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December 17, 2010

Mary L. Schapiro
Chairman
Securities and Exchange Commission
1 00 F Street, NE
Washington, DC 20549-2736

RE: Comments on Proposed Rules under Dodd-Frank Wall Street Reform and Consumer Protection Act, File No. S7-33-10, RIN 3235-AK78

Dear Chairman Schapiro:

Thank you for the opportunity to comment on the proposed regulations to implement the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Thank you, also, for the helpful memorandum issued with the proposed regulations. We notice that the Commission's memorandum finds that the proposed regulations "would limit the pool of eligible whistleblowers and thereby reduce the number of potentially useful informants." Proposed Rule, p. 112. They would "discourage potential whistleblowers from coming forward" by "heightening the standards for eligibility." Proposed Rule, p. 117. They would further "discourage some whistleblowers from submitting potentially useful information." Proposed Rule, p. 118. They could "result in instances in which the Commission does not receive important information regarding potential violations," Proposed Rule 118, and "cause those persons not to come forward with information in their possession about securities law violations." Proposed Rule, p. 118. Finally, they would "result in . . . forgone opportunities for effective enforcement action." Proposed Rule, p. 118. The proposed procedures for filing a claim will be "burdensome and confusing" for many whistleblowers. Proposed Rule, p. 116.

As noted on page 7 of the Commission memorandum and in the Senate Report accompanying the legislation, "[t]he Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government;" affording broad anti-retaliation protections to whistleblowers furthers this legislative purpose. S. Rep. No. 111-176 at 110 (2010). The staff comments above show that the proposed regulations fail a cost-benefit analysis. NWC urges rejection of the proposed rules on grounds that they are contrary to the purposes of the Act. It is time to make rules that are consistent with the remedial purposes of the legislation.

Unlike some other laws, the Dodd-Frank Act does not give the Commission authority to make substantive changes to the law. All regulations must be consistent with the purposes of the Act. The purpose of the Act is to motivate whistleblowers to come forward with information that will assist in the detection of fraud and the prosecution of violations. It is not to encourage internal corporate compliance programs, although that remains one of the avenues through which fraud can be detected. The regulations must carry forward the purpose of protecting and encouraging

employees in all activities that detect fraud, through all lawful means.

A. Introduction

The National Whistleblowers Center submits these comments to the proposed regulations at 17 CFR Parts 240 and 249. I am the Executive Director of the National Whistleblowers Center (NWC). With these comments, we are submitting a report explaining in further detail the empirical data available to assist the Commission accomplish the remedial goal of the Act.

Established in 1988, the **National Whistleblowers Center (NWC)** is a non-profit tax-exempt public interest organization. The Center regularly assists corporate employees throughout the United States who suffer from illegal retribution for lawfully disclosing violations of federal law. NWC maintains a nationwide attorney referral service for whistleblowers, and provides publications and training for attorneys and other advocates for whistleblowers. NWC has consistently advocated for the same level of protection for employees who raise concerns internally as for those who raise concerns with government agencies. NWC has participated as *amicus curiae* in the following cases: *English v. General Electric*, 110 S.Ct. 2270 (1990), *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (1985); *EEOC v. Waffle House*, 534 U.S. 279 (2002); *Haddle v. Garrison*, 525 U.S. 121 (1998); *Vermont Agency Of Natural Resources v. United States ex rel. Stevens*, (98-1828) 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000).

In 2002, the Center worked closely with the Senate Judiciary Committee and strongly endorsed its efforts to "prevent recurrences of the Enron debacle and make similar threats to the nation's financial markets." 148 Cong. Rec .S. 7420 (daily ed. July 26, 2002) (remarks of Senator Leahy, quoting from letter signed by the Center as well as the Government Accountability Project).

Senator Leahy recognized the role of NWC in the enactment of SOX:

> This "corporate code of silence" not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied. …
>
> Unfortunately, as demonstrated in the tobacco industry litigation and the Enron case, efforts to quiet whistleblowers and retaliate against them for being "disloyal" or "litigation risks" transcend state lines. This corporate culture must change, and the law can lead the way. That is why S. 2010 is supported by public interest advocates, such as the National Whistleblower Center, the Government Accountability Project, and Taxpayers Against Fraud, who have called this bill "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial

markets."

S. Rep. 107-146, at 10.

NWC advocates on behalf of whistleblowers because these truth-tellers uncover and rectify grave problems facing our federal government and our society at large. Whistleblowers are a bulwark of accountability against those who would corrupt government or corporations. Therefore aggressive defense of whistleblowers is crucial to any effective policy to address wrongdoing or abuse of power. Conscientious employees who point out illegal or questionable practices should not be forced to choose between their jobs and their conscience.

Whistleblowers who take an ethical stand against wrongdoing often do so at great risk to their careers, financial stability, emotional well-being and familial relationships. Society should protect and applaud whistleblowers, because they are saving lives, preserving our health and safety, and protecting vital fiscal resources.

In this vein, the Commission would benefit from the regulatory experience of the Nuclear Regulatory Commission (NRC). NRC has a long-standing whistleblower protection program. See, for example, 10 CFR 50.7 and 29 CFR Part 24.

B. Other whistleblower protection programs provide models for encouraging employees.

The purpose of employee protections is to afford protection for those who help to protect the environment, assist the government in obtaining compliance, and participate in other activities that promote the statutory objectives. In enacting SOX, Congress looked to the legislative history of the environmental and nuclear whistleblower protections. Congress intended that the courts and the SEC broadly construe the employee protection, just as courts and the Department of Labor have broadly construed previous employee protections. Congress expressed the same intention with the amendments to the False Claims Act, 31 U.S.C. § 3729, et. seq.

Employees can play an important role in protecting the public from corporate fraud, just as they do for environmental and nuclear safety dangers. They can keep managers and government officials honest by exposing attempts to cover up dangers. Discrimination against whistleblowers obviously deters such employee efforts on behalf of the public purposes. Accordingly, the federal statutes prohibit such discrimination. To achieve the ends of eliminating discrimination, and protecting complainants from retaliation, the law mandates that "employees must feel secure that any action they may take" furthering "Congressional policy and purpose, especially in the area of public health and safety, will not jeopardize either their current employment or future employment opportunities." *Egenrieder v. Metropolitan Edison Co./GPU*, 85-ERA-23, Order of Remand by SOL, pp. 7-8 (April 20, 1987). The whistleblower protection laws were passed in order to "encourage" employees to report safety violations and protect their reporting activity. *English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270, 2277 (1990); *Wagoner v. Technical Products, Inc.*, 87-TSC-4, D&O of SOL, p. 6 (November 20, 1990)(the "paramount purpose" behind the whistleblower statutes is the "protection of employees"). Accord, *Hill, et al. v. T.V.A.*, 87-ERA-23/24, D&O of Remand by SOL, pp. 4-5 (May 24, 1989). Consequently, there is a need for "broad construction" of the statutes in order to effectuate their purposes. *DeFord v. Secretary of Labor*, 700 F.2d 281,286 (6th Cir. 1983). In *Passaic Valley Sewerage Comm. v. Department of Labor*, 992 F.2d 474, 479 (3rd Cir. 1993), the Third Circuit stated:

> . . . from the legislative history and the court and agency precedents . . . it is clear that Congress intended the 'whistleblower' statutes to be broadly interpreted to achieve the legislative purpose of encouraging employees to report hazards to the public and protect the environment by offering them protection in their employment.

C. Internal and external whistleblowing should receive the same protection and encouragement.

On page 4, the Commission's memorandum discusses a potential concern about the effect of rewards on internal corporate compliance programs. This subject is addressed by the attached report. It shows that the similar reward program in the False Claims Act (FCA) has not deterred conscientious employees from raising concerns internally. There is no data to support the concern that the reward program would discourage employees from raising concerns through established corporate programs. NWC strongly urges that the Commission rules be revised and implemented consistent with this principle and treat employees equally whether they choose to make their disclosures internally, externally, or both. The purpose of the law is to encourage the disclosures that help detect fraud, and all such disclosures deserve protection and encouragement.

D. No additional exclusions can or should be made by regulation.

The Dodd-Frank Act sets out its own exclusions from the whistleblower reward program. The Commission has no jurisdiction to alter or expand this set of exclusions. Nor should it attempt to do so. Any such attempt would invite perpetrators of fraud to structure corporate organization and employment contracts to maximize the number of persons who would be denied encouragement to report fraud. Any exclusion from the reward program that is not required by the Act would discourage employees from coming forward. Expanding the exclusions reduces the number of frauds that will be detected.

The purpose of the Act is to detect fraud. It is not to better define the scope of professional obligations. For example, to the extent that attorneys have privileged information that would assist in the detection of fraud, the established law on the scope of the attorney-client privilege should determine if that information can be used as evidence. To the extent that the information is not privileged and can be used in evidence, then attorneys should be encouraged to come forward with that information. If it cannot be used in evidence, then there is no purpose to providing any reward for its disclosure. The Commission should defer to the existing and evolving body of law on the admission of evidence to determine the scope of the information that can support a reward.

E. Forms should be simple and facilitate adjudication on the merits.

The Commissions proposed forms are too complex. NWC urges the Commission to make clear that use of the form is not required and submissions can be made without the form. See 29 CFR § 24.103 for an example of a rule that does not require a form for submission. Rules requiring a form of submission invite adjudication on technicalities rather than the merits. Corporate defense counsel never like to receive the bad news of a claim against the company and they will look for technicalities to avoid the merits whenever possible. The public policy calls for adjudication on the merits.

F. All submissions should be encouraged.

The Commission memorandum, p. 5, states that the Commission is looking for "high-quality tips" and wants to deter "false submissions." Fraud detection depends on getting the initial report of suspicious activity. Employees may see only the tip of an iceberg and they would have no way of knowing the full scope of the fraud they detected. Therefore, effect fraud detection programs will encourage the submission of all reports of suspicious activity.

There is no data suggesting that employees would risk jeopardy to their careers to submit claims they could not prove. There is no data of employees submitting false claims under the False Claims Act. The Commission should base its regulatory policy on facts and data, not speculation and hypotheticals.

Any provisions that discourage the submission of "low-quality" or other tips will reduce the actual number of frauds detected and thereby work against the legislative purpose. The Commission should remove from the proposed regulations all provisions that would punish whistleblowers or their attorneys. Any fear or apprehension of penalty would work against the public purpose of encouraging employees to come forward with information about suspicious activity.

The False Claims Act protects employees who are collecting information about possible fraud "before they have put all the pieces of the puzzle together." See, *e.g., U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 739-40 (D.C. Cir. 1998). The same doctrine should apply to the Dodd-Frank Act to encourage employees to report any observation of even a portion of suspicious activity.

G. No exclusion should apply for participation in a violation.

The Act contains its own exclusion for those who initiating a violation without direction from a superior. No other exclusion is necessary or desirable. Since the False Claims Act was first adopted in 1863, it was understood that "it takes a rogue to catch a rogue." Perpetrators of fraud often need the assistance of others to accomplish their plans for ill-gotten gains. This is an inherent weakness of criminal conspiracies that the law wisely seeks to exploit. When perpetrators involve others in their crimes, they should forever face the risk of any of their

cohorts might turn state's evidence against them. The state needs to catch these opportunities, and encourage participants to come forward, even if they themselves had been employed in the commission of the violations. Who else would better understand the inner workings of the fraud? The attached report reviews empirical evidence of the value of reports for all manner of employee who may have knowledge of suspicious activity.

H. No exclusion for CFTC proceedings.

On page 8, the Commission seeks comment on proposed rule 21F-3(d) which would prohibit rewards if the CFTC has issued or denied a related reward. The doctrine of res judicata should apply only to the final outcomes of due process hearings. No automatic rule should bar rewards to whistleblowers. The interaction of the SEC and CFTC programs can be adjudicated on a case-by-case basis to avoid double recoveries. The CFTC process can be evidence, but it should not be a bar.

NWC encourages the SEC to enter into a Memorandum of Understanding (MOU) with the CFTC, and with other law enforcement programs that have overlapping jurisdiction. These could include the DOJ (both civil fraud and criminal), Department of Labor and IRS. Other whistleblower programs have similar MOUs. See for example, Notice of Signing of a Memorandum of Understanding Between the Federal Aviation Administration (FAA) and the Occupational Safety and Health Administration (OSHA), 08/30/2002, 67 FR 55883. How else will the SEC enforcement personnel have access to information in sealed cases handled by DOJ? It is clearly beneficial for the Commission to act strategically to maximize the amount of information available to its staff.

I. No exclusion for receipt of a subpoena or imposition of a duty.

The public interest will gain nothing from an exclusion that prohibits rewards to whistleblowers who make disclosures have receiving a subpoena. To the opposite, it is in the public interest to encourage everyone to make voluntary disclosures up to the minute when they are testifying under the compulsion of legal process. The first-to-file rule adequately protects the public fisc from multiple claims on the same fraud. The public interest is served by receiving multiple reports from a variety of employees so that enforcement personnel can have a wider view of the available information. NWC urges against the proposed rule 21F-4(a)(1). The IRS reward program has no exclusion from rewards for persons served with a subpoena. By adopting this proposed rule, the commission will be giving up one of the most valuable tools available: the opportunity to turn a witness from a hostile witness to a cooperating witness. Commission staff should not feel any pressure to refrain from pursuing lawful subpoenas. Adoption of this proposed rule would mean that once they serve a subpoena, they could no longer make a viable offer of legal rewards for turning state's evidence.

Similarly, the public interest is not served by denying rewards for those who have a legal duty to report information. Just because a person has a legal duty to disclose does not mean that the person would be free from supervisory pressure to conceal a fraud. The statute sets out its own exclusion at Section 21F(c)(2), and this Commission should not seek to expand the exclusion.

The Commission should not tempt fraudsters into establishing contracts or corporate duties that would deny certain witnesses from receiving lawful rewards for reporting frauds. NWC urges against the proposed rule 21F-4(a)(2).

J. "Independent knowledge" should follow FCA standards

On page 18, fn 21, the Commission memorandum acknowledges that Congress amended the False Claims Act to remove the "direct and independent knowledge" requirement. Congress recognized that the requirement worked against the public interest of maximizing the detections of fraud. This Commission should follow suit and adopt rules that reflect the current standards under the FCA. NWC urges the Commission to reject proposed rule 21F-4(b) as it would work against the public policy of the Act. This proposed rule also expands the exclusion for attorneys and accountants. The Commission has no need to tinker with the statutory exclusions, and any attempt to expand them works against the remedial purpose of the law.

K. Internal reporting should not be required, should be treated equally with direct reports to government, and should not be constrained with time limits.

NWC's report submitted with these comments documents the prevalence of employee reports of fraud as the primary source for detecting fraud. The Commission's memorandum appreciates the value of effective internal compliance programs, but the proposed regulations contain flaws that undermine the remedial purpose of the law.

First, it is contrary to the public policy established by the Act to require internal reporting. Giving whistleblowers a greater reward when they report internally would also be contrary to the Act. The public purpose is served by encouraging all routes of disclosure and all such routes should lead to the same opportunity for rewards. The IRS reward program has no exclusion or limitation on rewards for persons based on whether or not they participating in internal compliance programs.

The Act specifically permits anonymous disclosures. This provision excludes any idea that the Act would want to require internal reporting or encourage internal reports with higher rewards. Internal reports create the greatest risk of disclosure of identity. Anonymous reporters will naturally prefer to make reports directly to the government. It would be consistent with the law to provide such anonymous reports the same opportunity to receive the same reward.

Second, time limits for reporting should be no more strict than what is provided by law. NWC urges the Commission to reject the 90-day time limit to file with the SEC after an internal report. The added time limit will just add to the procedural hurdles for whistleblowers. If corporate defense counsel can defeat or lessen a reward on technicalities, then the cause of fraud detection will suffer.

L. The Commission should not restrict attorney's fees.

It is not the Commission's role to regulate contingent attorney fee agreements. Every state and

the District of Columbia have their own agencies to regulate attorney conduct. Contingent fee agreement are helpful in expanding access to legal service for those who could not otherwise afford market rates. In assessing the propriety of attorney fee awards, government should look to those market rates and not the contract between attorney and client. See *United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n. Local No. 307 v. G&M Roofing Sheet Metal Co*., 732 F.2d 495, 504 (6th Cir. 1984). State authorities are the proper authorities for policing against excessive attorney fee agreements. Bar rules prohibit excessive fees, and either the SEC or a client can file a compliant with Bar Counsel.

M. The Commission should not threaten attorneys with sanctions.

The Commission should encourage whistleblowers to retain counsel, and should endeavor to expand the pool of available counsel for whistleblowers. Requiring attorneys to be registered with the SEC is counterproductive. Attorneys do not need specialization in securities law to handle employee claims. Moreover, the threat of sanctioning attorneys with SEC enforcement actions serves as a discouragement and is contrary to the goal of encouraging whistleblower disclosures through the available pool of employment attorneys.

A monetary sanction against an attorney is "an extreme sanction, and must be limited to truly egregious cases of misconduct." *Jones v. Continental Corp.*, 789 F.2d 1225, 1232 (6th Cir. 1986). A contrary approach would have a chilling effect on plaintiffs seeking to vindicate rights and further the public policies underlying the laws they help enforce. The Supreme Court made this clear in *Christiansburg*, noting that assessing attorney's fees against non-prevailing civil rights plaintiffs "simply because they do not finally prevail would substantially add to the risks inherent in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement [of Title VII];" therefore, such awards should be permitted "not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious." *Christiansburg*, 434 U.S at 421, 422. In *Christiansburg*, the Supreme Court explained that the plaintiff in a Title VII case is "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Id.* at 418 (quoting *Newman v. Piggie Park Enterprises,* 390 U.S. 400, 402 (1968)). Under Dodd-Frank, attorneys serve a similar function in assisting the government in fraud detection and encouraging whistleblowers to come forward with disclosures.

Imposing sanctions through SEC enforcement actions has an undeniable chilling effect. In *Riddle v. Egensperger*, 266 F.3d 542, 547, 551-52 (6th Cir. 2001), the Court said:

> A potential plaintiff's fear of an increased risk of being assessed attorney fees . . . would create a disincentive to the enforcement of civil rights laws and would have a chilling effect on a plaintiff who seeks to enforce his/her civil rights, especially against a government official. . . . [T]he District Court cannot engage in *post hoc* analysis based on their findings in favor of Defendants . . .. This type of hindsight analysis discourages individual citizens from bringing suits to enforce their civil rights.

NWC urges this Commission to eliminate any provision for sanctions against whistleblowers and

their attorneys. Even the suggestion of such sanctions can have a deterrent effect against the very reports the law seeks to encourage.

The SEC is not powerless to police attorneys who appear before it. The SEC, like other agencies, can and should refer any attorney who violates appropriate standards to their Bar Counsel for discipline.

N. The Commission's rulemaking authority under § 21F is limited and must ensure that rules encourage employees to report potential violations to the SEC.

As previously noted, on page 7 of the Commission memorandum and in the Senate Report accompanying the legislation, "[t]he Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government." S. Rep. No. 111-176 at 110 (2010). This clear statement of legislative intent, combined with the explicit and detailed statutory language, sets forth strict parameters on the Commission's rulemaking discretion. The rules cannot be used to create exclusions from coverage or impediments to rewards. As set forth in § 21F(j), the Commission's rulemaking authority is limited to "implementing" the program dictated by Congress, and this implementation must be "consistent with the purposes of the section."

O. No *per se* restrictions can be placed on employees who perform compliance, audit or legal functions.

On page 27 of the Proposed Rue the Commission staff recommended that employees who learn of "information through" a company's "legal, compliance, audit or similar functions" should be excluded from obtaining a reward. This exclusion is not based on the statute, in which Congress carefully carved out specific statutory exemptions.

The report filed today by the NWC also demonstrates that the existence of a *qui tam* program will not have any negative impact on a company's compliance and audit functions.

These employees can serve a vital role in providing information to the SEC. In fact, compliance and audit officials are often subject to retaliation for doing a good job, and are often the targets of pressure to water-down findings or ignore issues. In fact, the 1986 legislative history of the False Claims Act referenced a case in which a corporate compliance-related employee was the prototypical whistleblower. *See Mackowiak v. University Nuclear Systems Inc.*, 735 F.2d 1159 (9th Cir. 1984), *cited in* S. Rep. No. 99-345 (analysis of section 6).

P. The "hearsay" exception has no basis in law

The Proposed Rules create a "hearsay" exception for reporting. If a person learns

of a violation from someone employed in one of the "excluded" rule-created excluded categories, said person cannot file a claim.

This rule has not basis in the statute and is counter-productive to the legislative intent. The goal of Dodd-Frank is to ensure effective and efficient detection of potential frauds, and the immediate communication of those frauds to an appropriate authority. This proposed rule is creates absurd results. For example, assume someone worked for Bernie Madoff, and overhead a conversation in which a compliance officer admitted to the Ponzi scheme. Unquestionably Congress would want this person to quickly report the fraud to the SEC, and Congress would expect that this person would be rewarded.

Q. The Commission's Concern over Obtaining Improper Evidence is Easily Resolved

On page 31 of the Proposed Rule the Commission raises the issue of how it should handle information provided to it that may have been produced in violation of judicial or administrative orders. Similar concerns were raised concerning attorney-client information.

This concern should be easily resolved. If information provided by a whistleblower is subject to a legitimate privilege that would exclude its use as evidence in administrative or judicial enforcement/criminal actions, then the information could not be considered the basis for a reward. The information is simply not usable. However, if information provided to the Commission can be used in enforcement proceedings, then that information should be considered part of the basis for a reward.

R. The 90 day rule should be not be approved

On page 32-33 of the Proposed Rule the Commission staff recommended a 90 day time period for employees who file information with "another authority" to file claims with the SEC.

There is no basis for this 90 day rule. First, the Commission should establish mechanisms for sharing information between all agencies that may obtain information concerning violations of law within the jurisdiction of the SEC. Joint task forces should be standard operating procedures, and the Whistleblower Office should assist in this process. Second, there is no reason to place such a limitation on employee-whistleblowers. The statute sets forth a statute of limitations for filing claims, and that statue of limitations should be controlling regardless of whether an employee files a similar or related claim with another agency, with internal compliance or as part of any other adjudication or lawsuit.

S. There is no public policy requiring companies to receive reports

concerning potential violations of law prior to law enforcement learning of these violations

Throughout the Proposed Rule, and specifically on page 34 of the proposal, Commission staff references a public policy that encourages whistleblowers to give "employers an opportunity to address misconduct before" allegations are filed with the Commission.

No such policy exists under federal law. All whistleblower laws strongly protect and encourage employees to make disclosures directly to law enforcement. This policy creates a double standard. One for white collar criminals employed on Wall Street, and another for other classes of criminals. Why should a company be given a "heads up" on its official misconduct? Why should a company be given information about potential criminal activity, and provided an opportunity to cover-up the problem, warn the wrongdoer, or create a defense? If an employee witnesses a crime, public policy mandates that the employee report that crime immediately to the police.

There can be no double standard in the obligation to report criminal activity to law enforcement. Section 1107 of the Sarbanes-Oxley Act established the actual federal policy on this issue. Under §1107, every person has the right to report suspected crimes to federal law enforcement, and *any interference* with that right not only is prohibited as a matter of federal law, it is criminally prohibited. Dodd-Frank created a civil cause of action for violations of § 1107. Thus, the existence of a compliance program does not create a policy that in any manner justifies a delay in reporting crimes to law enforcement. Furthermore, if a company or government agency used the pretext of a compliance program as a justification for retaliating against an employee, or denying an employee a monetary benefit, such conduct is criminalized under § 1107.

The attempt to use compliance programs as an excuse to delay reporting potential criminal activity to the police (including the SEC) reveals a cultural basis which both the Sarbanes-Oxley Act and the Dodd-Frank Act were intended to eliminate. A crime is a crime. It must be promptly reported to the authorities. No criminal has a right, direct or indirect, to get a "heads up" that their wrongdoing was discovered. No criminal has a right to cover-up or take evasive action because of an early-warning system implemented by a corporation with an interest in either preventing t he detection of the crime, downplaying the significance o the crime or creating an early-bird defense to the crime.

T. The "essential information" standard is not supported under the law

In various sections of the Proposed Rule, and directly on page 38 of the staff's proposal, the Commission proposed that high standards be placed on certain employees. For example, the standard for obtaining a reward set forth on page 38

is an "essential information that the staff would not have otherwise obtained" standard. *See also e.g.*, "principal motivating factor" standard; "high quality" standard; "significantly contributed" standard; "essential to the success" standard, the "essential" standard, set forth on pages 39 and 41 of the Proposed Rule.

These are not the standards established under the law. Section 21F sets forth the informational standard. The Commission cannot selectively or otherwise increase that standard. These standards may come into play when the Commission is determining the level of a reward, but they cannot be used to exclude a person from eligibility to obtain a reward.

U. The "single captioned action" rule should not be adopted

For calculating monetary sanctions, the Commission is proposing a "single captioned" action standard. Proposed Rule, p. 43. This rule should not be adopted. It places form over essence, and permits the SEC to deny claims based solely on the procedures used to administratively process information provided by a whistleblower. A reward must be based on the aggregate of all recoveries obtained by information provided to the SEC by the whistleblower. This aggregate should be based on recoveries related to any and all SEC proceedings, and to related proceedings instituted by other agencies based on the information provided by the whistleblower. It is the intent of Congress to pay these rewards to encourage employees to step forward. The rules should be drafted so as to encourage the payment of rewards and thereby induce other employees to step forward and file claims.

V. Whistleblowers must be notified and be provided an opportunity to oppose the disclosure of their identifies

On page 53 of the Proposed Rules the Commission anticipates that there may be circumstances in which the "identify of a whistleblower" must be revealed. First, this provision cannot apply to whistleblowers that file anonymously. In other words, the Commission cannot under any circumstances have the authority to compel the attorney for the anonymous whistleblower to identify his or her client.

Second, in cases in which the Commission knows the identify of the whistleblower, the Commission should be required to give timely notice to the whistleblower that his or her identify may be revealed, and the whistleblower must be given an opportunity to seek a protective order preventing such disclosure.

W. Whistleblowers should have an opportunity to correct their filings

The law does give the Commission the authority to deny a reward if a request is not filed in the proper manner. This is a procedural rule, not a substantive rule.

Regardless, because the goal of the law is to encourage disclosures by paying rewards, the Commission should establish by rule a procedure in which if a whistleblower's submission was defective, the whistleblower would receive notice of the defect and be provided a reasonable opportunity to correct the mistake.

X. The Commission cannot require confidentiality agreements

The Commission is proposing to give its staff the authority to require whistleblowers execute confidentiality requirements. Proposed Rule, p. 57. Such confidentiality requirements must be voluntary.

First, the standards established by Congress for determining the amount of a reward (i.e. whether a reward should be 10%, 30% or somewhere in between) contain a factor related to the amount of cooperation the whistleblower provides to the office. Under the law, a whistleblower can simply file his or her request and go home. They are under no duty to work for free for the SEC, and they cannot be required to provide any additional assistance. Most employees will want to cooperate with the SEC, in order to be eligible for a higher reward and/or to ensure that the SEC understands their allegations.

If an employee does not cooperate with the SEC in its investigation (including declining to execute a reasonable non-disclosure agreement), the Commission can use that as a reason to limit the size of a reward, but cannot use that factor as grounds for disqualifying a whistleblower from eligibility for a reward.

Second, the whistleblower may want to inform various persons of the underlying misconduct, including investors or clients.

Third, under the First Amendment, the whistleblower has a constitutional right to communicate matters of public concern to Congress or the press. The Commission cannot establish rules that require an employee to give up his or her First Amendment rights in order to qualify for participation in a whistleblower program.

Fourth, a whistleblower may need to file a complaint against Commission staff, and his or her right to file such a complaint cannot be compromised.

Y. There is no justification for a blanket exemption on the eligibility of foreign officials

On page 58 of the Proposed Rule, Commission Staff recommend a blanket exclusion against foreign officials filing claims. Again, such a blanket exclusion has not basis in law. Such exclusions may be considered on a case-by-case basis, and thereafter subject to judicial review.

This blanket exclusion may significantly interfere with the enforcement of the Foreign Corrupt Practices Act.

Z. The SEC should use the standard "sworn" statement utilized by the IRS and other agencies

The Proposed Rule, on page 60, creates a complex and expansive "swearing" statement. This expansive statement is designed to deter "false or spurious allegations." There is no factual basis to conclude that the Commission need worry about "false or spurious allegations" being filed under § 21F. In any event, these allegations are not filed in open court, they are filed with the Commission staff, who should be able to determine the validity of the claims. If a whistleblower publicly releases information that is defamatory, they can be held accountable.

The IRS has a swearing statement that is consistent with similar statements used by other federal agencies. The SEC should adopt that statement.

AA. The administrative Process is To Complex

On page 69 of the Proposed Rule, the Commission sets forth a graph of the administrative process designed to adjudicate reward requests. On the face of that graph, it is clear that the procedures are far too complex. A whistleblower should be required to fill out a simplified form, consistent with the form recommended by the Inspector General. For there, the process should be "user-friendly," and focused on a process designed to facilitate a final settlement between the SEC and the employee, in which both sides can reach an agreement on the basis for a reward, and the percentage amount. If an agreement cannot be reached, there should be an appeal process. If that process does not fully resolve the dispute, the whistleblower can obtain judicial review.

BB. The requirement that whistleblowers re-file their claim within a sixty day period is unworkable

The sixty day re-filing requirement identified on page 70 of the Proposed Rule must be eliminated. It is complex, not "user friendly," and presupposes that the whistleblower and the SEC will not have a cooperative relationship. The recommendations of the Inspector General should be followed in this regard. There should be regular communications between the whistleblower and SEC staff. A claim should be given a number, and monitored from beginning to end. Whistleblowers should be given regular notice as to the status of their claims, including a formal written notice every 90-180 days. This will prevent allegations from falling through the cracks. A settlement process should be built into the process. Once the SEC determines that monetary sanctions etc. may be collected on the basis of a whistleblower's claim, the whistleblower should be included in a

process designed to establish the basis (if any) for a reward, and the percentage amount. The SEC and the whistleblower should be encouraged to reach a consent agreement. This agreement would be binding on the agency and the whistleblower, and reduce the time and expense for litigating appeals.

CC. Relief if SEC Wrongfully Denies a Reward

The Final Rule should permit a whistleblower who is wrongfully denied a reward to obtain, as a matter of course, attorney fees from the SEC under the Equal Access to Justice Act, if the denial is reversed either through an administrative appeal or through judicial review.

DD. Interest

Interest should be paid on any reward effective the date the SEC obtains the monetary sanction etc. from the wrongdoer.

EE. Amnesty

On page 82 of the Proposed Rule, the staff discusses amnesty for whistleblowers. There should be no firm rule on this matter. If an employee engaged in misconduct, and then want to blow the whistle, a process should be established in which the employee can come forward with the information, and the Commission (in conjunction with other relevant agencies, such as the Department of Justice) can reach a decision as to whether amnesty or immunity should be given. Similar to the process used in criminal proceedings, information provided by the whistleblower should not be able to be used against the whistleblower in a criminal or civil proceeding, assuming that no agreement is reached.

FF. The disqualification set forth on page 83 is not justified as a matter of law

The sole goal of § 21F is to encourage whistleblowers to provide information to the SEC for the detection, prevention and elimination of fraud and other misconduct. Section 21F permits any person not statutorily prohibited from obtaining a reward, to file a claim. On page 83 o the rule the SEC replaces its "common understanding" of who a whistleblower is, with the statutory mandates. This is not supported as a matter of law.

Furthermore, *qui tam* laws do not share all of the characteristics of other whistleblower laws. They are designed to encourage participants in criminal activity to turn in their co-conspirators. As understood by the Civil War Congress, the goal of the *qui tam* is to use a "rouge" to catch a "rouge." The Commission cannot substitute its own moral standards for the standards of Congress.

This aspect of the Proposed Rule only violates the law, but challenges one of the most important underpinnings of the law. As stated by the author of the False Claims Act on the floor of the Senate in 1863:): "The old-fashioned idea of holding a temptation, and setting a rough to catch a rouge, which is the safest and most expeditious way . . . of bring rouges to justice." *See,* Cong. Globe, 37th Cong., 3rd sess., pp. 955-56 (1863) (remarks of Senator Howard). This is the primary intent of *qui tam* laws, such as the FCA and Dodd-Frank. This was the understanding of the authors of the original FCA, and of President Abraham Lincoln who approved and signed the False Claims Act.

The SEC must establish rules that, from top to bottom, understand that the primary purpose of this law is to induce wrongdoers, with direct knowledge of criminal activity, to risk their jobs and careers (and perhaps their freedom) to serve the public interest and turn in their follow rouges. The law demands the "expeditious" reporting of criminal activity, not to the wrongdoing company, but to the police or law enforcement.

We request an opportunity to meet with your staff to discuss these proposed regulations further. If Commission personnel or other interested parties have any questions about our comments, they are welcome to call on us.

Sincerely,

/s/

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Enclosure: "Impact of Qui Tam Laws on Internal Compliance: A Report to the SEC."