

DuaneMorris

“Whistleblowing Under the Dodd-Frank Act”

Presented by Michael E. Clark for the Duane Morris
Securities / M&A Practice Group

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The “Sleeper” Provision Has Gotten Noticed by the Legal Community

“In a span of just six weeks, the whistleblower provisions in the recently enacted Dodd-Frank Act have gone from a little-known sleeper section of the law to one of its most highly scrutinized provisions. Congress has been vocal that the whistleblower provisions are a smart way to uncover more fraud—at no cost to the taxpayers, they say, since the funds used for whistleblower bounties will come out of penalties companies pay to the Securities and Exchange Commission.”

Bruce Carton, “Pitfalls Emerge in Dodd-Frank Bounty Provision,” Compliance Week (Sept. 8, 2010)

Milberg Expands Practice to Include Representation of Securities Fraud Whistleblowers

“Milberg’s decades of experience prosecuting thousands of class actions and its record recoveries of over \$55 billion make it well suited to represent whistleblowers who want to be represented before the SEC. Milberg has successfully represented whistleblowers in other contexts, including in ‘*qui tam*’ actions, involving the prosecution of fraud against the federal government pursuant to the False Claims Act. Milberg possesses significant resources to assist in presenting whistleblower cases to the SEC, including a team of attorneys which includes former government and agency lawyers. Milberg’s team of in-house investigators, including former FBI and other law enforcement agents, and in-house forensic accountants, have significant experience working with confidential witnesses and whistleblowers.”

Will The New Whistleblower Provisions Increase The Number Of Referrals To The Agencies?

- It appears that the SEC already is getting some high quality tips. And the statutory threshold for bounty hunters of at least \$1 million in fines/penalties appears to be designed to limit lower quality tips.
- See **“Larger Bounties Spur Surge in Fraud Tips,” Wall Street Journal** (Sept. 7, 2010)
- See <http://lnkd.in/k5GdzC> (Comments of Stuart Meissner on DF Title IX - Whistleblower at sec.gov)
- See **New SEC Awards For Informants Already Yielding Tips,” Dow Jones** (Sept. 9, 2010)

**“Larger Bounties Spur Surge in Fraud Tips”
NY Times (Sept. 7, 2010)**

“ ‘We've gotten some very high-quality tips,’ said SEC official Stephen Cohen. He said the program aims to get timely information from insiders close to a fraud so the SEC can bring a case quickly, limit the damage and recover funds for victims. ‘The goal is not just to get more tips; we want to get more high-quality tips,’ Mr. Cohen said.”

<http://online.wsj.com/article/SB10001424052748704855104575470080998966388.html>

Will The New Whistleblower Provisions Increase The Number Of Referrals To The Agencies? (cont'd)

- **From: Stuart D. Meissner, Esq.
Managing Member, Law Offices of Stuart D. Meissner LLC**
- **August 17, 2010**
- **“Our law firm alone has already, just in the last ten days filed several whistle-blower complaints with the SEC, pursuant to the new statute, involving major Wall Street firms, which filings appear to implicate hundreds of millions of dollars, if not more, of investor related fraud issues, including on behalf of former senior employee(s) of entities. In addition, we are reviewing and screening several more potential submissions ranging from potential broker-dealer violations, accounting fraud, violations of the Foreign Corrupt Practices Act and improper or inadequate corporate disclosures by public companies.”**

Will The New Whistleblower Provisions Increase The Number Of Referrals To The Agencies? (cont'd)

“The SEC is offering some key protections for informants. They may choose to remain anonymous and work with the SEC through a lawyer, for example. They will have the right to appeal if they are denied a whistleblower award. And they will have the right to a jury trial if they sue their employer for retaliation after helping the government.”

“These features, combined with the guaranteed minimum payout for whistleblowers who qualify, are encouraging insiders to step forward, said Erika Kelton of Phillips & Cohen LLP. ‘**We're seeing a flood of inquiries,**’ said Kelton, who was the lead attorney on a health-care fraud case that resulted in a fine of \$2.3 billion for Pfizer Inc.”

“**New SEC Awards For Informants Already Yielding Tips,**” Dow Jones (Sept. 9, 2010)

Qui Tam Firms Are Prospecting For Cases

The search expression “SEC whistleblower” returned many, many sponsored links on Google:

- **SEC Whistleblower Firm** www.phillipsandcohen.com The most successful **whistleblower** law firm. \$5.3 billion recovered.
- **SEC Whistleblower** EmploymentLawGroup.net **Whistleblowers** Collect Up To 30% of Fines Collected By The Federal Govt
- **Whistle Blower Attorney** qui-tam-attorney.com A proven record of success. Hire only an experienced attorney.

Qui Tam Firms Are Prospecting For Cases (cont'd)

- Whistleblower Assistance: Legal help for those wishing to use the False Claims Act to stop fraud. www.blowthewhistle.com
- Whistleblower Experts: Corporate misconduct? Retaliation? Understand your options. www.zzalaw.com
- Get Whistleblower Reward: Exp Attorneys Help you Report Fraud on Government! Learn More FraudFighters.net/Whistleblower
- Ethics Whistleblower: Anonymous Whistleblower Hotline. Request Info or Schedule a Demo! www.EthicsPoint.com
- Expert Whistleblower: Recover Your Highest Reward. Very Experienced: \$500M+ Recoveries www.WhistleblowerAgainstFraud.com/ Whistleblower Protection

Qui Tam Firms Are Prospecting For Cases (cont'd)

- You can report companies that cheat our government. Get the facts today GovernmentFraud.us
- Sec Whistleblower Info: Get Info On Sec Whistleblower Access 10 Search Engines At Once. www.Info.com/SecWhistleblower
- SEC Whistleblower: Search for SEC Whistleblower. Find SEC whistleblower. www.Ask.com

A Sample Of The Marketing

“ ‘The new law contains a trifecta of enticements for whistleblowers,’ said [Eric R. Havian](#), a San Francisco attorney with Phillips & Cohen. ‘They will receive an assurance of confidentiality, solid protection against retaliation, and a guaranteed reward if their information leads to a recovery. With this combination of protections and incentives, the SEC should receive a flood of high quality submissions.’”

“The financial reform law creates whistleblower programs for the SEC and the Commodities Futures Trading Commission (CFTC) that will offer:

A Sample Of The Marketing (cont'd)

“Whistleblower rewards. Whistleblowers who report securities law violations will receive 10 percent to 30 percent of the amount the SEC, CFTC and any other government entity collects as a result of the whistleblower's information when the amount collected exceeds \$1 million.”

“Confidentiality to whistleblowers. The law contains one of the strongest confidentiality provisions for whistleblowers ever enacted. For the first time, whistleblowers will be allowed to report fraud anonymously. In some cases, their identities may remain unknown even to the SEC until the time comes for the payment of a reward.”

“Job protection for whistleblowers. The law prohibits employers from retaliating against whistleblowers. Employers may not fire, demote, suspend, threaten, harass, or discriminate against a whistleblower. Whistleblowers who suffer from employment retaliation may sue for reinstatement, back pay and any other damages that occurred.”

<http://www.phillipsandcohen.com/CM/NewsSettlements/NewsSettlements594.asp>

SEC Complaint Form

“If you have a tip or complaint involving violations of the securities laws, click the appropriate link below that best describes the conduct.”

- [Manipulation of a security’s price or volume](#)
- [Fraudulent or unregistered offer or sale of securities, including Ponzi schemes, high yield investment programs or other investment programs](#)
- [Insider trading](#)
- [False or misleading statements about a company \(including false or misleading SEC reports or financial statements\)](#)

SEC Complaint Form (cont'd)

- Failure to file required reports with the SEC
- Abusive naked short selling
- Theft or misappropriation of funds or securities
- Fraudulent conduct or other problems associated with municipal securities transactions or public pension plans
- Bribery of foreign officials
- Other fraudulent conduct

<http://www.sec.gov/complaint/selectconduct.shtml>

One Scholar Argued For Such Provisions Several Years Ago

“Insiders are valuable not only in alerting regulators and the public to ongoing wrongdoing, but they can also provide helpful assistance during an investigation. A knowledgeable insider can point ... to key records and witnesses, interpret technical or industry information collected during an investigation, provide expertise, and explain the customs and habits of the business or industry. Having an insider’s perspective available ... can save time and expense for both regulators and putative defendants by focusing the investigation on relevant areas.”

Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOU. L. REV. No. 4, 905, 944 (2003) (internal citations omitted).

One Scholar Argued For Such Provisions Several Years Ago (cont'd)

“Money, lots of it, is necessary to attract knowledgeable insiders with helpful inside information of complex wrongdoing[] ... for three reasons. The first is the impact that significant financial remuneration has on whistleblowers. The possibility of a large financial recovery may help persuade insiders to risk what they must to reveal information needed by public regulators....”

“The second reason ... is that such remuneration gets the attention of the media, which is a major factor in molding our social values....”

“Lastly, significant monetary rewards get the attention of the private bar....”

Bucy, 39 Hou. L. Rev. at 970-71.

Whistleblower Characteristics

“Studies of whistleblowers indicate that such individuals tend to be white, male, relatively well educated, and hold managerial positions. Before they became whistleblowers, they were typically described ... as ‘top performers and model employees.’ Whistleblowers tend to be good problem solvers with good cognitive skills. They are people who have a strong sense of right and wrong, who possess a ‘strong sense of individual responsibility,’ and who are “socially responsible.’ Whistleblowers tend to be intense, committed, and uncompromising people.... They also tend to score somewhat below the norm in self-esteem. They generally are loyal to their employers and have faith that their employers will remedy problems brought to their attention.”

Bucy, 39 Hou. L. REV. No. 4, at 959-60 (internal citations omitted).

Recent DOJ Press Release: Qui Tam

Wednesday, September 1, 2010

Allergan Agrees to Plead Guilty and Pay \$600 Million to Resolve Allegations of Off-Label Promotion of Botox®

WASHINGTON – American pharmaceutical manufacturer Allergan Inc. has agreed to plead guilty and pay \$600 million to resolve its criminal and civil liability arising from the company's unlawful promotion of its biological product, Botox® Therapeutic, for uses not approved as safe and effective by the Food and Drug Administration (FDA), the Justice Department announced today. The resolution includes a criminal fine and forfeiture totaling \$375 million and a civil settlement with the federal government and the states of \$225 million.

<http://www.justice.gov/opa/pr/2010/September/10-civ-988.html>

Recent DOJ Press Release: Qui Tam (cont'd)

“The civil settlement resolves three lawsuits filed in federal court in the Northern District of Georgia under the qui tam, or whistleblower, provisions of the False Claims Act, which allow private citizens to bring civil actions on behalf of the United States and share in any recovery. **As part of today’s resolution, the whistleblowers** – Dr. Amy Lang, Charles Rushin, Cher Beilfuss, Kathleen O’Conner-Masse, and Edward Hallivis – **will receive \$37.8 million from the federal share of the settlement amount.**”

<http://www.justice.gov/opa/pr/2010/September/10-civ-988.html>

Qui Tam Statistics: A Bellwether?

FRAUD STATISTICS - OVERVIEW

October 1, 1987 - September 30, 2009

Civil Division, U.S. Department of Justice

FY	NEW MATTERS ¹		SETTLEMENTS AND JUDGMENTS ²					RELATOR SHARE AWARDS ³		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
1987	343	30	86,479,949	0	0	0	86,479,949	0	0	0
1988	210	43	173,287,663	2,309,354	33,750	2,343,104	175,630,767	88,750	8,438	97,188
1989	224	87	197,202,180	15,111,719	1,681	15,113,400	212,315,580	1,446,770	200	1,446,970
1990	243	72	189,564,367	40,483,367	75,000	40,558,367	230,122,734	6,590,936	20,670	6,611,606
1991	234	84	270,530,467	70,384,431	69,500	70,453,931	340,984,398	10,667,537	18,750	10,686,287
1992	285	114	137,958,206	133,949,447	994,456	134,943,903	272,902,109	24,121,648	259,784	24,381,432
1993	304	138	181,945,576	183,643,787	6,603,000	190,246,787	372,192,363	27,576,235	1,766,902	29,343,137
1994	280	218	706,022,897	379,018,205	2,822,323	381,840,528	1,087,863,425	69,453,360	838,897	70,292,246
1995	233	269	269,989,642	239,024,292	1,635,000	240,659,292	510,648,934	45,162,296	465,800	45,628,096
1996	185	341	247,357,271	124,361,203	13,522,433	137,883,636	385,240,908	22,119,619	3,731,978	25,851,597
1997	184	547	465,568,061	621,919,274	6,021,200	627,940,474	1,093,508,535	65,857,419	1,658,485	67,515,904
1998	120	468	151,435,794	438,834,846	30,248,075	469,082,921	620,518,715	70,264,372	8,486,645	78,751,017
1999	140	493	195,390,485	492,924,785	5,067,503	497,992,288	693,382,773	63,018,064	1,374,487	64,392,552
2000	94	363	367,887,197	1,208,370,688	1,688,957	1,210,059,645	1,577,946,841	183,679,377	375,143	184,054,520
2001	85	311	494,496,974	1,169,531,786	128,587,151	1,298,118,937	1,792,615,912	187,268,812	30,701,881	217,970,693
2002	61	318	119,598,292	1,078,174,023	26,786,140	1,103,960,162	1,223,558,454	161,377,822	4,582,319	165,960,141
2003	92	334	703,003,368	1,539,357,284	5,185,911	1,544,543,195	2,247,546,563	337,181,857	1,382,741	338,564,598
2004	106	432	115,656,023	560,977,502	9,261,879	570,239,382	685,895,404	110,113,220	2,376,128	112,489,348
2005	105	406	276,914,983	1,149,047,524	7,481,593	1,156,529,117	1,433,444,099	168,580,543	2,031,695	170,612,237
2006	71	384	1,710,529,257	1,485,706,466	22,661,363	1,508,367,829	3,218,897,086	218,904,744	5,647,836	224,552,580
2007	129	384	562,725,115	1,283,305,474	160,212,814	1,443,519,288	2,006,243,403	176,879,653	4,606,675	181,486,328

Qui Tam Statistics: A Bellwether? (cont'd)

FRAUD STATISTICS - OVERVIEW

October 1, 1987 - September 30, 2009

Civil Division, U.S. Department of Justice

FY	NEW MATTERS ¹		SETTLEMENTS AND JUDGMENTS ²				RELATOR SHARE AWARDS ³			
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
2008	162	379	316,653,045	1,032,878,939	10,678,936	1,043,557,875	1,360,210,920	199,295,496	2,457,615	201,753,111
2009	132	433	457,781,589	1,937,046,275	33,404,502	1,970,450,777	2,428,232,366	245,205,843	9,588,816	254,794,659
TOTAL	4,022	6,628	8,397,978,400	15,186,360,670	472,043,167	15,668,403,837	24,056,382,238	2,394,854,364	82,381,883	2,477,236,248

Qui Tam Statistics: A Bellwether? (cont'd)

FRAUD STATISTICS - OVERVIEW

October 1, 1986 - September 30, 2007
Civil Division, U.S. Department of Justice

FY	NEW MATTERS ¹		SETTLEMENTS AND JUDGMENTS ²				RELATOR SHARE AWARDS ³			
	NON QUI TAM	QUI TAM	NON QUI TAM ⁴	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
2001	86	311	492,196,974	1,167,531,786	128,587,151	1,296,118,937	1,788,315,911	186,908,812	30,701,881	217,610,693
2002	62	318	119,598,292	1,077,375,794	25,786,140	1,103,161,934	1,222,760,226	160,914,076	4,582,319	165,496,395
2003	92	334	703,003,368	1,512,457,284	5,185,911	1,517,643,195	2,220,646,563	331,873,857	1,382,741	333,256,598
2004	120	431	115,656,023	557,080,136	9,261,879	566,342,015	681,998,038	110,113,220	2,376,128	112,489,348
2005	107	406	276,914,983	1,148,057,102	7,081,143	1,155,138,245	1,432,053,228	168,409,043	1,911,560	170,320,603
2006	85	384	1,714,824,081	1,482,048,337	22,493,863	1,504,542,200	3,219,366,281	218,392,497	5,598,336	223,990,833
2007	128	356	559,255,115	1,436,468,132	15,370,120	1,451,838,252	2,011,093,367	173,221,033	4,169,498	177,390,531
TOTAL	3,751	5,813	7,621,383,590	12,332,298,469	281,976,663	12,614,275,132	20,235,658,722	1,939,957,511	69,728,640	2,009,686,151

Qui Tam Statistics: A Bellwether? (cont'd)

FRAUD STATISTICS - HEALTH AND HUMAN SERVICES¹

October 1, 1987 - September 30, 2009

Civil Division, U.S. Department of Justice

FY	NEW MATTERS ²		SETTLEMENTS AND JUDGMENTS ³					RELATOR SHARE AWARDS ⁴		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
1987	12	3	11,361,826	0	0	0	11,361,826	0	0	0
1988	8	5	2,182,675	355,000	0	355,000	2,537,675	88,750	0	88,750
1989	20	16	350,460	5,099,661	0	5,099,661	5,450,121	50,000	0	50,000
1990	27	11	10,327,500	903,158	0	903,158	11,230,658	119,474	0	119,474
1991	22	12	8,670,735	5,420,000	0	5,420,000	14,090,735	861,401	0	861,401
1992	29	15	9,821,640	2,192,478	0	2,192,478	12,014,118	446,648	0	446,648
1993	22	38	12,523,165	151,760,404	0	151,760,404	164,283,569	22,946,101	0	22,946,101
1994	43	76	381,470,015	6,280,815	240,000	6,520,815	387,990,830	1,113,597	72,000	1,185,597
1995	27	87	96,290,779	84,061,789	1,620,000	85,681,789	181,972,568	14,337,982	466,800	14,803,782
1996	20	178	63,059,873	49,236,698	2,340,000	51,576,698	114,636,572	8,707,168	667,400	9,374,568
1997	49	274	351,440,027	578,987,081	92,500	579,079,581	930,519,608	58,852,605	20,250	58,872,855
1998	35	276	40,107,920	255,112,661	2,526,075	258,638,736	298,746,656	47,635,286	187,015	47,822,301
1999	28	315	38,000,792	405,761,680	1,366,699	408,128,379	446,129,171	45,174,556	317,829	45,492,385
2000	36	211	208,899,015	724,677,746	333,457	725,011,203	933,910,218	115,671,903	87,343	115,759,246
2001	35	177	435,849,179	885,268,792	14,991,554	900,260,346	1,336,109,524	143,583,042	3,735,501	147,318,543
2002	23	194	74,567,427	937,841,186	23,407,571	961,248,757	1,035,816,184	150,280,717	4,008,696	154,289,403
2003	26	218	536,834,879	1,309,415,245	2,880,785	1,312,296,030	1,849,130,909	283,948,368	722,233	284,670,601
2004	28	275	34,816,447	469,595,081	5,775,052	475,370,142	510,186,589	95,805,149	1,625,129	97,430,278
2005	34	271	204,821,548	906,656,836	6,671,593	913,328,429	1,118,149,977	120,989,298	1,900,095	122,889,393
2006	18	223	1,050,520,714	1,226,258,243	16,229,540	1,242,487,783	2,293,008,497	162,996,656	3,921,995	166,918,652
2007	25	202	466,052,993	914,942,229	153,980,905	1,068,923,134	1,533,976,127	152,807,064	2,964,456	155,761,520

Qui Tam Statistics: A Bellwether? (cont'd)

FRAUD STATISTICS- HEALTH AND HUMAN SERVICES¹

October 1, 1987 - September 30, 2009

Civil Division, U.S. Department of Justice

FY	NEW MATTERS ²		SETTLEMENTS AND JUDGMENTS ³					RELATOR SHARE AWARDS ⁴		
	NON QUI TAM	QUI TAM	NON QUI TAM	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
2008	60	230	162,108,293	956,553,469	4,852,571	961,406,040	1,123,514,293	184,537,088	982,154	185,519,252
2009	34	280	237,803,424	1,360,722,293	30,203,452	1,390,925,745	1,628,729,169	155,201,327	8,654,822	163,856,149
TOTAL	661	3,587	4,436,881,287	11,239,102,545	267,511,763	11,506,614,307	15,943,495,594	1,766,158,179	30,322,718	1,796,480,897

Not Surprisingly, Industries Subject To FCA Liability Have More Whistleblowing Employees

The availability of *qui tam* bounties impacts the number of employee tips:

“The difference in fraud detection between industries subject to *qui tam* bounty provisions and those not so regulated makes the success of bounty awards clear: **employees account for 46% of fraud detection where a *qui tam* bounty is available, and just 16.3% of fraud detection elsewhere.** “

Geoffrey Christopher Rapp, *False Claims, Not Securities Fraud: Towards Corporate Governance by Whistleblowers*, 15 NEXUS JOURNAL OF LAW & POLICY 55 (2010) (citing Raxak Mahat, *A Carrot for the Lawyer: Providing Economic Incentives for In-House Lawyers in a Sarbanes-Oxley Regime*, 21 GEO. J. LEG. ETHICS 913, 930 (2008)); available at <http://ssrn.com/>

Enhanced FCPA Risks: Pharmaceutical Companies and Many More

“The [DOJ is investigating] ... payments by leading pharmaceuticals companies for hospitality, consultants, licensing agreements and charitable donations in markets around the world as part of a wide-ranging corruption probe. **GlaxoSmith-Kline, Pfizer, Bristol-Myers Squibb** and **Eli Lilly**, among others, have disclosed being contacted by the [DOJ & SEC] in connection with the investigation. **Merck**, the US drugs group, announced last week that it had also been contacted and was co-operating with investigators.”

“US Probes Corruption In Big Pharma,” *Financial Times* (Aug. 12, 2010);

<http://www.ft.com/cms/s/0/9a8e8f90-a63e-11df-8767-00144feabdc0.html>

Enhanced FCPA Risks: Pharmaceutical Companies And Many More (cont'd)

“[W]e will also use every tool at our disposal to investigate and prosecute corrupt practices in the pharmaceutical industry. In the months ahead ... you can expect to see the Department increasingly use the ... [FCPA] to prosecute kickbacks and bribes paid to foreign government officials by pharmaceutical companies. As the drug companies do more and more of their business overseas where so much of the health care business is government run, we see the opportunities for FCPA violations unfortunately proliferating. Indeed, in some foreign countries nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product may involve a ‘foreign official’ within the meaning of the FCPA.”

...

Enhanced FCPA Risks: Pharmaceutical Companies And Many More (cont'd)

“The extent of government involvement in foreign health systems, combined with fierce industry competition and the closed nature of many public formularies, creates, in our view, a significant risk that corrupt payments will infect the process. The Department will not hesitate to charge pharmaceutical companies and their senior executives under the FCPA if warranted to root out foreign bribery in the industry.”

Acting Deputy Attorney General Gary Grindler’s remarks at 2010 Compliance Week Conference (May 25, 2010); www.justice.gov/dag/speeches/2010/dag-speech-100525.html

IRS Bounty Program: Another Bellwether?

“For more than 140 years, the IRS has been authorized to pay awards to individuals who blow on the whistle on those who do not pay their taxes. Prior to 2006, awards ... were discretionary and set at 1%, 10%, or 15% of the amounts recovered, with a \$10 million cap. For much of the ... provision’s history, the provision was underutilized. In 2006, however, things changed. That year Congress amended the IRS whistleblower program to strengthen the IRS’s ability to pay rewards to tax whistleblowers. [See Tax Relief & Health Care Act of 2006, Pub. L. No. 109-432, Div. A, Title IV, 406(d), 120 Stat. 2960; Adding subsection (b) to 26 U.S.C. 7623] 7623(b)(1) (2006)]”

Jarod S. Gonzalez, “A POT OF GOLD AT THE END OF THE RAINBOW: AN ECONOMIC INCENTIVES-BASED APPROACH TO OSHA WHISTLEBLOWING” (Jan. 2010), at 15-16.

IRS Bounty Program: Another Bellwether? (cont'd)

“Under current law, rewards to tax whistleblowers are mandatory if several conditions are satisfied. ... [T]o qualify for the mandatory award, the whistleblower must provide information relating to a tax noncompliance matter in which the tax in dispute exceeds \$2 million. [I]f the taxpayer who is alleged not to have paid the appropriate amount of taxes is an individual, the taxpayer’s gross income must exceed \$200,000 for any taxable year at issue. Finally, the information provided must substantially contribute to a decision to take administrative or judicial action that results in the collection of tax. When these conditions are satisfied, the whistleblower must receive an award between 15-30% of the collected proceeds resulting from administrative or judicial action.”

GONZALEZ, “A POT OF GOLD AT THE END OF THE RAINBOW: AN ECONOMIC INCENTIVES-BASED APPROACH TO OSHA WHISTLEBLOWING,” at 15-16.

IRS Bounty Program: Another Bellwether? (cont'd)

“The early evidence indicates that the changes in the IRS whistleblower program will spur more whistleblower submissions at higher tax amounts. ... For example, under the new law, by the end of Fiscal Year 2008, the IRS received 476 submissions relating to 1,246 taxpayers that met the \$2 million threshold, of which 228 alleged more than \$10 million. This far surpasses the number of “high ceiling” whistleblower claims in prior years. Under the old law, “only 8 of 198 full paid claims in 2008 involved collections of more than \$2 million, and only three involved collections of more than \$10 million.”

GONZALEZ, “*A POT OF GOLD AT THE END OF THE RAINBOW: AN ECONOMIC INCENTIVES-BASED APPROACH TO OSHA WHISTLEBLOWING*,” at 15-16.

Know your Client and Where It Operates



Know your Client and Where It Operates (cont'd)

Table 1. Bribe Payers Index 2008

Rank	Country/Territory	BPI 2008 Score	Standard Deviation	Confidence Interval 95%	
				Lower Bound	Upper Bound
1	Belgium	8,8	2,00	8,5	9,0
1	Canada	8,8	1,80	8,5	9,0
3	Netherlands	8,7	1,98	8,4	8,9
3	Switzerland	8,7	1,98	8,4	8,9
5	Germany	8,6	2,14	8,4	8,8
5	Japan	8,6	2,11	8,3	8,8
5	United Kingdom	8,6	2,10	8,4	8,7
8	Australia	8,5	2,23	8,2	8,7
9	France	8,1	2,48	7,9	8,3
9	Singapore	8,1	2,60	7,8	8,4
9	United States	8,1	2,43	7,9	8,3
12	Spain	7,9	2,48	7,6	8,1
13	Hong Kong	7,6	2,67	7,3	7,9
14	South Africa	7,5	2,78	7,1	8,0
14	South Korea	7,5	2,79	7,1	7,9
14	Taiwan	7,5	2,76	7,1	7,9
17	Brazil	7,4	2,78	7,0	7,7
17	Italy	7,4	2,89	7,1	7,7
19	India	6,8	3,31	6,4	7,3
20	Mexico	6,6	2,97	6,1	7,2
21	China	6,5	3,35	6,2	6,8
22	Russia	5,9	3,66	5,2	6,6

Source: Transparency International Bribe Payers Survey 2008.

Scores range from 0 to 10. The higher the score for the country, the lower the likelihood of companies from that country to engage in bribery when doing business abroad. For a number of observations see Appendix one.

Source: Transparency Int'l Bribe Payers Index (2008)

Know your Client and Where It Operates (cont'd)

FOREIGN BRIBERY AS VIEWED BY REGIONS

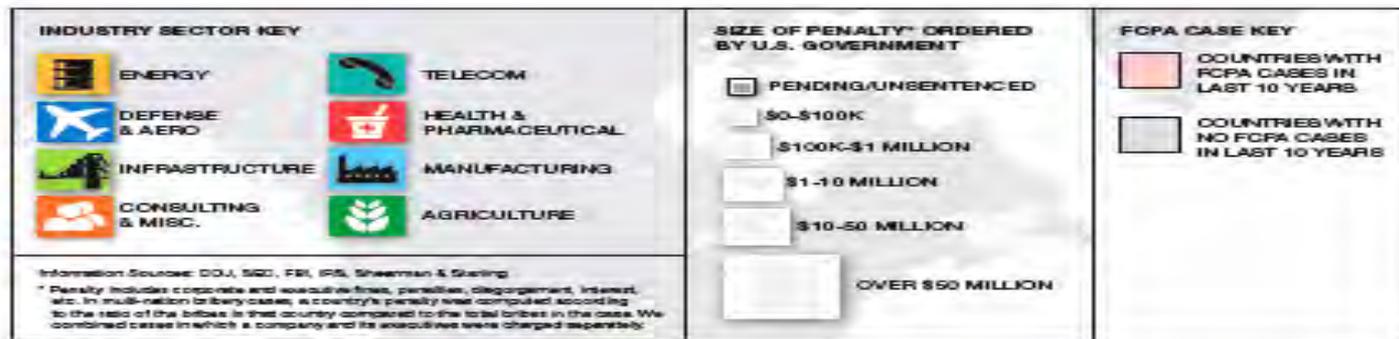
When assessed on a regional rather than global basis, four regional groupings of senior business executives offered somewhat distinct views of the likelihood of foreign companies to bribe.¹⁰

- **Africa and Middle East:** Respondents in these countries (Egypt, Ghana, Morocco, Nigeria, Senegal and South Africa) suggested that when operating in the African continent, companies from the Netherlands and Japan are the least likely to engage in bribery. At the bottom of their ranking were companies from India. It is worth noting that South African companies were seen as likely to pay bribes when doing business abroad within the region.
- **Asia Pacific:** According to the informed perception of business executives interviewed in these countries (India, Indonesia, Japan, Malaysia, Pakistan, the Philippines, Singapore and South Korea), companies from Germany and Canada are seen to be the least likely to pay bribes. By comparison, companies from China were judged to be most likely to pay bribes when doing business in the region.
- **Europe and the United States:** For respondents in these countries (the Czech Republic, France, Germany, Hungary, Poland, Russia, the United States and the United Kingdom), Swiss and Belgian companies are seen to be the least likely to engage in bribery, while companies at the bottom include those from China. Italian companies are also judged to be more likely to bribe in this region than many of their European neighbours.
- **Latin America:** For Latin American executives (Argentina, Brazil, Chile and Mexico), Chinese companies were viewed as the most likely to engage in bribery when doing business in the region, while German companies were seen as the least prone to engage in such practices.

Know your Client and Where It Operates (cont'd)

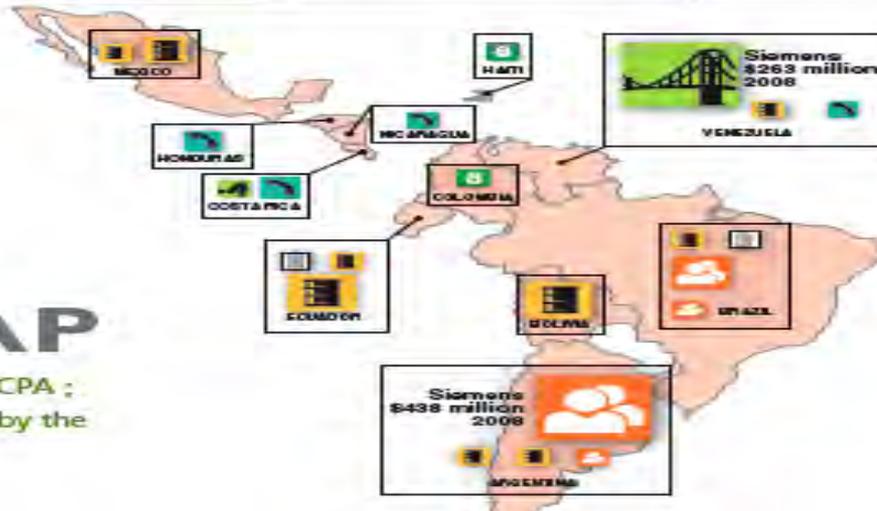
GLOBAL FACT GATHERING

mintz



FCPA MAP

Behold the Worldwide Sweep of FCPA ;
Ten Years of FCPA Cases Brought by the
U.S. Government



Impact On PSLRA Class Actions?

HEAT MAPS OF S&P 500 SECURITIES LITIGATION™
PERCENTAGE OF COMPANIES SUBJECT TO NEW FILINGS*
2000–2010 H1

	Average 00–09	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010 H1
Consumer Discretionary	5.3%	3.3%	2.4%	10.2%	4.6%	3.4%	10.3%	4.4%	5.7%	4.5%	3.8%	0.0%
Consumer Staples	4.3%	7.3%	8.3%	2.9%	2.9%	2.7%	8.6%	2.8%	0.0%	2.6%	4.9%	0.0%
Energy	1.4%	0.0%	0.0%	8.0%	0.0%	4.2%	0.0%	0.0%	0.0%	0.0%	2.6%	7.7%
Financials	11.7%	4.2%	1.4%	16.7%	8.6%	19.3%	7.3%	2.4%	10.3%	31.2%	11.9%	5.1%
Health Care	9.5%	2.6%	7.1%	15.2%	10.4%	10.6%	10.7%	6.9%	12.7%	13.7%	3.7%	7.7%
Industrials	3.8%	2.8%	0.0%	6.0%	3.0%	8.5%	1.8%	0.0%	5.8%	3.6%	6.9%	0.0%
Information Technology	6.9%	9.7%	18.2%	10.3%	5.2%	3.6%	7.5%	9.0%	2.6%	2.9%	0.0%	1.3%
Materials	1.2%	4.1%	0.0%	0.0%	2.9%	0.0%	3.1%	0.0%	0.0%	0.0%	0.0%	0.0%
Telecommunication Services	8.3%	23.1%	16.7%	15.4%	8.3%	0.0%	0.0%	0.0%	0.0%	0.0%	11.1%	0.0%
Utilities	7.5%	5.0%	7.9%	40.5%	2.8%	5.7%	3.0%	0.0%	3.1%	3.2%	0.0%	0.0%
All S&P 500 Companies	6.4%	5.0%	5.6%	12.0%	5.2%	7.2%	6.6%	3.6%	5.4%	9.2%	4.6%	2.4%

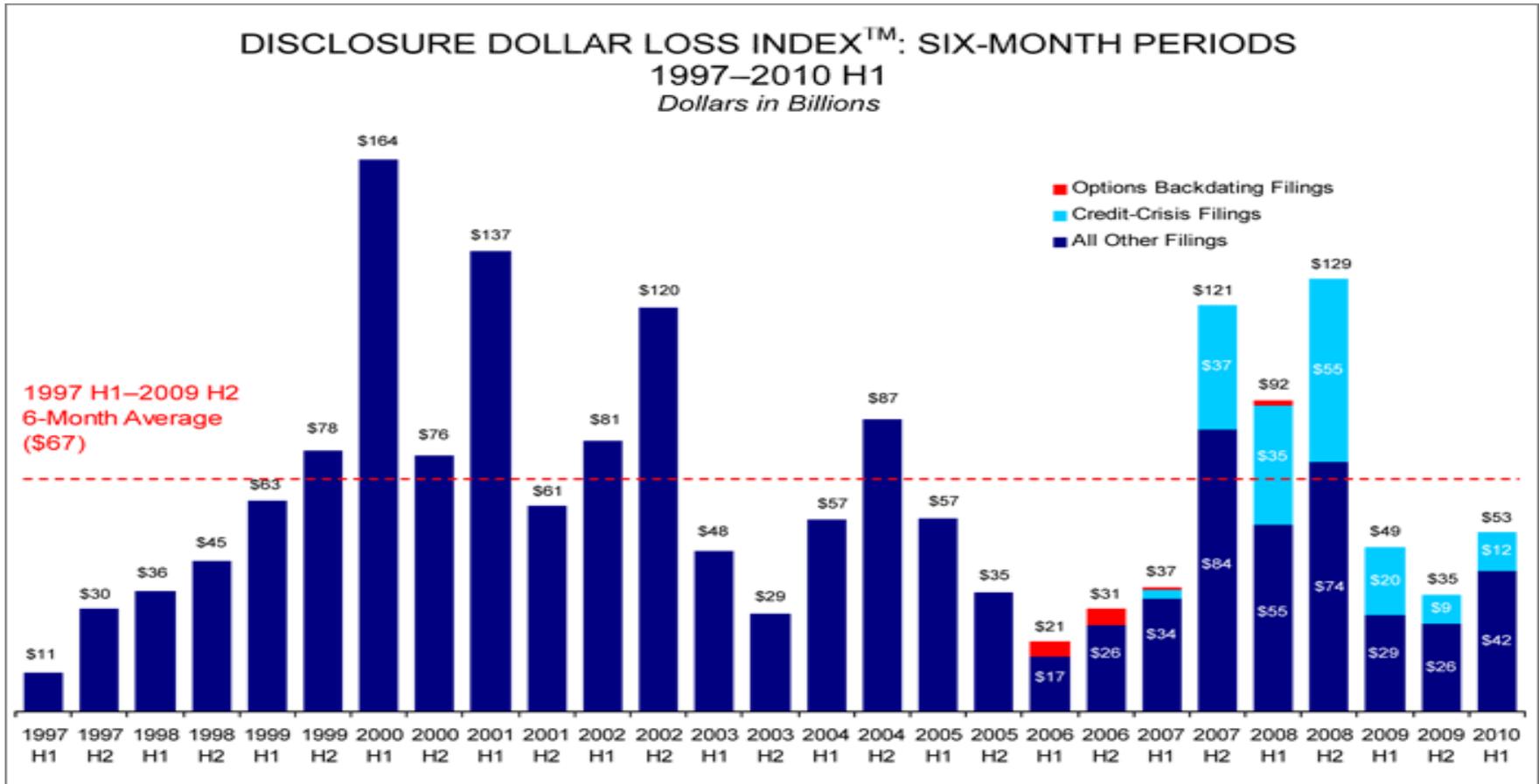
Legend 0% 0% – 5% 5% – 15% 15% – 25% 25%+

* The chart is based on the composition of the S&P 500 as of the last trading day of the previous year.

Sectors are based on the Global Industry Classification Standard (GICS).

Percent of Companies Subject to New Filings equals the number of companies subject to new securities class action filings in federal courts in each sector divided by the total number of companies in that sector.

Impact On PSLRA Class Actions? (cont'd)



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Leveraged Recovery?

- Can a plaintiffs' class action firm double its recoveries in securities fraud matters by (1) filing a Dodd-Frank complaint with the SEC, working with the Commission to build an enforcement case while keeping the identity of the whistleblower(s) anonymous until the matter settles, and then (2) filing a class action petition on the back-end end seeking damages for the same misconduct?*

The Commission's Rulemaking May Impact Private Securities Actions In Ways Yet To Be Seen

“Brokers and dealers and investment advisers have been held to different standards of conduct in their dealings with investors. In very general terms, a broker-dealer is held to a suitability standard, and an investment adviser is held to a fiduciary duty standard. With passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which tasks the ... [SEC] with issuing rules concerning the standards of conduct for brokers, dealers, and investment advisers, the current standards may be changed.”

* * *

“The Dodd-Frank Wall Street Reform and Consumer Protection Act: Standards of Conduct of Brokers, Dealers, and Investment Advisers,” Congressional Research Service, Report R4138 (Aug. 19, 2010), *available at* <http://www.fas.org/sgp/crs/misc/R41381.pdf>

The Commission's Rulemaking Will Impact Private Securities Actions In Ways Yet To Be Seen (cont'd)

“At this time any statements as to what the SEC study might find and whether there will be new rules concerning the standards of conduct for brokers, dealers, and investment advisers are completely speculative. Nevertheless, it is interesting to note what the Chair of the SEC, Mary Schapiro, stated in 2009: ‘I believe that, when investors receive similar services from similar financial service providers, they should be subject to the same standard of conduct—regardless of the label applied to that financial service provider. I therefore believe that all financial service providers that provide personalized investment advice about securities should owe a fiduciary duty to their customers or clients.’ ”

The Dodd-Frank Wall Street Reform and Consumer Protection Act: Standards of Conduct of Brokers, Dealers, and Investment Advisers, CRS Report R4138

Bounty Hunters Likely Will Try To Expand Liability Theories

- If *qui tam* litigation is a harbinger of what will occur as plaintiffs' counsel begin seeking recoveries under the new bounty hunter provisions, liability theories will be pushed to their limits, particularly in FCPA matters, where aggressive theories already are being asserted by the government:

“These included allegations of territorial jurisdiction over U.S. dollar transfers between foreign banks based on the use of correspondent accounts in the United States, a claim that may be repeated in the forthcoming settlement with Technip. In addition, we have noted, the government’s expansive interpretation of the statute’s ‘business nexus’ element and the SEC’s willingness to impute knowledge to the parent of acts by its subsidiaries.”

Shearman & Sterling, FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977 (March 4, 2010), at x.