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THE EXPANSION OF SEC ENFORCEMENT UNDER THE DODD-FRANK ACT

The Dodd-Frank Act gives the SEC and the CFTC important new authority to pay whistleblowers bounties for original information concerning securities and commodities law violations. The Act also broadens the SEC's authority to impose administrative fines and impose secondary liability on aiders and abettors, and includes various provisions designed to restore and enhance the government's authority in extraterritorial securities cases.

By Mark K. Schonfeld, John H. Sturc, and Barry R. Goldsmith *

During the midst of the financial crisis, the continued existence, much less powers, of the Securities and Exchange Commission were in doubt. But in the Dodd-Frank Wall Street Reform and Consumer Protection Act, passed in July 2010, the SEC emerged with several new weapons added to its already substantial enforcement arsenal. These provisions not only change SEC enforcement practice, but also have significant long term implications for public companies, their officers and employees, accountants, brokerage firms, investment advisers, and associate persons.

First and foremost, Dodd-Frank vastly expanded rewards to, and protections of, whistleblowers. Whistleblower rewards raise a number of significant policy and practical questions that will impact companies and their compliance (and related) programs. The often large size of disgorgement and civil money penalty awards sought or imposed by the SEC provide a powerful financial incentive to make claims of wrongdoing. The most significant question is whether, in promulgating rules to implement the whistleblower provision, the SEC strikes an appropriate balance between promoting sound whistleblower complaints without undermining the effectiveness of a company's existing legal, audit, and compliance programs.

In addition to the whistleblower provisions, Dodd-Frank further enhanced the SEC's enforcement capabilities through provisions that: (1) provide the SEC authority to impose substantial administrative fines on all persons, not merely securities brokers, investment advisers, and their associated persons; (2) broaden standards for the imposition of secondary liability; (3) confer on the SEC extraterritorial jurisdiction over alleged violations involving conduct abroad and enhance

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the ability of the SEC and the Public Company Accounting Oversight Board ("PCAOB") to regulate foreign private accounting firms; and (4) increase collateral consequences of securities law violations. The Act also contains a provision intended to expedite the resolution of pending SEC enforcement investigations.

REWARDS TO WHISTLEBLOWERS

Whistleblowers who recover millions of dollars for reporting alleged fraud, waste, and abuse in government contracts have long been a central feature of federal enforcement of the False Claims Act. In recent years, for example, the federal government has recovered hundreds of millions of dollars from pharmaceutical manufacturers who allegedly failed to comply with federal regulations and has paid out tens of millions to alleged whistleblowers.[1]

Section 922 of the Dodd-Frank Act adds a new Section 21F of the Securities Exchange Act governing the treatment of whistleblowers. The Act states that a whistleblower who voluntarily provides information to the SEC that leads to a successful enforcement action resulting in over $1,000,000 of monetary sanctions may be awarded by the SEC an amount not less than 10% and not more than 30% of the monetary sanctions collected. The Act states that determination of the amount of the award shall be in the discretion of the SEC, taking into consideration the significance of the information provided, the degree of assistance provided, and the programmatic interest of the SEC in deterring violations of the securities laws by rewarding whistleblowers, and other factors the SEC may establish.[2]

The whistleblower provisions build on the SEC's Enforcement cooperation initiative, announced in January 2010 and memorialized in the SEC's Enforcement Manual.[3] The cooperation initiative permits the SEC and its staff to assure a cooperating individual that he or she will not be charged with a violation or will receive reduced sanctions in exchange for information leading to enforcement action against others.

KEY SECTIONS OF THE PROPOSED NEW WHISTLEBLOWER RULE

The whistleblower reward provision is not self-operative and requires SEC rulemaking. Pursuant to the Act, the SEC recently proposed a rule that establishes standards and procedures pursuant to which the SEC would reward whistleblowers who provide high quality tips to the agency that lead to successful SEC enforcement actions.[4]

Definitions

Whistleblower. The proposed rule defines a whistleblower as "an individual who, alone or jointly with others, provides information to the SEC relating to a potential violation of the securities laws." The whistleblower must be a natural person and may remain anonymous when reporting potential violations to the SEC. To be eligible for an award, a whistleblower must

[1] *See* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Pharmaceutical Giant AstraZeneca to Pay $520 Million for Off-Label Drug Marketing (April 27, 2010), *available at* http://justice.gov/opa/pr/2010/April/10-civ-487.html; Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Two Johnson & Johnson Subsidiaries to Pay Over $81 Million to Resolve Allegations of Off-Label Promotion of Topamax (April 29, 2010), *available at* http://www.justice.gov/opa/pr/2010/April/10-civ-500.html; and Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Announces Largest Health Care Fraud Settlement in Its History (Sept. 2, 2009), *available at* http://www.justice.gov/opa/pr/2009/September/09-civ-900.html.

[2] Similar reward provisions apply to whistleblowers who provide information to the Commodity Futures Trading Commission. Sec. 748.

[3] SEC, *Enforcement Manual* (Jan. 13, 2010), § 6 et seq., 123-140, *available at* www.sec.gov/divisions/enforce/enforcement manual.pdf.

[4] The SEC press release announcing the proposed rule is *available at* http://sec.gov/news/press/2010/2010-213.htm. The full proposing release is *available at* http://www.sec.gov/rules/proposed/2010/34-63237.pdf. Comments were due by December 17, 2010. The Dodd-Frank Act requires the SEC to adopt regulations to implement the whistleblower program by April 21, 2011.

submit original information to the SEC in accordance with all the procedures and conditions set forth in the proposed rule.

Voluntary submission of information. All information must be voluntarily provided to the SEC. In general, information is voluntarily provided if there is no legal requirement that the recipient of the request provide the information or even respond to the request. A whistleblower is deemed to have provided information voluntarily to the SEC if the whistleblower has initially and voluntarily provided information to a local, state, or federal authority, the Congress, a self-regulatory organization, or the PCAOB.

Original information. All information provided must be original. Original information must be based on the whistleblower's independent knowledge or independent analysis, and not already known to the SEC and not derived exclusively from certain public sources. Original information includes only that information that is provided to the SEC for the first time after July 21, 2010. If the whistleblower provides the same information to another authority, such as an internal compliance program, the whistleblower will have a 90-day grace period during which he or she can alert the SEC and still be considered to have provided original information as of the date the information was provided to the compliance program. Ordinarily, information provided after an investigation has begun is not eligible for an award unless it has not been requested by the investigating agency and is either important to the success of the later enforcement action or informs the government of a new, potential violation of which it was previously unaware.

Payment of Award

The SEC will pay an award to one or more whistleblowers who voluntarily provide the SEC with original information that leads to the successful enforcement by the SEC of a federal court or administrative action in which the SEC obtains monetary sanctions – civil money penalties, disgorgement, and prejudgment interest – totaling more than $1 million. The SEC may also pay an award to a whistleblower based on monetary sanctions that are collected from a "related action," which may be an enforcement action commenced by the U.S. Department of Justice or other government agency. The SEC will not pay an award in a related action if an award has already been granted to the whistleblower by the CFTC for the same action.

Exclusions from Eligibility to Receive an Award

The proposed rule limits which individuals can be considered whistleblowers eligible for an award payment. Specifically, it exempts several categories of individuals who are not eligible for awards. Notably, neither the Act nor the rule prohibits persons who are complicit in the alleged violation from collecting an award. Rather, this is merely one factor to be considered in determining the appropriate amount of an award.

Certain employees. Employees with a legal or contractual duty to report to governmental authorities, any self-regulatory organization, or the PCAOB, or to investigate information, are not eligible to receive an award. This applies when a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity receives information about a potential violation. In a related exception, information obtained through an entity's legal, compliance, audit, or similar function, is not eligible. But none of these exclusions is applicable if the individual reported the information to the entity but the entity does not disclose the information to the SEC within a "reasonable time" or proceeds in "bad faith." The rule also includes an expectation that employees who learn of potential violations as part of their corporate responsibilities will take steps to address the violations.

Attorneys. Attorneys are not permitted to use information obtained from client engagements or attorney-client privileged information to make whistleblower claims for themselves (unless disclosure of the information is permitted under SEC rules or state bar rules).

Accountants. Independent public accountants and others who obtain information through an engagement required under the securities laws are not eligible for an award if that information relates to a violation by the engagement client or the client's directors, officers, or other employees. (Although, auditors have separate obligations under Section 10A to report violations of the securities laws.)

Other exclusions. Information that was obtained in a manner that violates federal or state criminal law is also excluded. The proposal further excludes foreign government officials, and, in order to prevent evasion of rules, anyone who obtained their information from persons subject to the other exclusions.

Statutory exclusions. Certain other individuals – such as employees of certain agencies and people who are criminally convicted in connection with the conduct – are excluded by the Dodd-Frank Act.

Information Must Lead to Successful Enforcement

Whistleblowers will be eligible for awards if they provided the SEC with original information that caused the SEC to commence an examination, open an investigation, reopen an investigation that the SEC had closed, or inquire concerning new or different conduct as part of a current examination or investigation, and the information significantly contributed to the success of the action. Alternatively, if the information is regarding conduct that is already under examination or investigation, the information must either lead to the discovery of new violations not otherwise known, or not be otherwise obtainable and essential to the success of the action.

Amount of Award

If all the conditions of the proposed rule are met, the SEC will decide the amount of the award based on the following criteria. First, the statute provides that the amount must be at least 10% and no more than 30% of the monetary sanctions that the SEC is able to collect. Second, the proposed rule states that, in determining the amount of an award, the SEC must consider:

- the significance of the information provided by a whistleblower to the success of the SEC action or related action;
- the degree of assistance provided by the whistleblower and any legal representatives of the whistleblower in the SEC action or related action;
- the programmatic interest of the SEC in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and
- whether the award otherwise enhances the SEC's ability to enforce the federal securities laws, protect investors, and encourage the submission of high quality information from whistleblowers.

As part of the analysis, the proposed rule provides that the SEC may take into consideration the following:

- the degree to which the whistleblower took steps to prevent the violations from occurring or continuing;
- the efforts undertaken by the whistleblower to remediate the harm caused by the violations;
- the culpability of the whistleblower; and
- whether a whistleblower reported the potential violation through effective internal whistleblower, legal, or compliance procedures before reporting the violation to the SEC.

Confidentiality

Under the proposed rule, the SEC will not disclose information that could reasonably be expected to reveal the identity of the whistleblower, except under certain circumstances, such as when disclosure is required to a defendant in connection with a federal court or administrative action, or when the SEC determines that it is necessary to disclose to the Department of Justice or other regulatory agency in order to advance the purposes of the Exchange Act or to protect investors. The proposed rule also requires that anonymous whistleblowers be represented by an attorney who must certify that he or she has verified the whistleblower's identity.

Amnesty and Culpable Individuals

The proposed rule does not grant amnesty to individuals who provide information to the SEC. In addition, in determining whether the required $1 million threshold has been satisfied for purposes of making the award, the SEC will exclude any monetary sanctions that the whistleblower is ordered to pay, or that are ordered against any entity whose liability is based on conduct that the whistleblower directed, planned, or initiated. In implementing this provision, the SEC states that it is seeking to prevent wrongdoers from financially benefitting from, essentially, blowing the whistle on their own misconduct. On the other hand, the proposed rule expressly contemplates that a whistleblower may be a participant in a securities fraud scheme or otherwise engage in other culpable conduct and could still receive an award.

Staff Communications with Whistleblowers

The proposal authorizes the SEC staff to communicate directly with whistleblowers who are directors, officers, members, agents, or employees of an entity that has counsel, without first seeking the consent of the entity's counsel. The rule attempts to create an exemption under state bar ethics rules governing the professional responsibility of lawyers to permit the staff to communicate with a whistleblower who initiates contact with the SEC staff, by defining such communications as "authorized by law," an exemption recognized by the ABA Model Rules.

IMPACT ON CORPORATE COMPLIANCE PROGRAMS

The SEC's proposed whistleblower rule has the potential to impact profoundly public companies and financial institutions. The proposed rule raises a number of important issues, including issues regarding confidentiality, privilege, and possible divided loyalties within the compliance function. Most important is the question of whether the proposed rule appropriately balances the policy goals of encouraging whistleblowers to report securities wrongdoing to the SEC while ensuring the effectiveness of company compliance programs. In its proposing release, the SEC expressed a desire to avoid creating a rule that had the unintended consequence of undermining internal legal, audit, and compliance programs, or discouraging whistleblowers who work for companies with robust compliance programs from first reporting violations internally. As discussed below, substantial questions remain as to whether the SEC has struck the appropriate balance. Comments on the proposed rule will undoubtedly explore these issues in depth.

Significantly, the proposed rule does not require an individual to report a potential violation internally to the company as a prerequisite to being an eligible whistleblower (although the SEC invites comment on this issue). Rather, the proposed rule attempts to accommodate companies' interest in effective compliance programs by providing (among other things) that:

- if a whistleblower provides the information to the company's internal compliance program, the whistleblower will have a 90-day grace period during which he or she can alert the SEC and still be considered to have provided original information as of the date of the report to the internal compliance program;
- when determining the amount of an award, the SEC may consider whether a whistleblower reported the potential violation through effective internal whistleblower, legal, or compliance procedures before reporting the violation to the SEC; and
- employees with a legal or contractual duty to report or investigate information, such as compliance personnel, generally are not eligible to receive an award.

These provisions may not be enough, however, to discourage an individual from bypassing his or her company's internal compliance and reporting program.

First, the 90-day window, which permits a whistleblower first to report to the company and then report to the SEC and have the SEC report relate back to the date of the report to the company, arguably is not, by itself, a reason to report through the company's compliance program. The threshold question is why an employee would want to take advantage of the 90-day window in the first instance, unless it is clear that such a step would help maximize his or her ultimate recovery. In addition, given the practicalities of investigating an employee complaint, 90 days may simply be insufficient time in which to conduct a proper review.

Second, in determining the amount of the award, the SEC must consider a number of factors but is not required to consider whether the employee first reported the alleged violation in accordance with the company's internal procedures. Whether or not the employee did so is instead a "permissible consideration[]" that the SEC may take into account and, even then, only when warranted in a particular case. The rule could (but does not) state that internal reporting will be considered a significant positive factor in determining the amount of the payout to the whistleblower, and that failure promptly to invoke internal company reporting procedures will be treated as a negative factor. By its terms, the proposed rule does not appear to set forth any concrete reason why an employee should use the 90-day grace period.

Third, although a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity generally cannot be a whistleblower under the proposed rule, there is a notable exception: those individuals may qualify as whistleblowers if they report the alleged violation to their compliance program but the entity: (1) does not disclose the information to the SEC "within a reasonable time" or (2) proceeds "in bad faith." In this context, there is a risk that the terms "reasonable time" and "bad faith" are unworkably vague, creating an incentive for individuals whose job it is to detect and investigate fraud to go to the SEC as whistleblowers. Under such circumstances, given the seductively high bounties available, such individuals, in practice, could render the "reasonable time" and "bad faith" elements toothless. For example, a supervisor may report a potential violation to the internal compliance program and soon thereafter claim that the company failed to report the alleged violation to the SEC in a reasonable time – because in the supervisor's estimation, for example, the facts and circumstances of the particular case required more immediate disclosure to the SEC. Or an internal auditor for a company who discovers possible securities wrongdoing in the performance of an internal audit may protectively report it to the SEC just in case the company is slower than is deemed reasonable in reporting it to the SEC (if indeed such reporting is warranted). Or, further still, if an individual believes that his or her report to the company's compliance department may enable a member of that department to obtain the bounty as a whistleblower, the individual may avoid submitting the report rather than take the risk of someone else receiving the award. Given the potential size of the bounty, some whistleblowers may decide to take no chances and avoid the internal program altogether.

In sum, the proposed framework may operate to undermine the effectiveness of internal company compliance programs by creating an incentive – and no meaningful disincentive – for employees to bypass internal company reporting procedures and report alleged violations directly to the SEC. This is unfortunate as oftentimes companies can move more quickly than the government to stop nascent wrongdoing by immediately removing those who are culpable from their positions and overseeing activities that may be suspect. If the rule is adopted as is, the impact on companies' compliance programs would likely be significant. Among other things, the rule could: (1) deprive the company of the ability to investigate promptly, determine the scope of the problem, and stop or limit the impact of wrongdoing; (2) if there is a systemic problem, deprive the company of the ability to revise its internal controls and procedures to stop violations; (3) impair the company's ability to take disciplinary action against employees who may have violated the law or internal company policies, as well as discipline those who are aware of wrongdoing and idly sit by; and (4) discourage employees from coming to the company with questions as to possible conduct that might or might not be a violation of law or company policy.

WHISTLEBLOWER PROTECTIONS

The Dodd-Frank Act creates new whistleblower protections for employees who provide information to or assist the SEC, authorizing a new private right of action for reinstatement, two times back pay, and other relief. This new cause of action can be brought in a federal district court within six years of a violation or three years of discovery, but in no event later than 10 years after a violation.[5]

The Act also expands the coverage of the existing Sarbanes-Oxley whistleblower protections by expressly including employees of subsidiaries of publicly traded companies included in their parent corporation's consolidated financial statements, extending the statute of limitations from 90 to 180 days, prohibiting mandatory predispute arbitration agreements for Sarbanes-Oxley claims, and clarifying the right to a jury trial in Sec. 922(c). The Act also creates new causes of action for employee whistleblowers who provide information about certain consumer protection violations, Sec. 1057, and expands the scope of protected whistleblowing activity under the False Claims Act, Sec. 1079b.

OTHER ENHANCEMENTS TO SEC ENFORCEMENT

While the whistleblower provisions of the Dodd-Frank have drawn the greatest attention thus far, the Act also included other provisions to strengthen SEC enforcement.

Authority to Impose Civil Penalties in Cease-and-Desist Proceedings

The SEC first received broad authority to seek or impose civil money penalties in enforcement actions as a part of the Securities Remedies and Penny Stock Reform Act of 1990. Perceiving that such quasi-criminal remedies should not be imposed on persons who did not voluntarily choose to subject themselves to the SEC's jurisdiction, Congress limited the SEC's authority to impose such remedies in administrative actions to persons who were associated with regulated enterprises – brokerage firms, investment advisers, investment companies, and other registered entities. For all other persons, the SEC was required to seek an order from a federal district court in a civil action, triable by jury.

Dodd-Frank washes away this distinction. Instead, Section 929P of the Act amends Section 8A of the Securities Act, Section 21B(a) of the Securities Exchange Act, Section 9(d)(1) of the Investment Company Act, and Section 203(i)(1) of the Investment Advisers Act to permit the imposition of civil money penalties in addition to cease-and-desist orders. Additionally, for cease-and-desist proceedings instituted under the Securities Act, the Dodd-Frank Act adopts the three-tiered penalty grid already contained in the Securities Exchange Act, but raises the penalty amounts by 50%.

In part, the new authority codifies existing regulatory practice and it could facilitate negotiated resolutions of SEC enforcement actions. Historically, the SEC has sought civil money penalties in most of its enforcement actions. With regard to settlements of matters regarding non-registered persons, it has frequently bifurcated its settled proceedings into two different proceedings – one an administrative action imposing prospective cease-and-desist orders and ancillary relief; the other, a civil, district court action seeking only the imposition of a civil money penalty. Because many regulatory provisions of the securities laws, such as the reporting and internal control requirements imposed on public companies by Section 13 of the Securities Exchange Act, are directly applicable only to issuers, the SEC had pursued its claims for civil penalties on a theory that an

[5] Sec. 922(a). The Act contains similar but somewhat less expansive protections for employees who provide information to or assist the CFTC. Sec. 748.

individual had "aided and abetted" the violation by the public company, a theory of violation that required allegations of scienter – either intentional or reckless misconduct. Now, persons seeking to settle actions can do so in one proceeding, and, if the settlement does not involve a claim of fraud, may do so in an administrative action asserting that the settling party was a "cause" of the violation, a claim which may be premised on negligence, rather than intentional or reckless misconduct.

On the other hand, this new authority also gives the SEC and its Enforcement Division a powerful incentive to bring more cases as administrative actions. Such actions can be disadvantageous to potential defendants in that: (1) administrative actions go to hearing on an accelerated schedule in which a hearing must be completed and an initial decision rendered by an administrative law judge within 270 days of the filing of the SEC's complaint; (2) there is no discovery in administrative proceedings; (3) there is no right of trial by jury; and (4) factual findings by the SEC in an administrative proceeding can only be reversed on appeal if the defendant shows that the findings failed to meet the "substantial evidence" test.

Still, certain enforcement remedies may only be imposed by a federal judge. These include, for example, an order issued pursuant to Section 21(d)(2) of the Securities Exchange Act prohibiting a person from serving as an officer or director of a public company, and an order requiring forfeiture of incentive-based or equity-based compensation following a restatement of financial statements under Section 304 of Sarbanes-Oxley.[6]

Expanding the Scope and Definition of Secondary Liability

The SEC has long relied on theories of secondary liability to enforce the federal securities laws, particularly those provisions, such as the reporting and internal controls requirements applicable to public companies, and the rules governing brokerage firms and investment advisers that were not directly applicable to individuals. To apply these provisions to individuals, the SEC commonly filed complaints alleging that an individual "aided and abetted" the violation by a company.

The SEC's authority to allege aiding and abetting was called into question by a Supreme Court decision, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*[7] In 1995, Congress restored the SEC's aiding and abetting claims as a part of the Private Securities Litigation Reform Act by adding Section 20(e) of the Securities Exchange Act, which extended liability to "any person who knowingly provides substantial assistance to another in violation. . . ." Several circuit courts interpreted the "knowing" requirement to exclude reckless conduct,[8] while others, relying on pre-*Central Bank* authority, held that recklessness sufficed to satisfy the state of mind requirements for liability.[9]

Sections 929M through O of the Dodd-Frank Act attempt to end this division by amending Section 15 of the Securities Act and Section 20(e) of the Securities Exchange Act and adding Section 209(f) to the Investment Advisers Act to state that aiding and abetting which is "knowing or reckless" will be a basis for an action.

Extraterritorial Enforcement of the Federal Securities Laws

Securities markets are increasingly global with multinational companies listing securities for trading in the United States and with trading in U.S. securities occurring in overseas markets. At the end of its most recent term, however, the Supreme Court ruled that Section 10(b) of the Securities Exchange Act prohibits fraud only in connection with the purchase or sale of securities listed on a domestic exchange and domestic transactions in other securities, but does not provide a cause of action to foreign plaintiffs suing foreign and American defendants for alleged misconduct in connection with securities traded on foreign exchanges.[10]

In response, Congress added provisions to the Dodd-Frank Act which restored the authority of the SEC and of the Department of Justice. In particular, the Act amended Section 22 of the Securities Act, Section 27 of the Securities Exchange Act, and Section 214 of the Investment Advisers Act to confer U.S. court jurisdiction over violations of the three anti-fraud provisions involving (i) conduct within the United States that constitutes significant steps in furtherance of the

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6 15 U.S.C. § 78u(d)(1); 15 U.S.C. § 78aa.

7 511 U.S. 164 (1994).

8 *E.g., S.E.C. v. Fehn,* 97 F.3d 1276 (9th Cir. 1996).

9 *E.g., Graham v. S.E.C.,* 222 F.3d 994 (D.C. Cir. 2000).

10 *Morrison v. National Australia Bank, N.A.,* 130 S. Ct. 2869 (2010).

violation, even if the securities transaction occurs outside the United States and involves only foreign investors, or (ii) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.[11]

Second, the Act amended Section 106 of the Sarbanes-Oxley Act to increase the authority of the SEC and the PCAOB to compel the production to them of audit work papers of foreign private accounting firms by making such firms subject to the jurisdiction of U.S. courts for purposes of enforcing such a request; requiring U.S. registered public accounting firms to secure the agreement of any foreign accounting firm upon which it relies in its audit to produce the work papers of that firm, and making a failure to comply a violation of law. The Act permits a foreign public accounting firm to produce work papers through alternate means, such as through foreign securities regulators.

Third, the Act adds confidentiality provisions that are intended to overcome objections by foreign authorities to inspections by the PCAOB and other US government data requests. For example, in testimony to the Congress, the PCAOB reported that it had been unable to conduct examinations of certain foreign registered public accounting firms because some overseas authorities believed that US law did not permit the PCAOB to share information with its overseas counterparts.[12] Additionally, overseas persons have expressed concern that US law did not adequately safeguard private data as required by overseas laws. The Act amends Section 24 of the Securities Exchange Act to permit the SEC to share documents with the PCAOB and other federal and state agencies without losing the protection from disclosure, to refuse to disclose privileged information obtained from foreign securities or law enforcement authorities, and amends Section 105(b)(5) of the Sarbanes-Oxley Act to permit the PCAOB to share its data with foreign government regulators or authorities empowered by governments to regulate auditors.

Increased Collateral Consequences

Historically, bars or limitations on association imposed under one provision of the securities laws, such as the Securities Exchange Act provisions regarding brokers, have not extended to association with another regulated entity registered under a different provision, such as investment advisers. The Dodd-Frank Act gives the SEC the authority to bar that person found to have violated one of the securities acts from associating with a range of SEC-regulated entities, and not just entities regulated by the specific title that was violated. Specifically, Sections 15(b)(6)(A), 15B(c)(4), and 17A(c)(4)(C) of the Securities Exchange Act and Section 203(f) of the Investment Advisers Act are amended to permit the SEC to bar a violator from association with a "broker, dealer, investment adviser, municipal securities dealer, transfer agent, municipal adviser, or nationally recognized statistical rating organization" in each case.

Deadline for Completing Examinations, Inspections, and Enforcement Actions

One recurring criticism of the SEC has been delay in the completion of enforcement investigations. The Act inserts new Section 4E to the Securities Exchange Act requiring the SEC staff to, within 180 days of providing a written Wells notification to any person, either file an action against such person or notify the Director of the Division of Enforcement of its intent not to file an action. This deadline can be extended for additional 180 day periods if the Director of the Division of Enforcement or a designee of the Director decides that it is necessary because of the complexity of the case and so notifies the Chairman of the SEC. Sec. 929U.

CONCLUSION

The Dodd-Frank Act significantly added to the SEC's enforcement powers. With respect to the whistleblower provisions in particular, the question remains whether Congress and the SEC, in their desire to promote more and better tips to the Commission, have risked undermining the corporate compliance programs on which they depend to be the front lines of effective regulation and enforcement. ■

[11] Rather than restore private actions, however, the Act directs the Commission to study whether the anti-fraud provisions should be given extraterritorial effect in a private action and to report its recommendations to Congress in 18 months.

[12] *See* Statement of PCAOB Acting Chairman, Daniel L. Goelzer, U.S. House of Representatives Financial Services Committee, Subcommittee on Capital Markets, May 21, 2010, *available at* http://pcaobus.org/News/Speech/Documents/05212010_Goelzer_HFSC_Testimony.pdf.