

Increased Whistleblower Protection after the Dodd-Frank Wall Street Reform and Consumer Protection Act

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Whistleblowers have been protected under an assortment of legal theories. In light of the adverse consequences whistleblowers continue to suffer and their increasing role in the detection of fraud, efforts have been made to increase that protection. The article summarizes the application of key common law and statutory whistleblower protections before the Dodd-Frank Wall Street Reform and Consumer Protection Act and the substantial reforms in the Dodd-Frank Act. The actual results to date of the Dodd-Frank Act are detailed. The current results are inconclusive in that the enacted reforms are still in the early stages of implementation.

INTRODUCTION

Interest in protecting whistleblowers has increased over the years. This is due, in part, to the recent recognition of the role whistleblowers play in the detecting business misbehavior. Indeed, whistleblowers have been cited as the “single most effective way to detect fraud” (Rapp, 2012). In a 2012 study by the Association of Certified Fraud Examiners, tips far exceed all other sources of fraud reports including audits and internal controls (ACFE). A 2010 U.S. Senate report attributes more than half (54.1%) of the fraud detected in public companies to whistleblower tips (Senate Report 111-176).

Unfortunately, whistleblowers historically bode quite poorly in the aftermath of their reports. They suffer a mix of personal, professional, and economic consequences. First, they most often lose their jobs. Secondly, if the whistleblower retains his/her job, they may suffer some form of retaliation and/or social ostracism by colleagues and supervisors. A recent study indicates that 82% of whistleblowers are fired, quit under duress, or had responsibilities altered (Dyck, Morse, Zingales 2010). This leads to income loss which may be long-lasting in that they are likely to be blacklisted and unable to secure subsequent employment (Rapp, 2012). Third, their situation is exasperated by financial and personal consequences of legal actions flowing from their whistleblower report. The legal action may be one they initiated alleging retaliation or wrongful termination or for up to 27% of the whistleblowers, a lawsuit brought by their employer (Rapp, 2012). Financial expenses and income losses have led to bankruptcy and sometimes, loss of homes (Goodson, 2012). Finally, whistleblowers go through an assortment of personal crises: marriage difficulties or dissolution, substance abuse, attempted suicides, and health or psychiatric issues (Goodson, 2012).

In light of the importance of whistleblower reports in regulating business conduct and the negative impact on whistleblowers of making those reports, legal protections were created to recompense whistleblowers for the consequences of prior reports and encourage and support continued reports. The legal remedies fall into two general categories: compensation for retaliation and/or eligibility for financial incentives based on recoveries flowing from the whistleblower's information. This article will focus on the latter inasmuch as that drew considerable attention among the Dodd-Frank whistleblower provisions.

WHISTLEBLOWER PROTECTION BEFORE DODD-FRANK

State protection for whistleblowers derives from common law actions and statutes. One basis for a common law action is a wrongful termination suit based on a public policy exception to the at-will doctrine. As in all common law actions, the requirements in these cases vary from state to state. Differences related typically to what actions qualify for protection. The varying interpretations of the rule have led to "considerable skepticism among legal scholars regarding the efficacy of the public policy exception in actual practice" (Goodson, 2012). Perhaps due to the uneven success of common law cases, states started enacting statutory whistleblower protection. All 50 states reportedly have some sort of statutory provisions (Goodson, 2012). Unfortunately, like common law cases, each state's requirements vary. Differences include whether or not the report must be made to a governmental entity, whether an actual violation of the law must have occurred, what the subject of the violation of law was, and whether the employee was public or private (Goodson, 2012; Rapp, 2012). All include anti-retaliation provisions (Goodson, 2012). Most apply only to public employees. Most do not provide for a financial incentive although those with that feature have been more successful (Goodson, 2012). The protection offered whistleblowers by state statutes has been characterized as sporadic and haphazard (Rapp, 2012).

Federal statutory protection has proven somewhat more predictable. Interestingly, the oldest applicable statute, the False Claims Act (FCA), is acknowledged as the most effective source of whistleblower protection (Miralem, 2011). It provides for a bounty of 15 – 30% of the recovery for false claims made against the government. Since 1986, there have been six thousand lawsuits filed and \$25 billion recovered for the government (Goodson, 2012). The Department of Justice reports that the last two years have been record setting, with a record 650 actions filed last year ("DOJ: Nearly \$5 Billion Recovered," 2012). Recoveries from judgments and settlements totaled \$3.2 billion the year before last and \$5 billion last year ("DOJ: Nearly \$5 Billion Recovered," 2012). The FCA is used in a variety of types of cases, most recently, often in the health industry ("DOJ: Nearly \$5 Billion Recovered," 2012). Interestingly, one of headline stories just last month involved a whistleblower's action under the False Claims Act for government sponsorships funds paid to Lance Armstrong (Albergotti & O'Connell, 2013).

Other notable federal whistleblower statutes are directed at the securities industry. The Insider Trading and Securities Fraud Enforcement Act of 1988 provided for payment to someone reporting insider trading information of up to 10% of any monetary sanction recovered. Payments were discretionary with the SEC. The provisions were used infrequently. Only seven payments totaling \$159,537 were made under the program up to 2010 (Vega, 2012). However, an award of \$1 million was made in 2010 (Quigley, 2012). The Sarbanes Oxley Act (SOX) attempted to reinforce whistleblower protection for employees of publicly traded companies. It required an internal whistleblowing reporting process, prohibited retaliation, and included criminal sanctions. Procedural provisions, however, are cited as shortcomings (Rapp, 2012). The statute of limitations was viewed as too short (Rapp, 2012). The processing of retaliation claims through OSHA was not proven effective (Goodson, 2012; Rapp, 2012). In combination, the anti-retaliation provisions did not do much to strengthen whistleblower protection (Rapp, 2012). Moreover, there were no financial incentive provisions. The limitations of these federal statutes created "nearly universal support among legal scholars for a new bounty program" (Vega, 2012).

DODD- FRANK WHISTLEBLOWER PROTECTION

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) included provisions designed to increase whistleblower protection in several ways. One, it applies to violations of any securities laws, not just insider trading. Additionally, it extended the types of information from which a bounty would flow to original information leading to a sanction of at least \$1 million. Two, it raises the maximum potential payment to 30%. Given that the average SEC settlement in 2010 was reported at \$18.3 million, the anticipated payment would be significant: \$2 million to \$5 million (Vega, 2012). Financial incentives were further improved by mandating payment. Decisions that no payments were due are reviewable in the federal courts. Finally, anti-retaliation provisions are expanded. The statute of limitations was increased, the requirement to file first with OSHA was eliminated, a right to a jury trial was ensured, and the amount of the recovery for back pay was doubled.

The expected impact of the law leading to and shortly after its enactment was multifaceted. Most notable was concern that the bounty program would be too generous and would lead to a rush in reporting, some of which would be questionable, in order to recover a financial windfall (Lee, 2012). Conversely, the possibility was raised that there could be a risk that a whistleblower could have a lesser chance of a financial recovery if governmental authorities sought no recovery or the recovery didn't meet the statutory threshold (Rapp, 2012). The unavailability of "qui tam" provisions allowing for direct action by whistleblowers in the event the government didn't pursue recovery has been viewed as its "biggest failure" (Rapp, 2012). Another oft repeated concern was that the reporting directly out approach that was adopted would negatively impact the SOX mandated internal control processes in which public companies had made substantial investment (Jones, 2011; Miralem, 2011; Quigley, 2012; Vega, 2012). Even though the data consistently demonstrates that most whistleblowers do report internally first (Miralem, 2011) and despite provisions incentivizing internal reporting, arguments were advanced that policy would be better served if whistleblowers were required to report internally first thus ensuring companies were given the first opportunity to act on a report. On a related note, it was predicted that there could be more self-reporting as companies attempt to ward off whistleblower reports motivated by the pursuit of the bounty (Miralem, 2012).

The SEC's second annual report on the Dodd-Frank whistleblower program (U.S Securities and Exchange, 2012), dated November 2012, gives the best picture so far of the program's impact to date. The first report was issued only a few months into the program's existence. The second report states that there were 3001 tips received in 2012 (U.S Securities and Exchange, 2012). The tips came from every state as well as 49 countries outside the United States (U.S Securities and Exchange, 2012). Appendices B & C from the report (as found in Tables 1 & 2 below) delineate the origin of these tips. The highest percentage of tips (17.4%) came out of California (U.S Securities and Exchange, 2012). The subjects of the greatest number of tips concerned corporate disclosures and financials (18.2%), offering fraud (15.5%), and manipulation (15.2%) (U.S Securities and Exchange, 2012). Appendix A from the report specifying tips by the nature of the allegation is found in Table 3 below. There were 143 cases that reached the statutory threshold but only one payment made which happened in August 2012 in the amount of \$50,000 (although additional payments may be made as collection continues) (U.S Securities and Exchange, 2012). Total whistleblower recoveries could potentially reach \$180 million (Ruger, 2012).

Proponents of the program point to the increased number of tips as evidence of the program's success (Atkins, 2013). Another view is to withhold evaluation until time reveals whether those tips lead only to lengthier investigations without increased discovery of law violations (Atkins, 2013). The substantial intake experienced and the ensuing investigatory workload raises an overriding concern in the ability of the SEC's Office of the Whistleblower to manage the volume of work generated by these tips (Foti, 2012). Its annual report identifies a staff consisting of a chief, a deputy chief, eight attorneys (plus one to whom an offer had been made), three paralegals, and one program support specialist (Foti, 2012). These limited resources may, in turn, limit the success of the program.

CONCLUSION

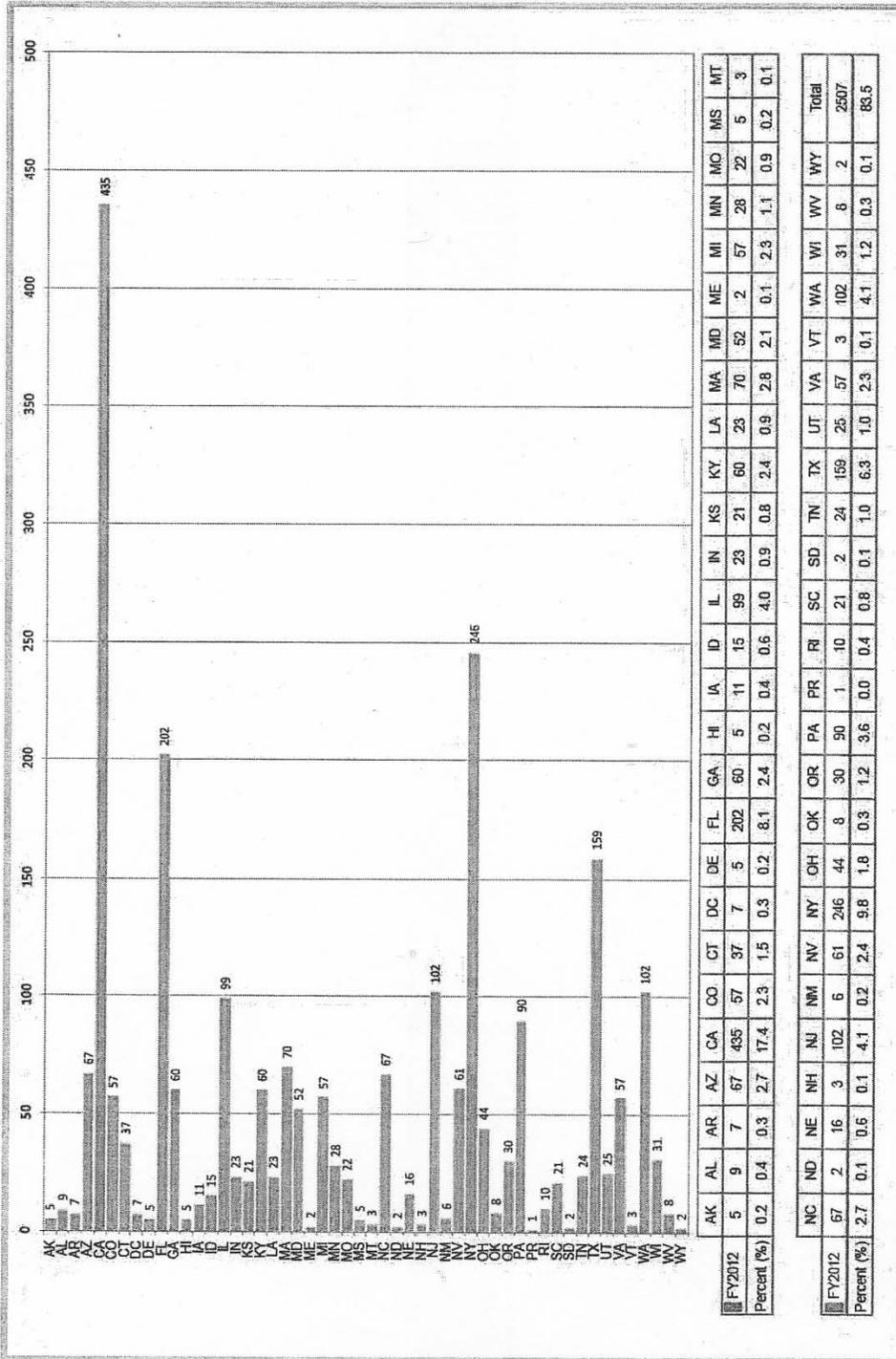
It is clear the Dodd-Frank whistleblower program added to the arsenal of tools available to encourage and support whistleblowers. The exact contribution is as yet undetermined because it appears from the number of tips received in the last fiscal year that the SEC's Whistleblower's Office has only begun its work.

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TABLE 1

Appendix B: Whistleblower Tips Received by Geographic Location – United States and its Territories – Fiscal Year 2012*



* The total number of WB TCRs originating within the United States and its territories for Fiscal Year 2012 was 2507, which constitutes 83.5% of total WB TCRs received for this period. Additionally, 170 WB TCRs constituting 5.7% of total WB TCRs received for Fiscal Year 2012 were submitted without any foreign or domestic geographical categorization.

TABLE 3

Appendix A: Whistleblower Tips by Allegation Type – Fiscal Year 2012

Month	Corporate Disclosure and Financials	Offering Fraud	Manipulation	Insider Trading	Trading and Pricing	FCPA	Unregistered Offerings	Market Event	Municipal Securities and Pension	Other*	Blank	Total
11-Oct	41	38	30	13	13	12	8	9	3	45	4	216
11-Nov	42	21	23	13	5	7	2	2	5	43	3	166
11-Dec	34	28	26	12	17	5	4	5	7	59	12	209
12-Jan	31	30	39	8	12	4	8	8	12	49	19	220
12-Feb	47	33	42	16	13	12	10	7	2	52	19	253
12-Mar	51	35	34	15	7	17	7	9	6	81	13	275
12-Apr	66	42	42	11	8	13	10	2	3	72	9	278
12-May	62	44	60	27	16	7	14	6	16	51	10	313
12-Jun	42	28	52	14	15	11	8	7	3	67	10	257
12-Jul	52	40	36	23	11	6	5	16	2	46	8	245
12-Aug	43	81	29	21	13	10	18	4	4	60	16	299
12-Sep	36	45	44	17	14	11	6	10	1	78	8	270
FY 2012 Total	547	465	457	190	144	115	100	85	64	703	131	3001
Percent	18.20%	15.50%	15.20%	6.30%	4.80%	3.80%	3.30%	2.80%	2.10%	23.40%	4.40%	100.00%

* "Other" indicates that the submitter has identified their WB TCR as not fitting into any allegation category that is listed on the online questionnaire.