Dodd-Frank Wall Street Reform and Consumer Protection Act
Securities Whistleblower Incentives and Protection (Section 922):

Huntsman Corporation's Comments to the Proposed Rule for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 17 CFR Parts 240 and 249

Introduction

Dodd-Frank established a whistleblower program that requires the Commission to pay monetary awards to eligible whistleblowers who voluntarily provide original information to the SEC that leads to successful enforcement actions involving the violation of federal securities laws and resulting in monetary sanctions over $1 million. Section 922(b)(1). Within 270 days of Dodd-Frank coming into effect, the Commission was required to issue implementing regulations. On November 3, 2010, the Commission released the proposed rules and forms designed to implement the whistleblower provision. 17 CFR Parts 240 and 249.

Huntsman Corporation ("Huntsman") reviewed and carefully considered the legislation and the proposed rules. The focus of this comment to the proposed rule is the significant incentive the bounty provision of Dodd-Frank, as it would be implemented under the Commission's proposed rules, creates for would-be whistleblowers to circumvent well-established compliance processes and procedures of public companies in favor of the chance to secure a significant monetary reward. Such an outcome undermines the effectiveness of companies' compliance programs, by depriving companies of a primary source of information necessary to identify and resolve potential issues. This tool is critical to companies' self-policing efforts. Huntsman provides below a response to proposed rule 21F-4 request numbers 13 and 17-19, and offers an alternative approach to the Commission's proposal for a method to support robust corporate compliance programs consistent with the goal and aim of Dodd-Frank.

Statutory Provisions and Proposed Implementing Regulations

Section 23(b)(1) of the Act provides, in pertinent part:

> In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregated amount equal to—
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> (A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and
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> (B) not more than 30 percent . . . .

Covered judicial or administrative actions are those where the monetary sanction imposed is $1 million or more and which relate to statutory violations covered by the referenced legislation, including the U.S. Foreign Corrupt Practices Act ("FCPA").

Subsection (c)(1) sets out several criteria that are to be considered in making an award, including "(IV) such additional relevant factors as the Commission may establish," and specifically states that "[t]he determination of the amount of the award under subsection (b) shall be in the discretion of the Commission." Subsection (c)(2) indicates that an award may be denied for several reasons including failure of the whistleblower ". . . to submit the information to the Commission in such form as the Commission may, by rule, require."

The Commission's Implementing Regulations Do Not Provide Sufficient Incentives for Whistleblowers to Avail Themselves of Otherwise Robust Internal Compliance Programs to Address Potential Issues.

In the preamble to the proposed rule, the Commission recognizes the danger that the Dodd-Frank whistleblower provision's monetary incentives could "reduce the effectiveness of a company's existing compliance, legal, audit and similar internal processes for investigating and responding to potential violations of the federal securities laws." Proposed Rule, at 4. The tension created by the whistleblower incentives is a particular concern with regard to the enforcement of the FCPA. In the last several years, increased FCPA enforcement led to numerous settlements that have exceeded tens of millions of dollars. The tremendous monetary incentive for whistleblowers to report issues directly to the SEC (namely the possibility of securing 10 to 30 percent of such significant settlements), even where compliance processes and reporting mechanisms are well established, threaten the ability of well-meaning, compliant public companies to identify and, where possible, address compliance concerns internally.

The FCPA presents particular compliance challenges because its application is to foreign business conducted around the world, including across numerous foreign cultures with different expectations for compliance than those in the U.S. and in parts of Western Europe. Responsible U.S. companies, like Huntsman, operating in countries where bribery of government officials has long been a way of life have, quite appropriately, implemented robust compliance programs at significant cost and effort designed to effectively identify and halt any such attempted illegal behavior by employees or company representatives.

Changing previously accepted cultural behavior is difficult and frequently takes some time because it involves bringing people of differing cultural norms into line with the compliance expectations of U.S. public companies. Even when policies and training programs are implemented, improper behavior can continue "under the rug." Without internal company whistleblowers, the most well-intentioned companies will not necessarily know of allegations of improper or illegal activities that could occur in some parts of the world.

The most effective thing that well-meaning companies can do to combat bribery and corruption is to implement high quality compliance policies, guidance, training, audits, anonymous hot lines, anti-retaliation programs, and annual improvement plans to allow for the identification, redress and elimination of these kinds of behavior. Such programs typically are administered within companies by dedicated employees who are true advocates for doing what is necessary – and making the necessary investments in resources – to ensure a high level of compliance. In any such compliance program, the most effective way of discovering potentially illegal behavior that might not otherwise be visible to the primary compliance function is through an internal whistleblower encouragement and protection program with at least the following characteristics:

1. A compliance program that is clear in its requirements and applicable to all levels and operations of the company.
2. Involvement and oversight of the company's senior management in the creation and implementation of the compliance program.
3. Effective enforcement of the requirements of the company's compliance program.
4. Effective communication of those requirements throughout the company, including the requirement that employees report potentially illegal behavior.
5. Implementation – and publication - of a safe means for employees to make such reports anonymously if they wish (typically, a hot line).
6. Communication to employees that those who report potential violations in good faith will be protected by the company from retaliation and harassment; and appropriate processes for ensuring such retaliation does not occur.
7. Active encouragement of employees through e-mail communications, placement of flyers and posters and other effective means, to report potential violations to the company.
8. Effective training of management and rank and file employees both in the substance of what is expected and the importance of reporting and protection from retaliation of those who report.
9. Effective and timely investigative follow-up to reported violations.
10. Full correction and appropriate preventive actions to prevent future violations of the sort discovered.
11. Periodic review and testing of compliance policies and procedures.

Most high quality company compliance programs require reporting of violations to the regulatory authorities. Self-reporting has many positive features, the most important being (from a public interest standpoint) the willingness of the company to subject itself to the scrutiny of regulatory authorities each time a violation is reported, which enables enforcement authorities to ensure that U.S. laws are upheld and violators are punished, thereby publicly deterring future violations by other wrong-doers. Also, most of the difficult and time-consuming work of investigating and analyzing potential violations is done by the company, thereby saving precious public resources while achieving full compliance.

A company with the type of compliance program and level of compliance commitment described above is, we believe, exactly what the regulators want. In fact, the Commission has said as much in the Proposed Rules: "Compliance with the federal securities laws is promoted when companies implement effective legal, audit, compliance and similar functions." Proposed Rule 21F-4, p. 24. Essentially, a company with such a program is choosing to take on full responsibility for keeping itself in compliance with the law. And, with the voluntary reporting of violations to regulatory agencies, it is operating its program in a transparent manner.

However, despite the fact that the Commission has stated that the whistleblower provision and the safeguards proposed in Proposed Rule 21F-4 are "intended not to discourage whistleblowers who work for companies that have robust compliance programs to first report the violation to appropriate company personnel..." (Proposed Rule, p. 4), the new whistleblower provision, as the Commission intends to implement and enforce it through Regulation 21F, threatens to be a major source of punishment for even the best run and most-committed-to-compliance companies. This is because it could easily eliminate a primary source of information a company typically would rely on to discover "under the rug" noncompliance that is not evident through other processes such as audits and routine compliance reviews unless there is a requirement, or a compelling incentive to cause whistleblowers to report such conduct to the company. Juxtaposed to the enormously large awards an employee could potentially receive by reporting potential violations to the government regulators instead of through existing internal compliance processes, there is little or no incentive for a whistleblower voluntarily to report violations to the company. The average employee cannot reasonably be expected to provide a company with an opportunity to investigate, and if need be, remedy and self-disclose conduct when by doing so he or she would reduce or eliminate the possibility of a resulting enforcement action and the potentially enormous sum he or she could receive by bypassing company hotlines and reporting directly to the government. With its employees facing such significant financial motivation, a sincere well-intentioned company with a robust compliance program and dedicated compliance professionals could easily find that its efforts to do the right thing have been undermined by the significant financial rewards offered to whistleblowers to bypass the company and report directly to regulators.

Simply giving a whistleblower the opportunity to disclose a potential violation to the company without losing the right to a bounty under the Dodd-Frank Act is not enough, in our view, to overcome the lure of a very large recovery that will likely be enhanced by not disclosing the problem to the company and allowing the company an opportunity to attempt to remediate the issue. It is not compelling to suggest that whistleblowers will fail to realize that if the company does a competent and credible investigation, takes appropriate corrective action and is fully open with the government as to its findings, the penalty will likely be minimized in all but the most egregious cases. A saavy bar of lawyers who already have begun advertising for the chance to represent would-be whistleblowers for possible recoveries under the Act certainly will be mindful of the issue and are unlikely to encourage whistleblowers to first seek redress through the company. Providing assurance that whistleblowers' percentage recovery will be less if

they bypass the company—although a good policy to promote—will not likely be adequate by itself in most cases to discourage bypassing of the company. The difference in actual recovery will likely be perceived by whistleblowers and their counsel to be less on average if disclosure is made to the company than if it is made only to the government.

The SEC's stated mission is "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." *See* "The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation," available at http://www.sec.gov/about/whatwedo.shtml. The result of the Dodd-Frank whistleblower provision, however, is that individuals incented for personal gain will deprive companies of their opportunity to self-police, an important component to assuring companies' compliance with federal securities laws. While self-policing and disclosure of violations by public companies further the SEC's stated mission to protect investors, undermining companies' ability to self-regulate does not.

A Solution

The importance of whistleblowers cannot be underestimated for both well-meaning companies and government enforcers. We understand the desire from the government's standpoint to encourage whistleblowers and obtain information. However, as a company committed to doing the right thing, Huntsman does not want to have a primary source of information about noncompliance eliminated from its compliance arsenal. The company wants a fair chance to receive whistleblower reports and demonstrate to the whistleblower and the regulators that it will deal with each reported potential violation appropriately without requiring government intervention. And Huntsman is thoroughly committed to being open and transparent to the government regarding any violations or potential violations of significance that we uncover. Is there a way where the best interests of both government enforcers and well-meaning companies can be accommodated? We think so.

The statutory language in Dodd-Frank creating the whistleblower program leaves to the SEC discretion to administer the program through regulation. Just recently, the SEC released its Proposed Rules for defining when and under what circumstance and to what extent bounty awards will be paid and has invited public comment. The SEC has broad authority to craft the implementing regulations provided that they are not inconsistent with other provisions of the statute.

We strongly urge that the SEC impose upon a whistleblower a presumptive duty to report a potential violation to the company and the government simultaneously if the company has implemented and advertised to its employees a compliance program that meets certain specified requirements.[1] Once the report is made to the government and the

[1] We recognize that there may be instances in which a whistleblower may not want to report to the company because of a concern that there will be retaliation or that senior management is so involved in the wrongdoing that it is unlikely that there will be a meaningful investigation. Thus, we suggest that the SEC strongly recommend reporting to the company first or at the same time as reporting to the SEC, but leave

company, and provided that the Commission determines that the company has a compliance program designed to identify and address such issues, the Commission should presumptively defer any further action until such time (a reasonable time from the date of initial disclosure) as the company reports back to the Commission.[2] Deferring an investigation or inquiry until the company can pursue the issue through its regular compliance processes is consistent with what the Commission has stated in the Proposed Rule: "We expect that in appropriate cases, consistent with public interest and our obligation to preserve the confidentiality of a whistleblower, our staff will, upon receiving a whistleblower complaint, contact the company, describe the nature of the allegations, and give the company an opportunity to investigate the matter and report back .... This has been the approach of the Enforcement staff in the past, and the Commission expects that it will continue in the future." Proposed Rule 21F-4, pp. 34-35. We urge the Commission to formalize this deferral policy as part of these regulations in order to provide consistency in practice and assurance to those companies who have invested heavily in their compliance programs.

If the company's response to the report is substantive and appropriate, and there is no evidence to support a finding that the company acted in bad faith, a minimal penalty to take away any economic benefit, where there is a finding of a noncompliance, would be appropriate, and the whistleblower could share in the penalty award. If the company acts in bad faith or fails to address the potential violation in a timely manner or to report the results of the investigation to the regulators, the company, of course, should be subject to more stringent sanctions. A company should not, however, be penalized for pursuing a matter through its compliance processes, taking the matter under review, and then reporting after an appropriate review that the company has investigated the matter and found the whistleblower report was not credible, could not be verified, or that the conduct described did not result in a violation of the federal securities law. By allowing a well-meaning company with an established compliance program to make use of its process and then to report back to the Commission with any findings, the legitimate concerns of both the company and government are satisfied.

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open the possibility that a whistleblower may be allowed to circumvent the company's compliance process if there is a substantial, reasonable and legitimate reason to do so. Where a whistleblower reports only to the SEC, the SEC should reserve the right to provide the information to the company and defer to the company's investigative process if the whistleblower's rationale is not substantial, legitimate and reasonable.

[2] The determination by the SEC that the company has the kind of compliance program that should qualify for deference can be made on the basis of at least three sources of information: the SEC, the company and the whistleblower. The SEC's prior experience with the company on compliance matters should be considered. In addition, the SEC could solicit information not already made available through regulated filings and by on-line publication by public companies, using a standardized form that requests that companies provide information and supporting materials related to the compliance program components and processes. Finally, the SEC could require a whistleblower to complete a form when initially making a report that would ask whether the company has compliance policies, a hot line for anonymous reporting, an anti-retaliation policy, etc., and whether that employee has made use of the compliance reporting mechanisms.

Thus, we strongly urge that the SEC promulgate regulations that allow companies with qualifying compliance programs the opportunity to review and address whistleblower allegations before the SEC expends resources on the problem. We suggest that the SEC include in its regulations the following:

1. A finding to the effect that it is important that the government whistleblower program not only ferret out violations in companies that do not have appropriate compliance programs, but encourage and incentivize companies to engage in a high level of self-policing and to voluntarily disclose violations company programs uncover.

2. A finding that the Commission believes it is in the public interest that companies have compliance programs that generally include the following elements:

    a. Clear policies to the effect that employees must comply with the law, including all laws administered by the SEC, that are applicable to all levels and operations of the company.
    b. Involvement and oversight of the company's senior management in the creation and implementation of the compliance program.
    c. Training and clear guidance on what is required by the SEC-administered laws and regulations, including the FCPA.
    d. Clear guidance and policies related to whistleblower protections.
    e. Effective communication of those policies and associated guidance to all employees through widely distributed documentation and training programs.
    f. A requirement that all employees are responsible (subject to the law of the local jurisdiction) to disclose violations of law and company policy to the company.
        i. A hot line to encourage reporting.
        ii. A commitment that the company will respect the anonymity of employees when they request it.
        iii. A commitment to protect whistleblowers from retaliation.
    g. A defined process for investigating possible issues to allow the company to respond to reports of violations in a timely and effective manner.
    h. A company policy of correcting violations as soon as reasonably possible when they are discovered.
    i. A company procedure for reviewing potential violations of SEC-administered laws, whether through a Legal Department or before an Audit Committee, and a process for voluntarily disclosing violations to the SEC when violations of law administered by the SEC are discovered.

3. Where a whistleblower is an employee of a company with a compliance program that includes the foregoing elements, a provision that the

whistleblower must report potential violations to the company when making or planning to make a report to the SEC and must certify to the SEC that he/she (a) is aware of the company's reporting processes, (b) made use of such processes to report the potential violation to the company's compliance or legal function, and (c) endeavored to provide all relevant information to the company.

4. Where the whistleblower has not reported a potential violation to the company, but the company is one that has a compliance program that generally includes the foregoing elements,[3] the SEC will presumptively,[4] consistent with the Commission's obligation to preserve the confidentiality of the whistleblower, notify the company, describe the allegation, and, prior to commencing any Commission-directed investigation or inquiry or making such information available to other enforcement agencies, provide the company with an opportunity to investigate the matter and make a report.

5. A company that is made aware of a whistleblower allegation that also is made to the SEC, should undertake the following:

    a. Review the allegation and, where appropriate and/or practical, initiate an investigation within 10 days after receiving the report.
    b. Within 45 days after receiving the report, consistent with the company's right to preserve privileged information, voluntarily disclose preliminary results of the investigation to the SEC, including whether the report requires further company review.
    c. Submit a final report to the SEC on the results of the investigation within 90 days (or, with the concurrence of the SEC, within a longer time period that is needed to complete and document the investigation) after making the initial voluntary disclosure.
    d. Where appropriate, take timely and measured corrective action to redress any potential violation and revise any existing compliance programs or procedures at issue.
    e. Pay a fine appropriate to the nature of the violation, if any, and the company's response; the company's disclosure and response will be fully considered in setting the fine.[5]
    f. The SEC will determine the percentage of the fine to be paid to the whistleblower; if the fine is less than $1 million, the SEC and the company, assuming there is a settlement, will agree on the percentage of the fine the company will pay to the whistleblower.

6. A provision to the effect that if the whistleblower fails to make a report to the company, assuming the company has a qualifying compliance

[3] See the discussion in footnote 2, *supra.*
[4] See the discussion in footnote 1, *supra.*
[5] See the discussion in the first full paragraph on p. 6, *supra.*

program and there is no substantial, reasonable and legitimate rationale for failing to make the report to the company, the whistleblower will not be eligible to recover a bounty reward by reporting only to the SEC.

Conclusion

Huntsman appreciates the SEC's consideration of its comments and would welcome the opportunity to discuss the company's proposal in greater detail with appropriate members of the Commission.