Banking Update

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Whistleblower Protection Under the Dodd-Frank Act—Early Lessons from Case Law

In response to the 2008 financial crisis, Congress in 2010 enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "DFA" or "Act") to improve the accountability and the transparency of the financial system. One critical provision of the DFA is a section entitled "Securities Whistleblower Incentives and Protection," which, among other things, creates a private cause of action for whistleblowers who allege retaliatory discharge or other discrimination. Employer violations may result in stiff statutory penalties, including reinstatement, twice the amount of back pay owed plus interest, and compensation for litigation costs, expert witness fees, and reasonable attorneys' fees. Although the DFA is still in its relative infancy, federal courts are starting to issue decisions interpreting the Act's provisions regarding whistleblower retaliation. From those early decisions, employers and legal practitioners can learn lessons or strategies to avoid lawsuits and liability for DFA whistleblower retaliation.

1. The Act arguably protects certain employees who do not report to the Securities and Exchange Commission (the "SEC"), even though a "whistleblower," by definition, must report to the SEC.

The Act defines a "whistleblower" as one who reports to the SEC. The Act's anti-retaliation provision includes three categories of protected actions. The first two categories protect whistleblowers who (1) report to the SEC or (2) cooperate with the SEC. The third category, in contrast, covers persons who make disclosures that are "required or protected" by law, but does not expressly provide that an employee must make these disclosures to the SEC. It may seem counterintuitive, but every court that has addressed

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the issue, as well as the SEC in its final rules interpreting the Act, found that an employee need not meet the statutory definition of a "whistleblower" to receive protection under the Act's prohibition against whistleblower retaliation. In short, although a "whistleblower" by definition is one who reports to the SEC, the Act may cover certain persons who make disclosures required or protected by law internally or to a federal agency or a federal law enforcement officer.

2. The Act's whistleblower retaliation provisions may not apply outside the United States.

Generally, legislation does not apply outside the United States unless Congress manifests an express intention to give a statute extraterritorial effect. This presumption typically means that if a statute is silent about whether it applies outside the United States, it does not. One section of the DFA explicitly addresses extraterritoriality, giving federal district courts extraterritorial jurisdiction over enforcement actions brought by the SEC or the United States. In contrast, because the DFA's anti-retaliation provision does not mention extraterritoriality, courts and commentators addressing the issue have found that the DFA's extraterritorial reach does not extend to private actions for whistleblower retaliation.

Early decisions have broadened protection beyond the statutory definition of a "whistleblower," restricted the reach of the DFA's anti-retaliation provision to the United States, and applied the DFA's affiliate amendment of SOX retroactively.

3. The DFA generally does not apply retroactively; however, the DFA's amendment of Sarbanes-Oxley to provide protection to whistleblowers employed by subsidiaries of public companies does apply retroactively.

Sarbanes Oxley ("SOX") protects employees of publicly-traded companies, but before the DFA, it was unclear whether SOX also protected employees of public companies' wholly-owned subsidiaries. The DFA amended SOX to clarify that it protected employees of a "subsidiary or affiliate whose financial information is included in the consolidated financial statements" of a public company (the "affiliate amendment"). The affiliate amendment, however, created a new question—whether the amendment applies retroactively, and courts have concluded that it does.

Generally, statutes do not apply retroactively, and the DFA is no different. With limited exceptions, numerous courts have found that the DFA's various provisions do not apply to conduct that occurred before the enactment of the DFA. Courts are finding, however, that the affiliate amendment is a clarification of SOX, not new law. Therefore, they are giving the affiliate amendment retroactive effect. Although the DFA generally does not apply retroactively, because the affiliate amendment clarifies SOX rather than effecting a substantive change in the law, courts find that the affiliate amendment applies to conduct predating the DFA.

Importantly, these are early decisions by federal district courts. Issues regarding whistleblower protection under the DFA are still percolating, and federal appellate courts have yet to rule on these issues. That said, the early decisions have broadened protection beyond the statutory definition of a "whistleblower," restricted the reach of the DFA's anti-retaliation provision to the United States, and applied the DFA's affiliate amendment of SOX retroactively. Hopefully, employers and practitioners can apply these lessons to avoid liability for whistleblower retaliation under the DFA. ■

Anthony D. Todero

New Power-of-Attorney Rules in Nebraska Present Pros and Cons for Bankers

The Nebraska Uniform Power of Attorney Act (the "Act") took effect on January 1, 2013, providing more detailed guidance for those attorneys-in-fact named on a durable power of attorney (defined as "agents" in the Act). The Act also provides safeguards to third parties working with agents, as well as imposing duties. The Act contains many provisions that are beneficial to banks, while other aspects impose additional requirements. The good news, and the bad, is described below.

The Good News

- Third Party Reliance of Power of Attorney. The Act generally provides greater protection for third parties dealing with agents, such as financial institutions. Generally, a third party that in good faith accepts a power of attorney that has been notarized, with no actual knowledge that the power of attorney is void, can rely on the power of attorney. The Act states that a third party that receives an agent's certification can rely on the certification as to factual matters, and third parties are also afforded protections for employees who had no actual knowledge of a fact that would make a transaction void.

The Act contains many provisions that are beneficial to banks, while other aspects impose additional requirements.

Financial institutions may want to begin obtaining certifications from those opening POA accounts and performing financial transactions as agent. In addition, financial institutions will want to ensure that powers of attorney executed in Nebraska after January 1, 2013 are notarized.

- General Powers. In the Act, "general powers" are triggered by one person granting an agent authority to do "all acts that a principal could do." General powers do not need to be specifically described in the power of attorney. Rather, the statute provides a litany of items that are to be included on the list of "general powers." In the banking context, the Act lists a comprehensive list of general powers relating to financial matters, which should give financial institutions more comfort that the agent has authority to perform financial acts.

- Specific Powers. The Act states that certain powers cannot be exercised by an agent unless they are specifically listed in the durable power of attorney. These include the authority to:

  - o Create, amend, revoke, or terminate an *inter vivos* trust;
  - o Make a gift;
  - o Create or change rights of survivorship;
  - o Create or change a beneficiary designation;
  - o Delegate authority granted under the power of attorney;
  - o Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;
  - o Exercise fiduciary powers that the principal has authority to delegate; or
  - o Renounce or disclaim property, including a power of appointment.

The Act lists a comprehensive list of general powers relating to financial matters, which should give financial institutions more comfort that the agent has authority to perform financial acts.

Financial institutions should be aware of these limitations if the financial institution may be called upon to facilitate their exercise.

- Authority of Co-Agents. Unlike prior law, co-agents are now by default allowed to act independently. This should simplify the monitoring of

power of attorney accounts that name co-agents.

The Bad News

The Act also makes a number of changes that may pose challenges to financial institutions, a few of which are summarized below:

- Liability for Refusal to Accept Power of Attorney. The Act requires a financial institution to accept a notarized power of attorney no later than seven (7) business days after it is presented, except in limited circumstances. Failure to timely accept a power of attorney can result in court action and the payment of attorney's fees to the agent.

- New Execution Requirements. The Act now requires that a durable power of attorney be notarized to be effective. Former law contained no such requirement, so confusion may arise about whether a power of attorney is validly executed depending on its execution date.

- No Automatic Revocation of Prior Power of Attorney. The Act does not provide for automatic revocation of an earlier executed power of attorney. Accordingly, a certification should be used to state that no prior power of attorney existed or, in the alternative, that the prior power of attorney was explicitly revoked.

Practical Considerations

We would recommend that financial institutions review their procedures for acceptance of durable powers of attorney to ensure continued compliance under the Act. Financial institutions should also review procedures to determine if it can take advantage of additional safeguards under the Act. ■

Jesse D. Sitz
Daniel P. Fischer

Congress Eliminates ATM Fee Notice Requirements And Provides Protection For Bank Information Provided To CFPB

Congress has finally acted to address two issues that we have addressed in past issues of this Update. One issue we have addressed in the past that has impacted many banks involved frivolous class action lawsuits filed under the auspices of the Electronic Fund Transfer Act. Such claims involved users of ATMs alleging that they were entitled to damages because a notice had not been placed on the ATM informing them they may be charged a fee for their transaction. On December 11th, a bill eliminating the on-machine notice requirement was passed by the Senate and sent to the President for his signature. The House of Representatives in their report on the bill stated they were eliminating the requirement that fee notice be affixed or displayed on the ATM as such notices were unnecessary since ATM operators are required to disclose the fees on the screen prior to the consumer consummating the transaction. The House saw the bill as a way to protect ATM operators from the frivolous lawsuits to which many have been subjected related to the ATM fee notice requirement. The President signed the bill into law on December 20, 2012. The new law eliminates the requirement that a notice be placed on our about the ATM, leaving in place the requirement for the on-screen notice.

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The second issue we have commented on in the past and which was finally rectified by Congress was Congress' failure to include the Consumer Protection Financial Bureau ("CFPB") within the terms of the Federal Deposit Insurance Act such that disclosure of attorney-client privileged materials to the CFPB would not waive the attorney-client privilege to those documents. On December 11, the bill adding the CFPB to the list of regulators to whom such disclosures are made does not waive the attorney-client privilege. The House of Representatives explained that the purpose of the bill was to clarify that institutions regulated by the CFPB will not waive applicable legal privileges as to third parties when they share information with

the CFPB. The President signed the bill into law on December 20, 2012. With this enactment, the debate about whether attorney-client privilege is waived by submitting information and documents to the CFPB has been put to rest. Such disclosure does not waive applicable legal privileges, including the attorney-client privilege. ■

Kenneth W. Hartman

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