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December 17, 2010

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

Re: File Number S7-33-10
The Securities Whistleblower Incentives and Protection Program of the
Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Ms. Murphy:

We write as compliance and ethics professionals who have worked with companies, government agencies, and non-governmental organizations in the field of compliance and ethics. We have attached brief bios giving our background in this field.

This letter is in response to the request by the Securities and Exchange Commission (the "Commission") for comments about proposed rules promulgated by the Commission in response to Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), or the Securities Whistleblower Incentives and Protection Program.

Overview

The Dodd-Frank Act established a whistleblower program that requires the Commission to pay awards to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the federal securities laws that leads to the successful enforcement of a covered judicial or administrative action, or a related action. The Act also requires the Commission to promulgate regulations governing such awards. In particular, the Dodd-Frank Act directs the Commission to pay awards equal to 10% to 30% of the amount of monetary sanctions collected resulting from original information relating to a violation of the securities laws if the monetary sanctions exceed \$1 million. The actual amount of the award – within those parameters – is determined at the discretion of the Commission.

Compliance Programs and the Controversy Surrounding this Provision of the Act

Encouraging employees and others to report suspected misconduct is a critical element of any compliance and ethics program, and a critical means of prevention and early detection of misconduct. As the Commission is undoubtedly aware, this provision of the Dodd-Frank Act has generated a significant amount of controversy regarding, in particular, whether the incentives offered by the Dodd-Frank Act will cause employees to bypass internal reporting procedures and thereby impair companies' reporting systems and compliance and ethics programs more broadly. We do not offer an opinion on that claim. Instead, we write to suggest that, regardless of the merits of that claim, the Commission's responsibility to promulgate regulations in this instance provides it with an important opportunity to address the Commission's support of compliance and ethics programs in the context of enforcement actions. Indeed, a pronouncement by the Commission regarding its willingness to consider compliance and ethics programs in the context of enforcement decisions should go a considerable way toward alleviating concerns regarding the impact of the Dodd-Frank Act on internal reporting mechanisms and compliance and ethics programs more broadly.

We respectfully suggest that the Commission consider making a pronouncement which could be contained in its release adopting rules relating to Section 21 F that the Commission will consider the existence of an effective compliance and ethics program when determining whether to bring an enforcement action against an organization, the types of charges it might bring, and the nature and amount of remedial relief that will be pursued. We believe that the Commission's promulgation of rules governing whistleblower incentives creates an important opportunity to enhance compliance with the nation's securities laws in a way that will more securely protect the interests of the investing public – that is, through enhanced support of compliance and ethics programs.

The Commission's Prior Statements

Such a pronouncement by the Commission would be consistent with (but, we hope, would expand upon) the Commission's articulated support for compliance and ethics programs in the past. As far back as 2001, in the Seaboard Release, the Commission articulated a framework for evaluating whether and how to charge violations of the federal securities laws that echoed the support of compliance programs found in the United States Sentencing Guidelines. There, the Commission expressly stated that its willingness to credit self-policing and self-reporting in deciding whether and how to take enforcement action "benefits investors as well as our enforcement program. When businesses seek out, self-report and rectify illegal conduct, and

otherwise cooperate with Commission staff, large expenditures of government and shareholder resources can be avoided and investors can benefit more promptly.”

Similarly, in the 2009 litigation release relating to American Commercial Lines,¹ the Commission stated that it had determined not to bring charges against the company because that company “cultivated an environment of compliance by providing training regarding the requirements of Regulation FD and by adopting policies that implemented controls to prevent violations.” However, despite these pronouncements, the Commission has not issued a significant amount of guidance regarding the weight it will give compliance programs and the factors that it will consider in determining whether a program is effective. It has also omitted reference to such programs from its penalty policy. The lack of clarity causes some organizations to question the enforcement-related benefits of compliance programs, which can lead to less support for such programs at high levels within organizations.

We respectfully refer the Commission to the Sentencing Guidelines for Organizations for an extensive discussion of what makes a compliance and ethics program effective, and those factors that the Commission may want to consider in determining the effectiveness of a program. In addition, the OECD’s Good Practice Guidance, which the United States has supported as a member of the Working Group on Bribery, provides another important resource in assessing the bona fides of company compliance and ethics programs. See Further Recommendations for Combating Bribery of Foreign Public Officials in International Business Transactions, Appendix II

http://www.corporatecompliance.org/Content/NavigationMenu/Resources/International/OECD/Recommendation_Web_English.pdf. It would provide useful guidance to companies if the Commission, in its references to compliance programs through the Dodd-Frank rules, makes clear that the legitimacy and weight to be given to any program will be based on the factors contained in those standards.

The Commission’s Support of Programs in the Proposed Rules

We fully support the Commission in recognizing throughout its Notice the value of compliance programs, the importance of government support for these programs, and the need for government to be conscious of the effect of various governmental actions on these programs.

We agree with giving those who report in-house a “marker,” to remove the potential disincentive for whistleblowers to report in-house. When whistleblowers first report in-house, this allows companies to act promptly to minimize the harm from any ongoing violation, and allows

¹ *Securities and Exchange Commission v. Christopher A. Black*, Litigation Release No. 21222, Case No. 09-CV-0128 (S.D. Ind., September 24, 2009).

companies to address honest misunderstandings by whistleblowers, thus avoiding the waste of Commission resources in investigating matters that are not violations.

We also support the prohibition of corporate compliance professionals, lawyers, and others being able to “front-run” a whistleblower’s report. This front-running disqualification will help maintain confidence in the companies’ reporting systems.

We strongly endorse the idea of taking into consideration whether a whistleblower first reported internally in determining where in the 10% to 30% range a reward will be determined. This provides an important incentive for whistleblowers to use legitimate in-house compliance systems.

We also applaud the Commission’s note (p. 34) that, in appropriate cases, it will call on a company to conduct an investigation of the allegation itself. We respectfully submit that, in making a determination of whether to ask a company to conduct an investigation, the Commission should consider the bona fides of a company’s compliance program, based on the standards of the Sentencing Guidelines and the OECD Good Practice Guidance. In particular, the Commission could send a message that it will scrutinize whether companies have in place meaningful efforts to encourage internal reporting, as opposed to merely establishing a nominal helpline with inadequate leadership and support systems. Factors that could be highlighted by the Commission in this regard would include: (i) whether the person with day-to-day management responsibilities for the compliance program has direct reporting obligations to the governing authority and sufficient autonomy from management, and (ii) whether there are adequate procedures in place to support consistent investigation of claims and ensure objectivity, professionalism, confidentiality, timeliness and non-retaliation.

The Need for Clarification Regarding What Constitutes an Effective Compliance Program

While the Commission’s articulated support of compliance and ethics programs is critical, this support would be more valuable – and more effective – if it were coupled with clarification regarding what constitutes an effective compliance and ethics program. In order to provide this much-needed guidance, the Commission need only refer to the Organizational Sentencing Guidelines standard,² which is the standard most widely accepted among companies, and the Organization for Economic Cooperation and Development’s Good Practice Guidance³, which

² Federal Sentencing Guidelines Manual § 8B2.1.

³ OECD, Further Recommendations for Combating Bribery of Foreign Public Officials in International Business Transactions, Appendix II

has been approved by the United States (as well as all 37 of the other signatories to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997).

We also agree with the Commission's observation, page 34, that promotion and preservation of company C&E programs also benefits efforts by companies to ensure compliance with other laws and standards, such as laws against discrimination and harassment. This observation by the Commission reflects a broader, important move by governments away from a narrow, siloed approach that looks only at one narrow area of the law, to one that recognizes that compliance efforts in any one legal area, such as securities laws, need to be undertaken in the context of an overall, empowered and effective compliance and ethics program. As the OECD Working Group on Bribery recognized in the Good Practice Guidance in reference to anti-corruption compliance programs: "[T]o be effective, such programmes or measures should be interconnected with a company's overall compliance framework."

How to Prevent Dodd-Frank from Undercutting Effective Programs

The Commission has requested additional input on how to prevent Dodd-Frank from undercutting effective compliance and ethics programs. We recommend that the Commission not look at this question in isolation, limited to the language of the proposed whistleblower rules. To a significant extent, the Commission's own actions and policies play an important role in the strength of these programs. In this respect, we recommend that the Commission build on its strong statements supporting compliance programs that are included with the draft rules by considering statements and actions in closely-related areas beyond the language of Dodd-Frank. While we commend the Commission's efforts to ameliorate any adverse effects on compliance programs within the Dodd-Frank rulemaking, we also urge the Commission to consider utilizing the variety of other tools it has available for this same objective. For example, the Commission's publication of instances where programs actually made a difference in how companies are treated in the enforcement context⁴ is extremely helpful in promoting compliance and ethics programs, and could presumably be done much more often. The Commission should also include the role of compliance programs explicitly in its penalty policies. This would help address the concern that Dodd-Frank will harm compliance programs, since the reduction of penalties based on the existence of a company's effective compliance program would also be a

http://www.corporatecompliance.org/Content/NavigationMenu/Resources/International/OECD/Recommendation_Web_English.pdf.

⁴ *Securities and Exchange Commission v. Christopher A. Black*, Litigation Release No. 21222, Case No. 09-CV-0128 (S.D. Ind., September 24, 2009).

factor in the size of potential bounty payments. In other words, companies with robust programs would have less to fear under Dodd-Frank if the existence of a robust program truly reduced the size of any penalties imposed (and thus the potential recoveries by whistleblowers). Steps like this would help send a strong message to companies that the Commission is concerned about recognizing and promoting effective compliance and ethics programs.

Drafting Recommendation

Lastly, we have one specific drafting recommendation regarding the proposed rules. On pages 157 and 158, in the Instructions for Completing Form TCR, those making submissions are asked to identify their occupation and any individual position about which the complaint relates. With regard to each possible function the terminology is generally by profession, such as an accountant, attorney, government official, etc., with the exception of compliance. There the reference is to “compliance officers.” This may promote the misconception that of all the great variety of compliance-related functions in companies, only the “compliance officer” is considered here.⁵ In the same way that the form used “attorney” rather than “general counsel,” it would be more consistent and send a clearer message to refer to compliance professionals, not just officers.

Conclusion

The underlying reason for section 922 of the Dodd-Frank Act is to encourage individuals to report securities law violations, building on the goals of certain provisions of the Sarbanes-Oxley Act. The government’s interest is to encourage individuals to report concerns – whether to companies or to the government. That is also the goal of compliance and ethics programs. The Commission’s leadership in support of compliance and ethics programs can achieve the important objectives of allaying the fears of corporate America and responding to Congress’s concern regarding encouraging reporting, and thereby lead to greater securities compliance more generally.

Respectfully submitted,

Joseph Murphy, Donna Boehme and Rebecca Walker

⁵ Indeed, in one book on the subject of the compliance and ethics profession, there is a compilation of 800 different titles related to compliance. Murphy and Leet, Working for Integrity (SCCE).

Joe Murphy, CCEP, Of Counsel, Compliance Systems Legal Group

Joe Murphy, of counsel to Compliance Systems Legal Group, and co-founder of Integrity Interactive Corporation, has worked in the organizational compliance and ethics area for over thirty years. Before joining Compliance Systems Legal Group, Joe was Senior Attorney, Corporate Compliance, at Bell Atlantic Corporation, where he was the lawyer for Bell Atlantic's worldwide corporate compliance program. Joe is Co-Editor of *ethikos*, a bi-monthly publication on corporate compliance and ethics. He was previously vice-chairman of the board of Integrity Interactive Corporation. He has worked on compliance and ethics matters on six continents, and has worked with government agencies, NGOs and companies across a broad range of industries.

Joe has lectured and written extensively on corporate compliance and ethics issues, is on the board of the Society of Corporate Compliance and Ethics (SCCE), and is the SCCE's Director of Public Policy (pro bono). He has represented SCCE as a consultative partner to the OECD's Working Group on Foreign Bribery in Paris, and testified before the US Sentencing Commission on the proposed revisions to the Sentencing Guidelines.

With his mentor, Jay Sigler, Joe wrote the first book on compliance programs, Interactive Corporate Compliance in 1988, 3 years before the Organizational Sentencing Guidelines were issued. Together with Jeff Kaplan and Win Swenson he wrote the leading legal text on compliance programs, Compliance Programs and the Corporate Sentencing Guidelines. He is also the author of 501 Ideas for Your Compliance & Ethics Program (SCCE; 2008) and co-author of Building a Career in Compliance and Ethics (SCCE; 2007).

Joe has his BA from Rutgers University, and his law degree from the University of Pennsylvania where he was a member of the Order of the Coif and Managing Editor of the *Law Review*.

Joe is also an avid ballroom dancer, chief cha-cha officer of Dance Haddonfield in his home town of Haddonfield, NJ, and founder of the Society of Dancing Compliance and Ethics Professionals.

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Donna C. Boehme is an internationally recognized authority in the field of organizational compliance and ethics with 20+ years experience designing and managing compliance and ethics solutions. As Principal of Compliance Strategists LLC, and Special Advisor to Compliance Systems Legal Group, Donna has advised a wide spectrum of private, public, governmental, academic and non-profit entities located in the US, Europe, Canada, Asia and worldwide. She serves on the respective boards of the RAND Center of Corporate Ethics and Governance, the Society of Corporate Compliance and Ethics, the Rutgers Center for Government Compliance & Ethics, and the South Texas College of Law - Corporate Compliance Center. She is currently Program Director (and past charter member) - Conference Board Council on Corporate Compliance and Ethics. Donna is Emeritus Member and past Board member of the Ethics and Compliance Officer Association and past Board member of the Association of Corporate Counsel – Europe. She was a charter member of the Corporate Executive Board's Compliance and Ethics Leadership Council and is a past Fellows member of the Ethics Resource Center. Her extensive on-the-ground experience includes serving as the first global compliance and ethics officer for two leading multinationals. At BOC Group (now a part of Linde), Donna established the company's global compliance and ethics function and developed its worldwide code and program "*Living Our Values.*" In 2003 she served as the first group compliance and ethics officer for BP plc, establishing the company's global compliance and ethics function, infrastructure and program, including a dedicated central team and groundbreaking network of 135 senior-level business ethics leaders worldwide. Many elements of the programs developed by Donna are regarded as best practice in the field and have been adopted in various forms by leading companies. Donna is a contributing editor of *Ethikos*, a leading business ethics publication, and has been published and quoted widely on compliance and ethics issues including in *The Wall Street Journal*, *Boston Globe*, *the Economist*, *Washington Times*, *Financial Times*, *New York Law Journal*, *Reuters* and *Compliance Week*. She is the publisher of *CS Newsflash*, a weekly commentary on compliance and ethics developments around the world. A frequent speaker to industry and professional groups, she has spoken at the House of Lords on the design and implementation of global compliance programs. Donna is a featured expert in the PBS documentary, "In Search of the Good Corporate Citizen." Earlier in her career, Donna was in private corporate practice at Fried, Frank, Harris, Shriver & Jacobson in NYC. She holds a J.D. from New York University School of Law and is a member of the American Bar Association and the New York bar. She operates her global consultancy from her New York-area based location. www.compliancestrategists.com

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Rebecca Walker is a partner in the law firm of Kaplan & Walker LLP, a law firm specializing in corporate compliance and governance located in Santa Monica, California and Princeton, New Jersey. Ms. Walker advises clients on the development and implementation of ethics and compliance programs that are tailored to each client's legal risks and business needs and that conform to applicable government requirements and pronouncements regarding effective compliance programs. Ms. Walker has worked with numerous companies in diverse industries on the design and implementation of the components of an ethics and compliance program, including risk assessment, compliance training, monitoring and auditing systems, reporting procedures, supervisory structure and program documentation. She has also conducted numerous assessments of companies' compliance and ethics programs. Her clients have included companies from the consumer products, apparel, financial services, pharmaceutical, healthcare, banking, advertising, consulting, telecommunications, energy, retail and airline industries, including many companies in the Fortune 500.

Ms. Walker advises clients on corporate governance matters, including assisting clients in drafting corporate governance guidelines and board committee charters, and advising clients on board oversight of their compliance programs. She also conducts compliance training programs for boards of directors.

Ms. Walker received her B.A. (*magna cum laude*, Phi Beta Kappa) from Georgetown University and her J.D. (*cum laude*) from Harvard Law School. She is the author of *Conflicts of Interest in Business and the Professions: Law and Compliance*, published by Thomson West in 2005. She is the co-author of *Finding the Right Balance: The Essentials of Third Party Ethics Programs*, a survey of third-party compliance and ethics programs conducted with The Conference Board in 2008. Ms. Walker has published numerous articles and authored numerous surveys regarding compliance and ethics. She is a contributing editor of *ethikos*, a leading compliance and ethics journal, and serves on the editorial board of *Compliance and Ethics*, a bi-monthly magazine. Ms. Walker co-chairs the Practising Law Institute's annual Compliance and Ethics Institutes in New York and San Francisco and their annual Advanced Compliance Workshops. She is a frequent speaker on ethics and compliance issues, including for the Practising Law Institute, The Conference Board, the Ethics and Compliance Officer Association and other legal and business groups. Ms. Walker serves on the Advisory Boards of the Society of Corporate Compliance and Ethics and the Corporate Compliance Center at the South Texas College of Law.