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The Dodd-Frank Act's New Whistleblower and Bounty Provisions

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This article summarizes some major provisions of the whistleblower protections included in the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Securities and Exchange Commission's Final Rules implementing Dodd-Frank's widely-reported "bounty" program.

Like many major regulatory enactments in recent years, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") contains a series of whistleblower provisions designed to encourage the reporting of prescribed conduct. The whistleblower protections included in the Consumer Protection Act provisions of Dodd-Frank ("CPA") became effective on July 21, 2011. Moreover, the Securities and Exchange Commission's Final Rules implementing Dodd-Frank's widely-reported "bounty" program became effective August 12, 2011.

"BOUNTY" PROGRAM

The Dodd-Frank whistleblower provision that has garnered the most attention is Section 922, which creates a "bounty" program. Under the "bounty" program, individuals voluntarily providing information to the Securities and Exchange Commission ("SEC") relating to a violation of the securities laws may be eligible for monetary rewards of between 10

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percent and 30 percent of the monetary sanctions the SEC collects in a subsequent judicial or administrative action, provided the action results in monetary sanctions of $1 million or more.

The amount of the "bounty" is determined by the SEC after taking into consideration the significance of the information the whistleblower provided, the degree of assistance provided in the action, the programmatic interest of the SEC in deterring violations of the securities laws and other factors set forth in the SEC's Final Rules. Awards may be diminished based on a whistleblower's culpability, reporting delay or interference with internal compliance systems.

The following individuals are not eligible for a "bounty:"

- Agents of appropriate regulatory agencies, including the Department of Justice, a self-regulatory organization, such as the Public Company Accounting Oversight Board, or a law enforcement organization;
- Whistleblowers convicted of a criminal violation related to the action;
- Whistleblowers who knowingly offer false statements or documentation; and
- In certain circumstances, whistleblowers who gain the information through the performance of an audit.

Any determinations by the SEC under this "bounty" program, except the amount of the award if within the 10 percent to 30 percent range specified in the statute, may be appealed to the appropriate U.S. Court of Appeals.

The SEC's Final Rules governing the "bounty" program became effective August 12, 2011, at which time prospective whistleblowers must submit information through the SEC's Tips, Complaints and Referrals online portal or form. However, any reports made between Dodd-Frank's date of enactment, July 22, 2010, and August 12, 2011, regardless of form, were eligible for the "bounty" program.

Contrary to the recommendations of many commentators, the SEC's Final Rules do not require whistleblowers to first submit an internal complaint before turning to the SEC. The Final Rules do, however, provide a limited incentive for whistleblowers to report their complaints internally by allowing whistleblowers to recover a reward for internal complaints

that result in a covered action and by taking into consideration a whistleblower's internal reporting when determining the amount of an award.

Section 922(h) of Dodd-Frank prohibits any discrimination or retaliation against whistleblowers who provide information to the SEC under the "bounty" program, testify or assist in an investigation or judicial or administrative action, or make other disclosures to the SEC protected by the Sarbanes-Oxley Act ("SOX"), the Securities and Exchange Act of 2002, or any other law, rule or regulation subject to the jurisdiction of the SEC. Significantly, under the SEC's Final Rules, an employee may claim whistleblower status based only on a "reasonable belief" that information provided relates to a "possible" securities law violation.

Under Section 922(h) of Dodd-Frank, whistleblowers alleging unlawful discrimination or retaliation may, within six years (or within three years of learning of facts material to the right of action), bring a private cause of action in the appropriate U.S. District Court, without the need to first exhaust administrative remedies. Alternatively, in its Final Rules, the SEC recognizes its own right to bring an enforcement action for alleged whistleblower retaliation. In any such action, a prevailing whistleblower plaintiff may be awarded reinstatement, double backpay and litigation costs, including attorneys' fees.

Dodd-Frank also created a whistleblower incentive and protection program for reporting information to the Commodity Futures Trading Commission. This remedy closely tracks Section 922 of Dodd-Frank.

CPA WHISTLEBLOWER CAUSE OF ACTION

In Dodd-Frank, Congress also created an entirely new cause of action to protect employees against retaliation for the following:

- Providing information to the Consumer Financial Protection Bureau ("CFPB") or any other government authority or law enforcement agency relating to a violation of the Consumer Protection Act provisions of Dodd-Frank or of any other rule or order of the CFPB;
- Testifying in a proceeding under the CPA or under other provision of law within the jurisdiction of the CFPB;

- Instituting a proceeding under any federal consumer protection law; and
- Objecting to or refusing to participate in an action that the employee reasonably believes to be in violation of any law, rule, or order within the jurisdiction of the CFPB.

Significantly, whistleblower protections under the CPA may not be waived by any agreement, policy or condition of employment, including a predispute arbitration agreement, with a limited exception for certain collectively bargained arbitration provisions.

The CPA whistleblower protections enacted in Dodd-Frank became effective on the "designated transfer date," July 21, 2011, and will fall under the original jurisdiction of OSHA. Like 20 other federal statutes, covering such industries as the airline, rail, trucking, nuclear, food, environmental and securities industries, the CPA whistleblower protections are administered by OSHA, whose Office of Whistleblower Protection Program is charged with investigating federal whistleblower complaints completely unrelated to OSHA's core mission of promoting workplace safety. Each of the whistleblower statutes under OSHA's jurisdiction contain similar procedural requirements, are administered by the same OSHA investigators and Administrative Law Judges, and involve an identical burden shifting analysis particular to this evolving body of federal administrative jurisprudence.

An employee must file a CPA whistleblower complaint with OSHA within 180 days following the alleged retaliation. OSHA will assign the case to a whistleblower investigator, who will conduct a prompt and thorough investigation, including requesting a written statement of position from the employer and interviewing witnesses. If, following the OSHA investigator's recommendation, the Secretary of Labor finds that a violation has occurred, the Secretary may order reinstatement, backpay or other compensatory damages, and all costs and expenses of bringing the complaint, including attorney's fees. In many cases, the Secretary also will issue a press release contemporaneous with its finding that the whistleblower complaint was meritorious.

Either party may file objections to the Secretary's determination and request a *de novo* hearing before a Department of Labor Administrative Law

Judge. Following a decision by the ALJ, either on summary judgment or after trial, either party may file an appeal to the Department of Labor's Administrative Review Board. Appeals from a final order of the Department of Labor may be taken to the appropriate U.S. Court of Appeals.

The administrative process before the Department of Labor is designed to move very quickly, with the initial investigation before OSHA, administrative trial before the ALJ and appeal to the Administrative Review Board all occurring within 210 days, although in practice administrative handling often extends beyond 210 days. However, if the Department of Labor does not issue a final order within 210 days after the initial complaint, the complainant may bring a *de novo* action in the appropriate U.S. District Court with a right to a jury trial.

AMENDMENT TO SOX WHISTLEBLOWER PROTECTIONS

Dodd-Frank also amended the existing administrative whistleblower protections under SOX, codified at 18 U.S.C. § 1514A, including:

- The statute of limitations for bringing a whistleblower action was extended from 90 days after the violation occurred to 180 days after the employee became aware of the violation.
- Employees were guaranteed the right to a trial by jury in any SOX whistleblower action heard in U.S. District Court.
- The rights provided under 18 U.S.C. § 1514A cannot be waived through any agreement, policy, or condition of employment (including a pre-dispute arbitration agreement). Pre-dispute arbitration agreements were specifically declared invalid if the agreement requires arbitration of a dispute arising under the SOX whistleblower statute.

The SOX whistleblower statute was also amended to clarify that it covered employees of subsidiaries of publicly traded companies, if the financial information for such companies is included in the consolidated financial statements of their parents.

CONCLUSION

Employees now have a strong financial incentive to report non-compliance and new statutory protections against alleged retaliation. More than ever, it is important for all public companies, and particularly those offering consumer financial products, to internally identify and root out potential compliance deficiencies.

Likewise, given the abbreviated statutory deadlines and significant administrative remedies, employers must prevent retaliation against whistleblowers, anticipate potential whistleblower complaints in response to legitimate personnel decisions, and rapidly develop a thorough defense strategy whenever a whistleblower complaint is filed.