



SECURITIES INDUSTRY PRACTICE

ALERT

THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: WHISTLE-BLOWER PROVISIONS AND FIDUCIARY DUTY STANDARDS

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which President Obama signed into law on July 21, 2010, represents the most sweeping changes to the financial system in decades. Among those changes, Dodd-Frank includes measures that will surely increase whistle-blower activity for violations of laws governing securities and commodities. Dodd-Frank also portends heightened scrutiny of brokers and broker-dealers by laying the foundation for imposing a fiduciary duty on their activities.

While the bulk of Dodd-Frank's impact will be felt through the regulations enacted to implement its broad mandate, it is clear that the statute's provisions are "game changers" for professionals in the securities and commodities industries.

Whistle-Blower Provisions

Section 748 of Dodd-Frank amends the Commodity Exchange Act to extend whistle-blower protection to those providing information about violations of the Commodity Exchange Act. Regulated employers cannot "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against" a whistle-blower for the whistle-blower's lawful actions in reporting offenses to the Commodity Futures Trading Commission (CTFC) or "in assisting in any investigation or judicial or administrative action of the CTFC based upon or related to such information." Dodd-Frank

provides aggrieved whistle-blowers a cause of action in the event they experience retaliation due to their whistle-blower activity.

Sections 922-944 of Dodd-Frank amend the Securities Exchange Act of 1934, the Securities Act of 1933, the Investment Company Act of 1940, and the Investment Advisers Act of 1940 to implement whistle-blower provisions for essentially all securities laws violations by regulated persons.

Section 922 also authorizes the Securities and Exchange Commission (SEC) to share whistle-blower provided information with other U.S. government agencies, including the Attorney General, as well as foreign securities authorities and foreign law enforcement.

Both the commodities and securities whistle-blower provisions establish the whistle-blower's bounty at no less than 10 and up to 30 percent of the total recovery. Notably, Dodd-Frank's whistle-blower provisions apply the 10-30 percent incentive to the Foreign Corrupt Practices Act, which has been the subject of increased SEC enforcement in recent years and for which total recoveries can top tens and even hundreds of millions of dollars.

By expanding the scope of violations to which whistle-blower protections apply, and motivating potential whistle-blowers with up to 30 percent of the

total recovery, Dodd-Frank is sure to prompt an increase in whistle-blower reporting.

Just as Dodd-Frank is sure to ratchet up whistle-blower activity, to stay ahead of the whistle-blowers, regulated companies must review the effectiveness of their compliance measures and accelerate the pace at which they perform internal investigations and determine whether to disclose issues to regulators.

Fiduciary Standard

Section 913 of Dodd-Frank also empowers the SEC to subject broker-dealers to the same fiduciary duty

standard of conduct currently applied to investment advisers. Although the statute does not directly impose a fiduciary duty standard, it empowers the SEC to do so after studying whether such action is appropriate. Statements from SEC Chair Mary Schapiro indicate that the SEC is likely to utilize this authority.

While broker-dealers are already subject to some conduct regulation, applying a fiduciary duty to their customers will, among other things, increase broker-dealers' obligations to disclose conflicts of interest and increase scrutiny of principal trading with customers and the recommendation of proprietary products and fees.

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