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July 2010

**COMPETITION, ANTITRUST &
WHITE-COLLAR CRIME AND
BUSINESS LITIGATION UPDATE****Dodd-Frank Act Expands Securities Whistleblower Incentives**

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) Securities Whistleblower Incentives and Protection provisions, enacted on July 21, rival and perhaps even surpass the scope, incentives and protections under the federal False Claims Act (FCA). The legislation greatly expands the types of cases that may result in lucrative whistleblower payouts and will change the way companies discover and address potential securities law violations. In light of the Securities and Exchange Commission's (SEC) new powers and priorities, companies will have to reassess compliance programs and ensure that internal reporting mechanisms and channels are communicated to their employees. Such programs will necessarily have to include enhanced and well-publicized employee rights to confidentiality and against retaliation. Even then, the Dodd-Frank Act's incentives increase the chances that a company will learn of possible misconduct, not from its own employees, but from the SEC first.

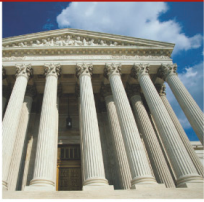
The Dodd-Frank Act provides whistleblowers with rewards, confidentiality and job protections similar to those afforded under the FCA. Under the Dodd-Frank Act, awards to whistleblowers will range from 10 percent to 30 percent of the amounts collected by the SEC in actions where its sanctions exceed \$1 million. The whistleblower's rewards are not limited to recoveries in actions brought by the SEC. "Related Action[s]" encompassing any judicial or administrative action resulting in a recovery of \$1 million or more in civil penalties now qualify, including those brought by the U.S. attorney general, regulatory authorities, self-regulatory organizations or state attorneys general. In order to qualify for the reward, the SEC is required to assess the significance of the information provided by the whistleblower, the degree of assistance and the SEC's "programmatic interest" in "detering violations of the securities law." Except for determinations regarding the amount of the reward, the SEC's determination is appealable to any appropriate U.S. Circuit Court of Appeal.

Unlike FCA awards, Dodd-Frank whistleblower awards are not contingent on the recovery of federal funds. Instead, Dodd-Frank awards are contingent on "securities law violations" that may include insider trading, money laundering, accounting fraud, broker-dealer violations, corporate disclosure violations and potential violations of the Foreign Corrupt Practices Act (FCPA). For the first time, whistleblowers are eligible for rewards for information regarding violations of the Commodity Exchange Act, involving commodity futures trading violations by hedge funds.

The legislation expands the confidentiality afforded to whistleblowers. Now, they will be allowed to not only report fraud anonymously to the SEC, but also will be permitted to remain anonymous until payment of the reward.

The Dodd-Frank Act also includes anti-retaliation provisions prohibiting employers from firing, demoting, suspending, threatening, harassing or discriminating against whistleblowers.

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Whistleblowers who suffer such adverse employment actions may sue in U.S. District Court for reinstatement, double back-pay, attorneys' fees and costs. The Dodd-Frank Act applies these anti-retaliation measures to financial industry employees and employees of nationally recognized statistical ratings agencies. Contractual provisions waiving these rights and requiring employees to submit to arbitration are unenforceable. Also, the purported loophole under the Sarbanes-Oxley Act of 2002 (SOX) that exempts employees of subsidiaries and affiliates of publicly traded companies from anti-retaliation claims is now closed.

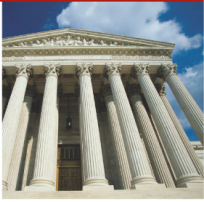
Whistleblower programs in the securities arena are nothing new, but past programs were often ineffectual. Prior to the Dodd-Frank Act's enactment and since 1989, the SEC had a whistleblower reward program that was limited to insider trading. Until last week, the SEC had made payments to five claimants and the total awards amounted to less than \$160,000. The prior program was unsuccessful because it was not well publicized internally or externally, awards were not mandatory, and awards were limited to 10 percent of monies recovered.

SOX also contained whistleblower provisions that offered protections against retaliation and limited recovery to damages resulting from retaliation where an employee reported a reasonable belief of a securities law violation. The Dodd-Frank Act amends SOX to address perceived shortcomings caused by the procedural complexity in bringing retaliation claims, the high burden of proof faced by claimants and the prevalence of employment agreement provisions requiring arbitration.

DODD-FRANK ACT WHISTLEBLOWER PROVISIONS RESEMBLE THE FCA'S

The Dodd-Frank Act's sweeping whistleblower reforms threaten to rival the FCA as the most powerful whistleblower law. The FCA, originally enacted in 1863, was revised in 1986 to make monetary recoveries for whistleblowers easier and more generous. Prior to 1986, there were fewer than six FCA suits. Now there are hundreds. The FCA's *qui tam* provisions authorize individuals, known as "relators," to file suit on behalf of the United States against those who have falsely or fraudulently claimed federal funds. It provides for civil penalties and triple damages and whistleblowers, if successful, can reap rewards of up to 30 percent of monetary recoveries.

Enforcement actions under the FCA have resulted in substantial recoveries for the federal government and foreshadow the possible effects of the Dodd-Frank Act's whistleblower provisions. In 2007, the United States obtained \$2 billion in settlements and judgments in the fiscal year ending September 2007. Of this amount, whistleblowers were awarded \$177 million. Most notably, a Pfizer salesman was awarded \$51.5 million last year for exposing problems with a Pfizer drug, Bextra. Pfizer paid a record \$2.3 billion settlement in connection with the FCA suit. This year, another pharmaceutical company, AstraZeneca agreed to pay \$520 million to settle a case initiated by a whistleblower who had previously assisted the government in an Eli Lilly probe resulting in a 2009 payout of \$100 million to several whistleblowers. These cases are not outliers. Since 1986, when Congress substantially strengthened the FCA, total recoveries have amounted to more than \$20 billion. Although the more recent recoveries have involved pharmaceutical



companies, FCA cases run the gamut of federally funded programs, from Medicare and Medicaid to defense procurement, disaster assistance loans, agricultural subsidies and mortgage fraud.

OHIO WHISTLEBLOWING STATUTES

The Dodd-Frank Act is much broader than many state laws. In Ohio, for example, whistleblower laws are much more limited. Rather than providing incentives, existing Ohio whistleblower laws seek to encourage whistleblowing by protecting the whistleblower from retaliation. However, a whistleblower may invoke the anti-retaliation protections afforded under the law only if his or her activities meet the law's strict requirements.

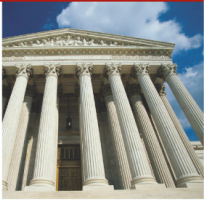
In order to qualify for protection against retaliation, the leading Ohio whistleblowing statute, ORC 4113.52, requires that the reported conduct constitute "a criminal offense likely to cause imminent risk of physical harm to persons or a hazard to public health or safety, a felony, or an improper solicitation for a contribution." Even if the employee has a reasonable belief that the observed violations are reportable, he or she is required to orally notify his or her employer first and file "a written report that provides sufficient detail to identify and describe the violation." Failure to meet these requirements results in a forfeiture of any available protection against retaliation under the law.

If an employee satisfies the requirements of ORC 4113.52, and is disciplined or retaliated against in violation of the statute, then the employee has 180 days in which to file a civil action. The available remedies include injunctive relief, back pay, reinstatement of fringe benefits and seniority rights. If the employee prevails, he or she may also recover reasonable attorneys' fees and costs and possibly interest.

IMPLICATIONS

The SEC has already begun signaling that it intends to fully exercise its newly authorized powers to financially reward whistleblowers and to publicize those rewards. Last Friday, the SEC announced that it had awarded \$1 million to the former wife of David E. Zilkha for providing previously undisclosed emails that led to the collection of civil penalties totaling \$10 million and payment of disgorgement and prejudgment interest totaling over \$17 million in an insider trading action against Pequot Capital Management, Inc. (Pequot), its chairman and CEO Arthur J. Samberg and David Zilkha, a former employee of Microsoft who later became an employee of Pequot. Although the award was made pursuant to the SEC's previous statutory authority and was therefore limited to 10 percent of the \$10 million penalty, it reflects the new regime's priorities and is the largest award paid by the SEC for information provided in connection with an insider trading case. The Pequot investigation had been closed twice by the SEC because of a lack of evidence, and the case would not have moved forward without the new information.

In the past, securities whistleblowers had very little incentive to report clear fraudulent behavior. Now, with the enactment of the Dodd-Frank Act, the potential for substantial monetary awards will probably encourage whistleblowers to bypass internal compliance programs and go directly to the



SEC with their submissions. Whether the SEC will have enough resources to separate the wheat from the chaff remains to be seen.

FOR MORE INFORMATION

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