

DODD-FRANK EXPANDS FEDERAL WHISTLEBLOWER PROTECTIONS

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which President Obama signed into law on July 21, 2010, has closed a loophole in the Sarbanes-Oxley Act (SOX) whistleblower provision that prevented employees of subsidiaries or affiliates of public companies from claiming the statute's protection from employer retaliation.

The new statute also puts in place an entirely new federal whistleblower law that rewards individuals for alerting the SEC to violations of the securities laws and provides them with protection against retaliation by their employers regardless of whether or not the employer is a public company or a subsidiary or affiliate of a public company.

BACKGROUND

Since it became law in 2002, Section 806 of SOX has provided protection for employees of public companies from discharge, demotion, suspension or other retaliation by their employer or any officer, employee, contractor or other agent of the employer for reporting or assisting in an investigation of conduct that the employee reasonably believes is a violation of any SEC rule or regulation or certain other federal statutes and rules prohibiting fraud. As originally enacted, the statute required employees first to petition the Department of Labor (DOL) for redress within 90 days of the alleged retaliatory action. If the DOL took no action within 180 days, the employee was entitled to commence a lawsuit against the employer in federal court.

Through September 2008, approximately two-thirds of the claims brought by employees against their employers under Section 806 were dismissed by the DOL's Administrative Law Judges. Many of the dismissals were apparently made on the grounds that the employees worked for a subsidiary of the public company against which the claim was brought. The DOL believed that "the plain language of the statute only applie[d] to publicly traded corporations." See Jennifer Levitz, "Whistleblowers are Left Dangling," *The Wall Street Journal* (Sept. 4, 2008).

THE DOOR TO SECTION 806 IS OPENED WIDE

Dodd-Frank emphatically opens the door to whistleblower claims under SOX Section 806 from employees of subsidiaries and affiliates of public companies. The new law amends SOX Section 806 to extend its protections to employees of "any subsidiary or affiliate [of the public company] whose financial information is included in the consolidated financial statements of such company." The new statute extends the limitations period for bringing claims from 90 days from the date of

THE BOTTOM LINE

Federal protection of whistleblowers has been greatly expanded and new incentives have been created to encourage whistleblowing. Claims of employer retaliation will no longer be dismissed on the grounds that the employer is not a public company. Access to federal court has been expanded for employees who suffer retaliation and the SEC will pay large sums if the information a whistleblower provides results in substantial penalties against the employer.

the violation to 180 days from the date of the violation or the date on which the employee became aware of the violation. The new statute also exempts whistleblower claims under SOX Section 806 from mandatory arbitration agreements, and expressly authorizes jury trials of SOX Section 806 claims brought in federal court. Finally, Dodd-Frank expands the whistleblower protections of SOX Section 806 to

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cover employees of nationally recognized statistical rating organizations, such as Standard & Poor's and Moody's.

REWARDING WHISTLEBLOWERS

But Dodd-Frank goes well beyond mere tinkering with SOX Section 806. Section 922 of the new law creates an entirely new federal whistleblower regime that gives *any* individual who provides the SEC with information relating to a violation of the securities laws protection from retaliatory action by *any* employer. The provision, codified as new Section 21F of the Securities Exchange Act of 1934, also requires the Commission to award a whistleblower at least 10% and up to 30% of any monetary sanctions that are collected from the wrongdoer.

NEW SECTION 21F KEY ELEMENTS:

- >> A whistleblower can bring a claim against his or her employer for retaliation in federal court without having to petition the DOL first.
- >> A claim for retaliation can be brought up to 6 years from the date of the employer's retaliatory act or 3 years from the date on which the employee knew or should have known of facts material to the claim of retaliation, but in no event more than 10 years after the violation.
- >> An employee who successfully sues an employer for retaliation may be awarded reinstatement plus two times back pay, litigation costs and attorney's fees.
- >> An award is payable to a whistleblower if the information provided by the whistleblower results in an SEC enforcement action that nets more than \$1 million in monetary sanctions (including penalties, disgorgement and interest).
- >> The award is calculated against monetary sanctions deriving from the SEC action and from any related action brought by the U.S. Attorney General, an appropriate regulatory authority, a self-regulatory organization (such as FINRA) or a state attorney general in connection with a criminal investigation that is based upon the information provided by the whistleblower.
- >> An award may not be made to a whistleblower who is a member, officer or employee of an appropriate regulatory agency, the Department of Justice or a self-regulatory organization, who is convicted of a crime related to the matter that would otherwise have resulted in a claim for an award, who is an independent auditor and obtains the information while performing an audit of financial statements, or who knowingly and willfully makes a false statement or representation or uses a document containing a false statement.
- >> A whistleblower can make a claim anonymously, but must identify himself or herself to the SEC before receiving an award. The SEC may not divulge the identity of the whistleblower except to other enforcement agencies and organizations.
- >> Although the SEC has been given until February 2011 to promulgate rules implementing Section 21F, whistleblowers may receive awards now, and even if the violation relating to the claim occurred before its enactment.
- >> A new fund, the "Securities and Exchange Commission Investor Protection Fund," is created to fund awards to whistleblowers. Fines and disgorgement obtained by the SEC under the various federal securities laws not disbursed to victims must be deposited in the new fund, at least until its balance reaches \$300 million.

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