findings of retaliation is attached.

[3]In September of 2012, the whistleblower filed a private lawsuit for retaliation under the Dodd-Frank Act, seeking the statutory awards of reinstatement, two-times back-pay with interest, and attorneys' fees and legal costs. The private suit was voluntarily dismissed in December 2012.

[4]The SEC also found that because Weir controlled both Paradigm and C.L. King, the sales were principal transactions that posed potential conflicts of interest between the adviser and the fund. Paradigm was therefore required to make written disclosure to, and obtain consent from, the fund. The SEC further found that Paradigm's conflicts committee, which reviewed and approved principal transactions, was conflicted and could not provide effective consent, and that Paradigm's Form ADV failed to disclose this conflict.

[5]On September 22, 2014, the SEC announced an award of more than $30 million to a foreign resident for disclosing "information about an ongoing fraud that would have been very difficult to detect." *See* Press Release, Securities and Exchange Commission, SEC Announces Largest-Ever Whistleblower Award (Sept. 22, 2014). The SEC awarded more than $14 million in 2012 to a whistleblower whose report aided in the recovery of substantial investor funds. *See* Press Release, Securities and Exchange Commission, SEC Awards More than $14 Million to

concerning securities violations, or who discover that their employees have filed complaints with the SEC, must be extremely careful to avoid retaliatory actions, including actions that could be perceived as retaliatory. To that end, following are top do's and don'ts that companies should keep in mind – in addition to working with outside counsel – as they respond to whistleblower complaints.

1. *Do create and foster a culture of compliance.*

Aside from the obvious compliance issues underlying its prohibited principal transactions (and the fact that Paradigm established a conflicts committee that itself was conflicted), Paradigm's actions towards the whistleblower failed to reflect a culture of compliance. Paradigm's initial response to the whistleblower's disclosure was actually the right one - to hear the whistleblower out and to preserve the status quo with regard to his employment. According to the SEC, "the whistleblower was questioned about his allegations and then returned to the trading desk and continued trading for the remainder of the day."[6] The next day, however, after consulting outside counsel, Paradigm removed the whistleblower from his responsibilities "temporarily," relocated him offsite and instructed him to prepare a report detailing his allegations.[7] Further, Paradigm told the whistleblower it needed to investigate *his* actions in relation to the trades.[8] Paradigm's sudden shift from business as usual to acting with mistrust towards the whistleblower reveals that important compliance policies and training were lacking.

To create a culture of compliance, companies should:

- Establish best practices, policies and procedures for deterring, discovering and reporting internal securities violations. This will include training personnel to identify the areas of fraud most likely to occur in their respective departments. Reporting suspected fraud should be encouraged, if not required. Companies also should be careful to ensure policies do not blatantly discourage cooperation with the SEC.

- Publicize standing policies and procedures for compliance and anti-retaliation. Ensure that new employees are appropriately trained on these policies, particularly if they are in supervisory or human resources roles. These policies should be reinforced frequently and distributed widely – even to the company's private contractors and subsidiaries.[9]

Whistleblower (Oct. 25, 2012); SEC. & EXCHANGE COMM'N, 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, 15 (2013) ("SEC Dodd-Frank Annual Report 2013").

[6] *In re Paradigm Capital Mgm't, Inc.*, Securities Exchange Act Release No. 72393, Investment Advisers Act Release No. 3857, File No. 3-15930 (June 16, 2014) (cease-and-desist order).

[7] *Id.*

[8] *Id.*

[9] The Supreme Court has interpreted SOX whistleblower provisions quite broadly, extending them to cover employees of a public company's private contractors, in addition to a company's direct employees. *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1171 (2014).

- Track and document internally all training, publications and awareness efforts to create a record of strong company compliance.

2. *Do incentivize internal reporting.*

The Paradigm whistleblower reported to the SEC first. [10] Almost four months passed before the whistleblower disclosed to Paradigm that he had reported an issue to the SEC.[11] The reason the whistleblower disclosed the SEC complaint to Paradigm is unclear; he was not required by the SEC to report internally, though certain compliance officers and auditors do face such requirements. His internal disclosure, however, gave Paradigm an opportunity to investigate, consult with outside counsel, and explore remediation before the SEC pursued enforcement. In other words, the whistleblower did Paradigm a huge favor. While companies would prefer to receive internal reports prior to SEC disclosures, any form of internal reporting is better than none.[12]

To incentivize internal reporting, companies should:

- Tailor incentives (1) to address whistleblowers' concerns for anonymity (for example, through the use of third party hotlines), (2) to prevent misconduct involving direct supervisors or high level executives, and (3) to convince employees that the company can be trusted to investigate the complaint, to be non-retaliatory and to preserve relevant evidence.

- Ensure employees understand the company's incentives for internal reporting. In light of recent multi-million dollar whistleblower awards, Plaintiffs' attorneys may encourage

[10] *In re Paradigm Capital Mgm't, Inc.*, Securities Exchange Act Release No. 72393, Investment Advisers Act Release No. 3857, File No. 3-15930 (June 16, 2014) (cease-and-desist order).

[11] *Id.*

[12] Companies clearly have a strong interest in internal reporting. However, it remains to be seen whether companies are capable of providing incentives that outweigh the incentives to go directly to the SEC. Given the recent multi-million dollar whistleblower awards and the requirement that tipsters provide the SEC with "original information" to qualify for an award, companies may not be able to combat unilateral SEC disclosures. Moreover, after *Asadi v. GE Energy (USA) LLC*, employees may fear that anti-retaliation provisions will not protect them unless they report suspected violations to the SEC. 720 F.3d 620 (5th Cir. 2013) (holding that the statutory definition of "whistleblower" includes only those individuals who have reported to the SEC). *Asadi*, however, conflicts with a multitude of district court cases holding that anti-retaliation provisions extend to tipsters who report internally, and choose not to report to the SEC. *See e.g.*, *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424, 2012 U.S. Dist. LEXIS 136939 (D. Conn. Sept. 25, 2012) (noting that every case considering the issue held in favor of anti-retaliation protections for internal tipsters); *see also*, *Genberg v. Porter*, 935 F. Supp. 2d 1094, 2013 U.S. Dist. LEXIS 41302 (D. Colo. 2013). The SEC has taken the position that its rules were intended to protect, and indeed incentivize, internal reporting. *Liu v. Siemens AG*, No. 13-4385, at 10-11 (2d Cir. Feb. 20, 2014) (amicus curiae brief of SEC) ("A principal challenge the Commission faced in crafting rules to implement the [whistleblower] award program was ensuring that employees and others were not dissuaded from reporting internally due to the possibility of a monetary award...The Commission also recognized that 'reporting through internal compliance procedures can complement or otherwise appreciably enhance [its] enforcement efforts in appropriate circumstances...Accordingly, the Commission 'tailored the final rules to provide whistleblowers who are otherwise pre-disposed to report internally, but who may also be affected by financial incentives, with additional economic incentives to continue to report internally.").

employees to skip internal reporting in favor of going directly to the SEC (and in hopes that their clients beat everyone else in the company to the punch by disclosing "original information" – a requirement for receiving a whistleblower award).

- Ensure employees understand the SEC's stance on internal reporting. Indeed, the SEC has attempted to encourage internal reporting by (1) requiring certain legal, compliance and audit staff to report internally in many cases before going to the SEC,[13] (2) factoring internal reporting into whistleblower award amounts, and (3) lessening sanctions against companies that take internal measures to rectify illegal conduct.

- Keep it simple. Consider using reporting forms similar to those used by the SEC to obtain the necessary details of suspected securities violations.

- Consider offering an award commensurate with the significance of the information provided.

3. *Do not delay. When faced with an internal report, act promptly.*

A company must act promptly to investigate a whistleblower's allegations in a manner consistent with internal compliance protocol and best practices. In September of 2013, the second largest (at least to date) whistleblower award of $14 million went to a tipster whose information was used in an enforcement action within six months of the initial disclosure. A prompt investigation, and remediation where appropriate, may also result in decreased sanctions or charges.[14]The SEC favorably accounts for proactive compliance measures and remediation efforts. *S.E.C. v. Oracle Corp.*, Exchange Act Release No. 22450, 2012 WL 3548182 (Aug. 16, 2012) (noting that its FCPA "settlement takes into account Oracle's voluntary disclosure of the conduct [at-issue] and its cooperation with the SEC's investigation, as well as remedial measures taken by the company, including firing the employees involved in the misconduct and making significant enhancements to its [FCPA] compliance program"); *S.E.C. v. Volt Informational Sci. Inc.*, Exchange Act Release No. 22589, 2013 WL 139425 (Jan. 11, 2013) (acknowledging target company's cooperation during SEC's investigation and undertaking of "significant remedial efforts").

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[13]*See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, § 301.

[14]SEC. & EXCHANGE COMM'N & DEP'T OF JUSTICE, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, 77-78 (Nov. 14, 2012) (including internal investigations within its list of the "Hallmarks of Effective Compliance Programs"), *available at* http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf. The SEC/DOJ FCPA Resource Guide describes several instances where the SEC declined to take action against companies that "fully cooperated [and] identified and remediated the misconduct quickly," including Morgan Stanley, which was "not charged" because the company "cooperated with the SEC's inquiry and conducted a thorough internal investigation to determine the scope of the improper payments and other misconduct involved". *Id.* at 77-79.

To ensure prompt internal investigations, companies should:

- Incorporate timelines into compliance protocols for responding to internal complaints.
- Impose deadlines upon legal, compliance, audit and other team members involved in the investigation.
- Assign someone to lead and supervise the investigation to ensure deadlines are met.

Assign someone to lead and supervise the investigation to ensure deadlines are met.

4. *Do not attempt to silence the whistleblower or "settle" to deter reporting to the SEC.*

The SEC closely scrutinizes confidentiality and severance agreements between companies and whistleblowers. These agreements may not be enforceable – and, indeed, may give rise to civil and criminal exposure for retaliation and obstruction of justice – if they were intended to frustrate a whistleblower's cooperation with the SEC, or to punish a whistleblower for reporting a violation.[15] Likewise, any other attempts to silence a whistleblower could result in increased sanctions in a retaliation action.

To avoid even the appearance of attempts to silence or deter a whistleblower, companies should:

- Ensure supervisors are properly trained in compliance and anti-retaliation protocols.
- Work with outside counsel to review existing employment, confidentiality and severance agreements to confirm there are no provisions that would unlawfully prevent or otherwise frustrate a whistleblower's freedom to communicate with the SEC.

5. *Do maintain business as usual with the whistleblower.*

Retaliation takes many forms. The "campaign of retaliation" the Paradigm whistleblower alleged in his lawsuit included removal from his office space, relief of his day to day trading responsibilities and supervisory duties, relocation to an offsite office building and later a different floor within his original building, termination and severance discussions, blocked access to all business accounts, including his original email account, and removal of his job title until he ultimately resigned.[16] Paradigm purportedly informed the whistleblower before his resignation, however, that he would retain his salary and benefit structure and would perform

[15] *See* 18 U.S.C. § 1513(e) (making it a felony to interfere with the lawful employment or likelihood of any person who has provided truthful information to a law enforcement officer related to a federal offense).
[16] *In re Paradigm Capital Mgm't, Inc.*, Securities Exchange Act Release No. 72393, Investment Advisers Act Release No. 3857, File No. 3-15930 (June 16, 2014) (cease-and-desist order).

tasks that were "meaningful and, to some extent, parallel or overlap those of a head trader."[17] These vague assurances were not enough to counter the retaliatory nature of the actions taken towards the whistleblower.

To maintain business as usual and prevent retaliation against whistleblowers, companies should:

- Ensure that human resources personnel and all supervisors, managers and others in positions of authority are properly trained and periodically refreshed on internal compliance policies and best practices.

- Simply put, avoid retaliation. Retaliation can take many forms including termination, suspension (of employment or responsibilities), reduced pay or benefits, selection for layoff, changes in work schedules, denied promotions or raises, decreased job responsibilities, decreased supervisory responsibilities, refusing requests for certain benefits (time off, reduced hours, etc.), insufficient raises, relocation, exclusion from meetings, trainings, seminars, etc., negative performance evaluations, restrictive directives, verbal or written warnings, extension of probationary period, severe and pervasive harassment, etc.

- Ensure that anyone with knowledge of the report avoids animus towards the whistleblower.

- Continue to document and address the whistleblower's performance in the normal course of business, but avoid excessive documentation or sudden attempts to create a previously undocumented record.

- Slow down employment decisions and let a prompt investigation serve as a shield. Temporal proximity between the complaint and any adverse action will bolster a retaliation claim.

6. *Do investigate the allegations thoroughly and document extensively.*

Paradigm did at least one thing right – it immediately requested that the whistleblower document his allegations and the facts supporting them.[18] Unfortunately, Paradigm simultaneously blocked the whistleblower's access to documents and electronic files he needed to prove his allegations.[19]

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[17] *Id.*

[18] *In re Paradigm Capital Mgm't, Inc.*, Securities Exchange Act Release No. 72393, Investment Advisers Act Release No. 3857, File No. 3-15930 (June 16, 2014) (cease-and-desist order).

[19] *Id.*

To launch a successful investigation, companies should:

- Establish the investigation's purpose, which is usually to gather information in order to provide legal advice to the company regarding the allegations.

- Establish guidelines for discussing the investigation, including that communications about the investigation should extend only to necessary individuals and counsel. Interviews with employees—administrative level to executives—should be limited to the content necessary to provide the information needed. This will help limit the risk of animosity or retaliation against the whistleblower by other company personnel.

- Avoid allowing the accused to conduct the investigation or be part of the investigation team, although obviously the accused may need to be interviewed in the course of the investigation. This will reassure the whistleblower that the investigation is impartial and that the allegations are being taken seriously.

- Properly label investigation documents as privileged and confidential. The committee overseeing the investigation should ensure confidential, restricted, and safe storage of investigation documents.

- Consider whether to appoint an independent "special committee" to manage the investigation. In-house counsel or company employees responsible for compliance issues often are deemed insufficiently impartial in view of their perceived bias toward the company and its personnel.[20]

- Engage outside counsel, particularly to serve a special committee. Counsel should immediately implement a litigation hold to preserve – and collect – hard drives, documents and all electronically stored information that may be relevant, including documents and information from the whistleblower himself. Whistleblowers are likely to feel less threatened and more receptive to document collections from outside counsel, provided they are treated as one of a number of witnesses and not as the sole target of the internal investigation.

- Work with outside counsel to interview relevant witnesses, giving special attention to whistleblower interviews. In such interviews,

[20] *In re John Doe Corp.*, 675 F.2d 482, 491 (2d Cir. 1982) (in-house counsel may be in an "uncomfortable position" upon the discovery of evidence of wrongdoing and, thus, the "wiser course may be to hire counsel with no connection to the corporation to conduct investigations").

counsel should avoid any appearance that the interview was punitive, threatening, or otherwise coercive, and should avoid warnings of discharge or other action that may appear retaliatory until those options are fully assessed. Even if the company or counsel has reason to doubt the credibility of the information provided by the whistleblower, the company must demonstrate its sincere interest in what the whistleblower has to say and that it takes seriously all allegations of misconduct.

- Consider (with the understanding that it could be discoverable) creating a final report of findings and conclusions, refuting or affirming the whistleblower's allegations. A final report that offers key facts mitigating the allegations, including documenting the remedial steps taken and new procedures implemented to prevent future instances of the same conduct, could be very favorable support for a reduction in SEC sanctions.

7. *Do consider communicating directly with the SEC.*

After receiving an internal complaint, companies may be faced with the difficult decision of whether to self-report any findings of wrongdoing or, at the other end of the spectrum, whether to report that the whistleblower's allegations are unfounded or incredible.

When determining whether to communicate directly with the SEC, companies should:

- Consider reporting to the SEC after internal compliance protocols have been followed, and an investigation has been completed. If the company is reporting for the purposes of admitting wrongdoing and cooperating with the SEC, the company will want to ensure that it has the full picture of any wrongdoing and the personnel involved so that it can report to the SEC with an action plan to remediate the situation.[21] If the company is reporting to the SEC for the purpose of discrediting the whistleblower (or her allegations), the company will want to show, at a minimum, that it took the allegations seriously and investigated them thoroughly.

[21]Self-reporting and cooperation is strongly encouraged by the SEC and can result in lesser charges or sanctions. *See Liu v. Siemens AG*, No. 13-4385, at 11 (2d Cir. Feb. 20, 2014) (amicus curiae brief of SEC) ("For instance, the subject company may at times be better able to distinguish between meritorious and frivolous claims. This would be particularly true in instances where the reported matter entails a high level of institutional or company-specific knowledge and/or the company has a well-functioning compliance program in place. Screening allegations through internal compliance programs may limit false or frivolous claims, provide the entity an opportunity to resolve the violation and report the result to the Commission, and allow the Commission to use its resources more efficiently.").

- Weigh the risks of admitting wrongdoing against the benefits of cooperation. Government agencies increasingly weigh cooperation as a factor when calculating penalties and sanctions.[22]

8. *Do communicate with the whistleblower throughout the investigation.*

It appears that Paradigm and the Paradigm whistleblower communicated frequently in the month or so leading up to his resignation.[23] However, there is no indication that they communicated about the investigation itself or that any of the communications were intended to reassure the whistleblower that his allegations were being investigated and taken seriously, and that he would not suffer retaliation.[24] To the contrary – the communications reflected Paradigm's insecurity and fear, as the company attempted to force the whistleblower's resignation or justify an eventual termination.[25] Naturally, almost any whistleblower who reports internally does so after much deliberation, and possibly after encouragement from legal counsel and/or the SEC itself. As a result, companies must provide some level of reassurance that retaliation will not occur and will not be tolerated.

To effectively communicate with whistleblowers, companies should:

- Thank the whistleblower for coming forward and treat her with respect.

- Appoint someone to be in charge of keeping the whistleblower sufficiently informed on the investigation without admitting culpability or disclosing privileged or confidential information. This person should be as neutral as possible and should not be a supervisor over the whistleblower.

- Again, ensure that others communicate with the whistleblower in a "business as usual" manner.

- Communicate regularly with the whistleblower's supervisors (if they are aware of the whistleblower's complaints) to remind them of the company's anti-retaliation policies and the various forms that retaliation can take.

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[22]Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and SEC Statement on the Relationship of Cooperation to Agency Enforcement Decisions (the "Seaboard Report"), Exchange Act Release No. 44,969, 76 SEC Docket 220 (Oct. 23, 2001), *available at* www.sec.gov/litigation/investreport/34-44969.htm. The SEC occasionally considers a company's cooperation even where there is ample evidence of improper conduct. *S.E.C. v. Pfizer, Inc., Wyeth LLC*, Exchange Act Release No. 3399, 2012 WL 3201839 (Aug. 8, 2012) (consideration given in context of conduct dating back more than 10 years and across eight countries to fact that Pfizer "fully cooperated" and "took such extensive remedial actions as undertaking a comprehensive worldwide review of its compliance programs").

[23]*In re Paradigm Capital Mgm't, Inc.*, Securities Exchange Act Release No. 72393, Investment Advisers Act Release No. 3857, File No. 3-15930 (June 16, 2014) (cease-and-desist order).

[24]*Id.*

[25]*Id.*

- Seek feedback from the whistleblower regarding documents, witnesses and other relevant sources of information for the investigation.

- Reassure, reassure, reassure. Remind the whistleblower that retaliation will not be tolerated and direct him to report any retaliation in accordance with company policy.

9. *Do remediate any retaliation or purported retaliation immediately.*

Paradigm's actions towards the whistleblower never included any measure of remediation.[26] Even the company's somewhat positive actions reflected its fear of a lawsuit more than any acceptance of wrongdoing or attempts at remediation. Soon after being informed of the SEC complaint, Paradigm directed the whistleblower to work off-site, and to work exclusively on preparing a report detailing his allegations. Paradigm then attempted to secure a cooperative severance, insisting that its relationship with the whistleblower was "irreparably damaged."[27] Shortly thereafter, however, Paradigm allowed the whistleblower to return to work, assuring him that his compensation and benefits structure would remain the same and that he would perform tasks that were "meaningful and, to some extent, parallel or overlap those of head trader."[28] Paradigm's vague assurances were insufficient to prevent a successful retaliation action. Paradigm should have remediated its retaliatory actions by reinstating the whistleblower to his position as head trader, investigating the principal transactions, and disciplining Weir and any other wrongdoers. In doing so, Paradigm could have faced lesser charges and sanctions from the SEC.[29]

When considering remedial measures, companies should:

- Work with counsel to formulate a clear picture of prior retaliation in order to determine what, if any, measures are appropriate to remediate adverse actions.

- Consider various remediation measures including back-pay, bonuses, a promotion for the prompt and accurate disclosure of

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[26] *In re Paradigm Capital Mgm't, Inc.*, Securities Exchange Act Release No. 72393, Investment Advisers Act Release No. 3857, File No. 3-15930 (June 16, 2014) (cease-and-desist order).
[27] *Id.*
[28] *Id.*
[29] DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, tit. 9, ch. 9-28.900 (updated 2008) (noting that prosecutors may consider remedial actions "such as improving an existing compliance program or disciplining wrongdoers" and that a "corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur"). *See also In re Navistar Int'l Corp.*, Exchange Act Release No. 3165, 2010 WL 3071892 (Aug. 5, 2010) (in determining not to impose civil penalties, SEC considered remedial measures such as terminating culpable employees or removing them from financial reporting responsibilities, adding over 100 new accounting employees, creating a position for new Corporate Compliance Officer, and instituting new employee training on internal controls and ethics); *In re Applied Minerals, Inc.*, Exchange Act Release No. 9100, 97 SEC Docket 1648 (Dec. 22, 2009) (consideration of company's remedial efforts, which included replacing all members of the management team and Board of Directors, adopting a Code of Conduct and Ethics for its CEO and senior financial officers, and retaining a new independent auditor).

suspected securities violations, additional vacation time, etc. These measures should align with the company's established incentives for internal reporting.

- Assess the situation carefully. Remediation on some level signals that the company accepts responsibility for wrongdoing. Retaliation actions are not contingent upon a finding of wrongdoing, however, and companies that need to remediate past retaliation may still argue they are completely innocent with respect to securities violations. A whistleblower need only have a reasonable belief that a securities violation has occurred in order to be protected by anti-retaliation laws.[30] Companies should carefully tailor remediation measures to the retaliation itself to avoid the appearance that the company is admitting to securities violations.

10. ***Do protect the company against submarine whistleblower claims by former employees.***

The six-year post-violation and three-year post-discovery statute of limitations for whistleblower retaliation claims under Dodd-Frank (subject to a ten-year statute of repose) makes it likely that companies may not be apprised of potential retaliation exposure until long after a whistleblower has left his or her employment.[31] The Paradigm whistleblower could have waited until he secured a job with another company, depriving Paradigm of the opportunity to investigate his claims internally with any level of efficiency. Moreover, there is a good chance that, after ten years, Paradigm would no longer have access to relevant documents and witnesses. Accordingly, it is critical that companies retain all evidence needed to protect themselves from the former employee, turned whistleblower (through the ten year statute of repose).

In order to protect themselves against former employees, companies should:

- Conduct thorough exit interviews. Companies should consider using form questionnaires prepared with assistance from counsel in every exit interview that can uncover any suspicions the employee has of securities violations, and any actual securities violations. The questions should cover the range of possible securities violations.

- Seek signed statements from departing employees stating they are not aware of any securities violations, or requesting that they detail facts regarding any suspected securities violations.

- Preserve all departing employees' hard drives, documents and electronically stored information for a period of time

[30] 15 U.S.C. §78u-6(h)(1); 17 C.F.R. § 240.21F-2(b).

[31] The Dodd Frank Act requires that an action be filed either within six years after the date when the violation occurs or within three years after the date "facts material to the right of action are known or reasonably should have been known by the employee," but not more than 10 years after the date of the violation.

commensurate with the employee's potential exposure to securities violations, and ideally for at least ten years (though understandably, the burden of preservation must be a consideration).

- Ensure that poor performance has been heavily documented and that any adverse actions taken against the employee are justified.

Conclusion

Companies faced with internal complaints from whistleblowers, including those that have reported alleged violations to the SEC, must act promptly to investigate and remediate the alleged violations and must ensure there is no retaliation against the employee whistleblower. Working closely with experienced outside counsel and following the advice set forth above can help the Company defend against private retaliation claims and mitigate any damages or sanctions levied by the SEC.

