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The Impact of Financial Reform: Bounty Available for Whistleblowers Who Reveal Violations of Federal Securities Laws, Including the Foreign Corrupt Practices Act

On July 21, 2010, President Obama signed into law the *Dodd-Frank Wall Street Reform and Consumer Protection Act* ("the Act"). While debate over the financial reform provisions of the Act has taken center stage in the media over the last several months, a lesser known provision of the 2,300 page Act has broad implications with respect to the enforcement of the Foreign Corrupt Practices Act ("FCPA"). That provision, section 922 of the Act, provides for a bounty to whistleblowers who voluntarily provide "original information" to the Securities and Exchange Commission ("SEC") that leads to the successful enforcement of a securities law violation by the SEC. Because the FCPA is part of the Securities Exchange Act of 1934, this measure applies with equal force to information regarding FCPA violations.

Under the Act's provisions, a whistleblower could receive an award for a tip that ultimately results in monetary sanctions in excess of $1 million. Although the SEC has ultimate discretion with respect to the exact amount of an award, the Act mandates that it be in the range of 10-30% of the total monetary sanctions collected in the action. Notably, the amount of the award is based on the aggregate of sanctions collected – not just by the SEC, but also by other government agencies, including the Department of Justice ("DOJ"), other federal agencies, state Attorneys General and other state agencies, in "related actions."

The Act instructs the SEC to consider the significance of the information and the degree of assistance provided by the whistleblower when determining the amount. The Act also bars payments to an individual who is convicted of a criminal violation related to the action for which he or she provides information. Successful whistleblowers who are unhappy with the amount awarded have 30 days to appeal the SEC's decision to the appropriate federal court of appeals. In addition, the Act authorizes whistleblowers who believe they have suffered retaliation for providing information to, or for assisting the SEC in its investigation, to bring an action in federal district court and to seek reinstatement, twice their back pay, and other damages. These new provisions have the potential to provide a significant boost to the government's already robust enforcement of the FCPA.

Between 2004 and 2009, enforcement of the FCPA and related anti-corruption laws by DOJ and SEC increased 800%. Speaking as a panelist at the American Bar Association's Program, "Current Issues in Medical Device and Pharmaceutical Litigation" in November 2009, Charles McKenna, then-Chief of the Criminal Division for the U.S. Attorney's Office for the District of New Jersey, noted that FCPA enforcement now trails only terrorism as a DOJ enforcement priority. With the enactment of the Act's bounty provision, this trend is poised to continue. As FCPA enforcement actions have grown in scope and number, so have the resulting fines. For example, DOJ and SEC recently collected more than $1.28 billion in penalties and disgorgement from three of the four joint venture partners involved in the TSKJ consortium for their participation in a scheme to bribe Nigerian government officials to obtain engineering, procurement, and construction contracts. In addition, the SEC has dedicated a special unit to enforcing the FCPA. As part of this initiative, in May 2010, the SEC opened a new FCPA unit in its San Francisco regional office to focus on domestic companies' compliance with the FCPA while conducting business in Asia.

Given the widespread risk posed by the FCPA and the sums at issue, the Act may prompt employees to take it upon themselves to determine whether their company, or for that matter a competitor, has been complying with the FCPA's prohibitions on bribery of foreign officials and accounting requirements. Advocates of the Act believe that such incentives are a cheap and effective way to encourage individuals to report hard-to-detect corporate wrongdoing to the government. Opponents point out that such provisions may undermine the effectiveness of internal company compliance programs because employees may be inclined to disclose compliance violations to the government, rather than to their employer, in the hope that their tip will translate into a large bounty. Regardless of this debate, the new whistleblower provisions are now law, and if the increasingly active enforcement environment and severe penalties were not reason enough, they clearly provide yet another incentive for companies that may face scrutiny by the SEC under the FCPA to implement proactive compliance measures to detect and deter FCPA violations.

We will continue to evaluate the impact of financial reform legislation, especially those changes that may affect your business activities. If you have any questions concerning *Financial Reform Matters* or the FCPA, please contact any of the attorneys listed below or the Ropes & Gray attorneys with whom you regularly work:

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