



Ethics & Compliance Officer Association

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December 17, 2010

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: File No. S7-33-10; Release No. 34-63237; Proposed Rules Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934

Dear Ms. Murphy:

On behalf of the members of the Ethics and Compliance Officer Association (ECO A), I am grateful for this opportunity to comment on the rules recently proposed by the Securities and Exchange Commission (SEC) in Release No. 34-63237. The ECO A is a founding leader of the organizational ethics and compliance (E&C) field and serves as the sole association exclusively for ethics and compliance officers and members of their teams worldwide. The ECO A's more than 1,200 members span hundreds of organizations from the largest multinational corporations; to city, state, and federal government agencies; to medium- and small-sized businesses; to colleges and universities; to nonprofit organizations.

One of the best qualities of the ECO A is the diversity of our members' professional backgrounds. While early corporate compliance programs were led only by attorneys, the modern field of ethics and compliance draws from many domains. This evolution reflects the fact that excellence in organizational ethics and compliance requires that the E&C team possess or have access to not only legal expertise, but organizational development, audit, program planning and evaluation, communications, organizational behavior, and many other functions, including business ethics.

On receiving your proposed rules this year, the ECO A surveyed its members' opinions. We are very pleased with the number and detail of responses they offered. Given media reports about early comments you've received, you may be surprised to learn that ECO A members have mixed reactions to the proposed rules. In fact, a few senior ethics and compliance officers (ECOs) of large U.S. corporations spoke very positively about the Dodd-Frank bounty program, given their overarching desire to uncover corporate misconduct, no matter who it's reported to. That said, most ECOs are very concerned that the SEC's program will undermine their sincere efforts to prevent and detect misconduct via their internal ethics and compliance programs.

To make the most of ECO A members' well-informed views, I've organized their feedback, often word-for-word, into "bullets" under several key headings:

1. As the commission staff works to finalize the rules, take special care to understand the quality and value of organizational ethics and compliance programs as they exist today, not according to their sometimes-negative reputations from decades past

- How the SEC addresses internal E&C programs in its final wording will, intentionally or not, have a dramatic impact on the future of these programs in the United States
- E&C programs have made extraordinary strides in the past 20 years—the SEC’s thought process should be influenced only by those aware of these recent successes
- SEC attorneys should work with and learn from practicing ECOs, who understand in micro detail what makes an effective internal program

2. The commission should strive to support and enhance current, successful initiatives by the U.S. government to prevent and detect misconduct and encourage ethical behavior

- The SEC should strive not to conflict with the successful regulations and standards promulgated over recent years by the U.S. Sentencing Commission, the U.S. Department of Justice, and the U.S. Department of Health and Human Services
- The rules should support internal ethics programs rather than compete against them
- SEC provisions should acknowledge the U.S. Sentencing Commission guidelines and do what they can to motivate all affected organizations to use these guidelines as a model
- The SEC has a uniquely valuable opportunity at this time to strengthen already-established federal standards, as compared to the opposite result: undermining what’s currently working
- Like regulations used effectively at the Equal Employment Opportunity Commission, unless there’s evidence that a whistleblower should legitimately fear retaliation, the rules should require that the whistleblower use the organization’s internal reporting mechanisms (including an anonymous option) first

3. The rules should strongly and specifically motivate whistleblowers to report their concern first to their internal ethics and compliance programs

- ECOA members represent hundreds of the largest corporations in the world, where trends prove that employees increasingly trust their internal reporting systems—this is an earned trust that should be recognized in the SEC rulemaking
- The SEC must not undermine organizations’ internal programs and their overall efforts to promote ethics and compliance among their employee populations
- The commission needs to take its standard that it "will consider higher percentage awards for whistleblowers who first report violations through their compliance programs" to a more-certain level: it should require that a whistleblower who discloses internally and waits for the full waiting period to expire will receive a bounty at the top of the 10% to 30% range
- We thoroughly support the commission’s decision to have the rules support contacting the organization on receiving an allegation
- The SEC should understand, as it finalizes its rulemaking, that internal programs:
 - are highly motivated (for liability as well as reputational reasons) to conduct honest investigations;
 - are much faster in resolving issues that cause harm than a government investigation can be;

- are much more-informed and, therefore, can be more accurate and effective in resolving an employee's concerns;
- are designed to achieve an ethical organizational culture; and
- serve to a great extent as a place for employees to ask questions that prevent misconduct.
- Ensure that the SEC knows that there is no single, best design for an E&C program. Different-sized companies at different stages of development will have different-looking programs that can all be effective.

4. The commission will be overwhelmed with meritless reports if it doesn't clearly explain what should be submitted to it vs. what shouldn't

- The resources at the SEC will be insufficient to handle the volume of reports that will arrive
- We have a great system now whereby information is reported quickly and which can be acted on quickly by internal resources. The SEC, in contrast, might not get the information quickly to us or might not get it to us at all
- 90 days is too short a period of time for the internal investigation to conclude—it should be 180 days
- The SEC must communicate its rules and standards extremely clearly so that whistleblowers who come to realize their issue doesn't fit within its limited parameters will strongly consider utilizing their internal program (vs. the least desirable outcome: doing nothing at all)
- All the good being done by internal programs—which address all varieties of illegal and unethical conduct—can be harmed simply because of these regulations focused exclusively on violations of securities laws
- The SEC needs to know that a surprising number of reported issues aren't the issues its looking for—rewarding whistleblowers for going to SEC first will clog its system, which will usurp the resources that should be devoted to the type of wrongdoing called for in the legislation (let alone the other important anti-fraud work the SEC already does)

5. The commission should do all it can not to create perverse incentives that will cause more harm

- The rules have to be written so that no employee will ignore early signs of fraud in the hope of reaching the \$1 million threshold
- Compliance problems might continue to occur while all wait for the government to get through the mounds of allegations it will receive
- I hope the SEC considers how its Dodd-Frank rulemaking will affect companies' willingness to cooperate with government authorities and could undermine the credit they seek for self-reporting

Conclusion

As the standard-bearer for organizations that seek to prevent misconduct and support their employees' efforts to combat wrongdoing, the ECOA asks you to consider the comments above as you write Dodd-Frank rules that will inevitably influence the future of the E&C field—for better or worse.

Thank you, again, for the opportunity to provide comments. Please know that the ECOA and its members stand ready to assist the commission in any way.

Sincerely,

A handwritten signature in black ink that reads "Keith T. Darcy". The signature is written in a cursive, flowing style.

Keith T. Darcy
Executive Director

