

CLIENT ALERT

New Whistleblower Incentives and Protections in the Dodd–Frank Wall Street Reform and Consumer Protection Act

August 31, 2010

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which became law at the end of July, contains new incentives for whistleblowers as well as enhanced whistleblower protections. These whistleblower provisions apply beyond the financial services industry, impacting public and private companies across all industries.

1. New Whistleblower Incentives for Reports to the SEC and the CFTC

Section 922 of the Dodd-Frank Act amends the Securities Exchange Act to create a significant financial incentive for whistleblowers who voluntarily provide "original information" to the Securities and Exchange Commission (SEC) that leads to the recovery of more than \$1 million in monetary sanctions. Qualified whistleblowers shall be awarded 10 to 30 percent of the collected monetary sanctions, with the specific amount within this range determined in the discretion of the SEC. "Original information" must be "derived from the independent knowledge or analysis of the whistleblower" and must not be known to the SEC from any other source nor exclusively derived from an allegation in a judicial or administrative hearing, in a governmental audit or investigation, or from the media. The amendments allow the whistleblower to anonymously provide the information, but disclosure of identity is required to receive an award.

Section 748 of the Dodd-Frank Act amends the Commodities Exchange Act to establish a similar financial incentive - award of 10 to 30 percent of the collected monetary sanctions (exceeding \$1 million) - for whistleblowers who voluntarily provide "original information" to the Commodities Futures Trading Commission (CFTC).

2. New Anti-Retaliation Protections for SEC and CFTC Whistleblowers

In addition to the financial incentives for whistleblowers, Section 922 creates a private right of action for securities whistleblowers who suffer retaliation. This provision prohibits employers from discharging, demoting, suspending, threatening, harassing or otherwise discriminating against a whistleblower in the terms and conditions of employment because of any lawful act by the whistleblower either in reporting, or participating in the investigation or prosecution of violations of the securities laws, including disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (SOX).

Unlike the SOX whistleblower anti-retaliation provision, which requires that the whistleblower first file a claim with the Department of Labor, there is no administrative exhaustion requirement under Section 922, permitting employees to sue directly in federal district court. In addition, unlike the short statute of limitations for SOX whistleblower claims (which is lengthened to 180 days in the Dodd-Frank Act), the Securities Exchange Act allows whistleblowers up to six years after the retaliation or three years after its discovery to bring a retaliation claim (not to exceed 10 years after the date the alleged retaliation occurred). Relief includes reinstatement, double back pay with interest, and compensation for litigation costs, expert witness fees and reasonable attorneys' fees.

Section 748 establishes a substantially similar private right of action in the Commodities Exchange Act for whistleblowers who suffer retaliation as a result of providing information to the CFTC or participating in a CFTC investigation or enforcement action. This provision is less favorable to employee-whistleblowers than the amendment to the Securities Exchange Act, in that the statute of limitations is only two years, and only straight back pay may be awarded rather than double back pay.

The SEC and CFTC have approximately 8 months to issue final regulations implementing the new whistleblower incentives and protections set forth in Section 922(a) and 748.

3. SOX Whistleblower Provisions Strengthened and Expanded

Section 922(c) amends the Sarbanes-Oxley Act (SOX), 1514A of Title 18 of the United States Code, to lengthen the statute of limitations for a SOX retaliation claim from 90 days to 180 days after the employee became aware of the violation. Section 922(b) further clarifies that employees are entitled to have their SOX retaliation claims tried before a jury.

This section of the Dodd-Frank Act also prohibits waiver of the rights and remedies provided to SOX whistleblowers in "any agreement," which on its face appears to bar the release of a SOX claim in a general release or settlement agreement. This section further precludes the enforcement of any pre-dispute arbitration agreement that requires arbitration of a SOX retaliation claim.

Finally, Section 929A amends SOX to extend whistleblower protection to employees of subsidiaries and affiliates of publicly traded companies if the subsidiary's or affiliate's financial information is included in the consolidated financial statements of the public company. This significant expansion of SOX whistleblower protections effectively overturns prior case law.

4. New Whistleblower Protections for Financial Services Employees

Section 1057 of the Dodd-Frank Act enhances whistleblower protection for financial services employees by prohibiting retaliation against employees who disclose or otherwise object to fraudulent or unlawful conduct related to the offering or provision of a consumer financial product or service. This section protects whistleblowers who (1) disclose information of a violation or any act that the whistleblower reasonably believes to be a violation of the Consumer Fraud Protection Act of 2010 (Title X of the Dodd-Frank Act) to the newly created Bureau of Consumer Financial Protection, the employer or any government authority or law enforcement agency, or (2) testify at an enforcement proceeding under the Consumer Fraud Protection Act or other laws subject to the Bureau's jurisdiction, or (3) file an action under any federal consumer financial law.

Employees have 180 days from the date of the alleged retaliation to file a complaint with the Secretary of Labor. Remedies may include (1) an order requiring the employer take affirmative action to abate the violation; (2) reinstatement; (3) compensation, including back pay; (4) compensatory damages; and (5) at the complainant's request, reimbursement of all costs and expenses (including attorneys fees and expert witness fees) reasonably incurred.

Similar to the SOX amendment, this provision of the Dodd-Frank Act prohibits waiver of the rights and remedies provided to financial services whistleblowers in "any agreement," likely barring the release of a Section 1057 claim in a general release or settlement agreement. This provision further precludes the enforcement of any pre-dispute arbitration agreement that requires arbitration of a Section 1057 retaliation claim.

5. Anti-Retaliation Provisions of the False Claims Act Expanded

Section 1079A establishes a uniform three year statute of limitations for a retaliation claim under the False Claims Act. This section also broadens the range of activity protected under the False Claims Act and adds protection for associational discrimination by expanding the definition of protected conduct to include lawful acts done by "associated others" in addition to the employee, contractor or agent, in furtherance of an action to stop violations of the False Claims Act.

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If you have any questions about this alert or about any other labor and employment matter, please contact the attorneys listed below or your usual Crowell & Moring contact.

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