

***" BLOWING THE WHISTLE" ON
THE NEW WHISTLEBLOWER
PROVISIONS OF THE
DODD-FRANK ACT***

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Dodd-Frank: Roadmap

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I. Introduction

II. Topics to Cover

- **Amendments to the Sarbanes-Oxley Act of 2002 ("SOX")**
- **New Whistleblower Bounty Program**
- **Anti-retaliation Protection for Whistleblowers (§ 922)**
 - **Employees who Provide "Original Information" to the SEC**
- **Amendments to Other Whistleblower Statutes**
 - **Commodities Exchange Act**
 - **False Claims Act**
- **New Whistleblower Protection for Financial Service Employees**
 - **Establishes New Bureau of Consumer Financial Protection**

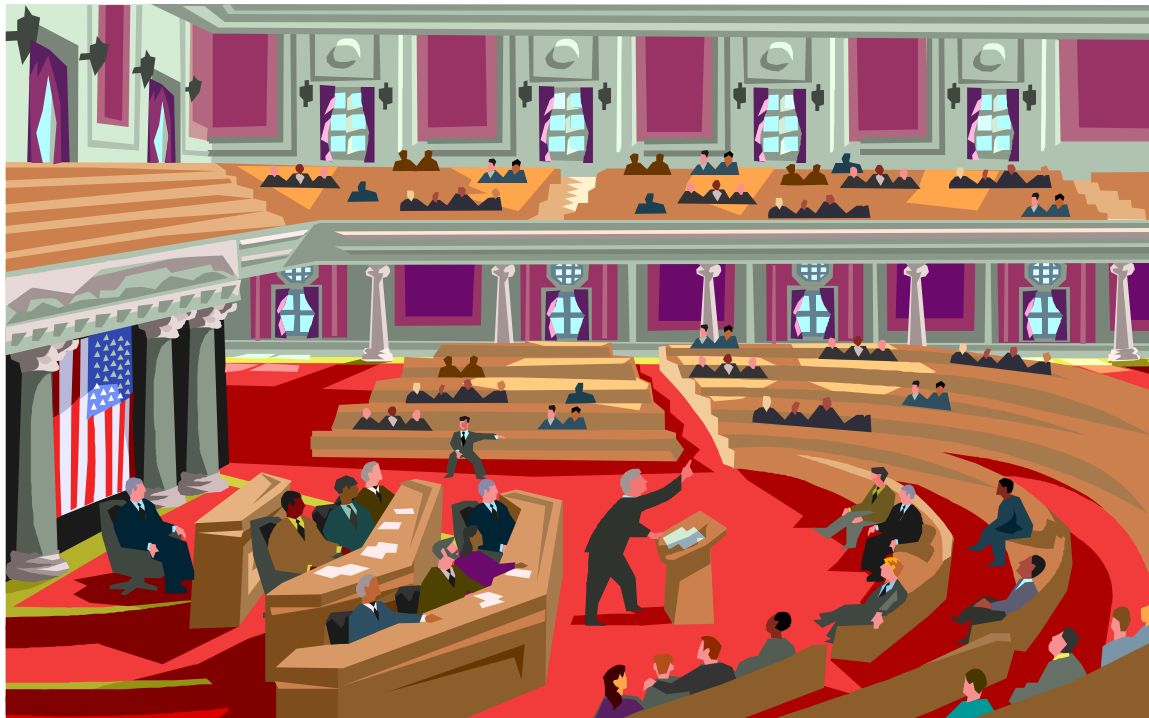
II. Final Thoughts

- **Potential Drawbacks to Dodd-Frank**
- **The Bottom Line: Recommendations**

III. Question and Answer (Time Permitting)

Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")

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Dodd-Frank: Introduction

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"Two backpackers are hiking through the woods when suddenly they see a huge bear staring at them hungrily. Kelly quickly removes her muddy hiking boots and starts putting on her running shoes. Blake whispers, 'Kelly, you'll never outrun that bear, so why put those on?' 'Well Blake,' replies Kelly, 'I don't have to outrun the bear. I only have to outrun you.'"

- *Anonymous*

THEME: Dodd-Frank Creates a Race-to-Report

- The new whistleblower provisions of Dodd-Frank create a new race to report, not only between whistleblowers themselves, but also pressuring the company to self-report before its own employees blow the whistle.

Dodd-Frank: New and Enhanced Whistleblower Provisions

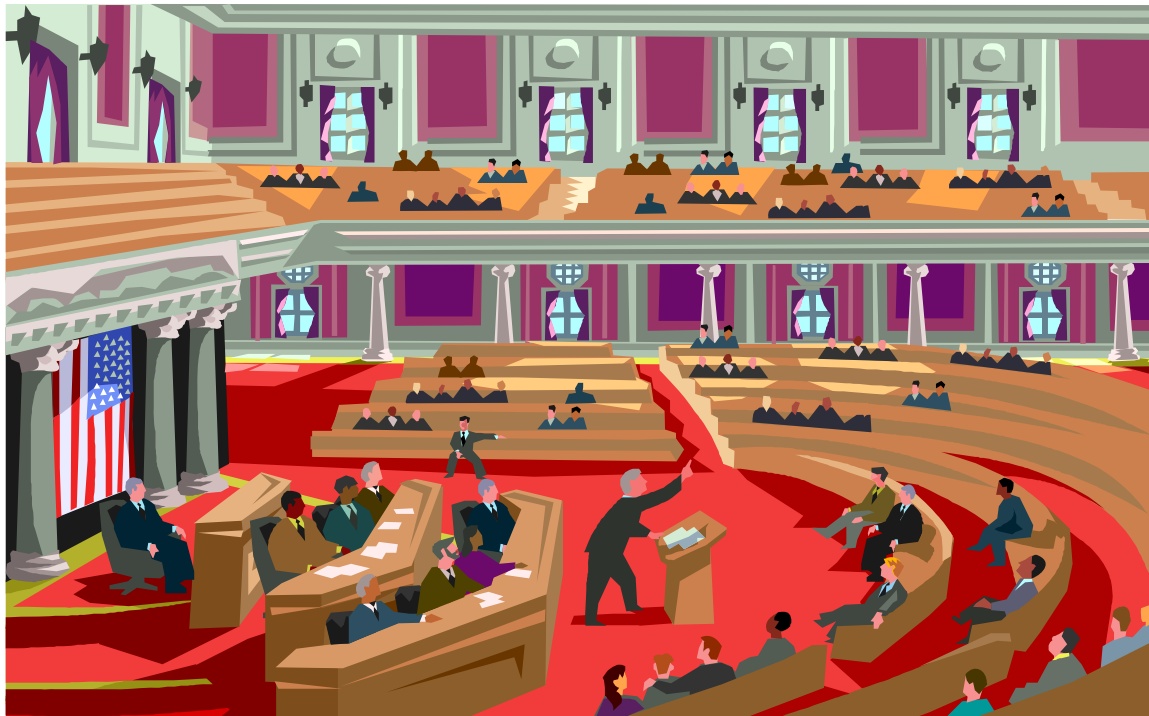
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Overview of the new Whistleblower Provisions

- Dodd-Frank includes significant changes to corporate whistleblowing protections that affect both publicly and non-publicly traded companies.
- Significantly expands the scope of Sarbanes-Oxley Act of 2002.
- Establishes a new whistleblower bounty program.
 - Congress' goal is to use greed to fight greed.
 - Huge financial incentive to report information.
- Enhances the protections for corporate whistleblowers.
- Relaxes the timing and manner in which retaliation claims can be made.
- Stiffens the penalties for such retaliation.
- These new provisions have contributed to "**at least one tip a day**" to the Securities and Exchange Commission ("SEC").

Dodd-Frank: Amendments to the Sarbanes-Oxley Act of 2002

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Amendments to Sarbanes-Oxley: Subsidiaries

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Prior to Dodd-Frank:

- As originally drafted, SOX extended only to employees of publicly traded companies.
- The Department of Labor ("DOL") and various courts interpreted SOX to include subsidiaries of publicly traded companies only where the subsidiary was found to be the "alter ego" of the parent.

Current Law After Dodd-Frank:

- "Any subsidiary or affiliate whose **financial information is included in the consolidated financial statements**" of a publicly traded company is now explicitly included within the definition of companies covered by SOX.¹
- "Nationally recognized statistical rating organizations" are also covered.

Impact:

- Employees of many non-publicly traded subsidiaries (including foreign subsidiaries), who were previously found not covered by SOX's protections absent a showing of a substantial nexus between the parent and the subsidiary, are probably now protected.

1. Dodd-Frank Act, § 929A

Amendments to Sarbanes-Oxley: Statute of Limitations – 180 days

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Prior to Dodd-Frank:

- One of the most common grounds for dismissal of SOX claims was an employee's failure to file a complaint with the DOL within 90 days of the employer's allegedly retaliatory conduct.

Current Law After Dodd-Frank:

- Dodd-Frank doubles the 90-day period to file a complaint with the DOL to 180 days after the employee becomes aware of the employer's alleged retaliatory conduct.¹

Impact:

- Employees have almost 6 months to file a complaint with OSHA to initiate a SOX Whistleblower complaint.

¹ Dodd-Frank Act, § 922

Amendments to Sarbanes-Oxley: Waivers and Arbitration

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Prior to Dodd-Frank:

- Separation Agreements, Settlement Agreements, and Release Agreements could include language releasing liability under SOX.

Current Law After Dodd-Frank:

- Whistleblower rights and remedies under SOX may not be waived by any agreement, policy, form or condition of employment.¹

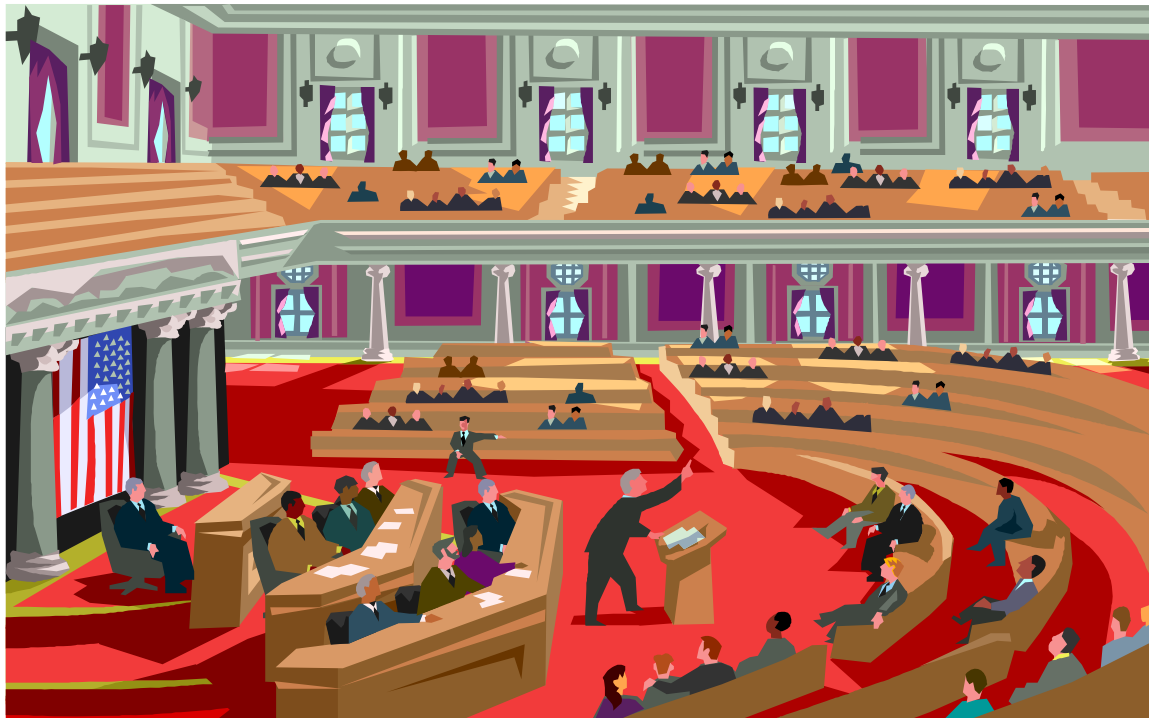
Impact:

- Reversing judicial precedent, Dodd-Frank states that SOX claims are not subject to mandatory arbitration agreements or policies.
- There is a question as to whether a separation and release agreement can still include a waiver of SOX claims; and, whether language in separation agreements created prior to Dodd-Frank is still enforceable.

¹ Dodd-Frank Act, § 922

Dodd-Frank: New Whistleblower Bounty Program

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Dodd-Frank: Whistleblower Bounty Program

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Prior to Dodd-Frank:

- Prior to Dodd-Frank, a limited bounty program existed for making reports to the SEC – but only for "insider trading."
- An SEC Inspector General report in early 2010 found that since 1989, only \$159,537 had been awarded under the SEC's insider-trading whistleblower bounty program, to just five people.

Current Law After Dodd-Frank

- Amends the Securities Exchange Act of 1934 (the "SEA").¹
- Section 922 of the Dodd-Frank Act adds a new Section 21F to the SEA, entitled "Securities Whistleblower Incentives and Protection."
- The bounty program now covers reports of all securities law violations to the SEC.

1. Dodd-Frank Act, § 922

Dodd-Frank: Whistleblower Bounty Program

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Significant Financial Incentives:

- An individual who voluntarily provide information about a securities law violation to the SEC,
 - Which constitutes "original information," and
 - Which leads to a successful recovery of more than \$1 million in "monetary sanctions,"
 - **Shall be awarded between 10-30% of the collected monetary sanctions.**
 - Discretionary award by SEC based on statutory factors.
 - Also based on considerations which will be in the regulations.
 - Cannot appeal the *amount of the bounty award*.
- Similar amendment to the Commodities Exchange Act (the "CEA") provides financial incentives for whistleblowers providing information to the Commodity Futures Trading Commission (the "CFTC").¹

1. Dodd-Frank Act, § 748

Dodd-Frank: Whistleblower Bounty Program

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Who May Be a Whistleblower:

- Employees are not the only ones who can blow the whistle.
- Any "individual", includes—
 - An employee
 - A contractor
 - A corporate insider
 - A business competitor
 - A consultant
 - A vendor
 - A service provider
 - A customer?
 - A family member?

Dodd-Frank: Whistleblower Bounty Program

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"Original Information":

- The term "original information" means information,
 - Derived from the independent knowledge or analysis of the whistleblower,
 - Which is not known by the SEC or CFTC from a source independent of the whistleblower, and
 - Where such information is not derived from allegations made in
 - Judicial or administrative hearings,
 - Governmental reports, hearings, audits or investigations, or
 - News media,
 - Unless the whistleblower is a source of the information.
- **Includes any information regarding a violation of any of the securities laws, including the Foreign Corrupt Practices Act (the "FCPA").**
- A whistleblower may obtain a reward for information submitted after July 21, 2010, even if the alleged violation occurred before that date.

Dodd-Frank: Whistleblower Bounty Program

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"Successful Enforcement Action":

- The information must lead to "the successful enforcement of [a] covered judicial or administrative action, or [a] related action."
- "*Covered judicial or administrative action*" means any judicial or administrative action brought by the SEC under the securities laws that result in monetary sanctions exceeding \$1 million.
- "*Related actions*" are judicial or administrative actions brought by:
 - the DOJ,
 - a self-regulatory organization,
 - a state attorney general, or
 - other "appropriate" regulatory authority,
- That are based on "original information" provided by a whistleblower and that lead to a successful enforcement action.

Dodd-Frank: Whistleblower Bounty Program

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Exclusions:

- Bounties are not available to individuals:
 - Who are convicted of criminal violations related to the action on which the whistleblower provided information;
 - Who obtain the information through audits of financial statements required by the securities laws;
 - Who fail to submit information to the SEC in such a form as the SEC may, by rule, require; or
 - Who is a member, officer, or employee of:
 - An appropriate regulatory agency,
 - The DOJ,
 - A self-regulating organization,
 - The Public Company Accounting Oversight Board, or
 - A law enforcement agency.

Dodd-Frank: Whistleblower Bounty Program

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Potential FCPA Ramifications:

- SEC has recently focused more resources in investigating FCPA cases.
- Based on multi-million dollar fines imposed in recent FCPA enforcement actions, the potential monetary rewards for whistleblowers provides enormous incentive to report alleged acts of foreign corruption to the SEC.

**Bounty:
10% - 30%
of total
recovery.**

- Goldman Sachs: *\$550 million* paid to the United States (2010) to reform its business practices and settle SEC charges that the Company misled investors.
- Halliburton: *\$559 million* paid to the United States (2009) to settle charges that one of its former units bribed Nigerian officials during the construction of a gas plant.
- Siemens: *\$800 million* paid to the United States (2008) for FCPA violations in Latin America and the Middle East.

Dodd-Frank: Whistleblower Bounty Program

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Immediate Impact of Dodd-Frank

- An SEC Inspector General report in early 2010 found that since 1989, only \$159,537 had been awarded under the SEC's whistleblower bounty program (for insider trading), to five people.
- **Two days after the enactment of Dodd-Frank**, on July 23, 2010, the SEC announced the largest whistleblower bounty ever awarded in an insider trading case (at that time).
 - Individual provided information that led to a settled civil injunctive action and a \$10 million penalty against Pequot Capital Management, Inc., and Arthur Samberg, its CEO.
 - The SEC exercised its new authority, to award the individual \$1 million, more than 5 times the aggregate awarded in all cases prior to the enactment of Dodd-Frank.
- To date, there have already been multi-million dollar bounties awarded to whistleblowers by the SEC.

Dodd-Frank: Whistleblower Bounty Program

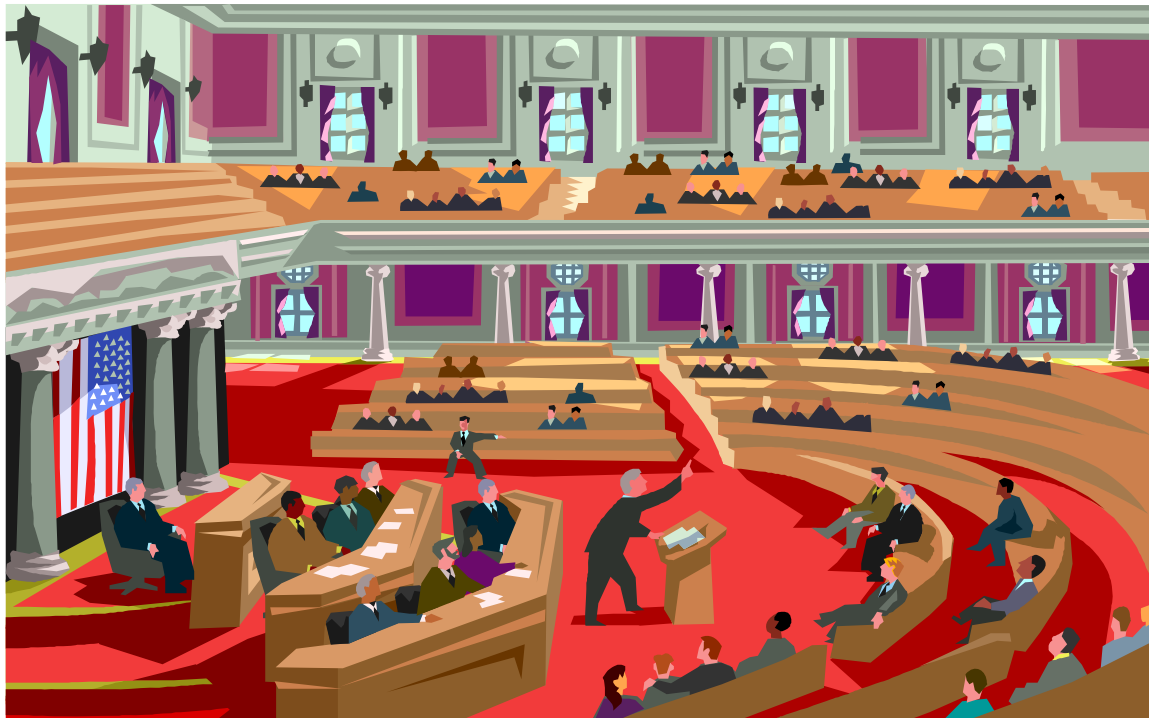
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Long-Term Impact:

- Once employees learn that the SEC (CFTC) will pay large rewards for information, companies may struggle with encouraging employees to report suspected violations internally rather than to the SEC (CFTC).
- Dodd-Frank will change the dynamics of determining when (or if) to "self-disclose" potential securities or FCPA violations to the government.
 - Adopting a "wait-and-see" approach to FCPA disclosure has become much riskier.
 - Preemptory self-reporting may become the standard practice.
- Whistleblowers who are still employees of the company could potentially act as the government's "eyes and ears" inside the company during the course of the investigation.
- SEC has asked for a 10% increase in the SEC's budget for 2011 in anticipation of increased investigation and enforcement efforts.

Dodd-Frank: Anti-Retaliation for Protection for Whistleblowers

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Dodd-Frank: Private Right of Action for SEC Whistleblowers

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Retaliation Prohibited:

- Dodd-Frank prohibits retaliation against any individual who:
 - Provides "original information" to the SEC (**includes the FCPA**);
 - Assists in an SEC enforcement proceeding or investigation based on such information (initiate, testify in, or otherwise assist); or
 - Makes disclosures required or protected under
 - SOX (15 U.S.C. 7201),
 - The Securities Exchange Act of 1934,
 - 18 U.S.C. 1513(e),¹ or
 - Any other law, rule, or regulation subject to the SEC's jurisdiction.

SOX Compared:

- SOX protects employees who report information they *reasonably believe* constitutes a securities violation or shareholder fraud.

1. Prohibits retaliation, including in connection with employment, against individuals for providing information to a law enforcement officer about possible commission of a federal offense.

Dodd-Frank: Private Right of Action for SEC Whistleblowers

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Types of Prohibited Conduct:

- No employer may
 - Directly or indirectly:
 - Discharge
 - Demote
 - Suspend
 - **Threaten**
 - **Harass**
 - In the terms and conditions of employment.

Dodd-Frank: Private Right of Action for SEC Whistleblowers

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Direct Access to Federal Court:

- Dodd-Frank allows individuals alleging retaliatory conduct to "bring an action . . . in the appropriate district court of the United States" without satisfying any administrative requirements.
- Immediate access to federal district courts.

SOX Compared:

- Individuals asserting claims of retaliation under SOX must go first to the Department of Labor (through OSHA).
- Individuals must exhaust their administrative remedies and follow any applicable filing and appellate deadlines, prior to filing an action in federal district court.

Dodd-Frank: Private Right of Action for SEC Whistleblowers

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Statute of Limitations Up to 10 Years:

- Employees filing under Dodd-Frank have
 - **6 years** to file after the retaliatory conduct; or
 - **3 years** after facts material to the right of action are known or reasonably should have been known by the employee.
- However, no action may be brought more than **10 years after the date of the violation.**

SOX Compared:

- Employees must go to the Department of Labor within 180 days of the alleged retaliatory conduct.¹

1. Dodd-Frank increased the 90-day filing period to 180 days.

Dodd-Frank: Private Right of Action for SEC Whistleblowers

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More Aggressive Remedy Structure:

- In addition to traditional SOX remedies:
 - ***Double back-pay***

SOX Compared:

- Remedies under SOX:
 - Reinstatement
 - ***Back pay***
 - Litigation costs
 - Expert witness fees
 - Reasonable attorney's fees

Dodd-Frank: Private Right of Action for SEC Whistleblowers

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Anonymous Reporting:

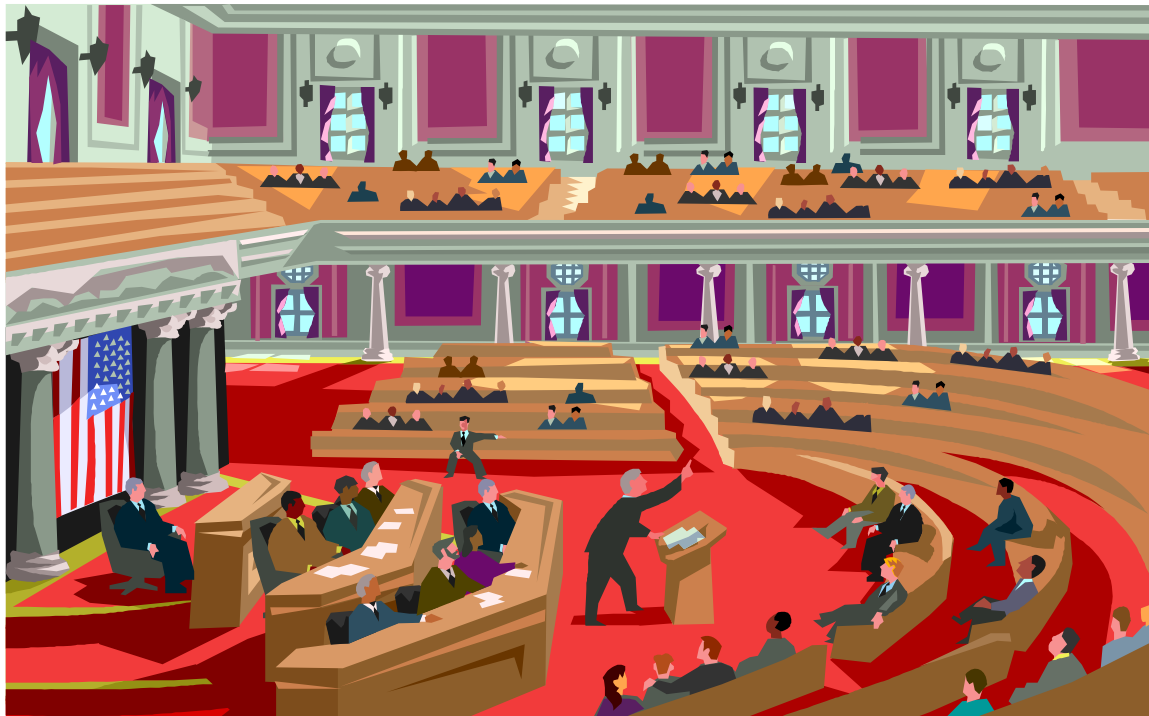
- Dodd-Frank permits reports to be made anonymously through an attorney and prohibits the SEC from disclosing the identity of the whistleblower prior to payment of the award.
- SEC must maintain confidentiality of whistleblowers unless and until required to be disclosed to a defendant or respondent in a public proceeding instituted by the SEC.

Dedicated SEC Whistleblower Office:

- Pursuant to Dodd-Frank, the SEC must establish a separate office within the SEC to administer and enforce the new whistleblower provisions.
- The office is required to report annually to Congress "on its activities, whistleblower complaints, and the response of the commission to such complaints."

Dodd-Frank: Amendments to Other Whistleblower Statutes

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Dodd-Frank: The Commodities Exchange Act (the "CEA")

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- Dodd-Frank also contains provisions protecting whistleblowers from retaliation for, among other things, providing information regarding violations of commodities law to the CFTC.¹
- Generally, the same laws apply as with Section 922
 - Individuals who provide "original information,"
 - Which leads to recovery of \$1 million or more,
 - **Shall** be awarded 0-30% of the collected monetary sanctions.
- Employees protected by the CEA (as amended) have up to 2 years to bring a private claim for whistleblower retaliation.
 - COMPARE: Employees protected by the SEA have between 3 and 10 years to bring a private claim for whistleblower retaliation.
- The Amendment also limits waivers of certain rights and invalidates pre-dispute arbitration agreements.

1. Dodd-Frank Act, § 748.

Dodd-Frank: Expansion of the False Claims Act ("FCA")

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Prior to Dodd-Frank

- Previously protected "lawful acts done by the employee, contractor, *or agent on behalf of the employee, contractor, or agent or associated others* in furtherance of other efforts to stop one or more violations of this subchapter."

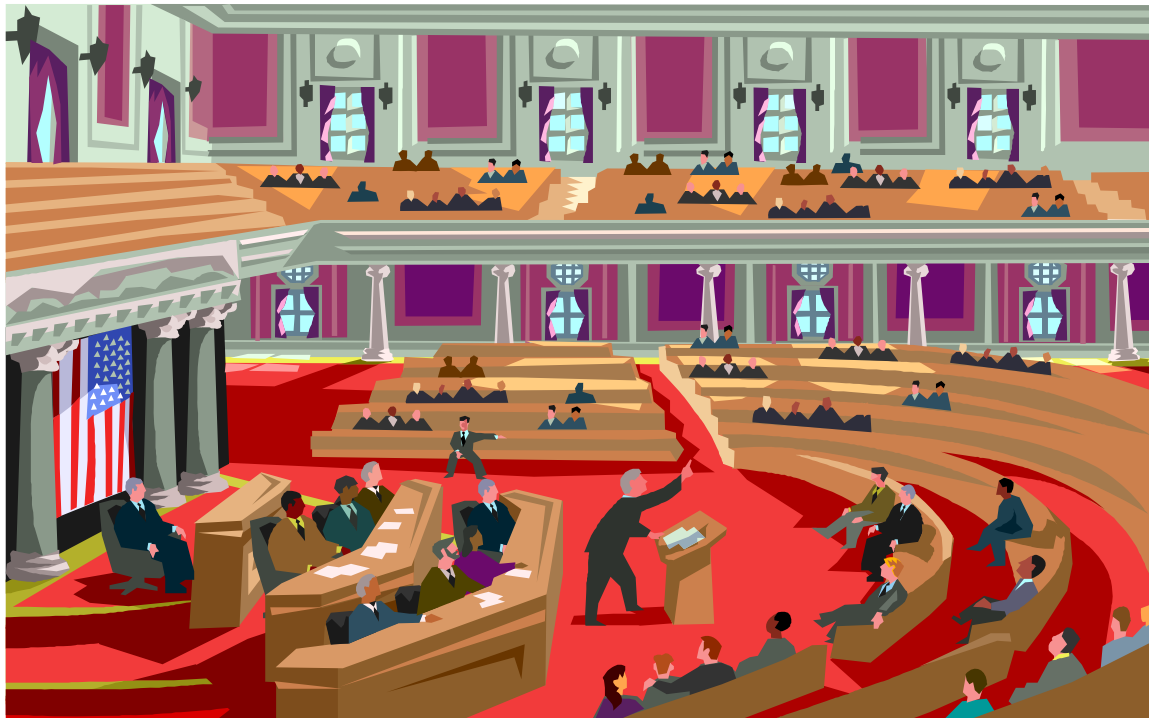
Current Law under Dodd-Frank

- Dodd-Frank expands the category of individuals and the scope of conduct protected by the False Claims Act.¹
- Protects "lawful acts done by the employee, contractor, **agent or associated others in furtherance** of other efforts to stop one or more violations of this subchapter."
- Individuals have 3 years from the date of an employer's alleged retaliatory conduct to bring civil actions under the FCA.

1. Dodd-Frank Act, § 1079.

Dodd-Frank: New Whistleblower Protection for Financial Services Employees

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Dodd-Frank: New Private Cause of Action for Financial Services

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- Dodd-Frank creates a new private right of action for employees in the financial services industry who are retaliated against for disclosing information about unlawful conduct.¹
- Examples of businesses specifically covered include, but are not limited to, the following types of businesses:
 - Extend credit or service loans or broker leases
 - Provide real estate settlement services
 - Perform real estate or personal property appraisals
 - Provide check cashing, check collection, or check guaranty services
 - Collect, analyze, maintain, or provide consumer report information
 - Collect debt related to any consumer financial product or service
- **Filing a Cause of Action:** 180 days from the alleged retaliation to file a complaint with the U.S. Secretary of Labor
 - Same standard as SOX.

1. Dodd-Frank Act, § 1057.

Dodd-Frank: New Private Cause of Action for Financial Services

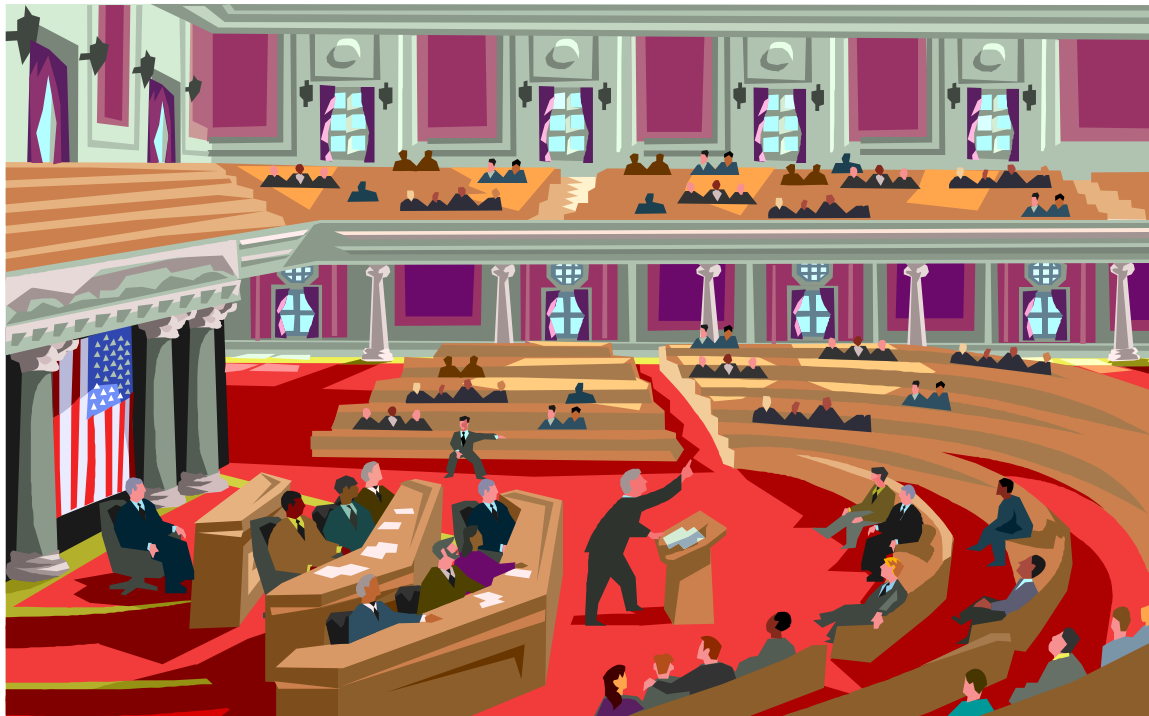
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Protected Activity Under Section 1057 of Dodd-Frank:

- Providing or attempting or causing to provide information to
 - an employer,
 - **the newly created Bureau of Consumer Financial Protection** (the "Bureau"), or
 - any other state, local, or federal government authority or law enforcement agency relating to any violation of the laws subject to the jurisdiction of the Bureau.
- Testifying in, filing or otherwise instituting a proceeding under any federal consumer financial law;
- Refusing to participate in any activity that the financial services employee reasonably believes is a violation of any laws subject to the Bureau's jurisdiction.

Conclusion: Final Thoughts

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Potential Drawbacks to Dodd-Frank

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- Companies already hit by the Great Recession may be squeezed further by this new legislation.
- Plaintiff attorneys will run with Section 922 as far and as fast as possible, taking advantage of a lucrative new practice area.
 - Section 922 specifically provides that any whistleblower who makes a claim may be represented by counsel, and must be represented by counsel to submit a claim anonymously.
- Dodd-Frank will be costly to the companies that have to defend such complaints.
- Employees who take their complaints to the SEC have seemingly greater protection under the law than employees who simply raise their concerns within the company.

Potential Drawbacks to Dodd-Frank

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- Employees may start lodging complaints with both the SEC and the company at the same time.
- Huge incentive to race to the SEC's door, so an employee can be the first to provide the agency with "original information" leading to an enforcement action.
- The incentive to go to the government immediately with information could deeply undercut today's ethics and compliance programs, which train and encourage employees to first report wrongdoing internally, so the company can assess and remedy the concern.
- Dodd-Frank encourages a "lottery mentality", where people may file complaints on weak or wholly illegitimate claims "just in case."
- Reacting to the expected deluge of whistleblower tips may take away from the SEC's ability to set its own agenda.

The Bottom Line: Recommendations

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- It is more important than ever for companies to avoid opportunities for whistleblower claims in the first place.
- Given the scope and breadth of Dodd-Frank, employers are encouraged to consult with counsel before taking any adverse personnel actions against employees who may have engaged in activities protected by Dodd-Frank.
- **Companies should emphasize evaluation and disciplinary procedures, and ensure that the company's reasons for taking specific employment actions are clearly and adequately documented.**
- **Companies should routinely ask appropriate questions about employees who are evaluated, disciplined or terminated to be able to defend against claims of retaliation.**

The Bottom Line: Recommendations

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- Employers should assess which subsidiaries or affiliates (including foreign subsidiaries) are now covered by SOX.
- Verify that proactive monitoring and tracking controls are in place to identify potential accounting, securities law and FCPA issues so the company can identify and respond to these before a whistleblower.
- Employers should be proactive in revising and strengthening their internal reporting and compliance procedures (of both the parent company and any subsidiaries or affiliates) to encourage employees to first raise any concerns directly with the employer prior to resorting to whistleblowing or litigation.
- **Create or revise programs that promote a culture of compliance and encourage ethical conduct and compliance with all laws.**
- Corporate compliance programs must allow for a speedy corporate response in dealing with potential violations.

The Bottom Line: Recommendations

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- If improper activity is identified, promptly investigate the activities and consider whether to proceed with self-reporting of a violation.
- While self-reporting typically will not avoid liability, the company may be better off after making a voluntary disclosure to the SEC than if the government first hears of wrongdoing from a potential whistleblower.
- Employers should consider revising any applicable document-retention policies to retain any personnel files or other records pertinent in defending against retaliation claims for a 10 year period (the maximum statute of limitations under Dodd-Frank).
- Include a requirement in third-party contracts that the third-party provide notice of any compliance issues.

Question and Answer (Time Permitting)

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