

**NO LONGER WHISTLING IN THE WIND:  
DODD-FRANK AND ENHANCED  
WHISTLEBLOWER PROTECTIONS**

by

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### **1. Introduction**

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”)<sup>1</sup> into law. Dodd-Frank explicitly expands the rights and protections available to “whistleblowers”. Among its most significant provisions, Dodd-Frank mandates substantial monetary awards for employees whose reports of securities or commodities law violations, including anonymous reports through counsel, lead to successful prosecutions of the offending companies. Dodd -Frank also enhances the protections afforded whistleblowers by creating a new private right of action for unlawful retaliation, lengthening the statute of limitations period for filing retaliation claims, and greatly adding to the circumstances in which reporting of corporate misconduct constitutes protected activity.

Although Dodd-Frank materially advances the rights of whistleblowers, the legislative scheme is anything but clear. Dodd-Frank amends disparate pieces of pre-existing whistleblower legislation found in the Sarbanes-Oxley Act (“SOX”), the Securities Exchange Act (“SEA”) and the Commodity Exchange Act (“CEA”), but does not do so in a consistent manner. Dodd-Frank then adds to the patchwork of varying whistleblower protections by creating the Consumer Financial Protection Act (“CFPA”) which, not surprisingly, has its own set of rules. This article attempts to make some sense of the most important respects in which Dodd-Frank changes whistleblower law.

## **2. Enhancements to Whistleblower Rights and Protections Under Dodd-Frank**

### A. The SEA and CEA Bounty Program

Dodd-Frank amends both the SEA<sup>2</sup> and CEA<sup>3</sup> to require a cash reward to individuals who provide “original information” to the Securities and Exchange Commission (“SEC”) or the Commodities Futures Trading Commission (“CFTC”) that results in monetary sanctions from a firm of more than \$1 million. “Original information”, as defined by the statute, consists of information that is: (1) derived from the whistleblower’s independent knowledge or analysis, (2) not already known to the SEC from another source and (3) not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing or audit, or investigation, or from the news media.<sup>4</sup> The monetary award to the whistleblower is to be between 10 and 30 percent of the amount collected, at the discretion of the agency.<sup>5</sup> Factors in determining the amount of the award include the significance of the information provided by the whistleblower and the degree of assistance provided by the whistleblower.<sup>6</sup> It should be noted that the statute also denies the possibility of an award to various categories of whistleblowers. For example, employees of the appropriate regulatory agency, the Department of Justice, a self-regulatory organization or a law enforcement organization are barred from recovering an award. Among others barred are whistleblowers who gained their information through the audit of a financial statement required under the securities laws.<sup>7</sup>

Importantly, Dodd-Frank amends the SEA and CEA to provide additional incentives to report misconduct by creating a process whereby the reporting may be done anonymously through counsel and still qualify for an award. Whistleblowers need only disclose their identity to the SEC or CFTC if and when there is an award and payment due.<sup>8</sup>

## B. Retaliation Complaints

Dodd-Frank amends the SEA and the CEA to provide broad protection against retaliation for employees who have provided original information to the SEC or the CFTC. An employer may not take any adverse employment action against a whistleblower because the whistleblower engaged in the protected activity. Protected activity is defined to include providing information to the appropriate commission, e.g. in accordance with the whistleblower incentive provisions and assisting in any judicial or administrative action based on such information.<sup>9</sup> Dodd-Frank also amends the SEA to protect whistleblowers who make disclosures that are required or protected under SOX and any other law, rule or regulation subject to the jurisdiction of the SEC.<sup>10</sup>

To the extent that a whistleblower has suffered some form of retaliation, Dodd-Frank creates a private right of action, enabling the whistleblower to have direct access to federal court.<sup>11</sup> The direct access to federal court is a substantial departure from SOX, which requires whistleblowers to first pursue a claim for retaliation before the Occupational Safety and Health Administration (“OSHA”). Delay was commonplace before OSHA, an administrative agency with limited expertise in financial matters and limited resources to conduct adequate investigations.<sup>12</sup>

Now, pursuant to Dodd-Frank, it may be expected that whistleblower claims under the SEA or CEA will be expedited by allowing those claims to be brought directly in federal court. Relief for prevailing employees includes reinstatement, back pay, attorneys’ fees and costs.<sup>13</sup> Under the amended CEA, a prevailing employee is entitled to actual back pay, while under the amended SEA, a prevailing employee may receive two times back pay.

Dodd-Frank's treatment of the statute of limitations periods applicable to retaliation claims under the various statutes is inconsistent, but in all cases lengthens the period previously available under SOX. For example, under the SEA, as amended, whistleblowers now have six years from the time of the alleged retaliation, or three years from the time the employee knew or should have known of the violation, to commence an action for retaliation.<sup>14</sup> Under the CEA, as amended, the statute of limitations period is two years from the time of the violation.<sup>15</sup> Both of these limitations period stand in contrast to statute of limitations period under SOX, which was extended by Dodd-Frank to 180 days from the prior 90 day period.<sup>16</sup>

### C. New Private Right of Action in Financial Services Industry

Unlike the direct access afforded by the SEA and CEA, Dodd-Frank maintains the requirement of an administrative filing for employees who have a claim for retaliation under the Consumer Financial Protection Act ("CFPA"), and employees with CFPA retaliation claims will be required in the first instance to file those claims with OSHA.<sup>17</sup> The activity protected by the CFPA greatly extends the protections available to whistleblowers. In summary, it protects employees who are retaliated against for: (1) providing information concerning a violation of the act to their employer, or to the newly created Bureau of Consumer Financial Protection ("Bureau"), or to any other government authority or law enforcement agency; (2) testifying in a proceeding resulting from the administration or enforcement of any of Dodd-Frank's consumer protection provisions; (3) filing or instituting any proceeding under any federal consumer financial law; or (4) objecting to any activity or task that the employee reasonably believes to be a violation of any law or rule under the jurisdiction of the Bureau.<sup>18</sup>

Although not yet effective, the coverage to be afforded by the CFPA will extend to employees who are engaged in "performing tasks related to the offering or provision of a

consumer financial product or service,” whether the employer is public or private.<sup>19</sup> Under SOX, in contrast, coverage was limited to employees of publicly traded companies.

Similar to the process under SOX, employees who believe they have been retaliated against under the CFPA have 180 days from the alleged violation to file a claim with the DOL.<sup>20</sup> As with SOX, the burden of proof is very favorable to the employee. The employee meets his initial burden by showing that the protected conduct was a contributing – not a determining or significant – factor in the adverse employment action.<sup>21</sup> If the whistleblower meets this burden by a preponderance of the evidence, then the employer must show by clear and convincing evidence that it would have taken the same action in the absence of the employee’s protected conduct.<sup>22</sup>

#### D. Amendments to SOX

Dodd-Frank amends SOX to make bringing retaliation claims under that statute easier. The new law makes the whistleblower protections of SOX available to a far greater number of employees by mandating that SOX applies not only to publicly traded companies, but also to any of their subsidiaries and affiliates whose financial information is included in the publicly traded company’s consolidated financial statements.<sup>23</sup>

Dodd-Frank also facilitates the bringing of retaliation claims by increasing the statute of limitations from 90 to 180 days<sup>24</sup> and by making clear that whistleblowers bringing an action in federal court have the right to a jury trial.<sup>25</sup> In addition, Dodd-Frank voids any agreement, policy, form or condition of employment which waives whistleblower rights and remedies under SOX and provides that predispute agreements requiring arbitration of SOX whistleblower disputes are not valid or enforceable.<sup>26</sup>

### E. Mandatory Whistleblowing

Finally, in a somewhat novel twist, Dodd-Frank places an affirmative obligation on all the nationally recognized statistical rating organizations to refer to law enforcement or regulatory authorities credible information received from third parties that an issuer of securities rated by the agency has committed or is committing a material violation of law that has not been adjudicated by a federal or state court.<sup>27</sup> The rating organization is not, however, required to verify the accuracy of the information it passes along.<sup>28</sup>

### **3. Conclusion**

Dodd-Frank's regulatory scheme significantly enhances the protections available to whistleblowers. It strengthens existing protections under SOX, adds new private rights of action covering a greater number of companies in a wide set of circumstances, creates a process for anonymous whistleblowing activity, and establishes powerful financial incentives to report wrongdoing. Although the precise impact of Dodd-Frank will not be fully apparent for years to come, it is certain to bring an increase in whistleblower activity.

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<sup>1</sup> Copies of the relevant whistleblower provisions from Dodd-Frank follow the end notes to this article.

<sup>2</sup> Dodd-Frank § 922(a)

<sup>3</sup> Dodd-Frank § 748

<sup>4</sup> Dodd-Frank §§ 748, 922(a)

<sup>5</sup> Dodd-Frank §§ 748, 922(a)

<sup>6</sup> Dodd-Frank §§ 748, 922(a)

<sup>7</sup> Dodd-Frank §§ 748, 922(a)

<sup>8</sup> Dodd-Frank §§ 748, 922(a)

<sup>9</sup> Dodd-Frank §§ 748, 922(a)

<sup>10</sup> Dodd-Frank § 922(a)

<sup>11</sup> Dodd-Frank §§ 748, 922(a)

<sup>12</sup> In one recent case, the whistleblower ran the gauntlet from OSHA, through the federal courts and finally to FINRA arbitration, in a process that took more than six years. *Roganti v. Metropolitan Life Ins. Co.*, Case No. 04-04876 (FINRA 2010). Although that whistleblower eventually prevailed and won a large award, the difficulty of the drawn-out process only adds to the burdens faced by whistleblowers.

<sup>13</sup> Dodd-Frank §§ 748, 922(a)

<sup>14</sup> Dodd-Frank § 922(a). In any event, claims must be brought within ten years from the time of the violation.

<sup>15</sup> Dodd-Frank § 748

<sup>16</sup> Dodd-Frank § 922(c)(1)(A)(i)

<sup>17</sup> Dodd-Frank § 1057(c)(1)(A)

<sup>18</sup> Dodd-Frank § 1057(a)

<sup>19</sup> Dodd-Frank § 1057(b)

<sup>20</sup> Dodd-Frank § 1057(c)(1)(A)

<sup>21</sup> Dodd-Frank § 1057(c)(3)(A)

<sup>22</sup> Dodd-Frank § 1057(c)(3)(B)

<sup>23</sup> Dodd-Frank § 929A

<sup>24</sup> Dodd-Frank § 922(c)(1)(A)(i)

<sup>25</sup> Dodd-Frank § 922(c)(1)(B)

<sup>26</sup> Dodd-Frank § 922(c)(2)

<sup>27</sup> Dodd-Frank § 934, amending the SEA to add 15 U.S.C. §780-7(u)(1)

<sup>28</sup> Dodd-Frank § 934, amending the SEA to add 15 U.S.C. §780-7(u)(2)