SEC stays on mission, adopts effective whistleblower rules

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As expected, but by a surprisingly close vote, the Securities and Exchange Commission today adopted the final rules mandated by Congress as part of last year's Dodd-Frank Act. The Dodd-Frank Act required that the SEC pay eligible whistleblowers cash awards ("bounties") ranging from 10 percent to 30 percent of monetary sanctions collected where the SEC successfully enforces federal securities law on the basis of information provided by the whistleblowers. The Act also includes enhanced protections for those whistleblowers from retaliation by their employers.

The SEC's adopting release (like the proposing release) is over 250 pages.

There will be numerous law firm memos analyzing the rules *ad nauseum* and one can expect most of them to be alarmist. The tenor of most commentary on the proposed rules (influenced by large companies with effective whistleblower compliance programs already in place) was that the SEC needed to protect corporate America from greedy employees by providing whistleblowing protection only to those employees who first reported their concerns internally.

The Commission acknowledged those concerns by adding some provisions to the final rules that required that the Commission, in assessing the amount of bounty that might be awarded, consider whether a whistleblower had first reported the matter internally. Further, the Commission made changes that have the effect of assuring whistleblowers that reports that they make internally that eventually get reported to the SEC will still potentially be compensable to the same extent as if the whistleblower had gone direct to the SEC, and perhaps even enhanced in amount.

Nevertheless, the Commission refused in the final rules to mandate that a whistleblower report internally his or her concerns.

I applaud the Commission's backbone in this matter. One can easily imagine circumstances in which a whistleblower would have reason to doubt that an internal compliance function would vigorously review the whistleblower's concerns, and in the meantime the whistleblower could be exposed to uncertainty in employment or even personal safety concerns. And whistleblowers might be motivated by the immediate need to protect investors, a motivation as to which even the most disinterested corporate authorities might find some conflict.

While the new whistleblower rules (despite new provisions designed to deal with such abuse) might be abused by disgruntled employees with no reasonable or good faith basis to file a "tip" with the Commission, as many commentators representing larger companies fear, they also may provide a useful escape valve that had been missing before whistleblowers were first protected by the Sarbanes-Oxley Act of 2002 in reaction to the risks taken by the courageous Enron whistleblowers. Here in Indiana, perhaps investor funds could have been saved had there been an opportunity for employees who may have suspected wrongdoing to report it free of fear of reprisal in well-known recent Indiana scandals such as Alanar, Fair Finance/Durham, and Schrenker. In none of those situations did a strong internal control environment exist to which a concerned employee might have turned.

The SEC is, in the words of its original Chairman, the "investor's advocate". Today it stayed true to that mission.