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Dodd-Frank Act Whistleblower Provisions

Dodd-Frank Act Contains Several New and Expanded Whistleblower Provisions, Including Mandatory Rewards

SUMMARY

The Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law by President Obama on July 21, 2010, includes several new whistleblower protections available to employees and others:

- **Mandatory Rewards.** In a unique new approach to encouraging whistleblowing activity, Dodd-Frank provides a mandatory reward to those who voluntarily provide original, independently derived information to the Securities & Exchange Commission ("SEC") or the Commodity Futures Trading Commission ("CFTC") relating to violations of the securities laws.

- **Whistleblowing to the New Bureau of Consumer Financial Protection.** The Act also provides broad protection to employees who provide information or testimony to the newly created Bureau of Consumer Financial Protection within the Federal Reserve system.

- **Extends SOX Protections.** Dodd-Frank extends the whistleblower provisions of Section 806 of the Sarbanes-Oxley Act of 2002 to cover employees of certain affiliates and subsidiaries of publicly traded companies.

- **Extends False Claims Act Protections.** Finally, the Act amends and clarifies the False Claims Act ("FCA") to provide a cause of action to “an employee contractor, agent or associated others” against whom an adverse employment action has been taken because of lawful actions undertaken to stop a violation of the FCA.

The new provisions also consistently state that a whistleblower’s rights under the law may not be waived, including pursuant to pre-dispute arbitration agreements. This memorandum reviews the Act’s specific whistleblower provisions. The Firm’s comprehensive memorandum regarding Dodd-Frank, released on July 2, 2010, can be found at [http://www.sullcrom.com/House-of-Representatives-Approves-Historic-Revision-of-Financial-Services-Regulation-07-02-2010/](http://www.sullcrom.com/House-of-Representatives-Approves-Historic-Revision-of-Financial-Services-Regulation-07-02-2010/).
A. THE ACT CONTAINS SIGNIFICANT NEW REWARD PROVISIONS FOR INDIVIDUALS WHO PROVIDE THE SEC OR THE CFTC WITH INFORMATION RELATING TO VIOLATIONS OF THE SECURITIES LAWS.

In a unique new approach to encouraging whistleblowing activity, Sections 748 and 922 of Dodd-Frank amend the Commodity Exchange Act and the Securities Exchange Act of 1934 respectively to provide a mandatory reward for individuals who voluntarily provide original, independently derived information to the CFTC or the SEC (together the “Commissions”) relating to a violation of the securities laws that leads to a successful enforcement action resulting in monetary sanctions exceeding $1,000,000.

Original information is defined by the Act as information “derived from the independent knowledge or analysis of a whistleblower; [which is] not known to the [Commissions] from any other source [and] 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 . . . .” Under the terms of the Act, an individual who provides such information is entitled to an award equal to between 10 and 30 percent of the money recovered as a result of a successful judicial or administrative action undertaken as a result of his or her supplied information. The amount within that range will be determined at the discretion of the relevant Commission, based on several criteria, including the significance of the information provided and the level of interest of the relevant Commission in deterring violations of the relevant laws through monetary awards to whistleblowers. A whistleblower may receive an award regardless of whether the violation underlying the judicial or administrative action upon which the award is based occurred before or after the date of the Act.

Certain persons may not be whistleblowers entitled to a reward, including those who are employed by certain governmental, regulatory, or self-regulatory agencies or were so employed when they obtained the relevant information; those who were convicted of a criminal violation relating to the alleged activities that are the subject of the whistleblowing report; those who, in the case of an SEC action, obtained the relevant information through the performance of an audit of financial statements required under the securities laws and for whom the submission of information would not be permitted under 10A of the Securities Exchange Act; and those whose submission of information was based on facts previously submitted by another whistleblower. In addition, a whistleblower who knowingly provides false information to the relevant Commission is not entitled to receive a reward.

To fund these awards, Dodd-Frank establishes a Securities and Exchange Commission Investor Protection Fund and a Commodity Futures Trading Commission Customer Protection Fund in the U.S. Treasury that will be funded in part by a portion of the monetary penalties associated with actions brought by the Commissions under the securities laws.

Dodd-Frank does not provide specific details concerning how the whistleblower must provide the relevant information to the Commissions or what the process for collecting a reward will be. Under the Act, these details will be provided in regulations to be promulgated by the Commissions (as discussed below in...
Section C of this memorandum). However, the Act does specify that an anonymous whistleblower must be represented by counsel when attempting to collect his or her reward and that the whistleblower must ultimately identify himself or herself through counsel to the relevant Commission before collecting a reward under the Act.

Sections 748 and 922 also provide a whistleblower with protections against his or her employer's adverse employment action (which may include discharging, demoting, suspending, threatening, harassing or in any way discriminating in terms and conditions of employment) as a result of his or her whistleblowing activities. An employee alleging a cause of action against an employer under these Sections must file a claim in federal District Court and may request relief in the form of reinstatement, back pay plus interest (in the case of adverse employment action as a result of information provided to the SEC, double back pay plus interest), and litigation costs and fees. The whistleblower may subpoena witnesses to testify regarding such a matter. The statute of limitations for an adverse employment action as a result of information provided to the SEC is the earlier of three years following the time when the employee knew or should have known of the facts relevant to the action, or six years after the adverse employment action. For an adverse employment action as a result of information provided to the CFTC, the statute of limitations is not more than two years after the adverse employment action.

The Commissions are not permitted to disclose to the employer the identity of the whistleblower or certain information provided by the whistleblower that may lead to the disclosure of his or her identity, until the information is requested to be disclosed in a formal proceeding against the employer. The Commissions may, however, disclose such information to governmental agencies and authorities subject to the same confidentiality provision.

Under the amendments to both the Exchange Act and the Commodity Exchange Act, an employee's rights and remedies provided by Dodd-Frank may not be waived as a condition of employment, by agreeing to a pre-dispute arbitration process or otherwise.

B. EXTENSION OF WHISTLEBLOWER PROTECTIONS PROVIDED UNDER THE SARBANES-OXLEY ACT OF 2002 (“SOX”)

Section 929A of Dodd-Frank clarifies that the whistleblower protections provided under SOX to employees of public companies include the employees of the public companies' consolidated subsidiaries and affiliates. In addition, Section 922 extends the whistleblower protections provided under SOX to cover employees of nationally recognized statistical rating organizations. Section 922 also doubles the statute of limitations for SOX whistleblower claims, requiring such actions be commenced within 180 days following the date on which the violation occurred or following the date the employee learned of the relevant action (rather than 90 days following the date on which the violation occurred). Section 922 provides for a jury trial for claims brought under the SOX whistleblower provisions. Similar to the protections the Act offers to those who provide information to the SEC or CFTC, Section 922 also
prohibits any agreement to waive the SOX whistleblower’s rights or remedies as a condition of employment, through a pre-dispute agreement to arbitrate whistleblower claims or otherwise.

C. RULES AND REGULATIONS TO BE ISSUED BY THE SEC AND CFTC

Dodd-Frank directs the SEC and CFTC to issue rules and regulations to implement the provisions of the whistleblower program within 270 days following the enactment of the Act. The Act also requires the SEC to establish a separate office to administer the whistleblower program. The SEC and the CFTC are required to submit annual reports concerning the status of the whistleblower program to the relevant Congressional Committees. The inspectors general of the SEC are tasked with conducting a study to determine the effectiveness of the new whistleblower protection program. Among other things, the study must consider whether the exemption under the Freedom of Information Act, as added by Dodd-Frank, aids whistleblowers in disclosing information to the Commission.1 The study must be presented to certain Senate and Congressional Committees and be made public on the Commissions’ websites.

D. CLARIFICATION OF WHISTLEBLOWERS PROVISIONS APPLICABLE TO FALSE CLAIMS ACT ("FCA") CLAIMS

Section 1079A of Dodd-Frank amends and clarifies the FCA to provide a cause of action to “an employee contractor, agent or associated others” against whom an adverse employment action has been taken because of lawful actions undertaken to stop a violation of the FCA.

The amendment also limits the statute of limitations for retaliation claims under the FCA to three years following the retaliation.

E. WHISTLEBLOWER PROVISIONS APPLICABLE TO THOSE WHO REPORT VIOLATIONS TO THE BUREAU OF CONSUMER FINANCIAL PROTECTION

Dodd-Frank establishes an independent Bureau of Consumer Financial Protection (the “Bureau”) within the Federal Reserve. Section 1057 of Dodd-Frank provides a cause of action to those who claim to have suffered an adverse employment action as a result of providing information (or planning to provide information) to the employer, the Bureau or any governmental authority or law enforcement agency; testifying (or planning to testify) in any proceeding; or filing or instituting any proceeding under federal consumer financial law concerning matters that the individual “reasonably believes to be a violation” of any provision of law that is subject to the jurisdiction of the Bureau. Importantly, the Act also provides a cause of action to any employee that objects to, or refuses to participate in, any activity or assigned task that the employee reasonably believes to be in violation of any law subject to the jurisdiction of, or enforceable by, the Bureau.

The complainant must file a complaint with the Secretary of Labor within 180 days of the alleged retaliation. In a burden-shifting scheme similar to that under Section 806 of SOX, the initial burden lies

1 The CFTC is also tasked with conducting and reporting a study; however, its study only needs to report on the issue concerning the FOIA exemption.
with the employee to establish a *prima facie* case that the protected activity was a contributing factor in the unfavorable personnel action. The burden then shifts to the employer to demonstrate by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior. In the case of a violation, the new provisions provide for relief to be ordered by the Secretary of Labor, including reinstatement, back pay and compensatory damages, as well as reasonable costs associated with bringing the claim. If the Secretary of Labor fails to issue a final order within 210 days of the filing of the complaint, the employee may also file an action “for *de novo* review” in district court, with the right to the same relief to which the employee is entitled from the Secretary of Labor.

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