



## Management Alert

# Dodd-Frank Act Expands SOX's Whistleblower Provisions and Creates Whistleblower Bounties and Protections

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (H.R. 4173) (WSRCPA) into law. The WSRCPA eliminates a number of defenses upon which employers have relied in defeating Sarbanes-Oxley whistleblower claims, offers bounties designed to encourage employees to "blow the whistle" on fraud and creates new private rights of action.

## Expansion of SOX's Whistleblower Protection Provisions

§§ 922 and 929A significantly expand the whistleblower protection provisions in § 806 of the Sarbanes-Oxley Act of 2002 ("SOX") by:

- Covering private subsidiaries or affiliates of publicly traded companies whose financial information is included in the consolidated financial statements of such companies, and covering nationally recognized statistical rating organizations;
- Increasing the current 90-day statute of limitations to 180 days;
- Providing a right to a jury trial in SOX actions removed to federal district courts; and
- Prohibiting pre-dispute arbitration agreements and any other "agreement, policy, form, or condition of employment" that requires a waiver of rights under SOX."

## Rewards For Blowing The Whistle To The SEC And Commodity Futures Trading Commission

§ 922 amends the Securities Exchange Act of 1934 (SEA) by including a provision requiring the SEC to provide a monetary award to individuals who provide "original information" to the SEC that results in sanctions exceeding \$1,000,000. The SEC has discretion to award between 10%-30% of the total amount of the sanctions.

Such bounties are not available to individuals who are convicted of criminal violations related to the action for which the whistleblower provided information, or who obtain the information through audits of financial statements required by securities laws and for whom submission would be contrary to the requirements of § 10A of the SEA. Likewise, employees

of an appropriate regulatory agency, the Department of Justice, a self-regulatory agency, the Public Company Accounting Oversight Board, or a law enforcement organization are ineligible for such awards.

Also, § 922 affords whistleblowers a private right of action, which they may pursue directly in federal court. This is a stark contrast to SOX actions, which require an employee to exhaust administrative remedies by first filing a claim with OSHA. Successful employees may obtain substantial remedies, including reinstatement without loss of seniority, double back-pay, reasonable attorneys' fees, costs and expert witness fees.

Further, the lengthy statute of limitations under § 922 is particularly noteworthy. It affords employees up to six years after the violation occurred, or three years after he or she knew or reasonably should have known of facts material to the violation, so long as the complaint is filed within ten years of the violation.

In addition, § 748 amends the Commodity Exchange Act to provide incentives to whistleblowers in a manner that is substantially similar to the amendments Section 922 makes to the SEA. However, this section contains a two-year statute of limitations. Awards under § 748 are not available to any employee of an appropriate regulatory agency, the Department of Justice, a registered entity, a registered futures association or a self-regulatory organization (as defined in § 3(a) of the SEA).

## **Whistleblower Protection For Employees Of Financial Services Organizations**

§ 1057 creates a cause of action for employees who perform tasks related to the offering or provision of a consumer financial product or service. This section protects employees who engage in the following conduct: providing information to an employer, the Bureau of Consumer Financial Protection ("Bureau") or any State, local or Federal government authority or law enforcement agency relating to the violation of consumer financial protection laws at issue in this statute or that are subject to the Bureau's jurisdiction; testifying in a proceeding against an employer resulting from the enforcement of consumer protection laws at issue in this statute or law that are subject to the Bureau's jurisdiction; helping to initiate any proceeding of consumer financial protection laws at issue in this statute; and objecting or refusing to participate in any activity that the employee reasonably believes to violate any law subject to the Bureau's jurisdiction.

A claim under this section must be filed with the U.S. Department of Labor (DOL) (specifically, with OSHA) within 180 days. A complainant has the option of proceeding through the DOL (i.e., appealing to an ALJ and then to the Administrative Review Board) or removing the claim to a federal district court within 210 days of the filing of the complaint if the DOL has not issued a final order within that timeframe. Claims under this section may not be waived by any agreement, policy, form or condition of employment, including by any pre-dispute arbitration agreement.

## **What Should Employers Do?**

The WSRCPA's bounty provisions, expansion of SOX's coverage and statute of limitations and the new private rights of action it creates require employers to take calculated steps to minimize the risk of whistleblower claims. Indeed, employers need to ensure that, where practicable, whistleblower claims are resolved internally, as employees now have a unique incentive (in the form of a bounty) to report perceived misconduct to third-parties, such as the SEC, even before an employer may adequately

address their concerns.

Thus, employers are compelled to implement sophisticated complaint hotlines and provide multiple avenues through which employees can report perceived misconduct without fear of retaliation. Likewise, employers, including both publicly traded companies and their private subsidiaries and affiliates, need to promulgate appropriate codes of ethics and anti-retaliation policies and train managers to be receptive and responsive to employee complaints. Further, on a broader scale, management should adopt leadership models that foster a culture of integrity and accountability throughout the organization. Management should do so with an eye towards encouraging employees to raise complaints internally rather than to third parties.

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