

**American Accounting Association
25th Annual
Ethics Research Symposium**

3:40 pm – 4:30 pm

**10.1 The Future of the Accounting Profession: Regaining
the Public Trust**

Moderator: William F. Miller, University of Wisconsin, Eau Claire

Panelists:

- Francine McKenna, American University
- Steven Mintz, California Polytechnic State Univ.
San Luis Obispo
- Rick Kravitz, Editor in Chief: The CPA Journal,
Texas A&M School of Law



Francine McKenna, Adjunct Professor
American University Kogod School of Business

Auditors as Whistleblowers



AUDITORS AS WHISTLEBLOWERS

We all know corporate accountants and other finance and operations professionals can be Dodd-Frank whistleblowers to the SEC.

So can independent analysts.

I call it the “Harry Markopolos provision.”

[*State Street forex settlement is notch in belt for Madoff whistleblower*](#)

“Markopolos spent years on Bernie Madoff’s trail and tried to warn regulators about the fraud, but he was largely ignored. It’s a frustrating experience he documented in his book, *No One Would Listen: A True Financial Thriller*.”

[*Whistleblower award for NYSE fine goes to HFT critic*](#)

“This is the first whistleblower award by the SEC under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 to reward an independent third party for analysis of a potential securities law violation, a model prompted by the experience of an unsuccessful outsider, [Madoff whistleblower Harry Markopolos](#).”

AUDITORS AS WHISTLEBLOWERS: CAN INTERNAL AND EXTERNAL AUDITORS BE DODD-FRANK WHISTLEBLOWERS?

Anthony Menendez: Former EY auditor, CPA, CFE and former Halliburton Director of Technical Accounting Research and Training

[The Whistleblower's Tale: How An Accountant Took on Halliburton](#) "In 2005, Tony Menendez blew the whistle on Halliburton's accounting practices. The fight cost him nine years of his life."

[He fought Halliburton and won](#) An interview with Tony Menendez, CFE, Sentinel Award recipient, Fraud Magazine

Brett Whitaker, former EY Senior Tax Manager and Director of Tax at Mattel

- Whitaker blew the whistle to [The Wall Street Journal](#) on an accounting error that led Mattel to understate its loss in the prior third quarter.
- Instead of restating its results, the company's finance team, [in conjunction with its auditor, PwC](#), allegedly decided to cover up the error.
- The reclassification was intended to avoid publicly admitting it had made an accounting mistake, according to Whitaker, who resigned soon after.
- An anonymous whistleblower sent a letter to Mattel, tipping it off to the reclassification. After an investigation, Mattel restated its earnings. We do not know the identity of the anonymous whistleblower — Whitaker has said it is not him — and we do not know if Whitaker filed an SEC whistleblower tip, too.
- During its investigation [the Audit Committee also found violations of auditor independence rules](#). PwC replaced its lead audit engagement partner, Joshua Abrahams, and, according to the filing, "certain other members of its audit team for its audit engagement with Mattel." Abrahams subsequently left PwC.
- The CFO stepped down and Mattel's 2019 annual report disclosed and SEC and DOJ investigation.
- Mattel and executives face a five-count, proposed derivative class complaint that names 13 current or former officers and directors of the business along with [PwC](#) and Abrahams. This is in addition to the ongoing direct class complaint in the [U.S. District Court for the Central District of California](#).

AUDITORS AS WHISTLEBLOWERS

Can external auditors be Dodd-Frank whistleblowers?

Mauro Botta, A PwC Audit Senior Manager, files an SEC whistleblower tip after getting no satisfaction with internal complaints.

On July 26 Judge Alex Tse in Northern District of CA just filed his decision in the Botta v. PwC case. The trial in Northern California ended April 13, 2021.

"The undersigned presided and now explains why judgment will be entered for the defendant, PricewaterhouseCoopers LLP (PwC)."

[Botta v. PwC: An analysis of the trial so far](#)

Part 1: I wrote about how well Botta makes his claims and how well PwC defends itself.

[Botta v. PwC Part II: A very bad relationship that could have ended better](#)

In Part II: I wrote about what happens when an abused partner finally feels empowered

- On March 3, 2018 Mauro Botta, an 18-year veteran of PricewaterhouseCoopers LLP and a former Senior Manager in its Assurance (Audit) practice in its San Jose, Calif., office, sued PwC for retaliatory termination.
- Botta alleged that PwC terminated him in retaliation for filing a whistleblower tip to the SEC about audits in which Botta had a reasonable belief that PwC was violating securities laws in the conduct of its audits. The SEC investigated PwC based on the tip and Botta believes that the SEC's contact with PwC essentially outed him and made him a target.
- Specifically, Botta alleged his firing was in retaliation for blowing a whistle to SEC on PwC's conduct on its audit of client Cavium. Botta said his activity is protected from retaliation in accordance with provisions of the Sarbanes Oxley Act of 2002.
- PwC said they fired him for either "fabricating a control" or lying to their investigators about "fabricating a control." PwC's partner on Cavium testified there was no fabrication, he made final audit decisions, and Botta's work was at his direction.

AUDITORS AS WHISTLEBLOWERS

Successful Big 4 whistleblowers – The KPMG-PCAOB scandal whistleblower

- On February 3, 2017, KPMG National Office partner, and former PCAOB KPMG Inspector Brian Sweet, informed KPMG audit partner Diana Kunz that one of her engagements had been approved for PCAOB inspection.
- Sweet not only explained why the client had been selected but also what the focus areas were for the PCAOB's upcoming inspection cycle. The audit was still in progress and staff were still conducting fieldwork.
- Kunz contacted her supervisors, John Rodi and Dave Marino, who co-led the Chicago office.
- “It was clear to me that if she was going to be getting notification at that point in time while the audit was ongoing, that we had information in advance that we should not be privy to under any circumstance...Because we would never be notified from a regulator that there was going to be an inspection of an engagement while that engagement was still being executed.”

Source: Testimony of David Marino, U.S. vs. Middendorf and Wada 2019, p. 1621

AUDITORS AS WHISTLEBLOWERS

Successful Big 4 whistleblowers – The KPMG-PCAOB scandal whistleblower

- Kunz’s choices when confronted with unethical and potentially illegal acts by her colleagues:
 - She could have kept quiet, like every other KPMG partner who received advance knowledge of inspections.
 - She could have called the KPMG ethics hotline.
 - She could have gone to the press.
 - She may have called a lawyer.
 - She could have gone to a trusted mentor in the firm and confided her concerns. Her chain of command, however, included someone (i.e., Middendorf) that was a member of “circle of trust” conspiracy.

Diana Kunz, as an experienced lead engagement partner, decided to discuss her concerns with knowledgeable partners that were members of the KPMG National Office and only a few steps below audit practice leadership. Her concerns carried significant credibility given her experience, tenure, and knowledge of practice and standards.

KPMG initiated an internal investigation, reported the issues to the SEC and PCAOB and the KPMG partners and professionals and one PCAOB professional were charged by the SEC and arrested. All have since either pled guilty or been found guilty by a jury.

Kunz was not retaliated against, as far as we know. She remains at KPMG.

The SEC fined KPMG \$50 million and she would have been potentially eligible for a reward of 10-30% of that fine. We do not know if Kunz filed a whistleblower tip with the SEC. Kunz has never spoken to the press.

AUDITORS AS WHISTLEBLOWERS

What are typical audit firm policies regarding whistleblowers?

All of the firms encourage professionals to say something if they see something. All have implicit and sometimes explicit policy that prohibits retaliation for speaking up and for reporting wrongdoing to authorities. You can not be punished for sharing confidential documents with regulatory authorities such as the SEC or state or federal authorities in a False Claims Act proceeding.

From [PwC's Global Code of Conduct website page](#):

PwC is committed to protecting our people against retaliation. Retaliation is serious misconduct that will not be tolerated, and any PwC professional (including partners/principals or staff) who takes retaliatory action will be held accountable.

Q. What is retaliation?

A. Retaliation can be any form of reprisal, direct or subtle, for reporting in good faith actual or suspected issues.

We consult with our:

- Supervisors
- Coaches
- Partners/Principals
- Ethics teams
- Risk and Quality teams
- Office of the General Counsel
- Human Capital representatives
- Others at PwC

We protect against retaliation

In being true to the values of integrity and care—if you report a concern, it will be handled with appropriate confidentiality and discussed with others only as needed or advisable under the circumstances. Exercising professional scepticism, applying common sense, and knowing and applying the Code as well as the local supplementary guidance, will help each of us know when to speak up through whichever channel we are most comfortable.

As well as the resources listed here, each firm in the PwC network provides a mechanism to report issues:

[PwC Ethics Helpline](#) 

AUDITORS AS WHISTLEBLOWERS

What laws protect auditor whistleblowers outside of the United States?

An EY Germany whistleblower raises fraud concerns and gets shut down.

Wirecard and EY Germany

- EY was warned in 2016 by one of its own employees that senior managers at Wirecard may have committed fraud and one had attempted to bribe an auditor.
- According to a KPMG special investigation report, EY's unnamed whistleblower in May 2016 filed a letter to EY Germany's headquarters in Stuttgart.
- An investigation by EY's anti-fraud team into the whistleblower report, codenamed "Project Ring", suffered from governance shortcomings, was terminated prematurely and left key questions unanswered, according to KPMG's review.
- Despite the fact that the whistleblower accused Wirecard's "senior management" in Germany of misconduct, the forensic audit was overseen by Wirecard's executive board rather than its supervisory board, KPMG found.

"...a KPMG probe found that an internal whistleblower at EY had raised fraud allegations against Wirecard in 2016 and also reported that the company had attempted to bribe an auditor in India. EY then conducted an investigation, but this was shut down at the behest of Wirecard's second-in-command Jan Marsalek, who is now a fugitive on Interpol's "most wanted" list."

Source: [Whistleblower warned EY of Wirecard fraud four years before collapse](#)
Exclusive: Employee at payments group's longtime auditor flagged suspicious accounting and attempted bribery in 2016, Olaf Storbeck in Frankfurt, SEPTEMBER 30 2020

We do not know the name or the fate of this whistleblower.

AUDITORS AS WHISTLEBLOWERS

What laws protect auditor whistleblowers outside of the United States?

PwC auditor Antoine Deltour and PwC Luxembourg Tax Leaks

- On Nov. 5, 2014, [International Consortium of Investigative Journalists \(ICIJ\)](#) and its media partners all over the world published a confidential cache of secret tax agreements approved by Luxembourg authorities. These tax-relief deals were proposed by a major accounting firm, PricewaterhouseCoopers, on behalf of more than 340 companies around the world. These private deals are legal in Luxembourg.
- PwC sold tax avoidance schemes that have already been deemed illegal or are now under scrutiny by US and EU regulators and the IRS to 100+ audit clients.
- Most of the documents released, 28,000 PwC Luxembourg tax rulings, were obtained from a whistleblower, Antoine Deltour worked as an auditor at the Luxembourg office of PwC, who was prosecuted at PwC's request, and eventually exonerated of all charges.

AUDITORS AS WHISTLEBLOWERS

PwC Luxembourg Tax Leaks

I wrote about PwC's primary [#LuxLeaks](#) defenses: [Luxembourg Tax Document Leak Leaves PwC and its Multinational Clients Vulnerable](#)

1. The advice PwC provided was legal.

- *"All our advice and assistance is given in accordance with applicable local, European and international tax laws and agreements and is guided by the [PwC Global Tax Code of Conduct](#) which has been in place since 2005. Our global tax code sets out guidance for our tax professionals around the world on a range of issues, including taking into consideration how any tax decisions will be viewed by wider stakeholders."*
- In its statement to ICIJ, PwC used a "complexity defense" to dismiss journalists' allegations that the schemes were aggressive and potentially abusive. PwC said media do not have "a complete understanding of the structures involved."

2. The documents were obtained illegally.

- PwC provided comments to media and issued [a press release](#) to discredit the reports using the "shoot the messenger" strategy.
- *"The recent reports in the media on tax advice in Luxembourg coordinated by the International Consortium of Investigative Journalists (ICIJ) are based on partial, incomplete information dating back four years or more, which was illegally obtained. PwC takes the improper disclosure of any confidential information extremely seriously. As soon as it became aware that documents had been illegally taken from its offices in Luxembourg, PwC undertook a full investigation that quickly led to the individual who we believe took the documents. The matter was immediately reported to the relevant judicial authorities in Luxembourg whose enquiries into the matter are continuing. At the time of the disclosure of the documents, the individual had already left PwC's employment."*
- However, there is a "whistleblower" element because the public has a compelling interest in the contents of the documents and they might provide evidence of public corruption or other illegal activities. ICIJ, and any journalist who uses them, must make sure they are authentic. They did. These documents were filed with the Luxembourg government and are considered by EU law to be public documents.

HOW TO WHISTLEBLOW

An auditor (or any internal or external accountant) may disclose information to the SEC and be eligible for an award if:

- The auditor has a **reasonable basis to believe that disclosure of the information to the SEC is necessary to prevent** the engagement client from engaging in conduct likely to cause substantial injury to the financial interest of the entity or investors;
- The individual has a **reasonable basis to believe that the relevant entity is engaging in conduct** to obstruct an internal or SEC investigation; or
- At least **120 days** have elapsed since the auditor (a) provided the information to the relevant entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or supervisor, or (b) received the information, if the auditor received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer or supervisor was already aware of the information.

Whistleblower Protections and Incentives for Auditors and Accountants

In 2014 the Supreme Court held in Lawson v. FMR that employees of contractors of public companies, including employees of accounting and audit firms, are protected under the whistleblower protection provision of the Sarbanes-Oxley Act.

In order to demonstrate that a whistleblower engaged in "protected activity", a whistleblower must show that she **reasonably believed** the conduct complained of constituted a violation of mail fraud; wire fraud; bank fraud; securities or commodities fraud; **any SEC rule or regulation (including auditor independence and PCAOB auditing standards)**; or any provision of Federal law relating to fraud against shareholders.

A whistleblower need not show that an actual violation occurred so long as they reasonably believed that the violation was likely to happen. As such, an auditor may still bring a successful SOX retaliation claim when the audit firm issues an unqualified opinion. The focus is on the whistleblower's reasonable belief.

HOW TO WHISTLEBLOW

Don't go it alone! Get a lawyer early in the process!

- To help uphold the law and the public interest, CPAs must be aware of not only current legislation regarding whistleblowing, but also of the AICPA Code of Professional Conduct and consult with their State Boards of Accountancy.
- The AICPA Code does allow whistleblowing by the CPA and permission to comply with an enforceable subpoena, applicable laws, or with AICPA or state society obligations.
- It is important to note that because the Dodd-Frank Act is a federal law it takes precedence over state laws and confidentiality restrictions.
- CPAs now have greater protections when blowing the whistle on financial wrongdoing by the employer and thereby better protecting the public interest. As applicable laws are continuing to be developed and changed, the answer for the CPA depends upon federal law, State Boards of Accountancy decrees, and the level to which states have adopted the AICPA Code of Professional Conduct.
- Source: [Whistleblowing by the CPA: Legality vs. Ethics](#) , Gregory J. Krivacek, Robert Morris University
- See also: [A Legal Perspective on Confidentiality & Whistleblowing](#), NASBA Annual Meeting Presentation, Orlando, Florida October 30, 2012 Noel L. Allen,1 NASBA Legal Counsel

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Previously featured at:

Transparency Reporter, MarketWatch, a Dow Jones Company
Washington DC

<http://www.marketwatch.com/topics/journalists/francine-mckenna>

Accounting Watchdog at Forbes.com
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<http://blogs.forbes.com/francinemckenna>

Accountable at American Banker
Former Columnist

<http://www.americanbanker.com/authors/1236.html>

Bull Market at Medium.com
Former Contributor

<http://medium.com/bull-market>

The University of Chicago Booth School of Business Capital Ideas Blog

<http://blogs.chicagobooth.edu/n/blogs/blog.aspx?nav=main&webtag=capideas&entry=41>

AUDITORS AS WHISTLEBLOWERS

More on PwC Luxembourg Tax Leaks

Excerpted from [The WhistleblowingNetwork.org](https://www.whistleblowingnetwork.org)

- Antoine Deltour worked as an auditor at the Luxembourg office of PricewaterhouseCoopers (PwC) from 2008 to 2010.
- In 2011 Deltour decided to leave PwC and resigned. Before leaving, he downloaded documents detailing tax deals that PwC had brokered with the Luxembourg government that allowed companies to funnel billions of dollars through Luxembourg, thereby slashing corporate tax bills by billions in the countries in which they were based or did business.
- Deltour eventually shared the documents with a French journalist, Edouard Perrin, who used them as the basis of a television documentary that aired on France 2 TV in May 2012.
- In December 2014, Luxembourg authorities charged Mr. Deltour for leaking documents. He faced a 5-year jail sentence and a fine of up to €1,250,000. Two years later, and after a high-profile criminal trial, Mr. Deltour was convicted. He was sentenced to a 12-month suspended jail term and a €1,500 fine.
- Despite his conviction, the European Parliament recognised Antoine Deltour's actions as being in the public interest and awarded him the European Citizens Prize in 2015.
- He appealed the conviction. In March 2017, his conviction was upheld by the appeal court. Mr. Deltour appealed again. Six years after the original complaint was lodged, the Court of Cassation finally recognized Deltour as a whistleblower in January 2018. In May, 2018 the Court acquitted him of all the charges relating to his whistleblowing on tax avoidance schemes.
- However, PwC continued to pursue Deltour and he had to return to a lower court to defend the "charge" that he had downloaded training materials without permission.