MAYER • BROWN

# The Dodd-Frank Act's Impact on Securities Litigation and Enforcement

## Expansion of SEC Enforcement Power

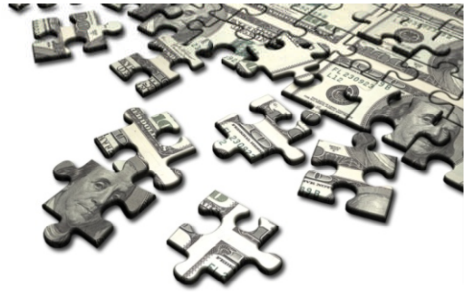

Joseph De Simone
*Partner*
+1 212 506 2559
jdesimone@mayerbrown.com

Hector Gonzalez
*Partner*
+1 212 506 2114
hgonzalez@mayerbrown.com

John J. Tharp, Jr.
*Partner*
+1 312 701 7146
jtharp@mayerbrown.com

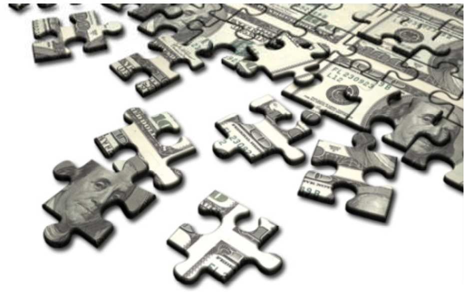

October 2010

# What We Will Cover



- Significant changes in bringing and proving “aiding and abetting” violations in SEC actions
- Extraterritorial jurisdiction of the SEC
- The power of the SEC to impose monetary penalties in “cease and desist” proceedings
- Increased burden of the SEC to fully investigate matters by newly established deadlines
- Expanding clawback of executive compensation
- Bounty provisions/whistleblowers – how the provisions affect companies before and during litigation
- Compliance – best practices

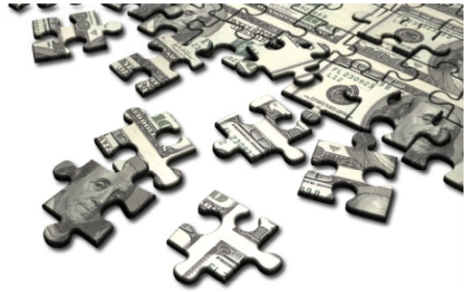
# Aiding and Abetting Liability



## Expanding the Scope of Liability

- SEC has long had ability to bring aiding and abetting claims under the Exchange Act
- Dodd-Frank also provides the SEC with the authority to bring a cause of action for aiding and abetting liability, not only under the Exchange Act, but also under the Securities Act, the Investment Company Act and the Investment Advisers Act.
  - Section 929M: Aiding And Abetting Authority Under The Securities Act And The Investment Company Act
  - Section 929N: Authority To Impose Penalties For Aiding And Abetting Violations Of The Investment Advisers Act

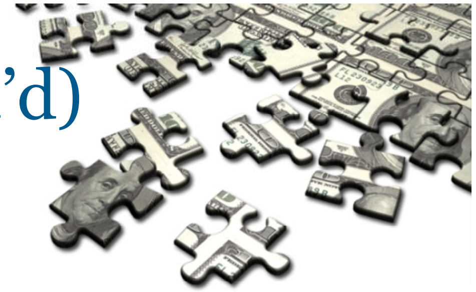
# Aiding and Abetting Liability



## Lowering the Requisite State of Mind

- Section 929O: Aiding and Abetting Standard Of Knowledge Satisfied By Recklessness
  - "Section 20(e) of the Securities Exchange Act of 1934 (15U.S.C. 78t(e)) is amended by inserting 'or recklessly' after 'knowingly.'"
- As Amended, Section 20(e) of the Exchange Act reads:
  - "For purposes of any action brought by the Commission under paragraph (1) or (3) of section 21(d), any person that knowingly **or recklessly** provides substantial assistance to another person in violation of a provision of this title, or of any rule or regulation issued under this title, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided." (emphasis added)

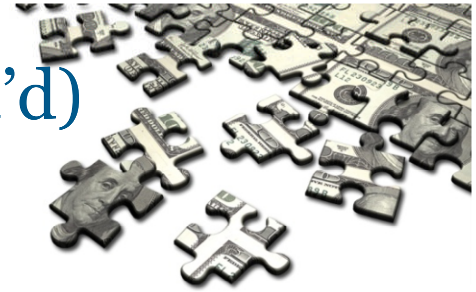
# Aiding and Abetting Liability (cont'd)



## <u>No Private Right Of Action . . . For Now</u>

- *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)
  - No private right of action under Section 10(b)  against aiders and abettors.
- *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008)
  - No "scheme" liability premised on aiding and abetting; implied private right of under Section 10(b) for securities fraud does not extend to third parties who neither make alleged misstatements nor engage in deceptive conduct on which investors relied.

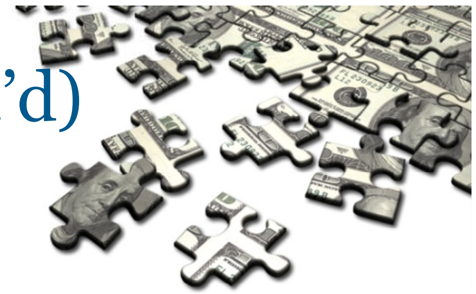
# Aiding and Abetting Liability (cont'd)



## GAO Study on Securities Litigation

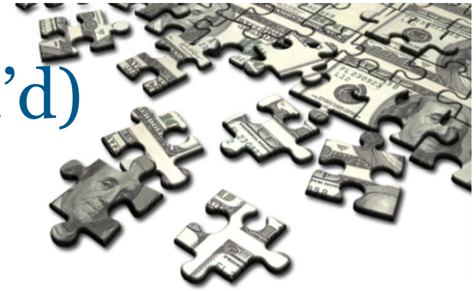
- After much deliberation and several proposals, Dodd-Frank does not enable private plaintiffs to bring aiding and abetting claims in securities fraud actions.
- As a compromise for omitting a private right of action from Dodd-Frank, the Comptroller General must conduct a study "on the impact of authorizing a private right of action against any person who aids or abets another person in violation of the securities laws." H.R. 4173, § 929Z(a)

# Aiding and Abetting Liability (cont'd)



- "To the extent feasible," the study must include:
  - A review of the role of secondary actors in companies issuance of securities;
  - The courts' interpretation of the scope of liability for secondary actors under Federal securities laws after January 14, 2008; and
  - The types of lawsuits decided under the Private Securities Litigation Act of 1995.
- The Comptroller General must also submit a report to Congress on the findings of the study within one year of the passage of Dodd-Frank. H.R. 4173, § 929Z(b)

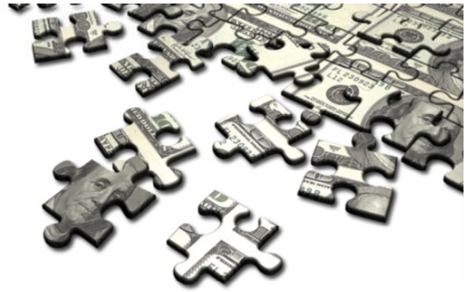
# Aiding and Abetting Liability (cont'd)



## What It All Means

- Enhance the SEC's ability to bring aiding and abetting actions.
  - Easier to provide evidence that someone acted "recklessly" than it is prove that someone "knowingly" assisted the primary wrongdoer.
- Expressly authorizes the SEC to bring actions for aiding and abetting liability under the same "knowingly" or "recklessly" standards for violations under the Securities Act, the Investment Advisers Act and the Investment Company Act.
- At Risk: Third-Parties that provide services to Issuers:
  - Accounting firms, financial consultants, law firms

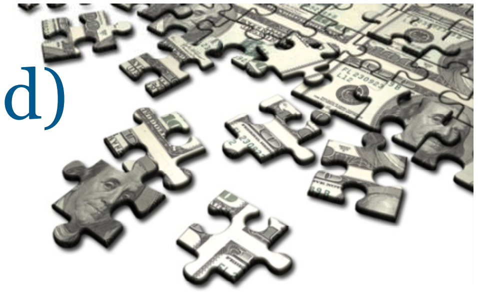
# Extraterritorial Jurisdiction



## Expands SEC's Extraterritorial Jurisdiction

- Section 929P(b): Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws
  - Amends antifraud provisions of the Securities Act, the Exchange Act and the Investment Advisers Act to confer U.S. Courts with jurisdiction of an action or proceeding brought by the SEC or the U.S. involving:
    - "conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
    - conduct occurring outside of the United States that has a foreseeable substantial effect within the United States."

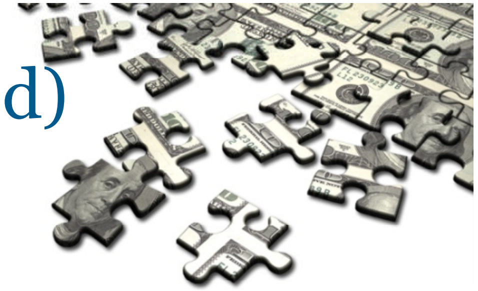
# Extraterritorial Jurisdiction (cont'd)



## *Morrison* Re-visited

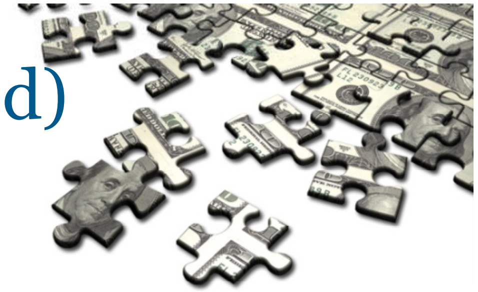
- *Morrison v. National Australia Bank Ltd.,U.S.* ,No. 08-1191 (June 24, 2010)
  - Held that Section 10(b) of the Exchange Act and SEC Rule 10b-5 prohibited fraud only in connection with the purchase or sale of a security listed on an American stock exchange and the purchase or sale of any other security in the United States.
  - Rejected so-called "conduct/effect" test, which permitted foreign investors to file Section 10(b) actions if the alleged wrongful conduct either occurred in the U.S. or had a substantial effect in the U.S. or upon U.S. citizens.

# Extraterritorial Jurisdiction (cont'd)



  - Court did not address whether SEC had extraterritorial jurisdiction because the case involved private investors.
- Section 929P(b) of Dodd-Frank effectively overrides *Morrison*, in part
  - Expressly grants SEC authority to bring actions based on "conduct/effect" standard.
- However, no private right of action

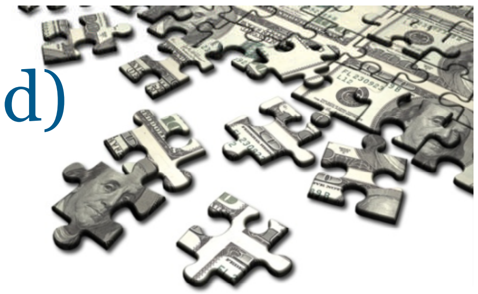
# Extraterritorial Jurisdiction (cont'd)



## <u>SEC Study on Extraterritorial Private Rights of Action</u>

- Congress will re-visit the issue of whether individual investors should have a private right of action for securities violations under antifraud provisions.
- The SEC must "solicit public comment and thereafter conduct a study to determine the extent to which private rights of action under the antifraud provisions of the Securities and Exchange Act of 1934 should be extended to cover:
  - "conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

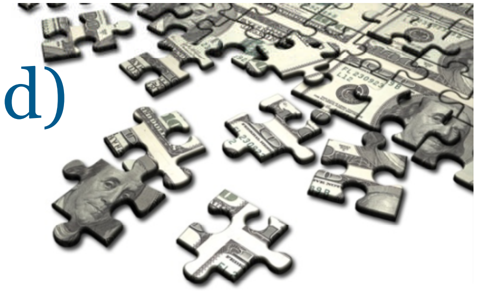
# Extraterritorial Jurisdiction (cont'd)



- conduct occurring outside of the United States that has a foreseeable substantial effect within the United States." H.R. 4173, § 929Y(a)

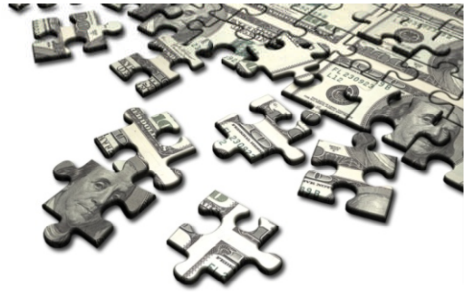
- The study shall consider and analyze:
  - The scope of such a private right of action, including whether it should extend to all private actors or whether it should be more limited to extend just to institutional investors or otherwise;
  - What implications such a private right of action would have on international comity;
  - The economic costs and benefits of extending a private right of action for transnational securities frauds; and
  - Whether a narrower extraterritorial standard should be adopted.

# Extraterritorial Jurisdiction (cont'd)



- SEC must also submit a report of its findings to the Committee on Banking, Housing and Urban Affairs of the Senate and the Committee on Financial Services of the House within 18 months after the passage of Dodd-Frank. H.R. 4173, 929Y(b)

# Cease and Desist Proceedings



## Imposing Monetary Penalties

- Section 929P(a): Authority to Impose Civil Penalties in Cease and Desist Proceedings
  - The Act amends the Securities Act, the Exchange Act, the Investment Company Act and the Investment Advisers Act to grant the SEC authority to impose monetary penalties in all its cease-and-desist proceedings.
  - For instance, the Securities Act was amended to include that "In any cease and desist proceeding under subsection (a), the Commission may impose a civil penalty on a person if the Commission finds, on the record, after notice and opportunity for hearing that

# Cease and Desist Proceedings (cont'd)

- (A) such person
  - Is violating or has violated any provision of this title or any rule or regulation issued under this title; or
  - Is or was a cause of the violation of any provision of this title, or any rule or regulation thereunder; and
- (B) Such penalty is in the public interest"

- Additionally, for cease and desist proceedings instituted under the Securities Act, Dodd-Frank adopts a three-tiered penalty system that is already contained in the Exchange Act, though it raises the penalty amounts.

# Cease and Desist Proceedings (cont'd)

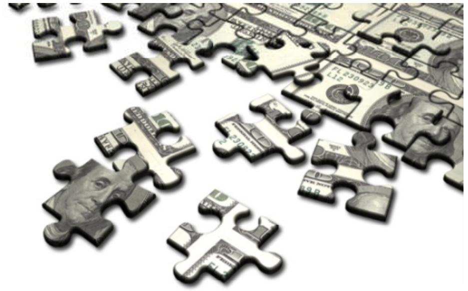
## What It All Means

- Previously, the SEC only had the authority to impose monetary penalties in cease and desist proceedings against registered entities and persons associated with registered entities. For non-registered entities, the SEC was required to seek an order from a federal district court.  Now, however, the SEC can seek civil penalties in administrative proceedings – as opposed to in federal court – against non-registered persons and entities as well.
- More incentive for the SEC to bring cases as administrative actions because of the differences between administrative proceedings and federal district court, such as:

# Cease and Desist Proceedings (cont'd)

- Limited to no pre-trial discovery /motion practice
- No right to a jury trial
- Less strict application of evidentiary rules
- Expedited process

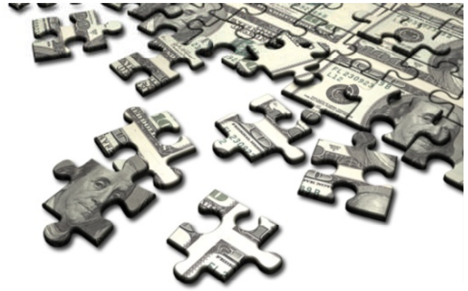
# Newly Established Deadlines



## Establishing Deadlines for SEC Examinations, Inspections and Enforcement Actions

- Section 929U: Deadline for Completing Examinations, Inspections and Enforcement Actions
  - “Not later than 180 days after the date on which the Commission staff provide a written Wells notification to any person, the Commission staff shall either file an action against such person or provide a notice to the Director of the Division of Enforcement of its intent to not file an action.”
- Exception for Sufficiently Complex Actions
  - “[I]f the Director of the Division of Enforcement of the Commission or [his] designee determines that a particular

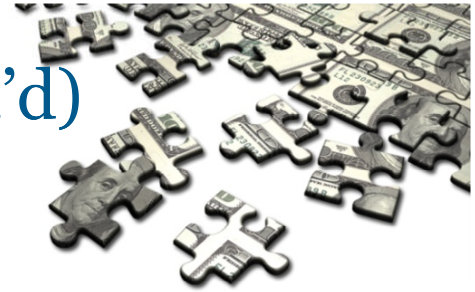
# Newly Established Deadlines (cont'd)



enforcement investigation is **sufficiently complex** such that a determination regarding the filing of an action against a person cannot be completed with the deadline . . . the Director . . . may extend such deadline as needed for on additional 180-day period." (emphasis added)

- Section 929U(b) provides that the SEC will have 180 days after completing an onsite compliance examination or inspection, or receiving all requested records to inform the entity being examined or investigated that the examination has concluded, has concluded without findings or that the staff requests that the entity take corrective action.
  - Similar to the previous section, there is a 180-day extension period for cases that are "sufficiently complex."

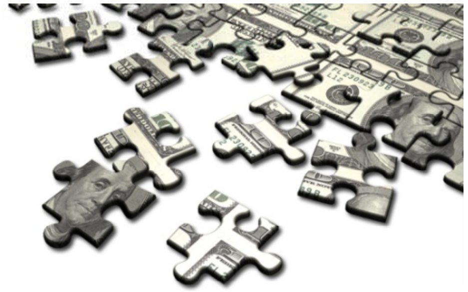
# Newly Established Deadlines (cont'd)



## Asks More Questions Than It Answers

- In theory, this should expedite SEC enforcement and examination
- Will the deadlines result in more or less SEC action?
- Will the "sufficiently complex" exception swallow the rule?
- Does the 180-day deadline have any impact on investigations that have not reached the notice stage?
- Are there any consequences if the SEC does comply with the 180-day deadline?

# Expanded Clawback of Executive Compensation



- Section 954: Recovery of Erroneously Awarded Compensation
  - Amends the Exchange Act by adding new Section 10D, which requires all companies listed with national securities exchanges and associations to enact clawback policies covering incentive based compensation.
  - Under Dodd-Frank, the clawback policy must provide that, in the event the issuer is required to prepare an accounting restatement due to the **material noncompliance** of the issuer with any financial reporting requirement under the securities laws, the issuer will recover any incentive based compensation (including stock options) paid to any **current or former executive officer** during the **3-year period preceding** the date on which the issuer is required to prepare the restatement.

# Expanded Clawback of Executive Compensation (cont'd)

- SOX § 304: Forfeiture of Certain Bonuses and Profits addresses this issue as well.
- Dodd-Frank, however, expands clawback on executive compensation.

# Expanded Clawback of Executive Compensation (cont'd)

## Major Differences Between Dodd-Frank and SOX

- Dodd-Frank covers "current and former executives officers" whereas SOX covered only the company's CEO and CFO.
- Dodd-Frank lowers the trigger for clawbacks to instances of "material noncompliance" whereas SOX required some form of "misconduct."
- Dodd-Frank contains a recovery period of 3-years prior to the requirement for the restatement whereas SOX had a 1-year period.

# Expanded Clawback of Executive Compensation (cont'd)

## Questions Left Unanswered

- Does Dodd-Frank contemplate private cause of action?
- Will Dodd-Frank lead to derivative lawsuits challenging the implementation of clawback policies?
- What steps must be taken to implement clawback policies?
- What steps must the issuer take to recover excess compensation?

MAYER • BROWN

# The Dodd-Frank Act's Impact on Securities Litigation and Enforcement

## Dodd-Frank's Whistleblower Protections

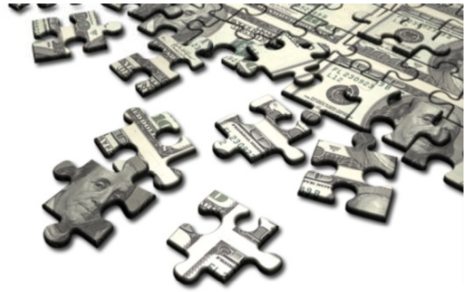

Anthony M. Alexis
*Partner*
+1 202 263 3450
aalexis@mayerbrown.com

Hector Gonzalez
*Partner*
+1 212 506 2114
hgonzalez@mayerbrown.com

Marcia E. Goodman
*Partner*
+1 312 701 7953
mgoodman@mayerbrown.com


October 2010

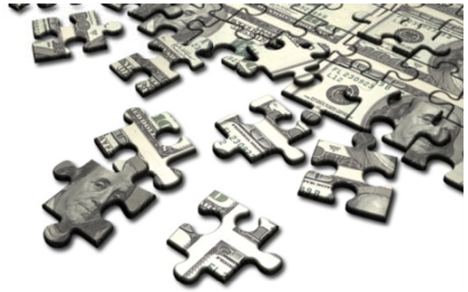
# Incentives and Protections for Whistleblowers



## Background

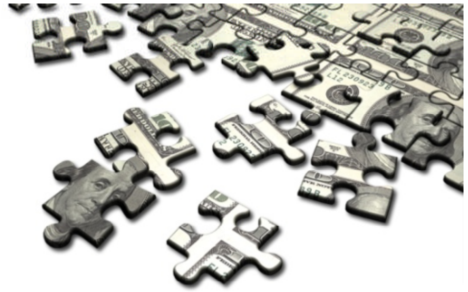
- As part of Congress' stated desire to increase regulatory enforcement remedies available to the SEC
  - Dodd-Frank amends the Securities Exchange Act of 1934 (34 Act) by creating a new Section 21F,  which creates a whistleblower program designed to provide monetary incentives for people who provide information to the SEC leading to successful SEC enforcement actions.

# Incentives and Protections for Whistleblowers (cont'd)



- Perceived Need:
  - According to a Senate Report:
    - Whistleblowers were responsible for uncovering 54.1% of all fraud schemes in publicly traded companies.
    - Outside auditors including the Securities and Exchange Commission ("SEC") have uncovered only 4.1%.

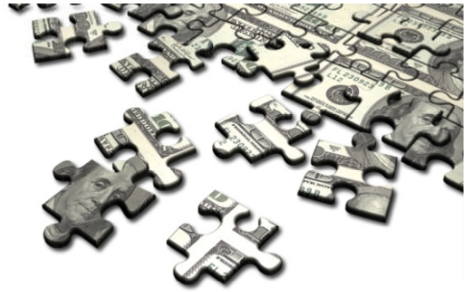
# Incentives and Protections for Whistleblowers (cont'd)



## <u>Rule Prior to Dodd-Frank</u>

- Prior SEC Bounty Program
  - 21A(e) of the 34 Act, 15 U.S.C. 78u-1(e) authorizes the SEC in its ***sole discretion*** to pay a bounty award of up to 10% of any civil penalty it recovered from an insider trader to any person who provided the information which led to the imposition of the civil penalty.
  - According to a published SEC-OIG report dated March 29, 2010, the SEC paid only $159,537 to five whistleblowers despite nearly 20 year existence of the program.
    - Criticized as not user friendly
    - Too limited in the SEC laws covered
    - Too much discretion by SEC to award bounty or not

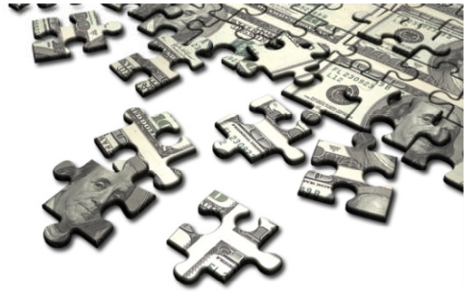
# Incentives and Protections for Whistleblowers (cont'd)



## Goal of the New Program

- Specifically designed to increase the size of the reward to the whistleblower to encourage people to come forward in the face of the potential adverse risk of losing employment, being blackballed out of similar employment, and the adverse personal toll of being involved as a whistleblower.
- Senate noted:
  - Whistleblowers often face the "difficult choice" between coming forward versus committing "career suicide."
  - Program with a rich reward between 10% and 30% is a critical component of a Whistleblower Program and would be the minimum payout that any individual could look towards in

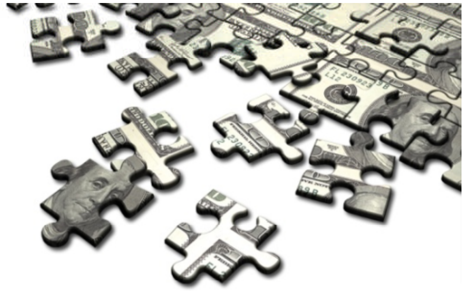
# Incentives and Protections for Whistleblowers (cont'd)



determining whether to take the enormous risk of blowing the whistle in calling attention to fraud.

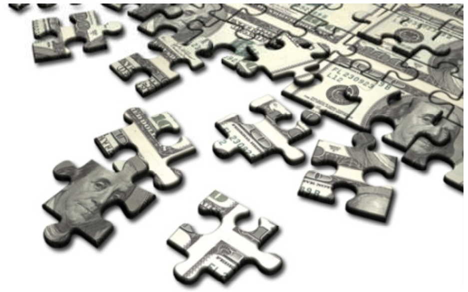
- The program is modeled after a successful IRS Whistleblower Program enacted into law in 2006. The reformed IRS program, which, too, has a similar minimum-maximum award levels and an appeals process is credited to have reinvigorated the earlier, largely ineffective, IRS Whistleblower Program.

# Incentives and Protections for Whistleblowers (cont'd)



- New Section 21F of the 34 Act ***requires*** that the SEC provide an award to a qualifying whistleblower of no less than 10% and no greater than 30% of any sanction imposed against a violator of any securities laws as a result of "original information" that is "voluntarily provided" to the SEC which leads to a successful enforcement or related action provided by the whistleblower.

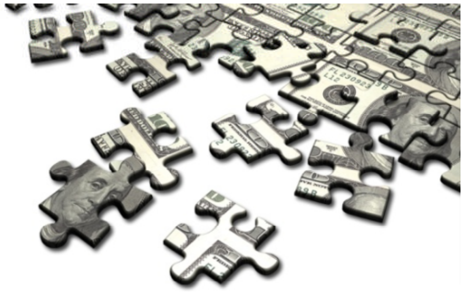
# Incentives and Protections for Whistleblowers (cont'd)



## <u>Nuts and Bolts</u>

- Provisions will apply to any:
  - judicial or administrative action brought by the SEC or related proceeding brought by the United States Department of Justice under any securities law which results in a monetary sanction (either by judgment or settlement) which ***exceeds 1 million dollars***. 21F(a)(1)
- The amount on which the share will be calculated specifically includes penalties, disgorgement and interest paid. 21F(a)(4) and (5)
- Size of the reward will be on sliding scale between 10-30 percent of the government's recovery based on:

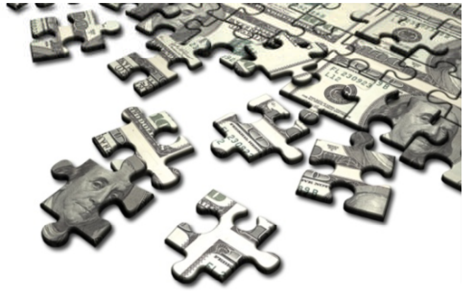
# Incentives and Protections for Whistleblowers (cont'd)



- 1) the significance of the information provided;
- 2) the degree of assistance of the whistleblower; and
- 3) the programmatic interest of the Commission in deterring violations of the laws. 21F(c)

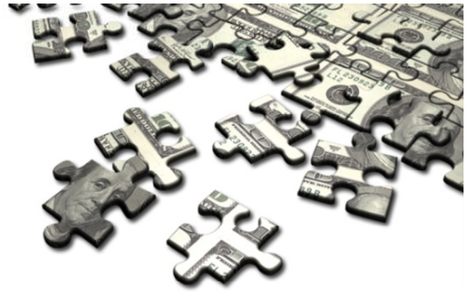
- Whistleblower must provide "original information" derived from the independent knowledge or analysis of the whistleblower that is not known to the SEC from another source nor derived from allegations made in a judicial or administrative hearing or a government report, hearing, audit or investigation or the news media. 21F(b)
- Whistleblower is disqualified from recovering a bounty if:

# Incentives and Protections for Whistleblowers (cont'd)



– he was convicted of a criminal violation related to the subject of the disclosure or if he is an employee of various relevant regulatory and governmental agencies and authorities such as the SEC, or the Department of Justice. 21F(c)(2)

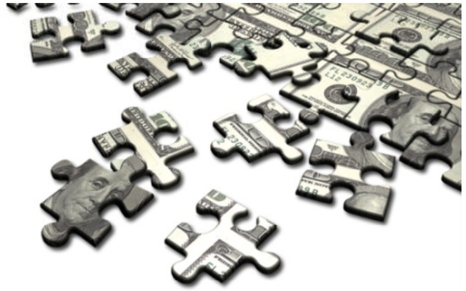
# Incentives and Protections for Whistleblowers (cont'd)



## No Qui Tam Provision

- Whistleblower may challenge in Court of Appeals denial of reward or the reward of an amount outside of the 10-30% range. 21f(f)
- No independent cause of action by whistleblower if the SEC does not pursue the allegations contained in the original information.
- Limits target's ability to challenge whistleblower's allegations through the whistleblower process.
- Limits target's ability to challenge the appropriateness or amount of the bounty.

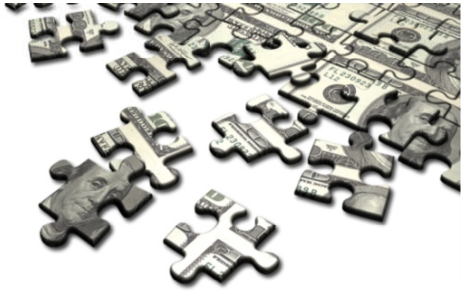
# Incentives and Protections for Whistleblowers (cont'd)



## FCPA

- Although the FCPA is not mentioned by name it clearly falls under the "securities law" provision and is covered within the ambit of Dodd-Frank. Due to the disgorgement provision within the FCPA statute, the monetary amounts involved in many FCPA settlement matters routinely are in the tens of millions of dollars.
    - Codified at 15 USC Sections 78m(b), (d)(1), (g)-(h), 78dd-1 to 78dd-3, 78ff.
    - Prohibits illicit payments to foreign public officials by businesses and individuals to influence or induce their influence to assist the company in obtaining or retaining business
    - Books and records requirement to keep and report the transactions of the corporations

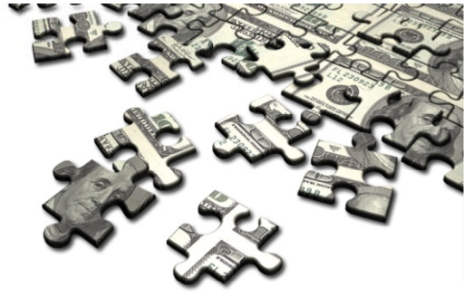
# Incentives and Protections for Whistleblowers (cont'd)



## Developments

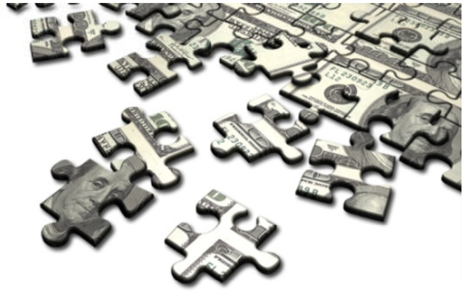
- SEC to promulgate rules and regulations for whistleblower program by April 2011.
  - However, law is in effect NOW.
  - Post-Dodd-Frank developments:
    - A few days after new legislation, SEC paid $1 million dollar bounty to whistleblowers who provided SEC with information regarding allegation of insider trading by Pequot Capital Management
    - SEC currently accepting comments as part of its rules promulgating process

# Incentives and Protections for Whistleblowers (cont'd)



- "Our law firm alone has already, just in the last ten days, filed several whistle-blower complaints with the SEC pursuant to the new statute. The complaints involve major Wall Street firms and the filings appear to implicate hundreds of millions of dollars, if not more, of investor related fraud issues, including on behalf of former senior employee(s) of entities. In addition, we are reviewing and screening several more potential submissions ranging from potential broker-dealer violations, accounting fraud, violations of the FCPA and improper or inadequate corporate disclosures by public companies."

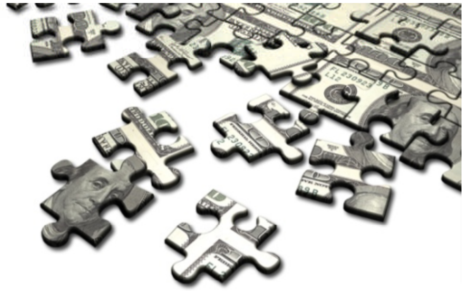
# Incentives and Protections for Whistleblowers(cont'd)



## Criticisms

- May undermine compliance programs which promote employee reporting of activities to company management
- People without all facts may file based on weak claims
- Increased claims will cause SEC to divert resources to handle claims and cause unnecessary opening investigations

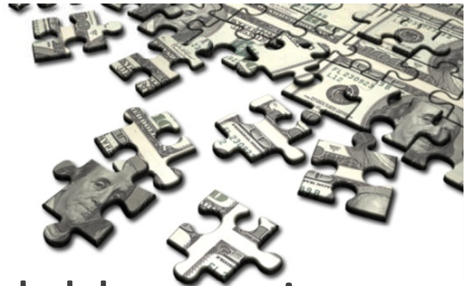
# Incentives and Protections for Whistleblowers (cont'd)



## Best Practices

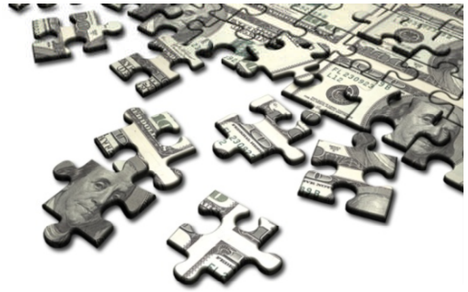
- Review and modify compliance programs to emphasize early reporting to management
- Carefully conduct investigations to prevent "planting the seed" of the existence of facts

# Whistleblower Protections: Anti-Retaliation Provisions



- The Act provides employment protections to whistleblowers in a number of contexts, including:
  - Protections for whistleblowing added to the Securities Exchange Act of 1934 (covering the Securities Act of 1933, the Securities Exchange Act of 1934, the FCPA, the Investment Advisors Act, and the Investment Company Act);
  - Protections for whistleblowing added to the Commodities Exchange Act;
  - Protections for whistleblowingwithin the Consumer Financial Protection Act;
  - Expanded protections for whistleblowing under the False Claims Act; and,
  - Expanded protections for whistleblowing under Sarbanes-Oxley.

# Whistleblower Protections: Anti-Retaliation Provisions



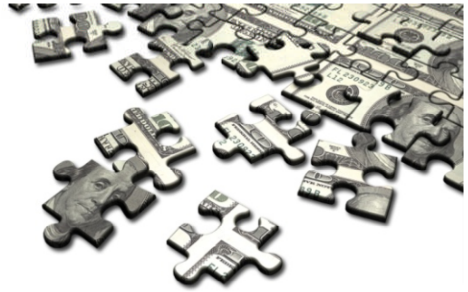
- With respect to the Securities Exchange Act protections, Section 922 provides that:

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of a lawful act done by the whistleblower—

"(i) in providing information to the Commission in accordance with this Section,

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information, or

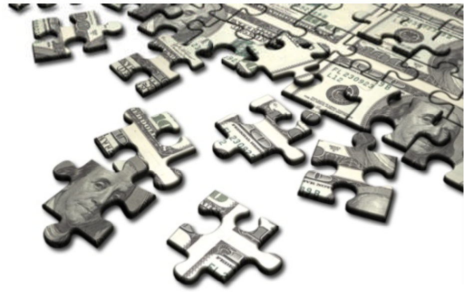
(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*, including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of title 18, United States Code, and any other law, rule or regulation subject to the jurisdiction of the Commission."



# Whistleblower Protections: Anti-Retaliation Provisions

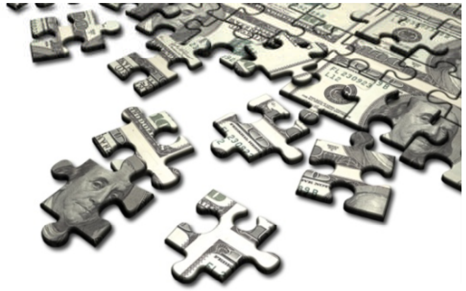
- Who is a "whistleblower" under Section 922?
  - A "whistleblower" is defined as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."  Section 21F(a)(6).
  - Successful enforcement *not* required for protections:
    - "Reasonable Belief" requirement?
    - Dodd-Frank does not reward knowingly false, fictitious, or fraudulent representations.
    - Is an unreasonable, but sincere belief protected?

# Whistleblower Protections: Anti-Retaliation Provisions



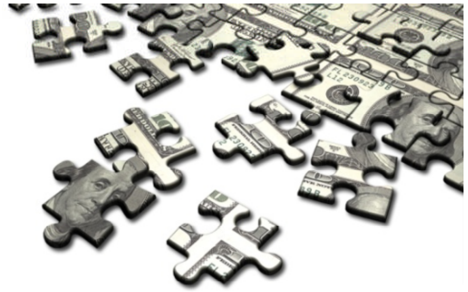
- What activity is protected?
  - Section 922 specifies three types of protected activity:
    - Providing information to the SEC relating to a violation of securities laws.
    - Participating in a Commission investigation or prosecution based on information relating to a violation of securities laws.
    - Making disclosures required or protected by (a) Sarbanes-Oxley, (b) Section 10A(m) of the Securities Exchange Act, (c) 18 U.S.C. §1513(e), or (d) any law, rule or regulation subject to the jurisdiction of the SEC.
  - Protections are not limited to disclosures to the SEC:
    - Sarbanes-Oxley protects internal reports of potential securities fraud.
    - 18 U.S.C. §1513(e) protects disclosures to a law enforcement officer "relating to the commission or possible commission of any Federal offense."

# Whistleblower Protections: Anti-Retaliation Provisions



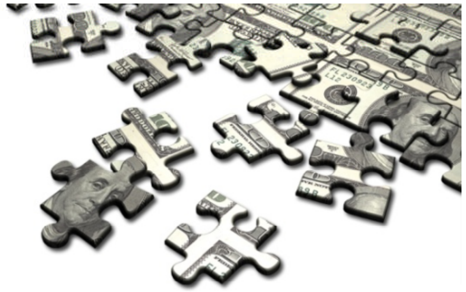
- Who is an “employer” under Section 922?
  - Employer is not defined by the Act, but rather a concept likely to be informed by the forthcoming regulations.
    - Regulations must be issued and finalized by April 17, 2011, and SEC has said it will issue proposed regulations before the end of the year.
  - Publicly-traded vs. Non-publicly traded companies:
    - As enacted, the anti-retaliation provisions are not limited to publicly-traded companies or entities related in some way thereto.
    - Rather, the Act’s anti-retaliation provisions apply to any company or transaction that is subject to regulation by the SEC.

# Whistleblower Protections: Anti-Retaliation Provisions



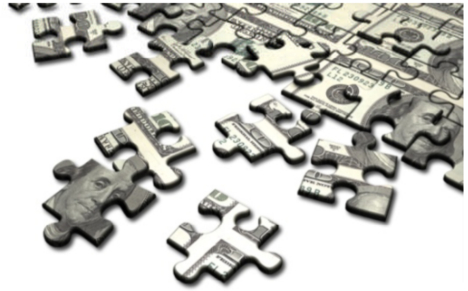
- What about non-U.S. companies or companies with employees outside of the United States?
  - Under appropriate circumstances (e.g. through the offering of ADRs or private placements), non-U.S. companies can be subject to regulation by the SEC.
  - Bounty provisions likely apply to employees anywhere in the world who provide information about violations of securities laws by such companies.
  - Retaliation claims brought under Section 922 by employees physically located outside of the U.S. raise jurisdictional issues without clear answers.
  - Changes to the extraterritorial jurisdiction of the securities laws' antifraud provisions raises additional questions.
  - The forthcoming regulations may clarify this issue.  Alternatively, the courts will have to address the issue as claims are raised.

# Whistleblower Protections: Anti-Retaliation Provisions



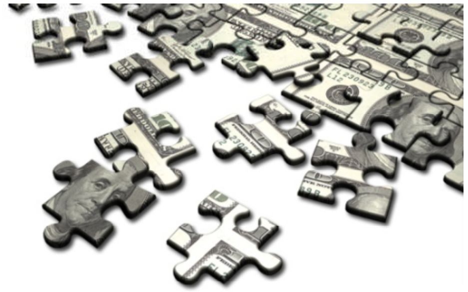
- Courts have addressed extraterritorial application issues with respect to other U.S. employment laws. Based on that experience, we expect that:
  - U.S. citizens working outside the U.S. for a U.S. company or a foreign subsidiary controlled by a U.S. company would likely be covered.
    - "Control" is often determined by the interrelation of operations, common management, centralized control of labor relations, and common ownership/financial control.
  - Non-U.S. citizens working outside the U.S. for a U.S. company or a foreign subsidiary controlled by a U.S. company would likely be covered, unless compliance with the whistleblower protection provisions would require the company to violate a law of the country in which the company is physically located.
  - Non-U.S. citizens working outside the U.S. for a foreign company not controlled by a U.S. company would likely not be covered.

# Whistleblower Protections: Anti-Retaliation Provisions



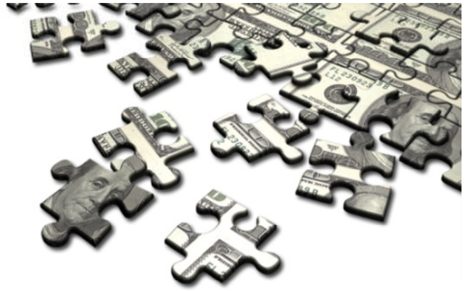
- Suggested Resources:
  - *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (federal employment laws will not be presumed to apply beyond U.S. territorial jurisdiction without clear Congressional intent).
  - *But see* 42 U.S.C.§§2000e(f), 2000e-1(a) and 12111(4) (amending Title VII and ADA to cover employees working outside the U.S. for a U.S. company or a foreign subsidiary controlled by a U.S. company); 29 U.S.C. §623(h) (same for ADEA).
  - EEOC's*Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States*, available at http://www.eeoc.gov/policy/docs/extraterritorial-vii-ada.html (Oct. 20, 1993).
  - *O'Mahony v. Accenture Ltd.*,537 F.Supp.2d 506 (S.D.N.Y. 2008) (subject matter asserted overAmerican employee of Bermuda company's French subsidiary who brought SOX whistleblower action against Bermuda company and its U.S. subsidiary).

# Whistleblower Protections: Anti-Retaliation Provisions



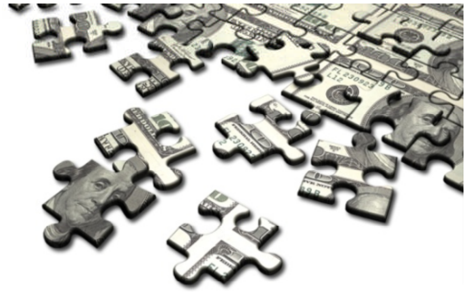
- Section 922 Procedural Issues:
  - Direct access to Courts:
    - Purported whistleblowers are not required to bring their retaliation claims before an administrative agency, but rather can proceed directly to "the appropriate district court of the United States."
    - Increased costs of litigation, and the potential for increased publicity.
  - Statute of limitations:
    - Claims can be brought up to six years after the violation, or three years after material facts become known by the employee, but no more than 10 years after the violation.
    - Significant impact on available defenses, availability of relevant witnesses and amount of accrued damages.

# Whistleblower Protections: Anti-Retaliation Provisions



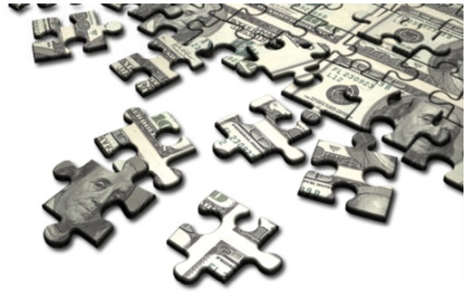
- Remedies Under Section 922:
  - Available remedies include:
    - (1) Reinstatement with the same seniority status that the individual would have had, but for the discrimination;
    - (2) Two times the amount of back pay otherwise owed to the individual, with interest; and
    - (3) Compensation for litigation costs, expert witness fees, and reasonable attorneys’ fees.
  - The lengthy statute of limitations period means that the back pay awards that get doubled are larger than in other retaliation cases, and that reinstatement could be required years after the fact.
  - Federal court likely means higher attorneys’ fee damages.

# Whistleblower Protections: Anti-Retaliation Provisions



- Other Procedure and Remedies Issues
  - Commodities Exchange Act (Section 748):
    - As with Section 922 claims, direct access to federal district court is provided.
    - Shorter statute of limitations: Claims must be brought within two years after the date on which the alleged violation is committed.
    - Back-pay *not* doubled: Remedies include reinstatement, straight back-pay with interest, litigation costs, expert witness fees, and reasonable attorneys' fees.

# Whistleblower Protections: Anti-Retaliation Provisions



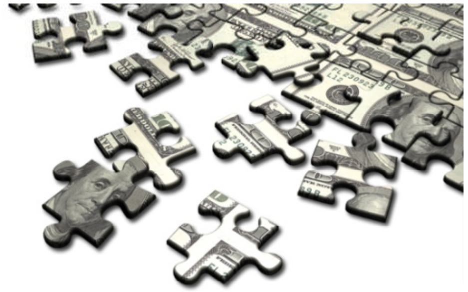
– <u>Consumer Financial Protection Act</u> (Section 1057):

- No direct access to courts: Administrative complaint must be filed with Secretary of Labor within 180 days of the alleged violation.
- Available Remedies include: an order requiring the employer take affirmative action to abate the violation, reinstatement, straight back pay, compensatory damages, attorneys' and expert witness fees, and litigation costs.

– <u>Amended False Claims Act</u> (Section 1079A):

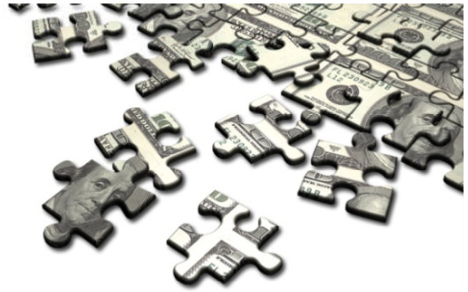
- Purported whistleblowers now have three years after the date when the alleged retaliation occurred to file claims.
- Process and available remedies remain unchanged.

# Whistleblower Protections: Anti-Retaliation Provisions



- Changes to Sarbanes-Oxley's whistleblower protections:
  - Covered Employers: both "nationally recognized statistical rating organizations" and "any subsidiary or affiliate whose financial information is included in the consolidated financial statements" of a publicly-traded company have been added to the definition of a covered employer.
  - Statute of Limitations: extended from "90 days after the date on which the violation occurs" to 180 days after the date on which the employee became aware of the violation.
  - Arbitration and waiver of claims: rights provided by Sarbanes anti-retaliation provisions "may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement."
  - Jury Trial: Sarbanes claimants are now clearly entitled to a jury trial.

# Whistleblower Protections: Anti-Retaliation Provisions



- What can I be doing now?
  - Ensure proper reporting mechanisms and anti-retaliation policies are in place and working.
  - Confirm employees are aware of and have easy access to policy on reporting procedures—try a dry run.
  - Train managers to recognize when a business dispute could turn into a retaliation claim and what to do in that situation.
  - Train HR and managers to recognize corporate whistleblower complaints, identify to whom complaints should be referred, and respond appropriately.
  - Use exit interviews to discover potential whistleblower complaints.
  - Consider altering document retention policies in light of lengthy statute of limitations period.
  - Other ideas?