ADVERTISEMENT

DuaneMorris®

WHISTLEBLOWER RISKS JUST INCREASED: WHAT TO WATCH FOR

A few "sleeper" provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("the Act") authorize financial incentives for whistleblowers who provide original information to the U.S. Securities and Exchange Commission ("SEC") or U.S. Commodity Futures Trading Commission ("CFTC"). These measures increase the enforcement *and* litigation risks and the compliance costs for publicly traded companies, including large healthcare providers such as pharmaceutical companies. Hundreds of tips have been pouring in, although the SEC has yet to issue the implementing rules and regulations.

As one plaintiff's attorney has remarked, the Act offers a "trifecta of enticements" for would-be whistleblowers who can report violations anonymously, enjoy heightened protections from retaliation—and now have a direct federal cause of action for the recovery of twice back pay, with interest, reasonable attorneys' fees and litigation costs—and be paid between 10 percent and 30 percent of the amount collected over $1 million.

Employees of a company are not the only potential whistleblowers. They may be joint-venture partners, contractors, sales agents or almost anyone who can provide original information, including analysis of public information. And they may be affiliated with a privately held or foreign business subsidiary consolidated in the company's balance sheet. Under the law and the implementing regulations proposed on November 3, 2010, only a few categories generally won't qualify, such as:

(1) employees of the SEC, CFTC or similar regulatory agencies;
(2) auditors who obtain the information during a required audit;
(3) individuals convicted of violations tied to the reported information;
(4) individuals required to report the information to the government or internally within a company (with some exceptions); and
(5) individuals who have a fiduciary duty to the entity not to use such information for private gain (such as attorneys and compliance officers).

How the Act's "Bounty Hunter" Provisions Compare to *Qui Tam* Actions

While similar to the federal False Claims Act's *qui tam* provisions, the Act's bounty hunter provisions appear to have even more enticing features, which is a possible explanation for why securities class-action firms and *qui tam* counsel may be aggressively seeking out clients. These matters would be significantly cheaper to handle than a *qui tam* since a Dodd-Frank whistleblower would not be required to file a complaint under seal or prosecute it against well-funded defense counsel. Instead, a firm must only convince the SEC or CFTC that its client has significant original information and, if requested, help to develop the enforcement action.

Also, nothing in the Act prevents double recoveries. A plaintiff can file both a *qui tam* complaint (for a percentage of penalties under the FCA) and a Dodd-Frank complaint (for a similar percentage of damages assessed for securities or commodities violations). In addition, a plaintiff can remain anonymous while the government secures a settlement, then file a securities-fraud class action to leverage the government's efforts.

Violations That Could Lead to a Bounty Payment

Among the types of securities violations that may trigger a Dodd-Frank complaint are:

(1) manipulation of a security's price or volume;
(2) a fraudulent or unregistered offer or sale of securities, including Ponzi schemes, high-yield investment programs or other investment programs;
(3) insider trading;
(4) false or misleading statements about a company (including false or misleading SEC reports or financial statements);
(5) abusive naked short-selling;
(6) theft or misappropriation of funds or securities;
(7) fraudulent conduct or problems associated with municipal securities transactions or public-pension plans; and
(8) bribery of foreign officials.

Perhaps the most significant Dodd-Frank issue facing pharmaceutical companies is under the Foreign Corrupt Practices Act ("FCPA"). As Acting Deputy Attorney Gary Grindler of the U.S. Department of Justice explained at the 2010 Compliance Week Conference, "The extent of government involvement in foreign health systems, combined with fierce industry competition and the closed nature of many public formularies, creates . . . 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."

Likely Effect of the New Measures

Companies may be forced to make more disclosures than ever before to:

(1) manage the negative effects of a likely enforcement action and potentially eliminate or limit the viability of a whistleblower recovery;
(2) meet reporting obligations under the securities laws, since notification that the SEC is evaluating a whistleblower tip may be *qualitatively* material information;
(3) reduce the fines and penalties from criminal exposure available provided by the SEC's Seaboard Report and by the Organizational Guidelines in USSG §8B2.1, both of which reward cooperation.

Since the pattern of *qui tam* litigation in the industry provides a likely forecast, it can be anticipated that expansive theories of liability will be urged—particularly in FCPA matters—where aggressive theories are already being asserted.

Proactive Steps

Because reactive steps can be far more costly and dangerous than proactive ones, companies may want to consider, with legal counsel's assistance, reassessing the adequacy of compliance programs—particularly for FCPA exposure. They also may want to consider how to handle a whistleblower before an event happens and review D&O policies to ensure that coverage is provided for costs related to whistleblower investigations and regulatory actions.

If you have a question on this material or would like to discuss legal services, please contact us at **healthcare@duanemorris.com**.

Duane Morris LLP is an international full-service law firm of more than 700 lawyers, approximately 35 of whom advise a wide range of healthcare organizations on all aspects of corporate matters, mergers and acquisitions, regulatory compliance and enforcement, reimbursement, litigation, labor and employment, real estate and taxation matters.

Michael E. Clark, an attorney at Duane Morris LLP, represents clients, including healthcare providers, in the area of litigation with concentrations in securities and financial fraud as well as white-collar law and general healthcare law. He has also helped clients conduct internal investigations and advises on compliance and corporate governance matters.

Originally published as a special supplement to Modern Healthcare Magazine, November 2010.