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## **Whistleblower Provision Likely to Increase FCPA Risk**

Primarily as a result of the recent dramatic increase in the U.S. government's enforcement effort, the Foreign Corrupt Practices Act (FCPA) has received a great deal of attention of late. The financial reform legislation signed by President Obama on July 21, 2010 adds an incentive that will likely further increase the dangers posed to companies and individuals by the FCPA. The law contains a provision that will reward whistleblowers who voluntarily provide information leading to the successful enforcement of U.S. securities laws, including the FCPA, with between 10% and 30% of any recovery over \$1,000,000. The whistleblower must provide "original" information, not already known to the SEC and not merely derived from existing investigations, audits, or reports. The SEC will have discretion to set the amount within the 10% - 30% range, based on the significance of the information to the success of the action, the whistleblower's degree of assistance, and the interest of the SEC in using whistleblower payments to deter problematic conduct in the future. The provision also extends the reward to "related actions" taken by other prosecuting agencies based on the reported information, and thus will apply to actions initiated by the DOJ and other federal, state, and foreign law enforcement agencies.

Given the staggering FCPA penalties the government has levied recently, whistleblowers are poised to reap a huge windfall under the new law. For example, if a whistleblower had been eligible for a 30% reward in the case of Siemens AG, which paid a grand total of \$1.6 billion in monetary sanctions to the SEC, DOJ and the German government in 2008, the whistleblower would have been awarded \$496 million. If the False Claims Act and the tax whistleblower provisions contained in section 7623 of the Internal Revenue Code are any guide, this provision will likely increase the number of enforcement actions and further complicate the question of when and whether to self-disclose violations to the government.

In addition, the new law must be analyzed in the context of the enforcement climate in which it debuts. The government has collected nearly \$3 billion in FCPA fines and penalties, with almost half that recovery coming thus far in 2010. In June 2010 alone, the government announced settlements with Snamprogetti Netherlands B.V. for \$365 million and Technip S.A. for \$338 million. The DOJ is said to currently have over 140 open FCPA investigations, including recent investigations reported by Avon and Hewlett Packard. The SEC opened a new FCPA-dedicated unit in San Francisco in April of this year, with an intent to focus on companies in Silicon Valley and their activities in Asia. Five companies have recently announced that FCPA settlements are likely to occur in the near future, including ABB (reserve of \$850 million) and Alcatel-Lucent (reserve of \$137.4 million).

Particularly against this backdrop, the whistleblower provision adds a new wrinkle to an already dangerous landscape. This change in the law underscores the need for all corporations with any

international connections to implement and maintain rigorous FCPA compliance programs and a quick and thorough response to allegations of FCPA-related misconduct.