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## Financial Reform Bill Includes FCPA Whistleblower Provision

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"), popularly known as the financial reform bill and signed into law by President Obama on July 21, 2010, includes a new whistleblower program that could pay considerable cash rewards to individuals who report securities violations, including violations of the Foreign Corrupt Practices Act ("FCPA"), to the Securities and Exchange Commission ("SEC"). Under Section 922 of the Act, which is modeled on the *qui tam* provisions of the Civil False Claims Act, the SEC will pay whistleblowers at least 10% and up to 30% of monetary sanctions in excess of \$1 million awarded in a successful enforcement action by the SEC.

The SEC will have to implement regulations to spell out the mechanics of how the whistleblower program will operate under Section 922's requirements. First, Section 922 requires that the information provided by the whistleblower must be "original information." That is, information "derived from the independent knowledge or analysis of the whistleblower" and "not known to the Commission from any other source" nor "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." Second, no award will be made if the whistleblower is convicted of a crime related to the action, is part of an appropriate regulatory agency or the Department of Justice, or learned of the information through performance of an audit under Section 10A of the Securities Act of 1934. SEC regulations will have to clarify whether a whistleblower with unclean hands who has not been convicted of a crime related to the action can receive a payment (for example, in the instance of a foreign whistleblower over whom there is no jurisdiction for criminal prosecution).

The whistleblower provision provides that the bounty will be paid only in actions resulting in monetary sanctions in excess of \$1 million dollars. "Monetary sanctions" includes "penalties, disgorgement, and interest." Though the Act provides for a payment of between 10% and 30% of monies obtained by the government, the SEC has considerable discretion in determining the amount within that range. Criteria includes "the significance of the information," "the degree of assistance," "the programmatic interest of the Commission in deterring violations" and any

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"additional relevant factors as the Commission may establish by rule or regulation."

The SEC has 270 days from enactment of the Act to issue final regulations implementing the whistleblower provisions. However, information provided by a whistleblower in writing to the SEC prior to the implementation of regulations but after the Act was signed into law can qualify as "original information." Moreover, otherwise qualified whistleblowers will be eligible for an award even if the reported conduct occurred before enactment the Act.

The whistleblower bounty also will be paid if the information provided to the SEC led to a successful "related action" by the Department of Justice or other appropriate state or federal enforcement agency. The Act provides that the source of payment for all awards will be made from the "Securities and Exchange Commission Investor Protection Fund," to be created from monetary sanctions collected by the SEC. One issue the regulations will have to resolve is whether a whistleblower will receive an award if the information leads to a monetary sanction in a related action but not in the SEC investigation (for example, if DOJ prosecutes a foreign subsidiary over which the SEC does not have jurisdiction). Regardless, given that the payments will be made from an SEC coffer, the SEC likely will seek a more active role in whistleblower-driven investigations. The SEC may also be encouraged to seek a larger portion of settlements in whistleblower cases that are settled globally because of its need to fund the Investor Protection Fund.

The Act also provides significant protection to whistleblowers against retaliation by employers. No employer may "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against" any employee who provides information to the SEC or otherwise assists in an SEC investigation. The Act provides aggrieved employees with a cause of action in federal court and remedies that include not only reinstatement, but also double back pay and compensation for litigation costs. The Act also makes clear that the anti-retaliation provisions apply to subsidiaries, as well as parent entities. It is unclear how the anti-retaliation provisions would be enforced in an instance involving a foreign whistleblower employed by a foreign company.

Though the SEC previously had a whistleblower program, that program only applied to insider trading cases and limited awards to a maximum of 10% of monetary sanctions. There never has been a whistleblower program to assist the government in the enforcement of other violations of the securities laws, including the books and records provisions of the FCPA. Given the trend in large monetary penalties assessed for violations of the FCPA and an increased focus on FCPA enforcement, the new program likely will provide significant incentives to whistleblowers. In the last two years alone, the SEC has announced some of the largest FCPA settlements in its history. Siemens agreed to \$350 million in disgorgement to the SEC and another \$450 million fine to the Department of Justice to settle FCPA charges in 2008. KBR and Halliburton similarly agreed to pay \$177 million in disgorgement to the SEC and a \$402 million criminal fine. Already this year, the SEC has announced a number of large settlements. In June, Technip, a former subsidiary of Halliburton and partner of KBR, agreed to pay \$98 million to the SEC and an additional \$240 million to the Justice Department to settle FCPA charges.

The new SEC whistleblower program carries with it a number of significant implications that companies with FCPA exposure must consider. The program may increase a company's incentive to self-disclose because the whistleblower's right to a share is triggered only if the wrongdoing is "not known to the Commission from any other source." Although the whistleblower theoretically should not increase total penalties to which the company is exposed, as a practical matter, whistleblower participation could adversely affect future settlement negotiations. Moreover, the whistleblower could "over sell" the issue to the government, thus potentially leading to a far more expansive (and expensive) investigation.

Finally, and perhaps most significant, the whistleblower provision likely will increase the volume of FCPA investigations. In a fashion similar to that seen in the realm of False Claims Act qui tam actions, attorneys seeking a percentage of the large bounties will be incentivized to seek out potential whistleblowers. The Act itself provides that a whistleblower may be represented in making a claim for award and must be represented if the whistleblower opts to anonymously submit information (though the whistleblower must identify him or herself prior to payment). The use of counsel surely will increase the number of whistleblowers seeking to provide the government with information. Moreover, because the whistleblowers could be current employees, they could provide the government with documents and materials to which the government otherwise would never have access. In some instances, these documents undoubtedly will include proprietary and/or attorney-client privileged materials, thereby raising further issues.

In sum, the whistleblower provision in the new financial reform bill likely will have a significant impact on companies that must comply with the FCPA and other securities regulations and provides a strong incentive to review compliance programs and policies.