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

RE: File Number S7-33-10 (Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934)

Dear Ms. Murphy:

In preparing the proposed rules, the SEC stated that it was guided in part by "Congress's suggestion that the Commission's whistleblower rules be clearly defined and user-friendly."[1] To this end, the SEC concluded that its proposed rules should provide "a complete and self-contained set of rules relating to the whistleblower program."[2] The SEC stated its belief that such an approach "will assist potential whistleblowers and add clarity, by providing in one place all the relevant provisions applicable to whistleblower claims."[3] The analysis provided below and in the attached Appendix A, as well as the requests made below, are respectfully submitted in support of those goals.

The proposed rules focus almost entirely on the program for providing monetary incentives to whistleblowers. The incentive program clearly is very important, and I respect that developing rules for such a program certainly is a time-consuming task. However, the purpose of this letter is to respectfully submit that it is even more important that the SEC's rules clarify certain aspects of the whistleblower protections set forth in Section 21F of the Exchange Act. In the absence of such clarifications, employers and their counsel already have succeeded—and I submit they will continue to succeed—in submitting false and misleading information to the SEC to thoroughly quash SEC investigations of whistleblower disclosures and to cause the SEC to take or refrain from taking actions related to whistleblower disclosures.

One reason that it would be especially beneficial to include the following proposed rules is that employers and their counsel are most likely to feel the need to mislead the SEC when a whistleblower's concerns are particularly meritorious. It stands

[1] Sec. Rel. No. 34-63237, Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (the "Exchange Act") (SEC 2010) at 3.

[2] *Id*. at 4.

[3] *Id*.

to reason that employers and their counsel will feel little need to mislead the SEC when a whistleblower's concerns lack merit. However, when a whistleblower's concerns are well grounded in fact and law, employers and their counsel have sought and will seek to blame or discredit the whistleblower or otherwise deflect attention from the employer's violations of securities laws. Under such circumstances, employers and their counsel also have misled and will seek to mislead the SEC with partial truths, equivocation, dissembling and knowingly false statements. For example, employers and their counsel have and will focus both their internal investigations and their disclosures to the SEC on whistleblower concerns that they can plausibly, if misleadingly, appear to disprove or rationalize away. At the same time, they will neglect to investigate or they will withhold information from the SEC regarding violations of securities laws that are indisputable.

Another reason the following proposed rules would be beneficial is that the historical safeguards against the perpetration of a fraud on the SEC and retaliation against whistleblowers are insufficient either to ensure the success of SEC investigations or to protect whistleblowers.[4] Employers and their counsel already have intentionally provided false and misleading information to the SEC for the purpose of discrediting a whistleblower with partial truths, equivocation, or dissembling or blackening the whistleblower's name with outright false statements. They engaged in such conduct because the whistleblower forwarded or caused to be forwarded to the SEC information pertaining to violations of federal securities laws. Attorneys at some of this country's most prominent—and presumably most respectable law firms and corporations—have lent their reputations and devoted their efforts to precluding SEC investigations or influencing SEC actions in relation to whistleblower disclosures by assisting their employers or clients in perpetrating frauds on the SEC. Lest the foregoing assertions be dismissed as mere hyperbole or exaggeration, this letter will address below a few of the many instances of misconduct by one of several such prominent firms of which the author has personal knowledge and which he may reveal without relying at all on information that may be covered by any privilege or confidentiality agreement.

## Requested Modifications to Regulation 21F

In it's proposal, the SEC included a proposed Form WB-DEC, *Declaration Concerning Original Information Provided Pursuant to §21F of the Securities Exchange Act of 1934*. In discussing that form, the SEC stated that

> [i]n proposed Item E, the whistleblower would be required to declare under penalty of perjury that … all information submitted to the SEC is true, correct and complete to the best of the whistleblower's knowledge, information and belief. In addition, the whistleblower would acknowledge

[4] The term "perpetrate a fraud" "cover[s] conduct involving the knowing misrepresentation of a material fact to, or the concealment of a material fact from, the [SEC] with the intent to induce the [SEC] to take, or not to take, a particular action…. [This applies to] specific submissions or contacts with the [SEC] by issuers which attempt to persuade the [SEC] to take, or not to take, particular actions, including, among other things, Wells submissions, applications for relief, and requests for 'no action' letters." Sec. Rel. No. 33-8150, Proposed Rule for Implementation of Standards of Professional Conduct for Attorneys (SEC 2002).

> his understanding that he may be subject to prosecution and ineligible for a whistleblower award if, in the whistleblower's submission of information, other dealings with the SEC, or dealings with another authority in connection with a related action, the whistleblower knowingly and willfully makes any false, fictitious, or fraudulent statements or representations, or uses any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.
>
> The counsel certification in proposed Item F would require an attorney for an anonymous whistleblower to certify that the attorney … has reviewed the whistleblower's Form WB-DEC for completeness and accuracy …."[5]

I respectfully submit that Regulation 21F should include a corollary to the foregoing Items E and F to the proposed Form WB-DEC. The analogous rule should require representatives of employers and their counsel to sign comparable acknowledgments whenever they submit information to the SEC in connection with either a disclosure by a whistleblower or an inquiry by the SEC staff.

I further respectfully submit that Regulation 21F should provide that when an employer's representatives provide information to the SEC to address past or expected disclosures by a whistleblower or in response to an SEC inquiry that is prompted by a whistleblower's disclosure, the SEC will disclose to the whistleblower the portions of the employer's responses that include statements regarding the conduct of the whistleblower or documentation purportedly prepared by the whistleblower. In instances in which the employer already is aware of the identity of the whistleblower, *e.g.*, when the whistleblower files a complaint of retaliation under Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX"), codified at 18 U.S.C. § 1514A, I respectfully submit that Regulation 21F should require the company to disclose to the whistleblower the portions of the employer's responses that include statements regarding the conduct of the whistleblower or documentation purportedly prepared by the whistleblower.[6]

I respectfully submit that Regulation 21F also should provide that statements by or on behalf of employers that are known to be false or that are made with reckless disregard for the truth constitute harassment of a whistleblower when such statements are made because the whistleblower engaged in activities that are protected under Section 21F(h) of the Exchange Act and when such statements (i) are made about a whistleblower and their content is of such a nature that it bears a significant risk of damaging the whistleblower's professional reputation or employment prospects or (ii) constitute the

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[5] *Id*. at 65.

[6] A company will become aware of the identity of a whistleblower, for example, when he or she files a complaint with OSHA under SOX Section 806. OSHA is required send notice to the company and to the other persons whom the whistleblower named as having engaged in the retaliation. OSHA also is required to send the same notice to the SEC. *See* Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, at 29 C.F.R. § 1980.104(a).

perpetration of a fraud on the SEC with respect to information provided to the SEC by a whistleblower. I further respectfully submit that the rule addressing such harassment should specify that it applies regardless of whether such harassment occurs before or after the whistleblower's employment with the employer has ended. Legal authority supporting the application of such a rule is discussed in part in the Appendix A attached hereto.

Apprising the whistleblower of allegations made against him or her is necessary to permit the whistleblower to defend or protect himself or herself against false allegations such as have been made by employers or their counsel to deflect attention from the employer's violations of securities laws. I submit that such a rule also will greatly reduce the likelihood that employers or their counsel will seek to undermine the SEC's whistleblower program by resorting to making false and misleading statements to the SEC about whistleblowers or about the concerns that whistleblowers report to the SEC.

**Illustration of the Need for the Requested Modifications to Regulation 21F**

The need for the rules requested above is illustrated by the conduct and statements of Eugene Scalia, one of the attorneys who is most prominent and active in representing employers in opposing whistleblowers.

> Eugene Scalia is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher and a member of the firm's Executive Committee. He is Co-Chair of the firm's Labor and Employment Practice Group, Chair of its Administrative Law and Regulatory Practice Group, and a member of the firm's Appellate and Constitutional Law Practice Group.
>
> Mr. Scalia has a national labor and employment practice handling a broad range of matters involving … the many statutes administered by the Department of Labor. He previously served as Solicitor of the U.S. Department of Labor, the Department's principal legal officer with responsibility for all Labor Department litigation ….
>
> In private practice, [Mr. Scalia's] representative employment matters include … [r]epresentation of companies and audit committees in many Sarbanes-Oxley "whistleblower" matters, including internal investigations and proceedings before the Department of Labor, administrative law judges, and the federal courts.

http://www.gibsondunn.com/lawyers/escalia (Gibson Dunn 2010)

For several years, the analogous Gibson Dunn web page further emphasized Mr. Scalia's expertise with the whistleblower protection provisions of SOX Section 806 and the implementing regulations promulgated by the Department of Labor ("DOL"):

> Matters for which Mr. Scalia had substantial responsibility during his tenure [as the Solicitor of Labor] included … implementation of the new "whistleblower" provision of the Sarbanes-Oxley corporate responsibility law … [and Mr. Scalia] is a leading authority on the Sarbanes-Oxley "whistleblower" provision.

Despite his expertise with SOX Section 806 and the implementing regulations, Mr. Scalia has outright misrepresented the effect of key provisions of SOX Section 806 and the implementing regulations for the purpose of opposing whistleblowers. For example, Mr. Scalia has misrepresented that individuals "are not proper defendants in a Sarbanes-Oxley [Section 806] case." He further misrepresented that, "[t]here is no reason that the outcome [with respect to individual liability in Title VII cases] should be different [from the outcome of a case arising under SOX] Section 806." Peculiarly, at the same time Mr. Scalia and Gibson Dunn made those misrepresentations to a federal tribunal regarding the effect of SOX Section 806, he and Gibson Dunn repeatedly publicly declared the opposite:

> in some cases individuals [] found to have retaliated against a whistleblower may be subject to administrative, civil and criminal sanctions…. The Act thus confronts corporate officers and managers with the prospect of being sued in their individual capacity and even serving prison time for personnel decisions they have made.[7]

Similarly, Mr. Scalia has publicly encouraged employers to oppose whistleblower claims by taking utterly frivolous positions, *e.g.*, regarding the application of the "security risk" exception that would permit employers to avoid reinstating a whistleblower. Mr. Scalia knows that the "'security risk' exception [in the DOL regulations implementing SOX Section 806]... is **not intended to be broadly construed**. Rather, it would apply **only** in situations where the [employer] clearly establishes to the Department that the reinstatement of an employee might result in **physical violence against persons or property**."[8] The "'security risk' exception ... [applies only] where [] **evidence** establishes that an employee's reinstatement might pose a **significant safety risk to the public**."[9] In direct contravention of the very clear statements in the DOL procedures, Mr. Scalia has openly encouraged employers to take the frivolous position that the security risk exception should be "read [] to refer not merely to a physical 'security risk' … but also to the security of the company's financial integrity and confidential financial data."[10] Indeed, in at least one instance in which a whistleblower

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[7] *The Whistleblower Provisions of The Sarbanes-Oxley Act Of 2002* (Gibson Dunn, Mar. 31, 2003), available among the publications on the web site of Gibson, Dunn & Crutcher LLP.

[8] Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (preamble discussing 29 C.F.R. § 1980.105) (Aug. 24, 2004).

[9] *Id*.

[10] *Emerging Issues Under The Sarbanes-Oxley "Whistleblower" Provision*, Eugene Scalia, Gibson, Dunn & Crutcher LLP, American Bar Association, Annual Meeting, Section of Labor and Employment Law (Aug. 9, 2004) at 20 (emphasis added), available at http://www.abanet.org/labor/lel-aba-annual/papers/2004/scalia.pdf.

was suspended within days after informing the employer that the whistleblower intended to file a whistleblower complaint with the DOL and to forward to the SEC information about the employer's violations of securities laws, Mr. Scalia, personally, succeeded in persuading a regional office of OSHA to dismiss the whistleblower's complaint merely because Mr. Scalia made the unsubstantiated assertion that some unidentified person had a vague "concern with [the whistleblower's] physical presence in the office while these matters were unresolved, as well as with [the whistleblower's] access to confidential company records."

Similarly, Mr. Scalia and Gibson Dunn repeatedly have included outright misrepresentations of law in filings in federal administrative proceedings, which misrepresentations Mr. Scalia knows to be false. For example, Mr. Scalia has directly misrepresented that findings of law in a decision by the DOL's Administrative Review Board continued to be valid and binding on DOL Administrative Law Judges even though Mr. Scalia knew that the ARB's findings had been vacated by the Fifth Circuit. In more recent examples, Mr. Scalia has repeatedly directly misrepresented that the Supreme Court in *Bill Johnson's Restaurant, Inc. v. NLRB*, 461 U.S. 731 (1983) "prohibit[ed] treating an employer's legal filing as impermissible retaliation for employee's exercise of legal rights."[11]

The foregoing are not even close to an exhaustive list of the false and misleading statements Mr. Scalia and Gibson Dunn have made in administrative proceedings and statements to OSHA and the SEC in opposing whistleblowers. The point of highlighting the foregoing misrepresentations of law and frivolous positions is simply to provide a few objectively assessable instances of statements by employers' counsel that serve no purpose but to harass whistleblowers and to impede federal agencies' actions in relation to whistleblower concerns.

The existing precautions and prohibitions on making false and misleading statements to the SEC are insufficient to prevent employers' counsel from making false and misleading statements of fact to federal regulatory agencies to influence proceedings related to concerns raised by whistleblowers. Mr. Scalia and Gibson Dunn have influenced and attempted to influence investigations by OSHA or the SEC and administrative proceedings by making outright misrepresentations of fact. To attack a whistleblower whose concerns are well grounded in fact and law, Mr. Scalia and Gibson Dunn have submitted statements to federal regulatory agencies that consist of snippets of fact stitched together with a long string of falsehoods. Mr. Scalia has even gone so far as to include in his statements fabrications of events that either entirely or in very significant part are fictitious. For example, Mr. Scalia's statements include allegations of misconduct by a whistleblower and allegations of disciplinary actions against a whistleblower that simply never occurred. Mr. Scalia's statements, unsupported by any affidavit by the employer, even include entirely fictitious quotations. He engages in such actions to blacken a whistleblower's name with false information for the very purpose of influencing the outcome of investigations by OSHA or the SEC and the outcome of administrative proceedings. The misrepresentations by Mr. Scalia have at times been so

[11] *Cf*. the analysis in the Appendix A attached hereto at 1.

flagrant and egregious that there is good reason to believe that they amounted to nothing less than mail fraud or wire fraud for the purpose of defrauding a whistleblower of the protections and recompense that are afforded by law.

One of Mr. Scalia's favorite allegations, for example, is that a whistleblower has raised concerns for the purpose of using them as leverage to extract a settlement or financial concessions from the employer. Mr. Scalia is so fond of that representation that he even falsely asserts it when he personally knows that it is the employer, not the whistleblower, who insists on a purely monetary settlement. This is illustrated by an email directly from Mr. Scalia to a whistleblower insisting that the employer would not agree to anything other than a purely monetary settlement:

> **any** resolution would have to be on **purely monetary terms—**[the employer] is not interested in rehiring or any ongoing contractual relationship in connection with a settlement. We have indicated previously the range for a monetary proposal by you that would be a basis for further discussions.

In summary, Mr. Scalia, as a leading representative of employers against whistleblowers, seeks to prevail in legal proceedings by misleading federal regulatory agencies and tribunals through equivocation, dissembling, and outright misrepresentations of both fact and law. In addition to including outrageously false statements in submissions to OSHA and the SEC, Mr. Scalia and Gibson Dunn have concealed and taken actions to cause federal regulatory authorities to conceal from whistleblowers the false statements submitted by Mr. Scalia and Gibson Dunn. As a result, such false statements have been concealed for several years and some continue to be concealed to this day.

When their misrepresentations have been exposed, Mr. Scalia and Gibson Dunn have been entirely unapologetic for the falsehoods included in their submissions to OSHA and the SEC and in federal administrative proceedings. Indeed, Mr. Scalia and Gibson Dunn unabashedly assert that that they and their clients are **entitled** to include even "false, extreme, or outrageous" representations in their statements to federal regulatory agencies. They even go so far as to assert that they may not be held liable for doing so **because** their statements are being made to "federal agencies [and] are protected by the First Amendment."[12] Mr. Scalia and Gibson Dunn further insist—and at least one DOL ALJ has agreed with them—that SOX Section 806 contains a loophole such that

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[12] This is yet another misrepresentation of law by Mr. Scalia and Gibson Dunn.

> [T]he right to petition is not an absolute protection from liability. In *McDonald*, petitioner wrote a letter to President Reagan accusing respondent of fraud, blackmail, extortion, and the violation of various individuals' civil rights. Respondent … brought a libel suit against petitioner, who claimed that the right to petition gave him absolute immunity in his statements []. The Supreme Court disagreed….. "The right to petition is guaranteed; the right to commit libel with impunity is not."

*Cardtoons v. Major League Baseball Players Assoc*., 208 F.3d 885, 891, quoting *McDonald v. Smith*, 472 U.S. 479 (1985) (citations omitted). *See also Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection").

attorneys and employers cannot be held liable for harassing statements made by attorneys simply because they are attorneys. In particular, Mr. Scalia and Gibson Dunn have asserted that "statements by lawyers for [a client] in legal proceedings before OSHA and the SEC … are not evidence and cannot support a SOX [whistleblower retaliation] claim."

The conduct described above supports the inference that employers' counsel go so far as to encourage and facilitate harassment of whistleblowers through knowingly false statements. In connection with the conduct mentioned above, there is very good reason to believe that Mr. Scalia and Gibson Dunn were the primary architects of certain aspects of whistleblower harassment and the perpetration of a fraud on the SEC in connection with opposing whistleblower disclosures. The fact that Mr. Scalia and other Gibson Dunn attorneys engage in the foregoing actions in responding to whistleblower complaints indicates that such conduct is not at all insignificant in frequency or impact.

## Conclusion

While Gibson Dunn's litigators have been under the influence of Mr. Scalia, it has been held that "GDC's use of the judicial system amounts to legal thuggery [that is] truly repugnant ... and [] highly reprehensible."[13] Mr. Scalia, personally, has engaged in no less repugnant legal thuggery in multiple proceedings opposing a whistleblower and in quashing investigations and actions by OSHA and the SEC to address whistleblower concerns. Unfortunately, Mr. Scalia is not alone in relying on false and misleadingly incomplete information to harass whistleblowers and to deny them the protections to which they are entitled under existing law.

I respectfully submit that the SEC could most effectively preclude such conduct by employers and their counsel by expressly addressing it in Regulation 21F. Consequently, I respectfully submit that Regulation 21F should include the following:

1. a corollary to Items E and F to the proposed Form WB-DEC, which corollary would require representatives of employers and their counsel to sign comparable acknowledgments whenever they submit information to the SEC in connection with either a disclosure by a whistleblower or an inquiry by the SEC staff;

2. a statement that when an employer's representatives provide information to the SEC to address past or expected disclosures by a whistleblower or in response to an SEC inquiry that is prompted by a whistleblower's disclosure, the SEC will disclose to the whistleblower the portions of the employer's responses that include statements regarding the conduct of the whistleblower or documentation purportedly prepared by the whistleblower;

[13] *Seltzer v. Morton, Gibson, Dunn & Crutcher, LLP, and Gladwell*, 154 P.3d 561, 609 (Mont. 2007) (upholding a punitive damage award of $9.9 million against Gibson Dunn based on statements in two letters written by Gibson Dunn attorneys. *Id*. at 576 (GDC's letter in Apr. 2002), at 577 (GDC's letter in May 2002), and at 580-581 (re: abuse of process).

3. in instances in which the employer already is aware of the identify of the whistleblower, a requirement that the employer disclose to the whistleblower the portions of the employer's responses that include statements regarding the conduct of the whistleblower or documentation purportedly prepared by the whistleblower;

4. a statement to the effect that statements by or on behalf of employers that are known to be false or that are made with reckless disregard for the truth constitute harassment of a whistleblower when such statements are made because the whistleblower engaged in activities that are protected under Section 21F(h) of the Exchange Act and when such statements (i) are made about a whistleblower and their content is of such a nature that it bears a significant risk of damaging the whistleblower's professional reputation or employment prospects or (ii) constitute the perpetration of a fraud on the SEC with respect to information provided to the SEC by a whistleblower; and

5. a statement that the prohibitions on threats or harassment apply regardless of whether such threats or harassment occur before or after the whistleblower's employment with the employer has ended.

If you would like any further information in support of the information provided above, please do not hesitate to contact me.

Respectfully submitted,

cc: Eugene Scalia, Gibson, Dunn & Crutcher LLP

**Appendix A**

The following analysis is offered to establish the propriety of a determination by the SEC that normally legitimate legal processes can be abused so that they constitute harassment and to further establish that Section 21F(h) of the Exchange Act prohibits harassment that occurs even after a whistleblower's employment with the employer has been terminated.

The use of generally permissible legal procedures and processes against a former employee can constitute prohibited retaliation. *See Bill Johnson's Restaurant, Inc. v. NLRB*, 461 U.S. 731, 743, 744 and 749 (1983) (regarding employer lawsuit against former employee). The Court held that a legal action may be entirely enjoined if it is "lacking reasonable basis" and if it was undertaken "with the intent of retaliating against an employee." *Id*. at 744. The Court further held that even legal actions that are not entirely lacking reasonable basis may constitute prohibited retaliation for which an employer can be held liable. *Id*. at 749. In other words, *Bill Johnson's* "requires a court to look at the underlying statute to determine whether the initiator of the suit can be held liable." *Cardtoons v. Major League Baseball Players Assoc*., 208 F.3d 885, 890, fn. 4 (10th Cir. 2000).

The Court in *Bill Johnson's* emphasized the power of the use of legal processes to harass a former employee and dissuade that employee and others from engaging in protected activities:

> A lawsuit no doubt may be used [] as a powerful instrument of coercion or retaliation … [by which] an employer can place its employees on notice that anyone who engages in protected activity faces the possibility of a burdensome lawsuit. Regardless of how unmeritorious the employer's [claims are], the employee will most likely have to retain counsel and incur substantial legal expenses....

*Bill Johnson's* at 740. The Court further recognized that, "[w]here, as here, [legal process is used against] ... individuals who lack the backing of a union, the need to allow the Board to intervene and provide a remedy is at its greatest." *Id*. at 741. The same analysis applies to defending against statements made to harass an employee or former employee in legal or regulatory proceedings. Regardless of how unmeritorious the employer's harassing statements may be, the employee will most likely have to incur substantial legal expenses to defend or protect himself or herself from that harassment.

Section 21F(h) of the Exchange Act provides that, "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower" in engaging in the protected activities specified in that section. Thus, harassment "directly or indirectly" is a type of discrimination that is specifically prohibited in Section 21F(h). Yet, harassment is not defined. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common

meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). The common meaning of "harass" includes "to create an unpleasant or hostile situation for …." Merriam Webster Dictionary at http://www.merriam-webster.com/dictionary (2010). Thus, when an employer seeks to create an unpleasant or hostile situation for a whistleblower by making false or misleading statements about the whistleblower to the SEC, such conduct should be deemed to constitute harassment regardless of whether it occurs before or after the whistleblower's employment has been terminated.

The structure of Section 21F(h) also compels the conclusion that harassment because of protected activity is prohibited not only during the term of the whistleblower's employment, but also after the employee has been discharged or constructively discharged or has resigned. In identifying prohibited discrimination, Section 21F(h) refers initially to specifically enumerated actions, *i.e.*, discharging, demoting, suspending, threatening, or harassing directly or indirectly a whistleblower. Those specifically enumerated actions are followed by a catch-all residual provision which prohibits "in any other manner discriminat[ing] against, an employee in the terms and conditions of employment."

Employers have argued and will continue to argue that the statutory prohibition on harassment is limited to harassment that occurs during the term of employment or to blacklisting to a specifically identifiable potential future employer. To this end, employers have asserted and will assert that the descriptive language in the residual provision "in the terms and conditions of employment" must be read to delimit the scope of the specifically enumerated types of discrimination. However, the U.S. Supreme Court repeatedly has reached the opposite conclusion in construing a similarly structured statute. The Supreme Court has found that the descriptive language of a residual provision should be read to describe rather than to limit the nature of the specifically enumerated offenses to a subclass of those offenses that would be captured by the residual provision.

In *Taylor v. U.S.*, 495 U.S. 575 (1990), the Court construed language of another statute that employed a structure similar to the provision of Section 21F(h) at issue here, *i.e.*, the use of specifically enumerated offenses followed by a residual provision that began with the word "otherwise." At issue in *Taylor* was a statute that, in relevant part, covered a crime that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id*. at 578, *quoting* 18 U.S.C. § 924(e). The Court squarely rejected the argument that Congress intended the descriptive language of the residual provision to limit the nature of the specifically enumerated offenses to a subclass of those enumerated offenses:

> Petitioner essentially asserts that Congress meant to include [] only a subclass of burglaries whose elements include "conduct that presents a serious risk of physical injury to another," over and above the risk inherent in ordinary burglaries. But if this were Congress' intent, there would have been no reason to add the word "burglary" [] since that provision already includes *any* crime that "involves conduct that presents a serious potential

> risk of physical injury to another." We must assume that Congress had a purpose in adding the word "burglary" ….
>
> Second, if Congress had meant to include only an especially dangerous subclass of burglaries [], it is unlikely that it would have used the unqualified language "*is* burglary ... or otherwise involves conduct that presents a serious potential risk" in § 924(e)(2)(B)(ii) (emphasis added). Congress presumably realized that the word "burglary" is commonly understood to include not only aggravated burglaries, but also run-of-the-mill burglaries involving an unarmed offender, an unoccupied building, and no use or threat of force. This choice of language indicates that Congress thought ordinary burglaries, as well as burglaries involving some element making them especially dangerous, presented a sufficiently "serious potential risk" to count … We therefore reject petitioner's view that Congress meant to include only a special subclass of burglaries ….

*Id*. at 597-598.

As Justice Scalia even more recently stated, the specifically enumerated activities should be understood to be examples of what Congress intended to cover by the residual provision:

> First to invite analysis is the word Congress placed at the forefront of the residual provision: "otherwise." When used as an adverb … "otherwise" is defined as "[i]n a different manner" or "in another way." Webster's New International Dictionary 1729 (2d ed.1954). Thus, the most natural reading of the statute is that committing one of the enumerated crimes (burglary, arson, extortion, or crimes involving explosives) is one way to commit a crime "involv[ing] conduct that presents a serious potential risk of physical injury to another"…. In other words, the enumerated crimes are examples of what Congress had in mind under the residual provision ….

*James v. U.S.*, 550 U.S. 192, 218 (2007) (Scalia, J., dissenting, Stevens, J., and Ginsburg, J., joining) (further analyzing 18 U.S.C. § 924(e)).

Significantly, the Court and Justices were construing 18 U.S.C. § 924(e) in the foregoing manner consistent with the "rule of lenity—that criminal statutes, including sentencing provisions, are to be construed in favor of the accused." *Taylor* at 596. *Accord James* at 219 (the "rule of lenity … demands that we give this text the more narrow reading of which it is susceptible"). In contrast, anti-retaliation statutes should be "liberally construed [] as prohibiting a wide variety of employer conduct that ... has the **likely effect of restraining, employees in the exercise of protected activities**." *Bill Johnson's at* 740 (emphasis added).

The Supreme Court more recently reasoned that "[i]nterpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends." *Burlington Northern &*

*Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006). In *Burlington Northern*, the Court held "that the antiretaliation provision [of Title VII] does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace." *Burlington Northern*, 548 U.S. at 57. "The scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm." *Burlington Northern* at 67. The Court noted that an "employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace." *Id*. at 63-64, *citing, inter alia, Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984, 986 (10th Cir. 1996) (finding actionable retaliation where employer filed false criminal charges against former employee who complained about discrimination). Significantly, Title VII's antiretaliation provision states that, "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has" engaged in protected activities opposing discrimination. *Burlington Northern* at 62 (citation omitted). Thus, the Court implicitly found that retaliation that occurs outside the workplace against a former employee constitutes an unlawful employment practice when it occurs because a former employee engaged in protected activities.

The Court's holding in *Burlington Northern* is consistent with its previous holding that a "benefit need not accrue before a person's employment is completed to be a term, condition, or privilege of that employment relationship." *Hishon v. King & Spalding*, 467 U.S. 69, 77 (1984). For example, the record of a person's professional performance, responsibilities, accomplishments, and reputation are vital aspects of his conditions of employment. That record routinely influences salaries, pay increases, bonuses and job opportunities. Thus, the terms, conditions or privileges of employment are affected by negative statements about an employee's work performance. When an employer makes such negative statements knowing that they are false or makes them with reckless disregard for the truth for the purpose of influencing SEC actions, or when such statements amount to the perpetration of a fraud on the SEC, in relation to whistleblower disclosures to the SEC, the employer's statements should be considered prohibited harassment of the whistleblower.

The type of activities that Section 21F(h) expressly protects includes providing information to Congress, the SEC, the DOL, or any other federal regulatory or law enforcement agency regarding, *e.g.*, mail fraud, wire fraud, securities fraud, or violations of federal securities laws . *See* Section 21F(h) of the Exchange Act (which also protects actions that are required or protected under 18 U.S.C. § 1514A and 18 U.S.C. § 1513(c)). Surely, Congress did not intend to limit protections for whistleblowers to apply only if they engaged in such protected activities while actually employed by the employer or only if the threats or harassment occurred while the whistleblower was employed by the employer. If that were the case, employers could discharge a whistleblower for a limited time, *e.g.*, for a month before the whistleblower testified before Congress or testified in an SEC judicial or administrative proceeding, during which time the employer would be free to relentlessly threaten and harass the employee. As long as the employer ultimately reinstated the whistleblower and paid him or her for the time during which he or she was unemployed, the whistleblower would have no recourse. *See, e.g., Burlington Northern* at 71-72 (employer argued that 37 day suspension without pay could not be adverse

action because employee was ultimately reinstated and received full back pay). There is no reason to believe that Congress intended to permit employers to so easily circumvent the prohibitions on threatening or harassing whistleblowers.

I respectfully submit that the following discussion from *Burlington Northern* focusing on the difference in language between two provisions prohibiting discrimination should further guide the consideration of whether harassment of a former employee is prohibited:

> [In determining] whether Congress intended its different words to make a legal difference. We normally presume that, where words differ as they differ here, Congress acts intentionally and purposely in the disparate inclusion or exclusion.
>
> There is strong reason to believe that Congress intended the differences that its language suggests [because of the purpose of anti-retaliation provisions]…. The antiretaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct…. But one cannot secure [that] objective by focusing only upon employer actions and harm that concern employment and the workplace [to the limited extent contemplated in Title VII's anti-discrimination provision]. Were all such actions and harms eliminated, the antiretaliation provision's objective would not be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace.
>
> A provision limited to employment-related actions [to the limited extent contemplated in Title VII's anti-discrimination provision] would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the antiretaliation provision's primary purpose….

*Burlington Northern* at 63-64 (internal citations and quotations omitted).

In considering statutory language, the *Burlington Northern* court was analyzing the differences between Title VII's anti-retaliation provision and the following language from the anti-discrimination provision:

> "It shall be an unlawful employment practice for an employer-
> "(1) *to fail or refuse to hire or to discharge* any individual, or otherwise to discriminate against any individual *with respect to his compensation, terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin ….

*Burlington Northern* at 61-62 (citation omitted). The court noted that "the italicized words … explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace." *Id*. at 62.

In contrast, Section 21F(h) is not limited to actions that necessarily occur during the period of employment. Section 21F(h) expressly prohibits threatening or harassing, directly or indirectly, a whistleblower because of protected activity. In this respect, Section 21F(h) is similar to SOX Section 806, which prohibits threatening or harassing a former employee because of protected activity.

> This wording [of SOX Section 806 and Section 21F(h)] is unique among the whistleblower statutes and diverges from the language of Title VII as well. The proscriptions of the Sarbanes-Oxley Act are far more specific than the proscriptions of the other acts. By explicitly prohibiting threats and harassment, the Sarbanes-Oxley Act has included adverse actions which are not necessarily tangible and most certainly are not ultimate employment actions.

*Hendrix v. American Airlines, Inc.*, 2004-SOX-23 (ALJ Dec. 9, 2004), fn. 10.

SOX Section 806—and now Section 21F(h)—are "unlike other whistleblower statutes administered by OSHA, [inasmuch as SOX Section 806] specifically describes the types of adverse actions prohibited under the Act." Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (preamble discussing 29 C.F.R. § 1980.102) (Aug. 24, 2004).

As a consequence of the foregoing, I respectfully submit that it is even more appropriate here than in *James* and *Taylor* to construe the residual provision of Section 21F(h) as describing rather than limiting the prohibition on harassment that occurs because of protected activity. I respectfully submit that in placing the residual provision after the enumerated types of discrimination, Congress intended that harassing a whistleblower because of protected activity should be understood to be workplace related and to constitute discrimination in the terms and conditions of employment regardless of whether it occurs before or after employment has been terminated and regardless of whether it occurs in the workplace *per se*. The contrary reading of Section 21F(h) would fail to give effect to the common meaning of "harass" and Congress' use of the phrase "in any other manner." Such a contrary reading fails to fulfill the "duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

Any assertion that the phrase "in the terms and conditions of employment" serves to modify each of the specifically enumerated types of discrimination also conflicts with the "rule of the last antecedent." *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). In *Barnhart*, Justice Scalia, writing for a unanimous Court, directly rejected reading a statute in the manner that the Respondents do:

> [such a] reading disregards—indeed, is precisely contrary to—the grammatical "rule of the last antecedent," according to which a limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows ….

*Id*. at 26. Application of that grammatical rule is consistent with a common sense reading of the Act's prohibitions on retaliation against whistleblowers. Logically, the phrase "in the terms and conditions of employment" should be read as modifying only the word "discrimination." It should not be read, for example, as prohibiting discharge in the terms and conditions of employment, or demotion in the terms and conditions of employment, or suspension in the terms and conditions of employment. All such actions indisputably constitute discrimination in the terms and conditions of employment. Moreover, there is no indication in the legislative history that Congress intended the phrase "in the terms and conditions of employment" to limit rather than describe Congress' use of "harass" in either SOX Section 806 or Section 21F(h).

Finally, even if the use of the term "harass" in Section 21F(h) is ambiguous, it is far more consistent to include post-employment harassment within the scope of the conduct from which whistleblowers are protected. When an anti-retaliation statute "expressly includes discriminatory 'discharge' as one of the unlawful employment practices against which [it] is directed… it is far more consistent to include former employees within the scope of 'employees' protected by" the statute. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 345 (1997). Section 21F(h) expressly includes discriminatory "discharge" as one of the unlawful employment practices against which it is directed. This indicates the intent of Congress to protect former employees from post-employment harassment.

In *Robinson*, the Court "agree[d] with the[] contentions" of the EEOC that

> exclusion of former employees from the protection of [the anti-retaliation provision] would undermine the effectiveness of [the statute] by allowing the threat of postemployment retaliation to deter [employees from engaging in the actions that the statute sought to encourage], and would provide a perverse incentive for employers to fire employees who might [otherwise seek to ensure the effectiveness of the statute.] Those arguments carry persuasive force given their coherence and their consistency with a primary purpose of antiretaliation provisions ….

*Robinson at* 346.

> The possibility of retaliation [] is far from being "remote and speculative**"** with respect to former employees for three reasons. First, it is a fact of business life that employers almost invariably require prospective employees to provide the names of their previous employers as references when applying for a job. Defendant's former employees could be severely handicapped in their efforts to obtain new jobs if the defendant should brand them as "informers" when references are sought. Second, there is the possibility that a former employee may be subjected to retaliation by his new employer if that employer finds out that the employee has in the past cooperated with [a federal regulatory agency]. Third, a former employee may find it desirable or necessary to seek reemployment with

> the defendant. In such a case the former employee would stand the same risk of retaliation as the present employee.

*Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1166 (10th Cir. 1977), *quoting Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303 (5th Cir. 1972).