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THE DODD-FRANK ACT'S BOUNTY HUNTER PROVISIONS

The Dodd-Frank Act authorizes the SEC and the CFTC to pay whistleblowers bounties for original information about securities and commodities law violations that leads to successful enforcement actions. There are exclusions for information obtained in legal, compliance, or audit functions, unless not disclosed in reasonable time. Business interests take strong exception to the proposed rules, arguing, among other things, that they would give employees an incentive to bypass existing compliance programs to earn a bounty.

By Michael E. Clark *

Several years ago, Professor Pamela Bucy submitted law review articles[1] calling on Congress to authorize *qui tam* actions for financial crimes and emphasizing that "[n]o matter how talented or dedicated our public law enforcement personnel may be nor how many resources our society commits to regulatory efforts, a public regulatory system will always lack the one resource that is indispensable to effective detection and deterrence of complex economic wrongdoing: inside information."[2] Although turning workers into informants by realigning their loyalties seemed fundamentally wrong to me, both then and now, Congress has recently decided to move in this direction. In the Dodd-Frank Act of 2010 ("the Act" or "Dodd-Frank"),[3] Congress authorized whistleblower bounties to entice the reporting of original information about securities and commodities violations to the Securities and Exchange Commission and the Commodities Future Trading Commission ("CFTC"). As a result, publicly traded companies can expect higher compliance costs, added enforcement activities, and more follow-on civil litigation.

These new bounty provisions promise to be a "game-changer" for financial fraud enforcement. Not only will whistleblowers now have strong incentives to put their personal interests ahead of loyalties to their employers, but they will have ample opportunities to do so since the terms security and commodity are broadly defined and a wide range of conduct can lead to actionable securities or commodities violations. The SEC provides online forms to report the following types of securities

[1] *See* Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 4-5 (2002) and Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905 (2002).

[2] Bucy, 76 S. CAL. L. REV. at 4-5 (2002). For another view about why whistleblower provisions should be expanded, *see* Marsha J. Ferziger and Daniel G. Currell, *Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs*, 1999 UNIV. ILL. L. REV. 1141 (1999).

[3] PUB. L. 111-203, 124 STAT. 1376 (2010).

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violations: (1) manipulation of a security's price or volume; (2) a fraudulent or unregistered offer or sale of securities, including Ponzi schemes, high-yield investment programs or other investment programs; (3) insider trading; (4) false or misleading statements about a company (including false or misleading SEC reports or financial statements); (5) abusive naked short selling; (6) theft or misappropriation of funds or securities; (7) fraudulent conduct or other problems associated with municipal securities transactions or public pension plans; and (8) bribery of foreign officials.[4] Another reason why the bounty provisions are so significant is that the penalties imposed for securities violations noticeably increased following Sarbanes-Oxley.[5]

It also will be far less expensive for lawyers to invest their time and money in representing whistleblowers seeking a Dodd-Frank bounty compared to the costs involved in representing plaintiffs in a private securities class action or whistleblowers in a False Claims Act ("FCA" or "*qui tam*") action. In the weeks since Dodd-Frank became law, SEC officials have acknowledged that the agency already has received a substantial number of tips.[6] It is therefore understandable why plaintiffs' attorneys are aggressively seeking Dodd-Frank whistleblowers as clients.[7]

DODD-FRANK'S WHISTLEBLOWER PROVISIONS

Not long before Dodd-Frank became law, the SEC's Office of the Inspector General criticized the agency's bounty program, which only authorized rewards for tips on insider trading violations.[8] While the program had existed for many years, it wasn't successful.[9] The SEC wanted to revamp and expand the program, and so it had consulted with the U.S. Department of Justice and the Internal Revenue Service to identify "best practices" from other successful whistleblower programs. It is therefore not accidental that Dodd-Frank's bounty provisions in many ways resemble the FCA's highly successful *qui tam* provisions[10] (which led to the recovery of $2.4 billion in 2009[11]) and the revised IRS whistleblower rewards statute.[12]

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[4] *See* http://www.sec.gov/complaint/selectconduct.shtml. Similar theories apply to CEA violations.

[5] *See, e.g.*, Matt Phillips *SEC's Greatest Hits: Biggest. Penalties. Ever.*," WSJ Blogs, MarketBeat (July 16, 2010) (describing "trophy penalties" obtained by SEC this decade), *available at* http://blogs.wsj.com/marketbeat/2010/07/16/secs-greatest-hits-some-of-the-other-biggest-penalties/.

[6] *See, e.g.*, Ashby Jones and Joann S. Lublin, *Critics Blow Whistle on Law*, Wall St. J. (Nov. 1, 2010) ("the SEC said it has . . . received hundreds of whistleblower tips since the passage of the law . . ."), *available at* http://online.wsj.com/article/SB10001424052702304879604575582603173894296.html?mod=dist_smartbrief and Kelly Eggers, *New Whistleblower Rules: Are Your Workers Government-Sponsored Moles*?, Wall St. J. Blog (Nov. 4, 2010) (indicating that since Dodd-Frank, complaints made to the SEC have risen tenfold),

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available at http://blogs.wsj.com/marketbeat/2010/07/16/secs-greatest-hits-some-of-the-other-biggest-penalties/.

[7] Shortly after Dodd-Frank was enacted, inputting the search expression "SEC whistleblower" with Google returned several advertisements from plaintiffs' firms known for *qui tam* work and for securities class action firms.

[8] SEC, Office of Audits, "Assessment of the SEC's Bounty Program," Report No. 474 (March 29, 2010), *available at* http://www.sec-oig.gov/Reports/AuditsInspections/2010/474.pdf.

[9] *Id.*, at iii.

[10] 31 U.S.C. § 3729, *et seq.*

[11] DOJ Press Release, "Justice Department Recovers $2.4 Billion in False Claims Cases in Fiscal Year 2009; More Than $2.4 Billion Since 1986," *available at* http://www.justice.gov/opa/pr/2009/November/09-civ-1253.html.

[12] 26 U.S.C. § 7623(b).

Like these regimes, Dodd-Frank authorizes a 10 to 30 percent bounty if collected monetary sanctions of over $1 million are recovered by the SEC, the CFTC, the DOJ, self-regulatory organizations ("SROs"), or certain other regulators.[13] But unlike the FCA's *qui tam* provisions, Dodd-Frank doesn't require (or allow) a whistleblower to pursue a lawsuit against the purported wrongdoer. Instead, the person must provide original information and, if requested, help the SEC or CFTC to develop an enforcement action. While a whistleblower lacks a say in whether the agency pursues or settles the action, Congress did provide a limited right for a whistleblower to appeal an award determination.[14]

Dodd-Frank's whistleblower provisions appear in section 748 (related to the CFTC) and section 922 (related to the SEC) of the Act. Congress required the agencies to promulgate the necessary implementing rules within 270 days.[15] The SEC issued its proposed implementing rules on November 4, 2010, and requested that public comments be made by December 17, 2010.[16] The CFTC issued its proposed rules on November 10, 2010, and requested that public comments be made within 60 days of publication in the Federal Register.[17] Significant public comments were provided by stakeholders during the week of December 17, 2010, including letters from the ACC which were joined by representatives of 270 major public companies.[18]

Dodd-Frank categorically excludes just a few categories of individuals from qualifying for a bounty – *i.e.,* individuals who work for regulatory agencies (notably, the SEC, CFTC, and DOJ); auditors who conduct a required audit of a publicly traded company; and individuals convicted in a proceeding related to the judicial or administrative action for which the whistleblower otherwise could receive an award.[19] Critically, potential whistleblowers are not limited to current or former employees, but they can be independent contractors, consultants, joint venture partners, sales agents, and many others whose dealings allow them to gather and provide "original information" in the hope of financial reward.

Ominously for larger businesses, whistleblowers also can be persons involved with a private wholly owned subsidiary consolidated in a publicly traded entity's balance sheet *or* persons involved with a private wholly owned foreign subsidiary consolidated in the publicly traded entity's balance sheet. Note also that while the SEC's proposed rules preclude a foreign "official" from eligibility for a bounty,[20] the CFTC's companion proposed implementing rules do not. Both agencies further indicate that even if a whistleblower is ineligible to receive a bounty, he or she isn't precluded from the anti-retaliation protections provided by Dodd-Frank.[21]

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[13] *See* Dodd-Frank § 748(a(1) ("covered judicial or administration action" brought by the CFTC) and § 922(a(1) ("covered judicial or administration action" brought by the SEC).

[14] Dodd-Frank § 748(f)(1)(2) (appeals from the CFTC's exercise of discretion in determining "whether, to whom, or in what amount" an award shall be made may be appealed to the appropriate court of appeals within 30 days when the CFTC issues its determination) and Dodd-Frank § 922(f)(1)(2) (reflecting the same rights for appealing such determinations made by the SEC).

[15] Michael E. Clark, *Publicly Traded Health Care Entities at Risk from New SEC Whistleblower Incentives and Protections in Dodd-Frank Act,* 7 ABA HEALTH ESOURCE No. 1 (Sept. 2010), *available at* http://www.abanet.org/health/esource/Volume7/01/clark.html.

[16] SEC Rel. No. 34-63237, "Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934" (Nov. 4, 2010). In this 181-page document, the Commission invites public comments on several issues.

[17] CFTC Rel. No. 8765, "Proposed Rules for Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act" (Nov. 10, 2010).

[18] *See, e.g.,* David Hechler, "ACC Fires Off One Last Volley at SEC Over Whistleblower 'Bounty, Plan," Corporate Counsel (Dec. 20, 2010)(observing that 270 companies signed on to letters submitted by the general counsel of ACC, a group that represents in-house counsel, offering suggestions for how to "fix" the SEC's proposed rules and providing links to the letters submitted to the SEC); available at http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202476384954&ACC_Fires_Off_One_Last_Volley_at_SEC_Over_Whistleblower_Bounty_Plan.

[19] Dodd-Frank §§ 922, amending the Securities Exchange Act by adding new §21F(c)(2)("Denial of Award") and 748, amending the Commodity Exchange Act by adding new § 23(c)(2)("Denial of Award").

[20] SEC Rel. No. 34-63237 at 58-59.

[21] Dodd-Frank's anti-retaliation protections are set out in § 748 for whistleblowers providing information about commodities violations and § 922(h) for whistleblowers providing information about securities violations. These protections are broader than those provided by Sarbanes-

Certain critical statutory terms used in Dodd-Frank's whistleblower provisions are addressed below.

Original Information

The Act defines original information to mean "information that – "(A) is derived from the independent knowledge or analysis of a whistleblower; (B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information."[22]

The agencies' proposed rules further limit what will be considered original information or a voluntary submission, thereby narrowing the pool of eligible bounty hunters. As the SEC explains, "Proposed Rule 21F-4 defines three terms – (i) 'Voluntary Submission of Information,' (ii) 'Independent Knowledge,' and (iii) 'Information that Leads to Successful Enforcement' – that together play a significant role in determining whether a whistleblower is eligible for an award."[23]

Voluntary Submission

Under SEC Proposed Rule 21F-4(a), a submission will be considered voluntary only if not made following a request (formal or informal), inquiry or demand from the SEC, Congress, other federal, state, or local authority, an SRO ("Self-Regulatory Agency"), or the Public Company Accounting Oversight Board about a matter to which the information submitted is relevant.[24] Correspondingly, to act voluntarily means to do more than just provide information not already compelled by a subpoena, court order, or applicable law.[25] Moreover, an inquiry, request, or demand made on a company will be considered as also made on employees possessing responsive documents or who are within the scope of the request.[26]

Significantly, if a company fails to timely respond to a request, apparently the SEC will permit its employees to qualify – but, unlike the CFTC (which states that the proscribed time is 60 days),[27] the SEC doesn't say what constitutes a "reasonable time." Furthermore, if a person has a duty to report or a contractual obligation to report violations of the type in issue, then generally a submission will not be voluntarily made.[28]

CFTC Proposed Rule 165.2(o) parallels the SEC's Proposed Rule 21F-4(a) by requiring that original information be provided before a whistleblower (or anyone representing the individual) receives "any request, inquiry, or demand from the Commission, Congress, any other federal, state, or local authority, or any self-regulatory organization about a matter to which the information in the whistleblower's submission is relevant."[29] It does not matter if the request, inquiry, or demand is formal or informal.[30] The CFTC similarly requires that a whistleblower do more than simply provide information to the agency.[31] And a request, inquiry, or demand on an employer is considered as made on employees having responsive documents or information the employer needs to produce. As noted, employees will not be considered to have voluntarily submitted the information unless the employer fails to provide it within 60 days.[32]

Independent Knowledge and Analysis

Paragraphs two through seven of SEC Proposed Rule 21F-4(b) define constituent parts of the term "original information," including independent knowledge (in Proposed Rule 21F-4(b)(2)) and independent analysis (in Proposed Rule 21F-4(b)(3)).

Under Proposed Rule 21F-4(b)(2), independent knowledge means factual information a whistleblower possesses that wasn't obtained from public sources. It need not be first-hand knowledge but can be derived

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Oxley since a Dodd-Frank whistleblower can be someone in a publicly traded entity's subsidiary, need not follow the administrative exhaustion requirements under Sarbanes-Oxley, and has a new direct federal cause of action.

[22] Dodd-Frank §§ 922 (amending the Securities Exchange Act) and 748 (amending the Commodity Exchange Act).

[23] SEC Rel. No. 34-63237 at 105.

[24] *Id.* at 11.

[25] *Id.* at 12.

[26] *Id.* at 12-13.

[27] *Id* at 104-05.

[28] *Id.* at 14.

[29] CFTC Rel. No. 8765 at 25.

[30] *Id.*

[31] *Id.* at 25-6.

[32] *Id.* at 26.

from the person's experiences, observations, or communications.[33] The SEC says that "[u]nder Section 21F(a)(3)(A) of the Exchange Act, the original information . . . can include information . . . derived from independent knowledge and also from independent 'analysis[.]'" Proposed Rule 21F-4(b)(3), in turn, defines independent analysis to mean "the whistleblower's own analysis, whether done alone or in combination with others. . . ."[34]

SEC Proposed Rule 21F-4(b)(4), lists seven categories of exclusions under which information will not be considered to derive from an individual's independent knowledge or analysis.[35] Notably, two of these seven generally preclude attorneys and others who owe special duties to clients (such as accountants and experts) from qualifying for a bounty.

1. The first exclusion concerns information obtained through a communication subject to the attorney-client privilege. This exclusion is not absolute. Rather, the SEC says that circumstances may exist where the privilege is waived or disclosure is "otherwise permitted" under applicable bar rules or federal regulations in which an attorney could still qualify.[36]

2. The second exclusion is similar and excludes information obtained during legal representation of a client on whose behalf the lawyer or law firm was retained. It also is not absolute, but subject to the same exceptions as the first exclusion.

3. The third exclusion concerns persons who obtain information during a required audit by a CPA related to violations by the engagement client or its directors, officers, or other employees.[37]

4. The fourth exclusion prohibits using information obtained from a company's "legal, compliance, audit, or similar functions or processes for identifying, reporting, and addressing potential non-compliance with applicable law" except if the company doesn't disclose the information within a reasonable time to the SEC or proceeds in bad faith.[38] In determining if there is bad faith, the SEC will consider who within an entity was responsible for responding to the allegations or took steps to conceal evidence or hinder a timely or appropriate response.[39] The SEC says what constitutes a "reasonable time" is a fact issue: "In some cases – for example, an ongoing fraud that poses substantial risk of harm to investors – a "reasonable time" for disclosing violations to the Commission may be almost immediate."[40]

5. The fifth exclusion addresses information otherwise obtained from or through an entity's legal, compliance, audit, or other similar functions to identify, report, and address potential non-compliance unless the entity did not disclose the information to the Commission within a reasonable time or proceeded in bad faith.

6. The sixth exclusion precludes whistleblowers from having independent knowledge if the information was obtained by violating criminal laws.[41] Note that the SEC's proposal is *broader* than Dodd-Frank's statutory language, which requires a conviction for a disqualification.[42]

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[33] *Id.* at 18.

[34] *Id.* at 19.

[35] *Id.* at 19-20.

[36] *Id.* at 21-22 (noting the exclusion won't apply "where disclosure of confidential information to the Commission without the client's consent is permitted pursuant to either 17 CFR §205.3(d)(2) or the applicable state bar ethical rules."). 17 C.F.R. § 205.3(d)(2) permits an attorney practicing before the SEC in representing an issuer to reveal confidential information related to the representation, without the client's consent, if the attorney believes it reasonably necessary to prevent the client from committing a material violation likely to cause substantial harm to the financial interest or property of the issuer or investors; to prevent the client in an SEC investigation or administrative proceeding from committing perjury or an act likely to perpetrate a fraud upon the SEC; or to rectify the consequences of a material violation by the issuer that may cause substantial injury to the financial interest or property of the issuer or investors when the attorney's services had been used.

[37] *Id.* at 23.

[38] *Id.* at 23-4.

[39] *Id.* at 26.

[40] *Id.* The SEC also warns that if a whistleblower played a part in the disclosure problems, this fact will be considered in determining if the whistleblower will be eligible for a bounty. *Id.* at 27.

[41] *Id.* at 28.

[42] This is one of many complaints the Taxpayers Against Fraud, a *qui tam* attorneys' organization, made in its

7. The seventh exclusion applies to persons who obtain the precluded information from others subject to these exclusions.

While excluding persons who violate criminal laws to obtain the information from qualifying for a bounty may seem significant, it really is not: Most would-be whistleblowers will be legitimately on the premises or authorized to access computers and other media where electronic information is stored at the time the information is obtained, and therefore they will not be committing a crime when gathering the information.[43]

CFTC Proposed Rule 165.2(c) defines the term "analysis" to mean "the whistleblower's examination and evaluation of information that may be generally available, but which reveals information that is not generally known or available to the public."[44] A related definition for the term "independent knowledge" is set out in CFTC Proposed Rule 165.2(g) to mean "factual information in the whistleblower's possession . . . not obtained from publicly available sources." But, as the CFTC notes, this definition "does not require that a whistleblower have direct, first-hand knowledge of potential violations."[45]

In CFTC Proposed Rule 165.2(g), the CFTC follows an approach similar to the SEC's – identifying four circumstances under which a whistleblower will not be deemed to have independent knowledge or independent analysis.

1. The first exclusion concerns information obtained through a privileged attorney-client communication.[46] It also is not absolute. The exclusion won't apply if disclosing the information is permitted.[47]

2. The second exclusion similarly applies to individuals who obtain the information about potential violations while performing "legal, compliance, audit, supervisory, or governance responsibilities for an entity" and the information was communicated "with the reasonable expectation that the person would take appropriate steps to cause the entity to remedy the violation.[48]

3. The third exclusion is similar to the first two and applies if the information is derived "from or through an entity's legal, compliance, audit, or similar functions or processes for identifying, reporting, and addressing potential non-compliance with applicable law."[49] It too is not absolute. An individual may have independent knowledge if the entity fails to disclose the information to the CFTC within 60 days or proceeds in bad faith.[50]

4 The fourth exclusion precludes whistleblowers from having independent knowledge if they obtain the information by violating criminal laws.[51]

Information that Leads to Successful Enforcement

In SEC Proposed Rule 21F-4(c), the agency explains that "[u]nder Section 21F, a whistleblower's eligibility

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December 17, 2010 submission to the SEC ("Proposed Rule 2IF-4Cb)(4)(vi) disqualifies whistleblowers who obtain information '[b]y a means or in a manner that violates applicable federal or state criminal law.' This proposed disqualification is directly at odds with Dodd-Frank, which provides only that no award shall be made to 'any whistleblower . . . convicted of a criminal violation related to the judicial or administrative action for which the whistleblower could otherwise receive an award . . .' Dodd-Frank § 922 (b)(2)(8); *see also* Senate Report at 112 ('[a]lso not eligible are whistleblowers . . . convicted of a criminal violation related to the case at hand') .. Rule 2IF-4(b)(4)(vi)'s use of the term 'violates' eliminates the statute's requirement of a conviction by an appropriate tribunal, and replaces it with the SEC's judgment as to whether a violation occurred."); TAF submission at 11; *available at* http://vaquitamlaw.com/files/116785-109034/SEC_Section_21F_Comment_Submission.pdf.

[43] *But see id* at 11-12 ("It could also preclude whistleblowers from states that criminalize a broad range of conduct that can include, under certain circumstances, the taking of documents obtained in the course of employment. Such prospective whistleblowers could be denied a reward if the SEC adopts a broad reading of certain criminal statutes such as 'trespass,' 'conversion,' and other such laws - readings that no doubt will deter many whistleblowers.").

[44] CFTC Rel No. 8765 at 7.

[45] *Id.* at 8-9.

[46] *Id.* at 10.

[47] *Id.*

[48] *Id.* at 10-11.

[49] *Id.* at 11.

[50] *Id.*

[51] *Id.* at 12.

for an award depends in part on whether the whistleblower's original information 'led to the successful enforcement' of the Commission's action or a related action[,]" and this proposed rule defines when this will be deemed to have occurred.[52] Generally, the SEC will consider the significance of the provided information in its decision to open an investigation *and* the success of any resulting enforcement action. It distinguishes between situations where the information causes the agency to initiate an investigation versus situations where the information is about conduct already under investigation.[53] It will be rare for the SEC to provide a bounty to someone who provides information about an open investigation.[54] Nor will a bounty be given simply for providing information that causes the SEC to open an investigation. Rather, the SEC's proposed rule requires the information to have "'significantly contributed' to the success of an enforcement action filed by the Commission[,]" which ultimately "depends on the staff's ability to establish unlawful conduct by a preponderance of evidence."[55]

The CFTC takes a similar approach in its Proposed Rule 165.2(i), which concerns the significance of the information provided by the whistleblower in the agency's decision to open an investigation and its success in a resulting enforcement action.[56]

[52] SEC Rel. No. 34-63237 at 37.

[53] *Id.* at 38.

[54] *Id.* at 40-41 (SEC Proposed Rule 21F-4(c)(2) "sets forth a separate, higher standard for cases in which a whistleblower provides original information . . . about conduct . . . already under examination or investigation by the Commission, Congress, any other federal, state, or local authority, any self-regulatory organization, or the . . . [PCAOB]. In this situation, the information will be considered to have led to the successful enforcement of a judicial or administrative action if the information would not have otherwise been obtained and was essential to the success of the action.").

[55] *Id.* at 39.

[56] *See* CFTC Rel. No. 8765 at 14.

The CFTC explains that Proposed Rule 165.2(i)(1) applies "where the staff is not already reviewing the conduct in question, and establishes a two-part test for determining whether 'original information' voluntarily provided by a whistleblower led to successful enforcement of a Commission action[:]" "First, the information must have caused the staff to open an investigation, reopen an investigation that had been

OPEN ISSUES AND CONTROVERSIES

Effect on Existing Corporate Compliance Programs

Even before the proposed rules were published, the agencies were lobbied by attorneys representing business interests, attorneys representing would-be bounty hunters, and by special interest groups. Representatives of business interests warned that carelessly incentivizing would-be bounty hunters would harm existing compliance programs because workers would bypass existing programs so they could be the first-in-the-door with the SEC or CFTC in order to secure an opportunity to earn a bounty.[57] To prevent this from happening, they argued that whistleblowers should be required to report problems through existing compliance mechanisms and wait a reasonable time for the company to do the right thing. Further, only if the company didn't timely and

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closed, or to inquire concerning new and different conduct as part of an open investigation." . . . " Second, if the . . . information caused . . . staff to start looking at the conduct for the first time, the proposed rule would require that the information "significantly contributed" to the success of an enforcement action filed by the Commission." *Id.* at 14-5.

[57] *See, e.g.*, "Issues Posed By The Dodd-Frank Act in the Light of General Counsel's Responsibilities," METROPOLITAN CORPORATE COUNSEL (Nov. 2, 2010) (Interview of E. Norman Veasey, former Chief Justice of the Delaware Supreme Court, who stated "[t]he problem with the whistleblower program is that there is an incentive . . . not to go through the corporate hierarchy, but . . . outside and not give the corporation the opportunity to cure the problem. This is because the whistleblower has a financial incentive to be the provider of 'original information.'"); Obiamaka P. Madubuko and Michael Kendall, *Whistleblowers and Dodd Frank: Is Your Company Protected?*, BoardMember.com (Oct. 12, 2010), *available at* http://www.boardmember.com/Article_Details.aspx?id=5454 ("Some employees, in hopes of receiving a large potential payout, may decide to rush to the government to report alleged misconduct instead of taking advantage of a company's internal reporting system. This may result in employees working at cross purposes from their companies' compliance departments. In such cases, companies will have less of an opportunity to address potential problems when they do arise; in some cases, they may first learn about issues when contacted by government investigators.").

appropriately respond should a whistleblower be eligible to earn a bounty.[58]

Not surprisingly, representatives of whistleblower interests adamantly disagreed. They argued that Congress made it clear by authorizing the Dodd-Frank's bounty provisions that it wanted to increase the number and value of tips so that the agencies could act quickly to protect the public from harm caused by corporate misdeeds.[59]

In their proposed implementing rules, the agencies charted a Solomonic middle ground in an attempt to prevent harming companies' internal compliance programs while also not putting up too many obstacles for whistleblowers to overcome, since that would frustrate the legislative goal of increasing the number and quality of tips. As the SEC explained:

> [O]ur proposal not to require a whistleblower to utilize internal compliance processes does not mean that our receipt of a whistleblower complaint will lead to internal processes being bypassed. We expect that in appropriate cases, consistent with the public interest and our obligation to preserve the confidentiality of a whistleblower, our staff will, upon receiving a whistleblower complaint, contact a company, describe the nature of the allegations, and give the company an opportunity to investigate the matter and report back. The company's actions in these circumstances will be considered in accordance with the Commission's Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions.[60]

Thus, while the agencies have not mandated that a company's employees and officers work through their existing compliance plans, they have explained that, in determining a whistleblower's eligibility for a bounty or for assessing penalties against a company, they will

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[58] *See, e.g.,* Bruce Carton, *Pitfalls Emerge in Dodd-Frank Whistleblower Bounty Provision*, SECURITIES DOCKET (Sept. 9, 2010) (noting a former SEC attorney's recommendation that the SEC adopt a framework like that for auditors under Section 10A of the Securities Exchange Act, which requires them to report a suspected problem to company management and its audit committee, and only if a company fails to take remedial action should the illegal act be reported to the SEC); *see also* Posted Comments from Arent Fox LLP to SEC (Oct. 25, 2010) (recommending the SEC require employees of public companies to use internal whistleblower procedures as a prerequisite to making a Dodd-Frank claim, which should only be allowed if no appropriate action is taken within a reasonable time), *available at* http://www.sec.gov/comments/df-title-ix/whistleblower/whistleblower-20.pdf.

[59] *See, e.g.,* Posted Comments from National Whistleblowers Center to SEC (Nov. 1, 2010) ("Any rule that would allow a corporation to make whistleblower protection contingent on compliance with an internal reporting scheme would illegally limit and chill the right of employees to anonymously disclose information to law enforcement agencies. Such a rule would be contrary to the explicit language of both . . . Dodd-Frank and Sarbanes-Oxley"), *available at* http://www.sec.gov/comments/df-title-ix/whistleblower/whistleblower-22.pdf; and Posted Comments from Stuart D. Meissner LLC to the SEC (Nov. 2, 2010) ("[I]t appears the companies are attempting to create so many obstacles for whistleblowers to overcome so as to render the historic statute useless for the very cases the SEC hopes to bring, involving what would be top management."), *available at* http://www.sec.gov/ comments/df-title-ix/whistleblower/whistleblower-23.pdf.

[60] SEC Rel. No. 34-63237 at 11-12; *see also* CFTC Re. No. 8765 at 11-12 ("Compliance with the CEA is promoted when companies implement effective legal, audit, compliance, and similar functions. The rationale for these proposed exclusions is the concern that Section 23 not be implemented in a way that would create incentives for persons involved in such functions, as well as other responsible persons who are informed of wrongdoing, to circumvent or undermine the proper operation of the entity's internal processes for investigating and responding to violations of law. Accordingly, under the proposed rule, officers, directors, employees, and others who learn of potential violations as part of their official duties in the expectation that they will take steps to address the violations, or otherwise from or through the various processes that companies employ to identify problems and advance compliance with legal standards, would not be permitted to use that knowledge to obtain a personal benefit by becoming whistleblowers. . . . Nevertheless, if the entity failed to disclose the information to the Commission within sixty (60) days or otherwise proceeds in bad faith, the exclusion would no longer apply, thereby making an individual who knows this undisclosed information eligible to become a whistleblower.").

consider whether a whistleblower had internally disclosed the information and if the company timely and appropriately responded.[61] Nevertheless it remains unclear how both agencies reconcile such statements with others set forth in the proposed implementing rules.

Contact with Whistleblowers who are Members of a Company's Control Group

An example of one such problem is presented by the position of both agencies that they can talk directly with a company whistleblower, including someone who is part of a company's control group. The SEC argues that unless it is free to make such contact, the Act's legislative intent will be frustrated and it is also "authorized by law" to do so:

> . . . Section 21F necessarily authorizes the [SEC] to communicate directly with these individuals without first obtaining the consent of the entity's counsel. Proposed Rule 21F-16(b) would clarify this authority by providing that, in the context of whistleblower-initiated contacts with the [SEC], all discussions with a director, officer, member, agent, or employee of an entity that has counsel are "authorized by law" and, will therefore not require consent of the entity's counsel as might otherwise be required by rules of professional conduct.[62]

The CFTC takes a similar position:

> Proposed Rule 165.18 clarifies the staff's authority to communicate directly with whistleblowers who are directors, officers, members, agents, or employees of an entity that has counsel, and who have initiated communication with the [CFTC] relating to a potential securities law violation. The proposed rule makes clear that the staff is authorized to communicate directly with these individuals without first seeking the consent of the entity's counsel.
>
> Section 23 of the CEA evinces a strong Congressional policy to facilitate the disclosure of information to the [CFTC] relating to potential CEA violations and to preserve the confidentiality of those who do so. This Congressional policy would be significantly impaired were the [CFTC] required to seek the consent of an entity's counsel before speaking with a whistleblower who contacts us and who is a director, officer, member, agent, or employee of the entity. For this reason, Section 23 of the CEA authorizes the [CFTC] to communicate directly with these individuals without first obtaining the consent of the entity's counsel.
>
> The [CFTC] believes that expressly clarifying this authority in the proposed rule would promote whistleblowers' willingness to disclose potential CEA violations to the [CFTC] by reducing or eliminating any concerns that whistleblowers might have that the [CFTC] is required to request consent of the entity's counsel and, in doing so, might disclose their identity. The [CFTC] also believes that this proposed rule is appropriate to clarify that, in accordance with American Bar Association Model Rule 4.2, the staff is authorized by law to make these communications. . . .[63]

Both agencies' analyses appear to be markedly incomplete. For one thing, they do not address the duties of care, loyalty, and good faith that such key corporate officials, as fiduciaries, owe to an entity as its decision-makers. Also, because the agencies have followed the DOJ's lead by announcing that companies will benefit by properly addressing problems when discovered, or will be punished more severely if they fail to do so,[64] it seems apparent that a key corporate official

[61] The SEC proposes a 90-day grace period in which a whistleblower's complaint will be deemed timely if the person provides the information to another authority first. *See* SEC Rel. No. 34-63237 at 22.

[62] SEC Release No. 34-63237 at 87.

[63] CFTC Rel No. 8765 at 54-5. The CFTC appears to be in error since it mentions its right to talk to a whistleblower about a *securities* violation (not a *commodities* violation).

[64] The DOJ encourages self-policing by offering non-prosecution or reduced penalties for making a timely, complete, and voluntary disclosure. The DOJ's policies appear in its "Principles of Federal Prosecution of Business Organizations," which has been revised over the years. At least two of the factors that federal prosecutors are told to consider in determining whether to charge a corporate entity with a crime are implicated – "the corporation's timely and voluntary disclosure of

will breach these duties to the company unless he or she first addresses the issues internally so that the company has an opportunity to evaluate and appropriately remediate the problem to avoid an enforcement action or minimize the collateral damage. Moreover, when such a whistleblower seeks a bounty from government officials, he or she is operating under a direct conflict of interest, putting personal interests ahead of the company's interests for personal gain in violation of the duty of loyalty.

While it is too early to know how a court may rule in the context of a Dodd-Frank whistleblower contact between one of these agencies and a key corporate official, the issue has been addressed in a *qui tam* action. In *United States ex rel. O'Keefe v. McDonnell Douglas Co.*,[65] the government failed to convince the Eighth Circuit to vacate a protective order that precluded DOJ lawyers from having *ex parté* communications with current employees of McDonnell Douglas. The company had obtained a protective order to prevent such contacts, successfully arguing that DOJ lawyers were barred from doing so by Missouri Supreme Court Rule 4-4.2.[66] The government asserted it was "authorized by law" to make such contacts and cited to 28 C.F.R. § 77.10(a). In its regulation, the DOJ says that its lawyers are not subject to state ethical rules.[67] The court rejected this argument, finding that the DOJ's regulation was not entitled to deference.[68]

The corollary issue of a whistleblower's violation of his duty of loyalty has also been considered by courts in *qui tam* litigation. *United States ex rel. Madden v. General Dynamics Corp.*[69] is instructive. On appeal, the Ninth Circuit reinstated General Dynamic's counterclaims against the relator for independent damages claimed to have been caused by Madden's breaches of his duty of loyalty, fiduciary duty, and the implied covenant of good faith and fair dealing. In

footnote continued from previous page...

wrongdoing and its willingness to cooperate in the investigation" and "the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies." *See* DOJ, Principles of Federal Prosecution of Business Organizations, at 4; *available at* http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf.

The SEC takes a similar position in its "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934" and its "Statement on the Relationship of Cooperation to Agency Enforcement Decisions"; *available at* http://www.sec.gov/litigation/investreport/34-44969.htm; *See also* the CFTC's "Enforcement Advisory: Cooperation Factors in Enforcement Division Sanction Recommendations," at 2; *available at* http://www.cftc.gov/ucm/groups/public/@cpdisciplinaryhistory/documents/file/enfcooperationadvisory.pdf.

[65] 132 F.3d 1252 (8th Cir. 1998).

[66] As the Eighth Circuit noted,

Missouri Supreme Court Rule 4-4.2 provides, "in representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The official comment explains that where the opposing party is an organization, Rule 4-4.2 bars *ex ex parté* communications with "persons having the managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." *Id.* at 1253-54.

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[67] *Id.* at 1254, explaining that the DOJ rule provided "[a] communication with a current employee of an organization that qualifies as a represented party or represented person shall be considered to be a communication with the organization for purposes of this part only if the employee is a controlling individual. A "controlling individual" is a current high-level employee who is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter."

[68] *See id.* at 1257; *see also United States v. Lopez*, 989 F.2d 1032 (9th Cir. 1993) (AUSA violated the "no contact rule"), *United States v. Tapp*, 2008 U.S. Dist. LEXIS 44212 (S.D. Ga.) (same; discussing the history of this issue), and *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988) (a pre-DOJ regulation, criminal case finding that an AUSA violated DR 7-104(A)(1) by providing a sham subpoena for an informant to use in approaching the target, which "contributed to the informant's becoming the alter ego of the prosecutor.").

[69] 4 F.3d 827 (9th Cir. 1993).

response to the argument that allowing counterclaims for independent damages would in effect be inconsistent with an earlier decision disallowing counterclaims for indemnification or contribution, the court noted that "it is possible to resolve the issue of a *qui tam* defendant's liability before reaching the *qui tam* defendant's counterclaims. If a *qui tam* defendant is found liable, the counterclaims can then be dismissed on the ground that they will have the effect of providing for indemnification or contribution. On the other hand, if a *qui tam* defendant is found not liable, the counterclaims can be addressed on the merits."[70]

The DOJ's aggressive stance on the ethical "no contact" proscription led to the passage of the Citizens Protection Act of 1998 (commonly called the "McDade Act"),[71] which requires government attorneys to abide by state ethics rules. The McDade Act instructs, in pertinent part, that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."[72]

Significantly, the SEC's and CFTC's stated positions on the "no contact" issue go beyond those found to be offensive in the DOJ's regulation. Even in its controversial regulation, the DOJ recognized that "[a] communication with a current employee of an organization that qualifies as a represented party or represented person shall be considered to be a communication with the organization for purposes of this part . . . if the employee is a controlling individual."[73] The SEC is aware of the controversy, as seen in the following passage from its proposed rulemaking, which notes that ABA Model Rule 4.2[74] has been adopted in some fashion by every jurisdiction:

[70] *Id.* at 830 (noting a few courts had dismissed counterclaims for independent damages, citing *U.S. ex rel. Newsham v. Lockheed Missile and Space Co.*, 779 F.Supp. 1252 (N.D.Ca. 1991) and *U.S. ex rel. Rodriguez v. Weekly Publications, Inc.*, 74 F.Supp. 763 (S.D.N.Y. 1947)). *U.S. ex rel.* Madden's holding has been cited with approval by other courts. *See, e.g., U.S. ex rel. Hartman v. Allegheny Gen. Hosp.*, 2005 U.S. Dist. LEXIS 18321 *15 (W.D. Pa. Aug. 23, 2005) ("Plaintiff argues that 'as a rule, counterclaims are not permitted in *qui tam* actions. . . .' There is no such rule. Defendant's counterclaim does not seek contribution from plaintiff for the damages caused by the allegedly false claims themselves. Instead, defendant seeks damages on a wholly unrelated claim. Counterclaims that seek damages on claims unrelated to the allegedly fraudulent claims under the False Claims Act are permitted. . . .").

[71] 28 U.S.C. § 530B.

[72] *Id.*

[73] 28 C.F.R. § 77.10(a).

[74] ABA Model Rule 4.2 ("Communication With Person Represented By Counsel") provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

Comment 3 to Model Rule 4.2 instructs that the rule applies "even though the represented person initiates or consents to the communication" and instructs a lawyer to "immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted." This standard, however, is arguably relaxed by Comment 5, which addresses communications "authorized by law" and says that such communications *may* "include communications by a lawyer on behalf of a client who is exercising a . . . legal right to communicate with the government."

Comment 7 to Model Rule 4.2, in turn, excludes from the no-contact prohibition contact with former employees and those individuals in non-supervisory roles. It also indicates that when the individual has an attorney, that counsel's consent to a communication satisfies this rule:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Note that Model Rule 4.2's concerns are satisfied if a director retains his own counsel, who approves discussing the matter with the government.

> Every jurisdiction that regulates the professional responsibility of lawyers has adopted some variation of ABA Model Rule 4.2. . . . In the context of organizational entities represented by lawyers, a difficulty in applying the various state versions of ABA Model Rule 4.2 is identifying those actors within the entity – such as directors or officers – that are the embodiment of the represented entity such that the proscription against contact applies.[75]

At bottom, it appears that the SEC has not sufficiently addressed why permitting a member of a company's control group to abrogate duties owed to the company is needed to increase the number or quality of tips. This is particularly problematic. Contact with a member of a company's control group is prohibited since such individuals are the entity's decision-makers and oversee its operations, including compliance.

State Actor Issue

Even when evidence is illegally obtained by a private actor, it will not be excluded solely on that basis since that ordinarily does not constitute "state action." In its enforcement manual, the SEC warns about the dangers of working too closely with private actors under the State Actor Doctrine, cautioning that:

> The State Actor Doctrine may be implicated when action by a private entity is fairly attributable to a government entity. The action may be fairly attributable if there is a sufficiently close nexus between the state, or government entity, and the challenged action of a private entity.
>
> The State Actor Doctrine applies to a wide variety of private actions in which government is in some way concerned. It has been analyzed under a two-prong test, either of which can result in a finding of state action:
>
> — Under the "joint action" prong, private entities engage in state action when they are willful participants in joint action with state officials.
>
> — Under the "government compulsion" prong, coercive influence or significant encouragement by the state can convert private conduct into state action.
>
> * * *
>
> When staff is aware that a private entity is investigating conduct that is the same or related to the conduct involved in the staff's investigation, staff should keep the following guidelines in mind:
>
> — In fact and appearance, the SEC and the private entity's investigations should be parallel and should not be conducted jointly. Staff should make investigative decisions independent of any parallel investigation that is being conducted by a private entity.
>
> — Do not take any investigative step principally for the benefit of the private entity's investigation or suggest investigative steps to the private entity.[76]

Although the SEC was asked to implement the IRS's "one-bite" approach[77] to limit a whistleblower's ability to violate others' rights when gathering evidence, that approach is not included in the proposed rules for Dodd-Frank whistleblowers. Under the "one-bite" approach, informants who are current employees of a taxpayer get one opportunity to gather evidence for the IRS because:

> There is a long-standing line of cases that support the ability of the government to legally use information received from a private party even if the private party obtained the information in an illicit or illegal manner as long as the government is a passive recipient of the information and did not encourage or acquiesce in the private party's conduct. *See, e.g., Burdeau v. McDowell*, 256 U.S. 465 (1921). This is often referred to as the "one-bite" rule. In the context of Service and Counsel interaction with informants, staying within the bounds of the "one-bite" rule protects the integrity of the adjustments that may result from a particular examination when current employee information has been used as part of the examination. There is a

[75] SEC Rel. No. 34-63237 at 86.

[76] SEC ENFORCEMENT MANUAL (2008), at 44-45.

[77] *See* Posted Comments from Arent Fox LLP to SEC (Oct. 25, 2010), *available at* http://www.sec.gov/comments/df-title-ix/whistleblower/whistleblower-20.pdf.

> risk that, after the initial meeting between the informant and the Service, the acceptance of any information by the Service from an informant who is a current employee of a taxpayer could be perceived as encouraging or acquiescing to the informant's actions, which could make it difficult for the Service to avail itself of the "one-bite" rule.[78]

Double Recoveries from a Company Based on the Same Information

The SEC explained that SEC Proposed Rule 21F-3(d)[79] is designed to prevent a Dodd-Frank whistleblower from earning bounties from both the SEC and CFTC for providing the same information (or to deny a bounty if one had already been denied by the CFTC). Although the SEC recognized that the rule was necessary to prevent whistleblowers from garnering double recoveries, the rule ignores other circumstances that present the same risks, such as: *qui tam* actions and Dodd-Frank actions arising from the same information *or* follow-on securities fraud actions tied to Dodd-Frank actions arising from the same information.[80]

Heightened Risk Areas

While, in recent years, publicly traded multinational businesses have been feeling the effects of the DOJ's and SEC's increased enforcement of the Foreign Corrupt Practices Act ("FCPA"), the dangers such businesses face under the FCPA have increased under Dodd-Frank since insiders now have financial motives to inform on such wrongdoing.

Moreover, the FCPA is not a model of clarity. This will allow whistleblowers to lobby regulators to use more expansive theories of liability, just as they have done under the FCA's *qui tam* provisions.[81] Such efforts are more likely to succeed since so few FCPA cases have been litigated, which means that courts have had few occasions to fill in some gaps that have not been addressed by Congress and regulators.[82] Even before Dodd-Frank, the DOJ was asserting aggressive theories of FCPA liability.[83]

Other parts of Dodd-Frank provide additional tools to the SEC that will make it easier to bring FCPA enforcement actions. Section 1504 of the Act ("Disclosure of Payments by Resource Extraction Issuers") requires entities engaged in commercially developing oil, natural gas, or minerals to provide additional information in annual reports about payments made by the issuer, a subsidiary, or any entity under its control to a foreign government, department, agency, or instrumentality of a foreign government, or a company

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[78] *See* IRS Office of Chief Counsel, Notice, "Limitations on Informant Contacts: Current Employees and Taxpayer upon Incorporation" (Feb. 27, 2008).

[79] *See* SEC Rel. No. 34-63237 at 9.

[80] *See, e.g.*, Kevin LaCroix, *The Dodd-Frank Whistleblower Provisions: Some Other Things to Worry About*, The D & O Diary (Nov. 2, 2010) (predicting follow-on civil litigation brought on behalf of the target company's investors, claiming that the company's senior managers failed to take action to ensure that proper controls were in place or that investors were misled by the company's statement about such controls).

[81] *See, e.g.*, Michael E. Clark, *Whether the False Claims Act is a Proper Legal Tool for the Government to Use for Improving the Quality of Care in Long Term Care Facilities*, 15 No. 1 HTHLAW 12 (2002) (discussing the implied certification and tainted claims theories of FCA liability).

[82] *See, e.g.*, Justin F. Marceau, *A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions under the Foreign Corrupt Practices Act*, 12 FORDHAM J. CORP. & FIN. L. 285, 285 (2007) ("Although the FCPA does not contain specific provisions regarding parent company liability, commentators and the . . . [DOJ] have conclusively established that parent companies may face liability for the actions of their foreign or domestic subsidiaries based on three somewhat overlapping theories: (1) direct liability, (2) indirect liability, and (3) agency liability, with parent company liability under the FCPA being triggered if the relationship between the parent and the improper payments at issue satisfies the requirements for liability under any one of the three.").

[83] *See, e.g.*, Shearson & Sterling, *FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977* (March 4, 2010), at xiv (noting that the DOJ's expansive theories of FCPA liability being asserted "included allegations of territorial jurisdiction over U.S. dollar transfers between foreign banks based on the use of correspondent accounts in the United States. . . . In addition, . . . the government's expansive interpretation of the statute's 'business nexus' element and the SEC's willingness to impute knowledge to the parent of acts by its subsidiaries.").

owned by a foreign government for the purpose of commercial development of oil, natural gas, or minerals.

Dodd-Frank also made it clear that aiding and abetting liability is authorized for SEC enforcement actions, which will make it easier for the agency to bring and maintain actions based on expanded secondary liability. The new and expanded authority appears in sections 929M, 929N, and 929O.[84] In addition, in section 929P(b), Congress legislatively repealed *Morrison v. National Australia Bank*[85] for certain SEC enforcement actions. It authorizes extra-territorial jurisdiction if the SEC charges federal securities fraud violations involving "conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors" or if the charged "conduct occurring outside the United States . . . has a foreseeable substantial effect within the United States."

CONCLUSION: MORE DISCLOSURES FORECAST

Because many publicly traded companies may face related issues, such as continued participation in government programs, collateral civil litigation, and obligations to shareholders, employees, customers, and the public, some may soon experience added pressures to make disclosures to the government in order to address a Dodd-Frank whistleblower action, obtain leniency, and minimize the damages of collateral civil litigation. Since being proactive is more effective and efficient than being reactive, companies should thoroughly review their existing corporate governance and compliance policies. They should also consider adopting measures to encourage and enhance the loyalty of employees and agents, while encouraging the internal reporting of potential problems, to discourage employees from quietly working with the government and plaintiffs' counsel to recover huge bounties at the company's expense. ■

[84] While the Private Securities Litigation Reform Act ("PSLRA") authorized the SEC to charge aider and abettor violations of the Securities Exchange Act in enforcement actions, Congress had previously required the agency to demonstrate that defendant(s) knew about the misconduct – which courts had interpreted as requiring proof of actual knowledge (and not just recklessness).

[85] 130 S. Ct. 2896 (2010).

CLE QUESTIONS on Clark, *The Dodd-Frank Act's Bounty Hunter Provisions* (Vol. 44, No. 3, February 9, 2011). Please circle the correct answer to each of the questions below. If at least four questions are answered correctly, there is one credit for New York lawyers (nontransitional) for this article. Complete the affirmation and evaluation and return it by fax to RSCR-CLE, 212-876-3441, or by e-mail attachment to rscrpub@att.net. The cost is $40, which will be billed to your firm. To request financial aid, contact us by e-mail or fax, as provided above.

1. The Dodd-Frank Act authorizes a 10 to 30 percent bounty to persons supplying original information if as a result monetary sanctions exceeding $1 million are recovered by the SEC, the CFTC, or the DOJ. **True** **False**

2. Knowledge obtained by an attorney through a communication subject to the attorney-client privilege is excluded even if disclosure to the Commission without client consent is permitted under federal or state bar rules. **True** **False**

3. The SEC's proposed rules require a whistleblower to utilize internal compliance processes in a company before going to the agency. **True** **False**

4. The SEC and CFTC, in proposed rules, take the position that agency staff has authority to communicate directly with whistleblowers who are part of a company's control group without first obtaining the consent of company counsel. **True** **False**

5. In its enforcement manual, the SEC encourages its staff to work jointly with any company investigations of the same conduct. **True** **False**

AFFIRMATION

_____, Esq., an attorney at law, affirms pursuant to CPLR
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2106 and under penalty of perjury that I have read the above article and have answered the above questions without the assistance of any person.

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