

The Sounds of New Whistleblower Awards and Protections under the Dodd-Frank Wall Street Reform and Consumer Protection Act

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With its enactment of financial reform legislation, Congress has elevated and expanded whistleblowing, giving it a more critical and mainstream function in the regulatory and enforcement scheme. The recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act¹ (Dodd-Frank) breaks from some conventional patterns in granting potential bounty awards and creating employment protection against retaliation for those who "blow the whistle" in matters involving securities, commodities and futures, and consumer financial products. By mandating whistleblowing for rating organizations, Dodd-Frank also expands a relatively limited notion that whistleblowing is an obligation, and not merely an option. Accompanying these entirely new extensions of coverage are some significant changes enabling whistleblowers to fare better under the Sarbanes-Oxley Act (Sarbanes-Oxley) and the False Claims Act (FCA). But even where common concepts, definitions, and procedures would seem to deserve identical treatment, Dodd-Frank lacks drafting uniformity – potentially affecting outcomes and assuredly inviting attention to detail.

Exchange Act Awards and Protections²

Amendments to the Securities Exchange Act of 1934 (Exchange Act)³ expand registration, reporting, and recordkeeping. More companies and activities sweep in to the jurisdiction of the Securities and Exchange Commission (SEC), yielding greater impact and reach for new whistleblower awards and protections.

A monetary award may be granted to one or more whistleblowers who voluntarily provide original information leading to the successful enforcement of a judicial or administrative action brought by the SEC or certain regulatory and enforcement authorities that results in monetary sanctions exceeding \$1,000,000.⁴ Qualifying original information must be:

1. derived from the independent knowledge or analysis of the whistleblower;
2. not known to the SEC from any other source, unless the whistleblower is the original source of the information; and
3. not exclusively derived from an allegation made in a judicial or administrative

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hearing; in a governmental report, hearing, audit, or investigation; or from the news media, unless the whistleblower is a source of the information.⁵

If any whistleblower qualifies for receipt of an award, the SEC may exercise discretion to determine the aggregate amount to be paid—in a range between 10 percent and 30 percent of the amount of monetary sanctions imposed.⁶ Apparently contemplating that there could be multiple contributors of original information and an allocation of a total sum amongst them, Dodd-Frank speaks of an aggregate distribution.⁷ In determining the amount of an award, the SEC will exercise discretion to consider the quality of the information by measuring its significance in the successful imposition of monetary sanctions, the quality of the whistleblower's contribution by measuring the assistance provided, and the institutional importance to the SEC relative to its programmatic interest in deterring violation of the law being enforced.⁸ By adoption of a rule or regulation, the SEC may establish additional relevant factors governing award amounts.⁹

An award may be denied altogether to individuals based on either their employment status or their conduct. The SEC will not grant an award to a whistleblower who is currently—or was at the time the original information was acquired—a member, officer, or employee of: (i) an appropriate regulatory agency; (ii) the Department of Justice (DOJ); (iii) a self-regulatory organization; (iv) the Public Company Accounting Oversight Board; or (v) a law enforcement organization.¹⁰ Also disqualified are individuals who gain the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of Section 10A of the Exchange Act.¹¹

For others who could qualify, there will be no entitlement to an award if the individual fails to submit information in a form satisfactory to the SEC, as established by rule;¹² has been convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award;¹³ or has knowingly and willfully made any false, fictitious, or fraudulent statement or representation or has used any false writing or document knowing the writing or document contains any false, fictitious, or fraudulent statement or entry.¹⁴

The SEC may exercise discretion as to whether, to whom, and in what amount to make awards.¹⁵ A whistleblower not satisfied with an award, other than the determination of its amount, may challenge the SEC determination by petitioning a U.S. Court of Appeals.¹⁶ The challenge must be brought early—within 30 days after issuance by the SEC.¹⁷ The appeal is subject to a customary standard of review for administrative determinations specified in the Administrative Procedure Act.¹⁸

Separate from bounty awards that may be available, employee-whistleblowers are afforded familiar protection against discharge, demotion, suspension, threat, harassment, and any other form of discrimination.¹⁹ But Dodd-Frank cuts a different substantive, procedural, and remedial course from Sarbanes-Oxley and several other whistleblower statutes for those Exchange Act protections. It delineates protected activity as lawful acts: in providing information to the SEC in connection with the statutory awards and protections; in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the SEC; or in making disclosures that are required or protected under Sarbanes-Oxley, the Exchange Act, and any

other law, rule, or regulation subject to the jurisdiction of the SEC based upon or related to such information.²⁰

For Exchange Act retaliation complaints, Dodd-Frank follows the FCA procedure allowing direct access to a U.S. district court.²¹ It rejects the prerequisite of filing an administrative complaint, a feature of initial (and possibly continuing) jurisdiction in Sarbanes-Oxley and many other whistleblower statutes administered by the Department of Labor (DOL) and its Occupational Safety and Health Administration (OSHA).²²

The statute of limitations for Exchange Act claims is stated in steps. Most simply, a whistleblower's action alleging Exchange Act retaliation must be brought within six years after the date on which the violation occurred.²³ But disputes in determining timeliness appear inevitable, because an action also will be timely if brought within three years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging unlawful reprisal by way of adverse employment action.²⁴ Although this knowledge factor makes the statute of limitations elastic and elusive in some respects, there is an absolute cap—in no circumstance may an action be brought more than 10 years after the date on which the alleged violation occurs.²⁵

While whistleblowers are broadly protected against an array of unfavorable personnel actions, the remedy available is crafted to an employment loss. Relief includes reinstatement with the same seniority status that the individual would have had, but for the discrimination; two times the amount of back pay otherwise owed to the individual, with interest; and compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.²⁶

*CEA Awards and Protections*²⁷

Whistleblower awards and protections in the Dodd-Frank amendments to the Commodity Exchange Act (CEA)²⁸ resemble, but do not mirror, Exchange Act provisions. In some respects, the distinctions relate to variances in the authority of the Commodity Futures Trading Commission (CFTC) and the SEC, but other differences affecting whistleblowers and their rights have been drafted in the CEA.

A whistleblower is defined as an individual, acting alone or jointly, who provides information to the CFTC relating to a violation of Dodd-Frank in a manner established by CFTC rule or regulation.²⁹ As with Exchange Act provisions, awards in the aggregate may range from 10 percent to 30 percent of monetary sanctions,³⁰ and they are available to whistleblowers who voluntarily provide original information to the CFTC that leads to the successful enforcement of the judicial or administrative action yielding monetary sanctions of at least \$1,000,000.³¹ Considerations for the significance of information, the assistance provided, and the CFTC's programmatic interest and exercise of discretion are substantially the same as those for the SEC.³² Also, the disqualification from receiving an award because of employment or status is similarly crafted to take account of CFTC jurisdiction, and no award is available to commissioners, members, officers, or employees of: (i) an appropriate regulatory agency; (ii) the DOJ; (iii) a registered entity; (iv) a registered futures association; (v) a self-regulatory organization as defined in the Exchange Act; or (vi) a law enforcement organization.³³

The CFTC will reward only the first to act, and a whistleblower submitting information previously received from another whistleblower will not qualify for an award.³⁴ As with Exchange Act coverage, whistleblowers convicted of a crime related to the underlying monetary sanction and those failing to submit information in the form required by the CFTC are disqualified,³⁵ as are those who knowingly and willfully make false, fictitious, or fraudulent statements or representations or make or use writings or documents containing any false, fictitious, or fraudulent statement or entry.³⁶ If a monetary award is challenged by petition to a U.S. Court of Appeals, the reviewing court has full customary discretion, and it will not be limited with respect to the amount of the award, as with Exchange Act awards.³⁷

CEA whistleblowers are protected against adverse employment actions resulting from their lawful acts in providing information to the CFTC or in assisting in any investigation or judicial or administrative action of the CFTC based upon or related to such information.³⁸ Unlike the Exchange Act, the CEA adopts a straightforward statute of limitations for commencing whistleblower retaliation actions; the time for filing a federal court action is two years after the date on which the alleged violation is committed.³⁹ The availability of relief also is more restricted; back pay is *not* doubled, as it is with Exchange Act retaliation.⁴⁰

Mandated Whistleblowing by Rating Organizations

Taking a turn not characteristic of most whistleblower statutes, Dodd-Frank mandates whistleblowing for a limited class of businesses. It requires that each nationally recognized statistical rating organization refer to appropriate law enforcement or regulatory authorities any information, received by it from a third party and found credible, alleging that an issuer of securities rated by it has committed or is committing a material violation of law that has not been adjudicated by a federal or state court.⁴¹ Nevertheless, the rating organization is not required to verify the accuracy of the information it has received,⁴² indicating that there may be no affirmative obligation to uncover an issuer's violation of law or corroborate information received.

Amendments Expanding Sarbanes-Oxley Whistleblower Protections

Protection Extended to Rating Organization Employees

As a companion to its mandate that nationally recognized statistical rating organizations report certain violations of law, Dodd-Frank amends the Sarbanes-Oxley civil whistleblower provision to include nationally recognized statistical rating organizations among companies prohibited from retaliating against individuals for their protected activity.⁴³ Accordingly, Sarbanes-Oxley whistleblower protection is conferred on the officers, employees, contractors, subcontractors, and agents of such rating organizations.⁴⁴

Inclusion of Corporate Subsidiaries and Affiliates

Providing a legislative resolution to the contentious issue of whether Sarbanes-Oxley whistleblower protection should extend to employees of subsidiaries and affiliates of companies having publicly traded securities or required to file reports under Section 15(d) of the Exchange Act, Dodd-Frank amends the civil whistleblower provisions of Sarbanes-Oxley by expressly including protection for employees of any subsidiary or

affiliate whose financial information is included in the consolidated financial statements of such a covered company.⁴⁵ With this amendment, there will be no further need to consider jurisdiction based on factors of agency, integration of subsidiary or affiliate operations, or control by the covered publicly traded corporate entity.

Statute of Limitations

Dodd-Frank extends the statute of limitations for Sarbanes-Oxley civil whistleblower complaints from the oft-criticized brief period of 90 days after the violation occurs to 180 days.⁴⁶ But the period for filing is not simply lengthened to that finite amount. Language bearing some similarity to the Exchange Act's whistleblower protection (but not that of the CEA) further extends the Sarbanes-Oxley statute of limitations by allowing a timely filing 180 days after the date on which the employee became aware of the violation.⁴⁷ This introduction of an element of employee knowledge may generate some confusion. Until now, Sarbanes-Oxley has been construed so its statute of limitations starts to run from the date when the allegedly discriminatory decision has been both made and communicated to the complainant.⁴⁸ Because an individual will know when certain adverse employment actions have occurred, particularly in the instance of discharge, it is not clear what types of belated knowledge will be permitted to extend the statute of limitations.

Waivers and Pre-dispute Arbitration Not Enforceable

In two more respects, Dodd-Frank extends whistleblower rights to pursue litigation. It amends Sarbanes-Oxley to state expansively that whistleblower rights and remedies may not be waived by any agreement, policy, form, or condition of employment.⁴⁹ Also, showing a continuing disfavor towards pre-dispute arbitration agreements and supportive case law,⁵⁰ Dodd-Frank amends Sarbanes-Oxley to provide that such an agreement requiring arbitration of a Sarbanes-Oxley civil whistleblower dispute is not valid or enforceable.⁵¹

Jury Trial Available in Court Proceedings

Sarbanes-Oxley allows a whistleblower to abandon administrative proceedings and commence a *de novo* action in a U.S. district court if a final Administrative Review Board decision has not been issued within 180 days after the filing of a whistleblower's administrative complaint and there is no showing that the delay is due to the whistleblower's bad faith.⁵² Dodd-Frank now specifies that the whistleblower bringing such a federal court action will have a right to a jury trial,⁵³ removing that issue from doubt and judicial discretion.

Consumer Financial Protection Act Protections

While Dodd-Frank rejects the administrative process and allows direct access to federal court for Exchange Act and CEA whistleblower protections, for the new Consumer Financial Protection Act (CFPA), it reverts—substantially, but not completely—to the familiar architecture and DOL/OSHA procedures of the Consumer Product Safety Improvement Act (CPSIA)⁵⁴ on which it is modeled.⁵⁵

With the creation of a new Bureau of Consumer Financial Protection (Bureau), individuals performing tasks related to the offering or provision of a consumer financial product or service and their authorized representatives will have whistleblower protection against discriminatory reprisals in connection with:

1. providing information to the employer, the Bureau, or any other state, local, or federal government authority or law enforcement agency based on a reasonable belief concerning violation of any provision of the CFPA or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau;
2. testifying in any proceeding resulting from the administration or enforcement of the CFPA or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau;
3. filing or instituting a proceeding under any federal consumer financial law; or
4. objecting or refusing to participate in any activity, policy, practice, or assigned task reasonably believed to be in violation of any law, rule, order, standard, or prohibition subject to the jurisdiction of, or enforceable by, the Bureau.⁵⁶

Protection applies without regard to whether the whistleblower initiated the activity or acted in the ordinary course of duties.⁵⁷

The DOL/OSHA procedures mapped from the CPSIA include:

1. a 180-day limitation on filing an administrative complaint;⁵⁸
2. administrative investigation and determination;⁵⁹
3. availability of a preliminary order of reinstatement;⁶⁰
4. burden of proof standards requiring the whistleblower to show that protected activity was a contributing factor in the unfavorable personnel action and requiring the employer to rebut by demonstrating with clear and convincing evidence that it would have taken the same unfavorable personnel action absent the whistleblower's alleged protected activity;⁶¹
5. remedial relief including affirmative action to abate the violation; reinstatement to the former position, terms, conditions, and privileges; back pay; compensatory damages; and recovery of costs and expenses, including attorney and expert witness fees;⁶² and
6. a right to bring a *de novo* action in a U.S. district court if no final order has issued within 210 days after the complaint was filed.⁶³

Unlike the Exchange Act provision of Dodd-Frank which calls for double back pay, the CFPA specifies simple back pay, a product of adopting the CPSIA protocol. As with the Dodd-Frank amendments to Sarbanes-Oxley, whistleblower rights and remedies may not be waived by any agreement, policy, form, or condition of employment, and a pre-dispute agreement requiring arbitration of a whistleblower's retaliation claims is not valid or enforceable.⁶⁴

To allow time for creation of the new Bureau to regulate the offering and provision of consumer financial products or services under federal consumer financial laws, the effective date of the new whistleblower protections is not certain, although it should occur within a corridor of 6 to 18 months following enactment.⁶⁵

FCA Amendments

The FCA's retaliation protections are expanded by Dodd-Frank to include conduct by those associated with a whistleblower in furtherance of a false claims action or efforts to stop a violation of the FCA.⁶⁶ And an amendment supplying a statute of limitations of three years after the date when alleged retaliation occurred⁶⁷ means courts will no longer apply the most analogous state law standard.⁶⁸

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With Dodd-Frank, federal whistleblowing legislation continues to advance in patchwork fashion. Variations have been legislated for the treatment of whistleblowers in substantially similar circumstances, depending upon whether they invoke protections concerning markets for securities, commodities and futures, or consumer financial products. In substantive reach and protection, availability of administrative or judicial process, statute of limitations, and burdens to prove or defend claims, cohesiveness is not a design feature of Dodd-Frank.

Where jurisdiction may lie under more than one law, this cafeteria approach presents an array of offerings to whistleblowers and their advocates. For affected businesses, it makes vigilance all the more important. Compliance programs intended to receive and appropriately respond to whistleblower reports, and organizational policies and practices that address related personnel considerations, will need to be assessed relative to new obligations and exposures created by Dodd-Frank and its interplay with other applicable federal and state laws.⁶⁹ That task is further compounded by the statutory set of incentives that may influence whether whistleblowers report within the organization or go outside to regulatory and enforcement authorities with matters of concern.

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¹ Pub. L. No. 111-203 (July 21, 2010). Further citations will be to the applicable section of Dodd-Frank (e.g., Dodd-Frank Section 922).

² Text in this section relates to Dodd-Frank Section 922, unless otherwise noted.

³ 15 U.S.C. §78a, *et seq.* Further citations will be to the applicable section of the Exchange Act (e.g., Exchange Act Section 21F).

⁴ Exchange Act Section 21F(a)(1).

⁵ Exchange Act Section 21F(a)(3).

⁶ Exchange Act Sections 21F(b)(1), 21F(c)(1)(A).

⁷ Exchange Act Section 21F(b)(1).

⁸ Exchange Act Sections 21F(c)(1)(A), 21F(c)(1)(B)(i), (I), (II), (III).

⁹ Exchange Act Section 21F(c)(1)(B)(i)(IV).

10 Exchange Act Section 21F(c)(2)(A).
11 Exchange Act Section 21F(c)(2)(C), referring to 15 U.S.C. § 78j-1.
12 Exchange Act Section 21F(c)(2)(D).
13 Exchange Act Section 21F(c)(2)(B).
14 Exchange Act Section 21F(i).
15 Exchange Act Section 21F(f).
16 Exchange Act Section 21F(f).
17 Exchange Act Section 21F(f).
18 5 U.S.C. §706; Exchange Act Section 21F(f).
19 Exchange Act Section 21F(h)(1).
20 Exchange Act Section 21F(h)(1)(A).
21 Exchange Act Section 21F(h)(1)(B)(i); 31 U.S.C. §3730(h).
22 See, e.g., 18 U.S.C. §1514A(b) and (c).
23 Exchange Act Section 21F(h)(1)(B)(iii)(I)(aa).
24 Exchange Act Section 21F(h)(1)(B)(iii)(I)(bb).
25 Dodd-Frank Section 924(d), adding Exchange Act Section 21F(h)(1)(B)(iii)(II).
26 Exchange Act Section 21F(h)(1)(C).
27 Text in this section relates to Dodd-Frank Section 748, unless otherwise noted.
28 7 U.S.C. §1, *et seq.* Further citations will be to the applicable section of the CEA (e.g.,
CEA Section 23).
29 CEA Section 23(a)(7).
30 CEA Sections 23(b)(1), 23(c)(1)(A).
31 CEA Sections 23(a)(1), 23(a)(4), 23(b)(1).
32 CEA Sections 23(c)(1)(B), 23(f)(1).
33 CEA Section 23(c)(2)(A).
34 CEA Section 23(c)(2)(C).
35 CEA Sections 23(c)(2)(B), 23(c)(2)(D).
36 CEA Section 23(m) (such individuals also are subject to prosecution).
37 CEA Sections 23(f)(2), 23(f)(3); *compare* Exchange Act Section 21F(f)(2) (no review
of award amount).
38 CEA Section 23(h)(1)(A).
39 CEA Section 23(h)(1)(B)(i); CEA Section 23(h)(1)(B)(iii).
40 CEA Section 23(h)(1)(1)(C); *compare* Exchange Act Section 21F(h)(1)(C).
41 Dodd-Frank Section 934, amending Exchange Act Section 15E to add 15 U.S.C. §78o-
7(u)(1).
42 Dodd-Frank Section 934, amending Exchange Act Section 15E to add 15 U.S.C. §78o-
7(u)(2).
43 Dodd-Frank Section 922(b)(1), amending 18 U.S.C. §1514A(a).
44 Dodd-Frank Section 922(b)(2), amending 18 U.S.C. §1514A(a).
45 Dodd-Frank Section 929A, amending 18 U.S.C. §1514A(a).
46 Dodd-Frank Section 922(c)(1)(A)(i), amending 18 U.S.C. §1514A(b)(2)(D).
47 Dodd-Frank Section 922(c)(1)(A)(ii), amending 18 U.S.C. §1514A(b)(2)(D).
48 18 U.S.C. §1514A(b)(2)(D); 29 C.F.R. §1980.103(d); *see also Corbett v. Energy East
Corp.*, ARB No. 07-044, ALJ No. 2006-SOX-65, slip. op. at 4 (ARB Dec. 31, 2008).
49 Dodd-Frank Section 922(c)(2), adding 18 U.S.C. §1514A(e)(1).
50 See, e.g., *Hill v. Ricoh Americas Corp.*, 634 F. Supp. 2d 1247 (10th Cir. 2010);
Guyden v. Aetna Inc., 544 F.3d 376 (2d Cir. 2008).
51 Dodd-Frank Section 922(c)(2), adding 18 U.S.C. §1514A(e)(2).
52 18 U.S.C. §1514A(b)(1)(B).
53 Dodd-Frank Section 922(c)(1)(b), adding 18 U.S.C. §1514A(b)(2)(E).
54 15 U.S.C. §2087.
55 Dodd-Frank Section 1057.
56 Dodd-Frank Section 1057(a).
57 Dodd-Frank Section 1057(a).
58 Dodd-Frank Section 1057(c)(1)(A).
59 Dodd-Frank Sections 1057(c)(2), (c)(4)(B).
60 Dodd-Frank Section 1057(c)(2)(B).
61 Dodd-Frank Section 1057(c)(3)(C).
62 Dodd-Frank Section 1057(c)(4)(B).

⁶³ Dodd-Frank Section 1057(c)(4)(D)(i).

⁶⁴ Dodd-Frank Sections 1057(d)(1) and (2). A limited exception that may permit arbitration of certain claims brought under a collective bargaining agreement is subject to further consideration by the Bureau. Dodd-Frank Section 1057(d)(3).

⁶⁵ Dodd-Frank Sections 1058, 1062(c).

⁶⁶ Dodd-Frank Section 1079A(c)(1), amending 31 U.S.C. §3730(h).

⁶⁷ Dodd-Frank Section 1079A(c)(2), amending 31 U.S.C. §3730(h) to add §3730(h)(3).

⁶⁸ See *Graham County Soil & Water Conservation Dist. v. U.S.*, 545 U.S. 409 (2005).

⁶⁹ Dodd-Frank is explicit that its whistleblower provisions do not diminish the rights, privileges, or remedies of any whistleblower under any federal or state law, or under any collective bargaining agreement. Exchange Act Section 21F(h)(3); CEA Section 23(h)(3).