

December 15, 2010

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, File No. S7-33-10

Dear Ms. Murphy:

The Association of Corporate Counsel (“ACC”)¹ and the leading in-house legal executives² co-signing this letter appreciate the opportunity to present our views to the Commission regarding its above-referenced proposed rules. We urge the Commission to reconsider their proposals in order to assure that the robust and effective corporate internal compliance and reporting systems we value, and that regulators have mandated, may continue to cultivate healthy and responsible corporate cultures. We believe that the Commission’s proposals will have the impact of thwarting internal compliance and reporting programs in a manner inconsistent with the intent of the Dodd Frank legislation that authorized them.³

ACC and its co-signers propose modifications to the rule that would require an individual with information regarding corporate misconduct to first use existing internal compliance and reporting systems and then to give the company a reasonable time to resolve the issue before making any submission to the Commission.⁴ Failure to do so raises the specter of two equally troubling and certainly unintended results: first, by

¹ ACC is the bar association for attorneys employed in the legal departments of corporations and private-sector organizations worldwide. ACC has more than 26,000 members in over 75 countries, employed by over 10,000 organizations. In addition, our membership brings to these important issues the unique views of in-house counsel who are at the very intersection of the compliance and reporting functions. As such, our membership speaks not only for in-house counsel, but also for the interests of their client organizations and the stakeholders who will be affected by the proposed rules.

² The co-signers are particularly well-suited to offer the SEC an important perspective on this issue, as they are responsible for the compliance and reporting functions within their companies. They lead companies of all sizes and industries, and many have direct or supervisory responsibility for the implementation of both reporting systems and whistleblower protection programs within their often multinational companies.

³ ACC will file a separate comment letter addressing a variety of issues raised by the proposed rule. However, ACC and the co-signers wish to make clear in this standalone submission the immediate need to safeguard internal compliance and reporting systems.

⁴ The Commission will receive many useful suggestions as to how to modify its proposed rule to accommodate the concerns we raise in this comment letter. We do not wish to preempt consideration of those approaches by offering a more detailed suggestion here, but rather to make clear the absolute minimum change required to protect the role of internal compliance and reporting systems.

undermining the internal compliance and reporting systems that allow responsible companies to comply with critical regulations and conduct themselves in an ethical manner; and second, by proposing an alternative system which fails to replace existing corporate reporting systems with any effective mechanism to ensure companies obtain early warnings of burgeoning failures or frauds within their organizations. While we commend the Commission for acknowledging these concerns in the commentary accompanying the proposed rules, the rules themselves do little to address them, and indeed, create a dynamic that works at odds with their resolution.

* * *

The vast experience of the thousands of companies with excellent records of compliance due to robust internal reporting procedures teaches us the practical reality that creating a culture of compliance requires a substantial effort. These efforts include the need to communicate and inculcate a shared value that all employees are responsible for ensuring that the company operates within the bounds of the law and ethics.

Stakeholders across the spectrum demand that organizations establish reliable systems to monitor and manage employees' adherence to the law, as well as effectively remediate problems that arise. That principle was articulated by Congress in a number of mechanisms in Sarbanes-Oxley, legislated against the backdrop of a series of significant corporate frauds; similarly, that principle drove the United States Sentencing Commission to make clear the need for effective and robust compliance systems in issuing its organizational sentencing guidelines, codified in Chapter 8 of the United States Sentencing Guidelines.⁵

But quite apart from regulatory obligations, effective compliance and reporting systems yield a variety of benefits to companies, investors and the government.⁶ First, and most importantly, they serve as an early tripwire for the detection of illegal or unethical conduct. Senior executives and boards – especially those in large companies who by definition are likely removed from the ability to personally monitor day-to-day operations at all levels – depend on these systems to empower employees to trigger the early warning systems that allow the company to respond to problems before misconduct can fester and expose the company to significant liabilities. Second, compliance systems are the principal vehicles for educating employees about what the law requires, particularly given rapid, complex, and multijurisdictional legal obligations that managers with all kinds of responsibilities in the company must navigate. Finally, these

⁵ United States Sentencing Commission, Guidelines Manual §8B2.1 (“Effective Compliance and Ethics Program”) (Nov. 2010).

⁶ It is true that not all companies use structured compliance and reporting mechanisms. As the Sentencing Commission recognized in promulgating its organizational sentencing guidelines, the size of the company and availability of resources sometimes prevent the creation of formal mechanisms. United States Sentencing Commission, Guidelines Manual §8B2.1 App. Note 2(c) (Nov. 2010). Nevertheless, the Commission should require individuals to make use of whatever procedures do exist, so that these smaller companies are not saddled by the costs of a Commission investigation for which the first notice was a phone call from Commission staff.

mechanisms, while directed at keeping companies out of trouble and protecting stakeholders, can also help to improve overall business performance and the maintenance of a strong, vibrant corporate culture.

But none of these important compliance mechanisms work if employees are not vested in and do not feel they will be protected in fulfilling their roles in reporting wrongdoing. ACC and its co-signers strongly support protections for individuals who identify and report misconduct. Indeed, in-house counsel are the pioneers in establishing and facilitating corporate whistleblowing systems and safeguards. Thus, we join the Commission in its desire to promote rules that reinforce important whistleblower principles, since they are crucial to unearthing otherwise hidden or ignored problems in companies so that they may be addressed.

Blowing the whistle on bad actors serves both the interests of companies who are playing by the rules and the interests of the investor community, but internal reporting systems are incented only when they operate in a manner that provides the company with the opportunity to successfully police its own house. Establishment of a successful reporting system thus incorporates a variety of features, from ongoing training and education designed to help employees recognize wrongdoing, to the facilitation of reporting mechanisms and anonymous hotlines for reporting allegations.

The *sine qua non* requirement for these programs to work and for companies to comply with the law is the expectation that employees will report misconduct internally so that the company can timely address and correct problems reported.⁷ Otherwise, reporting systems have no capacity to remediate rogue actions, and companies are deprived of the means to redress their own shortcomings before breakdowns in appropriate behaviors rise to the level of catastrophic failures.

Unfortunately, the Commission's proposed approach, while ostensibly accommodating these concerns, fails to resolve them:

1. The Commission's proposed rules disincent employees from looking for ways to improve or correct corporate behaviors, and incent them to find ways to profit from corporate wrongdoing. Fraudulent misconduct, the bane of good compliance systems, then becomes the gold mine, rather than an impetus for companies with effective compliance systems to address the underlying issues.
2. The Commission's proposed approach invites employees to focus on timing their report so as to maximize the bounty they'll receive, potentially allowing

⁷ Given their integral importance to the success of compliance programs, policies articulating employee responsibilities for helping the company to comply with the law and requiring cooperation with internal investigations have been incorporated into employee handbooks directly in many sophisticated companies. Employees who fail to comply with these policies can be subject to termination or other forms of discipline.

misconduct to fester in order to allow them to more easily evidence their claim or increase the damages caused by the misconduct (by which their bounty will be calculated) before approaching the Commission.

3. Encouraging those who wish to report suspected wrongdoing to end-run internal investigations invites waste and promotes less effective responses to serious problems. Companies confronted with a report can more timely address the underlying situation, and, if necessary, self-report to the Commission; knowing that employees with legitimate complaints can take their concerns to the Commission if the company does not respond is a very effective brake on burying bad behavior.⁸
4. While we commend the Commission for acknowledging that the bounty program could undermine corporate compliance regimes, the proposed rule's approach is not sufficient.⁹ We note three particular concerns:

First, the ninety-day look-back period merely permits the whistleblower an option of reporting internally first. That option places the prospect of significant financial compensation for reporting to the Commission in competition with internal reporting if the corporation then does what it should to remediate the problem. Prospective whistleblowers will quickly learn that waiting to allow the problem to fester and then to report directly to the Commission will yield a better award than reporting to their compliance officials soon after learning of the misconduct.

Second, the Commission's proposal to reduce the eventual award to an individual who does not make use of internal reporting systems is a good idea, but it is merely mentioned in the commentary without being listed in the rule

⁸ If the company refused to address the issue, the individual, after waiting a reasonable period of time (we suggest 180 days), could submit their allegations directly to the Commission. Given the large fines assessed in recent years, however, we expect companies to take complaints quite seriously. Any delay will not harm the resolution of the underlying allegations, and, in fact, will likely speed up the process. The Commission itself acknowledges that it may take more time for them to sift the many reports that may flood them as a result of this rule and its opportunistic bounties; and further, the Commission also acknowledges that after it does manage to sift reports, it will likely send any that it finds should be pursued back to the company anyway. Days, if not months, will be lost, while presumably illegal activity continues, resulting – ironically – in the potential for the company's liability to increase and the problems and impacts to worsen.

⁹ Some have argued that Dodd-Frank did not give the Commission the ability to require a whistleblower to exhaust the internal compliance route first. That proposition is flatly incorrect. In defining "whistleblower," Congress specifically required covered individuals to submit their allegations "in a manner established, by rule or regulation, by the Commission." In an effort to reconcile the myriad governmental and stakeholder interests in supporting effective compliance and reporting systems, the Commission should require individuals seeking the status of whistleblower under the securities laws to demonstrate in their submission to the Commission that they had first informed their companies and that the companies had an adequate time in which to resolve the issue.

itself as a relevant factor. Even if this factor were explicitly listed, it would take years of Commission precedent before it became clear to individuals, and their counsel, how exactly such a factor would be weighed in the balance. Ambiguity over the rewards and incentives of the system undermines internal corporate compliance and reporting systems in the interim.

Third, the Commission also suggests that it would, in its discretion, contact the company after learning of the allegation to allow the company to conduct an internal investigation and obtain cooperation credit. In addition to failing to make clear how its discretion would be exercised, the Commission would place the company in the unenviable position of learning of alleged wrongdoing via a phone call from Commission staff. And, others might learn of the report before the company can make any effort to ascertain the complaint's veracity, with potentially devastating impacts on the company and the investors and employees who rely on the company's legal health and strong brand. Companies with compliance and reporting systems should be, at the very least, given an opportunity to have notice of a problem before it reaches an adversarial or publicized stage, especially if there remains a potential that the company has not done anything wrong. Otherwise, the inefficient process the Commission has unveiled will prevent the type of quick action critical to stemming problems early.

* * *

We recognize the valid concern that some employees will fear retaliation for blowing the whistle.¹⁰ The solution to that problem is not, however, a scheme to undermine important and effective internal compliance and reporting systems; rather, employees who fear retaliation may rely on the anti-retaliation provision contemporaneously enacted by Congress. By doing so, the Commission will separate out the good corporate actors from the bad. The bad actors—who punish their employees for uncovering and reporting bad deeds—will find themselves unable to defend their actions in both the courts of law and public opinion, both for the underlying misconduct and for retaliating against employees who wanted to improve the situation. Good actors—who use their compliance and reporting systems to encourage employees to engage in responsible behavior and who act appropriately in response to meritorious tips—will benefit from the Commission requiring employee allegations to be routed internally by having an opportunity to strengthen their cultures of compliance.

¹⁰ From our perspective and based on the traditional understanding of the term, an individual who merely learns of a problem and heads for Door Number 1 to recover a large award is not a whistleblower. Instead, the archetypal whistleblower is an individual who attempts to solve the problem within an organization, but, finding no allies or worried that continued agitation will lead to personal retribution, reaches out to outside entities, such as the media or the government in an effort to uncover misconduct and protect their innocence as a reporter. The Commission should adopt a better definition of “whistleblower” by requiring those who would wear the title to earn it by reporting internally first.

The advent of compliance, investigative and reporting systems has been an unalloyed good for companies and their stakeholders. Today, because these systems exist, blowing the whistle does not occur in a vacuum. And, these systems continue to mature in response to the dynamic business and regulatory environment our companies confront. The undersigned would naturally appreciate the opportunity to work with the Commission and other interested regulators to strengthen these mechanisms, so that they can be more effective vehicles for ensuring compliance with the law and high standards of ethical conduct. However, the Commission must safeguard the gains and promote more “compliant” outcomes by revising its proposed rules to require individuals to first report within these systems and then to give these systems an opportunity to resolve the allegations.

Submitted on behalf of the Association of Corporate Counsel:



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