

From: Fagell, Steven
Sent: Wednesday, January 26, 2011 7:21 PM
To: Klein, Sarit; Cohen, Stephen L.
Cc: Hoffman, Barbara; Martin, David
Subject: Follow-up Comments on Proposed Whistleblower Rules

Steve and Sarit,

On behalf of the comment group members listed below, thank you again for the opportunity to meet with you and your colleagues last week regarding the proposed whistleblower rules. As you requested, we are writing to follow up on two of the topics we discussed.

First, our comment group had originally proposed that legal, compliance, audit, supervisory, or governance personnel -- or those who obtain information through such personnel -- qualify as whistleblowers only if they "report upward" within the company, and the company fails to investigate or remediate (which would include consideration of whether to self-report) within a reasonable period of time. During our meeting, the Staff expressed some concern about the length of time before such personnel would be eligible to report to the Commission, and also about how visible the company's investigation and remediation would be to such personnel. To address those concerns, we propose that legal, compliance, audit, supervisory, or governance personnel -- or those who obtain information through such personnel -- be allowed to become whistleblowers only if they "report upward" within the company, and the company fails to report back within 180 days thereafter that it has investigated or remediated (which would include consideration of whether to self-report).

Second, in the context of whether employees should be required to make a report to an effective internal compliance program in order to be eligible to become whistleblowers, the Staff referred to a report submitted to the Commission by the National Whistleblowers Center as an attachment to its comment letter dated December 17, 2010 (the "NWC Report"). The NWC Report stated that 89.7% of employees who eventually filed False Claims Act cases had made an internal report, despite the absence of a legal requirement that they do so. As we noted during our meeting, we believe that the statistics reported by the NWC were distorted by the study methodology. The NWC statistics on employee reports were based only on cases which included a retaliation claim. (NWC Report at 29.) By definition, an employer cannot retaliate against an employee for whistleblowing unless it is aware that the employee is a whistleblower. Absent an internal report by the whistleblower, a retaliation claim could be made only if the whistleblower's identity were revealed to the employer by some outside source, such as the government agency to whom the whistleblower reported. It is therefore not at all surprising that the NWC's flawed methodology of limiting the study to cases involving retaliation claims led to a very high statistic for voluntary internal reporting.

Thank you again for the opportunity to discuss and expand upon our comments. We are, of course, available to further clarify or discuss any aspect of our proposals.

Sincerely,

Steven Fagell

Steven E. Fagell
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202.662.5293
Fax: 202.778.5293
sfagell@cov.com

Comment Group Members

Apache Corporation
Cardinal Health, Inc.
The Goodyear Tire & Rubber Company
Hewlett-Packard Company
Merck & Co., Inc.
Microsoft Corporation
Newmont Mining Corporation
Procter & Gamble Co.
TRW Automotive Holdings Corp.
United Technologies Corporation