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Getting What They Pay For: The Far-Reaching Impact Of the Dodd-Frank Act's 'Whistleblower Bounty' Incentives on FCPA Enforcement

BY T. MARKUS FUNK

Congress, by recently passing the historic Dodd-Frank Wall Street Reform and Consumer Protection Act (H.R. 4173) (''Dodd-Frank Act''), provided a major boost to the U.S. government's recently ramped-up Foreign Corrupt Practices Act enforcement efforts. When President Obama signed the Dodd-Frank Act into law July 21, he made available both potentially huge new cash incentives for whistleblowers as well as beefed-up protections against retaliation.[1] Foreign and domestic corporate ''insiders'' (including those at the parent and off-shore subsidiary levels), purported recipients of bribes, as well as corporate ''outsiders'' (such as family members and friends who happened upon relevant information), now have unparalleled fi-

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[1] Note that the Dodd-Frank Act contains identical whistleblower provisions governing the Commodity Futures Trading Commission. *See* Section 748.

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nancial incentives to come forward with evidence of possible FCPA violations.[2]

The expected results are twofold: A notable uptick in government-initiated FCPA enforcement actions and an increase in self-disclosure by corporate entities. Companies will therefore need to update their anti-corruption compliance programs, making internal reporting mechanisms efficient and attractive to potential tipsters who surely will be tempted by the Dodd-Frank Act's considerable monetary incentives.

Exceptional Incentives for Tipsters

The stated objective of the Dodd-Frank Act is to address the root causes of the recent financial turmoil. As anticipated, the 2,253 pages of this ambitious omnibus act contain provisions that variously impact banks, derivative instruments, and financial institutions. Although easily overlooked, the act also introduces exceptional whistleblower bounty incentives.

The Dodd-Frank Act's impact on the FCPA enforcement landscape is emblematic of the government's ongoing commitment to addressing foreign bribery through the FCPA.

By way of a short recap, the FCPA, enacted in 1977, is enforced dually by the Department of Justice (and its chief FCPA investigative arm, the FBI) and the Securities and Exchange Commission, both of which have intensified their ongoing efforts to identify and prosecute FCPA violators, either criminally or administratively. The FCPA (1) makes it illegal for U.S. persons, real or corporate, or third parties acting on their behalf,[3] foreign companies registered with the SEC, and foreign companies or persons that commit an act in furtherance of an improper payment or offer while in the United States, to bribe foreign officials (that is, provide the officials with ''*anything* of value'') in order to ''obtain or retain business,'' and (2) mandates recordkeeping and internal-control standards for publicly held corporations registered under the Securities Exchange Act of 1934.

The Dodd-Frank Act's whistleblower provisions, designed to assist increasingly vigorous FCPA enforcement efforts and modeled after a successful 2006 IRS Whistleblower program,[4] must be taken seriously, as they promise to fundamentally alter a corporation's self-disclosure calculus when dealing with potential FCPA violations.

The Dodd-Frank Act's Language

The Dodd-Frank Act creates substantial contingency-based pecuniary incentives for those with ''inside'' FCPA-related information to come forward and report that information to federal authorities. That is, if an individual discloses to the government information concerning some yet-to-be-discovered FCPA wrongdoing, that person can potentially receive a percentage-based cash reward if and when the government collects on that information. In this regard, the Dodd-Frank Act has turned every corporate employee, located anywhere in the world, into a potential confidential informant for the FBI or the SEC. This is, stated plainly, a ''dream come true'' for the federal law enforcement community.

Specifically, under the act, whistleblowers who provide ''original'' violation-related information ''derived from [his or her] independent knowledge or analysis'' are now statutorily entitled to a *minimum* of 10 percent, and a maximum of 30 percent, of *all* monetary recoveries made as a result of the information (Section 922).[5] The tip must result in the ''successful resolution'' of the civil or criminal enforcement action and, for the tipster to collect, the government's total sanctions or recovery, through settlement or otherwise, must exceed $1 million.

Fortified Anonymity and Whistleblower Rights

Beyond the new financial incentives, which are paid through the SEC's existing Investor Protection Fund, the Dodd-Frank Act also motivates potential tipsters to blow the whistle by providing an option to remain anonymous ''prior to payment of the award.'' The Act additionally closes a considerable Sarbanes-Oxley Act and False Claims Act anti-retaliation loophole by explicitly covering whistleblowers employed by subsidiary companies as well as those working for the parent company. Finally, the Act provides a private cause of action for damages to whistleblowers claiming retaliation and allows whistleblowers denied an award to appeal the denial to federal court.

Ramped-Up FCPA Enforcement Efforts

The anticipated consequence of the Act's financial incentives and enhanced whistleblower protections is to spur domestic and foreign employees, as well as other ''insiders'' such as past and planned recipients of alleged bribes, into coming forward with evidence of claimed violations. Tipsters have in fact proved themselves extremely effective in uncovering fraud. Senate Banking Committee expert testimony, for example, indicates that whistleblower tips detected 54.1 percent of all uncovered fraud schemes in public companies; put another way, to date whistleblower tips have been some *13 times* more effective than the efforts of external auditors (which include SEC exam teams) when it comes to fraud detection.[6] And more tipsters, whether insiders

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[2] Section 922 enumerates a narrow category of individuals who are excluded from whistleblower award eligibility.

[3] The FCPA also claims expansive territorial jurisdiction for itself. Consider, in this context, the FCPA's ''alternative'' nationality-based jurisdiction, *see* 15 U.S.C. §§ 78dd-1(g) and 78dd-2(i); the FCPA's jurisdiction over foreign companies that are not issuers but that commit an act in furtherance of a prohibited payment within the United States, *see* 15 U.S.C. § 78dd-3(a); and the FCPA's jurisdiction over any ''issuer,'' ''domestic concern,'' officer, director, employee, or agent of such issuer or domestic concern, or stockholder acting on behalf of such issuer or concern, who makes use of any instrumentality of interstate commerce in furtherance of any improper payment or offer of payment, *see* 15 U.S.C. §§ 78dd-1(a) and 78dd-2(a).

[4] *See* Sen. Rep. No. 111-176.

[5] In contrast, under the pre-Dodd-Frank Act regime, the largely unused SEC whistleblower program was far more limited, applying only to insider trading cases and restricting monetary reward to a maximum of 10 percent of the recovered funds.

[6] *See* Sen. Rep. No. 111-176.

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or outsiders with knowledge, are exactly what the government is looking for.

The SEC and DOJ have in fact clearly announced their intent to pursue increasingly vigorous FCPA enforcement efforts. On March 18, SEC Enforcement Director Robert Khuzami stated that ''law enforcement authorities within the U.S. and across the globe are working together to aggressively monitor violators of anti-corruption laws.'' Similarly, on Nov. 17, 2009, Assistant Attorney General Lanny Breuer of DOJ's Criminal Division warned that ''the prospect of significant prison sentences for [FCPA violators] should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations.'' The Dodd-Frank Act's potent evidence-gathering tools undeniably enhance and advance the aim of ever-increasing and dynamic FCPA enforcement.

As a further predictor that the Dodd-Frank Act's new provisions promise to dramatically change the reporting and self-reporting landscape, consider that FCPA penalties and settlements alone in recent years have yielded billions of dollars for the U.S. government. In 2009, for example, Halliburton agreed to pay $559 million to the United States to settle charges that one of its former units bribed Nigerian officials during the construction of a gas plant, and in 2008 Siemens paid the United States $800 million for FCPA violations in Latin America and the Middle East.[7]

And it does not take much to render someone an FCPA violator: On Aug. 6, the Mercator Corporation, a merchant bank with offices in New York, pleaded guilty to one count of making an unlawful payment to a senior government official of the Republic of Kazakhstan in the form of two snowmobiles purchased almost 11 years earlier, in 1999. This Mercator resolution demonstrates that DOJ means business when it says it will prosecute improper payments to government officials, no matter how small the value. The FCPA's ''anything of value'' language apparently means ''anything of value,'' even if the improper payment is made well outside the window of typical statute-of-limitation calculations. In this regard, had these violations come to light after the enactment of the Dodd-Frank Act as a result of a tipster's information, that tipster would likely now be a wealthy individual.[8]

The Danger of False Reporting

That said, the promise to potential tipsters of financial riches also carries with it the risk of generating flawed, or even outright false, information to the great detriment of a corporation's finances and reputation. Indeed, Congress itself expressed concern about false reporting, as the Dodd-Frank Act directs the SEC inspector general to conduct a study examining, among other things, ''whether the reward levels are so high as to encourage illegitimate whistleblower claims.'' The results of the study must be reported and made public within 30 months of the Act's enactment.

Harmonizing Compliance Programs With the New Realities

The SEC has 270 days from July 21 to issue regulations implementing the Dodd-Frank Act's whistleblower provisions. Corporate employees, their personal and professional associates, as well as actual or intended bribe recipients, who may have previously been a bit more blasé about the FCPA, now have a very tangible reason to proactively uncover, ''investigate,'' and report an FCPA violation.

The emergence of this fortified program, coupled with the government's increasingly intensified efforts to aggressively prosecute FCPA violators, heralds an era of substantially increased FCPA prosecutions. These developments serve to further highlight the vital role that robust and updated FCPA and anti-corruption compliance programs, including investigations work plans that seek to anticipate potential problem areas by being tailored to match individual business models, must play for companies with operations outside the United States.

Full text of the Dodd-Frank Act is at http://pub.bna.com/cl/DoddFrankAct.pdf.

[7] Similarly, Statoil, Willbros Group, Halliburton/KBR, Siemens, and Daimler paid a collective $639.5 million in SEC civil settlements, which represent the SEC's *disgorgement* of the FCPA violators' profits; add to this figure the approximately $978.1 million in *penalties* subsequently assessed as a result of settlements with DOJ. Even a tipster achieving merely the Dodd-Frank Act's floor of 10 percent would have been well-compensated for his or her information assisting any of these investigations.

[8] Although the Mercator numbers are not yet available, consider the general FCPA recovery provisions: The FCPA provides that a company can be criminally fined up to $2 million per violation of the anti-bribery provisions and culpable individuals can be subject to a criminal fine of up to $250,000 per violation as well as imprisonment for up to five years. Willful violations of the books and records and internal control provisions, moreover, can result in a criminal fine of up to $25 million for a company and a criminal fine up to $5 million as well as imprisonment for up to 20 years for culpable individuals. Critically, as noted in the prior footnote, the FCPA also authorizes the SEC to disgorge a company's profits on contracts secured with improper payments; recent studies demonstrate that the SEC is increasingly pursuing this option. The Department of Justice, on the other hand, has the ability to impose criminal penalties that may be multiples of the gross profits. Violations may result in the imposition of costly and burdensome compliance monitoring, as well as the cancellation of government contracts or outright debarment—a kiss of death for a company with a sizeable government contracts portfolio.