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# 5 Years Of Dodd-Frank: Taking Stock

*Law360, New York (July 17, 2015, 11:41 AM ET) --*

Just five years old this month, the Dodd-Frank Act has transformed the legal landscape for whistleblowers. The law owes its impact to strong anti-retaliation provisions, effective financial incentives to employees who come forward and federal agencies that have embraced their roles as whistleblower advocates.

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**Anti-Retaliation Provisions**

Dodd-Frank strengthened existing anti-retaliation laws and created new protections for employees who report wrongdoing.

Dodd-Frank also strengthened existing protections. First, the law expanded the Sarbanes-Oxley Act's anti-retaliation provision. In 2002, SOX was passed in response to corporate scandals, and it included an anti-retaliation provision to protect the likes of Enron Corp. whistleblower Sherron Watkins. Because of Dodd-Frank, SOX now covers employees of certain subsidiaries and statistical rating agencies. The statute also doubled the time period for initiating a claim from 90 days to 180 days. Dodd-Frank further bolstered SOX's anti-retaliation provisions by barring mandatory pre-dispute arbitration of SOX claims. Finally, Dodd-Frank provides a jury trial to plaintiffs bringing SOX retaliation claims in federal court.

Additionally, Dodd-Frank strengthened the False Claims Act's anti-retaliation provision. The FCA forbids employers to retaliate against employees who disclose fraud on the federal government. However, the anti-retaliation provision had no explicit deadline, which created uncertainty for employers and employees alike. Dodd-Frank remedied this by providing a three-year statute of limitations for FCA retaliation actions. Further, Dodd-Frank clarified that the FCA's anti-retaliation provision covers individuals associated with protected activity, even if that person did not directly engage in that activity.

In addition to strengthening existing anti-retaliation provisions, Dodd-Frank created several new causes of action for whistleblowers. First, Section 922 of the law protects employees who report securities violations. Courts are still sorting out the scope of protected activity under the provision, making a claim under Dodd-Frank less predictable than a claim under SOX in some scenarios. However, Section 922 has a three-year statute of limitations, giving employees a potential alternative to the relatively short deadlines under SOX.

Dodd-Frank also protects employees of consumer financial services entities. Covered employers may not retaliate against any employee who makes certain internal or external disclosures of misconduct relating to consumer financial services, such as extending credit or brokering loans. The provision closely tracks SOX's anti-retaliation language. Like SOX, the law applies the contributing factor standard of causation, and aggrieved employees must bring their claims before the U.S. Department of Laborwithin 180 days. Under this provision, whistleblowers may remove to federal court after 210 days, but they also have the option of an administrative hearing.

Finally, Dodd-Frank added a whistleblower protection provision to the Commodity Exchange Act. Section 748 of the statute is similar to Section 922's protections, except that it covers employees who report information to the U.S. Commodity Futures Trading Commission. Whistleblowers who suffer retaliation can bring an action in federal court within two years.

In short, Dodd-Frank has broadly expanded whistleblower protections to cover many more employees, and it similarly enlarged the types of activities and disclosures that are protected. Further, Dodd-Frank removed significant procedural limitations on whistleblower actions. These changes appear to have had an impact. Since the law's enactment, 56 reported federal retaliation cases have cited at least one of the whistleblower provisions Dodd-Frank created. Since Dodd-Frank's enactment in July 2010, there have been about 200 reported decisions — more than a 50 percent increase from the preceding five-year period.

**Whistleblower Rewards**

Dodd-Frank also strengthened the financial incentives for reporting to financial regulators. Specifically, the statute directs the U.S. Securities and Exchange Commissionand CFTC to make monetary awards to eligible whistleblowers who voluntarily provide original information leading to a recovery of at least $1 million. Awards total between 10 to 30 percent of the monetary sanctions collected.

Dodd-Frank's reward programs filled a large gap. Though the FCA provides financial incentives to whistleblowers, it extends only to fraud on the federal government. TheIRS' whistleblower reward program is likewise limited in scope, as is state legislation. Lesser known and discretionary programs unfortunately have proven themselves ineffective.

Indeed, the Dodd-Frank whistleblower reward programs replaced a weak existing regime of discretionary awards. From 1989 to 2010, the SEC's discretionary reward program awarded a total of $159,537 to five whistleblowers. That program also capped awards at 10 percent of the sanctions collected. As noted above, Dodd-Frank provides mandatory awards of up to 30 percent of the government's recovery.

Unlike their predecessors, the Dodd-Frank whistleblower reward programs have generated great interest, and they have resulted in significant awards to whistleblowers. Since its implementation in 2011, the SEC's whistleblower reward program has paid out 17 awards, totaling more than $50 million. The CFTC's program, which began at the same time, has issued a single award of $240,000. However, even this lone award is more than the SEC's discretionary program paid out for two decades.

The rate and magnitude of payouts has increased rapidly. For two successive years, the SEC program made record awards with an award of more than $14 million in fiscal year 2013 and an award of more than $30 million in fiscal year 2014. These two awards account for about 88 percent of the SEC program's total payout. The rate of awards has increased, as well. The SEC made nine awards in fiscal year 2014, almost twice the number of awards made in the previous two years combined. Note, however, that the SEC has made only three awards so far this fiscal year, which ends Sept. 30.

Further, both programs have seen a reliable increase in tips year over year. The SEC program has received more than 10,000 tips since its inception, while the CFTC — which has a narrower mission — has received more than 600. For the SEC, that represents about a 20 percent increase from the number of tips received in fiscal year 2012. While a much smaller number overall, the CFTC received almost three times the number of tips in fiscal year 2014 than it did in fiscal year 2012. And despite stating that its current system is more than sufficient, the SEC has committed $11 million for a new computer system to handle whistleblower tips. The foregoing shows that the program has experienced steady growth, which the government expects to continue.

**Institutional Advocacy**

Dodd-Frank's biggest impact may be how it has caused federal institutions to advocate on behalf of whistleblowers. In a recent speech, SEC Chairwoman Mary Jo White characterized Dodd-Frank as a “game changer.” In the same remarks, White put the agency’s role as a whistleblower advocate on par with the SEC’s traditional, central role as “the investor’s advocate.” White has publicly and repeatedly endorsed the Dodd-Frank Act, calling it “enormously successful” and crediting the SEC’s whistleblower reward program with identifying fraud the SEC would otherwise miss.

But the SEC has proven that it is not content with just being a vocal ally and is willing to take direct action based on its Dodd-Frank authority. In 2014 alone, the SEC undertook three highly visible actions to help employees blow the whistle: The SEC took action against an employer for using a confidentiality agreement with impermissible restrictions on whistleblowers; it also took enforcement action for whistleblower retaliation; and the SEC made whistleblower awards to a compliance officer and corporate executive. These efforts demonstrate the SEC’s commitment to exercising its expanded powers to protect whistleblowers under Dodd-Frank.

First, the SEC has taken action against an employer because it used a confidentiality agreement that could restrict employees from reporting potential violations to the government, which is prohibited under Dodd-Frank. The SEC had vowed to go after noncompliant agreements and this past April the SEC did just that.

The SEC took administrative action against KBR Inc., for requiring witnesses in certain internal investigations to sign confidentiality agreements. Those agreements warned of disciplinary action, including termination, if employees discussed the investigation with outside parties without the KBR legal department’s prior approval. The SEC concluded that such agreements violate Rule 21F-17, which prohibits companies from using gag clauses in agreements or policies to prevent whistleblowers from providing information to the SEC. Rule 21F-17 is one of the regulations implementing the Dodd-Frank SEC whistleblower reward program.

Significantly, the SEC lacked any evidence that the agreement prevented a KBR employee from communicating directly with SEC or that KBR took any disciplinary action against an employee to enforce the form confidentiality agreement. Instead, the SEC reasoned that the threat of disciplinary action undermined the rule’s purpose, which is to “encourage[e] individuals to report to the [c]ommission.”

To settle the charges, KBR agreed to pay a $130,000 penalty and amend the confidentiality agreement to clarify employees’ ability to report to the SEC and other federal agencies without KBR’s approval.

In 2014, the SEC for the first time used its authority under Dodd-Frank to take enforcement action against employers who retaliate against whistleblowers. Section 922 of Dodd-Frank amended the Securities

Exchange Act to prohibit employers from retaliating against whistleblowers. The SEC has the power to enforce that prohibition by virtue of its authority to prosecute any violation of the Securities Exchange Act.

The SEC took action against hedge fund advisory firm Paradigm Capital Management Inc. for retaliating against an employee who reported violations to the SEC. According to the SEC's order, Paradigm's owner conducted transactions between Paradigm and a broker-dealer that she also owned, while trading on behalf of a hedge fund client. Because of the resulting conflicts of interests between the adviser and the client in such a scenario, advisers must disclose the situation and obtain the client's consent. Paradigm failed to do so.

The SEC's order found that when Paradigm learned that an employee had reported potential misconduct to the SEC, the firm began to retaliate. Paradigm removed the whistleblower from his head trader position, tasked him with investigating the very conduct he reported to the SEC, changed his job function from head trader to a full-time compliance assistant, stripped him of his supervisory responsibilities and otherwise marginalized him until he resigned. Notably, the whistleblower had not been terminated or had his pay reduced, indicating that Dodd-Frank's protections extend to a broad range of retaliatory treatment. Paradigm and its owner settled the SEC's charges, including the whistleblower reprisal charge, for $2.2 million.

Finally, the SEC has issued whistleblower awards to an internal compliance officer and a corporate executive. These rewards were significant because they speak to some employers' concern that the whistleblower reward program would cause employees to seek bounties rather than report internally and allow companies to self-correct. Eighty percent of employee-whistleblowers who received rewards under the program first report internally, according to the SEC. And executives or compliance officers cannot receive rewards unless an exception applies, such as when the whistleblower first reports internally, as was the case here. The SEC's message is clear: Employers need to take internal disclosures more seriously, and performing a sham investigation will likely spur a whistleblower to submit a whistleblower tip to the SEC.

**Conclusion**

As the law nears its five-year anniversary, it is clear that Dodd-Frank has successfully strengthened whistleblower incentives and protections in myriad ways. These changes appear to have had significant success in achieving their goal of encouraging more employees to report potential misconduct.

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