Steven A. Tyrrell
Washington, D.C. 20005-3314

December 17, 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:

Thank you for the opportunity to present my views regarding the above-referenced proposed rules. As described below, I believe the rules should be modified, and the agency's practices should be adjusted, in several respects to ensure that the Commission's whistleblower program does not undermine the effectiveness of internal compliance programs and thereby alienate one of the most important contributors to the fight against fraud and corruption in public companies: corporate America.

My perspective on this matter is based upon nearly twenty-five years of government and private sector experience handling investigations and cases involving allegations of violations of federal securities and other laws. I currently am a partner in the Washington, D.C. office of Weil, Gotshal & Manges, LLP, where I serve as co-chair of the firm's White Collar Defense and Investigations Group.[1] Before joining Weil in February 2010, I served as Chief of the Department of Justice's ("DOJ") Fraud Section at Main Justice for more than three years. In that capacity, I oversaw some of the most significant securities fraud prosecutions in recent memory and led DOJ's Foreign Corrupt Practices Act ("FCPA") enforcement program. A substantial number of those matters involved allegations of corporate wrongdoing. On many of those matters and others, I had extensive dealings with the leadership of the Enforcement Division of the Securities and Exchange Commission ("SEC") and legal and other representatives of public companies.

[1] The views expressed in this letter are those of the undersigned and do not represent the views of Weil, Gotshal & Manges, LLP, or any other firm or company.

For me, the Dodd-Frank whistleblower bounty provisions bring to mind the old adage, "be careful what you wish for, because you just might get it." Designed to encourage increased reporting of alleged securities violations, the provisions are certain to strain the limited resources of already overtaxed enforcement authorities. At the same time, the SEC has publicly acknowledged that the provisions threaten to undermine the effectiveness of internal compliance programs and thereby alienate one of the most important contributors to the fight against fraud and corruption in public companies: corporate America. To avoid this unintended and unfortunate result, and to ensure that companies continue to play a leading role in responding to whistleblower complaints, the whistleblower program must be implemented in a manner that strongly encourages the continued use of internal programs.

Many multinational companies, particularly U.S. companies, have first-rate compliance codes which include internal policies and procedures for reporting allegations of wrongdoing and protecting whistleblowers. Those companies have a wealth of experience in effectively dealing with the range of whistleblower complaints that are made through corporate hotlines and similar mechanisms, many of which would be of little or no interest to enforcement authorities. At the same time, those internal systems provide a vital, reliable, and discreet line of communication for whistleblowers to bring allegations of serious wrongdoing to the attention of senior management. In the absence of such systems, many legitimate complaints would never come to light, and many of those that do come to light would go unaddressed. Thus, it is beyond dispute that preserving those systems and ensuring that they continue to operate in a robust manner, is in the interests of the enforcement community, whistleblowers, and companies.

Perhaps the best evidence of the private sector's role in promoting integrity and detecting and addressing allegations of wrongdoing in corporate business dealings is the well-documented increase in enforcement actions under the FCPA. During the past five years, the SEC and DOJ have brought unprecedented numbers of FCPA cases to fruition, have extracted record penalties, fines and individual prison sentences, have assisted their foreign counterparts and motivated them to join in the fight against corruption in business transactions, and have sent a strong and clear message of deterrence to the international business community. But, they have not done it alone. The response in corporate America, particularly among U.S. multinationals, has been similarly impressive and has greatly advanced the fight against corruption. Companies have spent, and are spending, billions of dollars on state-of-the-art compliance programs, as well as on broad-ranging internal investigations of allegations of wrongdoing. Many companies also are voluntarily disclosing wrongdoing by their employees to the government and severely disciplining the wrongdoers despite the continuing uncertainty regarding the potential benefits of such disclosure and remediation.

One important outgrowth of these trends is that enforcement authorities already have more FCPA work than they can handle. For example, the DOJ recently reported

that it has more than 140 FCPA investigations pending.[2] While the number of prosecutors, enforcement attorneys, and agents investigating and pursuing these matters has steadily increased, there are still not enough to move the pending cases. Moreover, current economic woes and soaring government deficits make it unlikely that the DOJ and the SEC will experience sizeable increases in their resources in the foreseeable future.[3] At the same time, the early returns suggest that the bounty provisions will result in a substantial increase in reports of securities violations[4] and crushing backlogs at enforcement agencies. The unintended victims of this anticipated flood of complaints, the vast majority of which are certain to be without merit, will be responsible corporate citizens, which already deal with whistleblower allegations in an appropriate and effective manner. Indeed, while whistleblower complaints languish at enforcement agencies, corporations will be stigmatized in markets and elsewhere by pending, unresolved allegations of wrongdoing, even if those allegations ultimately prove to be frivolous or susceptible to speedy resolution.

Despite the foregoing, the SEC's proposed whistleblower regulations fall short in their stated objective of ensuring that companies with strong compliance programs remain partners in dealing with whistleblower complaints. There are, however, reasonable steps that can and should be taken in order to address this shortfall, to encourage employees to embrace and utilize internal whistleblower processes, and to reduce the incentive for employees to bypass internal processes. Four such steps are as follows:

First, the SEC regulations should condition payment of an award in excess of 10 percent of sanctions on the whistleblower reporting a claim internally before reporting it to the authorities, unless the whistleblower can establish by credible evidence that the alleged wrongful activity is ongoing and poses a significant risk of harm to others, that it

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[2] *See* Carrie Johnson, *U.S. sends a message by stepping up crackdown on foreign business bribes*, Washington Post, Feb. 8, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/02/07/AR2010020702506.html ("Assistant Attorney General Lanny A. Breuer, who leads the criminal division, recently told reporters that the department had more than 140 open investigations centering on foreign bribes.").

[3] *See SEC Announcement: Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act -- Dates to be Determined*, Dec. 2, 2010, available at http://www.sec.gov/spotlight/dodd-frank/dates_to_be_determined.shtml (SEC announces delay in creation and staffing of whistleblower office due to budget uncertainty).

[4] *See, e.g., After Dodd-Frank, SEC Getting At Least One FCPA Tip A Day*, The Wall Street Journal, Sept. 30, 2010, available at http://blogs.wsj.com/corruption-currents/2010/09/30/after-dodd-frank-sec-getting-at-least-one-fcpa-tip-a-day/tab/print/ ("The Securities and Exchange Commission has been receiving at least one tip a day about potential foreign bribery violations since a whistleblower bounty program became law in July, according to a person familiar with the matter.").

would have been futile to report the matter internally, that the company was acting in bad faith, or that the whistleblower had a reasonable fear of reprisal. In situations where none of these exceptions is present, this requirement would provide a real and certain financial incentive for a whistleblower to report an allegation internally, something that is absent from the current proposed regulations.

Second, the regulations should provide that a company's legal, compliance, audit, supervisory, or governance personnel may not be eligible for a whistleblower award based on information they receive in the course of performing their respective functions. These employees are the trusted eyes, ears and backbone of any effective compliance program. They are responsible for ensuring that a company's problems are detected and addressed in a manner that minimizes the possibility of recurrence. The current regulation provides incentives for these employees to pursue personal gain outside of internal processes for addressing allegations of wrongdoing. It also makes such employees targets of potential opportunists who may recruit them to provide information in support of potentially lucrative claims. While there may be rare instances where these employees legitimately feel compelled to report matters to the SEC, they should do so based on professional obligation or responsibility, not for personal gain.

Third, absent compelling reasons not to do so, the SEC should give a company notice of any whistleblower complaint it has not summarily closed and an opportunity to provide them with information bearing on the credibility of the whistleblower and the veracity of his or her allegations before initiating a preliminary inquiry or formal investigation. At a minimum, this opportunity should include a right to be informed about the specifics of the whistleblower's allegations, including the basis of his or her knowledge. Moreover, in matters where there is no credible basis for believing that the company will retaliate against the whistleblower, or that the investigation will be compromised, the company also should be informed of the whistleblower's identity so it has a meaningful opportunity to evaluate and respond to the complaint, as well as remediate any problems identified in it.

Enforcement agencies have a responsibility to conduct substantial and meaningful due diligence regarding whistleblowers and their allegations before subjecting a company to a potentially damaging inquiry or investigation. In cases involving allegations of corporate wrongdoing, it seems obvious that an important source of relevant information will be the accused company. Thus, a company should be free to provide the authorities with information concerning the background and credibility of a whistleblower, including evidence regarding his or her motive, without fear that they will be accused of, or subject to suit for "retaliation."

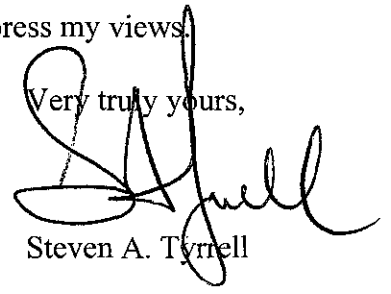
Fourth, the SEC should treat whistleblower complaints by current employees as voluntary disclosures by a company in instances where the employee bypasses existing internal processes for reporting the complaint. As a matter of policy and practice, both

the SEC and DOJ have encouraged corporations to maintain robust compliance programs, which include internal processes for reporting allegations of wrongdoing, and to voluntarily disclose allegations of wrongdoing. When companies maintain strong whistleblower programs, enforcement agencies should give them credit for disclosing an allegation of wrongdoing even if the allegation was disclosed by a whistleblower directly to the authorities. Companies should not be denied this benefit in a particular matter simply because they are unable to provide the substantial financial incentive to a whistleblower that the bounty provisions allow.

While there remains considerable debate about the contribution whistleblowers may make to the enforcement of federal securities laws, there is no debate about the tremendous contribution that companies have made. Thus, it is essential that the SEC consider whether its enhanced whistleblower program will alienate or incorporate that key ally in the fight against fraud and corruption in public companies. In the past, the SEC and DOJ have wisely recognized the reach and value of internal compliance programs and, by providing incentives for them, have leveraged their resources and efforts. The SEC's whistleblower program, if properly implemented, can enhance that relationship. On the other hand, if implemented in its current form, the program threatens to undercut internal compliance efforts and to diminish substantially the many benefits those efforts provide to companies, investors, and government.

Thank you again for the opportunity to express my views.

Very truly yours,



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