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CORPORATE COMPLIANCE

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THE WALL STREET REFORM ACT CREATES STRONG INCENTIVES FOR FCPA WHISTLEBLOWERS AND SIGNIFICANTLY EXPANDS WHISTLEBLOWER PROTECTIONS

The Dodd–Frank Wall Street Reform and Consumer Protection Act was signed into law on July 21, 2010, creating a lucrative whistleblower awards program for individuals who report violations of the securities laws to the Securities and Exchange Commission (SEC). Because the news coverage surrounding the Act has focused primarily on its efforts to respond to the financial crisis, the Act's significance for enforcement of the Foreign Corrupt Practices Act (FCPA)—which is also part of the securities laws—may not be readily apparent. Companies with operations, suppliers, or business relationships abroad should be aware that the same additional incentives and protections afforded under the Act to whistleblowers who report more familiar securities violations, such as insider trading and reporting violations, are also available for whistleblowers who report violations of the FCPA. Whether valid or not, such reports are likely to result in an increasing number of external investigations of overseas operations, books and records, internal controls, and compliance programs in general.

Of special note is the fact that the Act creates a payout *entitlement*, or bounty award, for a whistleblower who provides original information that leads to a successful enforcement action involving monetary sanctions in excess of $1 million *and* gives whistleblowers the right to appeal the denial of a bounty award. These provisions are intended to create an active and enforceable program with a predictable level of payout to motivate potential whistleblowers to come forward. Thus, the number of whistleblower reports of FCPA and other securities violations—and the number of verified reports and enforcement actions—are likely to increase.

- *New Whistleblower Incentives: An Award of 10-30% of Monetary Penalties.* The Act adds Section 21F to the Securities Exchange Act of 1934, which dramatically expands the SEC's existing whistleblower protection programs. If a whistleblower's information leads to a successful SEC enforcement action and the imposition of monetary sanctions by the SEC in excess of $1 million, the whistleblower is entitled to a reward equal to 10-30% of the amount of monetary sanctions collected (monetary sanctions include penalties, disgorgement, restitution, and interest). Notably, the whistleblower bounty is limited to a percentage of sanctions imposed by the SEC—whistleblowers would not be entitled to a share of any penalties imposed by the Department of Justice.
- *The Amount of the Award is at the Discretion of the SEC.* The SEC has discretion to determine the amount of the award within the 10-30% range, taking into account the significance of the information provided to the success of the enforcement action, the degree of assistance provided by the whistleblower, the deterrent effect of making awards to whistleblowers, and additional factors to be established by the SEC through rule or regulation. This payout, which will be drawn from an Investor Protection Fund, is intended to be made either before or at the same time as any

distributions to the victims of the scheme. Additionally, a whistleblower is to be rewarded under Section 21F even if "bits and pieces" of the whistleblower's information were known to the public before he came forward.

- *A Whistleblower Will Have the Right to Appeal the Denial of an Award.* Significantly, a whistleblower will have the right to appeal the denial of an award (but not the amount of an award, if one is made) directly to the United States Court of Appeals, creating not only a lucrative reward program, but a legally–enforceable right to the bounty.
- *The Award Program is Available NOW.* The SEC is tasked with issuing final regulations implementing Section 21F within 270 days of the date of enactment. However, a whistleblower may receive an award under Section 21F even if the underlying securities violation occurred prior to its enactment, provided that the whistleblower report was not made until after July 21, 2010.

The Act also establishes a private right of action for employment retaliation against a SEC whistleblower, expands the class of employees covered by Section 806 of the Sarbanes–Oxley Act (which prohibits discrimination against Sarbanes—Oxley whistleblowers), and extends the statute of limitations for filing a complaint for violation of Section 806 with the Department of Labor.

- *Private Cause of Action for Discrimination Against a SEC Whistleblower With a Generous Statute of Limitations.* Under Section 21F, an employer is prohibited from discharging or otherwise discriminating against a whistleblower because of the whistleblower's provision of information to the SEC or for making required disclosures under the Sarbanes–Oxley Act. The statute of limitations for such an action is generous: a whistleblower must bring an action within three (3) years of when he realizes that he was discriminated against or should have known that he was discriminated against, provided that the action is brought within six (6) years of the date of when the discharge or discrimination actually occurred. If an employee succeeds in his whistleblower protection action, he is to be reinstated with the same seniority status that he would have had absent the discrimination, receive *two times* the amount of back pay owed plus interest, and compensation for litigation costs, expert witness fees, and attorneys' fees.
- *More Employees Are Protected Under Section 806 of Sarbanes–Oxley.* Subsidiaries and affiliates of public companies had relied upon an ambiguity in Section 806, which had been read to protect only retaliation by the public company itself, but not subsidiaries or affiliates, as a defense in actions brought by whistleblowers. The Act eliminates such a defense by amending Section 806 to provide that subsidiaries and affiliates of public companies cannot retaliate against Sarbanes–Oxley whistleblowers.
- *Extended Statute of Limitations for Filing Department of Labor Complaints.* The statute of limitations for filing a complaint with the Department of Labor for violation of Section 806 is extended from 90 days to 180 days. Perhaps more significantly, Section 806 is also amended to read that the statute of limitations begins to run on the date the employee becomes aware of the violation; previously, the statute of limitations began to run on the date that the violation occurred, regardless of when the employee discovered it.

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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