NEW FINANCIAL REFORM LEGISLATION PROVIDES WHISTLEBLOWERS WITH EXPANSIVE PROTECTIONS

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To Our Clients and Friends:

Today, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"). The Act expands existing whistleblower protections under Section 806 of the Sarbanes-Oxley Act ("SOX") and establishes new whistleblower protections apart from SOX—including the potential for large bounties for whistleblowers who report "original information" to the Securities and Exchange Commission (the "SEC") or to the Commodity Futures Trading Commission (the "CFTC"). In light of these developments, companies – both public and private – should familiarize themselves with the new rules, consider how to incentivize whistleblowers to report wrongdoing internally and prepare for defending against potential litigation.

COVERAGE OF SOX WHISTLEBLOWER PROVISIONS EXPANDED

There has been considerable uncertainty since the enactment of SOX as to whether its whistleblower provisions, 18 U.S.C. § 1514A, applied to subsidiaries or affiliates of publicly traded companies, as opposed to only publicly traded companies. The Act ends that uncertainty and expressly expands Section 806 of SOX to cover "any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company."

NEW PROTECTIONS FOR WHISTLEBLOWERS WHO ASSIST IN ENFORCEMENT PROCEEDINGS BY THE SEC AND THE CFTC

In addition to expanding the number of companies covered by the SOX whistleblower protections, the Act provides an entirely new and separate avenue for whistleblowers – at both publicly traded and private employers – who provide information to the SEC or CFTC about violations of the laws that those agencies are charged with enforcing. In a significant departure from SOX, the new provisions provide a strong monetary incentive for whistleblowers to come forward by offering potentially rich bounties to those who provide "original information" to those agencies.

The new provisions differ markedly from Section 806 of SOX in three other significant ways. First, under Section 806, a whistleblower is required to bring the claims before the Department of Labor (the "DOL") in the first instance. If the whistleblower qualifies for protection under the SEC or CFTC whistleblower provisions of the Act, however, the whistleblower can immediately bring a civil action against the employer in federal court. Second, whistleblowers protected by the new provisions have more time to bring their claims. Whistleblowers proceeding under Section 806 must file a retaliation claim within 90 days, but whistleblowers proceeding under the new CFTC and SEC whistleblower provisions can bring claims as long as ten years after the violation. Third, under these new provisions, a successful whistleblower plaintiff can obtain double back pay, whereas Section 806 of SOX limits the plaintiff to compensatory damages. (Both provisions provide for reinstatement and recovery of costs and attorney's fees.)

PROTECTIONS FOR WHISTLEBLOWERS WHO REPORT VIOLATIONS OF THE NEW CONSUMER FINANCIAL LAW AND RELATED REGULATIONS

A key feature of the Act is its creation of a new independent federal agency called the Bureau of Consumer Financial Protection (the "Bureau") that is charged with the implementation and enforcement of the new federal consumer financial law. Section 1057 of the Act affords protection to whistleblowers who (1) provide information to the employer, the Bureau or any other governmental entity concerning a violation of a provision of law under the Bureau's jurisdiction; (2) testify or may testify in a proceeding to enforce such a provision; (3) have instituted a proceeding under the federal consumer financial law; or (4) have refused to participate in any activity that they reasonably believe would violate a provision of law within the Bureau's jurisdiction.

Section 1057 of the Act, like Section 806 of SOX (but unlike the new SEC and CFTC whistleblower protections), requires whistleblowers to bring their claims first before the DOL. Whistleblowers relying on Section 1057, like SOX whistleblowers, may proceed in court only if the DOL fails to act within a specified time. One significant difference between Section 1057 of the Act and the SOX provision, however, is that Section 1057 strictly limits the conditions under which retaliation claims may be arbitrated.

Employers who could face whistleblower liability under the Act should consider taking the following steps:

- Public companies should ensure that any existing policies aimed at compliance with Section 806 of SOX are made applicable to their subsidiaries and other affiliates.
- Employers should maintain comprehensive employee performance records for up to ten years. Because the Act gives some whistleblowers a private right of action against employer retaliation for up to ten years, employers should maintain detailed records of employee performance for up to ten years. Retaining these records as a matter of course

is particularly important because the Act's confidentiality provisions may prevent an employer from learning about an employee's assistance in an SEC or CFTC investigation until long after the fact.

- Employers should be prepared for an increase in whistleblower lawsuits. Though the meaning of some of the new whistleblower provisions will be subject to debate in the courts for many years, one thing is certain: as a whole, the Act exposes more companies to the potential for whistleblower retaliation claims than the original version of SOX. It also expands considerably the types of conduct that might qualify an employee for special whistleblower protection and, in some circumstances, provides a straight path into federal court.

- Employers should ensure that their internal compliance and reporting policies encourage internal reporting of wrongdoing. By ensuring that employees have mechanisms in place that not only enable but encourage employees to report wrongdoing internally, employers will better position themselves to timely investigate and correct any potential problems. Employers should re-circulate and remind employees of such policies regularly.

Please feel free to contact us with any questions.

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