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Wanted Dead or Alive: Whistleblower Bounties for FCPA and Securities Law Violators

July 20, 2010

President Barack Obama is expected to sign into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") and, in doing so, will dramatically change the securities enforcement landscape through the establishment of a robust whistleblower initiative.

Under Section 922 of the Dodd-Frank Act, whistleblowers who voluntarily provide the U.S. Securities and Exchange Commission ("SEC") with "original information"[1] that leads to the SEC's successful prosecution of the securities laws will receive between ten and thirty percent of the total "monetary sanctions"[2] imposed, when such sanctions exceed $1 million. The Dodd-Frank Act also contains strong protections for such whistleblowers, including the creation of a private right of action against retaliation.[3]

If the whistleblower provisions Congress previously provided in other areas are an accurate indication, the Dodd-Frank Act will increase dramatically the likelihood that suspected violators of the securities laws will face costly enforcement actions.[4]

While the whistleblower bounty exists for all securities violations, the risk companies face is particularly great relative to the Foreign Corrupt Practices Act ("FCPA"), which broadly proscribes corruptly influencing foreign public officials. The remarkable monetary sanctions in FCPA enforcement actions, where SEC settlements in the tens or even hundreds of millions of dollars have become increasingly common,[5] provide a compelling incentive for individuals to contact the SEC about suspected FCPA violations. Subject to certain limited exceptions,[6] a whistleblower can be "any individual" – companies thus face potential exposure from both corporate insiders (including any officer, director, employee, or shareholder of the parent company and any of its subsidiaries), as well as anyone with whom it does business and, as a result, might learn about a violation (whether a business competitor, any employee of any agent, consultant, distributor, vendor, outside contractor, service provider, or customer of the company, or otherwise).

The dramatic increase in FCPA enforcement efforts,[7] along with the comprehensive press coverage surrounding such efforts and the expected cottage industry of lawyers and others, will ensure that potential whistleblowers are aware of, and take full advantage of, this enticing incentive.

This increased risk underscores the importance for companies to consider self-reporting FCPA violations. Previously, certain companies may have taken the calculated risk of remediating, but not self-reporting, in the hope that the problem caused by rogue employees in some far corner of the world could be corrected. Those companies planned that the conduct would not otherwise see the light of day, thereby avoiding the steep costs of defending an external investigation and any penalties that may be imposed. Such a strategy now is more risky. Companies should be cautious to not rely on the "silence" of those who have learned about the problem. By creating generous incentives for potential whistleblowers, some of the hoped-for benefit of not self-reporting may have been diminished. In light of the Dodd-Frank Act, companies may want to reconsider self-reporting and the benefits that it typically offers (including, possibly, a smaller monetary sanction).

The increased possibility that FCPA violators will face substantial sanctions (for violations that may have been "under the radar" previously) also suggests that companies have even greater reason to inhibit bribery and fraud from occurring in the first place. The importance of effective internal controls and compliance programs to detect and prevent FCPA and other securities violations has intensified. With the new bounty, companies will need to adapt to this defining change in the legal landscape.

[1] "Original information" must be (i) "derived from the independent knowledge or analysis of a whistleblower"; (ii) "not known to the Commission from any other source, unless the whistleblower is the original source of the information;" and (iii) "is not 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, unless the whistleblower is the source of the information."

[2] "Monetary sanctions" include any penalties, disgorgement, and interest recovered by the SEC, as well as monies deposited into a disgorgement fund or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7246(b)), but would not appear to include criminal fines or penalties obtained by the Department of Justice.

[3] Analogous bounty and protection provisions for whistleblowers providing information to the Commodity Futures Trading Commission ("CFTC") can be found in Section 748 of the Dodd-Frank Act.

[4] The Internal Revenue Code awards whistleblowers up to thirty percent of additional tax, penalty and other amounts collected from noncompliant taxpayers as a result of the whistleblower's information. In addition, *qui tam* provisions of False Claims Act allow private citizens to share in the money recovered from a lawsuit alleging fraud by government contractors or other entities who receive or use government funds. Notably, there has been an exponential increase in *qui tam* actions and recoveries since these provisions were revamped in 1986.

[5] *See, e.g.,* Press Release, SEC, *SEC Charges Technip with Foreign Bribery and Related Accounting Violations – Technip to Pay $98 Million in Disgorgement and Prejudgment Interest; Company Also to Pay a Criminal Penalty of $240 Million* (June 28, 2010), http://www.sec.gov/litigation/litreleases/2010/lr21578.htm ($98 million "monetary sanction" recovered by the SEC); Press Release, SEC, *SEC Charges KBR, Inc. with Foreign Bribery; Charges Halliburton Co. and KBR, Inc. with Related Accounting Violations – Companies to Pay Disgorgement of $177 Million; KBR Subsidiary to Pay Criminal Fines of $402 Million; Total Payments to be $579 Million* (Feb. 11, 2009), http://www.sec.gov/litigation/litreleases/2009/lr20897a.htm ($177 million "monetary sanction" recovered by the SEC); Press Release, SEC, *SEC Files Settled Foreign Corrupt Practices Act Charges Against Siemens AG for Engaging in Worldwide Bribery With Total Disgorgement and Criminal Fines Over $1.6 Billion* (Dec. 15, 2008), http://www.sec.gov/litigation/litreleases/2008/lr20829.htm ($350 million "monetary sanction" recovered by the SEC).

[6] A whistleblower is not entitled to recovery if he or she:

- "is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of – (i) an appropriate regulatory agency; (ii) the Department of Justice; (iii) a self-regulatory organization; (iv) the Public Company Accounting Oversight Board; or (v) a law enforcement organization;"

- "is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award . . .";

- "gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would becontrary to [the requirements of the securities laws]"; or
- "fails to submit information to the Commission in such form as the Commission may, by rule, require."

Shockingly, whistleblowers who knowingly or recklessly participate in or aid and abet the securities law violation, and, thus, who are subject to an SEC enforcement action themselves, but who are not *criminally* convicted, are entitled to the bounty.

[7] *See* Client Alert, Proskauer Rose LLP, *Recent FCPA and Anti-Corruption News Highlights the Ever-Growing Importance of Effective FCPA Compliance Programs* (Apr. 22, 2010), http://www.proskauer.com/publications/client-alert/recent-fcpa-and-anti-corruption-news/.

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Special thanks to associate ***Jessica Fisher*** *for her assistance in drafting this client alert.*

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