Entities should qualify as Whistleblowers under the Dodd-Frank Act Whistleblower Program

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〈Abstract〉

In the aftermath of numerous corporate scandals in recent history that have shocked nations and generated enormous financial losses to investors around the world, the US Congress clearly recognized that the regulators and law enforcement authorities needed help in identifying and preventing fraud on timely basis. Help that Congress made available to the Securities and Exchange Commission (hereinafter referred to as “SEC”) was help from individual whistleblowers who report information relating to fraud and other violations of law directly to external law enforcement authorities. In this article, the term, “whistleblower,” refers to a person who makes an allegation of misconduct to an external authority.

Congress enacted on July 21, 2010 the Dodd-Frank Wall Street Reform and Consumer Protection Act (hereinafter referred to as the “DFA”) which, among others, established the most fortified whistleblower incentive and protection system seen in any federal law to date.

This article contends that the scope of whistleblowers covered by the DFA should be expanded to include entities, such as corporations, firms, associations, organizations, partnerships, limited liability companies, businesses or trusts (collectively, “Entities”). The SEC clarified in the Final Rule on Implementation of the Whistleblower Provisions (hereinafter referred to as the “Final Rule”) that only natural persons are eligible whistleblowers under the DFA since the term used in the DFA is “individual” and not “person” as was the case in the False Claims Act.

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While agreeing that SEC’s interpretation of the word, “individual,” as used in the DFA is a reasonable one, this article takes the view that the scope of whistleblowers should be reviewed and revised to include Entities because an important goal of the whistleblower program of the DFA is to enhance the law enforcement capability of the regulators by encouraging whistleblowers to provide quality leads directly to the regulators in a timely manner. More specifically, allowing such Entities to qualify as whistleblowers under the DFA will result in a much greater volume of tips in general and of high-quality tips in particular being submitted to the SEC on timely basis. Allowing a broad array of Entities to qualify as whistleblowers under the DFA will also have the added effect of legitimatizing the very act of whistleblowing by making it more commonplace and customary, thereby causing the public to regard it as less stigmatizing. The ultimate outcome that is desired is that more individuals and Entities would be encouraged to provide tips since the prevalence of whistleblowing will likely make the act of whistleblowing more socially acceptable and morally respectable. Individual whistleblowers who are not certain about the accuracy or relevance of their information would also be able to leverage on the resources of the Entities if they wish to assess the quality of their information or likelihood of successful enforcement action, or if they want to join forces with the Entities to strengthen their case.

To assess the full effect of allowing Entities to qualify as whistleblowers, this article will also address the potentially negative aspects of the proposal. Potential abuses of the whistleblower program such as frivolous or fraudulent reports being filed by competitors or labor unions, are explored as well as the potential side effect of special interest groups or civil societies propping up to take advantage of the financial reward stipulated under the DFA.

This article concludes by asserting that the harms or abuses that can be anticipated by the expanded definition of whistleblowers are outweighed by the benefits and urges that Entities be allowed to qualify as whistleblowers under the DFA. Inclusion of Entities in the definition of whistleblowers will go long way in the prevention of fraud and enforcement of securities laws by enlisting private sector resources, both the individual and organizational whistleblowers, to act as SEC’s eyes and ears in detecting corporate wrongdoing early on.

[Key Words] Dodd-Frank Act, SEC, whistleblowing, whistleblower protection, eligible whistleblowers, corporate fraud, financial reward, incentive to whistleblowing