

## **NEW WHISTLEBLOWER INCENTIVES AND PROTECTION IN THE DODD-FRANK ACT**

On July 21, 2010, President Obama signed into law the "Dodd-Frank Wall Street Reform and Consumer Protection Act" ("Dodd-Frank Act"). The legislation is primarily designed to increase overall regulation of the financial industry, but it also contains numerous provisions designed to encourage and protect whistleblowers in and outside of the financial industry.

First the Dodd-Frank Act creates new whistleblower protection for employees in businesses related to consumer financial products or services. Second, it creates new monetary incentives and protections for whistleblowers relating to public companies and public capital market participants (those regulated by the Securities and Exchange Commission). Third, it expands the scope of coverage and protections for whistleblowers with respect to entities in the public capital markets, where whistleblower protection was originally granted under the Sarbanes-Oxley Act of 2002 ("SOX"). SOX amended the Federal securities laws after the Enron and WorldCom scandals. And finally the Dodd-Frank Act adds new monetary incentives and protections for whistleblowers relating to commodity markets (businesses regulated by the Commodity Futures Trading Commission).

### **New Whistleblower Protections for Financial Services Employees**

Section 1057 of the Dodd-Frank Act creates a new whistleblower cause of action for employees who perform tasks related to the offering or provision of consumer financial products or services. The Act provides that offering or providing consumer financial products involves not only banks, savings banks and credit unions, but also any business which:

...offers or provides origination, brokerage or servicing of loans secured by real estate for use by consumers...

...[any] larger participant of a market for other consumer financial products or services...

...offers or provides to a consumer any private education loans...

...offers or provides to a consumer a payday loan.

Excerpted from section 1024 of the Dodd-Frank Act.

Section 1057 of the Dodd-Frank Act prohibits retaliation against employees who provide information to their employers or the government (Federal, state, or local) that they reasonably believe constitutes a violation of the Consumer Financial Protection Act of 2010 (Title X of the Dodd-Frank Act)



or any other provision of the law that is subject to the jurisdiction of the Bureau of Consumer Financial Protection (which is to be established pursuant to the Act). Protection also extends to whistleblowers who (1) testify in any proceeding resulting from administration or enforcement of the Consumer Financial Protection Act of 2010 or any other law or rule of the Bureau; (2) file, institute or cause to be filed or instituted any proceeding under any Federal consumer financial law; or (3) object or refuse to participate in any activity, policy or practice that the employee reasonably believes to be in violation of any law or rule of the Bureau.

Whistleblowers seeking protection under Section 1057 are required to file a claim with the Secretary of Labor within 180 days of the date of the alleged violation. The procedures prescribed for the Department of Labor's handling of such complaints, as well as the burdens of proof, remedies, and ability to remove to Federal court are similar to those provided under SOX, which are discussed below.

### **New Incentives and Protections for Employees Under the Securities Exchange Act**

Section 922(a) of the Dodd-Frank Act adds to the Securities Exchange Act of 1934 a new Section 21F, which provides powerful monetary rewards, as well as strong employment protection, for whistleblowers.

The Act directs that whistleblowers who provide the SEC with "original information," i.e., information derived from independent knowledge or analysis and not already known by the SEC, be awarded between 10% and 30% of monetary sanctions imposed by the SEC that exceed \$1 million. Penalties, disgorgement and interest paid by violators count towards the \$1 million threshold. Factors to be considered by the SEC in determining (in its discretion) the amount of the reward include the significance of the information and the degree of assistance provided by the whistleblower, the programmatic interest of the SEC in determining violations of the securities laws by making awards to whistleblowers, and other factors the SEC may establish by rule or regulation.

Section 922(a) also prohibits retaliation against whistleblowers who (1) provide information to the SEC; (2) initiate, testify or assist in any SEC investigation or legal action related to information provided by the whistleblower; or (3) make disclosures that are required or protected under SOX or the Securities Exchange Act of 1934. Notably, Section 922(a) appears to protect whistleblowers who complain to the SEC without regard to the ultimate validity or reasonableness of the complaint (emphasis added). By contrast, the whistleblower provisions of SOX provide protection only when there is a reasonable belief that a violation has occurred.

Also in contrast to SOX's whistleblower provision, Section 922(a) allows an employee alleging retaliation under the Dodd-Frank Act to bring an action directly in Federal district court, thereby appearing to bypass the OSHA administrative process that had to be exhausted by SOX whistleblower claimants. As well, the statute of limitations under Section 922(a) of the Act is much more expansive than that provided by SOX; whistleblowers under Section 922(a) may file an action either within six years after the date of the violation or within three years "after the date when facts material to the right of action are known or reasonably should have been known to the employee," but not more than 10 years after the date of the violation. A successful whistleblower under the Act



is eligible for relief including reinstatement, double backpay (as opposed to just backpay as provided under SOX) and litigation costs including reasonable attorneys fees. Akin to SOX, there is no explicit provision in the Act providing for recovery of non-pecuniary damages (such as emotional distress damages) or punitive damages.

### **Amendments to the SOX Whistleblower Provision**

The Dodd-Frank Act also amends the SOX whistleblower provision in several significant ways:

- Expansion of the coverage of SOX to include (1) nationally recognized statistical rating organizations and (2) subsidiaries of publicly traded companies included in their parent corporation's consolidated financial statements. Accordingly, employees of some non-publicly traded subsidiaries, who were previously found in court rulings not to be covered by SOX's protections absent showing of a substantial nexus between the parent and the subsidiary, are now undoubtedly protected by SOX. (Sections 922(b) and 929A)
- Extension of the statute of limitations from 90 to 180 days and clarification that this limitations period begins to run when an employee becomes aware of a SOX violation (not the date on which the violation occurs). (Section 922(c))
- Prohibition of mandatory predispute arbitration agreements for SOX whistleblower claims, (Section 922(c))
- Clarification that jury trials are available for SOX whistleblower claims, a reversal of the position taken by all Federal courts to have decided the issue. (Section 922(e))

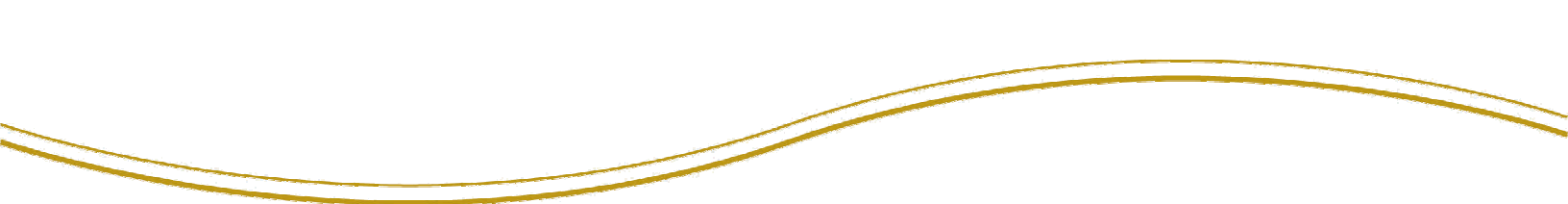
### **New Incentives and Protections for Employees Under the Commodity Exchange Act**

Section 748 of the Dodd-Frank Act amends the Commodity Exchange Act to provide incentives and protections to whistleblowers who provide certain information to the Commodity Futures Trading Commission or assist in any investigation or judicial or administrative action of the Commission related to such information; such whistleblowers are provided incentives and protection which are substantially similar to those provided by Section 922(a) with respect to the Securities Exchange Act of 1934. There are some significant differences, however. First, claims under Section 748 are subject to a two-year statute of limitations. Second, Section 748 claims are not waivable by any agreement, including any predispute arbitration agreement.

### **Implications of the Dodd-Frank Act's Whistleblower Provisions for Employers**

The Dodd-Frank Act's whistleblower provisions can be expected to have several important ramifications for employers. Employers who were already covered by SOX's whistleblower provisions prior to these recent amendments should take note of the expanded protections, such as the right to a jury trial, extended filing deadlines, and prohibition of mandatory predispute arbitration agreements, all of which will likely increase litigation under the statute.





Employers who were not previously subject to SOX's whistleblower provisions, especially in any business that maybe seen as offering or providing consumer financial products or services, may now be covered. As result, ALL EMPLOYERS should consider a careful review of their internal whistleblower procedures and policies, as well as additional training for appropriate personnel, to maximize opportunities to address at the company level and to resolve employee complaints, thereby avoiding whistleblower litigation.

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This *Labor & Employment Law Alert* was written by **Patrick T. Collins** and **Peter D. Hutcheon**, Members of Norris McLaughlin & Marcus, P.A. Pat is the Chair of the Firm's Labor & Employment Law Group and Peter is a member of the Firm's Business Law Department with substantial banking and securities law experience. If you have any question about any information contained in this alert, please do not hesitate to contact Pat at, [ptcollins@nmmlaw.com](mailto:ptcollins@nmmlaw.com) or Peter at, [pdhutcheon@nmmlaw.com](mailto:pdhutcheon@nmmlaw.com) or either at (908) 722-0700.

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NJ: 721 Route 202-206 P.O. Box 5933 Bridgewater, NJ 08807-5933 • P: (908) 722-0700 • F: (908) 722-0755  
NY: 875 Third Avenue, 8th Floor New York, NY 10022 • P: (212) 808-0700 • F: (212) 808-0844  
PA: The Paragon Centre, Suite 300 1611 Pond Road Allentown, PA 18104-2258 • P: (610) 391-1800 • F: (610) 391-1805

[www.nmmlaw.com](http://www.nmmlaw.com) E: [info@nmmlaw.com](mailto:info@nmmlaw.com)