

CLIENT ALERT

The New Bounty Hunters: Congress Creates New Incentives to Report Securities and Commodities Fraud

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Earlier today, the U.S. Senate passed the conference report for H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act. In a little-discussed piece of this sweeping financial reform legislation, Congress authorized the creation of two new bounty programs that will provide substantial monetary awards to whistleblowers who provide information that leads to an enforcement action with monetary sanctions exceeding \$1,000,000 imposed by either the Securities and Exchange Commission (SEC) (Sec. 922) or the Commodity Futures Trading Commission (CFTC) (Sec. 748). These bounty hunter provisions, which are expected to be signed into law by President Obama next week, are broadly drafted and could have far-reaching application to cases involving accounting fraud, disclosure violations, and the Foreign Corrupt Practices Act.

The provisions are similar to qui tam provisions of the False Claims Act, which provide a bounty for whistleblowers who provide information about government procurement fraud, and the SEC bounty program already in place to reward whistleblowers who report insider trading. They provide a financial incentive to individuals with information about securities and commodities violations to provide that information to government regulators. However, unlike the False Claims Act, to qualify for an award, the new bounty hunters must provide “original information” to the SEC or CFTC rather than filing a case themselves. Thus, the potential financial rewards remain while the risk and expense of filing a lawsuit have been removed.

When a whistleblower provides original information leading to a monetary sanction exceeding \$1,000,000, they can collect between 10% and 30% of that sanction, which has been defined to include civil monetary penalties, disgorgement, and interest. Under the new law, the SEC and CFTC will have discretion to determine the whistleblower award, taking into account (1) the significance of the information provided; (2) the level of assistance the whistleblower provided; (3) the government’s interest in deterring securities law violations; and (4) other relevant factors the SEC or CFTC may establish by regulation.

Despite the far-reaching impact of this provision, certain categories of people are ineligible, including those convicted of a crime related to the reported conduct, and employees of financial regulatory agencies such as the SEC, the Department of Justice, self-regulatory organizations such as FINRA, national stock exchanges, the Public Company Accounting Oversight Board, law enforcement agencies and outside auditors who gain knowledge of the reported information during the course of an audit.

The new bounty hunters also will have enhanced protection against retaliation under the new law. This includes the ability to seek relief for retaliation by bringing an independent action for relief in U.S. District Court.

Regardless of merit, these new bounty hunter incentives will undoubtedly prompt more company insiders to report suspected wrongdoing to the SEC and CFTC. As such, all companies regulated by the SEC and CFTC are well advised to be increasingly vigilant in their compliance and training efforts to decrease the risk of costly and distracting SEC or CFTC investigations. For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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