

Second Circuit Affirms Dismissal of “Creative Attempt to Recast Corporate Mismanagement as Securities Fraud”

by Michael Rowe, James K. Langdon, and Ian Blodger

The Second Circuit’s recent decision in *Singh v. Cigna Corp.*, confirms that puffery regarding a corporation’s compliance program cannot form the basis for a stock drop suit.

In 2012, Cigna sought to expand its Medicare insurance offerings by purchasing HealthSpring Inc., a Medicare insurer based in Tennessee. Cigna understood that its entry into the Medicare insurance market would require compliance with significant regulatory responsibilities. Following the transaction and in light of these heightened regulatory obligations, Cigna made several statements about its compliance programs in 10-K disclosures and marketing materials. In general, these statements noted that Cigna had adopted policies to comply with applicable regulations and had devoted significant resources to its compliance efforts. Cigna noted, however, that the regulations were complex, difficult to comply with in certain circumstances, and subject to frequent modification and administrative discretion.

Despite Cigna’s efforts, the Centers for Medicare and Medicaid Services (“CMS”) issued dozens of notices to Cigna for various compliance infractions. In 2015, CMS audited Cigna’s compliance systems, and issued a letter concluding “Cigna had substantially failed to comply with CMS requirements.” Upon receiving notice of CMS’s conclusion, Cigna issued a Form 8-K disclosing CMS’s letter and the imposition of sanctions. Cigna’s stock price fell on the news.

Plaintiffs brought a Section 10(b) and Rule 10b-5 action alleging Cigna misrepresented the nature of its compliance program. Plaintiffs claimed: “(1) a reasonable stockholder would rely on [Cigna’s compliance] statements as representations of satisfactory legal compliance by Cigna; and (2) that when the statements were made, Cigna was not, in fact legally compliant.” The district court dismissed the suit concluding the plaintiffs had failed to sufficiently allege a materially false statement and scienter.

On appeal, the Second Circuit concluded the dismissal was proper because the

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compliance statements amounted to “puffery,” and no reasonable stockholder would consider the statements “important in deciding whether to buy or sell shares of stock” and therefore the statements could not be a *material* misstatement. Critical to the court’s conclusion was the fact that Cigna’s statements did not explain its compliance program in detail and noted the difficulty of complying with a changing regulatory landscape. These characteristics distinguished Cigna’s statements from the very detailed descriptions the Second Circuit has previously found to be actionable. See *Meyer v. Jinkosolar Holdings Co.*, 761 F.3d 245 (2d Cir. 2014).

This is a significant ruling from the Second Circuit. First, it will likely curtail what had been a growing focus in securities fraud claims: whether a company’s general statements about its compliance or ethics policies in the face of a regulatory enforcement action could constitute securities fraud. And second, by comparing Cigna’s generic statements with the more specific statements addressed in *Meyer*, the Second Circuit has effectively offered companies guidance on how to describe their compliance policies in SEC filings or in other public settings. The Court suggested, for example, that Cigna’s statements about its compliance efforts “were framed by acknowledgements of the complexity and numerosity of applicable regulations. Such framing suggests caution (rather than confidence) regarding the extent of Cigna’s compliance.”

Case: *Singh v. Cigna Corp.*, No. 17-3484-cv, 2019 U.S. App. LEXIS 6637 (2d Cir. 2019)