

Proposed Rewards for FCPA Whistleblowers Raise Risk for Multinational Corporations

Amid heightened interest in FCPA investigations, the proposed whistleblower legislation will require corporations to implement new and upgrade existing FCPA compliance programs, fully investigate allegations of misconduct, and consider more carefully whether to self-report FCPA violations.

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Recent legislation proposed by both houses of Congress would result in changes to the federal securities laws that would allow employee whistleblowers to receive a reward of up to 30% of the fines collected by the U.S. Securities and Exchange Commission (SEC) and the U.S. Department of Justice (DOJ) from corporations violating the Foreign Corrupt Practices Act (FCPA). The proposed legislation comes amid several highly publicized cases in which federal authorities have collected staggering fines from corporations and have dedicated additional resources to investigating allegations of bribery of foreign officials to win business overseas. In this environment of heightened interest in FCPA investigations, the proposed whistleblower legislation intensifies the need for corporations to implement new and upgrade existing FCPA compliance programs, fully investigate allegations of misconduct, and consider more carefully whether to self-report FCPA violations to government authorities.

The proposed FCPA whistleblower provisions are a small but significant portion of an expansive financial reform bill and provide strong incentive for employees to report potential misconduct. The FCPA, which applies to U.S.-based corporations and domestic and foreign corporations that issue securities in the United States, makes it unlawful for a corporation, its employees, or its agents to corruptly make a payment or give anything of value to a foreign official for the purpose of obtaining business. The books and records provision imposes fines for mischaracterizing prohibited payments in company accounting records. The DOJ handles criminal enforcement of the FCPA, while the SEC conducts civil enforcement proceedings.

The proposed legislation would pay whistleblowers a percentage of the sanctions for providing the SEC with “original information” regarding violations of the securities laws, including the FCPA. Under the bill, “original information” would be limited to information independently known to the whistleblower and not already known by the government or derived from material uncovered in existing investigations. The whistleblower’s information must lead to a successful enforcement action or judicial proceeding as

well as sanctions against the corporation. The proposed provisions also extend the reward to actions taken by other prosecuting agencies based on the reported information. Whistleblowers convicted for conduct related to the disclosed activity are excluded from receiving a payout.

In both the Senate and House versions of the legislation, the whistleblower's reward may be up to 30% of the fines collected by the government from the corporation. Under the Senate bill, as long as the fines exceed \$1 million, the reward would be at least 10% of the total. The House language includes the \$1 million minimum, but would not guarantee a payout and would cap the whistleblower's potential share at 30% of the sanctions. The details concerning the amount of the whistleblower's payout will depend on the final version of the legislation. The government would have the discretion to determine the size of the award by weighing a variety of factors, including the significance of the whistleblower's information to its investigation.

The whistleblower reward provisions come at a time when both the DOJ and SEC have focused their resources on FCPA investigations. This January, the SEC named the chief of a new FCPA enforcement unit that will, according to its Enforcement Director, "focus on new and proactive approaches to identifying violations of the Foreign Corrupt Practices Act." The DOJ has already bolstered its efforts, adding prosecutors and FBI agents specifically focused on FCPA investigations. Moreover, the DOJ recently used an undercover FBI operation to investigate and indict 22 employees from companies doing business with defense officials in Africa. The fines and settlements collected from corporations substantiate the government's increased emphasis on FCPA violations, with \$627 million collected in 2009 and \$1.2 billion collected in the first few months of 2010.

The whistleblower provisions have already passed in the House, and are likely to be passed in the Senate and become law. Once passed, the whistleblower provisions will be a powerful new resource for federal officials, who have shown an increased interest in pursuing corporations that run afoul of the FCPA. With corporations paying ever-larger fines, whistleblowers will have a considerable incentive to report potential misconduct to government officials and collect up to 30% of the payout. In this environment, the government will be actively investigating potential misconduct, and corporate employees will have a valuable motivation to disclose it. The new law is likely to greatly increase the number of FCPA matters under government investigation.

Corporations must take proactive steps to ensure not only that they have a strong FCPA compliance program, including clear procedures for employees to report potential misconduct internally, but also that they have a robust plan to investigate allegations of misconduct. The new legislation will also change the calculus in deciding whether to self-report a violation, as the risk of disclosure by a current or former employee will be greatly heightened.

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If you have any questions regarding this Law Flash or developing an FCPA compliance program, or require assistance with any other issue relating to the defense of any other government enforcement matters, please contact the authors, Leslie R. Caldwell, Lisa Tenorio-Kutzkey, and Michael Cleary (contact information below), or any of the following White Collar practitioners:

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