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Wall Street Reform Act Provides a Cash Reward for FCPA Whistleblowers

The Wall Street Reform and Consumer Protection Act (“Wall Street Reform Act”) was signed into law by the President on July 21, 2010. Among the many provisions of the Wall Street Reform Act is one of particular interest to public companies doing business internationally: It amends the Securities Exchange Act of 1934 to provide a potentially substantial cash reward to whistleblowers who give information about securities law violations, including the Foreign Corrupt Practices Act (“FCPA”).

Under Section 922 of the Wall Street Reform Act, the Securities Exchange Commission (“SEC”) is not just permitted, but is required, to pay a reward to qualifying whistleblowers.¹ Whistleblowers also are provided with protection from retaliation and a private cause of action for damages suffered as a result of retaliation.² This provision creates a substantial incentive for employees to report any information, regardless of its reliability, directly to the SEC.

Large Rewards Possible

The cash reward authorized by the Wall Street Reform Act has the potential to be enormous. The SEC is required to pay qualifying whistleblowers between 10 and 30 percent of monies collected by the SEC over \$1,000,000, including penalties, disgorgement, and interest, as well as monies resulting from virtually any judicial or administrative action based on the information provided by the whistleblower.³ Considering the size of settlements and penalties assessed in recent FCPA enforcement investigations, this cash reward could easily reach millions of dollars.

A whistleblower is entitled to this reward if he or she voluntarily provides “original information” to the SEC that leads to a successful enforcement of securities laws. “Original information” is defined as information derived from the whistleblower’s independent knowledge or analysis that is unknown to the SEC and that is not derived from a judicial or administrative hearing, or from the news media.⁴ A few exceptions apply:

- A whistleblower is ineligible for the reward if he or she works for the government;
- If he or she gained their information from auditing financial statements for SEC reporting; or
- If he or she is convicted of a criminal violation relating to the information provided.⁵

The SEC is to determine the exact amount of the reward within the 10-30 percent range based on several factors, including the significance of the information provided to the success of the enforcement action.⁶

Furthermore, whistleblowers are eligible for the cash reward even if the information provided relates to a violation that occurred prior to the enactment of the Wall Street Reform Act.⁷

Potential Implications

While it is yet unclear what effect this whistleblower reward program will have, it is reasonable to expect an increase in the number of FCPA investigations initiated by the SEC. The potentially sizeable cash reward may encourage employees to report information and suspicions directly to the SEC rather than to their supervisors within the company. The requirement that the information be “original” may lead to investigations initiated on the basis of vague and

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unfounded information as employees race to blow the whistle first. In addition, the incentive to report directly to the SEC effectively cuts the company out of the disclosure loop, thereby reducing the company's ability to receive credit for voluntary disclosure of violations.

Section 922 of the Wall Street Reform Act further emphasizes the importance of robust FCPA compliance programs to public companies doing business internationally. Locke Lord's White Collar Criminal Defense and Internal Investigations Group has extensive experience advising clients on FCPA compliance, and stands ready to assist in evaluating current compliance programs, as well as in developing and implementing cost-effective and comprehensive compliance programs.

Endnotes

- 1 Wall Street Reform Act, H.R. 4173, 111th Cong. § 922(b)(1) (2010).
- 2 *Id.* at § 922(h)(1).
- 3 *Id.* at § 922(b)(1); § 922(a). In other words, once the SEC collects \$1,000,000 in an enforcement action, the reward to the whistleblower is calculated as a percentage of the amount over \$1,000,000 collected by the SEC, *plus* any amounts collected by other governmental entities.
- 4 *Id.* at § 922(a)(3).
- 5 *Id.* at § 922(c)(2).
- 6 *Id.* at § 922(c)(1).
- 7 *Id.* at § 924(c).

About the Authors

Tim Johnson is the co-chair of Locke Lord's White Collar Criminal Defense and Internal Investigations practice in the Houston office. As the United States Attorney for the Southern District of Texas from 2008-2010, Mr. Johnson led one of the largest U.S. Attorneys' offices in the country. In addition to his many years with the U.S. Attorneys' office, Mr. Johnson has nearly two decades of experience in private practice representing individuals and corporations in matters before the United States and its various agencies.

Stacy Williams is a partner at Locke Lord. He practices complex commercial litigation and has extensive experience conducting internal and governmental investigations. He also advises clients on corporate governance and compliance matters. He has advised clients on a wide variety of criminal and civil business fraud, including matters involving the Foreign Corrupt Practices Act, antitrust, class actions, export control requirements, and Commodities Exchange Act.

Erin Kolodny is an associate at Locke Lord. She practices complex commercial litigation and concentrates on white collar defense and internal investigations.