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WHISTLEBLOWERS

Lawmakers included whistleblower language in the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act as a way to promote transparency in the financial industry. In this BNA Insights article, Outten & Golden attorneys Tammy Marzigliano and Cara E. Greene take a close look at these provisions and the effects of preceding laws, such as the Sarbanes-Oxley Act, to examine what their future impact might be.

The Dodd-Frank Act's Whistleblower Provisions: The Act's Best Hope for Exposing Financial Wrongdoing

By Tammy Marzigliano and Cara E. Greene

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On Sept. 15, 2008, Lehman Brothers collapsed, sending shock waves through the financial services industry and portending the industry's broader meltdown. Less than two weeks later, Washington Mutual was seized by the federal government and placed into receivership. Over the next year, more than 100 banks folded, Americans saw $13 trillion in wealth evaporate, and massive securities fraud, like that committed by Bernie Madoff, shook investor confidence to the core. The housing market collapsed, the number of people out of work hit 15.6 million, and the federal deficit ballooned. America was in the midst of the Great Recession.

In response, on July 21, 2010, the federal government enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "act" or "Dodd-Frank Act"), which overhauls and strengthens federal oversight of the financial system. While it is impossible to know whether the financial meltdown could have been avoided had the act's provisions been adopted in 2007 instead of 2010, the question on everyone's mind is whether the Dodd-Frank Act will keep it from happening again. Only time will tell if it will have the desired and intended impact, but the act's whistleblower provisions attempt to ensure that in the future financial fraud and irregularities are exposed long before they corrupt the entire system.

Rewarding and Protecting Whistleblowers

The act seeks to encourage whistleblowers to step forward in three ways—rewarding those who blow the whistle, keeping whistleblowers' identities secret, and protecting whistleblowers from retaliation. Together, these three mechanisms provide the act's best hope for ferreting out wrongdoing that otherwise would remain undiscovered.

People, at least people on Wall Street, are incentivized by money. So to encourage Wall Street insiders to report financial wrongdoing, the act ensures that whistleblowers are financially rewarded for doing so. In what is commonly referred to as the "whistleblower bounty" provisions, the Dodd-Frank Act specifies that individuals who provide "original information" related to a violation of commodities or securities law that leads to a government sanction of over $1 million will be entitled to 10 percent to 30 percent of the sanction levied by the Commodity Futures Trading Commission ("CFTC") or the Securities Exchange Commission ("SEC") (collectively, "commissions"). "Original information" is defined to include new facts and analysis, as well as new information related to claims that are already public.

Providing original information related to violations of the law that occurred prior to the enactment of the Dodd-Frank Act also qualifies a whistleblower for a bounty, so long as the disclosure was made after the act's enactment. The combined effect of the broad definition of “original information” and the retroactivity is that individuals will be motivated to assist the government in a fact-finding mission, even when the illegal activity they are reporting has ceased and the impact mitigated.

A whistleblower's potential recovery could be significant. In July 2010, the SEC levied a fine of $550 million against Goldman Sachs; had the fine resulted from information provided by a whistleblower under the Dodd-Frank Act, that individual would have walked away with between $55 million and $165 million. Nevertheless, there is one factor that may curb employees' willingness to come forward. Because the bounty only applies when sanctions exceed $1 million, individuals may choose to report information only if they are certain that the commissions will investigate and levy a meaningful penalty. However, given the significant amounts that Congress has set aside to pay for bounties—up to $100 million for violations of the Commodities Exchange Act and up to $300 million for violations of the Securities Exchange Act—there is good reason to believe that the commissions will be encouraged to aggressively investigate and levy penalties for violations of the law, and whistleblowers will step forward.

Potential whistleblowers must be mindful that certain people are ineligible to receive a bounty. Individuals who fail to provide information requested by the commissions, who gained the information through auditing required by the relevant law, or who are employees of the commissions or other enforcement agencies are not eligible for the award. Neither are individuals who are convicted of participating in the wrongdoing they reported; if they avoid conviction (either through a cooperation agreement or through other means), however, they are entitled to the bounty. This last distinction—only prohibiting payment of bounties to people *convicted* of violations—may result in wrongdoers coming forward proactively (and perhaps anonymously) to seek a cooperation agreement with the respective commission that both limits their exposure to criminal charges and allows them to recover the bounty.

Most whistleblowers are reluctant, if not loath, to be known as a whistleblower. Like many people who expose wrongdoing in the workplace, they fear (rightly or wrongly) that their reputation and livelihood will be irreparably damaged if they come forward. The legislative drafters understood this and adopted an anonymity provision to allay those fears. Whistleblowers may remain anonymous until it is time to collect the bounty, at which point they must disclose their identity. The expectation is that by the time disclosure is required, whistleblowers will know what they are entitled to receive and can make informed decisions about whether to collect the money and reveal their identity or forgo the bounty and remain anonymous.

Anonymity is not the only means by which the act attempts to protect whistleblowers. The law also protects individuals who take advantage of the whistleblower bounty provisions from retaliation in the workplace and defines retaliation broadly to include discharging, demoting, suspending, threatening, harassing, directly or indirectly, or in any other manner discriminating against a whistleblower in the terms and conditions of employment. The Securities Exchange Act (but not the Commodities Exchange Act) also affords protection to individuals who make disclosures required or protected under SOX, the Securities Exchange Act, or any other law, rule, or regulation subject to the jurisdiction of the SEC.

In addition to retaliatory actions like firing an employee or reassigning him to a less desirable position, other, less-obvious forms of retaliation, such as ostracizing the employee in the workplace or failing to protect the employee from co-worker harassment, may also subject the employer to liability. And the penalties for retaliation are significant; under the Commodities Exchange Act, individuals who are subjected to retaliation are entitled to reinstatement, back pay with interest, and compensation for any special damages incurred, including litigation costs, expert fees, and reasonable attorneys' fees. Under the Securities Exchange Act, individuals are entitled to double back pay with interest, as well as the other remedies.

Individuals who blow the whistle as part of the whistleblower bounty provisions are not the only ones protected from retaliation. The Dodd-Frank Act also includes new protections for employees who report wrongdoing related to the offering or provision of consumer financial products or services, such as loans, property appraisals, financial advice, or credit counseling.

The act makes clear that employees who report wrongdoing related to the offering or provision of consumer financial

products or services are protected from retaliation, even if they blow the whistle as part of their ordinary duties or at the request of their employer.

Specifically, an employer may not fire or otherwise discriminate against an employee because he or she reported wrongdoing, provided information related to wrongdoing, or refused to engage in behavior the employee reasonably believed violated financial laws related to consumer financial products or services. This provision is a direct response to the predatory and deceptive lending practices that contributed to the collapse of the housing market and a significant spike in foreclosure rates. Available relief under this provision includes reinstatement and restoration of terms, conditions, and privileges associated with the position; back pay; costs and expenses, including litigation costs, expert witness fees, and reasonable attorneys' fees; injunctive relief; and compensatory damages.

Importantly, the act makes clear that employees who report wrongdoing related to the offering or provision of consumer financial products or services are protected from retaliation, even if they blow the whistle as part of their ordinary duties or at the request of their employer. For instance, an internal auditor who reports her audit findings pursuant to company policy is protected from retaliation. This specific protection for activities undertaken in the ordinary course of an employee's work duties was a response to decisions limiting whistleblower protections under the Sarbanes-Oxley Act of 2002 (“SOX”), as well as the U.S. Supreme Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410, 24 IER Cases 237 (2006), where the court held that speech made pursuant to a federal employee's professional duties is not protected. In fact, the three most expansive whistleblower statutes to be passed since SOX and the *Garcetti* decision—the Dodd-Frank Act, ARRA and the Consumer Products Safety Improvement Act—all include provisions that apply to individuals acting in the course of their employment. Courts considering this question in the context of Title VII or other retaliation claims may look to these statutes for guidance.

Employees who fail to rush to the courthouse at the first hint of retaliation need not be as concerned that their otherwise meritorious claims will be time-barred, since the act provides for a generous statute of limitations. Under the Commodities Exchange Act, individuals who are subjected to retaliation have up to two years to bring a claim in federal court and the Securities Exchange Act gives employees up to six years after the retaliatory act or three years after learning of the retaliatory act, whichever is later (but in any event no later than 10 years), to bring a claim. For claims related to the consumer financial products or services whistleblower provisions, the statute of limitations is 180 days and employees must file with the Department of Labor.

Plaintiffs and their attorneys also are cheering because the act prohibits forced arbitration of retaliation claims. Over the last decade, many employers have required, as a condition of employment or payment of bonuses, that employees waive their statutory right to a jury trial and submit claims to binding arbitration. Instead of having their claims heard by a jury of their peers, claims were heard by professional arbitrators whose bread money came from the employers paying their fees. Congress has now signaled its view on forced arbitration, and five years from now, employment attorneys may look to the act as the beginning of the end of forced arbitration of statutory employment claims.

Given that retaliation claims often are stronger than the claims that precipitated the retaliation, the act's retaliation provisions may prove to be among the most consequential for financial service employers. The longer statute of limitations, protections for employees acting in the course of their normal duties, and the prohibition against forced arbitration combine to ensure that employers do not escape liability for retaliation. Employers would be well advised, then, to implement meaningful systems to ensure that retaliation does not occur.

Reinvigorating the Sarbanes-Oxley Act

Remember SOX? Plaintiff-side employment lawyers had high hopes that SOX would be a watershed moment in affording protections for employees in the financial services, while management-side attorneys forecast doomsday for employers. In reality, SOX did not live up to the hype on either side. Due to an extremely short statute of limitations (90 days), many claims were never filed or were dismissed as untimely. Those that did make it past the statute of limitations hurdle were often dismissed on grounds separate from the merits—the whistleblowing was done in the ordinary course of the job or the employer was a private subsidiary of a public company. Some courts held that the SOX claims could not be heard in federal court and employers required their employees to submit the claims to binding arbitration. The end result was that SOX withered on the vine.

The Dodd-Frank Act attempts to revive SOX as a meaningful enforcement tool by addressing each of these shortcomings and broadening the application of the law. The Dodd-Frank Act doubles the time period for filing claims of retaliation with the Department of Labor to 180 days and prohibits forced arbitration of SOX retaliation claims. It also clarifies that employees have the right to have their SOX claims heard by a jury in federal court and extends whistleblower protections to employees of nationally recognized statistical rating organizations like Standard & Poor's, A.M. Best Company, Moody's Investor Services, and Fitch Ratings. The act also clarifies that SOX retaliation prohibitions apply to employees of private subsidiaries of publicly traded companies, if the private subsidiaries' "financial information is included in the consolidated financial statements of [the parent] company." The net result of these changes is that SOX may yet become the strong enforcement tool that it was intended to be.

Changing Wall Street Culture

While the Dodd-Frank Act appears to have the necessary power to effect meaningful change, at least as relates to whistleblowing, whether it is successful in doing so remains to be seen. Much will depend on the regulations adopted by the SEC and the CFTC and the steps employers take to ensure that a compliance culture reigns on Wall Street. If employers implement internal systems to encourage employees to comply with the law and report noncompliance, and if compliance, as opposed to risk-taking, is financially rewarded, the need for whistleblowing rewards and protections may disappear. Until that time, though, the Dodd-Frank Act provides a way for employees to speak up and be better off for it.

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