Peter van Schaick, P.C.
A PROFESSIONAL CORPORATION
77 JEFFERSON PLACE
TOTOWA, NEW JERSEY 07512-2614
EMAIL: PETER.VAN.SCHAICK@GMAIL.COM
PHONE: (201) 388-3383

December 17, 2010

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

Comments on Proposed Whistleblower Rules
File Number S7-33-10

Dear Ms. Murphy, Commissioners and Members of the Commission's Staff:

At the open meeting introducing the proposed whistleblower rules, Chairman Schapiro expressed deep appreciation for her staff's work. My review of their proposal led me to agree with her assessment—it was thoughtful, detailed, and well-intended. Time does not permit my detailing the various ways the staff "got it right;" my comments necessarily focus on the two principal ways they didn't—I apologize for my lack of balance.

My point of view is "from the trenches" of public and private enforcement, and is based on thirty-five years of practice. I brought my first *qui tam* case before I became a lawyer under the 1899 Rivers and Harbors Act. Frustrated that despite a clear statutory mandate, the OUSA (NDNY) only prosecuted one of many violators on whom I provided evidence, I studied prosecutorial discretion and corporate accountability in graduate school. Only then did I decide to become a lawyer. After six years prosecuting companies for the US Government (DOL & EEOC), I set up my practice as a private attorney general to enforce public law, such as the False Claims Act, and have represented many whistleblowers.

To review the proposal, I drafted criteria for assessing proposed rules and for evaluating the program's effectiveness, which are now in the section titled "Congress' Aims for the Whistleblower Program."[1] Next I developed a "A Plan for Continually Improving the Whistleblower Program,"[2] which combines eight Congressional specifications to fashion a feasible institutional framework for continually improving the program's effectiveness. This plan closes with rules for construing the text of Sec. 21F, and will hopefully generate spirited discussion as the staff writes its final rule.

Believing that one should "eat his own ice-cream," I then applied these criteria and rules of construction to two proposed rules. Troubled by the extent of drift from

[1] Alternate Rule § 240.21F-1(b), at page 3.
[2] Background to Alternate Rule § 240.1(b), at page 9.

the Congress' aims that I saw, I rewrote them to remain faithful to Congress' aims. I felt comfortable taking out the extensions for unintended consequences, given that within the "plan for continually improving" those concerns should be studied. I also felt comfortable with the culpability rule because its uses another power that Congress provided—adding factors to those used to determine awards, here, "culpability." The results of my rewrites of these two rules are

- Alternate Rule § 240.21F-4(a) Voluntary submission of information, and
- Alternate Rule § 240.21F-15 Denial and downward adjustment of awards to blameworthy whistleblowers.

These alternate rules illustrate the value of using the aims and rules of construction set out in Alternate Rule § 240.21F-1(b) when examining a rule proposal. These two tools in § 240.21F-1(b) (the full aims & the plan) might be circulated among the Commission's staff to use in write rules more closely aligned to Congress' aims.

I also considered the proposal in light of current prosecutorial practices. Here, the Commission overlooked a clearly foreseeable conflict: the monetary incentives created by the whistleblower law are at odds with the monetary incentives created by Seaboard, which reduce fines for self-policing, self-reporting, remediation and cooperation. Early settlements with such cooperation credits reduce whistleblower awards. Moreover, monetary incentives reward companies who trivialize the contributions of whistleblowers. Without rules to manage these competing monetary incentives, the effectiveness of the program is seriously threatened. Supplemental Rule § 240.21F-17 starts to fill this vacuum by proposing that settlement and award decisions be made by the same people, relying on the same narratives, and be made at the same time, if possible. This will provide the coherence and control needed to reconcile the tension between these two competing sets of monetary incentives.

As to the next step for the Commission to take on the conflicting incentives for whistleblowers and companies seeking leniency, after reading the sections on Supplemental Rule § 240.21F-17, the Commission might consider splitting this cluster of issues from the remainder of the rule (apparently, the anti-retaliation provisions were already apparently separated), and then publish a notice of proposed rulemaking, take comments, and promulgate a final rule on a different timeline.

Finally, there are several other items that might be considered in a final comprehensive rule that are **not** discussed in these comments: 1) a Questions and Answers section; 2) a copy of Sec. 21F; and 3) copies of all forms used in the program, which help make the final version of Part 240 more user-friendly.

I am available to discuss these comments with the Commission's staff, formally or informally, in writing, by phone or by email. I remain at your service.

Respectfully,

_____
Peter van Schaick

Enclosures

van Schaick Comments to Securities & Exchange Commission on its Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934

December 17, 2010

Table of Contents

Summary of Alternate Rules §§ 240.1(a) & (b) "Aims of Whistleblower Program"

Alternate Rule § 240.1(a) "Aims of Whistleblower Program," the summary version, succinctly restates the Congressional aims for the Commission's whistleblower program to provide users with a short and plain statement of its purpose.

Alternate Rule § 240.1(b) "Congress' Aims for Whistleblower Program," the full version, compiles Congress' aims for Section Sec. 21F of the Dodd-Frank Act to be considered when proposing rules, when administering the program, when evaluating the program after implementing this rule and operating for 30 months, when annually reporting to Congress on its operations, when considering amendments, and for other purposes. Background to Alternate Rule § 240.1(b), "A Plan for Continually Improving the Whistleblower Program," begins to build a comprehensive framework for evaluating the continued improvement of the Commission's whistleblower program.

Alternate Rule § 240.1(a) "Aims of Whistleblower Program"

Congress' Three Primary Aims: The "Securities Whistleblower Incentives And Protection" section of the Dodd-Frank Act[1] ("Sec. 21F"), uses monetary incentives and protection from retaliation to motivate those with inside knowledge to come forward and assist the government in protecting

[1] 15 U.S.C. §§ 78u-6(a)-(j).

investors. Sec. 21F defines "monetary incentives" as SEC awards of 10-30% of funds recovered through enforcement actions when an informant has contributed evidence made a difference in that enforcement effort.[2] Second, Sec. 21F defines its "protections" by using an informant's right to confidentiality,[3] to anonymity,[4] and by its anti-retaliation provisions.[5] Third, "[t]he Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government"[6] in protecting investors, by providing the SEC's investigators and enforcers with higher quality evidence with which to investigate securities violations.

Congress' Three Secondary Aims: The three secondary aims for the new whistleblower program are: for the Commission to promulgate whistleblower rules that are "clearly defined" and "user-friendly;" for the Commission to build the reputation of the whistleblower program by promoting it on the Commission's website and by providing it with broad publicity; and for the whistleblower program to be prompt and responsive to whistleblowers who are providing information or applying for awards.

The Commission's comprehensive rule governing the whistleblower program is contained in Part 240 of the Commission's rules. The

[2] § 78u-6(b).
[3] § 78u-6(h)(2).
[4] § 78u-6(d)(2)(A).
[5] § 78u-6(h).
[6] S. Rep. No. 111-176 at 110 (2010).

Commission's Questions and Answers about the whistleblower program are attached as the Appendix to Part 240.

Alternate Rule § 240.1(b)
Congress' Aims of Whistleblower Program

Congress' Three Primary Aims: The "Securities Whistleblower Incentives And Protection" section of the Dodd-Frank Act[7] ("Sec. 21F"), uses monetary incentives and protection from retaliation to motivate those with inside knowledge to come forward and assist the government in protecting investors. Sec. 21F defines "monetary incentives" as SEC awards of 10-30% of funds recovered through enforcement actions when an informant has contributed evidence made a difference in that enforcement effort.[8] Second, Sec. 21F defines its "protections" by using an informant's right to confidentiality,[9] to anonymity,[10] and by its anti-retaliation provisions.[11] Third, "[t]he Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government"[12] in protecting investors, by providing the SEC's investigators and enforcers with higher quality evidence with which to investigate securities violations.

[7] 15 U.S.C. §§ 78u-6(a)-(j).
[8] § 78u-6(b).
[9] § 78u-6(h)(2).
[10] § 78u-6(d)(2)(A).
[11] § 78u-6(h).
[12] S. Rep. No. 111-176 at 110 (2010).

To motivate whistleblowers with inside knowledge to step forward, Sec. 21F requires the Commission to pay awards[13] to certain whistleblowers.[14] The qualifications are that the whistleblower "voluntarily"[15] provided "original information"[16] that led to "led to the successful enforcement"[17] of a covered[18] or related[19] action that included "monetary

---

[13] Awards—In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and (B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions. 15 U.S.C. § 78u-6(b)(1)

[14] 15 U.S.C. § 78u-6(b)(1).

[15] Sec. 21F did not define "voluntarily," although the Commission implicitly defined its ordinary legal meaning as "not compelled by subpoena or other applicable law." [?? Proposed Rule § 240.Sec. 21F-4(a)(1), last sentence.]

[16] § 78u-6(b)(1) & 6(a)(3). The term 'original information' means information that—(A) is derived from the independent knowledge or analysis of a whistleblower; (B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

[17] § 78u-6(b)(1): The term 'covered judicial or administrative action' means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000. 15 U.S.C. § 78u-6(a)(1).

[18] § 78u-6(b)(1): The term 'covered judicial or administrative action' means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000. 15 U.S.C. § 78u-6(a)(1).

[19] § 78u-6(b)(1): The term 'related action', when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) [i.e., (I) the Attorney General of the United States; (II) an appropriate regulatory authority; (III) a self-regulatory organization; and (IV) a State attorney general in connection with any criminal investigation] that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action. 15 U.S.C. § 78u-6(a)(5).

This definition of 'related action' excluded subclasses (V) through (VII) of subsection (h)(2)(D)(i). The direct implication is that the term 'related action', when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity described in subclauses (V) through (VIII) of of subsection (h)(2)(D)(i), i.e., (V) any appropriate State

sanctions"[20] exceeding $1,000,000.[21] To fund whistleblower awards, Sec. 21F set up the Securities and Exchange Commission Investor Protection Fund.[22] Sec. 21F allows awards on violations occurring before enactment of Dodd-Frank on July 21, 2010,[23] and for information provided after that date, but before promulgation of the whistleblower rule.[24]

To protect whistleblowers from retaliation, Sec. 21F bans retaliation and provides an administrative apparatus for correcting retaliatory actions,[25] it provides for confidentiality of information that could identify a whistleblower,[26] and it allows whistleblowers to provide of information anonymously.[27]

Sec. 21F excludes certain classes of individuals from qualifying. No award may be made to a whistleblower who at the time of acquiring the original information was a member, officer, or employee of

- An appropriate regulatory agency;[28]

---

regulatory authority; (VI) the Public Company Accounting Oversight Board; (VII) a foreign securities authority; and (VIII) a foreign law enforcement authority.

[20] § 78u-6(b)(1): The term 'monetary sanctions', when used with respect to any judicial or administrative action, means—(A) any monies, including penalties, disgorgement, and interest, ordered to be paid; and (B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action. § 78u-6(a)(4).

[21] § 78u-6(b)(1): § 78u-6(a)(1), *supra,* note ??

[22] § 78u-6(g).

[23] D-F Sec. 924(c).

[24] D-F Sec. 924(b).

[25] § 78u-6(h).

[26] § 78u-6(h)(2).

[27] § 78u-6(d)(2)(A).

[28] § 78u-6(c)(2)(A)(i).

- The department of justice;[29]
- A self-regulatory organization;[30]
- The public company accounting oversight board;[31] or
- A law enforcement organization.[32]

Sec. 21F disqualifies any whistleblower who gained the information through a required audit and its disclosure would violate Section 10A of the 1934 Act.[33] It also disqualifies any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section.[34] Sec. 21F disqualifies any whistleblower who fails supply the information in the manner requested,[35] who knowingly makes any false statement,[36] or who knowingly uses a false document.[37]

Congress' Secondary Aims in Sec. 21F: The topics for the OIG study also indicate some secondary aims of the new whistleblower program created by Sec. 21F: the rules for the whistleblower program are intended to be clearly defined,[38] and user-friendly;[39] the Commission should promote

[29] § 78u-6(c)(2)(A)(ii).
[30] § 78u-6(c)(2)(A)(iii).
[31] § 78u-6(c)(2)(A)(iv).
[32] § 78u-6(c)(2)(A)(v).
[33] § 78u-6(c)(2)(c): 15 U.S.C. § 78j–1.
[34] § 78u-6(c)(2)(B).
[35] § 78u-6(c)(2)(D).
[36] § 78u-6(i)(1).
[37] § 78u-6(i)(2).
[38] § 78u-6(d)(1)(A).
[39] § 78u-6(d)(1)(A).

the program on its website, and widely publicize it; the whistleblower program should be administered to promptly respond to information provided by whistleblowers,[40] promptly respond to applications for awards filed by whistleblowers,[41] promptly update whistleblowers about the status of their applications,[42] and promptly otherwise communicate with the interested parties.[43] Framed more generally, these study directions imply three secondary aims:

- For the Commission to promulgate whistleblower rules that are "clearly defined" and "user-friendly;"
- For the Commission to build the reputation of the whistleblower program by promoting it on the Commission's website and by providing it with broad publicity; and
- For the whistleblower program to be prompt and responsive to whistleblowers who are providing information or applying for awards.

"Clearly Defined" Rules Are Crucial to Reducing the Uncertainty Faced By Whistleblowers: Congress' clarity mandate is especially important to whistleblowers in senior executive positions. Such executives have access to high quality evidence of fraud, the very kind of information Congress intended that its new Sec. 21F program would attract. This point is clearly

[40] § 78u-6(d)(1)(C)(i)(I).
[41] § 78u-6(d)(1)(C)(i)(II).
[42] § 78u-6(d)(1)(C)(ii).
[43] § 78u-6(d)(1)(C)(iii).

underscored by the study the Commission cited.[44] The first critical fact was that successful whistleblowers had routine access to highly pertinent evidence during their normal work. Senior executives were better able to identify fraud than others because their costs of gathering evidence were lower. Congress's clarity mandate helps induce such potential whistleblowers when deciding whether to participate.

Participation in the Commission's whistleblower program is guaranteed to put any employee's career in peril, senior executives included. Dyck concluded that "employees, seem to lose outright from whistle blowing."[45] After working long and hard in careers that led successfully to positions of substantial responsibility, such senior executives have much to lose if fired. This concern also motivated Congress's aim to protect whistleblowers from retaliation. Senior executives considering whether to blow the whistle are necessarily cautious. When assessing the costs and benefits of participation, they weigh every definition of eligibility; they estimate recoveries based on the full range of likely outcomes.

Every increase in the uncertainty of eligibility, and every increase in the uncertainty in estimated recoveries, discourages these most desirable whistleblowers from participation. The aim to create "clearly defined" rules is thus imperative.

---

[44] Page 104, fn. 105. Alexander Dyck et al., "Who Blows the Whistle on Corporate Fraud?" (2009) (Reporting that "having access to . . . monetary rewards has a significant impact on the probability a stakeholder becomes a whistleblower.")

[45] Dyck, *supra*, at 30. See Appendix A for pertinent excerpts.

Background to Alternate Rule § 240.1(b)
A Plan for Continually Improving the Whistleblower Program

Congress's Grant of Interpretive Rule-Making Authority: Congress granted the Commission the authority to promulgate rules under Sec. 21F: "[t]he Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section."[46] "[A]s may be necessary or appropriate" is classical language granting interpretative power.[47] The phrase "to implement the provisions of this section" limits it to carrying out existing provisions, not adding to them or changing them.[48] The next phrase "consistent with the purposes of this section" likewise limits its authority to defining existing purposes. All three qualifying phrases limit Congress's grant of power to interpretation;[49] not a hint exists of legislative authority.[50]

Congress Provided for an OIG Implementation Study: Congress also directed the SEC's Office of Inspector General to study the Commission's

---

[46] § 78u-6(j).

[47] Loss & Seligman, *Fundamentals of Security Regulation*, at 1517 ("Presumably, the 'as may be necessary' language does not import a general power to legislate, . . .").

[48] *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") (Footnote omitted.)

[49] *Chevron, supra,* at 843 n. 9 ("The judiciary . . . must reject administrative constructions which are contrary to clear congressional intent.").

[50] *Chevron, supra, at* 843-844 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.") (Footnote omitted.)

implementation of the whistleblower program[51] during its first 30 months of operations. The topics for study underscore Congress' aims. The key role of monetary incentives is underscored by its direction that the OIG study three questions: 1) whether the minimum and maximum reward levels are adequate to entice whistleblowers to come forward with information;[52] 2) whether the reward levels are so high as to encourage illegitimate whistleblower claims;[53] and 3) whether Congress should consider providing a private right of action to help enforce the securities laws.[54] Three more questions highlight the importance of confidentiality: 1) whether a certain FOIA exemption aids whistleblowers;[55] whether that exemption adversely impacts the public access to information,[56] and third, whether the exemption should remain in effect.[57] Important to the plan for continual improvement is the provision granting the OIG the authority to also study "such other matters as the Inspector General deems appropriate."[58]

Eight of Congress' Aims Together Create a Plan for Continually Improving the Whistleblower Program: First, Congress granted the

[51] The SEC OIG is to study the effectiveness of the whistleblower program and to report its results within 30 months to the Senate Committee on Banking, Housing, and Urban Affairs, the House Committee on Financial Services, and to the public. § 78u-6(d).
[52] § 78u-6(d)(1)(C)(i)(I).
[53] § 78u-6(d)(1)(C)(i)(I).
[54] § 78u-6(d)(1)(G).
[55] § 78u-6(d)(1)(H)(i).
[56] § 78u-6(d)(1)(H)(ii).
[57] § 78u-6(d)(1)(H)(iii).
[58] § 78u-6(d)(1)(I).

Commission narrow interpretive power; it has no power to legislate.[59] Second, Congress granted the Commission the power to make award determinations on a case-by-case basis,[60] not by general rules. Third, Congress gave the Commission the specific legislative power to add additional factors for determining awards.[61] Fourth, Congress directed the OIG to study implementation and the results of the first 30 months of program operations. For instance, the case files justifying awards could contain useful detail for the OIG's researchers to analyze. Fifth, Congress gave the OIG the power to increase the scope of its study to other matters.[62] Sixth, Congress directed the OIG to send its study results to the Congressional committees responsible[63] for the whistleblower program. Seventh, Congress required the Commission to report annually[64] on the operation of the whistleblower program. While this directive appears vague,[65] the Commission appears to have sufficient authority to elaborate on the criteria for this annual report using Congress' aims.[66] The eighth is an implied aim, namely that the Commission refer matters to the OIG for

[59] Grants of legislative power are limited to particular provisions. E.g., In determining the amount of an award, the Commission shall take into consideration] "such additional relevant factors as the Commission may establish by rule or regulation." § 78u-6(c)(1)(B)(IV).

[60] § 78u-6(c)(1)(B).

[61] § 78u-6(c)(1)(B)(IV) ("such additional relevant factors as the Commission may establish by rule or regulation").

[62] § 78u-6(d)(1)(I).

[63] § 78u-6(d)(2)(A).

[64] 78u-6(g)(5)(A).

[65] § 78u-6(d)(2)(g)(5)(A).

[66] § 78u-6(j).

study.[67] At the least, referrals should include requests for the study of concerns like "unintended consequences" that arose during the rule-making from the Commission's staff, as well as those expressed in the comments; and study of the factors used by the Commission to determine awards, including additional factors added by the Commission in rule-making, and perhaps factors the OIG finds embedded in the Commission's award decisions.

These eight elements make up a plan for continued improvement of the effectiveness of the whistleblower program that advances based on operating experience. Rather than promulgate rules that the Commission itself admits may discourage evidence, this eight point plan sticks to Congress' aims, relies on actual experience to implement changes in the program, and thus begins an evidence-based process of continually improving implementation of the whistleblower program. This plan avoids the downside of various Commission proposals that would narrow eligibility; as the Commission candidly noted, they "could in some cases discourage some whistleblowers from submitting potentially useful information."[68] This balance errs by undermining the primary Congressional aim to encourage whistleblowers. Moreover, none of the underlying concerns fall within other stated Congressional aim.

---

[67] Strictly speaking, the OIG adds "such other matters as the Inspector General deems appropriate." Practically, it seems that the OIG would accept referrals as a matter of comity, if no other legal duty existed.

[68] Notice, Section V. Cost-Benefit Analysis.

In the open meeting introducing its proposed whistleblower rule, Commissioner Schapiro explained that to avoid "unintended consequences,"[69] the proposal expanded definitions of ineligibility. The Commission revisits this list in Section V., its Cost-Benefit Analysis of the proposed rule.[70] , the Commission noted that it had narrowed various definitions, namely:

- "voluntary submission of information",
- "independent knowledge,"
- "information that leads to successful enforcement," and
- "foreign officials,"

As well as the

- "the element [that] excludes . . . [those with] a legal obligation to provide the information . . . to the Commission"

which the Commission candidly admitted "could in some cases discourage some whistleblowers from submitting potentially useful information."

These proposed changes go beyond the scope of Congress' aims, and are outside the limits of the rule-making authority Congress granted. The final rule should therefore reject them. *Chevron USA Inc. v. Natural*

[69] Jay Forrester, the founder of the MIT Systems Dynamics Group, wrote "Counterintuitive Behavior Of Social Systems" in 1971 based on testimony he gave to the House of Representatives, stressing the importance of simulations using assumptions based on empirical studies of the operative mechanisms. http://sysdyn.clexchange.org/sdep/Roadmaps/RM1/D-4468-2.pdf. The proposed rule did not make clear whether it use the phrase in a technical sense, or as common usage.

[70] Proposed Rules for Implementing the Whistleblower Provisions of Section Sec. 21F of the Securities Exchange Act of 1934. Release No. 34-63237; November 3, 2010. Section V. Cost-Benefit Analysis, pages 103-118, esp., 115-118.

("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.) (Footnote omitted.") The Commission should fashion rules that conform to Congress' aims, and abandon eligibility rules that exceed the Commission's limited rule making power.

All is not lost, however; Congress granted the Commission another tool for striking balances about these underlying concerns—the authority to add factors to Congress' list to use in determining awards. An example is detailed below in Alternative Rules §§ 240.15(b) & 15(c) "Denial and Downward Adjustment of Awards to Blameworthy Whistleblowers." That alternative proposal would have the Commission formally add "culpability" as a factor for determining awards. To further define that term, four key phrases are used from the SEC Enforcement Manual. Finally, the provides that even further definition can be taken from the entire pertinent section of that manual. This proposal gives due respect to Congress' conviction standard, and it stays within the Commission's rule authority. It also goes further than Congress' conviction standard, but within Congress' special legislative authority, which is limited to adding an award factor by rule. This rule then allows the Commission to visit its culpability concern, case-by-case. It also recommends asking the OIG to add culpability to its research agenda.

This example demonstrates the feasibility of working within the eight point plan for continual improvement, each element of which Congress articulated in some manner. As experience reveals the consequences of Congress' trade off using the conviction standard, and the consequences of the Commission's award determinations using a culpability factor, the OIG, Congress and the Commission will be better informed as they make changes to continually improve the whistleblower program.

Congress' Aims & Plan Imply Rules for Construction of Sec. 21F's Terms: The combination of Congress's grant of "interpretive" rule power, 15 U.S.C. 78u-6(j), and Congress's direction to the SEC's OIG to study of its implementation of Sec. 21F, 15 U.S.C. 78u-6(d), allows the Commission to adhere to the standards Congress specified in Sec. 21F, while referring concerns about matters that going beyond Congress's standards to the OIG for study.[71]

Congress's three primary aims clearly imply that in promulgating a whistleblower rule, a proposal should be guided by rules of construction, such as the following examples:

- To increase the flow of inside knowledge by broadening the classes of eligible informants, thereby increasing the number of those who with inside knowledge who might be motivated to step forward;

[71] § 78u-6(d)(1)(I). The OIG may study "such other matters as the Inspector General deems appropriate."

- To fully use the monetary incentives provided by Sec. 21F, increase awards to informants, thereby creating stronger incentives, until such time as an OIG study indicates the need to reduce awards;
- To motivate those with inside knowledge, but who are skeptical or fearful, to step forward by reducing all possible risks of retaliation;
- To motivate those with inside knowledge, but are cautious about risk and uncertainty, to step forward by writing rules with clear definitions to reduce uncertainty as to their meaning;
- To motivate to step forward those with inside knowledge but whose hands became unclean gaining that inside knowledge, by writing rules that allow them to step forward and assessing culpability on a case-by-case basis when determining awards; and
- To avoid exceeding the Commission's limited interpretive authority, and to make full use of the OIG implementation study, refer aims that go beyond Congress' intent to the OIG for study.

Following these rules will closely track Congress' aims.

Summary of Alternate Rule § 240.Sec. 21F-2 "Definition of a Whistleblower"

Alternate Rule § 240.Sec. 21F-2 "Definition of a Whistleblower" tracks Commission's Proposed Rule § 240.Sec. 21F-2(a) and rejects the Commission's suggestion to add a qualifying phrase "by another person" to impose a culpability policy that violates Congress' aims in Sec. 21F.

Alternate Rule § 240.Sec. 21F-2(b) next modifies Commission's Proposed

Rule § 240.Sec. 21F-2(a) to the same aim, broadening whistleblower protection, but through an approach that may reduce the risk of exceeding the Commission's rule-making power. Finally, Alternate Rule § 240.Sec. 21F-2(b) tracks Commission's Proposed Rule § 240.Sec. 21F-2(c).

Alternate Rule § 240.Sec. 21F-2
"Definition of a Whistleblower"

Track changes by following the Commission's Proposed Rule § 240.Sec. 21F-2:

(a) No change.

(b) The retaliation protections afforded to whistleblowers by the provisions of paragraph (h)(1) of Section Sec. 21F of the Exchange Act (15 U.S.C. 78u-6(h)(1)) apply irrespective of whether a whistleblower satisfies the procedures and conditions to qualify for an award. Moreover, for purposes of the anti-retaliation provision of paragraph (h)(1)(A)(i) of Section Sec. 21F, 15 U.S.C. 78u-6(h)(1)(A)(i), the requirement that a whistleblower provide "information to the Commission in accordance" with Section Sec. 21F (15 U.S.C. 78u-6) is satisfied if an individual provides information to the Commission that relates to a ~~potential~~ violation of the securities laws and the employer does not show that the individual's provision of information was unjustified.

(c) No change.

Description of Alternate Rule § 240.Sec. 21F-2 "Definition of a Whistleblower"

(a) The rule should not be amended to include the phrase "by another person," as proposed by the Commission's Request for Comment to Proposed Rule § 240.Sec. 21F-2. Denying awards to whistleblowers who have not convicted for misconduct "related to the judicial or administrative action for which the whistleblower otherwise could receive an award"[72] ignores and violates the Congressional "conviction" standard for denying awards to whistleblowers. See generally, Comments on Alternative Rule § 240.Sec. 21F-15. Given Congress' aims, the Commission should only construe Sec. 21F's terms to broaden, not narrow eligibility of whistleblowers. Moreover, the added clause would likely exceed the Commission's rule-making authority.[73]

(b) The Commission's use of "potential violation" adds protection for whistleblowers. Adding the word "potential," however, may go beyond the Commission's interpretive rule-making authority.[74] The Alternative does not add content to the definition of violation, which reaching the same result at the Commission's proposal by permitting the entity opposing the claim to prove that the individual's provision of information was unjustified. *Cf., NLRB v. Washington Aluminum*, 370 U.S. 9 (1962)(the reasonableness of workers'

[72] § 78u-6(c)(2)(B).
[73] § 78u-6(j).
[74] § 78u-6(j).

decisions were irrelevant; the conduct of the workers was "far from unjustified").

Alternate Rule § 240.Sec. 21F-4(a)
"Voluntarily Provided"

(a) Sec. 21F does not define the term "voluntarily." The following definition of "voluntarily" applies to the section providing that the Commission pay awards to whistleblowers:[75]

> Information is provided "voluntarily" if not compelled by a subpoena[76] or other judicial process, whether issued by the Commission or any other government party in any covered judicial or administrative action, or related action.

The following terms used to define "voluntarily" were already defined by Congress and are repeated here for the convenience of users:

> "Any covered judicial or administrative action" means "any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000." 15 U.S.C. 78u-6(a)(1).

---

[75] In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who **voluntarily** provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—

> (A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and
>
> (B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

[15 U.S.C. 78u-6(b)(1); emphasis not in original]

[76]

“Related action,” “when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.” 15 U.S.C. 78u-6(a)(5).

“Entit[ies] described in subclauses (I) through (IV) of subsection (h)(2)(D)(i)” include:

(I) the Attorney General of the United States;

(II) an appropriate regulatory authority;

(III) a self-regulatory organization; and

(IV) a State attorney general in connection with any criminal investigation.

“Entit[ies] described in subclauses (I) through (IV) of subsection (h)(2)(D)(i)” excludes those listed in subclauses (V) through (VIII):

(V) any appropriate State regulatory authority;

(VI) the Public Company Accounting Oversight Board;

(VII) a foreign securities authority; and

(VIII) a foreign law enforcement authority.

Description of Alternate Rule § 240.Sec. 21F-4(a) "Voluntarily Provided"

This description rule roughly follows the Alternate Rule § 240.1(b) Congress' Aims for the Whistleblower Program. Alternate Rule § 240.Sec. 21F-4(a) itself follows Sec. 21F, the common legal meaning of voluntarily, and limits compulsory process to the actions identified in 15 U.S.C. § 78u-6(b) using the pertinent definitions in 15 U.S.C. § 78u-6(a).

Uses the Ordinary Legal Meaning of Voluntarily: In this proposal "voluntarily" essentially means "not compelled by judicial process." The Commission used this same meaning in its qualifying phrase "even if your response is not compelled by subpoena or other applicable law." [Proposed Rule § 240.Sec. 21F-4(a)(1), last sentence.]

Is Limited to Congress' Classes of Cases: This proposed rule limits this definition of "voluntarily" to compulsory process issued in the classes of cases explicitly identified by Congress: "Any covered judicial or administrative action," as defined by 15 U.S.C. 78u-6(a)(1); "related action," as defined by 15 U.S.C. 78u-6(a)(5), which includes "Entit[ies] described in subclauses (I) through (IV) of subsection (h)(2)(D)(i)," but not those described in subsequent subclasses (V) through (VIII).

Promotes Congress' Aim to Use Monetary Incentives: This proposed rule follows the aim to use monetary incentives to motivate whistleblowers by increasing the numbers of potential whistleblowers who voluntarily

provide information. This rule adopts the ordinary legal meaning of "voluntarily," which is "not compelled by judicial process" to increase the numbers of potential whistleblowers who are eligible for awards.

In the absence of another competing criterion specified by Congress, a proposed rule should seek first to broaden, rather than to narrow, the class of eligible informants, thereby increasing the numbers of those with inside knowledge who might be motivated to come forward and assist the Government in protecting investors. The proposed rule does just this.

This rule does not change the incentives set by Congress because Congress aimed to assess award levels after 30 months of program experience, implying that the Commission should not do so, e.g., in defining broadly "voluntarily" to create another strong incentive to step forward at the earliest time possible, or risk losing eligibility.

Avoids the Risk of Exceeding the Commission's Authority: By adopting the ordinary legal meaning of "voluntarily" the rule clearly stays within the grant of interpretive rule-making authority granted to the Commission by Congress.

Avoids Increasing the Risk of Retaliation: Whistleblowing is perilous for employees. Protecting whistleblowers from retaliation was a primary aim of Congress in enacting Sec. 21F. It could be argued that creating a "strong incentive" to step forward to "beat the clock" imposed by the prospect of a Commission inquiry, may increase the risk to whistleblowers forced to step

forward prematurely. This rule avoids this risk by not creating a new "strong incentive."

Clearly Defines a Key Term with a Bright Line Rule: The proposed rule defining "voluntarily" creates a bright line making the rule "clearly defined" and easier for a non-lawyer to apply. Every increase in the uncertainty of eligibility, and every increase in the uncertainty in estimated recoveries, discourages whistleblower participation.

Makes Rule User-Friendly: The proposed rule restates other definitions used in the rule, rather than incorporating them by reference. This makes the rule self-contained and comprehensive one of the Commission's own aims. Congress intended that the Commission issue rules making the program "user-friendly" to whistleblowers. Sec. 21F(d)(1)(a). This principle of "user-friendliness" recognized the need to focus intentionally on the needs of potential whistleblowers and adapting to them. Here the rule simply puts all of the pertinent definitions in one place for the convenience of the user.

Responses to Commission Requests for Comments on Proposed Rule Sec. 21F-4(a)(1)

2a. Does Proposed Rule Sec. 21F-4(a)(1) appropriately define the circumstances when a whistleblower should be considered to have acted "voluntarily" in providing information about securities law violations to the Commission?

No. Rule Sec. 21F-4(a)(1) should use the ordinary legal sense of the word as the Commission defined it in its qualifying phrase "even if your response is not compelled by subpoena or other applicable law."[77]

Proposed Rule Sec. 21F-4(a)(1) Goes Beyond the Commission's Authority: The Commission's proposal goes beyond its interpretative rule-making authority in at least two ways. First, the Commission's extended definition of "voluntarily" goes far beyond the ordinary legal sense of that word. The Commission acknowledges this ordinary legal sense in its qualifying phrase "even if your response is not compelled by subpoena or other applicable law."[78]

Second, the Commission's rationale for its "strong incentive" distorts and goes beyond Congress' stated intent. The Senate Report clearly stated the main Congressional aim "to motivate those with inside knowledge to step forward and assist the Government."[79] The Senate did not insert the word "early" after its words "step forward." Neither Sec. 21F nor any part of the legislative history indicates Congressional support for a requirement that whistleblowers "come forward early . . . rather than wait until Government . . . 'com[es] knocking on the door.'"[80]

In sum, by ignoring the ordinary legal sense of the word "voluntarily" to refer to compulsory judicial process, and by adding a requirement to "step

[77] [Proposed Rule § 240.Sec. 21F-4(a)(1), last sentence.]
[78] [Proposed Rule § 240.Sec. 21F-4(a)(1), last sentence.] 15 U.S.C. 78u-6(j).
[79] S. Rep. No. 111-176 at 110 (2010).
[80] ???

forward early" to be considered stepping forward "voluntarily," goes beyond Congress' intent, this proposal runs a clear risk of exceeding Congress's grant of interpretive rule-making authority.

In Addition, Proposed Rule Sec. 21F-4(a)(1) Conflicts With Congress' Aim to Use Monetary Incentives: To faithfully execute Congress's aim to use monetary incentives, the Commission's proposal should broaden, rather than narrow, the classes of eligible informants, thereby increasing the number of those who with inside knowledge who might be motivated to step forward. Instead, the proposal introduces an aim that Congress did not propose, to motivate whistleblowers to "step forward early." Thus, the proposal also fails to fulfill this Congressional aim.

Proposed Rule Sec. 21F-4(a)(1)'s "Strong Incentive" May Increase the Risk of Retaliation, Conflicting With Congress's Aim to Protect Against Retaliation: In addition to the concerns about retaliation detailed above to support the commenter's proposed rule, by creating a "strong incentive for whistleblowers to come forward early . . . rather than wait until Government . . . 'com[es] knocking on the door,'" this proposal forces a whistleblower to err on the side of "jumping the gun," or risk losing an award. It could be argued that creating such a strong incentive overlooks the perils of whistleblowing that motivated Congress to pass strong protections from retaliation. This strong incentive force whistleblowers to ignore timing considerations that could minimize this risk. No apparent Congressional

purpose is served by forcing a whistleblower to "beat the clock" imposed by the prospect of a Commission inquiry, when premature action might increase the risk of retaliation. Moreover, The Commission might be better served if a whistleblower waited until the Commission is obviously motivated and receptive before stepping forward.

Proposed Rule Sec. 21F-4(a)(1) Increases the Vagueness of the Key Term Voluntarily: In addition to possibly creating peril for whistleblowers by interfering with their timing judgments, the proposed rule is not "clearly defined," running afoul of another Congressional aim.[81] How is the whistleblower supposed to know when the Commission is about to be motivated? Unlike the Commenter's proposal, which sets out a bright line that "clearly define[s]" the rule, the Commission's proposal vaguely presses for disclosure as soon as possible. This vagueness is likely to significantly chill participation in the program.

2b. Are there other circumstances not clearly included that should be in the rule?

Probably Not. Proposed Rule Sec. 21F-4(a)(1) is already inappropriately broad. Any extension of "voluntarily" beyond the ordinary legal meaning denies awards based on otherwise valuable information, and conflicts with the Congressional aim to use monetary incentives.

Congress' aim to use monetary incentives clearly implies that when promulgating a rule, the aim should be to broaden classes of eligible

[81] ??

whistleblowers, that is, to increase the number of those who with inside knowledge who might be motivated to step forward. That was the intent in the commenter's "Alternative Proposed Rule Sec. 21F4(a)(1)," which limited voluntarily to not compelled by process issued in "covered" and "related" judicial or administrative actions.

Without that rule of construction, voluntarily could refer more broadly to compulsion by any federal or state administrative process, not just those identified by the awards provision. Or going even further, voluntarily could refer to any compulsory process, whether judicial, administrative, or legislative, which would include Congress and other legislative bodies. These two extended meanings, however, run afoul of the rule to narrowly construe such limits to increase the eligibility of whistleblowers with otherwise valuable inside knowledge of value to the Commission's enforcement work.

Summary of Alternate Rule § 240.15
"Denial and Downward Adjustment of Awards
to Blameworthy Whistleblowers"

This alternate relocates four Congressional standards for denying awards for blameworthy conduct from their present locations in to one place.[82] This makes the rule user-friendly and more clearly defined. Second, it recognizes the tension between holding individuals fully accountable and providing incentives for cooperation, by adding "culpability" as another factor when determining the amount of a whistleblower's award.[83] To further define culpability, it borrows the

[82] Alternative Rule § 240.Sec. 21F-15(a).
[83] Alternative Rule § 240.Sec. 21F-15(a)(1).

Commission's framework for evaluating individual conduct.[84] To clarify the impact of any downward adjustment for culpability,[85] the proposed rule reminds the reader of the 10% minimum standard Congress specified.[86] This clarification also makes the rule "user-friendly"[87] while motivating individuals with inside knowledge, but unclean hands, to nevertheless step forward to assist the government.

Alternative Rule § 240.15
"Denial and Downward Adjustment of
Awards to Blameworthy Whistleblowers"

(a) No award shall be made under § 240.Sec. 21F-3 to any whistleblower:

1) Who stands convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award;[88]
2) Who has knowingly and willfully made any false, fictitious, or fraudulent statement or representation;[89]
3) Who used any false writing or document knowing the writing or document contained any false, fictitious, or fraudulent statement or entry;[90] or
4) Who failed to submit information to the Commission in such form as the Commission may, by rule, have required.[91]

[84] Alternative Rule § 240.Sec. 21F-15(a)(2).
[85] § 78u-6(b)(1)(A).
[86] § 78u-6(b)(1)(B).
[87] § 78u-6(d)(1)(A).

[88] § 78u-6(c)(2)(B).
[89] § 78u-6(i)(1).
[90] § 78u-6(i)(2).
[91] § 78u-6(c)(2)(D).

(b)(1) In determining the amount of an award made under subsection (b), the Commission shall take the culpability of the whistleblower into consideration as an additional relevant factor.[92]

(b)(2) When an otherwise eligible whistleblower is culpable of misconduct related to the judicial or administrative action for which the whistleblower otherwise could receive an award, in addition to the other factors specified,[93] the Commission shall consider culpability an additional factor,[94] and shall evaluate culpability using the following four considerations:[95]

- The assistance provided by the whistleblower in the Commission's investigation or related enforcement actions;
- The importance of the underlying matter in which the whistleblower provided information;
- The societal interest in ensuring that the whistleblower is held accountable for his or her misconduct; and
- The appropriateness of the award based upon the profile of the cooperating individual.

The Commission may refer to Section 6.1.1 of its Enforcement Manual for further elaboration of these four considerations.[96]

(b)(3) The Commission shall not award an otherwise eligible culpable whistleblower less than 10% of the collected monetary sanctions.[97]

---

[92] §§ 78u-6(b)(2)(B), 78u-6(c)(1)(B)(i)(IV), § 78u-6(j).
[93] §§ 78u-6(c)(1)(B)(I), (II) & (III).
[94] § 78u-6(c)(1)(B)(IV); § 78u-6(j).
[95] SEC Enforcement Manual, Section 6.1.1
[96] Enforcement Manual, Section 6.1.1 & § 78u-6(j).
[97] As defined in § 78u-6(b)(1)(A).

Description of Alternate Rule § 240.15
"Denial and Downward Adjustment of
Awards to Blameworthy Whistleblowers"

Introduction: "The Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government."[98] The program uses monetary incentives of 10-30% of funds recovered through enforcement actions when an informant has contributed evidence making a difference in that enforcement effort.[99] The program denies awards to "any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section."[100]

Alternate Rule § 240.Sec. 21F-15 is Aptly Labeled: "Denial" labels F-15(a)'s consolidation of the four grounds for denial of awards for misconduct. "Downward adjustment" labels 15(b)'s new culpability factor which allows the downward adjustment of awards to as low as 10%. "Blameworthy is broader than culpable, and includes both those "denied" awards and those with awards that are "downward adjusted."

Alternate Rule § 240.Sec. 21F-15(a) is User-Friendly: The rule moves the four Congressional standards for denying awards to blameworthy whistleblowers

---

[98] S. Rep. No. 111-176 at 110 (2010).

[99] 15 U.S.C. § 78u-6(b).

[100] 15 U.S.C. 78u-6(c)(2)(B).

Section Sec. 21F also denies awards to whistleblowers who fail to follow Commission procedures or who submit false information. These award denials enforce respect for the Commission's procedures and do not constitute "culpability" as proposed. Misconduct during enforcement denies awards to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require, 15 U.S.C. 78u-6(c)(2)(D); who knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, 15 U.S.C. 78u-6(i)(1); or who uses any false writing or document knowing the writing or document contains any false, fictitious, or fraudulent statement or entry. 15 U.S.C. 78u-6(i)(2).

from four locations[101] to one location.[102] This makes the rule user-friendly, more clearly defines blameworthy standards, while avoiding the risk of promulgating a rule that exceeds the Commission's authority.

Alternate Rule § 240.Sec. 21F-15(b)(1) Properly Frames the Considerations for the Culpability Factor: The Alternate follows previous Commission statements addressing the tension between holding individuals fully accountable and providing incentives for individuals to cooperate with its enforcement efforts: first, the "Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions;"[103] and second, the "Framework for Evaluating the Cooperation of Individuals."[104] These establish the following principle, which provides the basis for Alternative Rule §§ 240.15(b)(1) & (b)(2): on a case-by-case basis,[105] the Commission's whistleblower awards resolves the tension between the objectives of holding individuals fully accountable for their misconduct and providing incentives for individuals to step forward.

The rule adds "culpability" as an additional factor for consideration in determining the amount of a whistleblower's award.[106] Culpability is further defined using the four considerations the Commission looks to when assessing cooperation.[107] Even further detail is incorporated by reference.[108] Given the

---

[101] §§ 78u-6(c)(2)(B); 78u-6(c)(2)(D); 78u-6(i)(1) & 78u-6(i)(2).

[102] § 240.Sec. 21F-15(a).

[103] 17 CFR § 202.12.

[104] Section 6.1.1

[105] § 78u-6(c)(1)(B)(i).

[106] § 78u-6(c)(1)(b)(IV)("such additional relevant factors as the Commission may establish by rule or regulation").

[107] Enforcement Manual, § 6.1.1.

[108] *Id.*

Commission's aim to promulgate a comprehensive rule,[109] the Commission may wish to fully restate and adapt those criteria if it chooses to adopt Alternate Rule § 240.Sec. 21F-15(b)(2).

Alternate Rule § 240.Sec. 21F-15(b)(3) Reaffirms the 10% Minimum Award: Alternate (b)(3) makes clear that Congress only denied awards for culpability to convicts. When determining an award involving "culpability," the award can go no lower than 10% of the collected monetary sanctions. This redundant statement adds clarity and reduces uncertainty faced by a whistleblower with inside knowledge but unclean hands.

Referral of Empirical Matters: We recommend that the Commission's rulemaking staff formulate any empirical questions identified during this rulemaking that when answered, could establish an evidentiary basis for modifying the rules involving "culpability. We further ask the Commission to forward any such questions to the OIG together with its request that the OIG deem them "other matters" worthy of study.[110]

Summary of Supplemental Rule § 240.Sec. 21F-17 "Procedures When Company Seeks Seaboard Relief"

Particularly when settlements are reached early in an enforcement action, the monetary incentives that encourage whistleblowers to step forward conflict with monetary incentives for companies seeking reduced fines for self-policing, self-reporting, remediation and cooperation with prosecutors. If the Commission reduces the fine imposed on a company based on Seaboard, the whistleblower's award drops proportionately. If the

[109] ??

[110] § 78u-6(d)(1)(I).

company persuades the Commission that the whistleblower played a trivial role in its self-reporting, remediation and cooperation, it wins two ways. First the company appears to have accepted more responsibility, perhaps reducing its fine. Second, reducing the moral significance of the whistleblower's role may cause the Commission to award the whistleblower less money.

To reduce this tension, Supplemental Rule § 240.Sec. 21F-17 proposes three procedures: 1) requiring the company and the whistleblower to submit detailed narratives, and to comment on each before submission to the Commission; 2) imposing coherence between the award of Seaboard credit and the whistleblower award by a) requiring use of common narratives; b) requiring that both decisions be made by the same person; and c) adding an award factor for "holding harmless from company leniency."

First, a company settling any action covered by this rule would submit a report of its fact investigation and its plan of action showing its full account of the events, indicating how it will hold to account those responsible, how it plans to rectify the harm done, and how it will correct company structures to prevent recurrence. In its report of its fact investigation, the company should address facts related to the whistleblower's role in the entire set of events, and submit it to the whistleblower for review and comment before forwarding to the Commission.

Second, to promote the reconciliation of contending narratives, to help assure coherence between the whistleblower award and the Seaboard fine reduction, the rule requires common facts, common decision-makers and the simultaneous[111] decision of both decisions. Commission will approve the settlement at the same time it determines the amount of the whistleblower award, the same person or people will decide both matters, and both decisions will be based on a common set of overlapping facts.

Third, if the Commission concludes that the whistleblower successfully induced the firm to self-police, to self-report, to remediate or to cooperate with regulators and prosecutors, then the Commission shall increase the whistleblower's award in proportion to the amount the whistleblower's award was reduced by the reduced fines imposed on the company. To hold the whistleblower harmless from the effects of Seaboard incentives, up to the 30% maximum, would eliminate this particular conflict between these two sets of monetary incentives.

The recommendation is also made that the Commission refer queries related to the interaction of these conflicting monetary incentives to the OIG for study.

Supplemental Rule § 240.Sec. 21F-17
"Procedures When Company Seeks Seaboard Relief"

[111] Time has not permitted examination of this proposal in light of the administrative structure proposed for making awards. "Simultaneous" might yield to "within 30 days," given the administrative context.

The Commission seeks information about the whistleblower's involvement in and contributions to the company's proposed "report of internal investigation and action plan." As part of its applying for credit for self-policing, self-reporting, remediation and cooperating with investigators under the Seaboard criteria,[112] the company shall respond to the Commission's questionnaire. To receive full cooperation credit, the company must provide the Commission with fully responsive answers to its questionnaire that are documented with copies of all documents reflecting the role of the whistleblower in detecting and correcting the violation.

The Commission will use these responses1) to determine any reduction in fine it may grant under the Seaboard criteria; and 2) together with the whistleblower's award application, to determine the amount of the whistleblower's award.

In making these two decisions, the Commission shall consider, in addition to its other decision criteria, the tension between reducing the monetary sanctions paid by the company for self-policing, self-reporting, remediation and cooperating with investigators, which reduces the "monetary sanctions" shared by the whistleblower, against increasing the whistleblower's payment for encouraging the company's cooperation, notwithstanding the prospect of thereby reducing his award.

---

[112] Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Securities Exchange Act Of 1934, Release No. 44969, also called Accounting And Auditing Enforcement, Release No. 1470, both dated October 23, 2001 and available at http://www.sec.gov/litigation/investreport/34-44969.htm (the "Seaboard Report")

When determining the amount of a whistleblower's award, the Commission shall also consider the reduction in the whistleblower's award attributable to the Commission's leniency to the company under Seaboard-type standards. The Commission shall adjust the award upward so as to hold the whistleblower harmless from any such reduction, up to the 30% limit.

In any case in which the "holding harmless" upward adjustment would be more than 30%, were there no maximum limit on awards, the Commission shall report the rationale for the fee award, and the underlying facts, to the OIG for consideration in its implementation study.

Standards for Self-Investigation Report and Action Plan for Violations Also Covered By Whistleblower Report to the Commission

A company seeking leniency under the Seaboard criteria for violations also covered by a whistleblower report to the Commission shall submit to the Commission a credible self-investigation report and action plan proposing corrective remedies.

The self-investigation report shall reflect a thorough investigation of the roles played by all who are responsible, whether they be individuals, subunits of organizations, organizations, parent organizations, industry associations, gatekeepers such as accountants, auditor and attorneys, regulatory agencies or units of government. All those responsible shall be held accountable. This report shall include all documents related to the facts found during the self-investigation, including all records of witness interviews, copies of all papers used during the self-investigation, such as

emails, company records proving the violation; company records of pertinent compliance and audit activity; and evidence supplied by the whistleblower. A credible investigation shall report evidence sufficient for a decision-maker to enter findings on the nature and extent of the violation(s) of applicable by all those responsible.

The allocation of responsibility shall be pursued justly, shall safeguard the rights of individual suspects, shall allocate responsibility for attempted scapegoating, shall use company disciplinary systems where appropriate, and shall propose referrals for external sanctions for those individuals whose violations go beyond the reach of the company disciplinary systems. Where non-cooperation of an individual impedes the investigation, and the application of the organization's internal sanctions fail to induce full cooperation, the organization may request relief from the Commission prior to completion of its internal investigation.

The self-investigation shall thoroughly investigate the responsibility for violations of the laws governing securities triggered by the whistleblower's notice, as well as any retaliation that may have occurred to obstruct discovery of any such violations. At the minimum, the self-investigation shall report evidence sufficient for a decision-maker to make fact-findings under all applicable legal standards. The accountability proposal shall address the

pertinent Seaboard criteria[113] and the criteria for whistleblower participation listed in Appendix B.

When making any self-report to the Commission, the company shall first notify the whistleblower of the proposed self-report, and shall invite the whistleblower to participate. Upon completion of its accountability proposal, the company shall submit it to the whistleblower for review and comment before submitting it to the Commission.

Description of Substitute Rule § 240.Sec. 21F-17
"Procedures When Company Seeks Seaboard Relief"

Conflicts are inevitable between the monetary incentives used in the whistleblower program and the monetary incentives for self-policing, self-reporting, making restitution and cooperating with the investigators, the key considerations for reducing monetary sanctions suggested in the Seaboard Report. The whistleblower program sets up its own set of monetary incentives. The Commission's comprehensive rule for the whistleblower program should consider these two systems of monetary incentives, and align them to the extent possible, to avoid the unintended but clearly foreseeable consequences of the inherent conflicts explained below.

Two of seven recent settlements demonstrate the use of Seaboard-type[114] monetary incentives: To illustrate this inevitable conflict, consider

[113] The Seaboard criteria are broken up by individual fact questions, and are listed in Appendix B.

[114] Seaboard-type also refers to the DOJ Attorneys Manual provision on the prosecution of business organizations, which grants leniency for self-policing, self-reporting, remediation

last month's joint SEC / DOJ $236M settlement of cases against a group of oil services companies and a freight forwarding company for bribing foreign officials.[115] The Panalpina companies refused to cooperate with investigators; the DOJ filed its criminal information detailing the misconduct, Panalpina entered a deferred prosecution agreement, and the SEC continues to investigate. In contrast, the Noble companies cooperated fully with investigators; the SEC reported that the terms of its settlement "takes into consideration Noble's self-reporting and its substantial cooperation during the investigation, as well as its remediation efforts following its extensive internal review."[116]

Deciding the amount of the fines to impose is a key part of the settlement process. As a practical matter,[117] an enforcement attorney reviewing a possible settlement using the disgorgement method starts by estimating the amount of illicit gains and the accrued interest.[118] Next, whether a fine should be imposed, and its magnitude, is decided based on the Commission's culpability considerations, at point at which the Seaboard

---

and cooperation with investigators, although phrased differently. It also refers to any regulator or prosecutor offering leniency for such good behavior.

[115] DOJ Office of Public Affairs Release "Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties; SEC and Companies Agree to Civil Disgorgement and Penalties of Approximately $80 Million:" http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html.

SEC Press Release: "SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials:" http://www.sec.gov/news/press/2010/2010-214.htm.

[116] Cite SEC Release

[117] This is oversimplified for discussion purposes.

[118] SEC v. First City Financial Corp., 890 F.2d 1215 (D.C. Cir. 1989)

Report provides some considerations. In these seven cases criminal fines were assessed under standards set out in the US Attorneys Manual,[119] which reduces fines based on the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents; the existence and effectiveness of the corporation's pre-existing compliance program; and the corporation's remedial actions. These factors are equivalent to the Commission's comparable considerations of self-policing, self-reporting, remediation and cooperation with investigators. In short, low fines relative to disgorgement, partly reflect reductions made for Seaboard-type considerations, which the ratio of the fines to disgorgement measures.

Panalpina's fines were $70,560,000; it disgorged $11,329,369; its fines were 6.23 times its disgorgement. In contrast, Noble's fine was $2,590,000; it disgorged $5,576,998; its fines were 0.46 times its disgorgement. Comparing those ratios, Panalpina resistance cost led to fines at 13.4 times the rate of Noble's notable cooperation. This illustrates the

[119] US Attorneys' Manual, Principles Of Federal Prosecution Of Business Organizations, 9-28.300 "Factors to Be Considered," A. General Principle. http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#FN1.

First, the DOJ considers the nature and seriousness of the offense; the pervasiveness of wrongdoing within the corporation; the corporation's history of similar misconduct; collateral consequences; the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and the adequacy of other remedies.

Second, reductions may be made based on the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents; the existence and effectiveness of the corporation's pre-existing compliance program; and the corporation's remedial actions.

impact of Seaboard-type monetary incentives.[120] A key aims enforcement agencies is to create an enforcement climate that leads to more Panalpina-type laggards flipping to Noble-type leaders.[121] While of interest, such macro-enforcement concerns are beyond the scope of these comments. Likewise, the impact of a successful whistleblower program on the moral climate within firms is also beyond the scope of these comments. This Panalpina / Noble comparison sets the stage for a thought experiment proving that Seaboard-type monetary incentives may conflict with monetary incentives for whistleblowers.

First, these seven cases illustrate the significant financial impact of Seaboard-type incentives on settlements.[122] Noble paid fines that amounted to 46% of the amount it disgorged, whereas Panalpina paid fines that amounted to 623% of its disgorgement. If Noble had resisted as hard as Panalpina, it would have paid a fine of $34,733,883 instead of $2,590,000. On the other side, if Panalpina had cooperated like Noble, it would have paid a fine of only $5,261,445. This leads to our first observation—in these cases, the Seaboard-type considerations appear to account for part of the wide

[120] Thanks to Sean Hecker of Debevoise & Plimpton LLP for his PLI presentation at the November 24, 2010 *Securities Regulation Institute* panel titled "The Government Enforcement Agenda and Practical Handling of Enforcement Issues" in which he compared the ratio of fines to disgorgement in the FCPA oil services settlements of November 4, 2010.

[121] Cf., John Braithwaite, *Markets in Vice; Markets in Virtue* (2005)(a scholar of business regulation and white collar crime explains the mechanisms that created markets for abusive tax shelters, and the regulatory interventions that can flip such markets in vice to markets in virtue).

[122] This oversimplifies by attributing all of the difference in fines to cooperation. A more accurate assessment is not possible without careful, comparable justifications for the settlements. Nevertheless, the underlying point is remains valid.

range in the intensity of punishment. This implies that the Seaboard-type monetary incentives may be working.

Two of these recent settlements also demonstrate the conflict between Seaboard-type monetary incentives and monetary incentives for inducing whistleblowers to step forward: Second, these two cases illustrate that the Seaboard-type monetary incentives work in the reverse direction from the whistleblower's monetary incentives. If a whistleblower had a valid claim for 20% in the Nobile case, and Noble resisted as hard as Panalpina instead of cooperated, then the total monetary sanctions would rise from $8,166,998 to $40,310,881, and the 20% whistleblower award would rise from $1,663,400 to $8,062,176, a multiplier of five (494%). On the flip side, if Panalpina had been as good a corporate citizen as Noble, then the total monetary sanctions would have dropped from $81,889,369 to $16,590,814, and the 20% whistleblower award would drop from $16,337,874 to $3,318,163, a multiplier of a fifth (20%), or a reduction by four-fifths (80%). Thus, our second observation is that the whistleblower incentives work in the opposite direction to the Seaboard-type incentives. Company resistance to enforcement significantly raises the whistleblower's award; company cooperation significantly reduces it.

Third, consider a whistleblower from the view of the hypothetical of a purely self-interested company.[123] Minimizing a particular whistleblower's

[123] Setting aside morality and other non-financial norms.

award may serve several interests: 1) it will punish the whistleblower for betraying company loyalty, 2) it may help maintain an amoral company culture by showing other employees that "rats don't get paid," and 3) it may contribute to a broad campaign to impair the reputation of the Commission's whistleblower program to reduce the whistleblowing phenomenon. There appear to be no offsetting considerations. Thus, the third is the conjecture that firms may tend to act in ways that reduce awards paid to otherwise successful whistleblowers.

Fourth, suppose that same self-interested company decides to maximize its Seaboard-type recovery credits to reduce its fines. If it candidly acknowledges the whistleblower's role in inducing it self-police, self-report, remediate and cooperate, it undermines the weight of its acceptance of responsibility, which are part of the showing it makes for a reduced fine. Thus, the fourth observation is that firms seeking Seaboard-type reductions in fines appear to have a monetary incentive to minimize the whistleblower's role.

Fifth, if that a self-interested whistleblower, his/her tendency to play hard ball will likely induce litigious behavior by the firm. Creating a litigious case is likely to be rewarded in the long run[124] by a larger fine because the more the firm resists enforcement, the lower the fine reductions.

[124] Again, all other factors are held equal.

Sixth, if a self-interested whistleblower faces a firm that has decided to seek Seaboard type credits, it will be in the whistleblower's interest to maximize his/her portrayal of his/her role in presentations to the Commission, to reduce the firm's Seaboard-type fine reduction, thereby increasing the whistleblower's award.

These conflicts illustrate the key point for this rule-making: clearly foreseeable conflicts exist between the monetary incentives proposed by the whistleblower rule and the monetary incentives granted under the Seaboard Report.

Rationale for Self-Investigation Report and Action Plan: A famous model self-investigation was that of outside counsel John J. McCloy, whose report on bribery committed by the Gulf Oil Corporation was later published.[125] John Coffee later proposed that self-reports along McCloy's line become a routine element of corporate enforcement.[126] The crucial link that Coffee's proposal made was to complement public systems of regulatory and criminal enforcement, with private justice and compliance systems existing within companies. Brent Fisse and John Braithwaite then extended Coffee's key concept by proposing twenty criteria for assessing an integrated public /

[125] McCloy, *The Great Oil Spill.*

[126] Coffee, "No Soul to Damn, No Body to Kick," 79 *Mich. L. Rev*. 386, 430 (1981) ("An appropriate model might be the careful study prepared for Gulf Oil by John J. McCloy, its special counsel, which detailed in specific and unemotional terms the extent of the internal falsification and deliberate deception of the Gulf board by senior Gulf management. That deception fostered Gulf's extensive program of domestic and foreign political payments. [Footnote omitted.] The impact of the McCloy Report on the Gulf board was immediate and substantial; it triggered internal reforms within Gulf and hastened the resignation of some apparently culpable senior officials. [Footnote omitted.]")

private enforcement system based on Coffee's concept.[127] The standards proposed loosely follows these works.

Appendix A
Studies Supporting
Section Sec. 21F of Dodd-Frank Act

The Commission[128] cited the Dyck study to support Sec. 21F's primary aim to use monetary incentives to improve the quality of inside information streaming to the Commission's enforcement staff. In "Who Blows the Whistle,"[129] Dyck's team closely examined 216 cases between 1996 and 2004 involving US companies with more than $.75B in assets, which included Enron, HealthSouth, and World Com. They determined precisely who revealed the fraud in these major cases and concluded in their "second main result" that "the incentives for the existing network of whistleblowers are weak. Auditors, analysts, and employees do not seem to gain much and, in the cases of employees, seem to lose from whistle blowing." One "notable exception" are employees who have access to a *qui tam* suit."[130] The Commission cited Dyck in support of Sec. 21F's use of monetary incentives.[131]

---

[127] Fisse & Braithwaite, *Corporations, Crime and Accountability* (1993), at 158-217. Appendix A lists their twenty "desiderata."

[128] Alexander Dyck, Adair Morse & Luigi Zingales, "Who Blows the Whistle on Corporate Fraud?" (October 2008).

[129] **URL for recent free download; also url for excel sheed to 216; also url for abstracts summarizing findings on all 216.**

[130] Dyck, *supra*, at ??. The other "notable exception" were journalists who they found were motivated by reputational incentives. At ??

[131] At ??.

The Dyck study's "first main result" also justifies Sec. 21F's mobilizing whistleblowers beyond the employees of issuers and registrants. No single class detected more than 20% of these major frauds. The first surprise for these researchers was those with a legal duty to detect fraud accounted for many fewer than expected. Auditors only found 10%; the SEC only found 7%; and private litigation only found 3% of these major corporate frauds. In total, the legally obligated actors only detected 20% of the cases. The second surprise was the relatively high number of detections by those outside the legal and financial control systems. Employees found 17%, journalists 13%, and non-financial regulators found 13%. A total of 43% of these major frauds were detected by those with no legal or financial duty to do so.

To explain this difference, the Dyck researchers they pointed to the first critical factor before monetary incentives can be useful: the cost of the fraud information. Successful whistleblowers had the opportunity to identify and gather evidence of fraud in the course of their normal work. They were thus better positioned than the Commission because their information costs were lower. The Dyck study shows that Sec. 21F chose the proper target—"those with inside knowledge."

The ACFE's "2008 Report to the Nation"[132] also found that legally obligated actors detected surprisingly fewer frauds than whistleblowers.

[132] ?? **Give url**

Based on data compiled from 959 cases investigated in 2006 and 2007 by the members who actually investigated them,[133] the authors found that tips were twice as likely to reveal fraud than any other means: "[d]espite increased focus on anti-fraud controls in the wake of Sarbanes-Oxley and mandated consideration of fraud in financial statement audits due to SAS 99,"[134] in 46% of the 959 cases employees, customers, vendors, and other sources revealed the fraud,[135] whereas 20.0% were found by accident, 23.3% through internal controls, and 9.1% by external auditors.[136]

The IRS recently reformed its whistleblower program[137] based in part on findings that it was twice as productive as other IRS enforcement efforts. *The Informants' Project: A Study of the Present Law Reward Program* (1999)[138] reported that an IRS internal study determined that whereas the reward program cost around $0.04 per dollar collected, all other programs cost of $0.10 per dollar collected. Another productivity measure showed that exams targeted by whistleblowers yielded around $688 per hour, exams

---

[133] At 4.

[134] At 4.

[135] Id.

[136] At 18.

[137] ?? **Cite reform legislation; url for IRM; etc.**

[138] Treasury Inspector General for Tax Administration, "Informants' Rewards Program Needs More Centralized Management Ovesight," June 2006 (Ref # 2006-30-092), at 8-10 (pdf).

targeted by the IRS DIF program[139] compared to $382 per hour for DIF examinations.

Appendix B
Considerations of Seaboard Report Separated to Single Facts Supplemented with Draft Questions About Whistleblower's Role

Questions to be answered by companies applying for credit under Seaboard Report, in accordance with guidelines in Supplemental Rule § 240.Sec. 21F-17 "Procedures When Company Seeks Seaboard Relief"

Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Securities Exchange Act Of 1934, Release No. 44969, also called Accounting And Auditing Enforcement, Release No. 1470, both dated October 23, 2001 and available at http://www.sec.gov/litigation/investreport/34-44969.htm (the "Seaboard Report")

Code before Seaboard criterion indicating source: Leading numbers before text of each Seaboard Criterion refer to the specific question number in the original document. The letter refers to the question within the numbered group in the original. The trailing number refers to facts in the question; where questions called for more than one fact, they were broken down to one fact per question.

Self-policing

Seaboard Criterion	Related Whistleblower Criterion
1a. What is the nature of the misconduct involved?	
1b1. Did the misconduct result from inadvertence?	
1b2. Did the misconduct result from honest mistake?	
1b3. Did the misconduct result from simple negligence?	
1b4. Did the misconduct result from reckless indifference to indicia of	

[139] DIF means the IRS's Discriminant Index Function, a mathematical technique used to classify income tax returns for examination potential by assigning weights to certain basic return characteristics.

wrongful conduct?	
1b5. Did the misconduct result from deliberate indifference to indicia of wrongful conduct?	
1b6. Did the misconduct result from willful misconduct?	
1b7. Did the misconduct result from unadorned venality?	Did the whistleblower help elucidate the nature of the misconduct? If so, explain how? Did the whistleblower supply evidence of the misconduct? If so, describe that evidence in detail and explain how it helped determine the nature of the misconduct.
1c. Were the company's auditors misled?	If so, explain how did the whistleblower detected it while the auditors did not?
2a. How did the misconduct arise?	
2b1. Is it the result of pressure placed on employees to achieve specific results?	
2b2. Is it the result of a tone of lawlessness set by those in control of the company?	
2c. What compliance procedures were in place to prevent the misconduct now uncovered?	Explain how the whistleblower detected it while the system did not?
2d1. Why did the compliance procedures that were in place fail to stop the wrongful conduct?	
2d2. Why did the compliance procedures that were in place fail to inhibit the wrongful conduct?	

3a. Where in the organization did the misconduct occur?	
3b1. How high up in the chain of command was knowledge of the misconduct?	
3b2. How high up in the chain of command was participation in the misconduct?	
3c1. Did senior personnel participate in the misconduct?	
3c2. Did senior personnel turn a blind eye toward obvious indicia of the misconduct?	
3d. How systemic was the behavior?	
3e1. Is the misconduct symptomatic of the way the entity does business?	
3e2. Was the misconduct an isolated incident that is not symptomatic of the way the entity does business?	
4a. How long did the misconduct last?	
4b1. Did the misconduct last one-quarter?	
4b2. Was the misconduct a one-time event?	
4b3. Did the misconduct last several years?	
4c. In the case of a public company, did the misconduct occur before the company went public?	
4d. Did the misconduct facilitate the	

company's ability to go public?	
6a1. How was the misconduct detected?	Did the whistleblower detect or uncover the misconduct? If so, explain how. Also explain why the misconduct was able to go undetected by your internal compliance systems?
6a2. Who uncovered the misconduct?	
7a. How long after discovery of the misconduct did it take to implement an effective response?	How did the whistleblower notify you of the misconduct? Was the whistleblower's notice full enough for your company to implement an effective response? If it was not full enough, what additional evidence did your company actually gather after the whistleblower's notice and before deciding to implement an effective response? How much time elapsed between the time of the whistleblower's notice and implementing an effective response?
8a. What steps did the company take upon learning of the misconduct?	Did the whistleblower recommend any of these steps? If so, which ones?
8b. Did the company immediately stop the misconduct?	
8c. Are persons responsible for any misconduct still with the company?	Did the whistleblower identify the persons responsible? If so, which ones? Did the whistleblower report the particular misconduct involved.? If so, describe that

	misconduct and how the whistleblower reported it? Did the whistleblower produce evidence or give testimony that was used to identify the persons responsible? If so, which ones?
8d. If so, do persons responsible for any misconduct who are still with the company occupying the same positions?	Did the whistleblower recommend disciplinary action? Was disciplinary action considered? If so, against whom? Did the whistleblower produce evidence or give testimony that was used in the course of considering disciplinary action?
9a1. What processes did the company follow to resolve many of these issues?	
9a2. What processes did the company follow to ferret out necessary information?	
10a1. Did the company commit to learn the truth fully?	
10a2. Did the company commit to learn the truth expeditiously?	
10b1a. Did the company do a thorough review of the nature of the misconduct?	Did the whistleblower participate in the review? If so, how? Did the whistleblower participate in selecting the reviewer? Did the whistleblower object to its scope? Did the whistleblower participate in overseeing the review? What did the

	whistleblower contribute during oversight? Did the whistleblower participate in deciding on the scope of the review? Did the whistleblower object to its scope?
10b1b. Did the company do a thorough review of the extent of the misconduct?	Did the whistleblower prompt a more thorough review of the extent of the misconduct? If so, explain how.
10b1c. Did the company do a thorough review of the origins of the misconduct?	Did the whistleblower prompt a more thorough review of the origins of the misconduct? If so, explain how.
10b1d. Did the company do a thorough review of the consequences of the misconduct?	Did the whistleblower prompt a more thorough review of the consequences of the misconduct? If so, explain how.
10b2a. Did the company do a thorough review of the nature of the related behavior?	Did the whistleblower prompt a more thorough review of the nature of the related behavior? If so, explain how.
10b2b. Did the company do a thorough review of the extent of the related behavior?	Did the whistleblower prompt a more thorough review of the extent of the related behavior? If so, explain how.
10b2c. Did the company do a thorough review of the origins of the related behavior?	Did the whistleblower prompt a more thorough review of the origins of the related behavior? If so, explain how.
10b2d. Did the company do a thorough review of the consequences of the related behavior?	Did the whistleblower prompt a more thorough review of the consequences of the related behavior? If so, explain how.
10c1. Did management oversee the	

review?	
10c2. Did the Board oversee the review?	
10c3. Did committees consisting solely of outside directors oversee the review?	
10d1. Did company employees perform the review?	
10d2. Did outside persons perform the review?	
10e. If outside persons performed the review, had they done other work for the company?	
10f. If outside counsel performed the review, had management previously engaged such counsel?	
10g. Were limitations placed on the scope of the review?	
10h. If so, what limitations were placed on the scope of the review?	

Self-reporting

Seaboard Criterion	Related Whistleblower Criterion
8e1a. Did the company promptly disclose the existence of the misconduct to the public?	Did the whistleblower help disclose the misconduct to the public? If so, explain how.
8e1b. Did the company completely disclose the existence of the misconduct to the public?	
8e1c. Did the company effectively disclose the existence of the	

misconduct to the public?	
8e2a. Did the company promptly disclose the existence of the misconduct to regulators?	Did the whistleblower help disclose the misconduct to regulators? If so, explain how.
8e2b. Did the company completely disclose the existence of the misconduct to regulators?	
8e2c. Did the company effectively disclose the existence of the misconduct to regulators?	
8e3a. Did the company promptly disclose the existence of the misconduct to self-regulators?	Did the whistleblower help disclose the misconduct to self-regulators? If so, explain how.
8e3b. Did the company completely disclose the existence of the misconduct to self-regulators?	
8e3c. Did the company effectively disclose the existence of the misconduct to self-regulators?	
8g. Did the company identify what additional related misconduct was likely to have occurred?	Did the whistleblower help the company identify what additional related misconduct was likely to have occurred? If so, explain how.
9b1. Was the Audit Committee fully informed?	
9b2. Was the Board of Directors fully informed?	
9c1. If so, when was the Audit Committee fully informed?	
9c2. If so, when was the Board of Directors fully informed?	
11a1. Did the company promptly make available to the Commission's	

staff the results of its review?	
11a2. Did the company promptly make available to the Commission's staff provide sufficient documentation reflecting its response to the situation?	
11b1. Did the company identify to the Commission's staff possible violative misconduct?	
11b2. Did the company provide the Commission's staff with evidence of sufficient precision to facilitate prompt enforcement actions against those who violated the law?	Did the whistleblower help the company provide the Commission's staff with evidence of sufficient precision to facilitate prompt enforcement actions against those who violated the law? If so, explain.
11c. Did the company produce a thorough and probing written report to the Commission's staff detailing the findings of its review?	Did the whistleblower help the company produce a written report to the SEC staff detailing the findings of its review? If so, explain.
11d1. Did the company voluntarily disclose to the Commission's staff information that it did not directly request?	Did the whistleblower help the company voluntarily disclose information to the SEC staff it had not directly requested? If so, explain.
11d2. Did the company voluntarily disclose to the Commission's staff information that the Commission's staff might otherwise not have uncovered?	Did the whistleblower help the company voluntarily disclose information to the SEC staff that the Commission's staff might otherwise not have uncovered? If so, explain.
11fn3	
12c. Did the company provide our staff with sufficient information for it to evaluate the company's measures to correct the conditions that allowed the misconduct to occur?	Did the whistleblower help the company provide the SEC staff with sufficient information with which to assess the company's proposed compliance measures? If so, explain.

Remediation

Seaboard Criterion	Related Whistleblower Criterion
5a1. How much harm did the misconduct inflict upon investors?	Did the whistleblower help the company determine the harm inflicted on investors? If so, explain how.
5a2. How much harm did the misconduct inflict upon other corporate constituencies?	Did the whistleblower help ascertain the harm inflicted on other corporate constituencies? If so, explain how.
5b1. Did the share price of the company's stock drop significantly upon the discovery of the misconduct?	
5b2. Did the share price of the company's stock drop significantly upon the disclosure of the misconduct?	
8h1. Did the company take steps to identify the extent of damage to investors?	Did the whistleblower help the company identify the extent of damage to investors? If so, explain how.
8h2. Did the company take steps to identify the extent of damage to other corporate constituencies?	Did the whistleblower help the company identify the extent of damage to other corporate constituencies? If so, explain how.
8i. Did the company appropriately recompense those adversely affected by the misconduct?	Did the whistleblower help the company appropriately recompense those adversely affected by the misconduct? If so, explain how.
12a. What assurances has the company given that the conduct is unlikely to recur?	

12b1. Did the company adopt more effective internal controls to prevent a recurrence of the misconduct?	Did the whistleblower help the company adopt more effective internal controls to prevent a recurrence of the misconduct? If so, explain how.
12b2. Has the company ensured that effective enforcement of its internal controls will prevent a recurrence of the misconduct?	Did the whistleblower help the company ensured that effective enforcement of its internal controls will prevent a recurrence of the misconduct? If so, explain how.
13a1. Is the company the same company in which the misconduct occurred?	
13a2. Since the misconduct occurred, did the company change through a merger or bankruptcy reorganization?	

Cooperation

Seaboard Criterion	Related Whistleblower Criterion
8f1. Did the company cooperate completely with appropriate regulatory bodies?	Did the whistleblower help the company cooperate completely with appropriate regulatory bodies? If so, explain how.
8f2. Did the company cooperate completely with appropriate law enforcement bodies?	Did the whistleblower help the company cooperate completely with appropriate law enforcement bodies? If so, explain how.
11e1. Did the company ask its employees to cooperate with the Commission's staff?	
11e2. Did the company make all reasonable efforts to encourage its	Do you know whether the whistleblower encouraged the

employees to cooperate with the Commission's staff?	company's employees to cooperate with the Commission's staff? If yes, identify the employees and explain how.