

Sent: Tue Nov 02 18:01:43 2010

Subject: Whistle Blower Rules

Attached is a letter urging the SEC to be very restrictive in new rules dealing with whistle blowers. One might recall that the Sarbanes-Oxley Act included legislation designed to protect whistle blowers. However, the Department of Labor narrowly applied the law in essence gutting it. The result was additional legislation the SEC Director of Enforcement noted last week at Georgetown University stated was sought by the SEC. In Section 922 of the Dodd Frank bill, it gives the SEC the authority to:

“(b) AWARDS.—

“(1) IN GENERAL.—In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate

amount equal to—

“(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

“(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.”

In the attached letter, it appears the SEC is being asked to:

1. Require informants to have first told the company hotline of the problem before the SEC;
2. Once the employee has provided the SEC information, be prohibited from providing any further information within the company; and
3. Prohibit a fiduciary such as a director from informing the SEC of fraudulent behavior.

It seems like the letter is telling the SEC that if people (employees) have information related to a fraud being perpetrated on investors, that the person is to be silenced.

On the first point above, I have seen companies whose hotline tips flow back to the company in a manner that should be of concern to all. For example, I have seen where it flows back into the office of the company's general counsel, the very person responsible for defending the company. One would have to ask why any employee should consider this an independent hotline designed to protect innocent employees who report a potential fraudulent activity.

Companies who have a truly independent hotline, with a truly independent investigation reporting in directly to the audit committee, without interference from inside the company including general counsel have a valuable process. An assistant attorney general for the Southern District stated on 10/25 that the AG does subpoena emails and other evidence from such hotlines and processes to see if they do in fact work well and independently.

On the second point, there was a case during the corporate scandals in which an inside employee (senior marketing executive) informed the law enforcement agencies of a fraud. Those agencies then put a wire tap on that person who went back into the company to gather additional information. This additional information was then used in a successful prosecution. It would seem the attached letter is trying to stop such efforts.

Finally, on point three, if a director - who has an obligation to investors - is aware of a fraud, why is that something that should be kept from the SEC and stockholders?

The SEC is about to propose the rules to implement this part of the DODD/Frank Bill. It should be interesting to see how they respond to this request. It appears one of the names cited in the letter is a former chief of staff for an SEC Chairman. The other appears to be a former SEC enforcement attorney who is married to a former SEC Acting Chairman.

Also please note that representatives of the following companies went to meet with the SEC, along with legal counsel to discuss these issues. However the attached memo prepared by the SEC summarizing that meeting is so nontransparent as to be worthless and hides any detail of what was discussed from the public.

Johnson and Johnson

Tyco

Pfizer

Citigroup

Consolidated Edison

JP Morgan Chase

Prudential