



PROPOSED SENATE BILL OFFERS WHISTLEBLOWERS LUCRATIVE INCENTIVES AND ROBUST PROTECTION

By: Philip H. Hilder
Sunida A. Louangsichampa

On March 15, 2010, Senate Banking Committee Chairman Christopher Dodd unveiled his sweeping financial reform legislation.¹ Part of the *Restoring American Financial Stability Act of 2010* (RAFSA) would amend the Securities Exchange Act of 1934 by granting the SEC the authority to compensate whistleblowers who voluntarily report evidence of securities law violations.

WHISTLEBLOWER INCENTIVES

The RAFSA establishes a whistleblower program within the SEC to encourage individuals to report securities violations. Whistleblowers² providing “original information”³ leading to a successful enforcement of a judicial or administrative action

¹ See Staff of S. Comm. On Banking, Housing, & Urban Affairs, 111th Cong., *Restoring American Financial Stability Act of 2010*. The full text is available at http://banking.senate.gov/public/_files/ChairmansMark31510AYO10306_xmlFinancialReformLegislationBill.pdf

² 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.

³ 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

resulting in monetary sanctions exceeding \$1,000,000 shall be rewarded between 10 and 30 percent of any money collected of the monetary sanctions imposed in the action. No awards shall be permitted to any whistleblower who was convicted of a criminal violation relating to the action for which he or she provided information and payment of awards shall be paid from the Securities and Exchange Investor Protection Fund.

The SEC has discretion in determining the amount of the award. The SEC shall take into account the significance of the information provided by the whistleblower to the success of the enforcement action, the degree of assistance provided by the whistleblower, the interest of the SEC in deterring violations of securities laws, and any additional factors the SEC deems relevant. Any determination made under this provision may be appealed to the appropriate court of appeals of the United States not more than 30 days after the final determination issued by the SEC.

PROTECTION OF WHISTLEBLOWERS

Securities law violations are most commonly detected by employees, industry regulators, and analysts. The Bill further proposes to protect whistleblowers from retaliation in the terms and conditions of employment due to cooperation with the SEC or assistance in judicial or administrative actions. Whistleblowers would be protected from acts such as demotion, harassment and discharge. An individual who alleges discharge or other discrimination may bring a cause of action directly to the appropriate district court of the United States. Under the proposed Bill, the whistleblower would have until six years from the date of the retaliation, or three years from the time the whistleblower discovered the retaliation, to bring a complaint directly in federal district court.

If a whistleblower prevails in an unlawful discharge or discrimination action, he or she would be entitled to reinstatement with the same seniority status, to twice the amount of back pay owed with interest, and to compensation for litigation costs, including expert and reasonable attorneys' fees. The percent of recovery and double back pay with interest award would be significant new additions to the Sarbanes-Oxley Act of 2002. Under Section 806 of the Sarbanes-Oxley Act, whistleblowers are entitled to reinstatement, back pay with interest, and reimbursement of legal costs, including expert and reasonable attorneys' fees. However, under the Sarbanes-Oxley Act, a whistleblower must act within 90 days of any alleged retaliation by filing a complaint with the Department of Labor. An adverse ruling may then be appealed to the appropriate federal district court by either party.

CONCLUSION

(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.

While the fate of the proposed bill remains uncertain, financial reform has undoubtedly regained the national spotlight and the interest of the American people. The lucrative incentives the *Restoring American Financial Stability Act of 2010* proposes will undeniably lead to a boom in whistleblower cases.