Certification Pursuant To Section 25100(o) – Why It Still Matters (Part 2) And A Comment on H.R. 2483

August 31, 2011 by Keith Paul Bishop

Section 15100(o) and Usury

Yesterday, I wrote about the continued significance of certification by the Commissioner of Corporations of national securities exchanges pursuant to Section 25100(o) of the Corporations Code. Today is Part 2 of that discussion.

As discussed in this earlier post ("The 'Usury Permit' – Fact or Fiction?"), the California Constitution imposes limitations on the amounts that may be charged for a loan or forbearance. Cal. Const. Art. XV. The Constitution permits the legislature to create a class of transactions or persons who are exempt from these usury provisions. Pursuant to this authority, the California legislature has enacted Section 25117 of the California Corporations Code.

Section 25117 exempts evidences of indebtedness and purchasers or holders thereof if the issuer has any security listed or approved for listing upon notice of issuance on a national securities exchange certified by the Commissioner pursuant to Section 25100(o). The statute also provides exemptions if the evidence of indebtedness has a specified rating or the issuer is subject to Section 13 of the Securities Exchange Act of 1934 and has specified levels of shareholders' equity and consolidated net income. For a chart listing the exchanges currently certified by the Commissioner under Section 25100(o), see this post from earlier this week.

A Comment on H.R. 2483 - Is it Right for the SEC to Pay People to Break State Law?

Yesterday, Broc Romanek wrote about H.R. 2483 in TheCorporateCounsel.net Blog. Recently, I sent a letter to the bill's author, Michael Grimm (R-NY), with the following suggestion:

I do recommend that your bill be amended to preclude payments of bounties for information that is disclosed to the Commission in breach of state-law confidentiality requirements, such as those imposed on auditors. The Commission's final Whistleblower Rules do not preclude such payments. See SEC Release No. 34-64545 (May 25, 2011) fn. 117.

In essence, the Commission has taken the position that it is appropriate to reward persons for violations of state law. However, paying bounties in these cases may, depending upon the

circumstances and jurisdiction, constitute suborning or abetting the violation of state law. To the extent that Commission lawyers are involved, their actions may violate state bar professional standards. For example, Rule 3-210 of the California Rules of Professional Conduct provides in relevant part: "A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid."

Notably, the Commission has not asserted that the Whistleblower Rules preempt state laws and regulations or that those laws and regulations are invalid. Moreover, I believe that Congress has not delegated to the Commission either the express or implied authority to preempt state laws in this regard.

Accordingly, I strongly urge that you amend H.R. 2483 to preclude the payment of bounties when the information is provided to the Commission in violation of applicable state laws and regulations.

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