Enhanced Whistleblower Provisions Under Dodd-Frank Act

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Has Congress opened the floodgates to a sea of corporate whistleblower actions through the enactment of The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act")? Section 1057 of the Dodd-Frank Act has created a new whistleblower cause of action that allows employees in the financial services industry who suffer retaliation for disclosing information regarding unlawful conduct related to the offering of or provision of a consumer financial product or service to commence an action. In addition, the Dodd-Frank Act greatly expands the whistleblower protections created under the Sarbanes-Oxley Act (SOX) by expanding the companies subject to SOX's whistleblower provisions, creating a "bounty" for whistleblowers providing information leading to a securities law violation to the SEC and making certain procedural amendments to the SOX whistleblower provisions.

New Private Right of Action

Section 1057 of the Dodd-Frank Act creates a new private right of action for employees in the financial services who suffer retaliation for disclosing information about fraudulent or unlawful conduct related to the offering or provision of a consumer financial product or service. The cause of action applies to employees of businesses in the financial services industry including but not limited to those that: (i) extend credit or service loans; (ii) engage in deposit-taking activities or act as custodian of funds; (iii) provide cash checking or check collection services; (iv) provide financial advisory services to consumers; (v) collect, analyze, maintain or provide consumer report information; or (vi) collect debt related to any consumer financial product or service.

The protected activity covered by the Dodd-Frank Act includes providing information to an employer, the Bureau of Consumer Financial Protection (the "Bureau"), or other governmental authority relating to a violation of the laws under the jurisdiction of the Bureau, testifying or filing a proceeding under any consumer financial law or refusing to participate in any activity that the employee reasonably believes to be a violation of law subject to the Bureau's jurisdiction.

The legislation provides a less heightened burden of proof for the employee. To prevail, the employee must demonstrate by a preponderance of the evidence that the protected conduct was a contributing factor to the retaliatory treatment of the complaining employee. Once the burden has shifted, the employer can defeat the action by demonstrating clear and convincing evidence that the employer would have undertaken the same action even if the employee had not engaged in the protected activity. Employers are prohibited from contracting out of the private right of action through pre-dispute arbitration, with the exception of pre-dispute arbitration set forth in collective bargaining agreements.

Expansion of Whistleblowers Liability Under SOX

The Dodd-Frank Act has taken significant steps to expand liability under SOX. The Dodd-Frank

Act amends the whistleblower protections created under SOX to include both publicly-traded companies and their subsidiaries and affiliates. It extends the statute of limitations for filing claims with the Department of Labor from 90 days to 180 days.

Most significantly, the Dodd-Frank Act amends the Exchange Act to provide a "bounty" system for prospective whistleblowers. Pursuant to the amended provisions, whistleblowers who voluntarily report to the SEC "original information" that leads to a successful recovery by the SEC related to any securities law violation will be eligible for an award of 10-30% of the collected monetary sanctions in excess of $1 million.

Previously, there had been a cap of 10% of the award. "Original information" includes information derived from the independent knowledge or analysis of the whistleblower not otherwise known to the SEC from a source other than the whistleblower. The "bounty" provision provides significant incentives for employees to bypass internal company compliance programs for reporting allegations of wrongdoing to provide information directly to the SEC. In addition to securities law violations, the bounty provisions apply to Foreign Corrupt Practices Act violations, accounting fraud, broker-dealer violations or other similar matters that could result in the imposition of civil penalty.

Response to Enhanced Whistleblower Provisions

In light of the expanded potential exposure created by the enhanced whistleblower provisions under the Dodd-Frank Act, companies should take a very close look at existing internal controls and procedures to ensure that proper reporting mechanisms and anti-retaliation procedures are in place. Companies should investigate ways to encourage employees to report compliance matters in the first instance to the company. Additionally, companies should redouble efforts to supplement management training programs to reduce the risk of retaliatory actions.

For more information on the enhanced whistleblower provisions, please contact the author **Joseph C. Marrow**.