LAW OFFICES OF HAROLD R. BURKE

21 SHERWOOD PLACE ⚙ POST OFFICE BOX 4078
GREENWICH, CONNECTICUT 06831
WWW.BURKE-LEGAL.COM

MEMBER, STATE AND FEDERAL BARS
OF CONNECTICUT AND NEW YORK

TELEPHONE (203) 219-2301
FACSIMILE (203) 413-4443
E-MAIL HRB@BURKE-LEGAL.COM

September 14, 2010

Mary Schapiro
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Commissioner Schapiro:

The whistleblower provisions contained in Sec. 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act mandate that the Securities and Exchange Commission promulgate regulations with respect to a number of issues impacting whistleblowers. As an employment attorney who has litigated False Claims Act and qui tam proceedings in federal court, I am writing to suggest items that should be addressed in any proposed regulations.

I. Rewards Criteria

Section 922 permits a reward of between 10 percent and 30 percent to be paid to whistleblowers who voluntarily provide the Commission with original information leading to the successful enforcement of a covered judicial or administrative action. *See* Sec. 922(b). Subparagraph (c) provides general guidelines that the Commission is obligated to follow as well as authorizing the Commission to establish additional factors through the adoption of rules or regulations.

Preliminarily, the Commission should appreciate that the success of this new initiative will rest largely upon the public's perception that rewards are fairly and equitably made. The issue of what percentage to award successful whistleblowers has plagued False Claims Act ("FCA") cases since the 1986 amendments revitalized that statute, 31 U.S.C. 3729 et seq. In order to ensure that a transparent methodology exists, I am proposing that at an early date the Commission adopt additional factors to supplement those mandated by Congress. FCA enforcement procedures provide a good analogy to the program that the Commission will now be required to administer.

In early FCA cases, the Department of Justice ("DOJ") argued for minimal percentage awards (15 percent) in virtually all successful cases. The absence of any substantive statutory factors led to much litigation with DOJ claiming the amount was fair, just and reasonable with the whistleblowers (or relators) arguing that the percentages were arbitrary and capricious (as well as penurious). In evaluating the claims, courts oftentimes substantially increased the awards initially offered by DOJ.

Such litigation, as well as the perception that DOJ was turning the whistleblower from ally to adversary, led to DOJ issuing written guidelines on December 10, 1996 addressing criteria to be considered in making award recommendations. The experience of DOJ in this area, as well as the factors employed by DOJ in basing awards, should be recognized by the Commission and in relevant cases adopted.

The DOJ Guidelines recognize that the minimum statutory award percentage should be viewed as simply a finder's fee - a starting point to the determination of a proper reward percentage that may be significantly higher. Under DOJ Guidelines, awards are evaluated under two sets of criteria: the first consists of factors warranting an upward modification towards the statutory cap; the second contains factors warranting a modification down towards the statutory floor. The factors contained in each set are advisory, non-exclusive and may not apply to every case.

I suggest that the Commission adopt such an approach and consider using the following factors in making an upward deviation from the 10 percent floor authorized under Dodd-Frank:

1. The whistleblower reported the fraud promptly.
2. The efforts of the whistleblower to stop or report the fraud to a supervisor or the Government.
3. Whether the report, or the ensuing investigation, caused the offender to halt the fraudulent practices.
4. The complaint warned the Government of a significant safety issue.
5. The complaint exposed a nationwide practice.
6. The whistleblower provided extensive, first-hand details of the fraud to the Government.
7. The Government had no knowledge of the fraud or the practice complained of.
8. The whistleblower provided substantial assistance during the investigation and/or pretrial phases of the case when asked.
9. At his deposition and/or trial, the whistleblower was an excellent, credible witness.
10. The whistleblower's counsel provided substantial assistance to the Government.
11. The whistleblower and his counsel supported and cooperated with the Government during the entire proceeding.
12. The time at which the case was resolved, i.e. before during or after trial.
13. The filing of the complaint had a substantial adverse impact on the whistleblower.

In terms of factors that would warrant a downward adjustment, I believe that the following would be germane:

1. The whistleblower participated in the fraud.
2. The whistleblower substantially delayed in reporting the fraud or filing the complaint.
3. The whistleblower, or whistleblower's counsel, violated Commission procedures in filing the complaint.
4. The whistleblower had little knowledge of the fraud or only suspicions.
5. The whistleblower's knowledge was based primarily on public information.
6. The Government already knew of the fraud.
7. The whistleblower, or whistleblower's counsel, did not provide or offer to provide any help after filing the complaint, hampered the Government's efforts in developing the case, or unreasonably opposed the Government's position in litigation.
8. The case required a substantial effort by the Government to develop the facts to win the lawsuit.

The DOJ Guidelines also include as a factor the size of monetary sanction at issue with a greater percentage awarded to smaller cases and a lesser percentage to larger cases. In my opinion, the size of the monetary sanction should not be a relevant factor in reducing a reward percentage.

Large frauds would be in most cases more sophisticated and complex, would implicate a larger number of companies and individuals and would have a more profound negative effect on the financial industry as well as the U.S. economy. Additionally, the monetary sanctions imposed often reflect a fraction of the actual value of the underlying fraud. Given the profound effect that complex schemes can have on the U.S. financial system, e.g. the Madoff matter, individuals with knowledge of such schemes should been given every benefit in reporting to the Commission.

II. Complaint Procedure

Subparagraph (c)(2)(D) of Section 922 authorizes the Commission to establish a form for the reporting of information under the rewards program. Besides basic identifying information, the form should be prepared in a question and answer format in order to ensure that all specific information sought by the Commission is obtained. Individuals should be permitted to deviate from the format in order to provide greater specificity. Whistleblowers should be required to file such complaints under seal and the seal should be preserved during the time that the matter is investigated.

A specific concern is that once a complaint is lodged it will disappear into the system and the whistleblower will never know what is or is not happening to the complaint. I suggest that the Commission assign case officers to all filed matters and be required to provide at least annual updates to the whistleblower. Additionally, any Commission employee assigned to investigate a matter should be required to have at least one face-to-face meeting with the whistleblower in order to review the complaint and assess the quality of the information being presented.

III. Concerns

The Sec. 922 whistleblower rewards program suffers from a serious infirmity that may impair its long term effectiveness. Absent rectification - an amendment to the Internal Revenue Code - any reward paid to a whistleblower will be subject to the Alternative Minimum Tax ("AMT") which mandates that tax be paid on the entire award before any deduction for counsel fees and costs. Rather than simply being an esoteric tax issue, this will be a real problem for individuals fortunate enough to receive a whistleblower award under Dodd-Frank.

Until this problem was remedied in 2004 with respect to FCA rewards, the AMT unfairly reduced the effective reward percentage received by a whistleblower. There were instances prior to the 2004 exemption, in which large awards to successful whistleblowers were effectively nullified because attorney's fees and costs could not be first deducted from the gross proceeds.

Fortunately, § 62(a)(20) of the Internal Revenue Code now specifically permits attorneys fees and costs to be deducted from awards paid by under the FCA prior to the calculation of adjusted income. Subparagraph (21) does the same with respect to whistleblower rewards received under the IRS whistleblower program.[1]

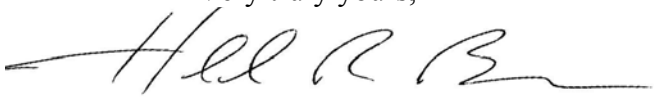
When Dodd-Frank was still before the Senate Banking Committee I raised this specific concern with various staff members. After review of the issue, I was advised by the Committee's legal advisor that all agreed with my assessment that the AMT would impact Sec. 922 rewards. However, I was also advised that this matter could not be addressed by the Banking Committee. Given that this is a major deficiency which will impact the program's long term effectiveness, I encourage the Commission to ask that Congress amend Sec. 62 of the Internal Revenue Code to similarly exempt Dodd-Frank whistleblower reward payments from the AMT. Successful whistleblowers, after having placed their careers and livelihoods in jeopardy, should not face the prospect that their just rewards will be scooped up by the IRS leaving them with little to show for their effort, risk, sacrifice and contribution to corporate integrity.

---

[1] **Internal Revenue Code § 62**. Adjusted gross income defined: **(a) General rule** For purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions: . . . **20) Costs involving discrimination suits, etc**.: Any deduction allowable under this chapter for attorney fees and court costs paid by, or on behalf of, the taxpayer in connection with any action involving a claim of unlawful discrimination (as defined in subsection (e)) or a claim of a violation of subchapter III of chapter 37 of title 31, United States Code [1] or a claim made under section 1862(b)(3)(A) of the Social Security Act (42 U.S.C. 1395y (b)(3)(A)). The preceding sentence shall not apply to any deduction in excess of the amount includible in the taxpayer's gross income for the taxable year on account of a judgment or settlement (whether by suit or agreement and whether as lump sum or periodic payments) resulting from such claim. **(21) Attorneys fees relating to awards to whistleblowers:** Any deduction allowable under this chapter for attorney fees and court costs paid by, or on behalf of, the taxpayer in connection with any award under section 7623 (b) (relating to awards to whistleblowers). The preceding sentence shall not apply to any deduction in excess of the amount includible in the taxpayer's gross income for the taxable year on account of such award.

Thank you for this early opportunity to contribute to this process. I will be pleased to respond to any questions you might have.

Very truly yours,



Harold R. Burke

HRB/st