

ALERTS AND UPDATES

Beyond Wall Street, the Dodd-Frank Act's Potential Impact on Whistleblowing

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On July 21, 2010, U.S. President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) into law. Much media coverage has been devoted to how the changes may impact Wall Street financial firms. What has largely gone unnoticed is the impact of the Dodd-Frank Act on nonfinancial-service firms.

One of the least discussed changes enacted by the Dodd-Frank Act is its robust whistleblower protections and incentives. For instance, the Dodd-Frank Act amends the Securities and Exchange Act of 1934 (Exchange Act) to *require* the U.S. Securities and Exchange Commission (SEC) to pay a reward, ranging from *10 percent to 30 percent* of the amount recouped, to a person who voluntarily discloses original information about a securities law violation to the SEC that results in monetary sanctions of \$1 million or more.¹ The SEC has the discretion to determine the amount of an award, based on the significance of the information provided, the degree of assistance provided by the whistleblower, the "programmatic interest of the Commission in deterring violations" and other factors the SEC establishes. Additionally, the Dodd-Frank Act provides considerable protections to whistleblowers, including creating a private cause of action against retaliation. Similar rewards and protection are also available to whistleblowers for providing information to the Commodity Futures Trading Commission (CFTC).

The indicated purpose of the whistleblower provisions in the Dodd-Frank Act is to incentivize employees to report securities law violations to the SEC. Once employees become aware that the SEC often pays large rewards for information, it may be a challenge for companies to encourage employees to report suspected violations internally rather than to the SEC or CFTC. Because the Dodd-Frank Act contains an anti-retaliation provision, employees are protected if they provide information to the authorities. The anti-retaliation provision allows employees to bring retaliation actions in federal court, and remedies include reinstatement, double back-pay with interest, litigation costs, expert-witness fees and reasonable attorneys' fees. It is important to note that employees are not the only ones who can blow the whistle—"any individual," including a corporate insider, business competitor, consultant, vendor and service provider, can become a whistleblower.

Paying a reward for information is not a new concept. The IRS has for years rewarded people who provide information leading to the collection of federal taxes. Although it is not often publicized and seldom used, the SEC itself has a bounty program to encourage reports of insider trading. What appears noteworthy here is that the Dodd-Frank Act expands the SEC bounty program from covering only reports of insider trading to reports of *all* securities law violations.

The potential risk to companies of whistleblowing may be even greater via the Foreign Corrupt Practices Act (FCPA). The SEC, in recent years, has focused substantial resources in investigating FCPA cases, and the SEC has secured multimillion-dollar FCPA settlements, which can make reporting FCPA violations to the SEC lucrative. Recently, the SEC settled an FCPA case against French engineering firm Technip S.A., where Technip disgorged \$98 million in profits. Technip paid another \$240 million to the U.S. Department of Justice (DOJ).²

With the considerable settlement amounts that have recently been paid to the SEC for FCPA violations, the incentive for whistleblowing appears significant. Companies may want to consider the potential for increased whistleblower activity. In recent testimony before the U.S. House of Representatives, SEC Chairperson Mary Schapiro pledged to increase

investigation and enforcement efforts, and asked for a 10-percent increase in the SEC's budget for 2011 to achieve this goal. It is anticipated that the SEC and CFTC will pass new regulations in the coming weeks and months.

In the current regulatory landscape, companies may want to consider updating their compliance policies, conducting internal audits to identify possible areas of vulnerability and addressing any weaknesses before they are reported to the authorities. Employers may also wish to review their current whistleblower policies, establish reporting hotlines and encourage employees to report suspected violations internally.

For Further Information

If you have any questions about this *Alert* or would like more information, please contact [Joseph J. Aronica](#), [Michael E. Clark](#), [Rebecca M. Lamberth](#), [Dana B. Klinges](#), [Suzan Jo](#), any [member](#) of the [Trial Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

Notes

1. Bounties are not available to individuals who are convicted of criminal violations related to the action on which the whistleblower provided information, or who obtain the information through audits of financial statements required by securities laws.
2. It appears that the reward provision applies only to monies recouped by the SEC and not to amounts recouped by the DOJ.