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Financial Reform Bill Bolsters Anti-Corruption Prosecution

The financial regulatory reform bill, enacted on July 21, 2010 as the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") contains two important provisions affecting U.S. companies doing business abroad.¹ One provision rewards whistleblowers who report violations of securities laws – including the Foreign Corrupt Practices Act ("FCPA") – with 10-30% of any resulting penalty or settlement recovered by the government in excess of \$1 million. The other provision requires SEC-registered companies developing minerals, natural gas or oil to disclose any payments made to foreign governments.

Whistleblowers Entitled To Portion Of FCPA Sanctions

Section 922 of the Dodd-Frank Act allows providers of "original information" concerning federal securities law violations to recover 10-30% of any resulting sanctions above US\$1 million. This includes any monies paid as penalties, disgorgement, or interest. "Original information" means information that (i) is derived from the independent knowledge or analysis of the whistleblower, (ii) is not known to the SEC from any other source, and (iii) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media.

The provision applies to violations of the FCPA, a federal statute which makes it unlawful to bribe foreign officials in order to obtain or maintain business. The FCPA also contains accounting provisions that require issuers to maintain accurate internal books and records and to implement a system of internal accounting controls. The new provision covers enforcement and related actions brought by the SEC and the DOJ – the two U.S. authorities that investigate and prosecute FCPA violations – as well as by foreign governments. The amount awarded is determined by the SEC based on the degree of the whistleblower's involvement and the nature of the information provided.

The new law is likely to further spike the already increasing number of FCPA prosecutions, as it creates a strong economic incentive for whistleblowers. As a result, self-reporting of FCPA violations may rise as well. In light of this development and given that ignorance of the FCPA and its nuances is not a valid excuse under the law, companies should ensure that their FCPA training and compliance programs are up to date, and that they have adequate whistleblower policies in place.²

¹ The Dodd-Frank Act can be accessed at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4173enr.txt.pdf.

² Contrary to Section 806 of the Sarbanes-Oxley Act, which only prohibits public companies but not private companies from retaliating against employee whistleblowers, Section 922(h) of the Dodd-Frank Act protects whistleblowers from employer retaliation and provides them with a private cause of action to recover damages stemming from retaliation.

SEC-Registered "Resource Extraction" Companies Must Disclose Payments To Governments

Section 1504 of Dodd-Frank Act applies to all SEC-registered companies engaged in "resource extraction," defined as the commercial development of minerals, natural gas or oil. The provision mandates the reporting of all extraction-related payments made to the U.S. federal government as well as to any foreign government by any such company or its controlled subsidiaries. Like under the FCPA, the term "foreign government" encompasses departments, agencies, and instrumentalities of and companies owned by a foreign government. Unlike the FCPA, the new provision also includes payments made to the foreign government itself. All relevant information is to be included in the company's annual SEC filings.

The provision complements the Extractive Industries Transparency Initiative ("EITI"), in which companies and countries voluntarily publish payments made to governments concerning oil, mining, and natural gas projects (*see* <http://eiti.org>). Fifty companies and over thirty countries have adopted the EITI, seeking to improve transparency within these industries. By mandating disclosure, the government creates a more far-reaching and all-inclusive form of transparency from companies engaged in extraction.

The new law provides definitions for certain key words, but leaves many terms and requirements undefined. The SEC has until April 17, 2011 to issue detailed rules to further clarify the new reporting requirements.

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