

E-ALERT | Foreign Corrupt Practices Act

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NEW FINANCIAL REFORM BILL INCLUDES TWO PROVISIONS AIMED AT CURBING CORRUPTION

PERMITS WHISTLEBLOWERS TO RECOVER PART OF FCPA SETTLEMENTS ABOVE \$1 MILLION; REQUIRES SEC-REGISTERED COMPANIES IN THE EXTRACTIVE INDUSTRY TO DISCLOSE ALL PAYMENTS TO FOREIGN GOVERNMENTS

The massive financial reform bill that was signed into law today contains two provisions related to companies' dealings with foreign governments and foreign officials. One provision permits whistleblowers who report violations of securities laws, including the FCPA, to claim 10 to 30 percent of any recovery. Another provision requires SEC-registered companies in the resource extraction sector to disclose *all* payments to foreign governments.

Whistleblowers Permitted To Recover Part of FCPA Settlements

Section 922 of the financial reform bill permits a whistleblower who voluntarily provides "original information" that leads to a monetary sanction above \$1 million for a violation of federal securities law to claim 10 to 30 percent of the sanction. The "sanction" for which a whistleblower may obtain an award includes not only SEC enforcement actions but also "related actions," including actions undertaken by the DOJ and foreign law enforcement authorities. The SEC will determine the exact amount of the award based on several factors, including the significance of the information to the success of the action and the degree of assistance provided by the whistleblower.

The provision covers a wide range of U.S. securities laws, and it will almost certainly result in more FCPA enforcement by U.S. authorities as whistleblowers now have a financial incentive to report improper conduct. This in turn may affect a company's determination whether to voluntarily disclose FCPA issues to U.S. enforcement authorities, as companies may wish to disclose information to U.S. authorities before a whistleblower does.

Mandatory Disclosure by SEC-Registered Companies in Extractive Industries of Payments to Foreign Governments

Section 1504 of the financial reform bill imposes a new reporting obligation on "resource extraction issuers" – defined as companies that file an annual report with the SEC (such as companies listed on U.S. stock exchanges and companies issuing American Depositary Receipts) and are in the extractive industry sector, which is defined as engaging in the commercial development of oil, natural gas, or minerals.

Resource extraction issuers will be required to include in their annual reports:

- "information relating to any payment"
- made by the issuer, a subsidiary of the issuer, "or any entity under the control of the issuer"

- to the U.S. government or to a “foreign government” (which, similar to the FCPA, includes a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government)
- “for the purpose of the commercial development of oil, natural gas, or minerals.”

The bill defines “payment” and “commercial development of oil, natural gas, or minerals,” but leaves many questions unanswered. The SEC is required within 270 days of the bill’s enactment to issue detailed rules, which may clarify the scope of the new reporting obligation.

The provision appears to complement efforts of the Extractive Industries Transparency Initiative (EITI), an initiative whereby countries and companies, in an effort to improve transparency, voluntarily publish material oil, gas, and mining payments to governments and government-affiliated entities and material revenues received by governments from oil, gas, and mining companies. Some 50 companies and more than 30 countries have signed onto EITI. The provisions in the financial reform bill appear to compel SEC-registered extractive companies that do not already disclose this information to do so.

Comment

The whistleblower bounty in particular may quicken the pace of rapidly increasing FCPA enforcement by U.S. authorities, who continue to focus on large penalties against companies, increased prosecution of individuals, and industry-wide sweeps.

This memorandum is intended to provide only general guidance and not to advise as to the lawfulness of any particular activity. If you would like more details on any of these provisions or assistance in navigating their intricacies, please contact one of the following members of our FCPA practice group:

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