

December 17, 2010

VIA E-MAIL: RULE-COMMENTS@SEC.GOV

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

**Comments on 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:

We are pleased to submit this letter in response to the request by the Securities and Exchange Commission (the “Commission”) for comments on the Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (SEC Release No. 34-63237) (the “Proposed Rules”). We appreciate the opportunity to comment on the Proposed Rules. As discussed in more detail below, our comments focus on the following aspects of the Proposed Rules:

***1. Reducing the adverse effects on corporate compliance programs.***  
Although we recognize that the Commission “considered and weighed a number of potentially competing interests,” including “the potential for the monetary incentives provided to whistleblowers . . . to reduce the effectiveness of a company’s existing compliance, legal, audit and similar internal processes for investigating and responding to potential violations of the federal securities laws,” we identify and comment on several aspects of the Proposed Rules which we believe will unnecessarily weaken internal corporate compliance programs and inhibit the efforts of responsible entities to investigate and remediate potential compliance violations. To address these concerns, our comments include specific proposals that the Commission: (i) require employees of companies with effective compliance and reporting programs to report any potential violation internally in order to be eligible for a whistleblower bounty; (ii) exclude from eligibility for whistleblower bounties employees involved in compliance, legal, audit or supervisory roles as well as others who obtain information about a potential violation as a result of their participation in a compliance investigation or function; and (iii) exclude from eligibility employees who misrepresent facts or withhold information from internal compliance inquiries.

2. ***Strengthening protections for the attorney-client privilege.*** We address in our comments certain statements in the Commission's proposing release that seem incorrectly, and perhaps inadvertently, to limit the applicability of provisions of the Proposed Rules restricting the use of privileged information to lawyers and others working for lawyers. We then offer additional comments suggesting that the Commission should adopt formal procedures for handling any potentially privileged information obtained from potential whistleblowers and should clarify that the Commission will neither seek nor obtain privileged information in any *ex parte* communications with directors, officers or other employees of represented entities. We also suggest revisions to the Proposed Form TCR to further clarify and strengthen the exclusion of otherwise privileged information from the whistleblower program and to similarly make clear that the Commission is not soliciting employees to provide stolen or improperly obtained materials.

3. ***Addition of standards for referral of whistleblower reports to entities.*** We recommend that the Commission include, in its Proposed Rules, standards to be followed by the Division of Enforcement both in the process for making such referrals and in assuring that appropriate cooperation credit is extended to companies that undertake voluntary investigation, remediation and self-reporting following such a referral.

4. ***Exclusion of other fiduciaries from eligibility for whistleblower bounties.*** In response to the Commission's request for comment on whether "other professionals" should be treated under the Proposed Rules in the same way as auditors and attorneys, we propose that professionals who owe similar fiduciary or "fiduciary-like" duties to entities and perform similar "gatekeeper" functions should be excluded from eligibility for whistleblower bounties to the same extent as auditors and attorneys.

5. ***Addition of rules implementing the "anti-retaliation" provisions of Section 21F.*** We respond to the Commission's requests for comment on the need for rulemaking concerning the "anti-retaliation" provisions of Section 21F and discuss several potential issues that we believe would benefit from the clarity and transparency of formally promulgated rules. In particular, we recommend that the Commission should adopt rules that, among other provisions, establish the burden of proof on plaintiffs to prove retaliation, provide that employers are not liable under the anti-retaliation provisions for actions based on legitimate, non-retaliatory grounds, and exclude individuals who make false, fictitious or fraudulent whistleblower reports from the protections of the anti-retaliation provisions of Section 21F.

6. ***Study and request for additional comments after a period of implementation of any final rules on whistleblower bounties and anti-retaliation.*** We propose that after implementation and operation of the final rules on the Commission's whistleblower bounty program and the anti-retaliation provisions of Section 21F, the Commission undertake a review of the operation of the program after two years,

including by providing an opportunity for public comment on the operation of the program.

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## **I. Revisions to Limit the Adverse Effects on Corporate Compliance Programs**

We recognize that the Commission sought to strike a balance in the Proposed Rules between the “potentially competing interests” of establishing a strong whistleblower program consistent with the statutory mandate in the Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010 (the “Dodd – Frank Act”), and the Commission’s long-standing interest in fostering robust internal compliance programs in issuers and other regulated entities, but we believe that the balance reflected in the Proposed Rules favors too heavily the promotion of whistleblower bounties at the expense of effective and efficient corporate compliance programs. Any whistleblower bounty program creates the potential for monetary incentives to cause employees to bypass or ignore internal compliance reporting mechanisms for the possibility of a substantial financial reward. Likewise, a bounty program that rewards information regardless of source creates the risk that even employees and others involved in the compliance process might seek to profit from the use of information obtained in the course of their work in the area rather than use that information to investigate or remediate compliance issues. We believe that these are real and substantial risks to corporate compliance programs that must be addressed more effectively by the Proposed Rules “in order to strike the right balance between the Commission’s need for a strong and effective whistleblower awards program, and the importance of preserving robust corporate structures for self-policing and self-reporting.”

### **A. The Rules Should Require Employees of Entities with Effective Compliance Programs to Report Internally in Order to be Eligible for the Bounty Program.**

The proposing release noted that the Commission considered, but rejected, a requirement that potential whistleblowers use internal compliance reporting processes in order to be eligible for awards. The Commission stated that “[a]mong [its] concerns was the fact that, while many employers have compliance processes that are well-documented, thorough and robust, and offer whistleblowers appropriate assurances of confidentiality, others lack such established procedures and protections.” The Proposed Rules instead seek to incentivize employees to report internally by permitting them to do so under Proposed Rule 21F-4(b)(7) (as long as they report the information to the Commission within 90 days of their internal report) and by including consideration of whether an employee reported internally among the factors the Commission will weigh under Proposed Rule 21F-6 in determining the amount of any award to a whistleblower. In our view, these proposals do not adequately weigh the potential negative effects on compliance programs.

We agree that the Commission should not require employees to report internally in the absence of an effective internal reporting process that adequately protects both their employment and confidentiality. However, if the Commission's goal is to encourage strong compliance programs, then a one-size-fits-all rule based solely on the least effective compliance programs seems inconsistent with that objective. The fact that internal reporting would be included as one of many discretionary considerations in the determination of an award likewise appears unlikely to provide a meaningful incentive to an employee concerned first about getting a report to the Commission in order to be eligible for any award.

In contrast to the proposed exception – which appears to elevate concerns about ineffective compliance programs over all else – we believe that the best way to balance the desires for strong compliance functions and an effective whistleblower program is to require internal reporting to be eligible for an award except in cases where the whistleblower's company does not maintain an effective compliance program with an acceptable reporting process. We believe that there are several options available to structure and implement such a requirement. A simple solution, and one that also offers a more robust way to promote and reward effective compliance programs, would be a process and basic standards by which companies would be permitted to certify annually that they maintain an effective compliance and internal reporting program accompanied by a provision that employees of certifying companies be required to report internally before being eligible for whistleblower awards. There are a number of pre-existing standards concerning the organization, operation and effectiveness of internal compliance programs and internal reporting processes, including those found in Chapter Eight of the Organizational Sentencing Guidelines and in the requirements for confidential, anonymous submission of certain complaints by employees under Section 10A(m) of the Securities Exchange Act. Recognizing these pre-existing standards, we believe that the Commission could adopt standards that would embrace the Commission's ultimate objectives in strengthening internal reporting and compliance functions without requiring detailed, design-level standards for such programs. We believe the standards for an effective compliance and reporting program should include:

- a means for employees to make confidential, anonymous submissions of information that may relate to potential violations of the federal securities and other relevant laws (“internal compliance reports”);
- mechanisms by which companies can ask questions and obtain additional information from those who make anonymous submissions without compromising their anonymity;
- processes for ensuring that appropriate levels of senior management and the board of directors or board committees are informed of internal

compliance reports involving potential violations of the federal securities laws, including the nature of the report and any disposition of the report;

- processes for evaluation and, if necessary, investigation of internal compliance reports, including procedures for referral of such internal compliance reports to the board of directors or a board committee for evaluation and investigation if it involves or implicates senior management or otherwise requires board-level oversight;
- policies and procedures ensuring that employees who make internal compliance reports are not retaliated against by the entity, supervisors, or co-workers;
- appropriate communication and training of employees on the existence and operation of the internal compliance reporting policies and procedures;
- periodic assessment by the company, including by the board of directors or an appropriate board committee, of the design, operation and effectiveness of the internal compliance and reporting program.

Given the existing internal controls requirements and management attestations and certifications arising under Sections 404 and 302 of the Sarbanes Oxley Act and the similar complaint-handling requirements for Audit Committees under Sarbanes Oxley Section 301, we do not believe that it would be difficult or unduly burdensome for most companies to meet reasonable, objective standards for effectiveness and to certify on a periodic basis that they meet such standards. At the same time, such a process would provide a powerful incentive for companies to meet the standards and to require the necessary transparency and accountability to their employees, their investors, the Commission, and the public on their compliance programs.

With respect to the Proposed Rules, we believe that an internal reporting requirement could be added without disturbing Proposed Rule 21F-4(b)(7), effectively ensuring that whistleblowers who provide information as required do not impair their status as the original source and with an effective report date as of the date they reported internally. At the same time, there would be no need for internal reporting to serve as a consideration in determining the amount of any award under Proposed Rule 21F-6, allowing those considerations to focus more appropriately on the value of the information provided by the whistleblower and the programmatic needs and interests of the Commission's enforcement program as a whole. The internal reporting requirement as well as any required definitions could be added to the "Eligibility" provisions of Proposed Rule 21F-8. Specifically, Proposed Rule 21F-8(c) ("You are not eligible to be considered for an award if you do not satisfy the requirements of paragraphs (a) and (b) of this section. In addition, you are not eligible if:") could be amended to add the

following item, “You are, or were at the time you acquired original information, an employee of an entity with a Qualified Compliance Reporting Process and you did not report original information relating to your employer in a manner consistent with your employer’s Qualified Compliance Reporting Process.” “Qualified Compliance Reporting Process” could then be defined to enumerate both the qualitative standards and the required methods of disclosure or certification that the SEC determined were necessary to confirm such status.

**B. The Rules Should Exclude, Without Exception, Information Obtained by Compliance, Legal, Audit and Supervisory Personnel in the Course of Their Duties and Information Obtained by Any Employee from Compliance Inquiries and Processes.**

Proposed Rules 21F-4(b)(4)(iv) and (v) exclude from the definition of “independent knowledge” or “analysis” information obtained by compliance, audit or supervisory personnel in the course of their compliance duties and information otherwise obtained by anyone as a result of a compliance inquiry or process. These exclusions make sense because internal compliance activities should not be viewed by employees as an opportunity to discover potential information for personal gain; rather, employees involved in compliance activities should be focused on investigating and remediating compliance issues on behalf of their companies. Both sections, however, contain exceptions for circumstances in which the potential whistleblower’s “company does not disclose the conduct to the [Commission] within a reasonable time or proceeds in bad faith.” The proposing release states that the objective of this exception is to “permit such persons to act as whistleblowers in circumstances where the company knows about material misconduct but has not taken appropriate steps to respond.” The proposing release adds that the exception “does not impose new reporting requirements in addition to those already existing under the federal securities law.” In practice, however, we believe that the proposed exception will either swallow the protection afforded to compliance processes created in the rules or impose detailed, burdensome and inefficient internal and external reporting requirements on company compliance programs.

By leaving it to the whistleblowers to evaluate and determine in the first instance whether their companies have reported the information to the Commission within a reasonable time or have otherwise acted in “bad faith” in handling a compliance inquiry, the Proposed Rules will, in effect, require companies to engage in internal reporting on the status and outcomes of compliance-related investigations on a scale far greater than what most programs currently envision and is inconsistent with prudent investigative and compliance practice. It is not the case, nor should it be, that all employees – even supervisory employees or others engaged in the compliance process – are informed of all sensitive information in the compliance process, particularly information on self-reporting or other interactions with the Commission or other regulators and on all aspects of the disposition or remediation of any misconduct or otherwise problematic conduct

detected in an internal investigation. To require companies to provide this type of information to all employees involved in the process – both those within the compliance and supervisory structure and those who may learn information about a potential violation because they have been questioned or contacted during an inquiry – is unnecessarily burdensome, impractical, and unwise. The only responsible alternative for companies is to continue to limit the dissemination of such sensitive information, with the effective consequence under the Proposed Rules of freeing these employees to report to the Commission at any time. Because the employees have the financial incentive to view the facts in a way that will lead them to report at the earliest possible time, the process will ultimately rely only on the Commission to make the determination in hindsight of whether companies were timely in self-reporting or otherwise acted in bad faith. Although the presence of a subsequent review protects the Commission from paying awards where the whistleblower reporting was premature, such an outcome means that there is effectively no support for, or benefit to, internal compliance programs arising from the exclusions for information from compliance processes.

A second significant consequence of the exception for compliance-related information is that it effectively removes the discretion and judgment afforded to companies on whether to self-report minor, and successfully remediated, compliance issues or violations. Thus, rather than serving as an effective internal tool for monitoring and self-policing controls, the Proposed Rules as conceived would turn compliance departments and internal investigations into mere conduits for reporting to the Commission every possible compliance issue that might conceivably involve a potential violation of the federal securities laws. Given the fact that every determination that self-reporting was not required or in the company's interest would be subject to the risk of being overruled by compliance or other employees with financial incentives to disclose what they learned in compliance inquiries, no company could realistically make a decision not to self-report everything to the Commission.

Additionally, we believe that a third negative unintended consequence associated with permitting whistleblower awards based on compliance-related information could, in some circumstances, be a decision by companies to limit or structure their compliance activities to avoid these issues. In conducting internal investigations, for example, companies could decide to provide less information to witnesses or rely on documents instead of conducting such reviews, all of which could lead to investigations that are less thorough and effective in uncovering potential misconduct. Likewise, companies faced with the risk that internal compliance and audit personnel could profit from disclosure of information learned in internal reviews, would likely choose to rely more heavily or even exclusively on outside counsel and others who are not permitted to take advantage of the whistleblower provisions to the same extent as internal compliance or audit personnel. The cumulative result of such actions may be investigations that are less effective, less efficient, and far more expensive as a direct result of the Proposed Rules.

To address these negative unintended consequences and, we believe, better meet the Commission's objectives to balance strong and effective compliance functions with a robust whistleblower program, we believe that Proposed Rules 21F-4(b)(4)(iv) and (v) should be amended to remove the exception that would permit whistleblower awards based on disclosure of information obtained in compliance processes, whether by personnel in compliance, supervisory or audit functions or by others who learn the information in the course of inquiries.<sup>1</sup> An unqualified exclusion, we believe, both better recognizes the importance of having compliance personnel and processes that are dedicated to overseeing compliance functions and, when necessary, investigating potential violations, and avoids the potential for conflict or tension between those roles and the possible financial rewards that might accompany a whistleblower role.<sup>2</sup>

**C. The Proposed Rules Should Exclude from “Voluntary Information” Any Information Withheld by an Employee from an Internal Compliance Inquiry.**

The proposing release states that the Commission determined not to exclude from the definition of those who have reported to the Commission “voluntarily” an employee who reports “original information” after being questioned about possible violations during an internal investigation or compliance review. We appreciate that the Commission would not exclude employees from having provided information “voluntarily” simply because they were asked about the information in compliance or other internal investigations. In fact, we believe that, with one important limitation, such a construction of “voluntary” is entirely consistent with our proposals described above, which would require employees to report any such information internally (assuming their employers have appropriate compliance and reporting processes) and prohibit employees

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<sup>1</sup> The focus of our recommendation is on removing the financial incentives for compliance and other employees to report information obtained in the course of compliance activities. Even now, of course, such employees can report non-privileged information and would remain able to do so in the absence of the financial incentive of a possible bounty. And, even if not eligible for a bounty, any of these employees who made such a report, would remain covered by the proposed definition of “whistleblower” and therefore protected under the “anti-retaliation” provisions of Section 21F.

<sup>2</sup> Concerns and reports about company inaction or bad faith in those circumstances, much like with company counsel, would more appropriately be addressed through “up-the-ladder” reporting requirements similar to those contained in the SEC’s Standards for Professional Conduct for Attorneys (17 CFR Part 205). Having in place appropriate internal reporting processes for compliance and audit personnel might be an appropriate standard for inclusion in the certification process proposed above.



from profiting on any information they learned in the course of compliance investigations. The limitation we would add to the Commission's proposal would address circumstances in which an employee improperly withholds requested information from an internal compliance program when directly or specifically requested by the company for such information (*i.e.*, when an employee fails to respond to or include the information in a response to an inquiry from the company or submits a "clean" certification when requested on a specific transaction), or misrepresents information in response to an internal compliance inquiry.

Given the substantial financial incentives in the Proposed Rules – and the absence of any disincentive for not cooperating in internal compliance processes – it is important that the Commission not reward employees when their actions or inaction interferes with their employers' ability to detect, investigate and remediate possible misconduct. Thus, while the Commission need not exclude those who report "original information" after being questioned in an internal compliance process, it should not permit employees who fail to respond accurately in such circumstances from later profiting from their silence. Accordingly, we believe that the Proposed Rules should also include a provision excluding from the definition of "voluntarily" any report made after an employee was questioned in an internal compliance investigation unless the employee provided the same or similar information in response to the internal inquiry. Given that the other provisions of the Proposed Rules would still grant such an employee "whistleblower" status after providing the information internally (if reported to the SEC within 90 days) and would still provide whistleblower protections against retaliation, we do not believe that this results in any negative consequences for employees and closes a potentially significant gap in the current proposal.

Under our proposal, Proposed Rule 21F-4(a) should be amended to add the following, "In addition, your submission will not be considered voluntary if you have been questioned or otherwise asked by your employer to provide or certify information substantially similar to your original information, unless you have provided to your employer substantially the same or similar information as the original information you provided to the Commission."

## **II. Revisions to Strengthen the Protections for Attorney-Client Privileged Information and to Deter Theft of Company Documents and Data**

The Commission identifies the possible consequences of the whistleblower rules on the attorney-client privilege as a second major category of issues it sought to address in the Proposed Rules. Describing its consideration of this issue, the Commission acknowledges that "[c]ompliance with the federal securities laws is promoted when individuals, corporate officers, and others consult with counsel about potential violations, and the attorney-client privilege furthers such consultation," and then observes that "[t]his important benefit could be undermined if the whistleblower award program created monetary incentives for counsel to disclose information about potential securities

violations that they learned of through privileged communications.” We agree with the Commission’s assessment of these issues and offer the following comments to address areas of the Proposed Rules and accompanying Proposed Forms that could be strengthened or clarified to more fully protect the attorney-client privilege. We also propose an amendment to the Proposed Forms to clarify that the Commission is not requesting that employees or others provide stolen or otherwise improperly obtained documents or data as part of the whistleblower process and that the Commission will not knowingly accept any such documents or data.

**A. The Proposed Rules Should be Clear that the Scope of Privileged Information Subject to the Exclusions from “Independent Knowledge” or “Independent Analysis” is not Limited to Information Possessed by Lawyers or Others Working for Lawyers.**

To address the potential for unauthorized disclosure of privileged information, Proposed Rules 21F-4(b)(4)(i) and (ii) specifically exclude privileged information from the types of information that would be considered “independent knowledge” or “independent analysis” under the definition of “original information.” Although the plain text of Proposed Rules 21F-4(b)(4)(i) and (ii) does not limit the application of these provisions to lawyers (or others working for lawyers), the proposing release seems to suggest that such a limitation is intended. In discussing these Proposed Rules, the release states that “[t]he first two exclusions apply to attorneys and to persons such as accountants and experts when they assist attorneys on client matters.” Similarly, the release explains that “this exclusion from independent knowledge or analysis only means that an attorney cannot make a whistleblower submission on his or her own behalf that is based upon information the attorney obtained through a privileged communication with a client.” Although we agree with the assertion that mere disclosure of facts to a lawyer by an individual with independent knowledge of those facts does not render the facts privileged or prevent disclosure of the facts by the non-lawyer, the discussion in the release does not address the practical reality that lawyers within or advising companies often communicate information to non-lawyers. Those communications, and the facts and information conveyed in those communications, however, are privileged and should be considered within the scope of the exclusion in Proposed Rules 21F-4(b)(4)(i) and (ii). Accordingly, we recommend that the Commission clarify that the Proposed Rules are not limited in the manner that the proposing release appears to suggest and confirm that privileged information possessed by non-lawyers is equally subject to the exclusions from independent knowledge or analysis reflected in Proposed Rules 21F-4(b)(4)(i) and (ii).

**B. The Proposed Rules Should Make Clear that the Commission Staff's Communications with Employees of Represented Entities will not Waive the Privilege.**

Proposed Rule 21F-16(b) purports to authorize the Commission staff to communicate directly with “a whistleblower who is a director, officer, member, agent, or employee of an entity that has counsel” with respect to the subject matter of the whistleblower’s communication to the Commission. The proposing release asserts that this authorization meets the “authorized by law” exception to the general prohibition of contact with represented parties set forth in ABA Model Rule 4.2 and in various state bar ethics rules. Although the law is not consistent or clear on whether and how contact with represented parties in civil and criminal enforcement investigations meets the “authorized by law” exception, there are significant differences between the typical circumstances of such contact – through the use of informants or other similar means of contact – and the circumstances contemplated by the Proposed Rules, which specifically invite employees of represented parties to contact the agency and promise potentially substantial financial awards to those who do. Rather than address the legal uncertainty of the Commission’s position in comments or rulemaking, a decision we believe is best left to the courts to make on the basis of the specific factual records before them, we believe that the Proposed Rules should make clear that the Commission will not seek to obtain privileged information in any such communications or consider any such communications as a basis for asserting waiver of any applicable privilege.

The proposing release already acknowledges that the Proposed Rule would not permit inquiry by the Commission staff into privileged information about an entity, so we do not believe that amending Proposed Rule 21F-16(b) in the manner we are recommending would differ from the Commission’s current position. Having a clear statement to that effect, however, would eliminate uncertainty and would likely reduce the potential for litigation around contacts with employees of represented entities. To that end, we recommend that Proposed Rule 21F-16(b) be amended to add the following after the first sentence, “The staff will not ask you to provide or disclose any information protected by the attorney-client privilege, and you should not do so unless specifically authorized by the entity of which you are a director, officer, member, agent or employee. The staff will not assert that its communication with you pursuant to this rule provides the basis for any claim that your entity has waived the attorney-client privilege.”

**C. The Proposed Rules Should Include Specific Processes and Standards for Handling Potentially Privileged Information.**

Notwithstanding the Commission’s stated objective of protecting the attorney-client privilege and specific proposals designed to minimize the risk of potentially privileged information being reported by whistleblowers, there is little doubt that some potentially privileged information will be disclosed to the Commission in the whistleblower program. The Proposed Rules, however, are silent as to how that

potentially privileged information will be recognized, evaluated and treated by the Commission staff in administering the whistleblower program and assessing complaints for investigative purposes.

Absent clear standards and guidance from the Commission through the rulemaking process, we are concerned that the process for identifying and responding to the disclosure of potentially privileged information will be inconsistent and less robust than it should be given the recognized importance of the privilege. Although we understand the need for the Commission and the Division of Enforcement to exercise judgment in making determinations under the Proposed Rules, privilege determinations in particular raise substantial risks both for the entities involved and for the Commission's enforcement program and require a thoughtful, organized process to assure that consistent and supportable judgments are made. Errors in those judgments harm both the entities whose privileges are improperly violated and the Commission, which may have devoted resources to a fundamentally flawed investigation initiated on the basis of improperly obtained information. Accordingly, we believe that the Proposed Rules should include clear standards and guidance for the Commission staff to follow in their handling of potentially privileged information obtained through the whistleblower process. At a minimum, we recommend that the Commission promulgate rules designed to ensure that any potentially privileged information is: (i) recognized and identified as such at the earliest possible stage of the process; (ii) kept segregated from Enforcement staff charged with any investigation of the entity to which the information relates at least until such time as a determination is made that the information is not privileged; (iii) evaluated in a manner that affords the entity with notice that potentially privileged information has been submitted to the Commission and with an opportunity to assert and establish the necessary elements of the privilege; and (iv) expressly not the basis upon which the Commission will argue that any applicable attorney-client privilege has been waived.

**D. Proposed Form TCR Should be Modified to Better Identify Potentially Privileged Information.**

Consistent with our view that clear guidance and standards are required to further enhance the protections afforded to the attorney-client privilege in the Proposed Rules, we also believe that Proposed Form TCR should be amended in two respects. First, item 3's request as to whether the potential whistleblower held any of a list of positions at the company should be amended to add company counsel to the list. Knowing from the initial form (and other than the current "occupation" blank on the first page) whether the whistleblower was counsel to a company makes sense as a threshold review issue, and could serve as an important first indicator to the Commission staff reviewing the form that the whistleblower's complaint involved potentially privileged information and documents. Second, we also would add a specific item to Proposed Form TCR that requires whistleblowers to identify whether and to what extent the information they are

providing was obtained from any lawyer working for or on behalf of the entity that is the subject of the complaint. Although the Proposed Form TCR as currently drafted contains a general request (item 8) for a description of how the whistleblower obtained the information, we believe that a specific question that could elicit whether counsel was the source of information would greatly enhance the staff's ability to identify the risk of receiving privileged information and would be an appropriate means of balancing the Commission's interest in receiving information with the need to protect the privilege. Knowing this information would allow the Commission staff to quickly and efficiently segregate the report for more detailed review and consideration and should present no additional burdens on whistleblowers seeking to submit the form.

**E. Proposed Form TCR Should be Modified to Exclude Documents and Data Improperly Obtained from Employers or Other Companies.**

Although not confined to privilege-related materials, we also believe that Proposed Form TCR should clearly indicate in its request for supporting documents that the Commission is not seeking, or requesting whistleblowers to provide it with, documents or data stolen or improperly obtained from entities. The definition of "original information" in Proposed Rule 21F-4(b)(4)(vi) excludes from a whistleblower's "independent knowledge" or "independent analysis" information obtained "[b]y a means or in a manner that violates applicable federal or state criminal law." There appears to be little clarity or uniformity in the application of state criminal theft or conversion laws to the theft of company data or the taking of company documents by whistleblowers, but that ambiguity should not lead the Commission to be silent or cavalier about the potential for employees to steal or otherwise improperly remove documents or data from entities. The typical risks of employee misuse or misappropriation of data or documents are substantially exacerbated in the case of the Commission's whistleblower program by the fact that potential whistleblowers under the Commission regime will have even greater financial incentives to take property and data for personal gain and, potentially, greater protection from potential adverse employment actions for their actions. The risks of such conduct are not limited to those faced by entities in the form of compromised trade secret, commercial or proprietary data and documents, but also potentially include risks to customers, employees or other third parties of inadvertent disclosure of sensitive personal or financial data.<sup>3</sup>

We do not suggest that the Proposed Rules seek to have employees misappropriate – and potentially lose or otherwise disclose – such data and documents, but whenever an employee compromises an entity's document and data security policies,

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<sup>3</sup> Consistent with this concern and in response to the Commission's Request for Comment 15, we believe that the rules should similarly exclude information obtained in violation of an applicable judicial or administrative protective or other similar order.

the risks of inadvertent and potentially harmful disclosures increase. Thus, in addition to the Proposed Rules' exclusion of information obtained in violation of state or federal law, and consistent with the Commission's objective that the Proposed Rules "be clearly defined and user-friendly," we believe that, at a minimum, Proposed Form TCR should be amended to make clear that the request for "supporting materials" in Item 7 does not include materials stolen or otherwise obtained improperly from an employer or another entity. Likewise, we believe that the certification in Part E of Proposed Form WB-DEC should be amended to include a representation by the whistleblower (similarly subject to the counsel's certification in Part F) that, to the best of the whistleblower's knowledge and belief, no data or documents submitted to the SEC were stolen or improperly obtained from the whistleblower's employer or another entity.

### **III. Standards for Referral of Complaints to Companies**

As described above, we believe that employees of companies with effective compliance and reporting systems should be required to report whistleblower complaints internally in order to be eligible for the bounty program. We recognize, however, that not all whistleblower complaints will come from current employees and not all employees will report internally first. In those cases, and others where it does not appear from the whistleblower report that the subject company is aware of the complaint, we believe that the Commission should require the staff to notify the subject company of the complaint.

The proposing release indicates that the Commission "expect[s that] in appropriate cases, consistent with the public interest and our obligation to preserve the confidentiality of the whistleblower, our staff will, upon receiving a whistleblower complaint, contact a company, describe the nature of the allegations, and give the company an opportunity to investigate the matter and report back." We believe it is important for the Commission to ensure that, to the fullest extent appropriate, companies are provided with notice of whistleblower complaints about them and with the information from the complaints necessary for the companies to conduct their own inquiries. Providing this information to companies not only helps the companies comply with – and the Commission enforce – the federal securities laws, but it also helps companies facilitate and monitor compliance with employment, workplace safety, consumer safety and a wide range of other laws and obligations. Providing companies with access to complaint information also helps to support and strengthen internal compliance programs by ensuring that companies are alerted to and can investigate and address any problems or concerns that may not have been reported or discovered internally. The Proposed Rules, however, contain no standards under which the Commission staff will determine when to make referrals to companies, no procedures to assure that entities will receive sufficient information from the Commission to undertake a meaningful inquiry, no means by which companies can determine whether and how they should report back to the Commission staff on the referred matter, and, for those companies who choose to undertake internal inquiries and report back to the Commission

staff on the results of those inquiries, no assurance that they will be treated as having provided voluntary cooperation pursuant to the Commission's policy statements in the October 23, 2001, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, SEC Rel. Nos. 34-44969 and AAER-1470 (the "Seaboard Report") and in the January 4, 2006, *Statement of the Securities and Exchange Commission Concerning Financial Penalties* (the "Penalty Statement").

The absence of standards or guidance on these issues in the Proposed Rules will, invariably, lead to inconsistent practices and uncertain expectations, neither of which benefits the Commission's enforcement program or the companies affected by the absence of an established referral process. For example, if the Commission staff forwards reports without providing all of the details in an effort to avoid providing information that would compromise a whistleblower's confidentiality, companies will end up potentially wasting significant resources trying to discover information or otherwise investigate matters already known to the Commission. Similarly, if the Commission staff were to simply forward all whistleblower reports and require companies to investigate and report back on all such reports, companies might be unnecessarily burdened by having to conduct multiple internal reviews of even facially frivolous complaints with a requirement to report back to the Commission staff on the outcomes, again regardless of whether any potential violations were identified. Finally, the Proposed Rules are silent on the issue of whether companies receiving referrals from the Commission staff that have acted appropriately to investigate, remediate and, if necessary, report back to the Commission on the matters will be considered to have provided voluntary cooperation under the relevant Commission policy statements.

We recognize that the Commission's enforcement staff already makes these types of referrals to companies, but those are ad hoc determinations made in the context of specific investigations and complaints. Given that even Commissioners have expressed concerns that the Commission staff will be "inundated with allegations" in the wake of the whistleblower program, we believe that clear standards and guidance from the Commission through the rulemaking process are essential to establish both the processes by which the Commission staff will make referrals and the expectations on companies that receive them.

Accordingly, we recommend that the Commission promulgate rules that would establish standards for considering and making referrals of whistleblower complaints to companies that include, at a minimum, the following: (i) standards providing that, where it does not appear that companies are aware of whistleblower complaints, the Commission staff will provide companies with notice of the complaints about them absent rare and extraordinary circumstances, such as if the staff specifically determines that doing so will compromise the confidentiality of the whistleblower or otherwise pose a significant risk to an ongoing enforcement investigation; (ii) a requirement that the

Commission staff provide all material information to companies in the event that it refers matters back to them for investigation; (iii) a requirement that the Commission staff and the Commission will not assert that a company's agreement to investigate and to report back to the Commission staff waives any applicable attorney-client privilege and that the Commission staff will not seek such a waiver from a company as part of a referral; and (iv) a clear statement that, in considering enforcement decisions and potential financial penalties under the factors set forth in the Seaboard Report and the Penalty Statement, the Commission staff and the Commission will fully credit companies who cooperate in investigating such referrals, remediating weaknesses or violations discovered in the course of their inquires, and, as appropriate, self-reporting any substantiated violations to the Commission.

#### **IV. Information from Professionals and Others with Fiduciary Duties**

The Commission's proposing release specifically requests comment on whether "other professionals" should also be included in the exclusions from those with "independent knowledge" of violations. Given that most professionals and others in relationships of trust or confidence with a company likely owe fiduciary or similar duties to the company that generally require them to use information for the benefit of their employer/client, we believe it would be appropriate to exclude the information they obtain in the course of performing their functions from the definition of "independent knowledge" in the same way that information obtained by auditors and attorneys will be excluded. Although it is not possible to identify every type of professional who would be covered by such a rule, we would expect it to include, at a minimum, investment bankers or other financial advisors as well as compensation and other consultants retained to advise companies or their boards of directors. These professionals all have access to sensitive, non-public information for the purpose of providing professional advice for the benefit of companies. Accordingly, we do not believe that they should be eligible to profit personally from the information they obtain in the course of performing these duties or that they should be incentivized by the Commission to forego their obligations to the company for personal gain.

#### **V. Rulemaking on the Anti-retaliation Provisions of Section 21F**

The proposing release specifically requests "comment on whether [the Commission] should promulgate rules regarding the interpretation or implementation of the anti-retaliation provisions of Section 21F(h)." We believe that the Commission should promulgate rules in this area.

In implementing Section 21F, the Proposed Rules depart from the statutory definition of "whistleblower" to clarify that, for anti-retaliation purposes, a "whistleblower" includes any person who provides information to the SEC concerning a "potential" violation and that an actual violation need not be found in order for the whistleblower to be protected from retaliation. We recognize that the Commission's



analysis on this point is designed to ensure that individuals who report all “potential” violations are protected from retaliation and do not disagree with the Commission’s objective. However, the fact that the term is intentionally defined broadly might be used later to apply whistleblower protection from retaliation in a broad range of cases in which such protection would not be warranted or within the scope of the statutory mandate in Section 21F.

To avoid such an outcome from this broad definition, we believe the Commission should promulgate specific rules under the anti-retaliation provisions that make clear the scope of the protection and the procedures for making determinations relevant to it. We believe that the Commission should consider and promulgate rules that reflect the following basic principles: (i) employers are not liable for retaliation claims if they had legitimate, non-retaliatory grounds for the challenged employment action; (ii) employers are not liable for retaliation claims if they did not have actual knowledge of the whistleblower’s status as of the time of the challenged employment action; (iii) plaintiffs bear the applicable evidentiary burdens of demonstrating retaliation or, in the case where employers can articulate legitimate, non-retaliatory reasons, of demonstrating that such reasons were a pretext for retaliation; (iv) although recognizing that a successful proceeding need not result from a whistleblower report in order for an employee to be protected from retaliation, the weakness of an alleged violation or potential violation should be considered in assessing the strength and merits of a retaliation claim; and (v) individuals who submit false, fictitious or fraudulent whistleblower reports are not only ineligible for awards under Proposed Rule 21F-8(c)(7), but they are also not “whistleblowers” under Section 21F(h) and Proposed Rule 21F-2.

## **VI. Study and Comment on Initial Implementation**

We understand that Section 922(d) of the Dodd Frank Act requires that the Commission Inspector General undertake a study and report to Congress on certain aspects of the whistleblower program following implementation, but believe that the areas required to be covered in that report, though important to an assessment of the effectiveness of certain aspects of the program, do not address the potential implementation issues we have identified, including those with respect to the possible effects of the whistleblower program on corporate compliance functions and the attorney-client privilege. In addition, we believe that the full range of the actual effects of the whistleblower bounty program will likely not emerge until after it is operational. Accordingly, we recommend that the Commission commit to undertake a study two years after final implementation of the rules it adopts in this process to assess the effects of the whistleblower program and, if necessary, consider and adopt revisions to the rules. As part of such a study, we believe that it will be important for the Commission to receive public comments from whistleblowers, entities and others involved and interested in the process to ensure that the Commission has the most complete record on which to base its assessment of the effectiveness and operation of the program.

\* \* \*

We appreciate your consideration of our comments and thank you for the opportunity to participate in this important process. We would be pleased to answer any questions the Commission may have or otherwise discuss any aspect of our comments. Any questions about this letter or our comments may be addressed to Mary Jo White or Jonathan Tuttle of Debevoise & Plimpton LLP at 212-909-6000.

Sincerely,

General Electric Company  
Google Inc.  
Honeywell Inc.  
JPMorgan Chase & Co.  
Microsoft Corporation  
Northrop Grumman Corporation

cc: The Honorable Mary L. Schapiro, Chairman  
The Honorable Kathleen L. Casey, Commissioner  
The Honorable Elisse B. Walter, Commissioner  
The Honorable Luis A. Aguilar, Commissioner  
The Honorable Troy A. Paredes, Commissioner  
Robert S. Khuzami, Director, Division of Enforcement