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December 17, 2010

Via e-mail: rule-comments@sec.gov

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: File Number S7-33-10, Proposed Rules for Implementing the Whistleblower Provisions of Rule 21F of the Securities Exchange Act of 1934

Dear Ms. Murphy:

Baron & Budd, P.C. is a law firm based in Dallas, Texas, and our practice focuses, in part, on representing whistleblowers and relators in *qui tam* actions. We write to comment on the proposed rules and to respectfully suggest refinements that we believe will promote effective corporate compliance channels, strengthen the Commission's whistleblower program, and add clarity to the program's procedures. While we agree with many of the comments raised by Taxpayers Against Fraud, we generally have the view that the Commission's proposed rules reflect a thoughtful and deliberative process addressing the concerns of the numerous stakeholders affected by Section 922 of the Dodd-Frank Act. The proposed rules go a long way towards balancing the needs of an effective whistleblower program with the Commission's desire not to undermine robust internal compliance infrastructure.

However, we believe the finalized rules ought to more directly address those situations where a whistleblower reports violations to his or her employer, and the employer in turn self-reports to the Commission. We respectfully propose that the Commission enact rules making such whistleblowers eligible for an award, as provided for in the statute.

Proposed Rule 240.21F-4(b)(5). This rule provides in relevant part:

> The Commission will consider you to be an *original source* of the same information that we obtain from another source if the information satisfies the definition of original information and the other source obtained the information from you or your representative.

Under this language, it is unclear that if a company self-reports original information to the Commission that was obtained from an internal whistleblower, then the Commission will consider the whistleblower as the original source of information and recognize the whistleblower's right to an award.

We believe clarifying this intent would have several advantages. *First*, it provides persons possessing knowledge of violations an incentive to come forth with the information, which after all is the purpose of the new whistleblower program. *Second*, it encourages whistleblowers to report through existing corporate compliance channels, which would improve the self-policing mechanisms sought by other stakeholders while not removing the incentives described above. *Third*, it would conserve Commission resources. For these reasons, it is in the public interest to reward a whistleblower for bringing securities violations to light through a company's established internal compliance procedures. Accordingly, Baron & Budd respectfully suggests that the Commission should clarify that included within the ambit of Rule 240.21F-4(b)(5)'s "another source" language is a company who self-reports violations to the Commission, and that such company's self-reporting is sufficient to make the internal whistleblower an "original source".

Proposed Rules 240.21F-8 & 9. Even if an internal whistleblower qualifies as an "original source" under Rule 4(b)(5), the Proposed Rules would not permit a whistleblower who qualifies under Rule 4(b)(5) to claim an award. Therefore, the Commission should enact a procedure or rule that allows a whistleblower who qualifies as an "original source" under Rule 4(b)(5) to claim an award.

Proposed Rule 240.21F-8 mandates that a whistleblower "must give the Commission information in the form and manner that the Commission requires[,]" in order to be eligible for an award. Proposed Rule 240.21F-9 requires original information to be submitted either through the Commission's Electronic Data Collection System or on Form TCR. However, a whistleblower who is an original

source under Rule 4(b)(5) would have reported to their employer, and in relying on the company to self-report, would not necessarily have reported directly to the Commission. And because the company is unlikely to use either of the methods required under Rule 240.21F-9 when self-reporting to the Commission, the plain language of Rules 240.21F-8 and 240.21F-9 would disqualify a whistleblower from receiving an award. Thus, a whistleblower who qualified as an original source of the information under Rule 4(b)(5) would not be eligible for an award, because the original information was not provided in the required formats.

Such an outcome would be contrary to the Commission's stated objective of improving the effectiveness of corporate compliance programs. Accordingly, we respectfully submit that Rule 240.21F-9 should be modified to expressly allow a whistleblower who is an original source under Rule 4(b)(5) to qualify for an award. We respectfully suggest that the Commission should add the following language to Proposed Rule 240.21F-9:

> (e) If you are considered an original source of information to the Commission pursuant to § 240.21F-4(b)(5) of this chapter, you will be eligible for an award only if you either submit your information online through the Commission's Electronic Data Collection System or complete Form TCR (referenced in § 249.1800 of this chapter) prior to, or simultaneously with, filing Form WB-APP as required by § 240.21F-10 of this chapter and otherwise follow the procedures set forth in paragraph (b) of this Rule.

This language would go far to resolving the issues raised above by allowing a whistleblower who takes advantage of Rule 4(b)(5) to still be able to collect an award.

Request for Comment 29. The Commission has requested comment on whether it should adopt rules regarding fees in the representation of whistleblower clients. We respectfully suggest that the Commission should not adopt any such rules because they impede the freedom of contract, would impose rigid constraints on parties who may find themselves in financial or other circumstances not envisioned by the Rules, and would not advance the Commission's goals.

A significant number of whistleblowers cannot afford to pay good, reputable attorneys their hourly fees, and instead must obtain counsel on a contingency fee basis. Under a contingency arrangement, an attorney devotes

time and other resources to investigate the matter and ultimately file the case. In return, the attorney is paid only when there is an actual recovery by the client. In this way, the whistleblower's, Commission's and the attorney's interests are aligned. The amount of the percentage contingency fee is negotiated as part of a contract between the whistleblowers and their attorneys.

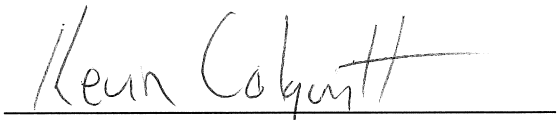
Even if a whistleblower has indisputable evidence of a clear violation of the securities laws, the attorney must devote time and other resources in the face of much uncertainty regarding the likelihood of the Commission acting and obtaining a recovery under the Commission's whistleblower program. Some factors that could affect a potential recovery include (1) whether the Commission already has knowledge of the violation from another source; (2) whether the Commission chooses to exercise its enforcement discretion and take action; and (3) if the Commission does take action, whether it will result in monetary sanctions greater than one million dollars. Such factors can only be evaluated on a case-by-case basis, and situations may arise where arbitrary caps on attorney's fees would be a disincentive to an attorney investing in a case because of the uncertainty of the outcome.

Any other concerns regarding attorney over-reaching, frivolous filings, or other issues that govern the relationships of the parties are best handled where they are handled now: by the rules governing attorney conduct. Every state already regulates attorney's fees and prohibits attorneys from charging excessive fees, contingent or otherwise. And the State Bars already provide mechanisms for a grieved client to seek redress if charged an excessive fee. Moreover, the Commission has the option filing a complaint with the State Bar of an attorney it believes acted in bad faith.

Thus any limit placed on contingency fees by the Commission would be arbitrary and would impede the right of the parties to freedom of contract. Perhaps the attempts to cap attorney's fees are designed to create a disincentive to attorneys taking these cases on contingency fee basis. But that would, in turn, severely undermine the purpose of these rules, which is to invite whistleblowers to submit their information to the Commission in a manner that can best help the Commission. Because the Commission does not have the prerequisite knowledge to create fee rules that are not arbitrary, the Commission and the whistleblowers would be best served by relying on established rules of professional conduct and attorney discipline.

In conclusion, while Baron & Budd wholeheartedly supports rules that provide an incentive for whistleblowers to use established internal compliance channels, we vigorously oppose any rule that mandates a whistleblower do so in order to qualify for an award. Rule 922 was enacted because of the failure of previous efforts to detect and deter securities violations. To give these failed laws precedence over Rule 922 would be a mistake. The purpose of Rule 922 is to incentivize whistleblowers to bring serious violations of the securities laws to the attention of the Commission. To accomplish this objective, awards should be granted regardless of whether a whistleblower reports indirectly through internal compliance channels or directly to the Commission.

Respectfully,



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