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Recent Legislation

**\*1829** CORPORATE LAW -- SECURITIES REGULATION -- CONGRESS EXPANDS INCENTIVES FOR WHISTLEBLOWERS TO REPORT SUSPECTED VIOLATIONS TO THE SEC. -- DODD-FRANK ACT, PUB. L. NO. 111-203, § 922, 124 STAT. 1376, 1841-49 (2010) (TO BE CODIFIED AT 15 U.S.C. § 78U-6).

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On July 21, 2010, President Barack Obama signed into law a vast and sweeping overhaul of the U.S. financial regulatory system, [FN1] effecting “a transformation on a scale not seen since the reforms that followed the Great Depression.” [FN2] Passed in response to the financial crisis that began in 2008, [FN3] the Dodd-Frank Wall Street Reform and Consumer Protection Act [FN4] (Dodd-Frank) reaches almost “every corner” of the financial industry, [FN5] with new rules and regulations governing everything from debit cards [FN6] to hedge funds [FN7] to mortgages. [FN8] Among the 2319 pages [FN9] of the Act is section 922, [FN10] a once obscure provision that has quickly come to the forefront of the legal debate surrounding the financial reform agenda. [FN11] Enacted a mere eight years after the Sarbanes-Oxley Act of 2002 [FN12] (SOX), “the first comprehensive statute of national scope” protecting corporate whistleblowers, [FN13] section 922 of **\*1830** Dodd-Frank dramatically expands the incentives for whistleblowers to come forward by (1) requiring the Securities and Exchange Commission (SEC) to award hefty bounties to persons who provide useful information to the SEC regarding securities law violations [FN14] and (2) enhancing retaliation protections for those who provide such information. [FN15] But rather than strengthening protections across the board, section 922 actually creates a two-tiered system of retaliation protection in which whistleblowers may receive stronger, more robust protection if they report directly to the SEC, but weaker, less reliable protection if they report to the company. This two-tiered structure discourages internal reporting and thus will likely undermine internal compliance and reporting systems and impede the effective functioning of the securities regulation system. [FN16]

Although the progress of the Dodd-Frank bill through the House and Senate was marked by intense industry lobbying and divisive partisan struggles, [FN17] the whistleblower provisions received little attention on the road to passage. [FN18] The bill that would later become the Dodd-Frank Act was introduced in the House of Representatives by Representative Barney Frank on December 2, 2009, and passed the House just nine days later. [FN19] Though the Senate later substituted its own version of the whistleblower provisions, substantially modifying the language and inserting a minimum bounty, it left the core provisions of the House version, including the basic design of the retaliation protections, **\*1831** largely intact. [FN20] When the Senate passed the bill with amendments on May 20, 2010, [FN21] section 922 was essentially in its final form; with the exception of a few minor changes in wording, the conference committee did not change it. [FN22]

As enacted, section 922 amends the Securities Exchange Act of 1934 [FN23] (Exchange Act) by adding a new provision: section 21F, “Securities Whistleblower Incentives and Protection.” [FN24] It defines a whistleblower as any individual or group of individuals “who provide[] information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.” [FN25] It goes on to provide that in any judicial or administrative action brought by the SEC that results in sanctions exceeding \$1 million, or in any related action, the SEC “shall pay an award” to any whistleblowers “who voluntarily provided original information

to the Commission that led to the successful enforcement of the . . . action, in an aggregate amount” of between ten and thirty percent of the monetary sanctions imposed. [FN26] To protect whistleblowers, new section 21F(h)(1)(A) prohibits employers from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against a whistleblower “because of any lawful act done by the whistleblower” in (1) providing information to the SEC, (2) assisting in any SEC investigation or action related to such information, or (3) “in making disclosures that are required or protected under” any securities law, rule, or regulation. [FN27] To enforce this prohibition, new section 21F(h)(1)(B) creates a private right of action for individuals alleging a violation of the antiretaliation provisions. [FN28]

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