

For More Information:

David B. Killalea
202-772-2280
killalead@gotofirm.com

August J. Matteis, Jr.
202.772.1923
matteisj@gotofirm.com

Ellen Katkin
202.772.1960
katkine@gotofirm.com

September 2010, No. 3

FINANCIAL REFORM BILL INCLUDES SIGNIFICANT NEW INCENTIVES FOR WHISTLEBLOWERS

by David B. Killalea, August J. Matteis, Jr. and Benjamin R. Davidson

The Dodd-Frank Wall Street Reform and Consumer Protection Act (HR 4173) provides significant new incentives to whistleblowers with information relating to violations of the Securities Exchange Act or the Commodities Future Trading Act. Whistleblowers who provide information that leads to a successful judicial or administrative action are now entitled to receive a financial award ranging from 10 to 30 percent of any monetary assessment imposed as a result of the action. Considering the size of monetary awards in recent SEC proceedings, this award could be substantial.

In order to receive a financial award, a whistleblower must meet two general conditions. First, the whistleblower must provide the federal government “original information.” Original information consists of independent “knowledge or analysis” that was not previously known to the federal government. The use of the word “analysis” suggests that monetary awards will now be available to whistleblowers who learn of a financial fraud through independent investigation, in addition to the more typical scenario of a whistleblowing employee with inside information. Second, the original information must lead to a judicial or administrative action under the Securities Exchange Act or the Commodity Exchange Act with monetary sanctions exceeding \$1,000,000. The definition of monetary sanctions includes civil penalties, disgorgement, and interest.

The Act also contains provisions that are designed to protect whistleblowers from retaliation. Whistleblowers who are represented by counsel may proceed anonymously and rely on their counsel to act as a liaison with the federal government’s investigation. The whistleblower’s identity must be revealed before any monetary award is made, but the ability to proceed anonymously up to that point helps ensure that whistleblowers who do not receive monetary awards will not be retaliated against. Any

David B. Killalea is a partner based in the Washington, DC office of Gilbert LLP. He can be reached at 202.772.2280 or killalead@gotofirm.com.

August J. Matteis, Jr. is a partner based in the Washington, DC office of Gilbert LLP. He can be reached at 202.772.1923 or matteisa@gotofirm.com.

Benjamin R. Davidson is an associate based in the Washington, DC office of Gilbert LLP. He can be reached at 202.772.2261 or davidsonb@gotofirm.com.

Based in Washington, DC, with an office in Austin, TX, Gilbert LLP is a law firm representing a wide range of clients, including corporations, partnerships, non-profit organizations and individuals in complex disputes, including high-stakes litigation, bankruptcy matters, class actions and ADRs. Best known for representing policyholder interests in insurance coverage matters, Gilbert LLP also has an active public interest practice that specializes in complex multi-plaintiff actions involving cutting-edge issues.

whistleblower who suffers retaliation also has a private right of action against his or her employer for reinstatement, twice his or her back wages plus interest, and legal fees.

There are several strategic and legal issues for potential whistleblowers to consider. First, whistleblowers must assess the likelihood that the information they provide may qualify as “original information” that is not already known to the government. Although the Act contemplates awards to multiple whistleblowers who provide information that leads to the same administrative or judicial action, each whistleblower must contribute new and unique information. Second, the whistleblower must assess the likelihood that the information provided will result in a monetary sanction exceeding \$1,000,000. Finally, whistleblowers who provide original information that results in a sufficient penalty could still forfeit their right to receive a financial award if they fail to provide the information in accordance with the applicable regulations developed by the Securities and Exchange Commission and Commodities Future Trading Commission.

For more information about the whistleblower provisions recently enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act please contact David B. Killalea, August J. Matteis, Jr., or Benjamin R. Davidson.