Arent Fox

December 15, 2010

Ms. Elizabeth M. Murphy
Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-33-10-Dodd-Frank Whistleblower Award Program

Dear Ms. Murphy:

This letter supplements our prior submission dated October 25, 2010,[1] regarding the Securities Whistleblower Incentives and Protection Program in Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Since the date of our original submission, the Securities and Exchange Commission ("SEC") has issued Proposed Rules ("Proposed Rules") for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 ("Exchange Act") in Release No. 34-63237.

We believe the Proposed Rules fail to address the significant concerns raised in our prior submission. In particular, the Proposed Rules fail to adopt the well-reasoned and important safeguards implemented by the IRS in governing its whistleblower program upon which the Dodd-Frank whistleblower provisions were based. Adopting a "one-bite" rule, which would prohibit the SEC from deputizing a whistleblower to go "back in" to a public company to look around for more information, prevents the risk of the informant becoming an instrument or agent of the government and the potential negative evidentiary consequences that might attach.

In addition, the Proposed Rules fail to adopt the IRS's "no bite" rule precluding the SEC from accepting information from public company representatives with direct fiduciary responsibilities to the company. We continue to believe that such company representatives should be excluded by rule from eligibility for financial rewards. Employees of the company's compliance, legal, and internal audit functions, as well as the control group of officers charged with management of the company, all fall into this category. Please understand that we are not suggesting that such individuals be prohibited from reporting potential securities laws violations

[1] A copy of our prior submission is attached for your reference.

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to the SEC, just that they not be eligible for receiving monetary rewards for doing so. It is their job to detect, report and address potential wrongdoing.

We also continue to believe that the SEC should follow the IRS's lead in being particularly sensitive to privilege and confidentiality issues that may be present in cases involving informants. Before using information provided by an informant, the SEC should determine whether the information being provided is subject to a privilege and if so, whether the privilege has been waived in whole or in part. This is especially important when dealing with anonymous whistleblowers. One solution might be to require whistleblowers or counsel for anonymous whistleblowers to certify that they understand what constitutes an attorney-client privilege and that they are aware of no potential privilege-related issues regarding the information being provided.

Finally, the Proposed Rules create an unnecessary and unhealthy competition between pubic company compliance departments and the SEC for whistleblower information. In light of the significant financial incentives being offered by the SEC for such information, employees will undoubtedly elect to circumvent company compliance departments. The Proposed Rules' 90-day "grace period," and proposed "credit" for reporting internally first, do little to address this fundamental flaw.

We continue to believe that Congress intended the Dodd-Frank whistleblower provisions to supplement rather than supersede the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"). As we previously noted, Section 301 Sarbanes-Oxley requires public company audit committees to have in place procedures to receive and address concerns, including those raised anonymously, regarding accounting, internal controls, and auditing issues. It also provided, and Dodd-Frank has now enhanced, protections for corporate whistleblowers.

Implementation of a requirement that employees of public companies utilize congressionally-mandated internal corporate whistleblower procedures to report suspected wrong doing, as a required prerequisite to making a claim under Section 922 of Dodd-Frank, is in the interest of everyone involved.[2] If no appropriate action is taken by a company within a reasonable time period,[3] then a Dodd-Frank whistleblower claim directly to the SEC by the employee could be permitted.

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[2] An onslaught of whistleblower claims could potentially overwhelm the SEC, which recently had to defer creation and staffing of five new offices required under Dodd-Frank, including its Whistleblower Office, due to budgetary uncertainty.

[3] A time period similar to the provision of Section 10A of the Exchange Act as applied to outside auditors could be incorporated into the SEC's rules.

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SEC rules could still make employee whistleblowers, who report such information to their company first, eligible to receive rewards under Dodd-Frank, and companies would still be afforded the opportunity to take their own remedial actions including self-reporting. Absent such an opportunity, companies will be deprived of the benefits of self-reporting provided by federal sentencing guidelines, and SEC and Department of Justice guidance.

Should you have any questions or need additional information, please feel free to contact Mark S. Radke at (202) 715-8431 or Peter V. B. Unger at (202) 857-6220.

Sincerely,

Arent Fox LLP

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Attachment

Arent Fox

October 25, 2010

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. DF-Title IX-Whistleblower Award Program

Dear Ms. Murphy:

This letter is in response to the request by the Securities and Exchange Commission ("SEC") for comments about proposed rulemaking by the SEC relating to the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). In particular, this letter addresses comments relative to the Securities Whistleblower Incentives and Protection Program in Title IX of Dodd-Frank.

Section 922 of Dodd-Frank adds a new Section 21F to the Securities Exchange Act of 1934 (the "Exchange Act"). Section 21F(j) gives the SEC the authority to issue rules and regulations to implement the provisions of Section 21F. The SEC has yet to publish proposed rules relative to Section 21F and has solicited comments in advance of its proposed rulemaking.

The provisions of Section 922 of Dodd-Frank are similar to the Internal Revenue Service's ("IRS") whistleblower program contained in Section 7623 of the Internal Revenue Code. Accordingly, we believe that consideration should be given by the SEC to adopting rules similar to those adopted by the IRS to implement its whistleblower program.[1]

In particular, the SEC should consider adopting a "one bite" rule prohibiting the SEC from deputizing a whistleblower to go "back in" to a public company to look around for more information. Such a rule prevents an informant from becoming an instrument or agent of the government and avoids the potential negative evidentiary consequences that might attach as a result.

[1] See IRS Chief Counsel Notices CC-2008-011 (February 22, 2008) and CC-2010-004 (February 11, 2010) (attached).

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The SEC should also consider a "no bite" rule precluding it from accepting information from public company representatives with fiduciary responsibilities to the company. We believe that such company representatives should be defined by rule to include, but not be limited to, employees of the company's compliance, legal and internal audit functions as well as the control group of company officers charged with the management of the company.

The SEC should also follow the IRS's lead in being particularly sensitive to privilege and confidentiality issues that may be present in cases involving informants. Before using information provided by an informant, the SEC should determine whether the information is subject to a privilege and if so, whether the privilege has been waived in whole or in part.

In addition, we believe that Congress intended Section 922 of Dodd-Frank supplement rather than supersede the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"). Section 301 of Sarbanes-Oxley requires public company audit committees to have in place procedures to receive and address complaints regarding accounting, internal controls, and auditing issues. It also provides protection for corporate whistleblowers by specifying that audit committees must establish procedures for employees' anonymous submission of concerns regarding accounting or audit issues. We believe that Congress intended such internal corporate whistleblower programs to be a "front line" of defense to address potential wrong doing.

Accordingly, we recommend that the SEC require employees of public companies to utilize such Congressionally mandated internal whistleblower procedures to report suspected wrong doing as a required prerequisite to making a claim under Section 922 of Dodd-Frank. If no appropriate action is taken by a company within a reasonable time period[2], then a Section 922 Dodd-Frank claim could be permitted. Any other interpretation of Section 922 of Dodd-Frank has the potential to eviscerate a key element of Sarbanes-Oxley's enhanced internal controls.

[2] A time period similar to the provision in Section 10A of the Exchange Act as applied to outside auditors.

Such a required prerequisite would also afford companies the opportunity to take their own remedial action including self-reporting. Absent such an opportunity, companies will be deprived of the benefits of self-reporting under federal sentencing and current SEC and Department of Justice guidelines.

Should you have any questions or need additional information, please feel free to contact Mark S. Radke at (202) 715-8431 or Peter V. B. Unger at (202) 857-6220.

Sincerely,

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Department of the Treasury | Internal Revenue Service | Office of Chief Counsel

Notice

CC-2008-011

February 27, 2008

Subject: Limitations on Informant Contacts: Current Employees and Taxpayer Representatives

Cancel Date: Upon incorporation into CCDM

Purpose

This Notice discusses the advice to be given to the Internal Revenue Service regarding the limitations on contacts with an informant (1) who is a current employee of a taxpayer and who is providing the Service with information regarding the informant's employer that has been obtained in the course of the informant's employment, or (2) who is acting as the taxpayer's representative in an examination or other proceeding pending before the Service. This Notice includes, but is not limited to, contacts with informants who have filed claims with the Service pursuant to I.R.C. § 7623. This Notice applies to the conduct of Counsel employees in dealing with informants in the categories described above at the administrative level or in litigation. The Service is in the process of issuing instructions to its employees that include a requirement to coordinate the current employee and taxpayer representative informant issues with Counsel, consistent with this Notice.

Informants Who are Current Employees of a Taxpayer

There is a long-standing line of cases that support the ability of the government to legally use information received from a private party even if the private party obtained the information in an illicit or illegal manner as long as the government is a passive recipient of the information and did not encourage or acquiesce in the private party's conduct. See, e.g., Burdeau v. McDowell, 256 U.S. 465 (1921). This is often referred to as the "one bite" rule. In the context of Service and Counsel interaction with informants, staying within the bounds of the "one bite" rule protects the integrity of the adjustments that may result from a particular examination when current employee information has been used as part of the examination. There is a risk that, after the initial meeting between the informant and the Service, the acceptance of any information by the Service from an informant who is a current employee of a taxpayer could be perceived as encouraging or acquiescing to the informant's actions, which could make it difficult for the Service to avail itself of the "one bite" rule. If the Service

cannot legally use information received from an informant, any adjustment that is dependent on that information or from information subsequently derived from that information may not be legally supportable.

The "one bite" rule is the operative rule for Service and Counsel employees regarding contacts with informants who are current employees of a taxpayer. The Service should be a "passive recipient" of the informant's information. In the context of Service and Counsel activities, this means that at the initial meeting between that person and the Service, the Service must be prepared to accept any and all information to be provided by an informant who is a current employee of a taxpayer, and that there will be no subsequent meetings or contacts with that person after this initial meeting. This minimizes the risk that examination adjustments will have to be conceded because of the use of employer information that is improperly disclosed to the Service by the current employee.

After an initial meeting between a current employee who is an informant and the Service, in the rare circumstance when it is not clear that the initial meeting constituted the "one bite" under this Notice, the potential for any subsequent meeting with the informant, whether initiated by the Service or the informant, must be brought to the attention of the appropriate Division Counsel and the Associate Chief Counsel (Procedure and Administration). The Division Counsel and the Associate Chief Counsel (Procedure and Administration), in consultation with the Deputy Chief Counsel (Operations), will decide on a suitable course of action.

Informants as Taxpayer Representatives

Under no circumstances is it appropriate to accept any information from an informant in the informant's capacity as an informant regarding a taxpayer (or related taxpayers) when the informant is also the taxpayer's representative in any administrative matter pending before the Service, *e.g.*, an income tax examination, or in any litigation involving issues that the Service has an interest in (Tax Court and refund litigation, collections suits, summons enforcement actions, etc.). If a taxpayer's representative makes a direct or indirect overture to the Service or Counsel about becoming an informant, *e.g.*, either orally or by filing a Form 3949 A, Information Referral, or Form 211, Application for Reward for Original Information, there will be no further dealings with that person as the taxpayer's representative and the informant must be informed of this outcome immediately. Any information provided by the taxpayer's representative in connection with an overture to become an informant cannot be used by Service or Counsel employees in any matter concerning the taxpayer (or related taxpayers). It will be the responsibility of the informant to attempt to explain the reason for being excluded from the matter as the taxpayer's representative under these circumstances.[1] In addition, Service and Counsel employees should have no further dealings or contact with, or receive any further information from, the informant as an informant.

[1] This is not an application of the bypass rule found at IRM 4.11.55.3.

The same rules discussed above apply and the same results are reached if an individual's status as an informant regarding a taxpayer (or related taxpayers) predates that person's appearance as the taxpayer's representative in any administrative matter pending before the Service or in litigation.

The appropriate Division Counsel and the Associate Chief Counsel (Procedure & Administration) must be notified immediately of any situation involving an informant or potential informant who is or may become the taxpayer's representative under the circumstances described above.

Evidentiary Matters

Counsel must be particularly sensitive to privilege issues that may be present when an informant is a current employee and/or the taxpayer's representative. It should be assumed that a current employee or a taxpayer's representative has access to information that may be privileged and there has been no affirmative waiver by the taxpayer of applicable privileges. The use of potentially privileged information by the Service can also have the same effect of tainting an issue or an entire case.

Questions relating to issues addressed in this Notice should be directed to Procedure and Administration Branch 6 at 202-622-7950 or Branch 7 at 202-622-4570.

/s/
Deborah A. Butler
Associate Chief Counsel
(Procedure & Administration)

Department of the Treasury | Internal Revenue Service | **Office of Chief Counsel**

Notice

CC-2010-004

February 17, 2010

Subject: Clarification of CC Notice 2008-011 – Limitations on Informant Contacts: Current Employees and Taxpayer Representatives

Cancel Date: Upon incorporation into the CCDM

Purpose

This Notice clarifies CC Notice 2008-011 as it applies to the advice to be given to the Internal Revenue Service as to the limitations on contacts with an informant who is a current employee of a taxpayer and who is providing the IRS with information regarding the informant's employer. This Notice also provides additional guidance relating to evidentiary issues that may arise when reviewing potentially privileged information provided by an informant. In addition, for purposes of convenience, this Notice restates the discussion in CC Notice 2008-011 regarding the advice to be given to the IRS regarding the limitations on contacts with an informant who is acting as the taxpayer's representative in an examination or other proceeding pending before the IRS. This Notice applies to, but is not limited to, contacts with informants who have filed claims with the IRS pursuant to I.R.C. § 7623. Finally, this Notice applies only to civil tax cases, whether at the administrative level or in litigation, and is intended to assist Chief Counsel attorneys in providing advice regarding contacts with informants in those cases. It does not apply to criminal matters. For guidance with respect to criminal matters, refer to IRM 9.4.2, Sources of Information.

Informants who are Current Employees of a Taxpayer

There is a long-standing line of cases that support the ability of the government to use information received from a private party, even if the private party obtained the information in an illicit or illegal manner, as long as the government is a passive recipient of the information and did not encourage or acquiesce in the private party's conduct. See, e.g., Burdeau v. McDowell, 256 U.S. 465 (1921). If the private party acts as an "instrument or agent" of the government, however, the Fourth Amendment, and its handmaiden the Exclusionary Rule, may apply and, as a result, a court may exclude the government's evidence. Whether an informant is an instrument or agent of the government is usually determined using a fact-intensive analysis that does not depend on any easily-identifiable objective criteria. Generally, courts focus on two factors: (1) the government's knowledge of, and acquiescence in, the search and seizure, and (2) the intent of the party conducting the search and seizure. See, e.g., United States v. Walther, 652 F.2d 788 (9th Cir. 1981). Courts applying the Walther two-part test have held for and against the application of the

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Exclusionary Rule, based on the particular facts at issue before them. Compare United States v. Feffer, 831 F.2d 734 (7th Cir. 1987) (holding that an employee did not act as a government agent in turning over company documents to the IRS) with Walther, supra (holding that an airline employee acted as a government agent in opening a case suspected of containing illegal drugs); see also United States v. Snowadzki, 723 F.2d 1427 (9th Cir. 1984) (holding that an individual acted on his own in illegally seizing documents from a co-worker and turning them over to the IRS).

In addition to whether the private party acted as an instrument or agent of the government, the potential application of the Exclusionary Rule to the IRS's use of information in a civil tax case will depend on the resolution of several other legal issues, including whether the target of the search had a reasonable expectation of privacy in the property searched. See Steagald v. United States, 451 U.S. 204 (1981).

In light of the foregoing discussion of case law and to protect the integrity of any proposed adjustments, the IRS should, to the extent possible, remain a passive recipient of information from informants. Interaction between the IRS and an informant, or actions by the IRS related to an informant's information, could be perceived as encouraging or acquiescing in the conduct of the informant and could thereby taint the information received from the informant. If the information is tainted in such a way that the IRS cannot legally use it, any adjustment that is dependent on the tainted information, or on any information derived from the tainted information, may not be legally supportable and may have to be conceded.

To minimize any increased risk associated with information and interactions with current employee informants, the IRS should be advised to adhere to the following rules and procedures.

Generally, the IRS should limit contact with a current employee informant to those circumstances when it will be considered under applicable case law as a passive recipient of information provided by an informant. Under this approach, the IRS should be advised to act as a passive recipient of information at an initial meeting with an informant and to accept any and all information provided by the informant at this initial meeting. The IRS's ability to receive information provided by a current employee informant, however, may also include, on a case-by-case basis, limited follow-up contacts, including debriefings,[1] initiated by the IRS to clarify the information previously submitted by the informant. The appropriate Operating Division Counsel should provide support to the IRS, as needed, with respect to these follow-up contacts and debriefings.

A current employee informant may submit additional information to the IRS following the initial submission. Depending on the facts and circumstances, the additional information may be received and used by the IRS. Generally, the IRS may receive and use supplemental information submitted by a current employee informant for the sole purpose of clarifying previously submitted information. For this purpose, supplemental information must reasonably relate to the previously submitted information, based on an analysis of all the facts and circumstances relating to the information and the IRS's contacts with the informant. In any case involving additional information submitted by a current employee informant, the IRS must coordinate the matter with the appropriate Operating Division Counsel. The Operating Division Counsel will consult with the Associate Chief Counsel (Procedure and Administration). The Deputy Chief Counsel (Operations) shall determine Counsel's position if the Operating Division Counsel and the Associate Chief Counsel (Procedure and Administration) disagree on whether the IRS should use

[1] Debriefing procedures applicable to civil cases are discussed at IRM 25.2.2.6.

the information. If Counsel concludes that the information may not, in fact, be supplemental to previously submitted information, as described above, or, based on an analysis of the risks of using the information, that the information should not be used by the IRS even if it is supplemental information, then an appropriate IRS Operating Division Executive will determine whether or how to proceed.

In certain circumstances, contacts with a current employee informant, whether initiated by the IRS or the informant, that are not clearly within the instructions described above, may also be considered on a case-by-case basis. These circumstances may arise, for example, when it is unclear whether a proposed contact would be an initial contact, a debriefing, or a subsequent contact, or when an informant submits additional information that relates to a new issue. Additional information that is submitted by a whistleblower, including a current employee informant, that relates to a new issue should be treated as a new claim that is subject to the procedures described in Notice 2008-4, 2008-2 I.R.B. 253 and any related IRM provisions. In these circumstances, the IRS must coordinate the matter with the appropriate Operating Division Counsel. The Operating Division Counsel will consult with the Associate Chief Counsel (Procedure and Administration). The Deputy Chief Counsel (Operations) shall determine Counsel's position if the Operating Division Counsel and the Associate Chief Counsel (Procedure and Administration) disagree on whether the IRS should use the information. If Counsel concludes that the IRS should not initiate a contact or use information based on its evaluation of the risks, then an appropriate IRS Operating Division Executive will determine whether or how to proceed.

Informants who are Current Representatives of a Taxpayer

Under no circumstances is it appropriate to accept any information from an informant regarding a taxpayer (or related taxpayers) when the informant is also that taxpayer's representative in any administrative matter pending before the IRS, e.g., an income tax examination, or in any litigation involving issues in which the IRS has any interest (Tax Court and refund litigation, collections suits, summons enforcement actions, etc.). If a taxpayer's representative makes a direct or indirect overture to the IRS or Counsel about becoming an informant, e.g., either orally or by filing a Form 3949A, Information Referral, or Form 211, Application for Reward for Original Information, there will be no further interaction with that person as the taxpayer's representative and the representative must be informed of this outcome immediately. It will be the responsibility of the taxpayer's representative to attempt to explain the reason for being excluded from the matter as the taxpayer's representative under these circumstances.[2] In addition, IRS and Counsel employees should have no further interaction or contact with, or receive any further information from, that taxpayer's representative as an informant.

The same rules apply and the same results are reached if an individual's status as an informant regarding a taxpayer (or related taxpayers) predates that individual's appearance as the taxpayer's representative in any administrative matter pending before the IRS or in litigation.

The appropriate Division Counsel and the Associate Chief Counsel (Procedure and Administration) must be notified immediately of any situation involving an informant or potential informant who is, or may become, the taxpayer's representative under the circumstances described above.

[2] This is not an application of the bypass rule found at IRM 4.11.55.3.

Evidentiary Matters

Counsel must be particularly sensitive to the privilege and confidentiality issues that may be present in cases involving informants. The use of potentially privileged information by the IRS can result in the inability to pursue an issue or an entire case.

For this reason, before using information provided by an informant, the IRS must determine whether the information is subject to a privilege and, if so, whether the taxpayer has waived the privilege. Moreover, the IRS needs to determine the extent of any privilege that may apply. In many cases in which a privilege does apply to information provided by an informant, portions of the information will nonetheless likely not be subject to the privilege. Whether information is subject to a privilege, and the extent of any such privilege, will depend on the particular facts and circumstances of the matter. Generally, it should be assumed that a current employee has access to information that may be subject to a privilege that has not been affirmatively waived by the taxpayer. If, in a particular case, the rules and procedures described above for current employee informant cases do not apply, then the IRS may conduct its own review of the information provided by an informant without the formal assistance of Counsel. The IRS will, however, coordinate with Counsel upon the identification of any potential privilege issue regardless of whether an informant is a current employee of the taxpayer.

If a current employee informant is an attorney, accountant, or other professional, the informant may violate a duty of confidentiality owed to his or her client by providing information to the IRS. In some cases, these ethical violations may affect the IRS's ability to use the information provided by the informant. The implications for the IRS of an informant's breach of an ethical duty will depend on the nature of the informant's ethical duty and the nature of the breach. Moreover, ethics rules that apply to the IRS and/or Counsel employees involved in a case may affect the ability of those employees to use the information and, as a consequence, may affect the IRS's ability to use the information. Finally, courts may impose limitations on the IRS's use of confidential information in litigation. See, e.g., In re Shell Oil Refinery, 143 F.R.D. 105 (E.D. La. 1992). Counsel should consider the potential impact of any applicable ethical duties in the course of its taint review.

Questions relating to issues addressed in this Notice should be directed to the Associate Chief Counsel (Procedure and Administration), Branch 6 at 202-622-7950 or Branch 7 at 202-622-4570.

/s/
Deborah A. Butler
Associate Chief Counsel
(Procedure and Administration)