CENTER FOR CAPITAL MARKETS COMPETITIVENESS
OF THE
UNITED STATES CHAMBER OF COMMERCE

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Ms. Elizabeth Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Ms. Murphy:

We are submitting these comments to supplement the December 17, 2010 letter filed by the U.S. Chamber of Commerce's Center for Capital Markets Competitiveness ("CCMC") in response to the U.S. Securities and Exchange Commission's Proposed Rules for Implementing the Whistleblower Provisions in Section 21F of the Securities Exchange Act of 1934. The U.S. Chamber of Commerce (the "Chamber") is the world's largest business federation representing the interests of more than three million companies of every size, sector, and region. The Chamber created CCMC to promote a modern and effective regulatory structure for capital markets to fully function in a 21 century economy.

The National Whistleblowers Center's ("NWC") report dated January 25, 2011 contains data that it offers in support of the proposition that most whistleblowers contact the company first as a matter of practice. We believe that the analysis is a tautology, where the selected data predetermines the conclusion that will be reached, and the results should not be used to support any policy determinations. According to the NWC,[1] the data is collected from a small pool of 107 claims asserted during a three-year window under only one ancillary section of False Claims Act (FCA) – subsection (h) -- focusing on alleged retaliation against the employee who communicated the information. While the FCA is designed to protect the anonymity

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[1] See Appendix entitled "Research Methodology" to Impact of *Qui Tam* Laws on Internal Compliance: A Report to the Securities Exchange Commission, National Whistleblowers Center, Dec. 17, 2010.

of claimants,[2] a person basing a violation on subsection (h) must have alleged some form of internal reporting or other act in furtherance of the *qui tam* case. The analysis is accordingly circular, insofar as the cases selected by definition reflect some form of internal reporting. By contrast, it would be relevant – and perhaps representative of parties to FCA cases generally -- to study the frequency of employee self-reporting among violations of the principal provisions of the FCA, excluding claims under subsection (h) for the reasons noted above.

We also question the NWC's data and methodology for other reasons. The NWC bases its conclusion on only 107 FCA claims that contain allegations of retaliation. The 107 cases relied upon are not identified in the report, and it is unclear whether they reflect mere allegations of self-reporting, or detailed facts.[3] It is equally unclear whether the cases encompass only communications by employees of the company in question, or the larger universe of potential relators, such as competitors and employees of competitors.

Finally, we believe that that the Commission's rules should encourage whistleblowers to use a company's internal compliance programs absent a well-founded reason for not doing so. While offering greater monetary rewards for doing so is marginally helpful, we do not believe that it would be sufficient. Among other things, whistleblowers and their counsel may discount the value of such an "internal reporting credit" insofar as they fear that a company's early involvement in and mitigation of the matter could either eliminate or reduce any resulting award. In effect, the whistleblower's interest at this stage is adverse to those of the company and its shareholders. The company and its shareholders have a strong interest in mitigating any future penalties and reputational harm, while the whistleblower would benefit financially from "letting the problem grow."

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[2] The company generally lacks access to the identity of a claimant until the Government has decided whether it will intervene in a particular FCA case. See American Civil Liberties Union, et al. v. Holder, et al., 652 F. Supp. 2d 654, 668 n.8 (E.D. Va. 2009) (noting that the seal provisions of the FCA "protect [whistleblower] interests by ensuring their anonymity and the secrecy of their allegations until the government has decided to intervene.").

[3] The report discloses the cases "excluded" from the study, but not those included.

As the mission of the Securities and Exchange Commission ("SEC") is one of investor protection and promulgating rules that promote market efficiency and capital formation, it would seem that the purpose of Whistleblower rules would be to stop the harm to shareholder interests as quickly as possible. In conforming to the SEC's mission and rationale for rulemaking, a reduced potential reward because of prompt action in mitigating a harmful act against investors' interests should be irrelevant in regard to the implementation of the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

In conclusion, CCMC believes that any data relied upon by the Commission in finalizing its rulemaking should be objectively sound and unbiased, and not predetermine any policy outcomes. We would be happy to further discuss our analysis with SEC staff and thank you for your considerations.

Sincerely,

David Hirschmann