

# Corporate Compliance after Dodd-Frank: One Voice; How Many Masters?

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# Agenda

- Introduction
- Presentation
- Questions and Answers — (anonymous)
- Slides — now available on front page of Securities Docket
  - [www.securitiesdocket.com](http://www.securitiesdocket.com)
- Wrap-up

## Webcast Series

- Approximately every other week
- December 15, 2010: “**Follow the Money—Using Technology to Find Fraud or Defend Financial Investigations**”
- December 16, 2010: “**F-Cubed Update: Six Months After *Morrison v. NAB***”



## Panel



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# Corporate Compliance after Dodd-Frank

One Voice: How Many Masters?



# Dodd-Frank Wall Street Reform and Consumer Protection Act

- Was initially proposed on December 2, 2009 and signed into law on July 21, 2010
- Consists of sixteen titles and marks the greatest overhaul of the country's financial regulatory system since the Great Depression
- Goal in Focus Today: To promote the financial stability of the United States by improving accountability and transparency in the financial system

## Section 922. Whistleblower Protection

- Section 922 provides significant new incentives for employees and others to “blow the whistle” to the SEC when they are aware of fraud within a company.
- A person who provides “original information” about a securities law violation to the SEC, which then leads to a successful enforcement action with penalties of \$1 million or more, is now entitled to collect 10 to 30 percent of the total penalties imposed by the agency.

## Sec. 922. Whistleblower Protection - Retaliation

- Section 922 creates a private cause of action for employees who have suffered retaliation (that could be demotion, dismissal, suspension, threats, or other harassment) because the whistleblower was lawfully trying to:
  - (a) provide information to the SEC in accordance with the new law; or
  - (b) assist in any investigation based on tips the whistleblower might provide.

# Retaliation Remedies

- The anti-retaliation provisions of Section 21F apply to all whistleblowers making complaints in good faith, regardless of whether the securities laws have been found to be violated, and regardless of whether the whistleblower satisfies all the conditions necessary to qualify for a monetary award.

# Sarbanes-Oxley and Internal Controls

- Corporations have been spending money, time and energy in developing internal reporting channels and encouraging transparency in internal anti-corruption matters to comply with Section 301.
- Whistleblowing hotlines have been an integral part of the perceived answer: the creation of a reprisal-free method of communicating concerns to those in power.

# Regulation Crosscurrent

- Section 922 sends a message to potential whistleblowers that bypassing the company's internal procedures set up to comply with Sarbanes –Oxley, and going directly to the SEC, could lead to incredible wealth.
- The SEC's generous reward provision and related rules seem to be designed to encourage the aggressive pursuit of contingency fees by the plaintiff bar.

# SEC Regulations

- Under Dodd-Frank, the SEC is required to adopt final regulations implementing Section 922 by April 21, 2011.
- The SEC announced the proposed regulations on November 3<sup>rd</sup> and stated that it continues to look for ways to encourage internal compliance and to exclude wrongdoers from benefitting from their own misconduct.

# Proposed Rules Aimed at Encouraging Internal Compliance

- The 90-day reporting grace period and increased awards for whistleblowers who utilize internal compliance systems, are aimed at encouraging whistleblowers to report problems internally before coming to the SEC.

# SEC Regulations - Exemptions

- Entities not governed by the Securities Exchange Act of 1934 (e.g. private companies)
- Further, the following categories of people will not be eligible to receive the treasure chest:
  - Those with a legal or contractual duty to report
  - Counsel (however, could be covered by Section 21F's anti-retaliation provisions)
  - Auditors
  - Foreign government officials; and
  - People who gain their knowledge through the company's internal compliance systems

# SEC Regulations - Not Exempt

- Any employee without a legal, compliance, audit, supervisory or governance responsibility for an entity
- Non-employees (3<sup>rd</sup> party IT, researchers)
- Internal compliance officers if the entity does not disclose the information to the SEC within a reasonable time or if the entity proceeds in bad faith.

# Challenges faced by companies

- Confidentiality agreements may no longer be enforceable
- Predispute arbitration agreements may no longer be enforceable
- Third party vendors not subject to a contractual or legal duty to report may, and can, completely bypass the company's internal reporting systems and profit
- The plaintiff's bar and analysts

# Significant Focus on Fines

- Fund for whistleblowers (\$452 million)
- Recent references to large fines in variety of types of cases
  - Fiscal 2010 - \$2.8 billion in penalties
  - Seven examples cited
  - Disclosure & accounting issues
  - Counterparties
  - Audit committee chair
  - Auditor

# Some Common Themes

- Start small
- Not limited to small companies. Often well-recognized companies with reputable auditors
- Majority involve senior management (CFO, Controller, CAO, etc.)
- Always a motive.
- Material fact omitted or hidden in vague descriptions
- Materiality
- Intent

# A Few Points on Whistleblowers

- Tips detect fraud
- Personnel issues
- Documentation
- Robust and comprehensive
- Cultural and language issues
  - Impact on FCPA exposure
  - Training
  - Internal communication and loyalty issues
  - Largest exposure could be from jurisdictions in other areas of the world.

# A Few Troubling Accounting Areas

- Disclosures on
  - Changes in accounting policies
  - Accounting methods
  - Reclassifications
- GAAP technical compliance argument
- Meaningful fraud risk assessments

# Reminders Regarding Investigations

- Documentation regarding process and results
- Decide quickly on team members, scope and information/data
- Revisit progress and scope repeatedly
- Confidentiality is more crucial than ever. Team members need to be made aware of this.
  - Impact on potential for whistleblowers
  - Retribution
- Timing
- Impact on self reporting

# Revisit Compliance Programs

- Meeting minimum requirements may not be sufficient
- Robust internal reporting mechanism
- Reinforce a genuine commitment to handling compliance concerns of all types
- Training and communication on anti-retaliation provisions
- Gain confidence of regulator
- Impact on potential fines

# Questions?



**Thank You**  
**for Attending This Webcast**