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New Protections Afforded Whistleblowers Under Dodd-Frank Act

Congressional efforts to address the financial crisis led to the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Act seeks to reform the financial services industry. As part of that effort, Congress included incentives for employees and others to report securities law and financial practices violations, while also providing greater protections to people reporting violations. New provisions protecting whistleblowers were added to the Commodity Exchange Act, the Securities Exchange Act, the Sarbanes-Oxley Act, and the False Claims Act. Employers in covered industries now face closer scrutiny from governmental agencies, employees, and others who deal with their companies.

The changes will require an examination of existing reporting systems to be sure that they effectively encourage employees to alert management to their concerns. Providing internal avenues for addressing “problems” and protecting those who report them are vital in order to avoid greater costs and adverse publicity. Early intervention, a commitment to the acceptance of critical self assessments of operations, and a renewed emphasis of ethical business practices will be in the best interests of shareholders, directors, managers, and employees.

There are several significant changes established by the Act. Among the changes are financial incentives for reporting suspected violations. If the information is “original information” and leads to the government’s recovery of \$1M or more, the employee or

employees who brought the information to light will share in the recovery ranging from 10% to 30% of the collected recovery based on factors related to their assistance.

Despite the incentives for reporting, a variety of factors discourage whistleblowers from coming forward: fear of retaliation, job loss, or ostracism on the job. To try to reduce these concerns, Congress provided that the whistleblowers’ identities not be disclosed, unless as part of a public proceeding involving the information disclosed. There are also new protections against employee retaliation. While the exact protection is slightly different depending under which law the employee raised an issue, if employees, who provide information about suspected violations or who assist in any investigation, judicial or administrative action related to the information, suffer an adverse employment action, they can bring a lawsuit in federal court. Each law also has a slightly different approach as to what damages are recoverable, but generally employees who prove that they were retaliated against can be reinstated to their former position, recover back pay with interest, and receive “special damages”, for the costs of litigation and attorneys’ fees (under the amendments to the Securities Act, back pay is doubled).

New protections have been established for whistleblowers. The law now permits employees to go directly to court if they believe they have been discriminated or retaliated against without first having to have their complaint heard by a governmental

agency. Previously under the Sarbanes-Oxley Act, the whistleblower had to file a complaint with the Department of Labor, Occupational Safety and Health Administration. Filing with OSHA is no longer the exclusive means for addressing employee retaliation claims, but is still a choice available to employees. The statute of limitations has also been extended.

While employers face increased scrutiny and significant penalties for retaliating against a whistleblower, the whistleblower can lose the right to share in the recovery if he/she knowingly and willfully makes any false or fraudulent statement and makes or uses any false writing or document that contains any false or fraudulent statement or entry. If an employee uses false statements or creates false information, that action will certainly undercut the whistleblower's credibility.

There are steps that employers can take to minimize the risks created by these new amendments. Recognizing that most whistleblowers only take that route because they are frustrated in having no place to go to effectively raise questions and concerns about business practices, instituting multiple avenues for addressing issues internally will provide a way to reduce corporate risk of statutory violations and employee discontent. This may require a culture change or added emphasis on corporate ethics, but the heightened scrutiny is justified. In looking at instituting or reinvigorating existing communications avenues, it is important to recognize that, besides a formal system, which may operate through human resources, having a confidential informal system can also have beneficial results. The confidential informal system can answer questions while preserving the employee's anonymity. It can also act as a check and balance where the formal avenue may involve co-workers who are friends, where the persons implicated are the persons to or through whom the reporting line goes, or where the chance that confidentiality may be breached is increased.

Training programs should emphasize corporate ethics and the importance of reporting concerns. Employees should understand that it

is in everyone's best interest to address matters internally and get them resolved. The resolution process may require the active involvement of the Board of Directors, and particularly the audit committee and the personnel committee. A problem may involve persons who are close to senior management. Therefore, reliance on human resources may not be enough to resolve and address the issues, as there may be an appearance of a conflict of interest.

There is another matter that needs human resource and general counsel attention. Traditional ways of resolving disputes with employees generally are still available. If, however, the employer wants to resolve a dispute with the employee-whistleblower before litigation or just wants to be protected against some future claim and wants the employee to agree to waive the rights and remedies provided by the Dodd-Frank Act, the employer cannot do that. This means that when asking an employee to sign a separation agreement containing a waiver of all claims, the inclusion of a waiver of the rights and remedies under the Dodd-Frank Act will not be enforceable. The law also bars provisions in employment agreements, corporate policies, or handbooks which would mandate arbitration of a future dispute under the Act.

Finally, new protections have been established for employees performing tasks related to the offering or providing consumer financial products or services. Within the Federal Reserve System a new bureau of Consumer Financial Protection has been created to regulate consumer financial products and services. This new Bureau is also empowered to protect employees who, on their own initiative or as part of their regular duties, provide information relating to any violation of the law or who report any act or omission that the employee reasonably believes violates the law. The protections extend to reporting to the Bureau, local, state or federal government or law enforcement agencies. Employees are encouraged to testify in any enforcement proceeding, to initiate or refuse to participate in, any activity, policy, practice, or assigned task that the employee reasonably believes to be in violation of any law within the Bureau's jurisdiction. The employee who believes



that he/she has been retaliated against can file a complaint with the Secretary of Labor within 180 days of the alleged violation. The Secretary of Labor is required to investigate, to hold a hearing, if warranted, and to award damages, including reinstatement, back pay and compensatory damages, when appropriate. If the complaint was brought in bad faith, the Secretary of Labor may award the employer up to \$1000 as reasonable attorneys' fees to be paid by the employee. The employee also may bring a lawsuit in the federal court.

The Dodd-Frank Act and the yet-to-be-issued regulations warrant a re-examination of internal processes. The implementation and/or reinvigoration of confidential informal avenues for complaints and a review of the effectiveness of existing formal complaint procedures should be a

priority to reduce the risk of unknown statutory violations and undisclosed retaliation against concerned employees. Additional protection for whistleblowers constitutes only one of the many tentacles of the Dodd-Frank Act.

Shipman & Goodwin will continue to inform its clients of the significant impacts of this ground-breaking legislation through a series of client alerts. In the meantime, if you have any questions on whistleblower protections, you may contact Gary Starr at (860) 251-5501 or gstarr@goodwin.com or Chuck Howard at (860) 251-5616 or choward@goodwin.com. If you have questions on any of the following aspects of the Dodd-Frank Act, the attorneys identified below are ready to assist you:

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