

Whistleblowers tuning in to foreign cases

The Dodd-Frank Act has given the Securities & Exchange Commission a new licence to enforce anti-bribery laws aggressively, making lucrative bounties available to whistleblowers. **Reuben Guttman** says multinational companies are now on notice



Reuben Guttman heads the whistleblower practice at US law firm, Grant & Eisenhofer and frequently represents foreign citizens who blow the whistle on FCPA, securities fraud, and False Claims Act violations, as well as conduct that defrauds the US government. He is founder of the website www.whistleblowerlaws.com

Under a US law known as the False Claims Act, companies are responsible for the losses their wrongful conduct causes the US government. Whistleblowers receive a percentage of the recovery, typically 15 per cent. Payments have been substantial in recent years: Pfizer paid \$1 billion; Merck paid \$950 billion; Glaxo SmithKline paid \$600 million; HCA paid \$731 million; Tenet paid \$900 million; and AstraZeneca paid \$520 million. Among the top 10 False Claims settlements on record, individuals and groups blowing the whistle on corporate misconduct collectively received more than \$1 billion in bounty payments.

Moreover, non-US citizens are eligible for these monetary rewards. US legislators have now passed a law providing for these same type of money rewards to individuals who report violations of US securities law by non-US employees of companies that trade their stock on US Exchanges.

One important US law for whistleblowers is the Foreign Corrupt Practices Act (FCPA). The FCPA, originally passed by Congress in 1977, makes it illegal for issuers, domestic concerns, or those acting on their behalf, to offer, promise or authorise the giving of anything of value to a foreign official to obtain or retain business. The FCPA also requires that every issuer keep books and records that fairly reflect their transactions with a system monitored by internal accounting controls.

Historically executives often gave this law little mind, since cash payments and other favours were long considered a cost of doing business abroad, especially in many parts of Asia, Africa and the former Soviet states. But thanks to stepped-up enforcement of the FCPA, international bribery allegations have become a major area of concern for businesses. In the last several years, multinational companies such as Halliburton, Siemens, Daimler, Shell, BAE and others have collectively paid hundreds of millions of dollars to the US government in settling corruption charges, while others are under investigation. Goldman Sachs is facing possible FCPA charges over allegations around Libya's sovereign wealth fund during the Gaddafi regime. Even the dainty Avon lady is feeling the heat in China for alleged improper entertainment and travel expenditures. An ongoing government investigation into Avon over FCPA violations began with an employee whistleblower.

Now, under the Dodd-Frank Act passed in 2010, the Securities & Exchange Commission has new license to aggressively enforce anti-bribery laws, making lucrative bounties available to whistleblowers and other wrongful conduct, like investment fraud. The SEC promulgated its own rules, which became effective in August 2011.

Thanks to this new whistleblower law, there is a strong incentive to blow the whistle, an incentive available to non-US citizens or even non-residents. Under Dodd-Frank and the SEC's new regulations, the voluntary submission of 'original information' leading to the successful enforcement of a judicial or administrative action, and resulting in monetary sanctions exceeding \$1 million, will entitle a whistleblower to an award equal to not less than 10%, and as much as 30%, of the total amount of the monetary sanctions collected from the action.

The law provides a broad definition of 'original information'. It includes public information, provided that the information is derived from the independent analysis of the whistleblower. Information is not deemed 'original' if it is known to the SEC from other sources. Foreign officials are not eligible for bounties under the law.

An example of conduct that may now lead to a claim under the False Claims Act or Dodd-Frank is any kind of illicit payment to someone considered a foreign official for business of any sort. This could be an official of a sovereign wealth fund – as in the Goldman Sachs investigation – or even a doctor working at a government-owned hospital. As Deputy US Attorney General Gary Griner said in a speech to the National Institute of Healthcare: 'In some foreign countries, nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product may involve a "foreign official" within the meaning of the FCPA.'

Multinationals should no longer think that an ocean or a complicit Third World regime will protect them from corporate misbehaviour. What happens overseas no longer stays overseas, and companies – as well as senior executives and boards of directors – can expect the arm of the law to follow them. And thanks to the incentivising of a team of potential whistleblowers wrongdoers have a new watchdog on their tail.