



**FINANCIAL REFORM LEGISLATION OFFERS WHISTLEBLOWERS
LUCRATIVE INCENTIVES AND ROBUST PROTECTION**

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The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), creates a new whistleblower program with potentially lucrative cash rewards for whistleblowers who voluntarily provide evidence of securities law violations to the U.S. Securities and Exchange Commission (“SEC”).

WHISTLEBLOWER INCENTIVES

The Dodd-Frank whistleblower program permits the SEC to gather information for any violation of federal securities law and encourages individuals to report securities violations. Prior to Dodd-Frank, the SEC only compensated whistleblowers for information regarding insider trading; total awards were capped \$160,000.00 and could only be given to seven of the submitted disclosures. Many consider the new law a “bounty” reward program because it encompasses all securities law violations, including disclosures within the Foreign Corrupt Practices Act (“FCPA”). This is an important addition to the SEC’s enforcement reach, as FCPA prosecutions have dramatically increased in recent years.

In order to encourage disclosure of securities violations, the new law provides whistleblowers³ with lucrative incentives to disclose securities violations. Previously, whistleblowers were limited to a maximum of 10 percent of the recovered amount in only insider trading violations. Under Section 922 of the Dodd-Frank Act, whistleblowers providing “original information”⁴ which leads to successful enforcement of a judicial or administrative action resulting in monetary sanctions exceeding \$1,000,000.00, shall be rewarded between 10 and 30 percent of any money recovered by the Government because of the whistleblower’s assistance. However, the monetary award is precluded if (i) the whistleblower is convicted of a criminal violation relating to the action for which he or she provided information or (ii) the whistleblower gains the information during an audit of financial statements required under the securities laws.

Whistleblower awards are paid from the Securities and Exchange Investor Protection Fund. The amount of the award shall be at the discretion of the SEC. In making an awards determination, the SEC considers several factors, including: (i) the significance of the information provided by the whistleblower to the success of the enforcement action, (ii) the degree of assistance provided by the whistleblower, (iii) the interest of the SEC in deterring violations of securities laws, and (iv) any additional factors the SEC deems relevant. The SEC’s final award determination may be appealed to the appropriate federal appellate court within 30 days after it is issued. .

WHISTLEBLOWER PROTECTION

Securities law violations are most commonly detected by employees, industry regulators, and analysts. Employees fear the huge risks that coincide with alleging an employer’s possible unlawful activity. Dodd-Frank implements certain measures to protect whistleblowers against

employer backlash because of their cooperation with the SEC. Specifically, Section 922 prohibits employers from retaliating against a whistleblower for: (i) providing information to the SEC; (ii) initiating, testifying in, or assisting in any investigation or judicial or administrative action of the SEC based upon information provided; or (iii) making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002, the Securities Exchange Act of 1934, and any other laws which are subject to the SEC's jurisdiction. Under Dodd-Frank, an individual who alleges discharge or other discrimination may file an action in federal court. This step negates filing an initial complaint with the Department of Labor, as required of complainants under the Sarbanes-Oxley Act ("SOX").

EXPANSION OF SARBANES-OXLEY PROTECTION AND REMEDIES

Under the Dodd-Frank Act, a prevailing whistleblower in an unlawful discharge or discrimination action is entitled to twice the amount of back pay with interest, among other remedies such as reinstatement with the same seniority status, and compensation for litigation costs, including expert and reasonable attorneys' fees. The percent of recovery and double back pay with interest award are significant additions to protection provided by SOX, which only provides for reinstatement, back pay with interest, and reimbursement of attorney's fees.

A Dodd-Frank whistleblower has 10 years to file a complaint, in contrast to the 90 days under SOX, which also requires a waiting period of 180 days. Under the new law, the whistleblower has until six years from the date of the retaliation, or until three years from the time the whistleblower discovered the retaliation, but not more than 10 years after the date of the violation to bring a complaint directly in federal court.

EXEMPTION FROM MANDATORY ARBITRATION

Section 922(e) of Dodd-Frank expressly prohibits enforcement of any “agreement, policy form, or condition of employment, including a predispute arbitration agreement” which waives the rights or remedies provided to SOX whistleblowers.⁵ Employers are estopped from compelling arbitration under SOX, thereby making any waiver of whistleblower claims in an employer’s general release or settlement agreement with an employee invalid.

SUBSIDIARIES OR AFFILIATES OF PUBLICLY TRADED COMPANIES INCLUDED

Section 929A of the Dodd-Frank Act extends the whistleblower provision of SOX to include employees of subsidiaries or affiliates of publicly traded companies “whose financial information is included in the consolidated financial statements of a publicly traded company.”⁶ Prior to this amendment, the Department of Labor followed a narrow definition which did not cover employees of non-publicly traded subsidiaries absent a showing of a substantial nexus between the parent and subsidiary.

AMENDMENTS TO THE RETALIATION PROVISION OF THE FALSE CLAIMS ACT

Section 1079B of Dodd-Frank also amends the anti-retaliation provision of the False Claims Act, 31 U.S.C. § 3730(h), by extending the definition of protected conduct to include lawful acts done by “an agent or associated others in furtherance of an action under this section or other efforts to stop one or more violations of the False Claims Act.”⁷ Furthermore, this section clarifies that the statute of limitations for bringing a retaliation action under the False Claims Act is not more than three years after the date the retaliation occurred.

CONCLUSION

Lucrative monetary incentives coupled with robust whistleblower protection will undeniably encourage employees to report securities law violations which will lead to an increase in investigations by the SEC and the Department of Justice. In light of these significant new changes, it is foreseeable that the SEC will face challenges in deciphering between legitimate disclosures provided by credible whistleblowers from those individuals coming forward with unfounded allegations in hopes of receiving a potentially huge cash reward that could total millions of dollars.

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³ The term “whistleblower” means any individual, or 2 or more individuals acting jointly, who provides information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.

⁴ Original Information: The term “original information” means information that –

- (A) is derived from the independent knowledge or analysis of a whistleblower;
- (B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and
- (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is the source of the information.

⁵ *See*, generally, Section 922(e).

⁶ *See*, generally, Section 929A.

⁷ *See*, generally, Section 1079B.