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Securities Litigation and Enforcement

The Dodd-Frank Act contains several provisions that are likely to have significant impact on securities litigation and enforcement, including new incentives and protections for whistleblowers, increased liability exposure for credit rating agencies and deadlines for completion of SEC investigations, among others.

By Peter C. Hein, George T. Conway III, Wayne M. Carlin, and Olivia A. Maginley

On July 21, 2010, nearly two years after the height of the financial crisis, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act).[1] In addition to many important regulatory provisions, the Dodd-Frank Act contains a number of provisions that are likely to have a significant impact on securities litigation and enforcement. As companies pause to reassess their legal exposure and the effectiveness of their compliance programs, this article highlights some of the key changes wrought by this legislation as well as certain noteworthy provisions that were considered and discarded as the Act made its way through Congress.

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Private Cause of Action for Aiding and Abetting Rejected—Open Questions Remain

Despite efforts by certain lawmakers, the Dodd-Frank Act leaves intact well-settled Supreme Court authority holding that there is no private right of action for aiding and abetting violations of Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act).[2]

In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, the Supreme Court ruled that the District Court had properly granted summary judgment to Central Bank, which had served as the indenture trustee for certain bond issues.[3] Despite repeated warnings that the liens securing the bonds had declined in value, Central Bank agreed not to seek independent review of the appraisal of the liens until after the closing on the bond issue. Reversing the Tenth Circuit's decision, the Supreme Court held that "a private plaintiff may not maintain an aiding and abetting suit under § 10(b)."[4] Instead, "secondary actors" can be held liable only if "*all* of the requirements for primary liability . . . are met."[5] Shortly after *Central Bank* was decided, Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA), authorizing the SEC to prosecute aiding and abetting violations of the Exchange Act, but leaving unchanged the central holding of *Central Bank*—that the implied right of action under Section 10(b) extends only to parties who commit primary violations.[6]

In 2008, in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, the Supreme

Court reaffirmed its decision in *Central Bank* and upheld the Court of Appeals' determination that no primary violation had occurred because defendants' "acts or statements were not relied upon by the investors."[7] Although defendants (suppliers, and later customers, of Charter Communications, Inc.) had entered into transactions designed to mask the issuer's failure to meet projected revenue and operating cash flow numbers, they had "no role in preparing or disseminating" the issuer's misleading financial statements and "their deceptive acts were not communicated to the public."[8] The Court deemed plaintiffs' theory of reliance—that "investors rely not only upon the public statements relating to a security but also upon the transactions those statements reflect"—to be inconsistent with their obligation to demonstrate reliance on defendants' "*own* deceptive conduct."[9]

Together, *Central Bank* and *Stoneridge* make clear that plaintiffs' ability to demonstrate reliance upon acts or statements of secondary actors themselves is necessary in order for acts or statements of the secondary actors to fall within the scope of Section 10(b)'s prohibitions. Applying the principles enunciated in these cases, federal courts have rejected claims against, for example, issuers' auditors[10] and outside counsel.[11]

In 2009, in an effort to overturn legislatively the Supreme Court's pronouncements in *Central Bank* and *Stoneridge*, Senator Specter introduced a bill seeking to establish a private cause of action for aiding and abetting violations of the Exchange Act.[12] While that bill remained in committee,[13] Senator Specter introduced an amendment (S. 3776) during the Senate debate on the Dodd-Frank Act that would have amended Section 20(e) of the Exchange Act to create a private cause of action against "any person that knowingly provides substantial assistance to another person in violation of this title."[14] Although this proposed amendment was ultimately withdrawn in the Senate, House members on the conference committee charged with reconciling the Senate and House versions of the bill endorsed a similar proposal by Representative Waters.[15] In the end, the conferees declined to adopt any provision that would overturn *Central Bank* and *Stoneridge*, opting instead to direct the Comptroller General to conduct a "study" analyzing the impact of authorizing a private right of action for aiding and abetting violations of the federal securities laws.[16]

As the Comptroller General begins the statutorily mandated study, the Supreme Court is considering another case concerning the proper scope of liability for secondary actors under the federal securities laws. In the wake of *Central Bank* and *Stoneridge*, the federal courts of appeals have endeavored to articulate when investors can be deemed to have relied on statements by secondary actors. While some circuits have held that the allegedly false or misleading statements must have been attributed to the secondary actor at the time of their dissemination, others have indicated that only substantial participation in the preparation of such statements is required.[17] The Supreme Court now appears poised to resolve this circuit split: In June, the Supreme Court granted certiorari in a case in which the Fourth Circuit held that the relevant inquiry is "whether interested investors would attribute to the defendant a substantial role in preparing or approving the allegedly misleading statement."[18]

Although the Dodd-Frank Act did not create a private right of action for aiding and abetting violations of the federal securities laws, the Act does augment the SEC's existing authority under Section 20 of the Exchange Act to pursue civil enforcement actions alleging aiding and abetting of violations of the Exchange Act. It lowers the requisite state of mind to encompass reckless (in addition to knowing) acts,[19] and empowers the SEC to pursue actions premised on "knowingly or recklessly" aiding or abetting violations of the Securities Act of 1933 (Securities Act), the Investment Company Act of 1940, and the Investment Advisers Act of 1940.[20]

Flawed Attempt to Alter Extraterritorial Reach of the Federal Securities Laws

In June 2010, the Supreme Court in *Morrison v. National Australia Bank Ltd.,* held that Section 10(b) of the Exchange Act and SEC Rule 10b-5 do not apply to securities transactions that take place outside the United States.[21] The Dodd-Frank Act contains two provisions, Sections 929P(b) and 929Y, that concern the territorial scope of the federal securities laws. But neither provision overturns *National Australia Bank*.

It has been widely assumed that, as its principal draftsman asserted on the House floor, Section 929P(b) "make[s] clear that in actions and proceedings brought by the SEC or the Justice Department, . . . provisions of the Securities Act, the Exchange Act, and the Investment Advisers Act may have extraterritorial application."[22] As actually worded, however, Section 929P(b) does no such thing. The provision unambiguously addresses only the "*jurisdiction*" of the "district courts of the United States" to hear cases involving extraterritorial elements; its language does not expand the geographic scope of any substantive regulatory provision.[23] That is a crucial, and likely fatal, omission. In *National Australia Bank*, the Supreme Court reaffirmed the longstanding principle that the territorial scope of a federal law presents not a question of "jurisdiction," of a "tribunal's power to hear a case," but rather a question of substance—of "what conduct" does the law "prohibit[]"?[24] The new law does not address that issue, and accordingly does not expand the territorial scope of the government's enforcement powers at all. To be sure, given the drafters' extra-statutory statements, some judges may be tempted to find substantive extraterritorial reach in Section 929P(b). But as the Supreme Court has made clear, it is "beyond [the courts'] province to rescue Congress from its drafting errors," and so "if Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent."[25] Congress will probably have to do that here.

Section 929Y addresses private litigation, but refrains from changing the extraterritoriality standards set out in *National Australia Bank*. Instead, the new provision merely directs the SEC to "conduct a study to determine the extent to which private rights of action" under the Exchange Act should extend extraterritorially, and to report the results of the study to Congress within 18 months.

New Incentives and Protections for Whistleblowers

In order to "motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws," the drafters of the Dodd-Frank Act included a number of provisions designed to strengthen existing whistleblower laws and to create powerful new incentives and protections for whistleblowers.[26]

SEC Whistleblower Program. One provision of the Dodd-Frank Act that has garnered considerable public attention is Section 922, which provides that individuals who voluntarily supply "original information" leading to an enforcement action in which the SEC obtains a monetary sanction (defined to include penalties, disgorgement, and interest) of at least $1 million, are eligible to recover between 10 and 30 percent of the monetary sanctions recouped in the SEC enforcement action and in certain related actions.[27] These bounty payments—which are intended to compensate whistleblowers for the "enormous risk of blowing the whistle in calling attention to fraud"[28]—are to be made from a newly established SEC Investor Protection Fund, funded (up to $300 million) by monetary sanctions obtained by the Commission in its enforcement actions that are not distributed to victims.[29]

Section 922 also provides significantly enhanced remedies for whistleblowers who believe they have suffered retaliation by their employers. Aggrieved employees are empowered to bring anti-retaliation claims in federal court—provided suit is brought within six years (and potentially up to 10 years) after the violation occurred—to seek relief in the form of reinstatement and double back pay, with interest, as well as compensation for litigation costs and reasonable attorney's fees. Notably, Section 922 of the Dodd-Frank Act differs from Section 806 of the Sarbanes-Oxley Act of 2002, which requires employees to file a complaint with the Secretary of Labor as a precondition to bringing a civil action, and under which back pay (but not double back pay) is available.[30]

The prospect of a significant cash payment, coupled with the robust new protections against retaliation afforded by Section 922, may have the unintended effect of undermining the effectiveness of corporate compliance systems and ethics mechanisms. By encouraging employees to bypass internal reporting procedures, Section 922 may hinder the ability of corporations to detect and remediate employee misconduct. Accordingly, companies will be required to think creatively about the most effective ways to incentivize employees to surface their concerns internally.

CFTC Whistleblower Program. Section 748 of the Act creates a parallel whistleblower reward program for the voluntary provision of information leading to the "successful enforcement" of any "judicial or administrative action" brought by the Commodity Futures Trading Commission under the Commodity Exchange Act resulting in monetary sanctions exceeding $1 million.

Strengthening Existing Protections under the Sarbanes-Oxley Act. In addition to the elaborate new whistleblower programs established by Sections 748 and 922, the Dodd-Frank Act amends Section 806 of the Sarbanes-Oxley Act in several respects:

- Section 922(b) expands Section 806 to cover employees of Nationally Recognized Statistical Ratings Organizations (NRSROs).
- Section 922(c) lengthens the statute of limitations for anti-retaliation claims from 90 to 180 days from the point at which the complaining employee becomes aware of the employer's alleged misconduct.
- Section 922(c) also provides that whistleblowers are entitled to try their anti-retaliation claims before a jury.
- Section 929A confirms that Section 806 applies to employees of subsidiaries of publicly traded companies "whose financial information is included in the consolidated financial statements of [the publicly traded] company."[31]

Special Protections for Financial Services Employees. The Dodd-Frank Act also creates a cause of action for employees engaged in "tasks related to the offering or provision of a consumer financial product or service" who are terminated or discriminated against for reporting any violation of Title X of the Act or any law or rule administered or prescribed by the newly created Bureau of Consumer Financial Protection.[32] Under Section 1057 of the Act, aggrieved employees will be eligible to receive reinstatement, back pay, compensatory damages, and litigation costs (including attorney's fees and expert witness fees). Like Section 806 of the Sarbanes-Oxley Act, however, employees cannot initiate a civil action without first filing a complaint with the Secretary of Labor. Once the Secretary has issued a determination, either the employee or the employer may request an administrative hearing. The employee may then seek *de novo* review from the appropriate federal district court if the Secretary fails to issue a final order within 210 days. Either party may appeal an adverse decision to the appropriate federal court of appeals.

Expanding Protections Under the False Claims Act. Section 1079B of the Dodd-Frank Act amends the anti-retaliation provision of the False Claims Act by expanding the universe of protected conduct to cover "lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of [the False Claims Act]."[33] The Act also clarifies that the statute of limitations expires three years after the date on which the asserted retaliation occurred.

Increased Exposure to Liability for Credit Rating Agencies

In addition to a host of new regulatory requirements,[34] credit rating agencies are likely to face new litigation challenges under the federal securities laws as a result of the Dodd-Frank Act.

Section 939G of the Act, which nullifies SEC Rule 436(g)—the effect of which was to insulate NRSROs from "expert" liability under Section 11 of the Securities Act—promises to be a source of continuing controversy. As a result of Section 939G, issuers will be compelled to seek the consent of the NRSROs before including their ratings in a registration statement.[35] And, having given their consent, NRSROs will be open to liability under Section 11.[36] In view of the strict liability standard applicable to Section 11 claims, an NRSRO may therefore face liability for inaccurate ratings unless it can prove that it had, "after reasonable investigation, reasonable ground to believe and did believe" that its ratings were not misleading when the registration statement became effective.[37] In response to Section 939G, Standard & Poor's, Moody's Investors Service and Fitch Ratings have already publicly stated that they will refuse to permit issuers to cite their ratings in connection with new bond sales.[38] To "provide issuers, rating agencies and other market participants with a transition period in order to implement changes to comply with the new statutory requirement while still conducting registered ABS offerings," the SEC has announced that it will permit bond issuers to omit credit ratings from registration statements for a period of six months.[39] (*Editor's note: for further discussion of the credit ratings provisions and public companies see Carbone article in this issue.*)

In addition to exposing NRSROs to potential "expert" liability under the Securities Act, the Dodd-Frank Act provides that private litigants may bring claims against credit rating agencies for violations of the Exchange Act "in the same manner and to the same extent" as against a "registered public accounting firm or a securities analyst."[40] Section 933(a) of the Act also provides that statements by a credit rating agency "shall not be deemed forward-looking" for the purposes of the PSLRA safe harbor.[41] In addition, Section 933(b) of the Act modifies plaintiffs' state-of-mind pleading burden for claims against credit rating agencies under the Exchange Act. Instead of being required to demonstrate a "strong inference" of scienter, plaintiffs can survive a motion to dismiss upon a showing that the credit rating agency knowingly or recklessly failed "to conduct a reasonable investigation of the rated security" or "to obtain reasonable verification" of the "factual elements relied upon by its own methodology for evaluating credit risk."[42] The Senate Report explains that Section 933(b) is intended to "permit[] plaintiffs to more easily pass the motion to dismiss stage of litigation" but "does not change the ultimate standard" of liability to be applied by the fact-finder.[43]

Other Provisions Affecting Securities Litigation and Enforcement

SEC Empowered to Ban or Limit Use of Mandatory Arbitration Provisions. Section 921 of the Act amends the Exchange Act and the Investment Advisers Act of 1940 to give the SEC the power by rulemaking to ban or limit the extent to which brokers, dealers, municipal securities dealers, and investment advisers can require customers to submit to arbitration future disputes arising under the federal securities laws.

Deadline for Completion of SEC Investigations. While it is not uncommon for SEC investigations to remain pending over long periods of time, Section 929U of the Act requires the SEC to bring an action—or provide notice of its intent not to file an action—within 180 days of issuing a written

Wells notification, subject to the possibility of a 180-day extension if the investigation is deemed sufficiently complex by the Director of the SEC's Division of Enforcement or the Director's designee. Any further extensions for sufficiently complex investigations can be obtained only with the approval of the Commission. While this provision is directed toward the worthy goals of reducing delays in SEC investigations and providing greater assurance of finality, it is a blunt instrument. The arbitrary statutory deadline may have the unfortunate consequence of further reducing the time and opportunity for productive interchange between defense counsel and the enforcement staff. The opportunity for defense counsel to understand the staff's concerns, and to respond to those concerns may both be diminished. Insofar as Section 929U is intended to address the SEC's slowness in closing unproductive investigations, it misses the mark—in many of those investigations, the staff never reaches the point of issuing Wells notices, which means that the deadline will never be triggered.

Short Sale Reforms. In addition to expressly prohibiting the manipulative short sale of any security, Section 929X of the Act directs the SEC to promulgate rules requiring public disclosures by institutional investment managers concerning the short sales of securities "[a]t a minimum . . . every month."

SEC Self-Funding Proposal Rejected. A proposal that the SEC should be able to fund itself based on the fees it collects was ultimately rejected. Instead, the conferees agreed in Section 991 of the Act that the SEC should continue to be subject to the Congressional appropriations process, and provided for increases in baseline appropriations through 2015. The Act does give the SEC a potentially stronger voice in its own finances by requiring the White House to submit unaltered to Congress the SEC's annual budget, and by establishing a $100 million reserve fund.

Ban on Trading on Non-Public Government Information. Section 746 of the Act amends Section 4c(a) of the Commodity Exchange Act[44] to prohibit federal employees and agents from entering into a contract of sale of a commodity for future delivery (or option on such a contract), an option or a swap on the basis of non-public government information, and to prohibit the sharing of such information with others "with the intent to assist" them in doing the same. Moreover, Section 746 penalizes those who receive and make "knowing use" of such information.

Conclusion

While the regulatory provisions of the Act may have the greatest impact on financial institutions and other participants in the markets, the Act also portends increased potential for exposure for securities violations, particularly in SEC enforcement actions.

NOTES

1. Pub. L. No. 111-203, 124 Stat. 1376 (2010).
2. 15 U.S.C. § 78j(b) (2006).
3. 511 U.S. 164, 191-192 (1994).
4. *Id.* at 191.
5. *Id.* (emphasis in original).
6. *See* Private Securities Litigation Reform Act of 1995 § 104 (codified as amended at 15 U.S.C. § 78t(e) (2000)).
7. 552 U.S. 148, 159 (2008).
8. *Id.* at 155, 159.
9. *Id.* at 160 (emphasis added).
10. *See, e.g., Wright v. Ernst & Young LLP*, 152 F.3d 169, 175-176 (2d Cir. 1998) (dismissing claims against outside auditor premised on oral approval of information included in issuer's press release); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 131 F. Supp. 2d 680, 685 n.5 (E.D. Pa. 2001), *aff'd*, 277 F.3d 658 (3d Cir. 2002) (auditor's approval of press release not a basis for Section 10(b) liability); *Danis v. USN Commc'ns, Inc.*, 121 F. Supp. 2d 1183, 1193 (N.D. Ill. 2000) (auditor not primarily liable for reviewing company's unaudited quarterly financial statements). *But see In re Homestore.com, Inc. Sec. Litig.*, 347 F. Supp. 2d 790, 803 (C.D. Cal. 2004) (denying in part outside auditor's motion for summary judgment in light of evidence of substantial participation in preparation of allegedly misleading statements).
11. *See, e.g., Pac. Inv. Mgmt. Co. LLC v. Mayer Brown LLP*, 603 F.3d 144, 159-160 (2d Cir. 2010) (rejecting claims against outside counsel for facilitating sham loan transactions and preparing allegedly misleading

offering documents); *Affco Invs., LLC v. KPMG, LLP*, No. 07-3379, 2009 WL 3248052, at *4-5 (S.D. Tex. 2009) (dismissing claims against outside counsel where plaintiffs had "no specific knowledge" of counsel's involvement in alleged fraud); *In re Parmalat Sec. Litig.*, 570 F. Supp. 2d 521, 525-526 (S.D.N.Y. 2008) (argument that outside counsel's deceptive conduct was reflected in issuer's public statements foreclosed by *Stoneridge*); *In re DVI Inc. Sec. Litig.*, 249 F.R.D. 196, 216-218 (E.D. Pa. 2008) (for purposes of class certification, requirement of predominance not satisfied with respect to claims against outside counsel absent a public misstatement affecting the market for the issuer's securities). *But see Lopes v. Vieira*, 543 F. Supp. 2d 1149, 1175-178 (E.D. Cal. 2008) (declining to dismiss claims against outside counsel based on role in preparing an offering memorandum).

12. *See* Liability for Aiding and Abetting Securities Violations Act of 2009, S. 1551, 111th Cong. (1st Sess. 2009) (introduced by Senator Specter on July 30, 2009).

13. No action has been taken with respect to S. 1551 since the Senate Judiciary Committee, Subcommittee on Crime and Drugs held hearings on the bill on September 17, 2009. *See* Library of Congress, Bill Summary & Status 111th Congress (2009-2010), S. 1551, All Congressional Actions, *http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN0 1551:@@@X* (last visited August 13, 2010).

14. 156 Cong. Rec. S. 3047-48 (daily ed. May 3, 2010). Senator Specter's proposal was met with opposition by the U.S. Chamber of Commerce and other industry groups. *See, e.g.*, Letter from U.S. Chamber of Commerce to Members of the United States Senate (May 13, 2010), available at *http://library.uschamber.com/issues/letters/2010/letter-opposing-amendment-sa-3776-offered-senator-specter-s-3217-restoring-ameri;* Letter from U.S. Chamber of Commerce, et al., to Hon. Harry Reid and Hon. Mitch McConnell (May 10, 2010), available at *http://library.uschamber.com/ issues/letters/2010/multi-industry-letter-opposing-sa-3776.*

15. *See* Peter J. Henning, *A Proposal to Increase Securities Fraud Liability*, N.Y. Times, June 21, 2010, available at *http://dealbook.blogs.nytimes.com/2010/06/21/securities-fraud-liability-may-hit-more-defendants/#more-243801*. Like Senator Specter, Representative Waters had also previously introduced a bill seeking to establish a private cause of action for aiding and abetting violations of the Exchange Act. *See* Liability for Aiding and Abetting Securities Violations Act of 2010, H.R. 5042, 111th Cong. (2d Sess. 2010) (introduced by Representative Waters on April 15, 2010). That bill, too, remains in committee. *See* Library of Congress, Bill Summary & Status 111th Congress (2009-2010), H.R. 5042, All Congressional Actions, *http://thomas.loc.gov/cgi-bin/bdquery/D?d111:1:./temp/~bdbRLs:@@@X |/home/Legislative Data.php|* (last visited August 13, 2010).

16. *See* Dodd-Frank Act § 929Z. To the extent feasible, the study (which must be submitted to Congress no later than July 21, 2011) is to include "(1) a review of the role of secondary actors in companies['] issuance of securities; (2) the courts['] interpretation of the scope of liability for secondary actors under Federal securities laws after January 14, 2008; and (3) the types of lawsuits decided under the [PSLRA]." *Id.*

17. *Compare, e.g., Mayer Brown LLP*, 603 F.3d at 155 ("[S]econdary actors can be liable in a private action under Rule 10b-5 for only those statements that are explicitly attributed to them."), *and Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1205 (11th Cir. 2001) ("[T]he alleged misstatement or omission upon which a plaintiff relied must have been publicly attributable to the defendant at the time that the plaintiff's investment decision was made."), *with In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615, 628-629 & n.3 (9th Cir. 1994) (substantial participation in the preparation of fraudulent statements can give rise to primary liability).

18. *In re Mutual Funds Inv. Litig.*, 566 F.3d 111, 124 (4th Cir. 2009), *cert. granted*, No. 09-525, 2010 WL 2555208 (U.S. June 28, 2010).

19. *See* Dodd-Frank Act § 929O; *see also* H.R. Rep. No. 111-517, at 870 (2010) (Joint Explanatory Statement of the Committee of Conference) (Subtitle B "makes clear that the intent standard in SEC enforcement actions for aiding and abetting is recklessness").

20. *See* Dodd-Frank Act §§ 929M-N.

21. 130 S. Ct. 2869, 2886 (2010).

22. 156 Cong. Rec. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski).

23. Dodd-Frank Act § 929P(b) (emphasis added).

24. *National Australia Bank*, 130 S. Ct. at 2877 (internal citations and quotation marks omitted).

25. *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) (internal citations and quotation marks omitted).

26. S. Rep. No. 111-176, at 110 (2010).

27. Although the SEC has discretion to determine an appropriate award, Section 922 of the Act directs the SEC to consider "the significance of the information provided by the whistleblower," "the degree of assistance provided by the whistleblower," and "the programmatic interest of the [SEC] in deterring violations of the securities laws." In the event that the SEC issues an award outside of the 10 to 30 percent range contemplated by Section 922, the whistleblower may appeal to the appropriate federal court of appeals, provided he or she does so within 30 days of the SEC's decision.

28. S. Rep. No. 111-176, at 111 (2010).

29. Under existing law, the SEC is authorized to pay whistleblowers up to 10 percent of amounts recovered by the SEC or the Attorney General in insider trading actions. *See* Section 21A of the Exchange Act, 15 U.S.C. § 78u-1(e) (2002). *See also SEC v. Pequot Capital Mgmt., Inc.*, No. 10-CV-00831 (CVD) Litig. Release No. 21601 (July 23, 2010), available at *http://www.sec.gov/litigation/litreleases/2010/lr21601.htm*

(announcing award of $1 million bounty). Unlike Section 922, however, the SEC's decisions to award (or withhold) payments to whistleblowers under Section 21A of the Exchange Act are "not subject to judicial review." 15 U.S.C. § 78u-1(e).

30. 18 U.S.C. § 1514A (2006).

31. The effect of Section 929A will be to resolve the disagreement that had emerged among some federal courts and ALJs concerning whether Section 806—which covers "employees of publicly traded companies"—also applied to employees of subsidiaries of publicly traded companies. *Compare, e.g., Rao v. Daimler Chrysler Corp.*, No. 06-13723, 2007 U.S. Dist. LEXIS 34922, at *13-14 (E.D. Mich. May 14, 2007) (relying on "corporate law principle" that parent companies are not necessarily liable for their subsidiaries to hold that subsidiaries of publicly traded companies are not automatically covered by Section 806), *with Walters v. Deutsche Bank AG*, No. 2008-SOX-70, 23 (Dep't of Labor Mar. 23, 2009) (concluding that Section 806 covered "all employees of every constituent part of the publicly traded company, including subsidiaries").

32. Dodd-Frank Act § 1057. This section also protects employees who file any proceeding under any federal consumer financial law, as well as employees who testify in any proceeding resulting from the administration or enforcement of any rule prescribed by the Bureau or law subject to its jurisdiction, or who refuse to participate in any perceived violation of such laws. *Id.*

33. To be codified as amended at 31 U.S.C. § 3730(h).

34. *See* Dodd-Frank Act § 931, *et seq.*

35. Section 7(a) of the Securities Act requires issuers to file with a registration statement the written consent of any person named as having "prepared or certified" (1) any part of the registration statement, (2) a report or valuation for use in connection with the registration statement or, generally, (3) a report or valuation that is used in connection with the registration statement, if that person is an "accountant, engineer, or appraiser" or one whose profession "gives authority to a statement made by him." *See also* SEC Rule 436(a)-(b). SEC Rule 436(g)—which is explicitly repealed by Section 939G of the Dodd-Frank Act—provided that "security rating[s] assigned" by NRSROs "shall not be considered a part of the registration statement prepared or certified by a person" within the meaning of Section 7 or 11.

36. Under Section 11(a)(4) of the Securities Act, "persons liable" include "every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement."

37. Securities Act § 11(b)(3)(B)(i).

38. Anusha Shrivastava, *Bond Sale? Don't Quote Us, Request Credit Firms*, Wall St. J., July 21, 2010.

39. Statement by SEC Staff: Statement Regarding the Registered Asset-Backed Securities Market (July 22, 2010), available at *http://www.sec.gov/news/speech/2010/spch072210mc.htm*.

40. Dodd-Frank Act § 933(a).

41. *Id*.

42. Despite Congress's ostensible intent to clarify certain aspects of private suits against NRSROs, on its face, Section 933(a) applies to the "enforcement and penalty provisions" of the Exchange Act.

43. *See* S. Rep. No. 111-176, at 122 (2010).

44. 7 U.S.C. § 6c(a) (2009).