

INTERNAL INVESTIGATIONS AND COMPLIANCE UPDATE

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Major Developments Imminent Regarding the SEC's Dodd-Frank Whistleblower Reward and Protection Program

April 8, 2011

Key Takeaways

As we previously [reported](#), the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act"), enacted last July, contains key new provisions regarding whistleblowers. Specifically, Section 922(a) of the Act grants significant protections and rewards to individuals who voluntarily provide the Securities & Exchange Commission ("SEC") with original information relating to the violation of the securities laws, including the Foreign Corrupt Practices Act ("FCPA"). It is worth noting that Section 748 of the Act, though less heralded than Section 922(a), contains very similar provisions regarding whistleblowers who report to the Commodities Futures Trading Commission information relating to violations of the Commodities Exchange Act.

Pursuant to Section 922(a), individuals (aside from certain ineligible persons such as law enforcement agents) who provide "original information" that leads to the assessment – in SEC actions under the securities laws – of monetary sanctions more than \$1 million are entitled to receive between 10 percent and 30 percent of the sanction amount; sanctions awarded in "related actions" count toward that amount. Moreover, whistleblowers may provide their original information (and file their whistleblower reward claims) anonymously through counsel, although the whistleblower's identity must be disclosed to the SEC before it pays any reward to the whistleblower. Whistleblowers also are entitled to protection – enforced by heavy sanctions – against various forms of retaliation by their employer for having provided information to the SEC or during an SEC proceeding.

Section 922(a) has been the subject of great interest and speculation in legal and business circles, spawning numerous questions, including: What are the precise requirements for a whistleblower to receive an award? What exactly constitutes "original information," and how must it be submitted to the SEC? Must whistleblowers attempt to use available internal reporting mechanisms before reporting to the SEC? How will the amount of specific rewards be determined? When will other agencies' actions "related" to an SEC action count toward the \$1 million in sanctions necessary to trigger award eligibility? Who, precisely, is within the class of persons ineligible to receive an award?

None of these questions is answered by the language of Section 922(a). By April 21, the SEC must issue final rules regarding the implementation of Section 922(a) which ideally would answer these and other important questions. Although the SEC released proposed rules last November, they were criticized by some for being too favorable to whistleblowers and by others for being unfair to whistleblowers.

Accordingly, the forthcoming final rules may differ substantially from the proposed rules in some respects.

The upcoming months also should shed light on additional questions that cannot be answered simply by rules, including: What is the volume of whistleblower reports submitted to the SEC? What types of alleged violations are most often reported? To what degree, when, and how does the SEC follow up on whistleblower reports? What sort of whistleblower reports (insider-trading, FCPA, etc.) are of greatest interest to the SEC? What kinds of awards will be granted by the SEC?

Thus, the near future promises to reveal much about both the procedures and priorities of the SEC in implementing Section 922(a) and the ultimate risks and other consequences to companies posed by Section 922(a). Companies would be well-served to keep abreast of these developments. In the meantime, several things are certain.

First, Section 922(a)'s provisions protecting whistleblowers should be understood and honored by companies subject to SEC jurisdiction, lest the company subject itself to sanctions for violating such protections; companies should be able to identify persons protected as "whistleblowers" under Section 922(a) and to ensure compliance with applicable protections.

Second, companies should assume that certain individuals will be motivated by the prospect of a big reward to report wrongdoing within the company.

Third, and consequently, companies should have in place a comprehensive compliance program to enable an adequate response to any allegations or wrongdoing and to minimize wrongdoing that could be reported in the first place.

Fourth, as part of the compliance program, companies should consider providing incentives (including appropriate rewards) for persons to report allegations internally before – or even instead of – reporting to the SEC.

Given these imminent developments regarding whistleblowers, companies should have a responsible plan for handling not only allegations of wrongdoing generally, but also allegations made by whistleblowers specifically. Allegations made by persons who potentially qualify as whistleblowers require special attention and treatment due to the unique issues and risks they raise. Guidance regarding handling whistleblower allegations can be found in Eli Richardson's article, "When the Whistle Blows: A Framework for Companies to Recognize and Handle Whistleblower Allegations," recently published in *Bloomberg Law Reports* and available on our [website](#). For more information or assistance regarding issues concerning whistleblowers or internal investigations generally, please contact Eli Richardson or one of our other attorneys listed below.

Wally Dietz	(615) 742-6276	wdietz@bassberry.com
Eli Richardson	(615) 742-7825	erichardson@bassberry.com
Ross Booher	(615) 742-7764	rbooher@bassberry.com
Taylor Phillips	(615) 742-7802	tphillips@bassberry.com

The materials contained herein have been abridged from the statutory sources and should not be construed or relied upon for legal advice. Readers are urged to consult legal counsel concerning particular situations and specific legal questions.

To ensure compliance with requirements imposed by the IRS, we inform you that this message is not intended to be used, and cannot be used, by the addressee or any other person for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code.

150 Third Avenue South, Suite 2800 • Nashville, TN 37201 • (615) 742-6200
The Tower at Peabody Place • 100 Peabody Place, Suite 900 • Memphis, TN 38103 • (901) 543-5900
1700 Riverview Tower • 900 South Gay Street • Knoxville, TN 37902 • (865) 521-6200