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Submitted via email to rule-comments@sec.gov

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Re: Comments from NELA, GAP, and Public Citizen to Proposed Amendments to the Securities and Exchange Commission (Commission or SEC) Whistleblower Program Rules; File No. S7-16-18

These comments are submitted on behalf of the National Employment Lawyers Association (NELA), the Government Accountability Project (GAP), and Public Citizen. These comments focus on the proposed rules implementing the anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u-6(h). Amendments to the Commission's Whistleblower Program Rules, Release No. 34-83557, 83 Fed. Reg. 34702 (to be codified at 17 C.F.R. §§ 240, 249) (proposed June 29, 2018) ("Proposed Rulemaking").

NELA's Work Protecting Workers from Retaliation

NELA is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated unlawfully in the workplace. NELA's members practice before nearly every relevant state and federal court and administrative agency. This experience provides NELA with a unique perspective on how the principles announced both by courts and regulatory bodies actually play out on the ground.

GAP's Work Protecting Whistleblowers

GAP was created in 1977 at the Institute for Policy Studies (IPS) in response to several whistleblowers, such as Daniel Ellsberg, who came to IPS about White House, FBI, and Pentagon scandals. Since that time, GAP has served as a lifeline to employees of conscience and has helped them release critical information that serves the public interest and the common good. A non-partisan public-interest group, GAP litigates whistleblower cases, helps expose wrongdoing to the public, and actively promotes government and corporate accountability. GAP has helped over 8,000 whistleblowers.

GAP's mission is to ensure government and corporate accountability by advancing occupational free speech, defending whistleblowers, and presenting their verified concerns to appropriate officials, groups, or journalists. GAP has become not only the most prominent whistleblower support organization, but also an important government and corporate accountability organization both domestically and internationally.

Working with the media, public interest allies, and public officials, GAP and its clients have achieved numerous highly public results. Noteworthy examples include the end of plutonium production in the U.S. before the end of the Cold War; the cancellation of three nuclear power plants under construction, and construction halts at a few other nuclear facilities; the dismantling of several national deregulatory schemes to turn meat and poultry production quality control over to food processors and slaughter houses; the resignation of World Bank President Paul Wolfowitz; the end or sharp curtailment in the manufacturing and marketing of several unsafe but widely used drugs, most notably Vioxx and Avandia; the exposure of rampant mortgage and securities fraud at Citibank, Deutsche Bank, Bank of America, and Countrywide Financial; the exposure of White House efforts to edit science reports summarizing the results of billions of federal research dollars to make it seem like climate change was either not happening or was not caused by human activity; and the exposure of warrantless and illegal wiretapping and surveillance by national security agencies during the George W. Bush Administration, and the expansion of that activity during the Obama Administration by having represented whistleblowers including Edward Snowden, Thomas Drake, and John Kiriakou, to name a few.

GAP also continuously advocates for the enactment of laws and policies providing stronger free speech rights for whistleblowers, and then monitors their implementation and enforcement to expose and correct loopholes that undermine protection. GAP has been a leader in the campaigns for 34 domestic and international free speech laws or policies, including all four generations of the Whistleblower Protection Act, the Sarbanes Oxley and Dodd-Frank statutes; the SEC's first rules for implementation of the Dodd-Frank Act; and internationally the laws or policies of the United Nations, Organization of American States, World Bank, African Development Bank, and Serbia. It is a founding member of the Whistleblowers International Network, and actively participates through contributions to the International Whistleblower Research Network.

Public Citizen's Decades Of Work Serving The Public Interest

Public Citizen is a national public interest organization with more than 500,000 members and supporters. Since 1971, we have advocated for stronger health, safety, consumer, whistleblower protection and other rules, as well as for a robust regulatory system that curtails corporate wrongdoing and advances the public interest. Whistleblowers are integral to our mission to protect the public interest, since they serve as our eyes and ears to government and corporate misconduct.

I. Narrowing the Anti-Retaliation Provision of the Dodd-Frank Act Would Undermine the SEC Whistleblower Program and Dissuade Whistleblowers from Reporting Potentially Unlawful Activity

In a June 28, 2018 public statement at the open meeting announcing the Proposed Rulemaking, Chair Clayton stated: "Many have asked whether the SEC will continue to enforce the anti-retaliation provisions of Dodd-Frank. Let me be clear: retaliation protections are a key component of the whistleblower program, and we will bring charges against companies or individuals who violate the anti-retaliation protections when appropriate." Statement at Open Meeting on Amendments to the Commission's Whistleblower Program Rules, *available at* https://www.sec.gov/news/public-statement/statement-open-meeting-amendments-commissions-whistleblower-program-rules. We welcome Chair Clayton's statement as an important emphasis that recognizes that deterring retaliation is a fundamental pillar of the SEC Whistleblower Program. We commend the SEC for taking an active role in enforcing the anti-retaliation provision of the Dodd-Frank Act and taking steps to combat retaliation that remains all too prevalent in the workplace.[1] The proposed amendments narrowing the scope of Dodd-Frank whistleblower protection, however, are a step in the wrong direction. They would limit the SEC's ability to protect whistleblowers and may cause courts to construe the statute inappropriately narrowly.

In a seminal speech titled *The SEC as the Whistleblower's Advocate*, former Chair White remarked, "[w]e want whistleblowers — and their employers — to know that employees are free to come forward without fear of reprisals." Chair Mary Jo White, U.S. Secs. & Exch. Comm'n, *The SEC as the Whistleblower's Advocate* (Apr. 30, 2015), *available at* https://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html. That objective should be the measuring stick by which to evaluate proposed rules implementing the whistleblower protection provision of the Dodd-Frank Act.

Unfortunately, several of the new proposals, such as limiting protection to written disclosures and imposing a "related subject matter" requirement, have the opposite effect. Indeed, the proposed modifications to Dodd-Frank's whistleblower protection would restrict the scope of the statute far beyond the Supreme Court's interpretation in *Digital Realty Trust, Inc. v. Somers*, 138 S.Ct. 767 (2018).

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[1] On September 29, 2016, the SEC ordered International Game Technology ("IGT") to pay a $500,000 penalty for terminating the employment of a whistleblower because he reported to senior management and to the SEC that the company's financial statements might be distorted. *See* Exchange Act Release No. 78991 (Sept. 29, 2016). In 2015, the SEC charged KBR Inc. with violating whistleblower protection Rule 21F-17 when it required witnesses in certain internal investigations interviews to sign confidentiality statements with language warning them that they could face discipline and even be fired if they discussed the matters with outside parties without the prior approval of KBR's legal department. KBR agreed to pay $130,000. *See* Press Release (Apr. 1, 2015), https://www.sec.gov/news/pressrelease/2015-54.html. In August 2016, the SEC fined Health Net $340,000 for including in a settlement agreement a provision that the employee waive any SEC whistleblower award. *See* Press Release (Aug. 16, 2016), https://www.sec.gov/news/pressrelease/2016-164.html.

A 2010 report of the Ethics & Compliance Initiative [ECI, formerly the Ethics Resource Center] concluded that, "one of the critical challenges facing both [Enforcement and Compliance] officers and government enforcement officials is convincing employees to step forward when misconduct occurs." *Blowing the Whistle on Workplace Misconduct*, Dec. 2010, *available at* https://www.whistleblowers.org/storage/documents/DoddFrank/ercwhistleblowerwp.pdf. This year, ECI's *2018 Global Business Ethics Survey*, p. 6, found that the most effective way to enhance favorable ethics program outcomes is to make sure that employees "felt encouraged to SPEAK UP even with bad news[.]" When they do feel encouraged, favorable outcomes increase by 14 fold.

We urge the SEC to abandon proposals that narrow Dodd-Frank whistleblower protections. Instead, we recommend that the Commission adopt rules that effectuate the purpose of the statute and further the SEC's mission. In so doing, the Commission can overcome unintentional flaws in the statutory language that caused the Supreme Court in *Digital Realty* to drastically reduce the scope of whistleblower protections.

II. Dodd-Frank Whistleblower Protection Should Not Be Limited to Written Disclosures

Proposed Rule 21F-2(a)(1) would limit protection to an individual who provides the Commission with information "in writing." 83 Fed. Reg. at 34718. There is no precedent for this limitation in the language of the Dodd-Frank Act or in the construction or enforcement of other federal whistleblower protection statutes. The proposed rulemaking offers two justifications for this substantial narrowing of Dodd-Frank whistleblower protection: 1) requiring written disclosures presents "a minimal burden to individuals who want to blow the whistle to the Commission while facilitating the staff's ability to track its use of the information"; and 2) "additional manners of reporting for anti-retaliation purposes (such as placing a telephone call), the Commission's staff could be ensnared by disputes in private anti-retaliation lawsuits over what information was provided to whom on what dates." The SEC also requests input on whether testifying under oath in an investigation or judicial or administrative action of the Commission is an additional "manner" of providing information to the Commission.

Per the definition of "whistleblower" in the statute, any individual providing information relating to a potential violation of the securities laws to the SEC consistent with its rules should be protected, regardless of whether the information is provided in writing. *See* 15 U.S.C § 78u-6(a)(6). Nothing in the statutory language requires or signals that a whistleblower may only be protected from retaliation if he or she provides information in writing. Imposing a writing requirement is inconsistent with the remedial purpose of the statute (provide robust protection to whistleblowers) and a significant departure from a well-developed body of precedent construing similar whistleblower protection laws. This rules change would create a significant new loophole.

Instead, consistent with Department of Labor regulations implementing analogous whistleblower protection laws and well-established precedent, the SEC should deem oral disclosures and testimony to the SEC protected whistleblowing under Dodd-Frank. For example,

the whistleblower protection provision of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, protects persons providing information, orally or in writing, about potential securities violations. *See Kuhns v. Ledger*, 202 F. Supp. 3d 433, 440 (S.D.N.Y. 2016) ("there is no requirement that the provision of information pursuant to Section 1514A must be in writing"); *Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432, 442, 444-48 (S.D.N.Y. 2013) (denying summary judgment based on plaintiff's oral statement regarding potential mail and wire fraud); *Barker v. UBS AG*, 888 F. Supp. 2d 291, 297 (D. Conn. 2012) (denying summary judgment based, in part, on finding plaintiff's discussions with management about potential violations of securities laws constituted protected activity); *Sequeira v. KB Home*, 716 F. Supp. 2d 539, 555 (S.D. Tex. 2009) ("Plaintiff engaged in protected activity . . . when he met with [his supervisor] to discuss the company's lack of internal controls related to inventory and vendor contracts."); *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1369 (N.D. Ga. 2004) (denying summary judgment based, in part, on finding plaintiff engaged in protected activity when making oral complaints of suspected fraud). In its implementing regulations, the United States Department of Labor declined to limit protected conduct to written disclosures, and no court has held that SOX protected conduct is limited to written disclosures.[2] The statute also expressly prohibits employers from retaliating against employees for "testifying" in Commission investigations. 15 U.S.C. § 78u-6(h)(1)(A)(ii).

The proposed writing requirement is also contrary to the Supreme Court's construction of the anti-retaliation provision of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 215(a)(3). In *Kasten v. Saint–Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011), the Court held that the phrase "filed any complaint" encompasses oral as well as written complaints, so long as the complaint is "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." *See also id.* at 1334 ("To limit the scope of the antiretaliation provision to the filing of written complaints would also take needed flexibility from those charged with the Act's enforcement. It could prevent Government agencies from using hotlines, interviews, and other oral methods of receiving complaints."). Both of the justifications for the proposed rule imposing this incongruous writing requirement are speculative and insufficient to warrant weakening Dodd-Frank whistleblower protection. The first is that the writing requirement would facilitate the staff's ability to track information disclosed by the whistleblower. There are few, if

[2] In *Williams v. Mason & Hanger Corp.*, ARB No. 98 030, ALJ No. 1997 ERA 14 (Nov. 13, 2002), the ARB described general principles relating to protected activity under the whistleblower provision of the Energy Reorganization Act: "Within the context of nuclear power plant operation and repair, the Secretary, the Board and a number of the United States Courts of Appeals have repeatedly addressed the issue of which activities qualify for ERA protection. That body of case law provides the following guidelines. First, safety concerns may be expressed orally or in writing. *See, e.g., Stone & Webster Eng'g v. Herman*, 115 F.3d 1568, 1573 (11th Cir. 1997) (holding that when "an employee talks about safety to a plant fire official, an employer and an industry regulator, he or she acts squarely within the zone of conduct that Congress marked out under 42 U.S.C. §5851(a)(1)"), *aff'g Harrison v. Stone & Webster Eng'g*, No. 93-ERA-44 (Sec'y Aug. 22, 1995); *Bechtel Const. Co. v. Sec'y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995) (agreeing with Secretary's characterization of "questioning one's supervisor's instructions on safety procedures as 'tantamount to a complaint.'"), *aff'g Nichols v. Bechtel Const. Co.*, No. 87-ERA-0044 (Sec'y Oct. 26, 1992).

any, barriers for the SEC's staff to track an oral disclosure. An oral disclosure requires the same amount of work for staff to log, follow up, and/or investigate as a written disclosure. Additionally, an oral disclosure is easily reduced to writing at the time of its disclosure and at any point thereafter. Moreover, in light of the substantial financial whistleblower incentive for submitting a written disclosure (a TCR Form) to the SEC Whistleblower Office, most of the protected disclosures will be written (to qualify for a whistleblower award). Therefore, most will be amenable to tracking. Any anticipated effort caused by the small number of oral disclosures will be minimal, at best.

The second justification is that the "staff could be ensnared by disputes in private anti-retaliation lawsuits over what information was provided to whom on what dates." Yet the SEC does not provide any evidence whatsoever of this speculative burden, either, particularly when it has protected oral disclosures under Dodd-Frank for the past eight years. And the Proposed Rulemaking ignores the fact that oral disclosures to the SEC have been protected for more than 16 years under SOX's anti-retaliation provision. If such protection created a significant burden on the staff, then presumably the SEC would have and could cite to data showing how many times SEC staff became ensnared in SOX or Dodd-Frank retaliation litigation, but they have been unable to do so. Moreover, the environmental whistleblower protection statutes which have been in place for nearly four decades at the Environmental Protection Agency (EPA),, and the EPAhas not felt the need to limit protected conduct under those statutes to avoid ensnaring the EPA in whistleblower retaliation litigation. This "reform" is a solution in search of a problem.

By excluding oral disclosures from the scope of Dodd-Frank protection, the SEC is sanctioning retaliation against whistleblowers who make oral disclosures. Adding this writing requirement eight years after Congress enacted the Dodd-Frank Act (without including any writing requirement for protected conduct), the SEC is failing to consider the reliance interests of whistleblowers that have made oral disclosures. In other words, employees who believed that they made protected disclosures by reporting potential securities law violations to the SEC will now suddenly find themselves unprotected.

We urge the SEC to abandon the proposed writing requirement and also expressly protect testimony to the SEC. As a law enforcement agency, the SEC has a strong interest in ensuring that employees of registrants and other entities subject to SEC jurisdiction can testify without fear of reprisal. Moreover, the second form of protected conduct set forth in the whistleblower protection provision of Dodd-Frank – "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission" is statutory language that requires protection of witnesses who testify before the SEC or otherwise assist with an SEC enforcement proceeding. 15 U.S.C. § 78u-6(h)(1)(A)(ii).

III. Protecting Disclosures of Potential Violations is Consistent with Well-Established Precedent

NELA, GAP, and Public Citizen agree with the SEC's proposal to clarify that Dodd-Frank protects disclosures of potential violations of the federal securities laws, in particular

information that "relates to a possible violation of the federal securities laws (including any law, rule, or regulation subject to the jurisdiction of the Commission) that has occurred, is ongoing, or is about to occur." Proposed Rule 21F-2(a)(1), 83 Fed. Reg. at 34718. The SEC's reasoning for this clarification is sound, and we note that protecting disclosures of possible violations is consistent with well-established precedent under analogous whistleblower protection laws.

For example, federal courts consistently have construed the whistleblower protection provisions of SOX to include disclosures of potential violations. *See, e.g.*, *Beacom v. Oracle America, Inc.*, No. 15-1729, 2016 WL 3144730, at 3 (8th Cir. June 6, 2016); *Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797 (6th Cir. 2015); *Nielsen v. AECOM Tech. Corp*., 762 F.3d 214, 220–21 (2d Cir. 2014); *Wiest v. Lynch*, 710 F.3d 121 (3d Cir. 2013); *Stewart v. Doral Fin. Corp.*, 997 F. Supp. 2d 129, 135–36 (D.P.R. 2014); *Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432, 443 (S.D.N.Y. 2013). Courts also have interpreted the whistleblower protection provision of the False Claims Act (FCA), 31 U.S.C. 3730(h), to encompass disclosures of potential violations of the FCA. *See, e.g.*, *United States ex rel. Yesudian v. Howard Univ.*, 332 U.S. App. D.C. 56, 153 F.3d 731 (1998); *Young v. CHS Middle E., LLC*, 611 Fed. App'x 130 (4th Cir. May 27, 2015); *Mikhaeil v. Walgreens Inc.*, No. 13-14107, 2015 WL 778179 (E.D. Mich. Feb. 24, 2015); *Ickes v. NexCare Health Sys., L.L.C.*, No. 13-14260, 2016 WL 1275543 (E.D. Mich. Mar. 31, 2016).

As explained by a district judge construing the scope of SOX whistleblower protection, protecting disclosures of potential violations is fundamental to effectuating the purpose of a whistleblower protection statute:

> This Court agrees with the Third Circuit and the [Administrative Review Board] that imminent crimes, or at least crimes in their infancy, are within the scope of Section 806. As the *Wiest* court noted, "[i]t would frustrate [the purpose of Sarbanes–Oxley] to require an employee, who knows that a violation is imminent, to wait for the actual violation to occur when an earlier report possibly could have prevented it." [*Weist v. Lynch*, 710 F.3d 133 (3d Cir. 2013)]; *cf. Walters v. Deutsche Bank AG*, No. 2008 SOX 70, 2009 WL 6496755, at *9 (ALJ Mar. 23, 2009) ("Senator Leahy justified the protection Section 806 affords to whistleblowers based on the importance of the unique, inside, financial perspective they can provide ... [Section 806 was] designed to encourage insiders to come forward without fear of retribution."). **It furthers the purpose of Section 806 to nip corporate wrongdoing in the bud, rather than permitting a scheme to blossom into a full-fledged crime before whistleblower protections take effect. Whistleblowers should not be asked to wait until executives have dotted the i's and crossed the t's before sounding an alarm**.

Leshinsky, 942 F. Supp. 2d at 446 (emphasis added). In *Wallace v. Tesoro Corp*., 796 F.3d 468, 480 (5th Cir. 2015), the court held that SOX protects "an employee who is providing information about a potential fraud or assisting in a nascent fraud investigation" because "[l]eaving those employees unprotected would have grave consequences for the statutory scheme of employee

protection embodied in § 1514A and would do so in a way that appears completely unrelated to whether a belief actually is reasonable."

In sum, the SEC is correct to construe Dodd-Frank as protecting both disclosures of possible violations of federal securities laws and disclosures grounded in an employee's reasonable belief that a violation has occurred.[3]

IV. The SEC Should Not Limit Dodd-Frank Whistleblower Protection to the Subject Matter of the Whistleblower's Submission to the SEC

Proposed Rule 21F-2(d)(1)(iii) would limit anti-retaliation protection to lawful acts that "relate to the subject matter" of the person's submission to the SEC, 83 Fed. Reg. 34720, thereby construing this remedial provision more narrowly than its statutory language or the Supreme Court's reasoning in *Digital Realty* would permit. Such a requirement is not compelled by the statute and would inject uncertainty, thereby weakening Dodd-Frank's whistleblower protection provisions and dissuading whistleblowers from coming forward.

Nothing in the statutory language of Dodd-Frank limits an employee's protection from retaliation protection to lawful acts that "relate to the subject matter" of the person's SEC submission. Both the definition of whistleblower and the delineation of lawful acts articulate the substance of the whistleblowers protected disclosure to the Commission. *See* 15 U.S.C. § 78u-6(a)(6), (h)(1)(A). Neither provision requires any connection between the retaliation experienced by the employee and her protected disclosure to the SEC. By creating this nexus, the SEC proposed to narrow protections to employees that was not contemplated by Congress or written into Dodd-Frank.

Significantly, none of the parties or *amici curiae* in *Digital Realty* proposed reading this limitation into Dodd-Frank. Indeed, as Justice Ginsburg noted, in expressing the views of the government, the Solicitor General wrote in his brief: "Moreover, nothing in Subsection (a)'s definition of 'whistleblower,' or in petitioner's interpretation of the statute, requires a temporal or topical connection between the violation reported to the Commission and the internal disclosure for which the employee suffers retaliation." 138 S. Ct. at 780-81 (citing Brief for the United States as *Amicus Curiae* 25, *available at* https://www.justice.gov/sites/default/files/briefs/2017/10/23/16-1276_digital_realty.pdf). The Court reiterated an example provided by the Solicitor General: "an employee who was fired for reporting accounting fraud to his supervisor in 2017 would have a cause of action under [§ 78u–6(h)] if he had reported an insider-trading violation by his previous employer to the Commission in 2012." *Id.* at 781. And the Court noted that Petitioner, Digital Realty, affirmed this position, stating that Congress "could reasonably have made the policy judgment that individuals who report securities-law violations to the SEC should receive broad protection over time against retaliation for a variety of disclosures." *Id.* (citing Reply Brief for the Petitioners 11).

[3] *See e.g.*, *Van Asdale v. Int'l Dame Tech.*, 577 F.3d 989, 1001 (9th Cir. 2009) (holding that to demonstrate an objectively reasonable belief that a violation has occurred, an employee need only plead facts that "approximate" the elements of a securities fraud claim).

The proposed subject matter requirement would also inject uncertainty in that it is unclear how close the nexus must be between the disclosures to the SEC and any other protected conduct, such as a disclosure to the employer. Narrowing the scope of protection and injecting uncertainty would weaken Dodd-Frank whistleblower protection.

V. Whistleblower Status Should Be Accorded Upon Disclosing a Potential Violation to an Internal Ethics or Compliance Program

The SEC's Proposal Fails to acknowledge that an employee's internal disclosure to corporate compliance programs should be protected as whistleblowing under the Dodd-Frank Act. Proposed Rule 21F-2(d)(2) would clarify that "a person does not need to qualify as a whistleblower under Rule 21F-2(a) before performing the lawful act described in Rule 21F-2(d)(1)(iii), in order to be eligible for anti-retaliation protection. In other words, whether conduct is protected from retaliation would not depend on whether the person performing that conduct reported to the Commission beforehand or afterward (in order to qualify as a whistleblower). Section 21F is silent on this issue, and we believe that this clarification will help maintain appropriate incentives for persons to make the internal reports described in Section 21F(h)(1)(A)(iii) before or at the same time as reporting to the Commission. Proposed Rule 21F-2(d)(2) would reiterate, however, that a person must qualify as a whistleblower under proposed Rule 21F-2(a) before experiencing retaliation. Thus, for example, an individual who experiences repeated retaliation for a prior lawful act, and who first reports to the Commission while the retaliation is still ongoing, would be protected with respect to any retaliation experienced after the Commission report but not for any retaliation experienced before the Commission report." 83 Fed. Reg. at 34720.

This "timing" solution would create an arbitrary loophole. As recognized in the Commission's whistleblower incentive rules, commonly whistleblowers make initial internal disclosures, and then report to the Commission due to lack of corporate corrective action. Paradoxically, under the proposed language, an employer's admission that they fired a whistleblower in retaliation for the initial corporate disclosure, not the subsequent SEC disclosure, could in effect operate as a potential defense. This would give unscrupulous employers a perverse incentive to terminate whistleblowers promptly for internal disclosures, before they go to the SEC. This interpretation threatens the purpose of Dodd Frank protections by encouraging in-house retaliation for defending the law.

We propose that the SEC modify this proposal to clarify that an employee's internal disclosure of violations of securities laws to corporate audiences with relevant responsibilities, such as supervisory, ethics, audit or compliance personnel, qualify as an initial step for SEC disclosures under the Commission's rules. The rule should then require the employer to forward those internal disclosures and its response to the SEC. By this mechanism, an employee's internal disclosure meets Dodd-Frank's statutory definition of whistleblower because the employee provided information relating to a violation of the securities laws to the SEC in a manner established by the SEC's rules or regulations. *See* 15 U.S.C. § 78u-6(a)(6). In terms of the Dodd Frank anti-retaliation shield, this procedure would credit relevant internal disclosures

as indirect communications to the SEC. In short, through this Rule the SEC can accomplish the objectives it set forth in its *Digital Realty amicus* brief, in light of the Court's decision. This is precisely the approach the Supreme Court took for a wage theft whistleblower in *Kasten v. Saint–Gobain Performance Plastics Corp*., 131 S. Ct. 1325 (2011).

Other courts have recognized that such protection must begin at the inception of an employee's choice to use the normal channels of raising issues at the workplace. In the seminal case on the scope of protection, the United States Court of Appeals for the District of Columbia held that the Federal Mine Safety Act protected internal whistleblowing, even though the statute required the employee to make a complaint to the Secretary of the Interior before gaining the protection of the statute's anti-retaliation provision. *See Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772, 779 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975). Given the public policy considerations of the statute and its broad, remedial purpose, the court found that a miner's notification to a foreman of possible safety dangers was "an essential preliminary stage in both the notification to the Secretary (A) and the institution of proceedings (B), and consequently brings the protection of the [Federal Mine Safety Act] into play." *Id.* The court explained as follows:

> Safety costs money. The temptation to minimize compliance with safety regulations and thus shave costs is always present. The miners are . . . in the best position to observe the compliance or noncompliance with safety laws. Sporadic federal inspections can never be frequent or thorough enough to insure compliance. Miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine foreman or mine top management. Only if the miners are given a realistically effective channel of communication re [*sic*] health and safety, and protection from reprisal after making complaints, can the Mine Safety Act be effectively enforced. To hold that Phillips was not protected . . . would nullify not only the protection against discharge but also the fundamental purpose of the Act to compel safety in the mines.

Id. at 778 (footnote omitted). *Accord, Munsey v. Fed. Mine Safety and Health Review Comm'n*, 595 F.2d 735, 741 (D.C. Cir. 1978).[4]

After these decisions made clear that whistleblower protection statutes would be construed broadly to protect employees making internal disclosures, Congress used similar wording to protect employees engaged in other areas of public interest. In 1976, Congress enacted the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2622, to protect employees who, "commenced, caused to be commenced, or [are] about to commence or cause to be commenced a proceeding under this chapter." *See also* 42 U.S.C. § 7622 (Clean Air Act); 42 U.S.C. § 5851 (Energy Reorganization Act).

[4] Congress later amended the Federal Mine Safety Act to expressly include protections for internal whistleblowers. *See* Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290, 1303 (Nov. 9, 1977).

In *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505, 1511-12 (10th Cir. 1985), the Court elaborated on the protections contained in these statutes:

> [T]he legislative history of the [Federal Mine Safety Act] amendment shows that Congress did, in fact, intend the older version of the amendment to afford protection to internal complaints and the older version of the amendment is what the [Energy Reorganization Act] provision was modeled after. "The committee intends to insure the *continuing* vitality of various judicial interpretations of § 110 of the Coal Act which are consistent with the broad protections of the bill's provisions; *see e.g.*, *Phillips v. IBMA*, 163 U.S. App. D.C. 104, 500 F.2d 772 (D.C. Cir. 1974); *Munsey v. Morton*, 165 U.S. App. D.C. 379, 507 F.2d 1202 (D.C. Cir. 1974)." S. Rep. No. 186, 36, 95th Cong. 1st Sess. 1977, U.S. Code Cong. 2nd Ad. News, 3436.

(emphasis added). With Dodd-Frank, the reason to protect and encourage the use of internal controls is stronger in light of how the Act now requires public companies to maintain internal compliance programs.

We agree, however, with the SEC's proposal to clarify that the statute does not impose any requirement on the whistleblower to prove that the employer knew about the disclosure to the SEC when the employer retaliated against the whistleblower. An employer that retaliates against an employee for an internal disclosure about a potential securities law violation violates Dodd-Frank if that employee has also made an anonymous disclosure to the SEC. Indeed, the Court adopted that approach in *Digital Realty*:

> [Dodd-Frank] protects a whistleblower who reports misconduct both to the SEC and to another entity, **but suffers retaliation because of the latter, non-SEC, disclosure. That would be so, for example, where the retaliating employer is unaware that the employee has alerted the SEC.** In such a case, without clause (iii), retaliation for internal reporting would not be reached by Dodd-Frank, for clause (i) applies only where the employer retaliates against the employee "because of" the SEC reporting. §78u–6(h)(1)(A). Moreover, even where the employer knows of the SEC reporting, the third clause may operate to dispel a proof problem: The employee can recover under the statute without having to demonstrate whether the retaliation was motivated by the internal report (thus yielding protection under clause (iii)) or by the SEC disclosure (thus gaining protection under clause (i)).

Digital Realty Trust, Inc., 138 S. Ct. at 779 (emphasis added).

VI. The SEC Should Construe Prohibited Retaliation Broadly

The Proposed Rulemaking requests comment on whether the SEC should specify additional types of misconduct that fall within the prohibition in Section 21F(h)(1)(A) against "any other manner [of] discriminat[ion] against[] a whistleblower"? 83 Fed. Reg. at 34721. In particular, the SEC asks whether the rules should clarify that "if an employer rejects a prospective employee, or a past employer attempts to cause such rejection, because that individual had engaged in activity protected under Rule 21F-2, this would be a form of retaliation covered by Section 21F(h)(1)(A)?" *Id.*

Consistent with well-established precedent construing analogous whistleblower protection laws, we propose that the SEC construe prohibited retaliation to include any employment action that is *reasonably likely to deter employees from engaging in protected activity.* The Supreme Court articulated that standard in ***Burlington Northern & Santa Fe Railway Co. v. White***, 548 U.S. 53 (2006), a seminal decision construing the anti-retaliation provision of Title VII. In *Robinson v. Shell Oil*, 519 U.S. 337, 346 (1997), the Supreme Court made clear that reprisals undertaken after the termination of employment would still be actionable as they arise from the prior status as an "employee" and such an interpretation would further the broad remedial purpose of maintaining "unfettered access to statutory remedial mechanisms."

In particular, we suggest that the SEC clarify in the proposed rule that retaliation includes the following acts:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner retaliate against, including, but not limited to, intimidating, threatening, restraining, coercing, blacklisting, constructively discharging or disciplining, any person, including an applicant or former employee, with respect to the employee's compensation, terms, conditions, or privileges of employment because the person, acting alone or jointly with another individual, because the employer perceived that the person was assisted, was about to or engaged in, or was associated with protected whistleblowing.

This proposed clarification of the scope of prohibited retaliation is similar to the DOL's rule implementing the anti-retaliation provision of SOX, *see* 29 C.F.R. § 1980.102(a), and incorporates jurisprudence construing analogous whistleblower protection laws.

VII. The SEC Should Not Eliminate Internal Whistleblowing as a Basis to Increase an Award

Request for Comment No. 24 asks: "In determining the amount of an award, the Commission considers participation in internal compliance systems. Given the change in anti-retaliation protections, should the Commission still use this criterion in determining the size of

whistleblower awards? Why or why not?" 83 Fed. Reg. at 34721. We do not propose eliminating this upward adjustment factor, but we propose that the SEC take steps to warn whistleblowers of limitations on protection for internal disclosures. For example, the SEC should state those limitations on the website of the SEC Office of the Whistleblower and in the final rules.

Thank you for considering these comments, and feel free to contact us for any additional information or feedback.

Sincerely,

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