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Congress Passes Sweeping Changes to Labor and Employment Whistleblower Protections

The newly passed Dodd-Frank Wall Street Reform and Consumer Protection Act will be signed into law this week, strengthening the whistleblower provisions of the Sarbanes-Oxley Act and creating several new whistleblower programs.

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The Dodd-Frank Wall Street Reform and Consumer Protection Act (the Wall Street Reform Act), which will be signed into law this week, contains provisions that significantly strengthen the whistleblower provisions contained in the Sarbanes-Oxley Act. New whistleblower protections have also been established to protect employees reporting certain alleged violations of law to the U.S. Securities and Exchange Commission (the SEC), the Commodity Futures Trading Commission (CFTC), or the newly established Consumer Financial Protection Bureau. The Act also protects employees who engage in certain other protected conduct as defined by the statute.

Background

As described in Morgan Lewis's May 21, 2010 LawFlash, "Sweeping Changes Made to Labor and Employment Whistleblower Protections,"[1] the Restoring American Financial Stability Act (RAFSA), passed on July 19 by the U.S. Senate, includes significant new whistleblower provisions, as well as important changes to the Corporate and Criminal Fraud Accountability Act of 2002 (Sarbanes-Oxley or SOX). Those provisions have been incorporated as part of the Wall Street Reform Act, passed by both houses of Congress and expected to be signed this week by the President.

Briefly, the Wall Street Reform Act will create a new Whistleblower Program (WP) administered by the SEC that will accomplish the following:

- Enable whistleblowers to bypass SOX administrative proceedings, and instead file retaliation claims directly in federal court.
- Offer a six- to 10-year statute of limitations period to bring claims, as opposed to SOX's current 90-day statute of limitations period.
- Increase monetary incentives by providing a new double-back-pay remedy, as well as the opportunity for the whistleblower to share in any government recovery where "original information" about shareholder fraud was provided.

[1] *Available at* http://www.morganlewis.com/pubs/FRR_LaborWhistleblowerProtections_LF_21may10.pdf.

The Wall Street Reform Act will also expand SOX to cover subsidiaries and other related entities that are consolidated on a company's financial reports, and nationally recognized statistical rating organizations. A more detailed explanation of these significant changes impacting public company employers is included in Morgan Lewis's May 21, 2010 LawFlash.

In addition to the provisions described in the LawFlash, the final Wall Street Reform Act contains **additional** significant changes to SOX, and establishes two further whistleblower programs designed to protect employees reporting alleged violations of the Commodity Exchange Act and the various consumer financial protection laws. The False Claims Act has also been amended with respect to its whistleblower protections. These additional changes are summarized below.

Additional Amendments to SOX

Additional amendments to SOX incorporated into the Wall Street Reform Act include the following:

- **Waivers and pre-dispute arbitration agreements unenforceable.** The Wall Street Reform Act includes a provision rendering unenforceable the waiver of any SOX rights and remedies by any agreement, policy, or condition of employment, including by a pre-dispute arbitration agreement. The Act specifies that "no pre-dispute arbitration agreement shall be valid or enforceable if the agreement requires arbitration of a dispute arising under this section."

- **Expansion of SOX statute of limitations from 90 days to 180 days.** The Wall Street Reform Act also increases the amount of time under SOX in which a whistleblower can file a complaint of retaliation with the Occupational Safety and Health Administration (OSHA) from 90 days to 180 days from the date of a violation or from the date on which the employee becomes aware of a violation.

- **Right to a jury trial.** Whistleblowers who bring a private action in federal court following the Department of Labor's (DOL's) failure to issue a final decision within 180 days now have a statutory right to a jury trial.

Additional Changes to the New SEC Whistleblower Program

- **Expanded definition of who is protected under the new SEC WP.** The Wall Street Reform Act provides that to be protected from retaliation under the new SEC WP, a whistleblower must either (1) provide information to the SEC in accordance with the statute, (2) initiate, testify, or assist in any investigation or judicial or administrative action of the SEC based upon or related to such information, or (3) make disclosures that are required or protected under SOX or SEC laws and/or regulations.

The SEC is required to issue regulations to implement its WP within 270 days of the Wall Street Reform Act's enactment (approximately April 2011).

New Whistleblower Program for Alleged Violations of the Commodity Exchange Act

In an effort to crack down on the "swap markets" that contributed to the 2008 global financial crisis, the Wall Street Reform Act also creates a whistleblower program to encourage reporting of violations

of the Commodity Exchange Act. Administered by the CFTC, the program (the CFTC WP) is similar to the provisions creating the new SEC WP, providing the same lucrative monetary incentives and allowing commodity whistleblowers who believe they have been retaliated against to file a private right of action. In addition, similar to the changes to SOX, the CFTC WP provisions forbid the waiver or pre-dispute arbitration agreement regarding the rights and remedies for such whistleblower actions.

Two differences between the SEC WP and the CFTC WP are noteworthy. First, unlike the expansive six- to 10-year statute of limitations provided for the SEC WP, the CFTC WP statute of limitations requires that retaliation claims be initiated within two years after the date on which the alleged statutory violation was committed. Second, the acts covered by the antiretaliation provision of the CFTC WP include only "providing information" in accordance with the statute or "assisting" in an investigation or judicial or administrative action based upon or related to such information. In contrast, the language in the SEC WP also protects those who make disclosures required by SOX or securities laws.

The CFTC is required to issue regulations to implement its whistleblower program within 270 days of the Wall Street Reform Act's enactment (approximately April 2011).

New Whistleblower Protections for Financial Services Employees Reporting Alleged Violations of Various Consumer Protection Laws

The Wall Street Reform Act will also create significant new protections for employees working in the consumer financial services sector. Employers that offer or provide a consumer financial product or service; participate in designing, operating, or maintaining the consumer financial product or service; or process transactions related to the consumer financial product or service are prohibited from terminating or otherwise discriminating against "any individual performing tasks related to the offering or provision of a consumer financial product or service," by reason of the fact that the employee or representative either has or will have taken the following actions:

- Provided (or caused to be provided) information—whether at the initiative of the employee or in the ordinary course of the duties of the employee—to either the employer, the newly created Consumer Financial Protection Bureau (the Bureau), or any other local, state, or federal authority or agency relating to any violation of, or act or omission that the employee reasonably believes to be a violation of one of the laws[2] protected by the Bureau or other rules promulgated by the Bureau.
- Testified in any proceeding resulting from the administration or enforcement of the Act, any of

[2] The Bureau has jurisdiction over the Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. §§ 3801 et seq.; the Consumer Leasing Act of 1976, 15 U.S.C. §§ 1667 et seq.; the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693 et seq., except with respect to section 920 of that Act; the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 et seq.; the Fair Credit Billing Act, 15 U.S.C. § 1666 et seq.; the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 et seq., except with respect to sections 615(e) and 628 of that Act, 15 U.S.C. §§ 1681m(e), 1681w; the Home Owners Protection Act of 1998, 12 U.S.C. §§ 4901 et seq.; the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq.; subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act, 12 U.S.C. §§ 1831t(c)–(f); sections 502 through 509 of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6802–6809, except for section 505 as it applies to section 501(b); the Home Mortgage Disclosure Act of 1975, 12 U.S.C. §§ 2801 et seq.; the Home Ownership and Equity Protection Act of 1994, 15 U.S.C. § 1601 note; the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601 et seq.; the S.A.F.E. Mortgage Licensing Act of 2008, 12 U.S.C. §§ 5101 et seq.; the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq.; the Truth in Savings Act, 12 U.S.C. §§ 4301 et seq.; section 626 of the Omnibus Appropriations Act, 2009, Public Law 111-8; and the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701.

the laws protected by the Bureau, or other rules promulgated by the Bureau.

- Filed or instituted (or caused to be filed or instituted) any proceeding under federal consumer financial law.
- Objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any law subject to the jurisdiction of the Bureau or enforced by the Bureau.

A person who believes that he or she has been terminated or otherwise discriminated against because of one of the above actions may file a complaint with the DOL within 180 days of the alleged violation. The DOL then has the jurisdiction to conduct an investigation and issue a determination. Should the DOL issue a determination of a violation, the determination will also include a preliminary order of relief, which shall include affirmative action to abate the violation, reinstatement of the employee to his or her prior position, back pay, compensatory damages to the employee, and, if requested by the complainant, his or her attorney fees, any expert witness fees and other reasonable costs. If the DOL finds that the complaint was frivolous or brought in bad faith, the DOL may direct the employee to pay to the employer a reasonable attorney fee not to exceed $1,000.

Within 30 days of the notice of the determination, either party has the right to object to the determination and request a hearing on the record. However, this request does not stay any determination of reinstatement of the employee. If a hearing is not requested in the 30-day period, the preliminary order of relief shall be deemed final and not subject to any further judicial review. If a hearing is requested, the DOL must issue a final order regarding relief or denying the complaint within 120 days of the hearing. Any party adversely affected or aggrieved by a final order of the DOL can appeal such order by filing a petition for review with the U.S. Court of Appeals within 60 days.

If the DOL has not issued a final order within 210 days after the filing of the complaint, or within 90 days after the date of receiving a determination, the complainant may bring a right of action in federal court. The court is empowered to impose the same injunctive and monetary remedies as outlined above.

The employee meets his or her *prima facie* case by demonstrating that one of the four actions listed above was a “contributing factor” in the alleged adverse employment action by the employer. The employer then must rebut the *prima facie* case with a showing of “clear and convincing evidence” that the employer would have taken the same adverse employment action regardless of the protected activity.

Similar to the amendments to SOX and the CFTC WP, the rights and remedies provided for whistleblowers under this section of the Act cannot be waived, or be subject to a pre-dispute arbitration agreement.

Amendments to False Claims Act Whistleblower Protections

The Wall Street Reform Act will also slightly modify the retaliation protections under the False Claims Act (the FCA) by establishing a three year statute of limitations for civil actions under the anti-retaliation section of the FCA, as well as modifying the existing definition of covered individuals and protected conduct.

Conclusion

In light of the passage of the Wall Street Reform Act and its significant impact on whistleblower protections, public company employers need to consider doing the following:

- **Review waiver and arbitration agreements.** In light of the restrictions on waivers and predispute arbitration**, employers need to review their employment agreements to ensure they do not run afoul of these provisions**.

- **Find new ways to encourage internal reporting.** In response to increased financial incentives to whistleblowers who provide original information to the government, employers need to consider how best to encourage would-be whistleblowers to raise compliance concerns internally.

- **Audit subsidiary compliance.** While public companies are now well versed in the "compliance culture" created by SOX in 2002, companies must be mindful to extend the same corporate compliance structures to subsidiaries and other related entities. Employers should also audit existing compliance structures and develop ways to extend them to umbrella organizations.

The Wall Street Reform Act also instituted a number of significant new executive compensation requirements, many of which are immediately applicable and which will apply, in whole or in part, to almost all publicly traded companies. The Wall Street Reform Act addresses issues such as:

- Recovery of erroneously awarded compensation (clawbacks)
- Executive compensation disclosures (internal pay equity)
- Disclosure regarding employee and director hedging
- Voting by brokers
- Disclosures regarding whether the chairman and CEO are combined positions, and if so, why
- Shareholder vote on executive compensation disclosures ("say on pay")
- Enhanced compensation structure reporting applicable to covered financial institutions
- Compensation committee independence

A more detailed explanation of these significant executive compensation changes can be found in Morgan Lewis's July 16, 2010 LawFlash, "Financial Reform Bill Imposes Significant New Executive Compensation and Corporate Governance Requirements."[3]

We will continue to monitor the unfolding impact of this Financial Regulatory Reform. If you have any questions or would like more information on the issues discussed in this LawFlash, please contact the authors, **Sarah Bouchard** (215.963.5077; sbouchard@morganlewis.com) and **Tom Linthorst** (609.919.6642; tlinthorst@morganlewis.com), or any of the following Morgan Lewis attorneys:

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[3] *Available at* http://www.morganlewis.com/pubs/FRR_NewExecCompAndCorpGovReq_LF_16jul10.pdf.

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