

FINANCIAL INSTITUTIONS ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Significant Whistleblower Incentives and Protections in the Dodd-Frank Wall Street Reform and Consumer Protection Act

July 22, 2010

On July 21, 2010, President Obama signed the 2,319-page Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") into law. Among other things, the Act provides significant incentives and protections to whistleblowers through amendments to both the Commodity Exchange Act and the Securities Exchange Act of 1934 ("the Securities Exchange Act").¹ Financial institutions or their holding companies with securities registered under the Securities Exchange Act have always been susceptible to claims of allegedly materially misstating their financial condition or results of operations (for example, by overstating the fair value of their financial assets or omitting material information from their public filings). However, those risks are greatly amplified by the Act's empowerment and protection of whistleblower plaintiffs.

Incentives

Under the Act, whistleblowers who provide original information to the Commodity Futures Trading Commission ("CFTC") or the Securities and Exchange Commission ("SEC") of alleged violations of the Commodity Exchange or Securities Exchange Acts are entitled to an award of between 10 percent and 30 percent of the amount collected from the violator. Certain public servants with duties to uncover those violations, including law enforcement agents and SEC officials, are ineligible to receive the monetary incentives. The CFTC and the SEC have discretion in whether to award the incentives, to whom the incentives should be given, and what amount should be awarded based on criteria in the Act. However, the whistleblower has the right to appeal the CFTC's or the SEC's determination to the appropriate United States Court of Appeals.

Whistleblower Protections

A significant protection under the Act is that the whistleblower may provide the original information and seek the incentives under that Act anonymously, although he or she must disclose his or her identity to the CFTC or the SEC before the incentives are paid out.

The Act also provides substantial anti-retaliation protection to whistleblowers. While whistleblowers were previously required to pursue administrative remedies for their employers'

¹ Dodd-Frank Act, 111th Cong. §§ 748, 922 (2010).

retaliatory actions, the Act now provides that whistleblowers may bring complaints for retaliatory conduct directly in the United States District Courts. Significantly, the Act deems pre-dispute arbitration agreements related to whistleblowers' claims to be invalid and unenforceable. Moreover, the statute of limitations for alleged retaliatory conduct is expanded to two years after the claimed retaliation under the Commodity Exchange Act, and six years after the retaliatory conduct under the Securities Exchange Act. [Under the Securities Exchange Act only, the retaliatory conduct claim also may be brought within three years of when the facts giving rise to the claim were known or reasonably should have been known if that period is longer than six years from the retaliation itself. In no event, however, can a claim be brought more than 10 years after the violation.]

The remedy for retaliatory conduct against a whistleblower under the Commodity Exchange Act is reinstatement at the same seniority status, back pay with interest and other special damages, including litigation costs, expert witness fees and attorney's fees. Relief under the Securities Exchange Act is largely identical, but it allows for twice the amount of back pay with interest.

Adapting to the Dodd-Frank Act's Whistleblower Provisions

An important change to which many businesses will need to adapt is the possibility that retaliation claims may now be brought by whistleblowers as late as 10 years after the claimed retaliation. Businesses should review their record retention policies in light of this change to preserve a decade's worth of documentation of non-retaliatory reasons for disciplinary conduct against a whistleblower. In addition, although pre-dispute arbitration clauses are commonplace in employment agreements, businesses need to be aware that these clauses will not be enforced with respect to whistleblowers' retaliation claims. Finally, while the Act does provide for criminal prosecution of whistleblowers who provide false information, the financial incentives available to whistleblowers under the Act (which could be worth tens or even hundreds of millions of dollars) seems certain to increase this type of high-dollar, high-profile litigation. To minimize the likelihood of increased CFTC and/or SEC investigations, as well as related whistleblower litigation, businesses should review their internal reporting policies to provide potential whistleblowers with increased opportunities to report information internally before turning to the CFTC or the SEC.

Additional analysis of those provisions of the Act affecting community banks and their holding companies will be forthcoming in a separate alert.

If you have any questions regarding the information in this alert, or with respect to other provisions for this legislation, please contact any of the attorneys in our business or litigation Financial Institutions Groups listed below.

Bass, Berry & Sims Financial Institutions Attorneys

Annie T. Christoff

(901) 543-5939

achristoff@bassberry.com

M. Jason Hale

(615) 742-6573

jhale@bassberry.com

Brian R. Iverson

(615) 742-7918

biverson@bassberry.com

Robins H. Ledyard

(615) 742-6259

rledyard@bassberry.com

Stephen W. Ragland

(901) 543-5917

sragland@bassberry.com

William G. Whitman

(901) 543-5931

bwhitman@bassberry.com

Tiffany A. Yates

(901) 543-5933

tyates@bassberry.com

E. Steele Clayton, IV

(615) 742-6205

sclayton@bassberry.com

Colleen D. Hitch

(901) 543-5929

chitch@bassberry.com

Paul G. Jennings

(615) 742-6267

pjennings@bassberry.com

Anthony J. McFarland

(615) 742-6250

amcfarland@bassberry.com

T. Stephen C. Taylor

(615) 742-7758

staylor@bassberry.com

Clarence A. Wilbon

(901) 543-5927

cwilbon@bassberry.com

John S. Golwen

(901) 543-5903

jgolwen@bassberry.com

D. Scott Holley

(615) 742-7721

sholley@bassberry.com

Nolan M. Johnson

(901) 543-5937

njohnson@bassberry.com

Frank M. Pellegrino

(615) 742-7941

fpellegrino@bassberry.com

Bob F. Thompson

(615) 742-6262

bthompson@bassberry.com

Price W. Wilson

(615) 742-7820

pwilson@bassberry.com

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150 Third Avenue South, Suite 2800 • Nashville, TN 37201 • (615) 742-6200

The Tower at Peabody Place • 100 Peabody Place, Suite 900 • Memphis, TN 38103 • (901) 543-5900

1700 Riverview Tower • 900 South Gay Street • Knoxville, TN 37902 • (865) 521-6200