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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

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November 9, 2004

Chairman William H. Donaldson
Securities & Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

Dear Chairman Donaldson:

As authors of the corporate whistleblower provision in the Corporate and Criminal Fraud Accountability Act, section 806 of the Sarbanes-Oxley Act, we have a particular interest in exercising oversight over its implementation and ensuring its aggressive enforcement to deter retaliation against corporate whistleblowers. Recently, the Department of Labor (DOL) Office of Occupational Safety and Health (OSHA) issued the first decision since enactment of the Sarbanes-Oxley Act finding retaliation by a public company against an employee in violation of Section 806. See *Hogan v. CheckFree Corporation*. This important decision has raised several issues for us regarding implementation of the Sarbanes-Oxley Act. Accordingly, we have several questions relating to this finding of retaliation vis a vis your respective criminal and civil investigative and enforcement powers.

1. Section 806 amended federal criminal law to prohibit public companies from discriminating in the terms and conditions of employment with respect to employees who: 1) provide information or make a complaint regarding conduct the employee reasonably believes constitutes a securities violation or securities fraud, or 2) file or participate in proceedings related to fraud against shareholders. Section 3(d) of the Act states clearly that: "a violation by any person of th[e Sarbanes-Oxley] Act ... shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 (15 U.S.C. ss78a et seq.) ... and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules and regulations." The criminal provisions of the Securities Exchange Act of 1934 (15 U.S.C. s78ff) state that "any person who willfully violates any provision of this chapter (other than section 78dd-1), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter . . . shall upon conviction be fined not more than \$1,000,000, or imprisoned not more than 10 years, or both." What is your position on whether or not a violation of the Section 806 whistleblower prohibitions can generate criminal liability under Section 3(d) of the Act?

Additionally, what is your position as to whether or not a violation of Section 806 whistleblower prohibitions can result in a company being subject to fines and other penalties under the SEC's enforcement jurisdiction? Please provide a detailed response of your position including, if appropriate, the number of criminal and/or civil-enforcement investigations that have been initiated as a direct result of suspected willful violations of the Sarbanes-Oxley Act including Section 806, the whistleblower provisions?

2. It is our understanding that the confluence of the provisions of the securities and criminal laws discussed in question (1) above is similar to the Atomic Energy Act of 1954, as amended (AEA). The AEA gives the Nuclear Regulatory Commission the authority to investigate allegations that employees of licensees or their contractors have been discriminated against for raising concerns and to take enforcement action if there is evidence of discrimination. See 10 C.F.R. 50.7. On the other hand, the Department of Labor also has the authority to investigate complaints of discrimination to provide a personal remedy to the employee if discrimination is found to have occurred. Given these two authorities, the NRC and DOL have entered into a Memorandum of Understanding to facilitate cooperation between the agencies. See 47 Federal Register 54585. Is there such a Memorandum of Understanding in place, being negotiated or contemplated between the SEC and the DOL with reference to the whistleblower provision in Sarbanes-Oxley and the criminal provisions in the Securities and Exchange Act? Please explain.

3. It is our understanding that the NRC has also promulgated regulations to prohibit discrimination that support the spirit of the whistleblower provisions contained in the AEA. See, 10 C.F.R. 50.7 and NRC Policy Statement, "Freedom of employees in the nuclear industry to raise safety concerns without fear of retaliation" (May 14, 1996). Can you provide us with the status of any regulation drafting process on the whistleblower provisions within the DOL?

4. The NRC requires that all licenses post notice to their employees regarding their rights under the whistleblower law. See NRC Form 3. Does the SEC require the posting of a similar notice?

5. Without commenting on the pendency of any particular criminal investigation, can you advise us whether or not there is a mechanism in place for notifying the enforcement sections of SEC, when a decision of OSHA like the one in the *Hogan v. Checkfree Corporation* case makes a finding that Section 806 was violated? If so, would you provide us information on that process?

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As we stated at the outset, in order for Sarbanes-Oxley to be effective, it must be vigorously enforced and subject to vigorous oversight. We look forward to your prompt response on these issues.



PATRICK LEAHY
Ranking Democratic Member



CHARLES E. GRASSLEY
United States Senator