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New Incentives for Foreign Corrupt Practices Act Whistleblowers: Dodd-Frank Wall Street Reform and Consumer Protection Act

An easily overlooked provision in the soon-to-be signed Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) creates a new whistleblower program that authorizes substantial cash rewards to whistleblowers who voluntarily provide the Securities and Exchange Commission (“SEC”) with information leading to the successful prosecution of securities laws violations.¹ This “sleeper” bounty provision threatens to have an immediate and significant impact on companies with operations outside of the United States. Recent events — including, among other things, statements by senior government officials,² an unprecedented undercover sting operation by the Department of Justice (“DOJ”),³ and the successful extradition of foreign nationals to the United States to face Foreign Corrupt Practices Act (“FCPA”) charges⁴ — suggest that this new whistleblower program may end up playing a key role in identifying and prosecuting violations of the FCPA. Given the large size of recent FCPA settlements, the promise of multimillion dollar bounties will be a strong incentive for potential whistleblowers to contact the government about FCPA concerns.

The FCPA generally makes it unlawful for a company or people acting on its behalf to “offer . . . promise to give, or authoriz[e] . . . the giving of anything of value to” foreign officials to obtain or retain business.⁵ In addition, the FCPA contains accounting provisions that require issuers to maintain accurate internal books and records and to implement a system of internal accounting

¹ Dodd-Frank Act, 111th Cong. § 922(b)(1) (2010).

² For example, on March 18, 2010, SEC Enforcement Director Robert Khuzami stated “that law enforcement authorities within the U.S. and across the globe are working together to aggressively monitor violators of anti-corruption laws.” In addition, on November 17, 2009, the Assistant Attorney General for the DOJ’s Criminal Division, Lanny Breuer, stated that “the prospect of significant prison sentences for [FCPA violators] should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations.”

³ See Howard W. Goldstein, Kevin J. Harnisch, William F. Johnson and Steven M. Witzel, [“Undercover DOJ Sting Operations for FCPA Violations: A New Level of Enforcement.”](#) Fried Frank Memorandum to our Friends and Clients, Jan. 21, 2010.

⁴ See Howard W. Goldstein & Lisa H. Bebchick, [“U.K. Extraditions Facilitate Corruption Prosecutions.”](#) N.Y. Law J., May 6, 2010.

⁵ 15 U.S.C. § 78-dd1-3, 78ff.

controls.⁶ FCPA violators are subject to both criminal and civil penalties, and the DOJ and the SEC share enforcement responsibilities under the Act.⁷

Under the Dodd-Frank Act, the SEC is required to pay whistleblowers cash rewards of between 10% and 30% percent of any monetary sanctions in excess of \$1,000,000 that the government, as a result of the whistleblowers' assistance, recovers through either civil or criminal proceedings.⁸ In order to qualify for such rewards, whistleblowers must provide the SEC with "original information."⁹ "Original information:" (i) must be "derived from the independent knowledge or analysis of a whistleblower;" (ii) cannot be "known to the Commission from any other source;" and (iii) cannot be "exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media."¹⁰ Nevertheless, a whistleblower may still be entitled to a cash reward even when "bits and pieces of the whistleblower's information were known to the media prior to the emergence of the whistleblower," so long as the whistleblower provides additional information that is critical to the government's case.¹¹ The Dodd-Frank Act gives the SEC wide discretion to determine the specific dollar amount of any cash reward within the ten to thirty percent range by considering, among other factors, the "significance of the information provided by the whistleblower," the "degree of assistance provided by the whistleblower," and "the programmatic interest of the Commission in deterring violations" of the relevant securities laws.¹²

This new whistleblower initiative dramatically expands the SEC's pre-existing whistleblower program, which applies solely to insider trading cases and limits whistleblower rewards to a maximum of 10% percent of any monetary sanctions recovered by the government in civil and criminal proceedings, with no minimum reward guaranteed.¹³ Since its inception in 1989, the SEC's existing whistleblower program has paid out less than \$160,000 to just five whistleblowers.¹⁴ In response to those statistics — which may have resulted from would-be whistleblowers weighing harsh reprisals against the prospect of low rewards for raising concerns about wrongdoing in a corporation¹⁵ — Congress included in the Dodd-Frank Act a minimum cash reward of 10% of any monetary sanctions recovered by the government to encourage individuals "to take the enormous risk of blowing the whistle in calling attention to fraud."¹⁶ The

⁶ 15 U.S.C. § 78m.

⁷ 15 U.S.C. § 78m(b), 78ff.

⁸ Dodd-Frank Act § 922(b)(1). The whistleblower program applies to monetary sanctions recovered by the SEC, the DOJ, self-regulatory organizations, state attorneys general, and other regulators. *Id.* § 922(h)(2)(D)(i)(I)-(IV).

⁹ *Id.* § 922(a)(3).

¹⁰ *Id.*

¹¹ S. Rep. 111-176, at 111 (2010).

¹² Dodd-Frank Act § 922(c)(1).

¹³ 15 U.S.C. § 78u-1(f).

¹⁴ S. Rep. 111-176, at 111.

¹⁵ The Dodd-Frank Act protects whistleblowers from employer retaliation and provides whistleblowers with a private cause of action to recover damages stemming from any such conduct. Dodd-Frank Act § 922(h). While Section 806 of the Sarbanes-Oxley Act prohibits public companies from retaliating against employee whistleblowers, it does not similarly protect employees of private companies.

¹⁶ S. Rep. 111-176, at 111.

government's failure to detect Bernie Madoff's fraud also spurred the SEC to endorse a more expansive whistleblower program.¹⁷

Given that monetary sanctions in several recent FCPA enforcement actions have resulted in settlements exceeding \$100 million,¹⁸ would-be whistleblowers may soon have a compelling incentive to report corrupt behavior. This dramatic financial incentive is likely to immediately increase the number of whistleblower complaints filed with the government, and may tempt some to report information that is speculative or unconfirmed, leading to more investigations. In anticipation of this new law, companies should ensure that their whistleblower policies are robust and that they are prepared for a likely increase in whistleblower reports.

Once President Obama signs the Dodd-Frank Act into law, the SEC will have 270 days to issue regulations implementing the SEC's new whistleblower program.¹⁹ The emergence of this new whistleblower program, coupled with the government's current focus on aggressively prosecuting FCPA violators, will likely increase the number of new FCPA prosecutions, further highlighting the vital role that FCPA compliance programs should play at companies with operations outside of the United States.

¹⁷ SEC Office of Inspector General, Report No. 474, Assessment of SEC's Bounty Program, at ii (Mar. 29, 2010).

¹⁸ See, e.g., SEC Charges Technip with Foreign Bribery and Related Accounting Violations, Litigation Release No. 21578 (June 28, 2010) (Technip agreed to pay \$98 million in disgorgement and prejudgment interest and a \$240 million criminal penalty to settle charges that it bribed Nigerian government officials to obtain government contracts); SEC Charges Daimler AG with Global Bribery, Litigation Release No. 2010-51 (Apr. 1, 2010) (Daimler paid \$93.6 million in criminal fines and \$91.4 million in disgorgement to settle charges that it made hundreds of improper payments worth tens of millions of dollars to foreign officials in at least 22 countries); Press Release, U.S. DOJ, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010) (BAE paid a \$400 million criminal fine to resolve charges that it made illegal payments to foreign officials in various countries to secure defense contracts); SEC Charges Siemens AG for Engaging in Worldwide Bribery, Litigation Release No. 2008-294 (Dec. 15, 2008) (Siemens paid \$350 million in disgorgement to settle the SEC's charges, and a \$450 million fine to the U.S. Department of Justice to settle criminal charges, that it made payments worth at least \$1.4 billion to foreign officials to obtain or retain business, and that it intentionally violated the FCPA's internal controls and books and records provisions).

¹⁹ Dodd-Frank Act § 924(a).

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