

Rx COMPLIANCE REPORT

EXCLUSIVELY DEVOTED TO PHARMACEUTICAL
SALES AND MARKETING COMPLIANCE

Sleeper provision in financial reform bill creates new whistleblower program for multi-national companies

An easily overlooked provision in the financial reform bill signed into law by President Obama this month creates a new whistleblower program that authorizes substantial cash rewards to people who voluntarily provide the Securities and Exchange Commission (SEC) with information leading to the successful prosecution of securities laws violations, says **Lisa Bebchick**, a partner with Fried Frank in New York. This “sleeper” bounty provision is likely to have an immediate and significant impact on companies with operations outside of the United States, including multi-national drug and device companies, she says.

Under the Dodd-Frank Act, the SEC is required to pay whistleblowers cash rewards between 10 percent and 30 percent of any monetary sanctions in excess of \$1,000,000 that the government, as a result of the whistleblowers’ assistance, recovers through either civil or criminal proceedings.

The emergence of this new whistleblower program, coupled with the government’s current focus on aggressively prosecuting Foreign Corrupt Practices Act (FCPA) violators, will likely increase the number of new FCPA prosecutions, says Bebchick, further highlighting the vital role that FCPA compliance programs should play at companies with operations outside of the United States.

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GSK announces new compensation program for U.S. sales reps

GlaxoSmithKline announced on July 26 that it will implement a new system for evaluating and compensating its sales reps beginning in 2011. Under the new system, bonuses for sales reps who work directly with healthcare professionals and other customers will no longer be based on individual achievement of sales targets. Instead, they will be based primarily on the service they deliver to customers. Bonuses will be determined, in part, by customer feedback, and by a sales professional’s adherence to the company values of transparency, integrity, respect and patient-focus, GSK announced.

Some of industry’s sharpest critics, namely the *qui tam* bar, responded largely favorably to GSK’s announcement, albeit with several caveats. “GSK has changed the game,” says *qui tam* attorney **Mark Kleiman**. “This is incredibly important and if they follow through, it could set a new standard that we measure all pharmaceutical marketing and compliance against.”

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Sleeper provision in financial reform bill creates new whistleblower program for multi-national companies

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In short, says Bebchick, multi-national firms now face a whistleblower program, similar to the False Claims Act, for FCPA violations, an area that had already become a sharp focus of the government.

A dramatic expansion

According to Fried Frank's **Howard Goldstein**, the new law dramatically expands the SEC's pre-existing whistleblower program, which applied solely to insider trading cases and limited whistleblower rewards to a maximum of 10 percent of any monetary sanctions recovered by the government in civil and criminal proceedings, with no minimum reward guaranteed. Since its inception in 1989, the SEC's existing whistleblower program has paid out less than \$160,000 to just five whistleblowers, he notes.

In response to those statistics, which may have resulted from would-be whistleblowers weighing harsh reprisals against the prospect of low rewards for raising concerns about wrongdoing in a corporation, says Goldstein, Congress included in the Dodd-Frank Act a minimum cash reward of 10 percent of any monetary sanctions recovered by the government.

A strong incentive

Recent events — including, among other things, statements by senior government officials, an unprecedented undercover sting operation by the Department of Justice, and the successful extradition of foreign nationals to the United States to face FCPA charges — suggest that this new whistleblower program may end up playing a key role in identifying and prosecuting violations of the FCPA, says **William Johnson**, a partner in Fried Frank's New York office.

Given that monetary sanctions in several recent FCPA enforcement actions have resulted in settlements exceeding \$100 million, would-be whistleblowers now have a compelling incentive to report corrupt behavior, says Johnson. This dramatic financial incentive is likely to immediately increase the number of whistleblower complaints filed with

the government, and may tempt some to report information that is speculative or unconfirmed, leading to more investigations, he warns.

Broad discretion for the SEC

In order to qualify for such rewards, says Fried Frank's **Kevin Harnisch**, whistleblowers must provide the SEC with "original information."

According to Harnisch, "original information:" must be "derived from the independent knowledge or analysis of a whistleblower;" cannot be "known to the Commission from any other source;" and cannot be "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."

Nevertheless, he says, a whistleblower may still be entitled to a cash reward even when "bits and pieces of the whistleblower's information were known to the media prior to the emergence of the whistleblower," so long as the whistleblower provides additional information that is critical to the government's case.

According to Harnisch, the Dodd-Frank Act gives the SEC wide discretion to determine the specific dollar amount of any cash reward within the ten to thirty percent range by considering, among other factors, the "significance of the information provided by the whistleblower," the "degree of assistance provided by the whistleblower," and "the programmatic interest of the Commission in deterring violations" of the relevant securities laws.

The SEC now has until April 2011 to issue regulations implementing the SEC's new whistleblower program.

In anticipation of this new law, companies should ensure that their whistleblower policies are robust and that they are prepared for a likely increase in whistleblower reports, say the Fried Frank attorneys. ■

This "sleeper" bounty provision is likely to have an immediate and significant impact on companies with operations outside of the U.S., says Fried Frank's Lisa Bebchick.
