

# PUBLICATION

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## Dodd-Frank Law Signals Open Season for Financial Whistle Blowing Complaints

August 19, 2010

President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA) into law on July 21, 2010. Notable among its many provisions was the DFA's *creation* of whistleblower rights for direct reports to the Securities and Exchange Commission, the Commodity Futures Trading Commission and financial services employees, as well as its *enhancement* of anti-retaliation provisions under Sarbanes-Oxley and the False Claims Act.

### New Whistleblowing Provisions

Individuals who provide original information to the SEC and/or CFTC that results in the payment of monetary sanctions greater than \$1 million will receive a reward of between 10 and 30 percent. "Original information" must come from the independent knowledge or analysis of the whistleblower, must not already be known to the SEC/CFTC, and cannot be exclusively derived from other administrative hearings, governmental reports, audits, investigations or the media. The DFA does not provide whistleblowers with a private right of action to prosecute securities fraud or other SEC violations. It does, however, provide a private right of action to individuals who allegedly suffer retaliation for engaging in protected expression, such as providing information to the SEC, participating in investigations or SEC actions, or making appropriate disclosures under SOX, the Securities Exchange Act of 1934 or other laws under the SEC's jurisdiction. This private right of action is not limited to employees, but rather extends to any individual allegedly threatened, harassed or mistreated on account of their protected activity. Remedies include reinstatement, double back pay with interest and attorneys' fees. The statute of limitations for such actions is either *six years* after the date on which the retaliation occurred, or *three years* after the retaliation became known or should have been known to the individual.

The DFA likewise protects financial services employees who disclose information about allegedly fraudulent or unlawful conduct related to the offering or provision of a consumer financial product or service. Unlike whistleblowing provisions that apply to protected expression under the SEC/CFCTC, only employees are covered by this provision, and all employees who wish to complain of retaliation must file a complaint with the Department of Labor within 180 days of the alleged retaliation. Those administrative complaints may either be brought to an Administrative Law Judges or may be filed in federal court. Notably, these claims may not be made the subject of mandatory arbitration.

### Enhanced Whistleblowing Provisions

The DFA now doubles the SOX statute of limitations period from 90 to 180 days, and it clarifies that SOX litigants are entitled to a trial by jury. Moreover, subsidiaries and affiliates of publicly-traded companies are now subject to SOX if their financial information is included in the public company's consolidated financial statements. Last, SOX whistleblowing claims may no longer be subject to mandatory arbitration agreements, nor may they be waived by private agreements.

The DFA also amends the FCA's anti-retaliation provisions by expanding protected expression to individuals who engage in consumer protection efforts and by uniformly extending the statute of limitations period for FCA retaliation claims to three years rather than tying it to existing state statutes.

## What These Changes Mean

We expect the DFA to meaningfully increase the volume of whistleblowing complaints as well as increase the recovery for successful complainants. Accordingly, training on SOC, CFTC, FCA and other corporate compliance legislation is more critical than ever. To get more information on these and other changes to the regulatory landscape, contact your Baker Donelson attorney or any of our nearly 70 Labor & Employment attorneys, located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.*

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