

Client Alert.

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New Whistleblower Provisions Likely to Increase FCPA Enforcement

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The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank” or the “Act”), which President Obama signed into law today, includes important new provisions intended to encourage whistleblowers to report violations of securities laws to the Securities and Exchange Commission (“SEC”) by offering bounties for information leading to successful enforcement actions and by shielding whistleblowers from employer retaliation. Although the new provisions apply to all violations of the securities laws, they are likely to have particularly significant impact on enforcement of the Foreign Corrupt Practices Act (“FCPA”), an area in which criminal and civil penalties and enforcement activity have increased sharply in recent years.

BOUNTY PROVISIONS

The Act adds new provisions to federal securities laws that provide for payments to whistleblowers who voluntarily provide information that leads to a successful enforcement action by the SEC.¹ The whistleblower’s information must be “original,” meaning that it must be derived from the whistleblower’s independent knowledge or analysis, must not be known to the SEC from any other source (unless the whistleblower is the original source), and must not be exclusively derived from judicial, administrative, or government reports, hearings, audits, or investigations, or from the news media.

A whistleblower would be entitled to an award based on not only the SEC action but also any “related” judicial or administrative action. A “related” action includes a judicial or administrative action brought by the Department of Justice (“DOJ”), an appropriate regulatory authority, a self-regulatory organization, or a state attorney general in connection with a criminal investigation that is based upon the original information provided by the whistleblower that led to the successful enforcement of the underlying action. Thus, the effect of this provision is that the whistleblower’s award will be based on the total collected from the underlying action and any related actions, so long as there is a successful enforcement action by the SEC. Although the Act provides for an award in only those SEC actions that result in sanctions of more than \$1,000,000, the ability to collect from related actions and to aggregate sanction amounts will increase the reach of the new whistleblower provisions.

Awards to whistleblowers range from ten to thirty percent of the collected monetary sanctions. The Act gives the SEC discretion to determine the exact award amount, taking into account: (1) the significance of the whistleblower’s information to the action’s success; (2) the degree of assistance provided; (3) the SEC’s “programmatic interest” in deterring violations; and (4) “such additional relevant factors as the Commission may establish by rule or regulation.”

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010) § 922(a) (adding § 21F to the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*).

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The Act permits a whistleblower to submit information and make a claim anonymously, through counsel, but the whistleblower must disclose his or her identity prior to the payment of the award. It forbids the SEC from disclosing any information that could reasonably be expected to reveal the whistleblower's identity unless and until the information is required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the SEC or one of the other enumerated government entities. The Act qualifies as a statutory exemption from the Freedom of Information Act's disclosure requirements.

Certain individuals are excluded from becoming whistleblowers, including persons convicted of a criminal violation related to the action, those who learned of the disclosed information through the performance of an audit of financial statements as required by the securities laws, and certain federal regulatory and law enforcement employees. The Act also excludes "any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require." Finally, the Act bars rewards to whistleblowers who knowingly and willfully make any false, fictitious, or fraudulent statement or representation, or who use any false writing or document knowing that it contains a false, fictitious, or fraudulent statement or entry.

More details about the whistleblower program are still to come. Although the whistleblower provisions take effect immediately, the SEC will have 270 days to issue final regulations implementing these provisions of the Act.

ANTI-RETALIATION PROVISIONS

The Act accords whistleblowers robust protections against employer retaliation. It prohibits employers from discharging, demoting, suspending, threatening, harassing, or discriminating against a whistleblower in the terms of conditions of employment because the whistleblower provided information to the SEC, initiated, testified, or otherwise assisted an SEC investigation or action, or made statutorily required or protected disclosures. The Act creates a private right of action for employees in federal court, and provides for nationwide subpoena power. Statutory relief includes full reinstatement, with return to the same seniority status had the violation not occurred; double back pay, with interest; and litigation costs, including expert witnesses' and attorneys' fees. The retaliation action must be brought either within six years of the violation or within three years after the material facts became known or should have been known. In either case, the action cannot be brought more than 10 years after the violation.

IMPACT ON FCPA INVESTIGATIONS AND ENFORCEMENT

Although Dodd-Frank's whistleblower provisions apply to any of the securities laws under which the SEC can bring enforcement actions, the Act will likely have an immediate and outsized impact on FCPA enforcement. Enacted in 1977, the FCPA is a federal law that prohibits making payments to foreign officials for the purpose of obtaining or retaining business and requires publicly traded companies to maintain records that accurately and fairly represent the company's transactions and to devise and maintain a system of adequate internal accounting controls.² It applies broadly to United States companies and persons, to companies that have issued securities registered in the United States, to employees and agents of United States businesses, and to foreign nationals and businesses that cause any act in furtherance of prohibited payments to take place in the United States. The DOJ enforces the criminal anti-bribery provisions and the SEC enforces the civil books and records provisions.

² Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff).

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Given the large size of recent FCPA settlements and enforcement actions, the ability to aggregate the recoveries from “related judicial and administrative actions” when determining the whistleblower’s award, and the government’s continued focus on and increased resources devoted to FCPA enforcement, the Dodd-Frank whistleblower provisions are likely to result in even more FCPA investigations and enforcement actions. The staggering recoveries against health care companies and government contractors under the False Claims Act – a federal statute addressing fraud against the government that includes similar whistleblower provisions – has led to more whistleblowers alleging violations in the hopes of receiving a windfall, a proliferation of plaintiffs’ lawyers to assist them, and increased enforcement of that statute. The Dodd-Frank whistleblower provisions are likely to have a similar impact on FCPA enforcement.

OTHER IMPLICATIONS

Companies learning of potential violations of the securities laws, including the FCPA, already face the decision whether to voluntarily disclose them in the hopes of receiving lenient treatment from the government. Although a company that voluntarily discloses a potential violation to the government will be better situated than one that does not in the event it finds itself facing enforcement action, the tangible benefits from voluntary disclosure are unpredictable and difficult to measure. The new whistleblower provisions could lead to more and/or earlier voluntary disclosures of potential securities law violations, as companies hoping to obtain the benefits of voluntary disclosure must move quickly, before the whistleblower makes his or her disclosure. They could also lead to more reports of minor violations previously deemed not significant enough to report.

CONCLUSION

The Dodd-Frank whistleblower provisions underscore the need for corporations to implement and maintain rigorous compliance programs, to review their whistleblower policies, and to proactively address any compliance issues that do arise.

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