

## **Final Dodd-Frank Whistleblower Rules Do Not Mandate Internal Reporting; May Dramatically Reshape FCPA Enforcement**

**May 26, 2011**

On May 25, 2011, a divided Securities and Exchange Commission (SEC) approved final rules to implement the SEC whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Because the SEC and the Department of Justice (DOJ) share responsibility for enforcing the Foreign Corrupt Practices Act (FCPA), the SEC's whistleblower program is likely to dramatically reshape FCPA enforcement which, to date, has been heavily dependent on voluntary self-reporting by companies.

Under the final rules, to be considered for an award, a whistleblower must voluntarily provide the SEC with original information that leads to the successful enforcement by the SEC of a federal court or administrative action in which the SEC obtains monetary sanctions totaling more than \$1 million.

The whistleblower provisions almost certainly will result in a significant increase in the number of FCPA investigations initiated by current and former employees through allegations related to bribery of foreign officials. In recent years, some of the highest SEC recoveries have been in FCPA books and records cases, including, in recent months, settlements of \$77 million, \$137 million, and \$218 million. Whistleblowers, who stand to obtain awards of 10% to 30% of those amounts, are protected against retaliation and will be highly incentivized to report allegations of the books and records provision of the FCPA, which the SEC enforces through civil enforcement proceedings.

Although many parties had urged the SEC to require potential whistleblowers to first report information through their companies' internal compliance programs, the SEC instead made changes to the final rule that would encourage—but not require—internal reporting.

Among other things, the final rules do the following:

- Make a whistleblower eligible for an award if the whistleblower reports internally and the company informs the SEC about the violations.
- Treat an employee as providing "original information" if the information is not already known to the SEC as of the date the employee reports internally, provided that the employee provides the same information to the SEC within 120 days. (The proposed rules provided for only a 90-day

grace period.) Thus, employees are able to report their information internally in the first instance, while preserving their “place in line” for a possible award from the SEC.

- Provide that a whistleblower’s voluntary participation in an entity’s internal compliance and reporting systems is a factor that can increase the amount of an award, and that a whistleblower’s interference with internal compliance and reporting is a factor that can decrease the amount of an award.

In a change from the proposed rules, the final rules provide that sanctions from SEC federal court and administrative enforcement proceedings can be aggregated in determining whether the \$1 million monetary sanctions threshold has been satisfied.

During the May 25 Commission hearing, Sean McKessy, the head of the SEC’s Whistleblower Office, reported “an uptick, not a flood” of whistleblower reports since the SEC announced its program. McKessy also reported that the “quality” of whistleblower reports has increased.

The final rules serve to emphasize the importance to companies of implementing strong internal compliance programs that will detect and prevent potential FCPA violations, as well as promoting corporate cultures in which employees will value the opportunity to report internally in the first instance.

For more information regarding the impact of the Dodd-Frank Act’s whistleblower provisions on FCPA enforcement, please see “The FCPA and Dodd-Frank Act” webinar presentation, available online at [http://www.morganlewis.com/pubs/FCPAWebinar\\_Dodd-FrankAct\\_08march11.pdf](http://www.morganlewis.com/pubs/FCPAWebinar_Dodd-FrankAct_08march11.pdf).

For more information regarding the final rules, please see the May 25, 2011 Morgan Lewis LawFlash, “SEC’s Final Rules for Implementing Dodd-Frank Whistleblower Provisions: Important Implications for Covered Entities,” available online at [http://www.morganlewis.com/pubs/FRR\\_LEPG\\_LF\\_SECFinalRulesForDodd-FrankWhistleblowerProvisions\\_25may11.pdf](http://www.morganlewis.com/pubs/FRR_LEPG_LF_SECFinalRulesForDodd-FrankWhistleblowerProvisions_25may11.pdf).

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