**DOCUMENTS AND INFORMATION OVER WHICH DEFENDANTS MIGHT CLAIM PRIVILEGE:**

***Employment Counsel Perspective on Privileged Information and Retaliation Claims***

**Taxpayers Against Fraud Conference**
**October 4, 2018**

Matthew Stiff
Katz, Marshall & Banks, LLP
1718 Connecticut Ave., N.W.
Sixth Floor
Washington, DC 20009
(202) 299-1140

## Introduction

In the experience of this author representing whistleblowers, a troubling pattern repeats itself in corporate America with regularity. While performing her job duties, a worker inadvertently uncovers evidence of her employer's unlawful conduct. Disturbed by this discovery, the conscientious employee risks her career to disclose the misconduct to her superiors and urges the company to address the harm. Management officials who are complicit in the wrongdoing learn of these investigatory efforts and summarily fire the employee, in a self-serving attempt to prevent their collective misconduct from being discovered.

Depending on the circumstances of the underlying corporate misconduct, the terminated employee could simultaneously hold a viable retaliation claim and possess information that, if submitted to government regulators, would position the employee to later receive a sizable monetary payment as an incentive reward for her whistleblowing. These dual paths – an employee's prosecution of whistleblower retaliation claims and her participation in a whistleblower reward program – offer related but distinct avenues for whistleblowers to pursue. Given the high stakes frequently involved in these matters, it is imperative that practitioners understand the complexities that arise from the interplay between whistleblower retaliation protections and whistleblower reward programs.

These complexities grow even more fraught when a corporate wrongdoer's potentially privileged information enters the picture. Legal practitioners must be cognizant of complications that arise from exposure to a corporation's purportedly privileged information, as well as with the whistleblower's ability to use such information in prosecuting whistleblower retaliation claims and/or whistleblower reward program tips. A litigant's ability to rely on documents or information over which a corporate actor might claim attorney-client privilege is an important consideration in the context of *qui tam* lawsuits filed pursuant to the False Claims Act ("FCA"). It is also important for the U.S. capital markets whistleblower reward programs administered by the U.S. Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC"). The idea behind these programs is straightforward: whistleblowers who supply information about

fraud on the U.S. government or violations of securities and commodity-related laws can be eligible to receive sizable monetary rewards. However, it is not uncommon for a corporate actor to assert attorney-client privilege over certain documents or information that are relevant to these frauds or violations of law. It is thus important for counsel to grasp the manner in which the governing whistleblower program rules might render their clients ineligible for rewards in certain circumstances.

### A. Using Privileged Information to Establish Protected Activity for Claims of Whistleblower Retaliation in the Workplace

Attorneys are not the only insiders who have might access or exposure to a corporation's attorney-client privileged information. Senior executives also frequently acquire sensitive information about company-wide practices or unlawful activity, reviewing highly confidential documents or conferring with or reporting concerns about corporate misdeeds to corporate legal counsel and/or compliance officers who may be lawyers, but acting in a non-legal role. Similarly, corporate compliance or audit professionals may be exposed to the company's attorney-client privileged information in the course of executing their compliance functions.

Against this backdrop, courts have increasingly permitted plaintiffs to rely on privileged information to prove that they engaged in "protected activity" within the meaning of federal whistleblower retaliation laws. The vast majority of this jurisprudence arises in the context of retaliation claims brought pursuant to Section 806 of the Sarbanes-Oxley Act, which is one of the most widely litigated federal whistleblower statutes. See 18 U.S.C. § 1514A ("SOX 806"). In contrast, there is relatively little case law addressing circumstances in which privileged information can be utilized by plaintiffs to establish retaliation claims under the FCA's employee protection provision.[1]

For this reason, employment counsel will likely look to SOX-related jurisprudence to argue that a plaintiff may rely on a corporation's purportedly privileged information to establish his or her whistleblower retaliation claims, whether under SOX, the FCA, or other retaliation protection provisions. While not exclusive to plaintiff-attorneys, the issue is most often litigated in instances involving plaintiffs who served as in-house lawyers for the corporate defendant.

The U.S. Department of Labor's Administrative Review Board ("ARB") laid the groundwork for protecting in-house attorneys from retaliation under SOX, holding that attorneys may rely on privileged communications as evidence of retaliation to the degree necessary to establish their SOX 806 claim. See Jordan v. Spring Nextel Corp., ARB No. 06-105, ALJ Case No. 2006-SOX-041, 2009 WL 3165850 (ARB Sept. 30, 2009). The Ninth Circuit also took this position in Van Asdale v. Int'l Game Tech., 577 F.3d 989, 995–96 (9th Cir. 2009), holding that the "appropriate remedy" for confidentiality concerns in attorney-plaintiff retaliation claims "is

[1] In one of the rare decisions touching on this issue, a federal district court held that state law and local professional responsibility rules barred an attorney's FCA retaliation claim because those rules "provided a client with an absolute right to discharge its attorney." Under Seal v. Under Seal, 19 F.3d 1430, *reported in full text at* 1994 U.S. App. LEXIS 5422, *3-4 (4th Cir. March 24, 1994) (affirming the lower court decision on other grounds).

for the district court to use the many equitable measures at its disposal to minimize the possibility of harmful disclosures, not to dismiss the suit altogether."

### i. The Impact of Part 205 on the Privilege Analysis

Regulatory support for the use of privileged communications to establish SOX 806 and/or Dodd-Frank Act retaliation claims can be found in 17 CFR Part 205 ("Part 205"), which governs the conduct of attorneys practicing before the SEC. With respect to such claims, Part 205 provides guidelines that are balanced in favor of disclosure, but their authority is contested and unclear. And because there is no analogue to Part 205 in the government contracting context, corporate FCA defendants would likely attack any attempted analogy between FCA retaliation claims and whistleblower retaliation case law arising in the SOX/Dodd-Frank context, with Part 205 being far more pertinent to the latter arena.

Part 205 requires in-house counsel to first report "material violations" of SEC regulations to a corporation's Chief Legal Officer ("CLO"), for example. 17 C.F.R. § 205.3(b). If the CLO does not make an "appropriate response in a reasonable amount of time," the in-house attorney is then required to report the violation to the board of directors or a board committee. 17 C.F.R. § 205.3(b)(3). The SEC does not mandate that in-house attorneys must then, or at any time, report violations to the SEC itself, but the SEC does provide that attorneys *may* disclose confidential information without permission from their employer, *i.e.* "report out," in the circumstances delineated under 17 C.F.R. § 205.3(d)(2).

While Part 205 allows for disclosure of confidential information by in-house attorneys to federal regulators, there is debate over whether the SEC has the legal authority to override local legal ethics rules about disclosure of privileged and/or confidential client information. The SEC has attempted a kind of self-executing protective rule for attorneys by declaring: "Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, [Part 205] shall govern." 17 C.F.R. § 205.1. A separate provision of Part 205 states, "An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices." 17 C.F.R. § 205.6(c).

### ii. The *Bio-Rad* Decision

The SEC's declaration in § 205.6 was put to the test in a closely watched case that ultimately bolstered whistleblowers' ability to rely on privileged information to establish retaliation claims. See Wadler v. Bio-Rad Labs., *Inc.*, 212 F. Supp. 3d 829 (N.D. Cal. 2016). In its December 2016 decision, the U.S. District Court for the Northern District of California denied the defendant's motion to exclude evidence of, among other things, "all testimony that may be based on information [Plaintiff] learned in the course of his service as Bio-Rad's general counsel." Id. at 832. Bio-Rad argued that the parties' claims and defenses implicated protected information that could not be used at trial in light of California's privilege and confidentiality rules. Id. at 845. The district court rejected this argument, pointing to Rule 1.6 of the Model Rules of Professional Conduct – which permits lawyers to reveal confidential or privileged information "to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer

in a controversy between the lawyer and the client . . . ." – and precedent from the Ninth, Third, Fifth, and First Circuit Courts of Appeals in ruling that federal common law allows in-house attorneys to use privileged and confidential materials under certain circumstances in support of a whistleblower retaliation claim. Id. at 846–49. The Bio-Rad court further explained that procedures that protect any kind of confidential information – such as filing evidence under seal so that it is not publicly accessible – are sufficient "special measures . . . [to ensure] that such evidence is admitted only when plaintiff's belief that it is necessary to prove a claim or defense is *reasonable*." Id. at 849.

In addition, the Bio-Rad court ruled that "to the extent the ethical obligations governing attorneys who practice in California impose stricter limits on the disclosure of privileged and confidential information in this action than are imposed under the Sarbanes–Oxley Act, as reflected in Part 205, the former are preempted." *Id.* at 857. The court explained that "Federal regulations have no less pre-emptive effect than federal statutes." Id. at 856 (citing Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982)).

After proceeding to trial, the jury found that Bio-Rad unlawfully terminated Sadler for raising complaints about the company's violation of the Foreign Corrupt Practices Act. The jury awarded Wadler $7.96 million in total damages, including $5 million in punitive damages. The district court later doubled the compensatory award pursuant to the Dodd-Frank Act's doubling provision, for a total award of $11,061,608, including post-judgment interest. Bio-Rad later stipulated to a $3.5 million award of attorneys' fee and litigation expenses to Sadler, subject to the outcome of appellate review.[2]

Thus, in one of the first tests for whether courts will accept the SEC's proclamation that Part 205 will supersede "the standards of a state or other United States jurisdiction where an attorney is admitted or practices," the SEC Rule has withstood the legal challenge to its primacy. Given this result, companies should not assume that the attorney-client privilege is inviolable in the whistleblower retaliation context.

### B. Attorneys As Relators in *Qui Tam* Actions

By virtue of their advisory roles, a company's in-house attorneys and external legal counsel are relied upon to ensure the propriety of the entity's business operations. This also means that in-house and external lawyers are well-positioned to became discover and address corporate

[2] On June 7, 2017, Bio-Rad appealed the jury verdict to the Ninth Circuit. Bio-Rad submitted its opening brief on October 16, 2017, and simultaneously added a prominent appellate advocate (Kathleen Sullivan of Quinn Emmanuel) to its appellate team. Importantly, however, Bio-Rad's opening brief does *not* challenge the district court's rulings on attorney-client privilege. Instead, Bio-Rad argues that it is entitled to judgment as a matter of law or a new trial because Sadler allegedly did not engage in protected activity within the meaning of SOX. Bio-Rad also argues in its brief that the district court abused its discretion by preventing Bio-Rad from impeaching Wadler's testimony and/or from questioning Sadler about his internet searches for a whistleblower lawyer. The parties are currently awaiting the Ninth Circuit's ruling; however, given Bio-Rad's argument on appeal, it appears that the district court's whistleblower-friendly rulings on the use of privileged information will remain intact regardless of the outcome of Bio-Rad's appeal.

misconduct. However, bedrock ethical and legal constraints place significant limitations on an attorney's ability to disclose corporate misconduct externally to regulators. Those same constraints often render attorneys ineligible to participate in the whistleblower rewards programs or serve as a relator in a FCA *qui tam* action.

The FCA neither expressly allows nor directly prohibits attorneys from bringing *qui tam* suits. At least one federal district court has noted that the plain language of the statute does not bar attorneys from acting as relators.[3] But the vast majority of legal jurisdictions severely restrict the disclosure of client information and prohibit representation against the interests of a former client in the absent of client consent. All else being equal, it is generally unlikely that attorney-relators will be able to provide information that is sufficiently detailed and specific to support a FCA claim,[4] or undertake the action at all, without significant risk of violating applicable rules of professional ethics.[5]

In one FCA *qui tam* action brought by a former in-house counsel and other executives of a company, the district court held that a balancing of federal interests was required to determine whether the action could go forward.[6] After weighing the interest in encouraging *qui tam* actions against preserving the attorney-client privilege, the court found that the FCA did not trump state ethics rules.[7] The court ultimately dismissed the suit after determining that the former in-house attorney had violated state professional responsibility rules and because there was no effective way to remove him from the suit without his knowledge continuing to provide benefits to the remaining relators.[8]

---

[3] United States *ex rel.* Doe v. X Corp., 862 F. Supp. 1502, 1506-1507 (E.D. Va. 1994) (citing Erickson v. American Institute of Biological Sciences, 716 F. Supp. 908, 912 (E.D. Va. 1989)). See also, United States *ex rel.* Repko v. Guthrie Clinic, P.C., 2011 U.S. Dist. LEXIS 98584, *56-58 (M.D. Pa. Sept. 1, 2011).

[4] See Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). For application of the Rule 9(b) standard for FCA claims, see, e.g., United States *ex rel.* Nathan v. Takeda Pharmaceuticals North America, Inc., 707 F.3d 451, 455-456 (4th Cir. 2013), *cert. denied* 134 S.Ct. 1759, 188 L.Ed.2d 592 (2014) ("To satisfy Rule 9(b), a plaintiff asserting a claim under the Act must, at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.").

[5] See, e.g., United States *ex rel.* Doe v. X Corp., 862 F. Supp. 1502, 1509-1510 (holding that the former in-house counsel for the defendant could not act as a relator for a FCA claim where counsel was enjoined under state ethics rules from disclosing client secrets that formed the basis of his claim). The court in X Corp. noted that where state law requires or permits disclosure of client information related to ongoing crimes or fraud, a *qui tam* action comprising such conduct would not be barred. *Id.* at 1507-1508.

[6] United States *ex rel.* Fair Laboratory Practices Associates v. Quest Diagnostics, Inc., 2011 U.S. Dist. LEXIS 37014, *20-21 (S.D.N.Y. April 5, 2011), *aff'd* 734 F.3d 154 (2d Cir. 2013).

[7] Id., 2011 U.S. Dist. LEXIS 37014, *21 (S.D.N.Y. April 5, 2011).

In another case brought by the in-house counsel of one company against another company with which his employer had engaged in negotiations and arbitration, the district court dismissed the case because the attorney had violated ethical rules governing attorneys.[9] The attorney had used his position as the attorney for an adverse party to gain access to information that he then used in filing a *qui tam* claim against that party.[10] Among the several ethical violations the court identified was the fact that the attorney-relator did not receive informed consent from his client to proceed with the *qui tam* claim despite the risk of a conflict-of-interest.[11] The court dismissed the case because it would have been tried on a record tainted by the ethical violations, thus prejudicing the defendant.[12]

In another case, a New York state trial court ruled that an attorney could not maintain a *qui tam* lawsuit against his former employer for state tax avoidance, as the action would potentially result in the attorney's earning a whistleblower reward for his disclosure of client confidences that he obtained as in-house counsel.[13]

### C. The Use of Privileged Information in a Capital Markets Whistleblower Tip

The U.S. capital markets serve as a core driver to the success of the global economy. The primary function of these markets is to allocate and supply capital to businesses and entrepreneurs that generate goods and services consumed by the world. The capital markets include the U.S. equity and debt markets, both of which allocate capital in complementary ways and provide investment opportunities to a wide array of institutional and retail investors. The capital markets also include the derivatives markets, which permit companies to flexibly manage risks and implement business strategies. In addition, the U.S. capital markets facilitate lending channels ensuring that Americans have ready access to credit needed for the purchase homes, cars, and other key items. The size of the U.S. capital markets is staggering, consisting of the $29 trillion equity market, the $8.5 trillion corporate bond market, and the $200 trillion (notional) derivatives market.

---

[8] Id. at *36-38 (finding that the former general counsel for the defendant violated state ethics rules by disclosing more information to the United States and other relators than "would be necessary to prevent the commission or continuation of a crime").

[9] United States *ex rel.* Holmes v. Northrop Grumman Corp., 2015 U.S. Dist. LEXIS 71804, *30-33 (S.D. Miss. June 3, 2015), *aff'd* 642 Fed. Appx. 373 (5th Cir. 2016).

[10] Id., 2015 U.S. Dist. LEXIS 71804, *15-16 (S.D. Miss. June 3, 2015).

[11] Id. at *19-21.

[12] Id. at *32.

[13] See State of New York ex rel. David Danon v. Vanguard Group, Inc., et al., available at http://www.courts.state.ny.us/Reporter/pdfs/2015/2015_32213.pdf; see also J. Distefano, *Danon barred from whistleblower's cut in Vanguard NY case*, PHILA. INQUIRER (Nov. 18, 2015), http://www.philly.com/philly/blogs/inq-phillydeals/Exclusive-Vanguard-tax-lawyers-NY-whistleblower-claim-barred.html#Rqt4dymOMu5CGyoC.99.

The SEC and the CFTC are the primary federal regulators of these capital markets. The SEC is charged with protecting investors, maintaining fair, orderly, and efficient equity and debt markets, and facilitating the formation of capital. The CFTC is responsible for fostering open, competitive, and financially sound derivatives markets to help companies address risks in their respective business environments. Both agencies have begun taking aim at potentially widespread violations in the burgeoning digital assets markets, including fraud in connection with so-called "initial coin offerings," and "pump-and-dump" schemes reminiscent of the "boiler room" tactics that have harmed countless retail investors in penny stocks.[14]

Given the massive scope of their responsibilities and their limited resources, the SEC and CFTC have increasingly relied on whistleblowers to supply regulators with actionable information about violations of the law. The SEC and CFTC whistleblower programs provide incentives to those corporate insiders who often risk their careers to shine light on unlawful conduct. A full survey of these programs is beyond the scope of this paper, but at their simplest, the programs pay awards to eligible whistleblowers who voluntarily provide the respective agencies with original information that leads to a successful enforcement action in which the SEC recovers monetary sanctions in an amount over $1,000,000.

As a general rule, however, SEC and CFTC whistleblowers should *not* give information that is protected by attorney-client privilege to these regulatory agencies. The agencies cannot rely on privileged information in an investigation or enforcement action, and the agencies' mere receipt of such information can interfere with and significantly delay the staff's ability to proceed in an otherwise viable enforcement action. Potentially privileged information generally includes documents authored by, received by, or prepared at the request of counsel for the entities or individuals that may be the subjects of an SEC or CFTC investigation. Potentially privileged information also can include conversations with counsel, the contents of which the whistleblower could disclose in a written submission or discussions with SEC staff.

Deciding whether the attorney-client privilege protects information from disclosure is a complicated, fact-intensive, and time-consuming inquiry. The least risky practice is to avoid providing the DOJ, SEC, or CFTC with any information that could implicate the attorney-client privilege. Where such an approach is problematic or infeasible, whistleblowers and their counsel should discuss with the relevant regulatory officials (*i.e.*, the Office of the Whistleblower staff and/or enforcement staff assigned to the investigation) about using a "filter" team to screen certain documents and prevent staff involved in the investigation from viewing privileged materials. Whistleblowers and their counsel can also proactively retain "taint counsel" to serve as a filter

---

[14] *See, e.g.*, *SEC Obtains Emergency Order Halting Fraudulent Coin Offering Scheme*, SEC (May 29, 2018), https://www.sec.gov/news/press-release/2018-94; *Initial Coin Offerings (ICOs)*, SEC https://www.sec.gov/news/press-release/2017-219 (last visited July 3, 2018) (SEC web page providing general information about ICOs and a list of SEC enforcement actions relating to ICOs); *Bitcoin*, CFTC, http://www.cftc.gov/bitcoin/index.htm (last visited July 3, 2018) (CFTC web page with links to several CFTC publications related to cryptocurrency trading from late 2017 to the present, including, *inter alia*, a "CFTC Primer on Virtual Currencies" and a "Customer Advisory: Beware Virtual Currency Pump-and-Dump Schemes"); Complaint in *CFTC v. McDonnell et al.*, No. 18-CV-0361 (E.D.N.Y. filed Jan. 18, 2018).

team that can review, assess, and screen the whistleblower's counsel from exposure to attorney-client privileged information.

Although whistleblowers should generally avoid the submission of privileged information in submitting a tip to a government regulator, the attorney-client privilege is not an absolute bar to eligibility for an SEC whistleblower reward. The SEC has offered the most direct guidance on the circumstances in which privileged information may form the basis for a whistleblower reward.

In the rules governing the SEC whistleblower reward program, the SEC has designated information in the possession of certain categories of individuals as not constituting original information that could form the basis for a successful tip, making these individuals presumptively ineligible for participation in the whistleblower reward program. Two these exclusions apply specifically to attorneys, both in-house and external, and to non-attorneys who possess attorney-client-privileged information. The rules exclude from original information:

- Information obtained through a communication subject to attorney-client privilege, unless disclosure would be permitted under either SEC rules governing the conduct of attorneys practicing before the Commission, or state ethics rules governing attorneys; and

- Information obtained in connection with the whistleblower's (or her firm's) legal representation of a client, unless disclosure would be permitted by the rules described above.

See 17 C.F.R. §§ 240.21F-4(b)(4)(i)–(ii).

As seen above, this provision notes that attorneys may receive awards for information they are empowered to reveal to the SEC, even without their client's consent, under Part 205. Accordingly, and consistent with this reporting exception contained in Part 205, attorneys are potentially eligible for SEC whistleblower awards for information they report: (1) to prevent a material violation that will cause "substantial injury to the financial interests or property of the [company] or investors"; (2) to prevent the company from engaging in perjury or fraud on the SEC; or (3) to rectify a material violation causing substantial injury to the financial interests of the company or investors that involved the use of the attorney's services. 17 C.F.R. § 240.21 F-4(b)(4).

Lawyers who are considering providing information to the SEC about securities violations need to be particularly careful, however, as they may nevertheless still run afoul of state rules of professional responsibility even when Part 205 would otherwise allow disclosure and thus allow participation in the SEC whistleblower program. For example, in 2013 the Professional Ethics Committee of the New York County Lawyers Association issued a bar opinion stating that New York's rules of professional conduct prohibit attorneys from collecting SEC awards, and presumably other "bounties," based on the confidential information of a client.[15] State bar rules

[15] *See* New York County Lawyers Association, Ethics Opinion 746, "Ethical Conflicts Caused by Lawyers as Whistleblowers under the Dodd-Frank Act of 2010" (Oct. 7, 2013).

vary widely in their restrictions on attorney disclosure of client confidences, with some following the American Bar Association's Model Rule 1.6 and other states imposing either more or less restrictive rules. For this reason, attorneys thinking of participating in the whistleblower program should carefully review the rules of professional conduct that apply to them and their actions.

### D. Practice Tips for Navigating Parallel Proceedings

General best practices, gleaned by the author and other lawyers from litigating whistleblower retaliation claims and submitting tips to various whistleblower programs, can provide potential whistleblowers with a helpful framework to navigate the challenges of relying on privileged information in these proceedings. These considerations are based on the case law and rules discussed above, the judicial and regulators' handling of privilege issue to date, and the authors' first-hand experience representing clients before various whistleblower offices:

- **Proceed cautiously when using privileged information to establish retaliation claims**. Attorney-litigants, or whistleblowers relying on privileged information to establish retaliation claims, should exercise extreme caution and limit their disclosure of privileged information as much as possible. To that end, litigants should take all necessary steps to ensure that they disclose such information in a manner that limits access to the information to the tribunal and/or to the persons needing to know it, which often includes sealing any filings that might include privileged information. The whistleblower's counsel also should work with the employer to enter appropriate protective orders where practicable to further protect the integrity of the privileged information.

- **Avoid where possible relying on privileged information in your whistleblower tip and/or *qui tam* complaint allegations**. SEC and CFTC whistleblowers should avoid submitting information that is protected by attorney-client privilege to regulators, as these agencies cannot rely on privileged information and their mere receipt of such information could interfere with the staff's ability to proceed in an otherwise viable enforcement action.

- **Explore the use of screen teams and taint counsel to safeguard against exposure to privileged information.** Counsel for whistleblowers should proactively approach SEC/CFTC/DOJ staff to flag the privilege issue and encourage the formation of an SEC/CFTC/DOJ privilege screening team. Counsel should also consider retaining private taint counsel, to better protect against their inadvertent exposure to the company's attorney-client privileged information. For SEC whistleblowers, counsel and their clients should consult Part 205 to determine whether those SEC rules permit the disclosure of otherwise privileged information.

- **Be on the lookout for corporate privilege waivers.** Finally, whistleblowers and their counsel should remain vigilant for possible company waivers of attorney-client privilege. If a waiver can be established, it will better allow whistleblowers to submit the previously-protected information to regulators and/or rely on that information to prove whistleblower retaliation claims.