WHISTLEBLOWER CLAIMS UNDER THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: THE NEW LANDSCAPE

Jill L. Rosenberg
Renée B. Phillips[1]

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act.[2] The legislation covers a wide range of topics in an effort to address the causes of the financial crisis of 2008 and 2009 that created vast turmoil and dislocations in the financial markets.

With respect to whistleblowing, the legislative history of the Act explains that "whistleblowers often face the difficult choice between telling the truth and the risk of committing 'career suicide.'"[3] It cites Madoff whistleblower Henry Markopolos's congressional testimony that "[w]histleblower tips were 13 times more effective than external audits" at uncovering "fraud schemes in public companies."[4]

Thus, Dodd-Frank includes significant new whistleblower incentives and protections, including the creation of SEC and CFTC (Commodities Futures Trading Commission) whistleblower programs, expansion of current whistleblower protections under the Sarbanes-Oxley Act of 2002, and a new whistleblower cause of action for employees performing tasks related to consumer financial products or services. The legislation "aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud."[5]

Significantly, the Dodd-Frank Act creates alternative paths for whistleblowers to assert their rights, often with different and conflicting rights, procedures. Enabling regulations to the SEC's Whistleblower Program became effective on August 12, 2011 and are codified at 17 C.F.R. Parts 240 and 249.

This paper provides an overview of the new legislation and regulations and their impact on employee whistleblower claims.

I. SECTIONS 748 AND 922: NEW SEC AND CFTC WHISTLEBLOWER INCENTIVES AND PROTECTIONS

The Dodd-Frank Act provides powerful monetary incentives for whistleblowers to report securities and commodities law violations to the SEC and CFTC, as well as strong protections for doing so. Sections 748 and 922 of the Act provide that whistleblowers who provide the respective Commissions with original information about violations of securities or commodities

---

[1] Jill Rosenberg is a Partner and Renée B. Phillips is a Senior Associate in the Employment Law Department of Orrick, Herrington & Sutcliffe LLP in New York City.
[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).
[3] S. Rep. No. 111-176 at 110-112 (2010).
[4] *Id.*
[5] *Id.*

laws to be awarded a share of between 10% and 30% of monetary sanctions ultimately imposed by the Commissions that exceed $1 million.

These provisions of the Act also prohibit employer retaliation against whistleblowers who provide information to the SEC or CFTC, assist in any investigation or legal action of the SEC or CFTC related to such information, or engage in any other protected activity under the Sarbanes-Oxley Act. An employee claiming retaliation under Dodd-Frank may bring an action directly in federal district court (as opposed to the procedure under SOX, where a complainant is first required to file an administrative complaint with the Department of Labor, OSHA), and can take advantage of a longer statute of limitations and broader remedies than those available under SOX.

A. Section 922's Whistleblower Bounty Provisions

Section 922 of the Dodd-Frank Act provides powerful monetary incentives for whistleblowers to report securities law violations to the SEC. This provision amends the Securities Exchange Act of 1934 to add a new section 21F. Pursuant to section 21F, "whistleblowers" who "voluntarily" provide the Commission with "original" information about violations of securities laws shall be awarded a share of between 10% and 30% of monetary sanctions ultimately imposed by the Commission where the sanctions exceed $1 million.[6] Specifically, the Act provides,

> In any covered judicial or administrative action, or related action, the Commission…shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to –
>
> (A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and
>
> (B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.[7]

Section 924 of Dodd-Frank required the SEC to establish a separate office specifically to administer and enforce section 922's whistleblower provisions.[8] It also required the SEC to issue final regulations implementing section 21F, which regulations became effective on August 12, 2011.[9]

---

[6] *See* Dodd-Frank Act, § 922(a); 15 U.S.C.A. § 78u-6 (2010).
[7] *See* 15 U.S.C. § 78u-6(b)(1).
[8] *See* 15 U.S.C. § 78u-7(d).
[9] *See* 15 U.S.C. § 78u-7(a); 17 C.F.R. Parts 240.21F *et seq*. and 249.1800-01 (2011).

1. Definition of Whistleblower

Section 922 defines a whistleblower as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."[10]

The SEC's regulations further define whistleblower for purposes of the bounty provision as follows:

> You are a whistleblower if, alone or jointly with others, you provide the Commission with information pursuant to the procedures set forth in § 240.21F-9(a) of this chapter, and the information relates to a possible violation of the federal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing, or is about to occur. A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower.[11]

Thus, a whistleblower must be an individual as opposed to an entity to be covered by the whistleblower bounty provision. Moreover, in stating that information must only relate to a "possible" violation to be covered, the SEC in its implementing regulations has adopted a broad view of the definition of whistleblower, making clear the agency's position that reporting of an "actual" or even "probable" violation of law, rule, or regulation is not required to meet the standard. The broad interpretation will likely be subject to challenge and clarification in the courts.

2. Eligibility for an Award

To be eligible for an award under the SEC bounty provision, the whistleblower must:

(1) voluntarily provide the Commission

(2) with original information

(3) that leads to the successful enforcement by the Commission of a federal court or administrative action

(4) in which the Commission obtains monetary sanctions totaling more than $1,000,000.[12]

The SEC will also pay awards based on amounts collected in certain "related actions," defined by the regulations as judicial or administrative actions brought by the U.S. Attorney General, an appropriate regulatory authority, a self-regulatory organization, or a state attorney general in a criminal case, which are based on the same original information that the

---

[10] *See* 15 U.S.C. § 78u-6(a)(6).

[11] *See* 17 C.F.R. § 240.21F-2. The regulations contain a further definition of whistleblower with respect to who qualifies for protection under the section's anti-retaliation provision, which is discussed in Section I.B, *infra*.

[12] *See* 15 U.S.C. § 78u(b); 17 C.F.R. § 240.21F-3(a).

whistleblower voluntarily provided to the Commission and that led the Commission to obtain monetary sanctions totaling more than $1,000,000.[13]

The SEC will not make an award to a whistleblower who has already been granted an award for the same related action by the Commodities Futures Trading Commission ("CFTC") pursuant to its whistleblower award program under Section 23 of the Commodities Exchange Act (7 U.S.C. 26).[14] Similarly, a whistleblower who is denied an award by the CFTC in a related action will be precluded from relitigating any issues before the SEC that were decided against the whistleblower as part of the CFTC's award denial.[15]

a. Voluntary Submission of Information

The SEC will consider a submission voluntary for purposes of a bounty award if it is made **before** the whistleblower (or his or her representative) receives a request, inquiry, or demand that relates to the subject matter of the submission (i) from the Commission; (ii) in connection with an investigation by the Public Company Oversight Accounting Board ("PCOAB") or a self-regulatory organization; or (iii) in connection with an investigation by Congress, any other authority of the federal government, or a state attorney general or securities regulatory authority.[16]

Even if the whistleblower is not compelled by subpoena or other applicable law to respond to a request, such a request from one of these authorities will remove a whistleblower from eligibility for a bounty award.[17] In addition, a submission will not be considered voluntary if the individual is required to report the information to the SEC as a result of a preexisting legal duty, a contractual duty that is owed to the SEC or one of the other authorities, or a duty that arises out of a judicial or administrative order.[18]

b. Original Information

Original information is defined as information that is:

(A) derived from the independent knowledge or analysis of a whistleblower;

(B) not known to the SEC from any other source, unless the whistleblower is the original source of the information;

(C) not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information; and

[13] *See* 17 C.F.R. § 240.21F-3(b).
[14] *See* 17 C.F.R. § 240.21F-3(b)(3).
[15] *See id.*
[16] *See* 17 C.F.R. § 240.21F-4(a)(1).
[17] *See* 17 C.F.R. § 240.21F-4(a)(2).
[18] *See* 17 C.F.R. § 240.21F-4(a)(3).

(D) provided to the SEC for the first time after July 21, 2010.[19]

(1) Independent Knowledge or Analysis

"Independent knowledge" is factual information in the whistleblower's possession that is not derived from publicly available sources.[20] The regulations explain that a whistleblower may gain independent knowledge from his or her experiences, communications, and observations in business or social interactions.[21] "Independent analysis" means the whistleblower's own analysis, whether done alone or with others, i.e., the whistleblower's examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public.[22]

(2) Exclusions from Independent Knowledge and Analysis

The SEC excludes a number of categories of information from the definition of "independent knowledge or analysis," and thus, excludes the individuals who report such information from eligibility for a bounty award. As described below, however, the exceptions to these exclusions may render them largely ineffective in preventing these categories of whistleblower disclosures.

The regulations provide that information will not be considered to be derived from independent knowledge or analysis if:

(1) the information is obtained through an attorney-client privileged communication, unless disclosure of the information would otherwise be permitted by an attorney pursuant to SEC rules, the applicable state attorney conduct rules, or otherwise; or

(2) the information is obtained in connection with legal representation of a client, unless disclosure would otherwise be permitted by an attorney.[23]

Thus, information learned through legal representation of a client will generally not be eligible for a whistleblower award under the SEC bounty provision.

In addition, individuals will not be eligible for a bounty if they learned the information because they were:

a. an officer, director, trustee, or partner of an entity where the information was learned from another or in connection with the entity's processes for handling possible violations of law;

b. a compliance or internal audit employee or an employee or contractor of an outside firm retained to perform these functions;

---

[19] *See* 15 U.S.C. § 78u-6(a)(3); 17 C.F.R. § 240.21F-4(b).
[20] *See* 17 C.F.R. § 240.21F-4(b)(2).
[21] *See id.*
[22] *See* 17 C.F.R. § 240.21F-4(b)(3).
[23] *See* 17 C.F.R. § 240.21F-4(b)(4)(i) and (ii).

c. employed or associated with a firm retained to conduct an investigation into possible violations of law; or

d. employed or associated with a public accounting firm, if the individual obtained the information through the performance of an engagement required of an independent public accountant under the federal securities laws and the information related to a violation by the engagement client or client's directors, officers, or other employees.[24]

The exclusions in (a) through (d) however, will not apply to preclude eligibility for a whistleblower bounty if any one of the following three conditions is met:

(1) the individual has a reasonable basis to believe that disclosure of the information to the SEC is necessary to prevent the entity from engaging in conduct likely to cause substantial injury to the financial interest or property of the entity or shareholders;

(2) the individual has a reasonable basis to believe that the entity is engaging in conduct that will impede an investigation of the misconduct; **or**

(3) at least 120 days have gone by since the individual provided the information to his or her supervisor, the entity's audit committee, chief legal officer, chief compliance officer or their equivalents, or at least 120 days have gone by since the individual received the information, if the individual received the information under circumstances indicating that one or more of these individuals or committees was already aware of the information.[25]

These broad exceptions to the exclusions may, in many cases, swallow the rule, as otherwise ineligible individuals can simply make a report to the company and then go to the SEC after 120 days and be eligible. In addition, otherwise ineligible individuals may report to the SEC, asserting that they are eligible because they reported conduct is likely to cause substantial injury or that an investigation of the misconduct was being impeded by the company.

Finally, in addition to the above categories, the regulations provide that information will not be considered to be derived from independent knowledge or analysis if the individual learned the information by violating a state or federal criminal law, as determined by a U.S. court, or if the individual learned the information from a person who is not eligible for a bounty, unless the information concerns possible violations involving that person.[26]

3. <u>Eligibility for an Award</u>

In addition to the above categories of individuals and information that the SEC will not consider eligible for a bounty under the independent knowledge or analysis inquiry, the regulations list several more requirements for eligibility for an award and categories of individuals who will not qualify for a bounty under section 922.

---

[24] *See* 17 C.F.R. § 240.21F-4(b)(4)(iii).
[25] *See* 17 C.F.R. § 240.21F-4(b)(4)(v).
[26] *See* 17 C.F.R. § 240.21F-4(b)(4)(iv) and (vi).

First, to be eligible, an individual must give the SEC information in the form and manner required by the regulations, although the SEC may waive any of its procedures based upon a showing of extraordinary circumstances.[27] Whistleblowers are also required to provide any follow-up information the SEC may request after the initial report and may be barred from eligibility for a bounty upon a refusal to do so.[28]

Second, the following categories of individuals are not eligible for a bounty under the Act and/or its regulations:

(1) members, officers, or employees of the SEC, the Department of Justice, an appropriate regulatory agency, a self-regulatory agency, the PCAOB, or any law enforcement association;

(2) members, officers, or employees of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority;

(3) individuals convicted of a criminal violation related to the action;

(4) individuals who obtained information through an audit of the company's financial statements, if making a whistleblower submission would be contrary to the requirements of Section 10A of the Exchange Act,

(5) persons who acquired information from individuals who obtained the information through an audit (unless the information was about the individuals' own violations or the individuals are not themselves excluded from using the information);

(6) spouses, parents, children, siblings, or those residing in the same household of an SEC member or employee;

(7) individuals who acquired the information from a person with the intent to evade any provision of the SEC's rules; or

(8) individuals who knowingly make false, fictitious, or fraudulent statements or representations, or knowingly use any false writing or document with the intent to mislead or hinder the SEC or another authority in a related action.[29]

4. <u>Incentives to Report Internally</u>

Perhaps the most controversial aspect of section 922's bounty provisions is that it strongly incentivizes employees to go directly to the SEC with concerns of violations rather than first reporting issues internally to the company to try to resolve them through internal compliance procedures. Many companies commenting on the SEC's proposed regulations urged that the SEC require internal reporting before a whistleblower could make disclosures to the SEC and be eligible for a whistleblower bounty. The SEC rejected such a requirement, and instead attempted

[27] *See* 17 C.F.R. § 240.21F-8(a).
[28] *See* 17 C.F.R. § 240.21F-8(b).
[29] *See* 15 U.S.C. § 78u(c)(2); 15 U.S.C. § 78u(i); 17 C.F.R. § 240.21F-8(c).

through its final regulations to incentivize employees in several ways to use their companies' internal compliance and reporting systems when appropriate.

First, the regulations provide that a whistleblower who first reports possible violations of the law internally to the company and within 120 days reports the same information to the SEC could be an eligible whistleblower whose submission is measured as if it had been made at the earlier internal reporting date.[30]

Second, the regulations provide that if the employee reports internally, and the company then provides information arising out of that report to the SEC, the employee will be eligible for a bounty as the original source of not only the information the employee provided to the company, but the information the company provided to the SEC, meaning a potentially greater award. To qualify under this rule, the employee must report to the SEC within 120 days of reporting to the company.[31]

Third and finally, with respect to the criteria for determining the amount of an award, the final rules expressly provide that a whistleblower's voluntary participation in an entity's internal compliance and reporting systems is a factor that can increase the amount of an award, and a whistleblower's interference with internal compliance and reporting is a factor that can decrease the amount of an award.[32]

Time will tell as to whether these so called "incentives" will achieve their stated objectives. Critics of the SEC's approach have argued that these efforts to incent employees would appear to pale in comparison to the powerful monetary motivations for employees to immediately secure their place in line at the SEC as the original source of information in quest of a potentially huge bounty award.

5. <u>Anonymous Reports to the SEC</u>

Reports under section 922 may be submitted anonymously, but in such cases an attorney must represent the whistleblower in submitting the information.[33] Before the attorney submits the information, the whistleblower must provide the attorney with a completed Form TCR (the required paperwork for a whistleblower report), signed under penalty of perjury.[34]

When submitting a report on behalf of an anonymous whistleblower, an attorney must certify that the attorney (1) has verified the whistleblower's identity; (2) has reviewed the completed Form TCR and that, to the best of the attorney's knowledge, information, and belief it is complete and accurate; (3) has obtained the whistleblower's non-waivable consent to provide the Commission with the whistleblower's Form TCR in the event the Commission requests it due to concerns of false representations; and (4) consents to submit the Form TCR within seven days of a request by the Commission.[35]

---

[30] *See* 17 C.F.R. § 240.21F-4(b)(7) ; 76 Fed. Reg. 34301.
[31] *See* 17 C.F.R. § 240.21F-4(c)(3); 76 Fed. Reg. 34301.
[32] *See* 17 C.F.R. § 240.21F-6; 76 Fed. Reg. 34301.
[33] *See* 15 U.S.C. § 78u(d)(2); 17 C.F.R. § 240.21F-9(c).
[34] *See id.*
[35] *See id.*

6. SEC's Communications With Employees

The SEC's regulations make clear that employers may not impede employees from communicating directly with the Commission staff about possible securities law violations, including by enforcing, or threatening to enforce, a confidentiality agreement.[36] Moreover, the SEC is not required to seek the consent of the entity's counsel before communicating directly with a whistleblower who has initiated communication with the Commission relating to a possible securities law violation.[37]

B. Section 922's Whistleblower Retaliation Protections

Section 922 of the Dodd-Frank Act also contains anti-retaliation protections for whistleblowers who report possible securities law violations. The anti-retaliation protections, like the bounty provisions, are codified in the new section 21F of the Securities Exchange Act of 1934. They provide:

> (h) PROTECTION OF WHISTLEBLOWERS.–
>
> (1) PROHIBITION AGAINST RETALIATION.–
>
> (A) IN GENERAL.--No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower –
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission.[38]

1. Procedures and Statute of Limitations

a. Federal Court Action

An individual alleging retaliation under section 21F can file suit directly in federal district court.[39] Unlike SOX, there is no requirement to first file a complaint with an agency and exhaust remedies prior to filing a district court action. Moreover, the regulations implementing section 21F provide that the anti-retaliation provisions "shall be enforceable in an action or

---

[36] *See* 17 C.F.R. § 240.21F-17(a).
[37] *See* 17 C.F.R. § 240.21F-17(b).
[38] *See* Dodd-Frank Act, § 922(a); 15 U.S.C.A. § 78u-6(h)(1)(A) (2010).
[39] *See* 15 U.S.C. § 78u-6(h)(1)(B)(i).

proceeding brought by the Commission."[40] Accordingly, the SEC may itself bring retaliation suits under the Act.

b. Statute of Limitations

In sharp contrast to SOX's 180-day statute of limitations, under section 21F an action must be filed either within six years after the date when the retaliation occurs or within three years after the date "facts material to the right of action are known or reasonably should have been known by the employee," but not more than ten years after the date of the violation.[41] This limitations period not only expands employers' potential liability under the Act as compared to SOX, it could create problems for employers who do not typically maintain employee records for ten years. Employers may want to consider reexamining their record retention policies in light of this provision.

2. Scope of Protections

Section 922 defines a whistleblower as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."[42]

Based on this statutory language, it would appear that the anti-retaliation provision only covers individuals who provide information "to the Commission." However, both the SEC and the first federal district court case to address the issue have interpreted scope of the Act's protections far more broadly.

3. Categories of Protected Reporting

a. District Court Interpretation

On May 4, 2011, a district court in the Southern District of New York issued the first decision interpreting the scope of Dodd-Frank's whistleblower anti-retaliation provisions. In *Egan v. TradingScreen, Inc.*,[43] Judge Sand interpreted the anti-retaliation provisions of section 21F as covering not only whistleblowers who provide information to the SEC, but also individuals whose disclosures are "required or protected" under the Sarbanes-Oxley Act ("SOX"), the Securities Exchange Act, 18 U.S.C. § 1513(e), or any other law, rule, or regulation subject to the SEC's jurisdiction.

Egan claimed that his employment was terminated after he informed the company's President that its CEO was diverting the company's corporate assets to another company that the CEO solely owned. Egan asserted that his termination under these circumstances constituted unlawful retaliation under section 21F.

---

[40] *See* 17 C.F.R. § 240.21F-2(b)(2).
[41] *See* 15 U.S.C. § 78u-6(h)(1)(B)(iii).
[42] *See* 15 U.S.C. § 78u-6(a)(6).
[43] *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011).

The defendants moved to dismiss Egan's retaliation claim on the ground that he was not a "whistleblower" covered by Dodd-Frank, because Egan made his reports to TradingScreen, not to the SEC. The court agreed with the defendants that, by its plain terms, Dodd-Frank's anti-retaliation provision prohibits retaliation against whistleblowers who provide information to the SEC, and that if Congress wanted to extend whistleblower protections to individuals beyond those who report to the SEC, it would have explicitly done so.[44]

But the court then looked at § 78u-6(h)(1)(A) and noted that, in addition to protecting lawful acts done by the whistleblower to provide information or testimony to the SEC, sub-section 78u-6(h)(1)(A)(iii) protects whistleblower disclosures that are required or protected under: (1) the Sarbanes-Oxley Act; (2) the Securities Exchange Act; (3) 18 U.S.C. § 1513(e); and (4) any other law, rule, or regulation subject to the jurisdiction of the Commission.[45]

The court determined that this created a contradiction in the statute, as "a literal reading of the definition of the term 'whistleblower'…requiring reporting to the SEC, would effectively invalidate…the protection of whistleblower disclosures that do not require reporting to the SEC." The court then determined that "the contradictory provisions of the Dodd-Frank Act are best harmonized by reading 15 U.S.C. § 78u-6(h)(1)(A)(iii)'s protection of certain whistleblower disclosures not requiring reporting to the SEC as a narrow exception to 15 U.S.C. § 78u-6(a)(6)'s definition of a whistleblower as one who reports to the SEC."[46]

Thus, under the court's reading of the statute, a plaintiff asserting a section 21F retaliation claim must *either*:

> allege that his information was reported to the SEC, *or* that his disclosures fell under the four categories of disclosures delineated by 15 U.S.C. § 78u-6(h)(1)(A)(iii) that do not require such reporting: those under the Sarbanes-Oxley Act, the Securities Exchange Act, 18 U.S.C. § 1513(e), or other laws and regulations subject to the jurisdiction of the SEC.[47]

The court dismissed Egan's claim without prejudice, permitting Egan to amend his complaint to include factual allegations in accordance with the standards it articulated.[48] Egan amended his complaint, and the defendants subsequently moved to dismiss the amended complaint. The court has not yet issued a decision on that motion. It remains to be seen whether other district or appellate courts will follow the court's rather broad reading of the statute in *Egan*.

b. <u>**SEC Final Rule**</u>

The SEC, in its final regulations adopted on May 25, 2011, took the same position as the district court in *Egan* that a whistleblower need not make a disclosure to the SEC to be protected

---

[44] *Id.* at *4.
[45] *Id.*
[46] *Id.* at *5.
[47] *Id.*
[48] *Id.* at *9-10.

under section 21F. Rather, under the agency's interpretation, an individual is a protected whistleblower if he or she provides covered information in a manner described in 21F(h)(1)(A), *i.e.*, the individual *either* provides the information to the SEC *or* in a disclosure otherwise required or protected under SOX, the Exchange Act, 18 U.S.C. 1513(e), or any other law, rule, or regulation subject to the SEC's jurisdiction.

The implications of this interpretation adopted by the SEC and the district court in *Egan* are significant: if any SOX-protected disclosures fall within the scope of Dodd-Frank's whistleblower provisions whether or not the employee reports to the SEC (despite the statutory definition of "whistleblower" as someone who reports "to the Commission"), employees in any SOX matter will arguably be able to bring their whistleblower retaliation claims under Dodd-Frank instead of SOX. As described above and further herein, Dodd-Frank has an expansive six to ten-year statute of limitations (as opposed to SOX's 180-day statute of limitations), a direct right of action in federal district court, as opposed to having to exhaust remedies before OSHA, and double back-pay damages. Thus, based on this interpretation of the Act, plaintiffs may opt to pursue SOX claims under the more employee-favorable provisions of Dodd-Frank, including claims that might otherwise be time-barred under SOX, instead of under OSHA's administrative scheme. Such a shift in strategy could greatly diminish OSHA's role in investigating and adjudicating SOX cases going forward, and could lead to the 180-day SOX statute of limitations becoming obsolete. The comments to the SEC's regulations did not address these implications with respect to the existing SOX statutory scheme. Nor did the court's opinion in *Egan* address the issue, probably because TradingScreen was not a SOX-covered entity. Again, it remains to be seen whether this interpretation will withstand further scrutiny as courts are called upon to interpret the Act.

4. **"Reasonable Belief" Standard**

Pursuant to the regulations, to be protected under section 21F, a whistleblower must possess a reasonable belief that the information being provided relates to a "possible" securities law violation (or, where applicable, a possible violation under SOX) that has occurred, is ongoing, or is about to occur.[49] The comments to the regulations explain that the reasonable belief standard requires that the employee hold a subjectively genuine belief that the information demonstrates a possible violation, and that this belief is one that a similarly situated employee might reasonably possess.[50] This is the same standard employed in the SOX context.[51]

The whistleblower need not provide information about an actual securities law violation to be covered, as the regulations make clear that it is sufficient for the whistleblower to reasonably believe that there is a possible violation that has occurred, is ongoing, or is about to occur.

[49] *See* 17 C.F.R. § 240.21F-2(b)(i).
[50] *See* 76 Fed. Reg. 34303.
[51] *See, e.g., Livingston v. Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir. 2008).

5. **“Providing Information” to the SEC**

Section 21F(h)(1)(A)(i) protects whistleblowers who “provide information” to the SEC in accordance with the statute. In *Egan v. TradingScreen, Inc.*,[52] it was undisputed that the plaintiff did not make any disclosures directly to the SEC. Rather, Egan reported alleged misconduct by the company’s CEO to the president of the company and its outside counsel. Egan nevertheless contended that he “provided information” to the SEC pursuant to 21F(h)(1)(A)(i) by initiating the inquiry into the CEO’s malfeasance and disclosing information to outside counsel in interviews, which, upon information and belief, outside counsel then reported to the SEC. Egan argued that these actions amounted to “jointly” providing information to the SEC with outside counsel. The defendants countered that, to be protected under section 21F, a whistleblower must personally provide information directly to the Commission.

The court chose to broadly interpret section 21F’s anti-retaliation provision and concluded that Egan “adequately alleged that he acted jointly with the Latham attorneys, in an effort to provide information to the SEC regarding [the CEO’s] alleged misconduct.”[53] Egan had not, however, adequately alleged that outside counsel *actually* reported the CEO’s alleged misconduct to the SEC, so the court dismissed the claim without prejudice, giving Egan the opportunity to amend his complaint to include such factual allegations.[54]

In reaching its conclusion that Egan adequately alleged that he acted jointly with his employer’s outside counsel in an effort to provide information to the SEC, the court drew a distinction between section 21F’s anti-retaliation provisions and its bounty provisions, stating with respect to the bounty provisions, “[o]bviously, a whistleblower must directly report to the SEC to receive a bounty award from the SEC.”[55]

Egan’s broad interpretation of what constitutes “providing information” to the SEC raises potential concerns for employers, who may unwittingly increase their exposure to a retaliation suit under Dodd-Frank by investigating and reporting issues to the SEC that stem from a whistleblower’s report. *Egan* is the first federal district court case to weigh in on the scope of Dodd-Frank’s anti-retaliation provisions, and it remains to be seen how influential this decision will be in other cases.

6. **Interaction with Bounty Provision**

The SEC’s final rule makes clear that section 21F’s anti-retaliation protections cover individuals whether or not they satisfy the provision’s requirements for a bounty award.[56]

[52] *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011).
[53] *Id.* at *9.
[54] *Id.* at *9-10. Egan has since amended his complaint, and the defendants moved to dismiss the amended complaint. The court has not yet issued a decision on that motion.
[55] *Id.* at *8.
[56] *See* 17 C.F.R. § 240.21F-2(b)(iii).

7. **Remedies**

The remedies available under section 21F are more generous than those available to whistleblowers under SOX. Upon a finding of retaliation, section 21F provides for the whistleblower's reinstatement, double back pay (as opposed to just back pay as under SOX), and attorneys' fees and other litigation costs.[57] There is no explicit provision for the recovery of non-pecuniary damages, such as emotional distress or loss of reputation damages. The Act does not provide for recovery of punitive damages.

8. **Pre-Dispute Arbitration Agreements/Waivers of Claims**

Unlike the amendments to SOX and the provisions of section 748 of Dodd-Frank (the CFTC's whistleblower provisions), which provide that their rights and remedies "may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement," section 21F does not explicitly ban predispute arbitration agreements or waivers of claims. It is the agency's position, however, as stated in the comments to the regulations, that such language is unnecessary because section 29(a) of the Exchange Act provides that "any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or any rule or regulation thereunder…shall be void."[58] The comments conclude, "Thus, under Section 29(a), employers may not require employees to waive or limit their anti-retaliation rights under Section 21F."[59] As such, it would appear under this interpretation of the statute in the enabling regulations that employers that have implemented mandatory arbitration by adopting pre-dispute arbitration programs will not be able to compel Dodd-Frank whistleblower retaliation claims to arbitration. Nor will standard release agreements that employees sign on separation of employment be effective to release such claims under Dodd-Frank. Again, it remains to be seen whether the courts will enforce this broad interpretation by the SEC.

C. **Section 748's Whistleblower Bounty Provisions**

Section 748 of the Dodd-Frank Act, codified at 7 U.S.C. § 26, provides powerful monetary incentives for whistleblowers to report commodities law violations to the Commodity Futures Trading Commission ("CFTC" or "Commission"). This provision amends the Commodity Exchange Act ("CEA") to add a new section 23, entitled "Commodity Whistleblower Incentives and Protections."

Pursuant to section 23, "whistleblowers" who "voluntarily" provide the CTFC with "original" information about violations of the CEA that leads to the successful enforcement of covered judicial or administrative actions, or related actions, shall be awarded a share of between 10% and 30% of monetary sanctions ultimately imposed by the CTFC or imposed in the related actions.[60] Specifically, the Act provides,

---

[57] *See* 15 U.S.C. § 78u-6(h)(1)(C).
[58] *See* 76 Fed. Reg. 34304.
[59] *See id.*
[60] *See* Dodd-Frank Act, § 748(b); 7 U.S.C. §26.

> In any covered judicial or administrative action, or related action, the Commission…shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to –
>
> (A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and
>
> (B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.[61]

On August 4, 2011, the CFTC issued final rules implementing section 23. Those rules will take effect sixty days after their publication in the Federal Register on August 25, 2011 (*i.e.*, on October 24, 2011) and will be found at 17 C.F.R. Part 165.[62]

Section 748 and its implementing regulations are somewhat similar to section 922 of Dodd-Frank, which governs the SEC's whistleblower bounty program. In sharp contrast to the SEC, which expects that it will receive approximately 30,000 whistleblower tips per year, the CFTC anticipates receiving about 100 whistleblower tips per year.[63] The CFTC bases this estimate on the volume of whistleblower tips received in the first eleven months after the passage of Dodd-Frank (less than two dozen), and an expectation that the volume of tips will increase as the public becomes more aware of the CFTC's whistleblower program.[64]

1. <u>Definition of Whistleblower</u>

Section 748 defines a whistleblower as "any individual, or 2 or more individuals acting jointly, who provides information relating to a violation of [the CEA] to the Commission, in a manner established by rule or regulation of the Commission."[65]

The CFTC's regulations further define whistleblower for purposes of the bounty provision as follows:

> The term 'whistleblower' or 'whistleblowers' means any individual, or two (2) or more individuals acting jointly, who provides information relating to a potential violation of the

---

[61] *See* 7 U.S.C. § 26(b)(1).
[62] *See* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister080411c.pdf.
[63] *Compare* 76 Fed. Reg. 113 at 34,354 (June 11, 2011) *with* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister080411c.pdf at 112-113.
[64] *See* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister080411c.pdf at 113 n.185.
[65] *See* 7 U.S.C. § 26(a)(7).

> Commodity Exchange Act to the Commission, in the manner established by §165.3. A company or another entity is not eligible to be a whistleblower.[66]

Thus, a whistleblower must be an individual as opposed to an entity to be covered by the whistleblower bounty provision. Moreover, in stating that information must only relate to a "potential" violation to be covered, the CFTC in its implementing regulations has adopted a broad view of the definition of whistleblower, making clear the agency's position that reporting of an "actual" or even "probable" violation of is not required to meet the standard. The broad interpretation will likely be subject to challenge and clarification in the courts.

Section 165.3 of the regulations also clarifies that to be considered a "whistleblower," an individual must submit information by means of a "Form TCR" (Tip, Complaint or Referral questionnaire) to the Commission.[67]

2. <u>Eligibility for an Award</u>

To be eligible for an award under the CFTC bounty provision, the whistleblower must:

(1) voluntarily provide the Commission

(2) with original information

(3) leading to successful resolution of a "covered judicial or administrative action," defined as an action brought by the CFTC under the CEA that results in monetary sanctions exceeding $1,000,000, **or** a "related action," defined as any judicial or administrative action brought by one of the following entities that is based upon original information provided by a whistleblower that led to a successful CFTC enforcement action: (i) the Department of Justice; (ii) an appropriate department or agency of the federal government acting within its jurisdiction; (iii) a registered entity, registered futures association, or self-regulatory organization; (iv) a State attorney general; (v) an appropriate State department or agency acting within its jurisdiction; or (vi) a foreign futures authority.[68]

To be eligible for a bounty under the CFTC whistleblower provisions, a whistleblower is also required by the CFTC's regulations (1) to provide the Commission with additional information, upon request, relating to the whistleblower's submission or eligibility for an award; and (2) to enter into a confidentiality agreement with the CFTC upon request.[69]

---

[66] *See* 17 C.F.R. § 165.2(p). The regulations contain a further definition of whistleblower with respect to who qualifies for protection under the section's anti-retaliation provision, which is discussed in Section I.D. *infra*.
[67] *See* 17 C.F.R. § 165.3
[68] *See* 7 U.S.C. §§ 26(a)(1); (a)(5); (b).
[69] *See* 17 C.F.R. § 165.5(b).

a. <u>Voluntary Submission of Information</u>

The CFTC will consider a submission "voluntary" for purposes of a bounty award if it is made **before** the whistleblower (or his or her representative) receives a request, inquiry, or demand about a matter "to which the information in the whistleblower's submission is relevant," from the CFTC, Congress, any other federal or state authority, the Department of Justice, a registered entity, a registered futures association, or a self-regulatory organization.[70] Even if the whistleblower is not compelled by subpoena or other applicable law to respond to a request, such a request from one of these authorities will remove a whistleblower from eligibility for a bounty award.[71]

Pursuant to the regulations, and in contrast to the SEC's bounty provisions, a whistleblower will be considered to have received a request, inquiry, or demand if documents or information provided by the whistleblower are within the scope of a request, inquiry, or demand to the whistleblower's employer.[72] There is, however, one exception: in the event the whistleblower's employer, after receiving the documents or information from the whistleblower, fails to provide the whistleblower's documents or information to the requesting authority in a timely manner, the whistleblower may submit the information and the submission will be considered voluntary.[73]

Finally, a submission will not be considered voluntary if the individual is under a preexisting legal or contractual duty to report the violations to one of the requesting authorities listed above, or if the whistleblower has a duty to disclose such information based on a judicial or administrative order.[74]

b. <u>Original Information</u>

"Original" information is defined as information that is:

(1) derived from the "independent knowledge" or "independent analysis" of a whistleblower;

(2) not already known to the Commission from any other source, unless the whistleblower is the original source of the information;

(3) not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit or investigation, or from the news media, unless the whistleblower is a source of the information; and

(4) provided to the CFTC for the first time after July 21, 2010.[75]

---

[70] *See* 17 C.F.R. § 165.2(o).
[71] *See id.*
[72] *See id.*
[73] *See id.*
[74] *See id.*
[75] *See* 7 U.S.C. §26(a)(4); 17 C.F.R. § 165.2(k).

i. Independent Knowledge or Analysis

"Independent knowledge" is defined by the regulations as factual information in the whistleblower's possession that is not generally known or available to the public.[76] The regulations explain that a whistleblower may gain independent knowledge from his or her experiences, communications, and observations in personal, business or social interactions.[77] "Independent analysis" means the whistleblower's own analysis, whether done alone or in combination with others.[78]

ii. Exclusions from Independent Knowledge

The CFTC will not consider information to be derived from a whistleblower's independent knowledge if the whistleblower obtained the information:

(1) from sources generally available to the public, such as corporate filings and the media;

(2) through a communication that was subject to the attorney-client privilege, unless the disclosure is otherwise permitted by applicable federal or state attorney conduct rules;

(3) in connection with the legal representation of a client on whose behalf the whistleblower, or the whistleblower's employer or firm, has been providing services, where the whistleblower seeks to use the information to make a submission for the whistleblower's own benefit, unless disclosure is authorized by applicable federal or state attorney conduct rules;

(4) because the whistleblower was an officer, director, trustee, or partner of an entity and another person informed the whistleblower of allegations of misconduct, or the whistleblower learned the information in connection with the entity's processes for identifying, reporting, and addressing possible violations of law;

(5) because the whistleblower was an employee whose principal duties involved compliance or internal audit responsibilities; or

(6) by means or in a manner that is determined by a United States court to violate applicable federal or state criminal law.

If the whistleblower falls under exclusions (4) or (5), however, his or her information will nevertheless be considered to be derived from independent knowledge if one of the following three conditions is met:

(1) the whistleblower has a reasonable basis to believe that disclosure of the information to the CFTC is necessary to prevent the entity from engaging

[76] *See* 17 C.F.R. § 165.2(g).
[77] *See id.*
[78] *See* 17 C.F.R. § 165.2(h).

in conduct likely to cause substantial injury to the financial interest or property of the entity or investors;

(2) the whistleblower has a reasonable basis to believe that the entity is engaging in conduct that will impede an investigation of the misconduct; or

(3) at least 120 days have elapsed since the whistleblower provided the information to the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or the whistleblower's supervisor, or since the whistleblower received the information, if the whistleblower received it under circumstances indicating that one of the persons or committees above was already aware of the information.

These broad exceptions to exclusions (4) and (5) may, in many cases, swallow the rule of ineligibility, as otherwise ineligible individuals can make a report to the company and then go to the CFTC after 120 days and be eligible. In addition, otherwise ineligible individuals may report to the CFTC, asserting that they are eligible because they reported conduct that is likely to cause substantial injury, or an investigation of the misconduct was being impeded by the company.

c. <u>Additional Categories of Ineligible Individuals</u>

In addition to the above categories of individuals and information that the CFTC will not consider eligible for a bounty under the independent knowledge inquiry, the statute lists several more categories of individuals who will not qualify for a bounty under section 748. It provides that no award shall be made to any whistleblower who:

(1) is, or was at the time of acquiring the original information, a member, officer or employee of certain federal regulatory agencies, the Department of Justice, a registered entity, a registered futures association, a self-regulatory organization, or a law enforcement organization;

(2) is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award;

(3) submits information that is based on facts underlying the covered action submitted previously by another whistleblower;

(4) fails to submit information to the CFTC in such form as it may, by rule or regulation, require; or

(5) knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or makes or uses any false writing or document knowing same to contain any false, fictitious, or fraudulent statement or entry.[79]

The regulations further provide that the following categories of individuals will not be eligible:

---

[79] *See* 7 U.S.C. §26(c)(2); §26(m). *See also* 17 C.F.R. § 165.6(a)(1); (a)(2); (a)(3); and (a)(5).

(1) individuals who acquired the information from certain categories of ineligible individuals;[80]

(2) individuals who are members, officers, or employees of either a foreign regulatory authority or law enforcement organization, individuals who were in such a role at the time they acquired the original information, or individuals who acquired the original information as a result of being in such a role;[81] or

(3) individuals who acquired the original information from any other person with the intent to evade any provision the CFTC's implementing regulations.[82]

Although a whistleblower will be ineligible for a bounty based on any of the above criteria, the whistleblower will still be covered under section 748's anti-retaliation protections.[83]

3. Incentives to Report Internally

Section 748's bounty provisions strongly incentivize employees to go directly to the CFTC with concerns of violations rather than first reporting issues internally to the company to try to resolve them through internal compliance procedures, as the first whistleblower who provides "original" information to the Commission will be the one to potentially receive a generous bounty. Several organizations commenting on the CFTC's proposed regulations urged that the CFTC require internal reporting to the company before a whistleblower could make disclosures to the CFTC and be eligible for a whistleblower bounty. The CFTC, like the SEC, rejected such a requirement, and instead attempted through its final regulations to incentivize employees in several ways to use their companies' internal compliance and reporting systems when appropriate.

First, the regulations provide that a whistleblower who first reports possible violations of the law internally to the company and then within 120 days reports the same information to the CFTC could be an eligible whistleblower whose submission is measured as if it had been made at the earlier internal reporting date.[84]

Second, the regulations provide that if the employee reports internally, and the company then provides information arising out of that report to the CFTC, the employee will be eligible for a bounty as the original source of, not only the information the employee provided to the company, but the information the company provided to the CFTC, meaning a potentially greater award. To qualify under this rule, the employee must report to the CFTC within 120 days of reporting to the company.[85]

---

[80] *See* 17 C.F.R. § 165.6(a)(4).
[81] *See* 17 C.F.R. § 165.6(a)(6) and (7).
[82] *See* 17 C.F.R. § 165.6(a)(8).
[83] *See* 17 C.F.R. § 165.6(b).
[84] *See* 17 C.F.R. § 165.2(l)(2).
[85] *See* 17 C.F.R. § 165.2(i)(3).

Third and finally, with respect to the criteria for determining the amount of an award, the final rules expressly provide that a whistleblower's voluntary participation in an entity's internal compliance and reporting systems is a factor that can increase the amount of an award, and a whistleblower's interference with internal compliance and reporting is a factor that can decrease the amount of an award.[86]

Time will tell as to whether these incentives will achieve their stated objectives or whether these efforts to incent employees will be insufficient in comparison to the powerful monetary motivations for employees to immediately secure their place in line at the CFTC as the original source of information in quest of a potentially huge bounty award.

4. <u>Anonymous Reports to the CFTC</u>

Under section 748, a whistleblower need not be represented by counsel to submit a whistleblower report of an alleged violation to the CFTC anonymously. This is in contrast to the SEC's whistleblower program, which requires whistleblowers reporting anonymously to be represented by counsel.[87]

If, however, the whistleblower subsequently wishes to request a bounty award based on information anonymously provided, at that point the whistleblower has two choices: he or she may either (1) identify him/herself on a Form WB-APP (the required paperwork for requesting an award); or (2) retain counsel in order to request an award anonymously.[88]

A whistleblower who wishes to remain anonymous during the award request process must provide his or her counsel with a completed Form WB-APP, of which counsel must retain a signed original.[89] The whistleblower's counsel may then submit a version of the Form WB-APP signed solely by counsel and that does not reveal the whistleblower's identity.[90] Upon the CFTC's request, however, the whistleblower's counsel must produce the whistleblower's signed original WB-APP to the CFTC.[91]

Prior to the payment of an award under section 748, a whistleblower is required to identify him or herself.[92] The whistleblower's identity must be verified in a form and manner that is acceptable to the CFTC prior to the payment of any award.[93]

5. <u>CFTC's Communications With Employees</u>

The CFTC's regulations provide that, to the extent a whistleblower is a director, officer, member, agent, or employee of an entity that has counsel, once the whistleblower has initiated a communication with the CFTC relating to a potential violation of the CEA, the CFTC's staff is

---

[86] *See* 17 C.F.R. §§ 165.9(b)(4) and 165.9(c)(3).
[87] *See* 17 C.F.R. § 240.21F-9(c).
[88] *See* 7 U.S.C. §26(d)(2)(A); 17 C.F.R. § 165.7(c).
[89] *See* 17 C.F.R. § 165.7(c)(2).
[90] *See id.*
[91] *See id.*
[92] *See* 7 U.S.C. §26(d)(2)(B); 17 C.F.R. § 165.7(c).
[93] *See* 17 C.F.R. § 165.7(c).

authorized to communicate directly with the whistleblower regarding the subject matter of the whistleblower's communication, without seeking the consent of the entity's counsel.[94]

D. Section 748's Whistleblower Anti-Retaliation Provisions

Section 748 of the Dodd-Frank Act, codified at 7 U.S.C. § 26, amended the Commodity Exchange Act ("CEA") to add a new section 23, which, in addition to containing a whistleblower bounty provision, contains anti-retaliation protections for whistleblowers who report violations of the CEA to the CFTC.[95] Specifically, section 23(h) provides:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower--
>
> **i.** in providing information to the Commission in accordance with subsection (b);[96] or
>
> **ii.** in assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information.[97]

On August 4, 2011, the CFTC issued final rules implementing section 23. Those rules will take effect sixty days after their publication in the Federal Register on August 25, 2011 (*i.e.*, on October 24, 2011) and will be found at 17 C.F.R. Part 165.[98]

1. Who is Covered?

The statute defines a "whistleblower" as "any individual, or 2 or more individuals acting jointly, who provides information relating to a violation of this chapter to the Commission, in a manner established by rule or regulation of the Commission."[99]

The regulations define a "whistleblower" slightly differently, as "any individual, or 2 or more individuals acting jointly, who provides information relating to a *potential violation* of this chapter to the Commission, in a manner established by rule or regulation of the Commission."[100] The comments to the regulations explain that the term "potential violation" is used in the regulations to make clear that the whistleblower anti-retaliation protections set forth in section

---

[94] *See* 17 C.F.R. § 165.18.

[95] *See* Dodd-Frank Act, §748; 7 U.S.C. §26(h).
[96] Subsection (b) provides, in relevant part: "In any covered judicial or administrative action, or related action, the Commission…shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action…." 7 U.S.C. §26(b).
[97] *See* 7 U.S.C. §26(h)(1).
[98] *See* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister080411c.pdf.
[99] S*ee* 7 U.S.C. §26(a)(7).
[100] *See* 17 C.F.R. § 165.2(p) (emphasis added).

23(h) "do not depend on an ultimate adjudication, finding or conclusion that the conduct identified by the whistleblower constituted a violation of the CEA."[101] This definition of whistleblower in the regulations, to the extent it differs from the plain statutory text, will likely be subject to challenge in the courts.

The regulations also provide that a whistleblower is covered by section 23(h) if:

(1) the whistleblower possesses a "reasonable belief" that the information being provided relates to a "possible violation of the CEA, or the rules or regulations thereunder, that has occurred, is ongoing, or is about to occur;" and

(2) provides that information "in a manner described in §165.3" of the regulations, *i.e.,* submits a completed Form TCR (Tip, Complaint or Referral questionnaire) to the CFTC.[102]

The regulations further state that the anti-retaliation provisions apply "whether or not the whistleblower satisfies the requirements, procedures and conditions to qualify" for a bounty award, and clarify that a "company or another entity is not eligible to be a whistleblower."[103]

2. <u>Statute of Limitations and Procedures For Enforcement</u>

Anti-retaliation claims under section 23(h) must be filed in federal district court "not more than 2 years" after the alleged retaliation occurs."[104] If the whistleblower is an employee of the federal government, however, the claim must be filed with the Merit Systems Protection Board in accordance with 5 U.S.C. §1221.[105]

Pursuant to the statute, witness subpoenas may be served at any place in the United States.[106]

3. <u>Remedies</u>

The remedies available to an employee that prevails in a whistleblower action under section 23(h) include:

- reinstatement with the same seniority status that the individual would have had, but for the retaliation;
- back pay, with interest; and
- compensation for any special damages resulting from the retaliation, including litigation costs, expert witness fees, and reasonable attorney's fees.[107]

---

[101] *See* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister080411c.pdf. at 40-41.
[102] *See* 17 C.F.R. § 165.2(p).
[103] *See id.*
[104] 7 U.S.C. §26(h)(1)(B).
[105] 7 U.S.C. §26(h)(1)(B)(i).
[106] 7 U.S.C. §26(h)(1)(B)(ii).

Section 23(h) does not provide for the recovery of punitive damages.[108]

4. Pre-Dispute Arbitration Agreements/Waivers of Claims

Section 23 provides that "[t]he rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment including a predispute arbitration agreement" and further provides that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."[109] As such, employers that have implemented mandatory arbitration by adopting pre-dispute arbitration programs will not be able to compel section 23 whistleblower retaliation claims to arbitration. It also appears that standard release agreements that employees sign on separation of employment be not be effective to release such claims under section 23.

II. SECTION 1057: NEW CONSUMER FINANCIAL WHISTLEBLOWER PROTECTIONS

Section 1057 of the Dodd-Frank Act creates a new whistleblower cause of action for employees performing tasks related to the offering or provision of consumer financial products or services. The effective date is July 11, 2011.[110] Section 1057 of the Act prohibits retaliation against employees who provide information to their employers or to the government they reasonably believe to be a violation of the Consumer Financial Protection Act of 2010 (which is Title X of the Dodd-Frank Act) or any other provision of law subject to the jurisdiction of the Bureau of Consumer Financial Protection. This provision also protects employees who object to, or refuse to participate in, any activity that the employee reasonably believes to be a violation of any law, rule, or standard of the Bureau, who testify in proceedings relating to same, or who file, institute or cause to be filed any proceeding under any Federal consumer financial law. Aggrieved employees are required to file a complaint with the Department of Labor, OSHA within 180 days of an alleged violation, and the procedure for handling such complaints, as well as the burdens of proof, remedies, and ability of a complainant to file an action in federal district court and demand a jury trial, are somewhat similar to the scheme to which employers have become accustomed under SOX, but with several differences, as described in more detail below.

A. Covered Employees

Section 1057 covers a wide range of employees. The section covers employees who perform "tasks related to the offering or provision of a consumer financial product or service."[111] A "consumer financial product or service" is defined by the Act as any of the following products

---

107 7 U.S.C. §26(h)(1)(C).
108 *See id.*
109 7 U.S.C. §26(n).
110 *See* http://www.whistleblowers.gov/acts/dfa-1057.html.
111 12 U.S.C. § 5567(b).

or services "offered or provided for use by consumers primarily for personal, family, or household purposes"[112]:

- Extending credit and servicing loans.
- Extending or brokering leases of personal or real property that are the functional equivalent to purchase finance arrangements.
- Providing real estate settlement services or performing appraisals of real estate or personal property.
- Engaging in deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer.
- Selling, providing, or issuing stored value or payment instruments.
- Providing check cashing, collection, or guaranty services.
- Providing payments or other financial data processing products or services to a consumer by any technological means.
- Providing financial advisory services to consumers on individual financial matters or relating to proprietary financial products or services.
- Collecting, analyzing, maintaining, or providing consumer report information or other account information.
- Collecting debt related to any consumer financial product or service.
- Other financial products or services as may be defined by the Bureau of Consumer Financial Protection if it finds that the product or service is: (1) entered into or conducted as a subterfuge or with a purpose to evade any Federal consumer financial law; or (2) permissible for a bank or for a financial holding company to offer or to provide under any provision of a Federal law or regulation applicable to a bank or a financial holding company, and has or likely will have, a material impact on consumers.[113]

B. Protected Activities

Section 1057 protects employees from termination or other forms of discrimination if they engage in any of the following activities:

[112] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1956 (2010).
[113] *Id*. at 1958–1960.

- providing information to their employer or the government relating to violations of the Consumer Protection Act of 2010 (Title X of the Dodd-Frank Act) or violations of any other provision of law that is subject to the jurisdiction of the Bureau [of Consumer Financial Protection] or any rule, order, standard, or prohibition prescribed by the Bureau;"

- testifying or intending to testify about the above violations;

- filing, instituting or causing the filing or institution of a proceeding under any Federal consumer financial law; or

- objecting to, or refusing to participate in activities reasonably believed to be in violation of any law, rule, order, standard, or prohibition subject to the jurisdiction of, or enforceable by, the Bureau.[114]

C. Claim Procedures

Section 1057 sets out procedures and timeframes for handling claims similar to those found under SOX. To begin the process the employee must file his or her claim with the Department of Labor, OSHA no later than 180 days after the violation occurs.[115] Once OSHA receives the claim, it must notify the party named in the complaint in writing that (1) a complaint was filed, (2) the allegations in the complaint, (3) the evidence supporting the complaint, and (4) the opportunities available to the party to respond to the complaint.[116]

Within 60 days from the time the employee filed the complaint and after hearing from both parties, OSHA must investigate and determine whether there is reasonable cause to believe the complaint has merit.[117] The agency must then notify the parties of the decision[118] and if it does decide there is reasonable cause, it must issue a preliminary order granting relief.[119] The parties then have 30 days from the time they receive notice of the determination to file objections and request a hearing, before the order is deemed final.[120] The filing of objections will not operate to stay any reinstatement remedy contained in the preliminary order.[121]

If such hearing is requested and held, the Department of Labor has 120 days from its conclusion to issue a final order, during which time the parties have the opportunity to settle and have the proceeding terminated.[122] Then after the final order is issued, "any person adversely affected or aggrieved" by it may file a petition of review with the Court of Appeals in which the violation occurred or in which the complainant resided on the date of the violation.[123] Such a

---

[114] 12 U.S.C. § 5567(a)(1)-(3).
[115] 12 U.S.C. §5567(c)(1)(A).
[116] 12 U.S.C. §5567(c)(1)(B)(i)-(iv).
[117] 12 U.S.C. §5567(c)(2)(A).
[118] *Id*.
[119] 12 U.S.C. §5567(c)(2)(B).
[120] 12 U.S.C. §5567(c)(2)(C).
[121] *Id.*
[122] 12 U.S.C. §5567(c)(4)(A). The Secretary is a party to such settlement agreements. *Id.*
[123] 12 U.S.C. §5567(c)(4)(E).

petition does not act as a stay of the order.[124] If any party does not comply with the final order, the Secretary of Labor or the party on whose behalf the order was issued may file a civil action for enforcement in district court.[125]

D. Burdens of Proof

To demonstrate a violation, the employee must make a *prima facie* showing that his or her protected activity was a contributing factor in the alleged unfavorable personnel action.[126] If such showing is not made OSHA will not conduct an investigation and will dismiss the complaint.[127] Even if the employee makes the *prima facie* showing, however, no investigation will be conducted if the employer can demonstrate by clear and convincing evidence that it would have taken the same action against the employee regardless of the employee's alleged protected activity.[128]

E. Remedies

Upon a determination that unlawful retaliation under the Act has occurred, OSHA "shall" order the employer:

- to take affirmative action to abate the violation;
- to reinstate the employee to his or her former position, together with compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment;
- to provide compensatory damages; and
- to pay the employee's litigation costs and attorneys' fees.[129]

F. Penalty for Frivolous Claims

If the agency finds that an employee's claim is frivolous or was brought in bad faith, it may order the employee to pay up to $1,000 of the employer's attorney fees.[130]

G. *De Novo* Review In Federal District Court

If the Department of Labor fails to issue a final order within 210 days from the time the complaint was filed or within 90 days from the time the parties were given written notice of the agency's decision, the employee may choose to file his or her claim in federal district court.[131]

[124] 12 U.S.C. §5567(c)(4)(E).
[125] 12 U.S.C. §5567(c)(5)(A)-(B).
[126] 12 U.S.C. §5567(c)(3)(A).
[127] *Id*.
[128] 12 U.S.C. §5567(c)(3)(B).
[129] 12 U.S.C. §5567(c)(4)(B)(i)-(ii).
[130] 12 U.S.C. §5567(c)(4)(C)
[131] 12 U.S.C. §5567(c)(4)(D)(i)

The district court then will review the claim *de novo* and, if warranted, grant the appropriate relief "to make the employee whole."[132] A jury trial is expressly made available for these causes of action.[133]

H. No Waiver Provision

As a general matter, employees may not waive their rights and remedies under Section 1057 by any "agreement, policy, form or condition of employment, including by any predispute arbitration agreement."[134] Thus, employers will typically be unable to compel arbitration of claims under Section 1057 based on predispute arbitration agreements. It also appears that employers may not be able to enforce separation and release agreements, unless such releases are executed after a complaint has been filed with the Department of Labor or in court.

There is, however, one limited exception in which predispute arbitration agreements will be deemed enforceable. If the arbitration provision at issue is contained in the parties' collective bargaining agreement, and the employee alleges retaliation pursuant to subsection (a)(4) of the statute for objecting to, or refusing to participate in, an activity that he or she believed was in violation of any provision of the law that is subject to the jurisdiction of the Bureau of Consumer Financial Protection, such an arbitration provision shall be enforceable.[135]

III. SWEEPING AMENDMENTS TO § 1514A OF THE SARBANES-OXLEY ACT

The Dodd-Frank Act expanded the scope of SOX's whistleblower protections in several key ways.

The statute of limitations was broadened from 90 to 180 days to file a complaint with OSHA.[136]

SOX plaintiffs are now entitled to a jury trial, which was an unsettled question under SOX case law.[137]

Non-publicly traded subsidiaries of publicly traded companies are now covered by SOX, by amendment to the definition of "publicly traded company" to include any "subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company." Prior to this amendment, the Department of Labor took the position that employees of non-publicly traded subsidiaries were generally not covered by the Act absent a showing of a substantial nexus between the parent and subsidiary, significantly narrowing the scope of coverage.[138]

---

132 12 U.S.C. §5567(c)(4)(D)(i)-(ii)
133 12 U.S.C. §5567(c)(4)(D)(i).
134 12 U.S.C. §5567(d)(1)-(3)
135 12 U.S.C. §5567(d)(3)
136 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(c)(1), 124 Stat. 1376, 1848 (2010); 18 U.S.C. § 1514A(b)(2)(D).
137 18 U.S.C. § 1514A(b)(2)(E).
138 18 U.S.C. § 1514A(a).

"Nationally recognized statistical ratings organizations" are now covered by SOX, so employees of these organizations will now have the benefit of SOX whistleblower protection.[139]

Pre-dispute arbitration agreements will no longer be enforceable under SOX (except perhaps in the collective bargaining agreement context), nor will the rights and remedies under SOX be capable of waiver by agreement. This means that employers will no longer be able to compel arbitration under SOX, and that releases of SOX claims in general releases or settlement agreements with employees may not be enforceable unless such releases are executed after a complaint has been filed with the Department of Labor or in court.[140]

[139] 18 U.S.C. § 1514A(a).
[140] 18 U.S.C. § 1514A(e).