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The Dodd-Frank Act: Update on Whistleblowing and Anti-retaliation

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EXPAND YOUR EXPECTATIONS™

Why are we here today?

- Dodd-Frank creates an incentive for employees to report matters to the SEC
- In the wake of the SEC's new whistleblower rules, our company:
 - Has changed existing policies to address the new rules - 9.1%
 - Hasn't yet, but intends to change existing policies to address the new rules - 27.3%
 - Not sure yet if will change existing policies - 42.4%
 - Has decided not to change existing policies because considerations under the new rules are adequately addressed by existing policies - 21.2%

The Sarbanes-Oxley Act of 2002

- Sarbanes-Oxley requires publicly traded companies to reshape their businesses and their attitudes toward workplace crime. Sections 806, 301, and 1107 of SOX provide additional guidance for whistleblowing.
- **Section 806**
 - Extends protection to employees of publicly traded companies who report fraud.
 - Protects “whistleblowers” who provide information or assist in an investigation from retaliation.
 - If retaliated against, employee will be “entitled to all relief necessary to make the employee whole.”
- **Section 301**
 - Requires audit committees to take a role in whistleblowing and reducing corporate fraud.
 - Audit committees must develop mechanisms for recording, tracking, and acting on information.
- **Section 1107**
 - Whistleblowing protections extend beyond public corporations.
 - Extends protection to any person who reports “to a law enforcement officer” information related to a violation of a federal law.

New Whistleblower Incentives and Protections

- **Bounty Provision:** If original information voluntarily provided by one or more whistleblowers leads to successful SEC enforcement action that results in sanctions exceeding \$1million, the whistleblower is entitled to between 10% and 30% of collected monetary sanctions.
- **Anti-Retaliation Provision:** No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other matter discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower (i) in providing information to the SEC; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or (iii) in making disclosures that are required or protected under Sarbanes Oxley, the Securities Exchange Act or any other law rule or regulations subject to the jurisdiction of the SEC.

What is a Whistleblower?

- Section 922(a)'s Specific Definition of a **Whistleblower**:
 - Expressly defines “whistleblower” as “any individual[s] ... who provide[s] information relating to a violation of the securities laws to the [Securities and Exchange] Commission. . . .”
- Under the new rules, a whistleblower is any individual who provides information to the SEC regarding a possible violation of the securities laws that has occurred, is ongoing or that is about to occur.
 - Employee, agent, or someone outside the company who provides relevant information may be a whistleblower.

Whistleblower Incentives and Protection Under Dodd-Frank

- SEC Section 922(a) Protection Provisions
 - **New causes of action:** SEC whistleblowers have a private right of action in Federal district court
 - **Statute of limitations:** 6 years from date of violation or 3 years after employee should reasonably have known of violation, but in any event no longer than 10 years after date of violation
 - **Relief:**
 - Reinstatement with same seniority status
 - 2 times the amount of back pay otherwise owed (with interest)
 - Compensation for litigation costs, expert witness fees and reasonable attorney fees
 - **Carveout:** A whistleblower is not entitled to an award if the whistleblower:
 - Knowingly and willfully makes any false, fictitious or fraudulent statement or representation; or
 - Uses any false writing or document knowing the writing or document contains any false, fictitious or fraudulent statement or entry

Should we pay our own bounty?

- In the wake of the SEC's new whistleblower rules, our company:
 - Has provided incentives for whistleblowers to report internally first - 0%
 - Hasn't yet, but intends to provide incentives for whistleblowers to report internally first - 3.0%
 - Not sure yet if will provide incentives for whistleblowers to report internally first - 60.6%
 - Has decided to not provide incentives for whistleblowers to report internally first - 36.4%
- Pros and cons of companies paying bounties

Who Must Comply?

- Dodd-Frank and many other federal whistle blowing statutes apply only to publicly-traded companies.
- But many employment-related and other federal and state statutes and common law prohibit whistle blowing AND apply to most public, private and municipal employees. Examples include:
 - Tennessee's Public Protection Act,
 - OSHA,
 - Environmental laws like Clean Water Act, etc.,
 - No FEAR Act (which made individual federal agencies directly responsible for the economic sanctions of unlawful retaliation),
 - Other various state and local laws.

Judicial Interpretation

Recent Anti-Retaliation Cases Involving Sarbanes-Oxley or Dodd-Frank Whistleblowers

- *Sylvester v. Parexel International* (ARB May 25, 2011)
- *Tides v. Boeing Corporation* (9th Cir. May 5, 2011)
- *Egan v. TradingScreen, Inc.* (S.D.N.Y. May 4, 2011)
- *Johnson v. Siemens Building Technologies, Inc.* (ARB March 31, 2011)
- *Menendez v. Halliburton* (ARB September 13, 2011)
- *Kim v. The Boeing Co* (W.D. Wash. September 23, 2011)

Top 10 Proactive Measures to Consider Now

- Embrace the culture of compliance; appeal to shared values
- Reminder of the risks posed to everyone by improper conduct
- Examine current policies and procedures, particularly anti-retaliation policies
- Publicize internal reporting procedures
- Leverage technology
- Provide regular opportunities for reporting
- Train and retrain employees, particularly supervisors
- Create an investigative response team
- Conduct prompt and thorough internal investigations
- Establish procedures for communicating with whistleblowers

What can we do to get the word out?

- In the wake of the SEC's new whistleblower rules, our company:
 - Has created a system to alert employees of the benefits of reporting internally (eg. sign updated employee handbook, fill out compliance questionnaires) - 12.1%
 - Hasn't yet, but intends to create a system to alert employees of the benefits of reporting internally - 24.2%
 - Not sure yet if will create a system to alert employees of the benefits of reporting internally - 60.6%
 - Has decided not to create a system to alert employees of the benefits of reporting internally - 3.0%

Discussion Topic #1

- **How should a company revise its policies and handbooks in a way that encourages corporate compliance?**

Discussion Topic #2

- **How should a company train its employees on corporate whistle blowing and anti-retaliation policies and best the related best practices?**

Discussion Topic #3

- **How can a company leverage its technology in a manner that assists corporate compliance efforts?**

Discussion Topic #4

- **How should a company consider handling employee complaints and performing subsequent investigations considering the need to keep matters internal and the fear of retaliation?**

Discussion Topic #5

- **What are best practices to consider when a company receives notice from an agency that a complaint has been made?**

Questions and Comments

