TRACE
Anti-Bribery Compliance Solutions

December 17, 2010

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Dear Secretary Murphy:

TRACE appreciates the opportunity to submit comments on the proposed rules for implementing the whistleblower provisions of Section 21F of the Securities and Exchange Act of 1934. TRACE is a non-profit business membership association made up of approximately 170 multinational companies across all industries. TRACE focuses exclusively on anti-bribery compliance, including compliance with the U.S. Foreign Corrupt Practices Act (the "FCPA"). The majority of TRACE members are publicly traded companies that are subject to SEC regulations, including the whistleblower provisions of Section 21F of the Securities and Exchange Act of 1934.

TRACE suggests that the proposed rules can be improved in the following ways:

1) Maintain the exclusion for information obtained through communication protected by the attorney-client privilege and indeed broaden the types of privilege that would apply to the exclusion to include all evidentiary privileges.

2) Maintain the exclusion for information obtained by independent public accountants and expand the category of professionals who are subject to the exclusion to include consultants and other professionals who are regularly engaged by companies to assist with auditing, creating, and implementing robust anti-bribery compliance programs and internal controls.

3) Require individuals to report suspected violations of securities laws through internal reporting mechanisms such as hotlines or ombudsmen in order to be eligible to receive an award under the whistleblower program and provide the company with a 90 day window to investigate and remediate any credible reports of misconduct.

4) Prohibit whistleblowers who obtain information through violations of foreign law from receiving an award under the whistleblower program.

5) Prohibit whistleblowers from benefiting from their own misconduct by categorically excluding individuals from award eligibility if they directed, planned or initiated; participated in; or encouraged the misconduct or failed to take appropriate action when they learned of the misconduct.

151 West Street • Suite 300 • Annapolis, MD 21401 • USA
Tel: 410-990-0076 • Fax: 410-990-0707
info@TRACEinternational.org

TRACE will provide more detailed comments on each of these topics below.

1. **Maintain the exclusion for information obtained through communication protected by the attorney-client privilege and expand the scope of the rule to exclude all evidentiary privileges from the definition of original information.**

Proposed Rule 21F-4(b)(4) contains seven circumstances in which information would not be considered "original" as required under the statute and would therefore preclude individuals from receiving an award. The first situation that would preclude award eligibility is if the information was obtained through communication that was protected by the attorney-client privilege. The Commission specifically requested comments on whether it should maintain this exclusion in the final rule.

TRACE agrees with the Commission that any information obtained through attorney-client privileged communication should be excluded from the definition of original information. As the Commission states, companies rely on communication with counsel about potential violations of securities laws and regulations to ensure their compliance with those laws and regulations. To allow attorneys who have access to such information to personally benefit would impact companies' ability to seek advice, maintain compliance and remediate areas of potential non-compliance with securities laws without fear that the attorney could use the information against his or her client and collect a substantial award. Indeed, TRACE proposes that the exclusion should be broadened to include any information obtained in connection with the representation of a client whether or not such information would be considered privileged.

In addition, the Commission should expand this exclusion to include other types of evidentiary privileges, such as spousal privilege, physician-patient privilege and clergy-penitent privilege. The law has long recognized these relationships as deserving protection. Creating a monetary incentive for those holding this sort of privileged information to divulge it to the Commission is contrary to the principles behind these evidentiary rules.

2. **Maintain the exclusion for information obtained by independent public accountants and expand the category of professionals who are subject to the exclusion to include consultants and other professionals who are regularly engaged by companies to assist with auditing, creating and implementing robust compliance programs and internal controls.**

The third proposed exclusion under Proposed Rule 21F-4(b)(4) is for information obtained by an independent public accountant through the performance of an engagement required under the securities laws related to violations by the client's directors, officers or employees. The Commission specifically requested comments on whether this exclusion is appropriate.

TRACE agrees that it would be inappropriate to allow public accountants to personally gain from information uncovered during a statutorily mandated audit or review. Legally requiring a company to retain the services of a public accountant, while at the same time placing the company at risk of the accountant disclosing any suspected misconduct to the Commission for personal monetary gain, is patently unfair. TRACE proposes that this exclusion should also include federal, state and local

government representatives who are responsible for auditing and regulating the business community. While these individuals may have a duty to report violations of securities laws, they should not be able to personally benefit by receiving an award from the Commission.

In addition, the Commission should expand the exclusion to include other professionals who are regularly engaged by companies to assist with auditing, creating and implementing robust anti-bribery compliance programs and internal controls, including professionals who perform due diligence on third party relationships as required by the securities laws. Companies focused on compliance with the FCPA routinely hire not only law firms and public accountants, but also a host of other consultants and professionals to assist them with establishing and implementing a robust compliance program. These range from due diligence service providers who conduct background searches on existing and potential third party relationships, to consultants who conduct risk assessments and compliance reviews and assist companies with implementing effective and robust anti-bribery compliance programs. The possibility of one of these professionals receiving a financial windfall from information obtained through the course of their professional engagement would have a chilling effect on companies' willingness to hire these types of professionals and could lead to companies forgoing these relationships.

3. **Require individuals to report suspected violations of securities laws through internal reporting mechanisms such as hotlines or ombudsmen in order to be eligible to receive an award under the whistleblower program and provide the company with a 90 day window to investigate and remediate any credible reports of misconduct.**

The Commission has asked whether it should consider other ways to promote continued robust corporate compliance processes consistent with the requirements of the statute and has specifically asked whether it should consider a rule that would require whistleblowers to utilize employer-sponsored complaint and reporting procedures.

TRACE strongly encourages the Commission to craft a rule that requires whistleblowers to utilize employer-sponsored complaint and reporting procedures in a way that is consistent with the statutory guidelines. The Commission could draft a rule that would *require* a whistleblower to report through any internal reporting mechanism available subject to certain exceptions. As the Commission states, corporate compliance programs run the gamut from well-documented, thorough and robust to those which lack established procedure and protections. A rule that requires disclosure through a corporate hotline or ombudsman program before allowing a whistleblower to recover under Section 21F would reward those companies that have spent time and resources to develop reporting mechanisms in order to enhance and ensure compliance with the securities laws. The rule could be drafted to include exceptions for the following situations: 1) the company does not have a compliance program; 2) the company has no internal process for the reporting and investigation of complaints of improper conduct; 3) the information was previously reported to the company and they have failed or refused to act upon it; 4) the company has no policy or process for maintaining confidentiality; or 5) there is a substantial likelihood of retaliation or other harm. Under these circumstances, a whistleblower could bring any information of suspected violations directly to the Commission.

In addition, the rule could allow whistleblowers to recover in situations where a company that receives a complaint does not investigate and remediate credible reports within 90 days of receipt of the

information alerting it to the potential violation. The 90 day timeframe would provide enough time for companies to conduct an initial investigation of any claims, while at the same time allowing whistleblowers to maintain their status if the company fails to do so.

4. **Prohibit whistleblowers who obtain information through violations of foreign law from receiving an award under the whistleblower program.**

The Commission has requested comment on whether whistleblowers who obtain information through violations of foreign law should be excluded from award eligibility. TRACE strongly encourages the Commission to draft a final rule that includes this exclusion. The Commission should not encourage individuals to break the laws of foreign countries by rewarding them under the whistleblower provisions and should therefore exclude information obtained in violation of the criminal laws of foreign countries as well as information obtained in violation of federal and state criminal law.

5. **Prohibit whistleblowers from benefiting from their own misconduct by categorically excluding culpable individuals from award eligibility.**

Proposed Rule 21F-15 states that the Commission will discount the monetary sanctions for purposes of recovery 1) by any amount that the whistleblower is required to pay in sanctions as a result of his or her own misconduct; and 2) by the amount of any corporate fines that are "based substantially on conduct that the whistleblower directed, planned or initiated." The Commission specifically requested comments on whether it should exclude any wrongdoer categorically from eligibility to receive an award. TRACE suggests that a categorical exclusion for any wrongdoer is appropriate. The final rule should state that any individual who 1) directed, planned or initiated; 2) participated in; or 3) encouraged the scheme or failed to take appropriate action when they learned of the scheme, is excluded from award eligibility.

The proposals outlined in this letter would allow the Commission to implement a final rule that strikes an appropriate balance between the Commission's need to receive information necessary to investigate potential violations of securities laws and the acknowledgment and recognition of effective corporate compliance programs. TRACE welcomes the opportunity to work with the Commission on this important initiative. Thank you for your consideration of our comments.

Sincerely,

Alexandra A. Wrage
President
TRACE International, Inc.