

## New Whistleblower Protections for Financial Service Employees

October 1, 2010

Much attention has been given to the whistleblower protections of Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. That section, effective immediately on enactment, expanded whistleblower protections and created a private right of action for employees of publicly traded companies under the Sarbanes-Oxley Act of 2002.<sup>1</sup> In addition, Section 929A of Dodd-Frank confirmed that SOX protections were available to employees of subsidiaries and affiliates of public companies as well as the public companies themselves.<sup>2</sup>

What has gone largely unnoticed, however, is Section 1057 of Title X of Dodd-Frank, which extends whistleblower protections to **nonpublic** providers of consumer financial services. Section 1057 will become effective on July 21, 2011.<sup>3</sup>

### Who Is Protected

Section 1057 protects from retaliatory termination or discrimination a “covered employee,” defined as any individual (management or otherwise) performing tasks related to the provision of a consumer financial product or service, because he or she: (1) provided information to his or her employer, the Bureau of Consumer Financial Protection created under Title X, or any governmental or law enforcement body regarding a violation of a consumer financial law within the jurisdiction of the Bureau; (2) testified in an enforcement action with respect to such law; (3) instituted a proceeding under any federal consumer financial law; or (4) objected or refused to participate in an activity he or she reasonably believed to be a violation of consumer financial law within the jurisdiction of the Bureau.<sup>4</sup>

The whistleblower must be in the employ of a “covered person” (or a service provider assisting such covered person). A covered person is defined by Title X as **any** individual or incorporated entity that provides “consumer financial products or services,” defined broadly to include lending (including payday lending), loan servicing, “rent-to-own” leasing, real estate settlement services, deposit-taking, sale or issue of stored value products, check-cashing, credit counseling and other consumer finance-related activities.<sup>5</sup> Although certain individuals and entities are excluded from primary supervision by the new Consumer Financial Protection Bureau, such as depository institutions with total assets of less than

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<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 922, 124 Stat. 1391, 1841 (2010) (hereinafter referred to as DODD-FRANK).

<sup>2</sup> *Id.* at § 929A, 124 Stat. at 1852.

<sup>3</sup> *Id.* at § 1057, 124 Stat. at 2031. Treasury Secretary Timothy Geithner has set July 21, 2011, as the “designated transfer date” under Title X. On the designated transfer date, most provisions of Title X, including those of Section 1057, will become effective, and the consumer financial protection authorities under certain “enumerated consumer laws” such as TILA, HOEPA and RESPA will be transferred to the Bureau of Consumer Financial Protection. See *id.* at § 1062, 124 Stat. at 2039.

<sup>4</sup> Although Section 1057 does not define what would constitute retaliatory discrimination, Section 922’s injunction against the demotion, suspension, threatening or harassment of a whistleblower employee will probably be the standard used in interpreting Section 1057.

<sup>5</sup> DODD-FRANK at §§ 1002(5), 1002(15), at 124 Stat. at 1955. Some of the consumer financial products and services listed in Section 1002(15) are subject to certain limitations and/or exceptions.

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\$10 billion, auto dealers or insurance companies, Section 1057 applies to **any covered individual or entity**, whether public or private, regardless of size or primary regulator.

## Section 1057 Rights

Unlike SOX protections, Section 1057 does not provide a private right of action to a whistleblower. Instead, an employee who believes that he or she is the victim of retaliatory termination or discrimination must follow Department of Labor procedures and may not press the claim in federal district court unless the Department of Labor fails to act within 210 days after the initial filing.<sup>6</sup> An employee who prevails on a Section 1057 claim is entitled to reinstatement to his or her position, including compensation and other terms of employment, back pay and reimbursement of costs and expenses incurred with respect to bringing the claim.

Again, unlike SOX, Section 1057 does not provide financial incentives to encourage a whistleblower to report violations of consumer financial laws. Section 1057 is solely a protective provision to encourage public or private financial service employees to cite or refuse to cooperate in violations of consumer financial laws. In contrast, much of the attention given to Section 922 has centered on the “bounty,” equal to 10 to 30 percent of the money sanction levied by the Securities and Exchange Commission for securities law violations, paid to whistleblowers whose information contributed to the successful prosecution of the violator.

## What Financial Services Employers Could Do

Consumer finance employers could find it helpful to implement a written Section 1057 policy that would include:

- A confirmation of the employer’s commitment to the purposes of Title X and delivery of consumer financial products and services that are fair, transparent and not abusive;
- A specified procedure for reporting alleged violations of consumer financial laws;
- A commitment by the employer to investigate all complaints of violations of consumer financial laws and to apprise the complaining employee of any resolution;
- A prohibition against retaliation and delineated procedures for employees to follow if they believe they have been retaliated against; and
- A commitment by the employer to take appropriate action with respect to any retaliation against a complaining employee.

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<sup>6</sup> To prevail on his or her Section 1057 claim, an employee must prove by a preponderance of the evidence that retaliatory termination or discrimination occurred, and the employer, to whom the burden shifts at that point, must provide clear and convincing evidence that it would have taken such actions absent any whistle-blowing activity by the employee. A final order by the Department of Labor may be appealed in the appropriate federal Court of Appeals.



*If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.*

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