

## WSGR ALERT

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# ENHANCED WHISTLEBLOWER BOUNTY PROVISIONS OF THE NEW FINANCIAL REFORM LAW MAY PROMPT INCREASED SEC ENFORCEMENT ACTIVITY

On July 15, 2010, after months of deliberation, Congress passed a comprehensive financial reform bill, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). President Obama is expected to sign the act into law this week.

Most of the media attention surrounding the Dodd-Frank Act has focused on provisions creating sweeping changes throughout the financial sector. A sleeper provision in the act, however, may prove to be a harbinger of increased enforcement activity by the Securities and Exchange Commission (SEC). Section 922 of the act provides that the SEC may award whistleblowers who report securities violations, including violations of the Foreign Corrupt Practices Act (FCPA), anywhere between 10 and 30 percent of any monetary sanctions recovered by the SEC that exceed \$1 million.

The SEC has had a whistleblower bounty program for reports of insider-trading violations since 1989. This limited program, to date, has resulted in a total of only \$159,537 paid to only five claimants. Largely as a response to public outcry over the extraordinary fraud scheme perpetrated by Bernard Madoff, and the SEC's apparent failure to act on valuable information about Madoff's scheme provided by whistleblower Harry Markopolos, the Dodd-Frank Act greatly expands the whistleblower bounty program to include all securities violations. The new program applies to a wide range of securities law violations, including improper revenue recognition and other types of accounting

fraud, insider trading, false representations in financial statements, and FCPA violations.

### The FCPA

The expansion of the whistleblower bounty program is expected to lead to an increase in the SEC's already active enforcement of actions charging FCPA violations.

Pursuant to the FCPA's anti-bribery provisions, it is unlawful for any issuer, domestic concern, or person acting in the United States to offer anything of value to members of a foreign government, international organization, or political party for the purpose of: (1) influencing duties; (2) inducing them to use their influence to affect a foreign government's or agency's decision; (3) obtaining or retaining business for anyone; or (4) directing business to anyone. The Dodd-Frank Act provides both monetary incentives and protections to whistleblowers who report an FCPA violation.

The new incentives for whistleblowers to report FCPA violations come in the wake of increased enforcement efforts by the SEC leading to an ever-expanding array of conduct subject to enforcement actions and some of the largest monetary settlements in the history of the FCPA. Recent examples include the following:

- On June 28, 2010, the SEC announced a settlement with Technip for FCPA violations in which Technip will pay \$98 million to settle the SEC's charges. Technip will pay an additional \$240

million penalty in separate criminal proceedings announced by the U.S. Department of Justice (DOJ). Notably, Technip's joint venture partner, KBR, Inc., and its former parent, Halliburton Co., previously settled similar charges. As the SEC recently reported, "[t]ogether with Technip's payment, the combined sanctions of \$917 million represent the largest combined settlements ever paid to date to the U.S. resulting from an FCPA violation."

- On April 1, 2010, the SEC announced that Daimler AG agreed to pay \$91.4 million in disgorgement to settle SEC charges of FCPA violations.
- On March 18, 2010, the SEC announced that Innospec, Inc., a specialty chemical company incorporated in Delaware with principal offices in the United States and the United Kingdom, agreed to a \$40.2 million global settlement with the SEC, the DOJ, the U.S. Department of the Treasury's Office of Foreign Assets Control, and the United Kingdom's Serious Fraud Office.

These highly publicized and substantial settlements, coupled with the SEC's recent adoption of initiatives designed to encourage individuals to cooperate in investigations, may serve as a strong incentive for whistleblowers, hoping to reap a significant financial windfall, to participate in the new SEC whistleblower bounty program.

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# Enhanced Whistleblower Bounty . . .

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## Whistleblower Protections

In addition to providing a monetary award to whistleblowers, the Dodd-Frank Act contains provisions aimed at protecting whistleblowers from retaliation. The act prohibits employers from discharging, demoting, suspending, threatening, harassing, or in any way discriminating against a whistleblower for providing information to the SEC, testifying or assisting in any legal proceeding, or making any other disclosure required or allowed by law. The act further provides that any whistleblower who suffers retaliation is entitled to reinstatement with the same seniority status that the whistleblower would have had but for the retaliation; two times the amount of back pay otherwise owed to the whistleblower, with interest; and reimbursement of litigation costs. The act also provides that the SEC will maintain the confidentiality of whistleblowers except as necessary to provide information to other law enforcement and regulatory agencies.

## Not All Whistleblowers Qualify for Reward

Awards under the whistleblower bounty program will be made at the sole discretion of the SEC. No award, however, may be made to a whistleblower who acquires the original information from a regulatory or governmental agency; who is convicted of a crime related to the judicial or administrative action for which the whistleblower otherwise could receive a reward; who obtains the information through the performance of an audit of financial statements; or who fails to submit information to the SEC as requested. Also, no awards will be made to whistleblowers who make false statements or representations to the SEC.

## Investor Protection Fund to Pay Whistleblowers

The Dodd-Frank Act creates a fund entitled the "Securities and Exchange Commission Investor Protection Fund" that will be used to pay awards to whistleblowers. The Investor

Protection Fund will be funded, in part, by monetary sanctions collected by the SEC, as well as income from the investment of a portion of the fund. The SEC is required to report to Congress each year the number and amounts of payments made from the fund, in addition to the types of cases in which whistleblower rewards were paid in the preceding year.

## Responding to Increased Incentives for Whistleblowers

The whistleblower bounty provisions of the Dodd-Frank Act create significant incentives for individuals to report any suspected FCPA or other securities law violations to the SEC. The advent of the enhanced bounty program highlights the need for companies to engage legal counsel with expertise not only in developing and implementing effective corporate compliance programs, but also in creating and administering corporate whistleblower policies and procedures that promote the reporting by employees of suspected securities law violations to internal compliance personnel.

For more information or if you have questions about the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act or other recent developments regarding the Foreign Corrupt Practices Act, please contact Leo Cunningham (lcunningham@wsgr.com), Robert Gold (rgold@wsgr.com), Elizabeth Peterson (epeterson@wsgr.com), Lisa Prager (lprager@wsgr.com), or Michael Sommer (msommer@wsgr.com) in Wilson Sonsini Goodrich & Rosati's white collar criminal defense practice.



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