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

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Elizabeth M. Murphy, Secretary

**Reference: S7-33-10** December 20, 2010

Dear Ms. Murphy,

Thank you for the opportunity to provide comments on the SEC's proposed rules for the implementation of the whistleblowing provisions of the Dodd-Frank Act. I have worked in internal audit and in accounting functions at subsidiaries and the holding company of a foreign listed company and as the controller of foreign funds of private equity funds with U.S. investors. I hope that my knowledge in international issues can provide some valuable suggestions for the planned study. In addition, I have used the Commission's web form for supplying tips to the Commission and can provide some suggestions for improving the form.

## 1. General comments

*1.1 Do not sanction whistleblowers for not using internal compliance processes*

Direct whistleblowing to the Commission should have no influence on the award

The Commission should not sanction whistleblowers for not using internal compliance processes by making such use a precondition for eligibility for an award or by considering such use in the determination of the percentage amount of the award.

The information to assess the effectiveness of an internal complaint process is unavailable

Neither the whistleblower nor the Commission has the information that would be necessary whether an internal ethics and compliance program is effective and whether a whistleblower will be effectively protected from retaliation by the employer. Employers typically do not disclose such information about the operating effectiveness of their internal ethics and compliance process to their employees or to the Commission. Particularly past retaliations or the successful protection against retaliation against whistleblowers are typically not disclosed to all employees.

Organizations may not disclose misconduct to the SEC after receiving internal tips

Employers may want to control which information flows to the Commission so that they retain the ability to withhold information about violations of laws from the Commission in order to avoid monetary sanctions and a loss of reputation if the Commission discloses a complaint against the employer on its website. The employer may even view the avoidance of

monetary sanctions against the organization to be in the best interest of shareholders because those monetary sanctions are born by shareholders in the form of reduced profits. The management of on organization may also know or find out that conduct has been going on for a while that management at certain levels knew about it and that the compliance program may be ineffective and that there is a high risk of high monetary sanctions against managers.

Employees prefer to remain anonymous when they use internal complaint processes

The fact that a large portion of employees that provided tips chose to remain anonymous provides circumstantial evidence that employees fear retaliation by their employers even if those employers have internal complaint procedures and that they do not fully trust that they will be protected from retaliation. In a survey of Certified Fraud Examiners by the Association of Certified Fraud Examiners, 13.4% of all tips relating to 1'843 completed fraud investigations that occurred between January 2008 and October 2009 were anonymous. In addition, 67% of the anonymous tips were reported through an organization's fraud hotline.[1] Moreover, the majority of persons that reported 524'628 incidents via the hotline in all five years covered in a report by the Network, a provider of outsourced hotlines for complaints, remained anonymous. It is particularly noteworthy that 58% of the hotline complaints in the finance, insurance and real estate industry and 59% of the hotline complaints in the mining industry were anonymous in 2009. Both industries seem to be particularly relevant to the Commission and for purposes of the Dodd-Frank Act. In addition, 71% of participants did not notify management of an issue before making a report via the hotline in 2009.[2]

Not all organizations are required to have internal complaint processes and their scope is limited

In addition, most organizations are not required by law to have internal compliance programs that cover all types of violations of the U.S. securities laws. Only issuers that have securities registered on a national securities exchange in the U.S. are required to have an internal complaint reporting system. In addition, this system is limited to accounting, internal accounting controls and auditing matters. While the federal sentencing guidelines for organizations and the U.S. attorney's manual for charging organizations provide certain benefits to organizations that have effective ethics and compliance programs, such programs are often not required by law or may not be effective.

Foreign organizations may not have internal complaint processes at all. UBS was listed on a national securities exchange in the U.S. and had an internal complaint reporting system, but it still got fined as a organization, because members of its cross-border U.S. private banking clients team provided investment advisory services without the Swiss UBS entity that they worked for being registered as an investment advisor in the U.S. It is noteworthy that the Swiss Federal Banking Commission (the predecessor of the Swiss Financial Market Supervisory Authority) proposed a circular in 2005 that would have required Swiss banks to have a system for internal whistleblowing to the board of directors or to its audit committee and for the protection of whistleblowers.[3] However, the Swiss Bankers Association was against such systems in its comment letter. It was concerned that such a system would have a

[1] *See* Association of Certified Fraud Examiners, 2010 Report to the Nations on Occupational Fraud and Abuse, p. 17, available at http://butest.acfe.com/rttn/rttn-2010.pdf
[2] *See* The Network, 2010 Corporate Governance and Compliance Hotline Benchmarking Report, p. 9, 21, 37 and 50, available at http://www.tnwinc.com/downloads/2010BenchmarkingReport.pdf
[3] *See* Swiss Federal Banking Commission, Proposed Circular Internal Surveillance and Control, May 4, 2005, http://www.finma.ch/archiv/ebk/d/archiv/2005/20050504/050504_02_d.pdf, p. 5, item 3.4

massive influence on the internal culture and on the work climate. In particular it would threaten the basis of the trust between management and the internal audit function.[4] In addition, the Swiss Private Bankers Association strongly opposed such systems. It viewed such systems as an encouragement to denounce others, even to settle old personal grudges (literally to settle personal accounts) that risks to damage the work climate. In addition, it viewed such systems as a foreign innovation in our (Swiss) culture that should be avoided.[5] The Swiss Federal Banking Commission ultimately did not require Swiss banks to have a system for internal whistleblowing and for the protection of whistleblowers in its final circular on internal surveillance and control.

Labor law protections against retaliation are unavailable for foreign employees

The U.S. Court of Appeals for the First Circuit has ruled that the labor law protection contained in 18 U.S.C. § 1514A are not available to employees that work in foreign countries.[6] The labor law of many countries does not provide effective protection against retaliations from employers. In such environments, not revealing the identity of a whistleblower to the employer and awards are even more important to compensate whistleblowers for the risk incurring serious negative economic and emotional consequences.

*1.2 Do not increase sanctions for organizations in case of direct whistleblowing to the SEC*

Organizations that have effective compliance programs should not receive higher sanctions from the Commission or from the U.S. Department of Justice (DoJ) merely because the Commission or the DoJ received the information from a whistleblower and the organization either did not receive the information or was still in the process of performing an internal investigation based on the information in good faith that could not have been finished and disclosed to the Commission or the DoJ in a reasonable amount of time.

*1.3 The Commission should publish a comprehensive whistleblower manual*

The Commission should publish a comprehensive whistleblower manual with an executive summary at the beginning of the manual. The manual should cover all aspects that may be of interest to a potential whistleblower. This would start with information that a potential whistleblower is likely to need in order to make a decision whether to submit information to the Commission or not. In this phase links to existing Commission manuals and case law concerning violations for categories of regulated entities would be helpful for potential whistleblowers and for compliance professionals. In addition, the whistleblower will be interest how he can be protected from retaliation from his employer. This should cover measures that the Commission takes to protect the confidentiality of the identity of the whistleblower and of information from which the identity of the whistleblower can be inferred. It should also cover labor law protections and criminal law protections against actual retaliation by the employer. I include some bullet points

What protections are available to whistleblowers?

- 21F(h)(1) anti-retaliation labor law protections
- 1514A accounting-related labor law protections

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[4] See Swiss Bankers Association, comment letter dated August, 2, 2005, http://www.finma.ch/archiv/ebk/d/regulier/stellungnahmen/EBK_Entwurf_RS/050907_01.pdf, p. 6

[5] See Swiss Private Bankers Association, comment letter dated June, 16, 2005 http://www.finma.ch/archiv/ebk/d/regulier/stellungnahmen/EBK_Entwurf_RS/050907_09.pdf, p. 1-2

[6] *See* Carnero v. Boston Scientific, 433 F.3d 1, http://cases.justia.com/us-court-of-appeals/F3/433/1/546191/

- 21F(h)(2) obligation of the Commission to keep identity confidential (explain when the Commission or a district attorney has to inform employer)
- criminal sanctions against employers who sanction (interpret and explain)
- state law
- foreign laws of in jurisdictions with major financial centers (U.K., Switzerland, etc.)
- 21F awards for whistleblowers (links to past awards and case law on denial of awards)
- protections against being prosecuted and against sanctions by the Commission or by foreign countries in case the whistleblower has violated a law

How to contact the Commission?

Which information should be supplied on the initial submission?

What can the whistleblower expect as the next step?

- Can a whistleblower expect to be notified if the Commission takes an initial look at the information so that the whistleblower knows that a decision how to react to the information has not taken place yet?
- Can a whistleblower expect to be notified if the Commission decides not to take any action (enforcement, review of filings by the division of corporate finance, etc.)?
- Ca a whistleblower expect to be notified if the Commission decides to take some action? Probably not in principle, but in cases where the Commission wants to receive more information from the whistleblower or to share information with the whistleblower.

How is the interaction and information sharing going to work between the WB and the Commission and any district attorney that they Commission may share the information with?

- The release accompanying the proposed rule mentions that a confidentiality agreement may be required in some cases if it becomes necessary or advisable for the staff to share non-public information with a whistleblower either during the course of the investigation (for example, to obtain the whistleblower's assistance in interpreting documents).

Can a whistleblower refuse to provide testimony that would reveal his or her identity?

*1.4 The Commission should review the contents of the complaint forms*

The Commission should review whether certain fields on the current web complaint forms could be omitted for certain types of complaints or entities and whether additional fields are needed. This review should consider the criteria that will be used to assign types of complaints to specialized staff of the Commission for an initial manual review. It should also consider the possibility to link the complaint with existing information that allows to prioritize complaints by the importance of entities to the capital market (i.e. assets under management of public or private investment funds, assets under management of investment managers or broker-dealers, market capitalization of other issuers of securities, etc.). In addition, using unique identification numbers obtained through the registration of investment advisers, broker-dealers, registered investment companies (public investment funds), private investment funds (through reporting by private fund advisers) or other issuers, will allow to automatically populate name and address fields so that whistleblowers are not confused and bothered with information that they may not know or that is cumbersome for them to research. This will only work through links to manuals that explain how whistleblowers can search for those numbers in the Commission's existing disclosure systems (IARD, EDGAR, etc.).

In addition, the meaning of many fields is not straightforward and may lead to incorrect input in some fields. Every field should have a button next to it that links to instructions about the meaning of this field.

**2. Comments on specific questions contained in the SEC's release**

*Question 1: In other provisions of these Proposed Rules - e.g., Proposed Rule 21F-15 - we propose that whistleblowers not be paid awards based on monetary sanctions arising from their own misconduct, based on the notion that the statue is not intended to reward persons for blowing the whistle on their own misconduct. Consistent with this approach, should we define the term "whistleblower" to expressly state that it is an individual who provides information about potential violations of the securities laws "by another person"?*

This would be appropriate in cases where the "whistleblower" initiated the misconduct. This would be the case when the whistleblower acted alone without being asked to do so by other persons (e.g. control persons) who had the power to retaliate against the "whistleblower", so that the "whistleblower" would be the only person that pays the monetary sanctions and that would otherwise get a quasi discount on those sanctions through the whistleblower award.

However, there may be situations where persons are considered aiders and abettors of violations of securities law due to a lack of knowledge in U.S. securities law (especially foreign persons), due to their economic dependence on their employers and the threat of a loss of income (especially in jurisdictions with lower and limited unemployment benefits) or due to a lack of positive references or active bad-mouthing by their current employer to potential future employers. The Commission should be mindful that an employment relationship is characterized by a disparity in power between the employer and employee in jurisdictions with a fire at will labor law doctrine, unless the economic risk of losing the employment is mitigated by unemployment benefits that are equal to the full prior compensation and that are paid for a sufficient amount of time to find an equally compensated specialist or executive position.

The Commission may want to obtain information from persons that have some degree of culpability, but that may be able to alert the Commission and to substantially contribute to gaining enough evidence or to be a material witness. Those persons take an even higher risk when acting as whistleblowers since they may not be able to obtain immunity from sanctions or lower sanctions or a judge may overrule any deal that they have with the Commission or a district attorney.

*Question 2: Does Proposed Rule 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? Are there other circumstances not clearly included that should be in the rule?*

Yes. However, the Commission should consider specifying in subsection (3) that this only relates to a pre-existing legal duty or a pre-existing contractual duty that is based on a written contract between the person and the Commission or one of the other authorities described in paragraph (1) of section 240.21F-4(a). Employers should not be able to create a legal duty for their employees to supply information to the Commission through contracts between employers and employees. Unless employers effectively protect their employees from

retaliation, such contracts could be used as a sham to deprive employees of whistleblower awards while at the same time threatening retaliation against whistleblowers through a behavior of past retaliations.

*Question 3: Should the Commission exclude from the definition of "voluntarily" situations where the information was received from a whistleblower after he received a request, inquiry, or demand from a foreign regulatory authority, law enforcement organization or self-regulatory organization? Similarly, should the Commission exclude from the definition of "voluntarily" situations where the information was received from a whistleblower where the individual was under a pre-existing legal duty to report the information to a foreign regulatory authority, law enforcement organization or self-regulatory organization?*

No. The Commission should focus on violations of U.S. securities law. The Commission has no assurance that foreign regulatory authorities have the legal authority to, deem it necessary to or are willing to forward this information to the Commission so that it can take its own enforcement actions. It would be difficult for the Commission to apply such a definition in practice, because the Commission cannot be expected to have knowledge of foreign laws of all foreign countries that may include such duties to report the information to a foreign regulatory authority, law enforcement organization or self-regulatory organization.

*Question 4: Is it appropriate for the proposed rule to consider a request or inquiry directed to an employer to be directed at individual employees who possess the documents or other information that is within the scope of the request? Should the class of persons who are covered by this rule be narrowed or expanded? Will the carve-out that permits such an employee to become a whistleblower if the employer fails to disclose the information the employee provided in a timely manner promote compliance with the law and the effective operation of Section 21F?*

How does the Commission expect an employee to be able to determine, whether the employer has failed to disclose the information that the employee provided in a timely manner to the SEC or the relevant authorities? I think it is unlikely that employers will always inform their employees about the existence of a request, inquiry or demand from the Commission or the relevant authorities, about the scope of the internal investigation and to provide regular updates on the progress of the internal investigations and whether information that was provided by an employee has ultimately been forwarded to the Commission or the relevant authorities. In addition, the employer may be lying about having forwarded the information. As a consequence, the employee may not have the information to judge whether the employer has disclosed the information in a timely manner.

*Question 5: The standard described in Proposed Rule 21F-4(a)(1) would credit an individual with acting "voluntarily" in certain circumstances where the individual was aware of fraudulent conduct for an extended period of time, but chose not to come forward as a whistleblower until after he became aware of a governmental investigation or examination (such as by observing document requests being served on his employer or colleagues, but before he received an inquiry, request, or demand himself, assuming that he was not within the scope of an inquiry directed to his employer). Is this an appropriate result, and, if not, how should the proposed rule be modified to account for it?*

Persons with information that may assist in an ongoing investigation or examination that have not been asked by their employer may not be willing to risk retaliation by their employer without the possibility of receiving whistleblower awards that can compensate the negative

economic and psychological consequences of a possible retaliation by their employer. In my opinion, the Commission has a policy interest in encouraging material witnesses and persons with information that may help in the investigation to come forward and take the risks.

Fear of retaliation is a perfectly legitimate reason not to report information to the Commission even if a person suspects that the securities laws may have been violated.

*Question 6: Is the exclusion set forth in Proposed Rule 21F-4(a)(2) for information provided pursuant to a pre-existing legal or contractual duty to report violations appropriate? Should specific circumstances where there are pre-existing duties to report violations to investigating authorities be set forth in the rule, and if so, what are they? For example, should the rule preclude submissions from all Government employees?*

The Commission should clarify, whether a pre-existing contractual duty to report to report the securities violations (the wording of the rule should probably talk about violations of the federal securities laws that are subject to enforcement by the Commission) to the Commission in a contract between the person and an employer or an affiliate of the employer will preclude a submission from being considered to be voluntary. Otherwise pre-existing contractual obligations to report securities law violations to the Commission based on employment contracts that predate the Dodd-Frank Act could undermine the intent of receiving more tips if the employer at the same time has threatened to retaliate or has shown a past pattern of retaliations against persons that actually fulfill the contractual obligation and report to the Commission (i.e. a pre-existing sham contractual obligations with employers).

The rule should not preclude submissions from all U.S. or non-U.S. government employees. The fact that a foreign government employee has a legal or contractual duty to report violations does not automatically mean that there are sufficient protections to prevent retaliations by the foreign government. Imagine an example where a foreign customs official observes that his colleagues are taking bribes from representatives of companies in a country that is generally not so safe and where the protections of the law and of an independent justice system are not practically available. The official may fear retaliation by his colleagues or his employer, especially if his superior knows about the behavior or gets a portion of those bribes.

*Question 7: Is it appropriate to include knowledge that is not direct, first-hand knowledge, but is instead learned from others, as "independent knowledge," subject only to an exclusion for knowledge learned from publicly-available sources?*

Yes.

*Question 8: Is there a different or more specific definition of "analysis" that would better effectuate the purposes of Section 21F?*

None that I can think of at the moment.

*Question 9: Is it appropriate to exclude from the definition of "independent knowledge" or "independent analysis" information that is obtained through a communication that is protected by the attorney-client privilege? Are there other ways these rules should address privileged communications? For example, should other specific privileges be identified (spousal privilege, physician-patient privilege, clergy-congregant privilege, or others)? Should the exclusion apply broadly to information that is obtained through communications*

*that are subject to any common law evidentiary privileges recognized under the laws of any state?*

Yes. Information that is protected by clergy-congregant privilege should be excluded. Spouses should be able to obtain independent knowledge from their partner and to blow the whistle if their partner does not dare to or is unable to do so.

*Question 10: Is it appropriate to exclude from the definition of independent knowledge" or "independent analysis" information that is obtained through the performance of an engagement required under the securities laws by an independent public accountant, if that information relates to a violation by the engagement client or the client's directors, officers or other employees? Are there other ways that our rules should address the roles of accountants and auditors?*

Only if the existing laws and the binding professional standards would require the principal registered public accounting firm and its foreign affiliates to report violations of U.S. securities law to the Commission or to the U.S. Department of Justice. Otherwise, the Commission may never know about those violations.

*Question 11: Should the exclusion for "independent knowledge" or "independent analysis" go beyond attorneys and auditors, and include other professionals who may obtain information about potential securities violations in the course of their work for clients? If so, are there appropriate ways to limit the nature or extent of the exclusion so that any recognition of relationships of professional trust does not undermine the purposes of Section 21F?*

No.

*Question 12: Apart from persons who obtain information through privileged communications, and professionals who have access to client information, are there still other categories of persons who should not be considered for whistleblower awards based upon their professional duties or the manner in which they may acquire information about potential securities violations? If such exclusions are appropriate, what limits, if any, should be placed on them in order not to undermine the purposes of Section 21F? Is the exclusion for knowledge obtained through violations of criminal law appropriate?*

No other categories of persons should be excluded from whistleblower awards based upon their professional duties or the manner in which they may acquire information about potential securities violations.

*Question 13: Do the proposed exclusions for information obtained by a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity under an expectation that the person would cause the entity to take steps to respond to the violation, and for information otherwise obtained from or through an entity's legal, compliance, audit, or similar functions strike the proper balance? Will the carve-out for situations where the entity does not disclose the information within a reasonable time promote effective self-policing functions and compliance with the law without undermining the operation of Section 21F? Should a "reasonable time" be defined in the rule and, if so, what period should be specified (e.g., three months, six months, one year)? Does this provide sufficient incentives for people to continue to utilize internal compliance processes? Are there alternative or*

*additional provisions the Commission should consider that would promote effective self-policing and self-reporting while still being consistent with the goals and text of Section 21F?*

The exclusion of information obtained by a person with legal, compliance, internal audit, supervisory, or governance responsibilities for an entity under an expectation that the person would cause the entity to take steps to respond to the violation and for information otherwise obtained from or through an entity's legal, compliance, internal audit or similar functions strikes the proper balance. A carve-out for situations where the entity does not disclose the information within a reasonable time to the Commission is appropriate. However, it will be difficult for such persons to interpret the meaning of "reasonable time".

The final rule or at least the release accompanying the final rule should explain the meaning of supervisory or governance responsibilities. Does this include the superior or superiors or the superior that received information about a potential violation of securities law from their subordinates? In my opinion it should. In cases of trust between a subordinate and his superior, the first person a subordinate will go to with concerns about potential violations of securities laws may be his or her superior. You may want to prevent situations where a superior cashes in on information from a subordinate that he or he previously did not know. This should not be independent knowledge unless it has also been reported to higher up, to legal, internal audit or compliance and not been reported to the Commission within a reasonable amount of time.

*Question 14: Is the proposed exclusion for information obtained by a violation of federal or state criminal law appropriate? Should the exclusion extend to violations of the criminal laws of foreign countries? What would be the policy reasons for either extending the exclusion to violations of foreign criminal law or not? Are there any other types of criminal violations that should be included? If so, on what basis?*

Yes. The Exclusion should not be extended to violations of the criminal laws of foreign countries. Fortunately, the rule refers to *obtaining* the information by a means or in a manner that violates applicable federal or state criminal law. The rule should not refer to situations where only the *disclosure* of the information would violate foreign criminal law. Otherwise, some foreign jurisdictions, such as Switzerland, could use existing foreign blocker statutes, such as criminal provisions to disclose bank secrets or business secrets, acting for a foreign government or industrial espionage to prevent the U.S. from enforcing its own laws and from protecting its own capital markets and investors. The rule should clarify that federal criminal law means the federal criminal law of the U.S. and that state criminal law means the criminal law of a state of the U.S. in order to avoid any ambiguity that the laws of a foreign country that also has federal laws and state laws (e.g. Switzerland, Germany, Austria, Australia, etc.) are included in the rule.

*Question 15: How should our rules treat information that may be provided to us in violation of judicial or administrative orders such as protective orders in private litigation? Should we exclude from whistleblower awards persons who provide information in violation of such orders? What would be the policy reason for this proposed exclusion?*

No. Securities law primarily deals with administrative law (i.e. public law). Usually the policy interests of public law trump private law.

*Question 16: Is the provision that would credit individuals with providing original information to the Commission as of the date of their submission to another Governmental or regulatory authority, or to company legal, compliance, or audit personnel, appropriate? In*

*particular, does the provision regarding the providing of information to a company's legal, compliance, or audit personnel appropriately accommodate the internal compliance process?*

Yes. Whistleblowers who reports original information through an internal compliance process should be treated to have submitted the information to the Commission as of the date of their submission to the internal compliance process.

*Question 17: Is the 90-day deadline for submitting Forms TCR and WB-DEC to the Commission (after initially providing information about violations or potential violations to another authority or the employer's legal, compliance, or audit personnel) the appropriate timeframe? Should a longer time period apply in instances where a whistleblower believes that the company has or will proceed in bad faith? Would a 90-day deadline for submitting the TCR and WB-DEC also be appropriate in circumstances where an individual provides information to an SEC staff member? Would a shorter time frame be appropriate? Should there be different time frames for disclosures to other authorities and disclosures to an. employer's legal, compliance or audit personnel?*

No. Whistleblowers should not loose their eligibility for a reward simply because they do not file a whistleblower reward request form within 90 days after having made an internal submission to an internal compliance program. Since Commission actions or related actions may take years until a monetary sanction is obtained, whistleblowers should also have a deadline of years until which they can file claims. Whistleblowers should not use eligibility for awards simply because they did not respect some deadline. A deadline that starts after the receipt of monetary sanctions is appropriate. However, the Commission should have an obligation to contact whistleblowers that supplied information to the Commission and that may be eligible for an award after the monetary sanctions have been obtained. The Commission should have the primary duty to act to initiate the award. The whistleblower should only need to act if the Commission fails to perform its duty to act to contact the whistleblower concerning the award.

*Question 18: Should the Commission consider other ways to promote continued robust corporate compliance processes consistent with the requirements of Section 21F? If so, what alternative requirements should be adopted? Should the Commission consider a rule that, in some fashion, would require whistleblowers to utilize employer-sponsored complaint and reporting procedures? What would be the appropriate contours of such a rule, and how could it be implemented without undermining the purposes of Section 21F? Are there other incentives or processes the Commission could adopt that would promote the purposes of Section 21F while still preserving a critical role for corporate self-policing and self-reporting?*

No. The Commission should neither require whistleblowers to first utilize employer-sponsored complaint reporting procedures to be eligible for a reward, nor require such behavior to receive a higher percentage reward. Due to a lack of information whistleblowers face uncertainty whether their employer will retaliate against them or will actually disclose violations of securities laws to the Commission. Whistleblowers have a right to fear retaliation. Whistleblowers should not loose the ability to obtain awards or obtain lower awards just because they fear that their employers will retaliate or because they fear that their employers will not disclose violations of securities laws to the Commission.

However, organizations that have effective compliance programs should not receive higher sanctions from the Commission or from the U.S. Department of Justice (DoJ) simply because the Commission or the DoJ received the information from a whistleblower and the

organization either did not receive the information or was still in the process of performing an internal investigation based on the information in good faith that could not have been finished and disclosed to the Commission or the DoJ in a reasonable amount of time.

Section 301 of the Sarbanes-Oxley Act only requires issuers that have securities listed on a national securities exchange in the U.S. to have an internal complaint procedure. In addition, such internal complaint procedures are only required for complaints regarding accounting, internal accounting controls or auditing matters and concerns regarding questionable accounting and auditing matters. All other violations of securities laws that are administered by the Commission are not necessarily covered. In addition, the labor law protections for employees also only cover narrow violations mail fraud, wire fraud, bank fraud, securities fraud or any rule or regulation of the Commission or any provision of federal law relating to fraud against shareholders.

All other issuers that use the public capital market of the U.S. and that have securities registered with the Commission because their equity securities are traded over-the-counter in the U.S. or because their securities have been offered to the public in the U.S. are not required to have internal complaint procedures.

To my knowledge, private companies, private funds, registered investment companies, their management companies, investment advisers and broker-dealers are not required to have internal complaint procedures.

If Congress had the opinion that compliance procedures are working effectively and are the solution that ensures the enforcement of the securities laws and that prevents further violations, it would have required other regulated organizations to have internal complaint procedures and would have extended the scope of those procedures to cover all violations of securities law. In addition, it would have explicitly required that whistleblowers use internal complaint procedures before reporting information to the SEC. It is a more reasonable interpretation that Congress intended to provide an additional solution to increase enforcement and to deter further violations.

*Question 19: Would the proposed rules frustrate internal compliance structures and systems that many companies have established in response to Section 10A(m) of the Exchange Act, as added by Section 301 of the Sarbanes-Oxley Act of 2002, and related exchange listing standards? If so, consistent with Section 21F, how can the potential negative impact on compliance programs be minimized?*

No. There is hardly any potential negative impact on internal compliance programs, because the Commission can forward information that it received from a whistleblower to an employer so that the employer can still perform an internal investigation if the Commission decides that it is in the interest of enforcement. If the Commission believes that employers are willing and have the competence to perform a thorough investigation and to voluntarily report this information to the Commission although this could mean hefty fines for the employer and a loss of reputation if the Commission discloses a complaint against the employer on its website, then the Commission can pass on the information that it received from the whistleblower to the employer.

The risk that the Commission could receive unfounded complaints and that employers could incur burdens to respond to Commission requests and investigations that are based on unfounded complaints is not new. As such this argument from employers is surprising.

Whistleblowers already had the opportunity to make anonymous complaints to the SEC long before the Dodd-Frank Act and the SEC had the ability to start investigations at employers based on those tips. Unless the communications of the staff of the Commission during the investigation were likely to allow the employer to identify the identity of an anonymous whistleblower, the employer has not been able to retaliate against employees who make unfounded complaints to the Commission in the past. As the Commission has pointed out in its estimates for purposes of the Paperwork Reduction Act, it gets a lot of tips, but only a small portion of those tips have resulted in monetary sanctions that would have been eligible for awards to whistleblowers. I think most whistleblowers can judge whether a potential violation could result in monetary sanctions that reach such a high amount as one million dollars.

It seems more likely that the requests by employers and law firms retained by them to the Commission to require whistleblowers to use internal complaint procedures first are motivated by other reasons. Employers may want to control which information flows to the Commission so that they retain the ability to withhold information about violations of laws from the Commission in order to avoid monetary sanctions and a loss of reputation if the Commission discloses a complaint against the employer on its website. The employer may even view the avoidance of monetary sanctions to be in the best interest of shareholders because those monetary sanctions are born by shareholders in the form of reduced profits. Employers may also know or find out that conduct has been going on for a while that management at certain levels knew about it and that the compliance program may be ineffective and that there is a high risk of high monetary sanctions.

The Commission should not base its rules on mere *claims* by employers that their internal complaint processes are all effective and that they would be undermined. Who guarantees that internal complaint and internal investigation processes are staffed with people that have the necessary independence and competence to truly assess whether a violation of the securities law occurred? Who guarantees that employers will be an effective good faith filter that filters outs complaints without merit and really save work for the Commission to focus on the complaints that are important and that have merit? The Commission should look at facts and analyze its own enforcement actions in how many cases there was voluntary reporting by employers and whether there were cases that were based on other sources despite the claim of an effective internal compliance program in those cases. The Commission should also review academic studies of such cases and of retaliations by employers against whistleblowers.

*Question 20: Is the proposed standard for when original information voluntarily provided by a whistleblower "led to" successful enforcement action appropriate?*

No. It should be more detailed.

*Question 21: In cases where the original information provided by the whistleblower caused the staff to begin looking at conduct for the first time, should the standard also require that the whistleblower's information "significantly contributed" to a successful enforcement action?*
*a. If not, what standards should be used in the evaluation?*
*b. If yes, should the proposed rule define with greater specificity when information "significantly contributed" to enforcement action? In what way should the phrase be defined?*

That depends on how the word significantly will be interpreted. An interpretation that it merely means more than insignificantly would be reasonable. The Commission may want to

prevent cases where somebody hardly has any information and more or less makes wild guesses that there may be misconduct at an organization with the hope of getting a reward. On the other hand the Commission should also give a reward in cases where the Commission would not have opened an investigation, reopened an investigation or would not have scheduled an examination of that entity that would have otherwise discovered the misconduct on its own through the review of samples of transactions that were picked by the Commission. At least minimum awards should also be given to whistleblowers that have some, but not detailed information about potential violations, but where the Commission needs to find evidence on its own without getting a detailed tip which specific individual transactions and disclosures to look at (i.e. not other significant contributions to the enforcement action other than generating the decision to open/reopen the investigation or examination).

*Question 22: Is the proposal in Paragraph (c)(2), which would consider that a whistleblower's information "led to" successful enforcement even in cases where the whistleblower gave the Commission original information about conduct that was already under investigation, appropriate? Should the Commission's evaluation turn on whether the whistleblower's information would not otherwise have been obtained and was essential to the success of the action? If not, what other standard(s) should apply?*

Whistleblowers should also be eligible for an award even in cases where the conduct was already under investigation provided that they contribute significantly to the successful enforcement. However, the rule should not refer to information that would not otherwise have been obtained. It may be possible that the Commission would have obtained a document or verbal information from a person, but that it would not have been able to judge the significance of this information for purposes of enforcement or would not have obtained further information to refute this information, because the Commission lacked the technical knowledge and experience in the field to judge, whether the information would be perceived to be material by investors in this asset class, or because the Commission lacked the inside knowledge to judge whether the information was incorrect or a lie. As a consequence, it is critical that the staff of the Commission has the legal authority to share documents and verbal statements made by other persons with the whistleblower in order to obtain the whistleblower's opinion whether they misstate the facts (i.e. lies and fake documents).

*Question 23: The Commission requests comment on the proposed definition of the word "action." Are there other ways to define an "action" that are consistent with the text of Section 21F and that will better effectuate the purposes of the statute?*

I am not an expert on SEC actions. However, whistleblowers should also be eligible for an award when the Commission decides to pursue separate actions against an organization and against natural persons that are directors, officers, employees or major shareholders of that organization or that are outside aiders and abettors rather than consolidating it into a single action with several defendants. All monetary sanctions of such related Commission actions should be added towards the one million dollar limit as long as they are related and as long as the same whistleblower significantly contributed to their success. Whistleblowers should not be at a disadvantage if the Commission decides for whatever reason to split or to consolidate related actions.

*Question 24: Is the proposed definition of "appropriate regulatory agency" appropriate? Are there other definitions that that should be adopted instead?*

Yes. The definition seems appropriate.

*Question 25: Is the proposed definition of "self-regulatory organization" appropriate? Are there other definitions that that should be adopted instead?*

Yes. The definition seems appropriate.

*Question 26: Is the provision stating that the percentage amount of an award in a Commission action may differ from the percentage awarded in a related action appropriate?*

Yes. It is appropriate that the percentage amount for an award in a Commission action may be different from the percentage amount for an award in a related action.

*Question 27: Should the Commission identify, by rule, additional criteria that it will consider in determining the amount of an award? If so, what criteria should be included? Should we include as a criterion the consideration of whether, and the extent to which, a whistleblower reported the potential violation through effective internal whistleblower, legal or compliance procedures before reporting the violation to the Commission? Should we include any of the other considerations described above?*

Yes. The Commission should not only consider the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action. The Commission should consider the degree of assistance in conjunction with the risks associated with providing assistance and the actual ability to provide assistance.

A whistleblower may be unable to provide certain information in the Commission action or related action due to foreign laws that make the disclosure of such information or the acting for a foreign government criminal offences (banking secrecy, business secrecy, acting for a foreign government, economic espionage in the Swiss criminal code). The whistleblower risks criminal prosecution in cases where the Commission is obligated to share this information with the employer or his employees and where the Commission needs to disclose the identity of the whistleblower or where there is a risk that the identity of the whistleblower may be inferred by the employer or by foreign law enforcement personnel. Decisions by U.S. courts of appeals have reinforced the principle that the interest of the U.S. to enforce its own laws are sufficient to compel others to break foreign laws, such as banking secrecy.[7]

The Commission may also consider the magnitude of the economic risk that the whistleblower takes. Whistleblowers with higher compensation in management or specialist roles with a narrower labor market risk the loss of higher amounts of compensation and may be unemployed for a longer period of time. There is no assurance that whistleblowers are covered by anti-retalation statues (e.g. foreign nationals or nationals employed by foreign employers) or will prevail in anti-retaliation lawsuits to recover back-pay. The whole idea of monetary awards to whistleblowers is to motivate them to take the risk of facing negative economic and emotional consequences that may be associated with blowing the whistle.

The Commission should not include the extent to which a whistleblower reported the potential violation through effective internal whistleblower, legal or compliance procedures before

[7] See In Re Grand Jury Proceedings v. The Bank of Nova Scotia, 740 F.2d 817, 826-29 (11th Cir. 1984) (rejecting the argument that a foreign bank could properly invoke foreign secrecy laws to resist disclosure of documents to a grand jury); United States v. Vetco, Inc., 691 F.2d 1281, 1286-91 (9th Cir. 1981) (upholding the validity of an IRS summons to a Swiss bank over objections that the disclosure of responsive documents would violate Swiss law).

reporting the violation to the Commission as a criterion for determining the percentage amount for the award. In addition, the Commission should also not "consider" higher percentage awards for whistleblowers who first report violations through their compliance programs even if this is not an official "criterion".

It is unrealistic to apply such a requirement in practice and would create a high degree of legal uncertainty. How and based on what information are a potential whistleblower or the Commission supposed to be able to judge, whether internal whistleblower, legal or compliance procedures exist and whether they are "effective"? What factors need to be considered in the determination, whether internal procedures are "effective"?

- "Effective" to guarantee a thorough internal investigation by competent and independent people?
- "Effective" to guarantee that there will be no immediate retaliation or later retaliation against the whistleblower when time has passed and it is harder to prove what the real reason for the termination of employment was?
- "Effective" to guarantee that the organization will disclose all of the results of the internal investigation to the Commission even if it could mean significant sanctions for the organization and for its major shareholders, officers, directors or employees? I bet that some directors and officers will consider it in the best interest of their shareholders to withhold information from the Commission if they have learned of violations from an internal investigation that may result in significant monetary sanctions against the organization or whose publication by the Commission may damage the public reputation and business of the organization, because the shareholders would pay for the consequences in the form of reduced profits.

The Commission should consider that some foreign countries, such as Switzerland also have a fire at will doctrine in their labor law. In such an environment, the employer does not even need to find a legitimate reason for terminating an employment contract. A ban on terminating an employee that has provided information to the Commission would need to cover a long time and may be viewed to be an excessive restriction by employers. An important policy objective of whistleblower awards is to serve as a compensation for the economic and emotional loss that a whistleblower risks. Even if a whistleblower's employment is not terminated, there may be other forms of retaliation or the relationship and trust between the whistleblower and the employer and certain of its employees may be so strained that the whistleblower would want to search for a new job, which may take considerable time during which the whistleblower needs the money from the award.

*Question 28: Should we include the role and culpability of the whistleblower in the unlawful conduct as an express criterion that would result in reducing the amount of an award within the statutorily-required range? Should culpable whistleblowers be excluded from eligibility for awards? Would such an exclusion be consistent with the purposes of Section 21F?*

Often persons who are closely involved with illegal actions have most knowledge about those illegal actions and can provide the most valuable information to the Commission. The Commission will have to balance the risks that such persons take when coming forward and disclosing information to the Commission with allowing such people to keep too much of the fruits from illegal actions.

Please also refer to my answer to question 1.

*Question 29: Because representation of whistleblowers constitutes practice before the Commission by an attorney, should the Commission consider adopting rules governing conduct by attorneys engaged in this type of practice? In some contexts, courts have disallowed excessive fee requests to attorneys for whistleblowers. Should we adopt a rule regarding fees in the representation of whistleblower clients? Would such a rule encourage or discourage whistleblower submissions?*

Rules defining excessive fees for attorneys would provide more legal certainty than leaving this to the courts. Rules are easier to access and research for non-lawyers than case law. In addition, it may take a long time until sufficient case law is available in order to make a reliable determination of which fees are excessive under which circumstances.

*Question 30: We request comment on the manner of submission requirements set forth in Proposed Rule 21F-8(b). Are these requirements appropriate? Should there be different or additional requirements to supplement the submission of information as set forth in Proposed Rule 21F-9?*

I think that the requirements in Proposed Rule 21F-8(b) are appropriate.

*Question 31: We also request comment on the ineligibility criteria set forth in Proposed Rule 21F-8(c). Are there other statuses or activities that should render an individual ineligible for a whistleblower award?*

Please refer to my answer to question 6 relating to employees of non-U.S. governments.

*Question 32: Although the Commission is proposing alternative methods of submission, we expect that electronic submissions would dramatically reduce our administrative costs, enhance our ability to evaluate tips (generally and using automated tools), and improve our efficiency in processing whistleblower submissions. Accordingly, we solicit comment on whether it would be appropriate to eliminate the fax and mail option and require that all submissions be made electronically. Would the elimination of submissions by fax and mail create an undue burden for some potential whistleblowers?*

While I strongly endorse the option to make electronic submissions, I believe that the Commission should not eliminate the option to make fax or mail submissions. I believe older persons may be less familiar and comfortable with computers and that not all persons have the ability to timely access a computer with an internet connection outside of their place of work where they do not fear that their employer may block or monitor access to the Commission's website.

*Question 33: Is there other information that the Commission should elicit from whistleblowers on Proposed Forms TCR and WB-DEC? Are there categories of information included on these forms that are unnecessary, or should be modified?*

The current and proposed form TCR is too long and the meaning of many of its fields is not clear without the instructions to the form and even after reading the instructions.

The longer a form is, the more unclear and confusing the meaning of the fields of the form is and the longer it takes to fill it out, the greater is the chance that whistleblowers will decide to abort filling in the form and to not provide information to the Commission.

The Commission should provide online instructions for the meaning of various options for the content of fields on web form via buttons right next to each field.

The Commission should review which fields are really necessary at this first stage and which information can be obtained later by the Commission on its own or through contacting whistleblowers that have left some means how to contact them. The necessity of fields could be driven by the initial automated or manual information that the Commission needs in order to perform an initial screening of the tips to determine the need for further action by the Commission. Some fields could also be necessary for software to decide which person in the Commission should have an initial manual look at the information.

The Commission should provide an online help on the web form for tips that explains to whistleblowers how they can check whether an investment fund, a private fund, a security, a broker-dealer, an investment adviser, etc. is registered with the Commission and how to obtain a number that uniquely identifies this entity or security. A whistleblower that provides such a uniquely identifying number should be informed that he or she does not need to fill out more fields about the entity or security that the Commission can obtain on its own records using this identifying number. If the number is available and the whistleblower enters it on form TCR, the Commission can get any details from the filing and does not need to bother the whistleblower with it.

Certain fields may only be necessary for certain types of misconduct or for misconduct by certain types of entities or persons (e.g. management companies or investment advisers of investment funds vs. other issuers, registered investment funds vs. private investment funds, public other issuers vs. private other issuers, investment advisers for conduct not related to investment funds, broker-dealers, etc.).

The Commission should also consider whether information on the securities is necessary for all types of misconduct. Fields should not be shown in order not to confuse and discourage whistleblowers unless those fields are needed.

Does the asset class that an investment fund invests in matter for initial screening by the Commission?

Does it matter certain types of U.S. investors invest in interests in an investment fund or in securities of other issuers?

Are the assets under management or the market capitalization of the securities that the information relates to important for the prioritization of tips? Can and will the Commission be be able to automatically retrieve and link the latest available assets under management that are advised by an investment advisor, the assets in customer accounts of broker-dealers, the assets under management of a public or private investment fund or the market capitalization of other issuers through identifying numbers for the investment advisors, broker-dealers, registered investment companies, private investment funds, securities or identification numbers of the other issuers? This would allow the staff to determine if a tip could have a big impact and to look at the tip more closely.

Does the type of securities really matter for all sorts of conduct and for all sorts of entities or persons? What amount of detail is needed about the type? Just whether they are equity securities or debt securities? Why does it matter whether conducts relates to an issuer that uses American Depositary Receipts? Isn’t it more important whether an issuer is a domestic

issuer or a foreign private issuer and couldn't the Commission determine this through the identifying number of the securities or of the issuer?

*Question 34: Is the requirement that an attorney for an anonymous whistleblower certify that the attorney has verified the whistleblower's identity and eligibility for an award appropriate? Is there an alternative process the Commission should consider that would accomplish its goal of ensuring that it is communicating with a legitimate whistleblower?*

Retaining an attorney is expensive. The time that an attorney needs to spend could be reduced by requiring the whistleblower to disclose his identity and to make certain written and signed representations to the Commission or to be available to answer questions from the Commission at some point in time during the process for claiming an award so that the Commission rather than the attorney can verify the identity and eligibility for an award of the whistleblower.

*Question 35: Is the Commission's proposed process for allowing whistleblowers 120 days to perfect their status in cases where the whistleblower provided original information to the Commission in writing after the date of enactment of Dodd-Frank but before adoption of the proposed rules reasonable? Should the period be made shorter (e.g., 30 or 60 days) or longer (e.g., 180 days)?*

The Commission should consider the need for and the benefits of having such short time periods. What matters is the provision of information that contributes significantly to the successful enforcement of the securities laws. It should not matter when some additional form has been filed. Whistleblowers should not be obligated to file a form to claim an award within a certain deadline. Instead, the Commission should be obligated to review whether a whistleblower that provided information to the Commission is eligible for an award right after the receipt of monetary sanctions relating to covered actions and the Commission should be obligated to contact the whistleblower and to help him with the paperwork to receive the award.

*Question 36: Are there any ways we can streamline and make the required procedures more user-friendly?*

The Commission should promulgate rules that require the staff of the Commission that interacts with whistleblowers and the whistleblowing website of the Commission to remind whistleblowers that they may be eligible for an award when they submit information and require them to explain what a whistleblower needs to do. Unless a whistleblower declines to want an award, he should be noted for such an award on the same form where he provides the information. This should be done fully electronically without burdening whistleblowers with having to file additional paper forms, to manually sign them and to put them in the mail.

The staff of the Commission should have a legal obligation to electronically link whistleblower information with at least the Commission actions and with the successful receipt of monetary sanctions in Commission actions. The Commission staff should be obligated to note whether the whistleblower's information significantly contributed to the success of the enforcement action in the file for the covered action that is linked to the original submission of information by the whistleblower. In addition, the staff of the Commission should have a legal obligation to contact whistleblowers that have said that they would like an award when they provided the information and to liaise internally to collect

information that can be obtained internally. In short, whistleblowers should not be burdened to file additional forms after the submission of information, to monitor deadlines or loose their award, to monitor the Commission website every day whether a covered action has been submitted and then again to comply with a deadline to file another form to apply for an award, etc. The process should not be designed to save work for the Commission and to burden the whistleblower to do the work and to coordinate the flow of information between separate divisions and offices of the Commission. The process should make it as easy as possible and as user-friendly as possible for the whistleblower in order to encourage whistleblower to provide information and to maximize the chances of whistleblowers to receive awards. After all whistleblowers are the ones who risk economic and emotional sanctions by their employers and who should be motivated and rewarded for taking those risks.

*Question 37: We request comment on the significance of the tension between the interests of whistleblowers and victims in this circumstance, the likelihood that this situation would arise, and whether there is anything that the Commission can or should do to mitigate this tension.*

I think such a tension between paying an award to a whistleblower and compensating victims is unlikely to occur since the balance of the fund as of September 30, 2010 already exceeded 451 million dollars.[8] While the statute would require to deposit the full amount of monetary sanctions from the action into the fund if its balance is not sufficient to pay the whistleblower, it does not require an immediate payment of the award to the whistleblower. In such cases, the Commission could determine whether the whistleblower's financial situation requires the full award to be paid promptly or whether payment of the award or of parts of the award could be postponed until victims have been compensated. If the Commission thinks that this would undermine the spirit of the statute, it could still ask the whistleblower whether he voluntarily wants to wait for his award or for a part of his award until so that victims can be compensated first.

*Question 38: For example, in determining whether the $1,000,000 threshold for a covered action has been met, should we exclude monetary sanctions ordered against an entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated? Should we exclude those amounts from monetary sanctions collected for purposes of making payments to whistleblowers?*

A whistleblower should not be eligible for an award that is based on conduct that the whistleblower directed, planned or initiated in the first place. However, whistleblowers that were directed by others to engage in the conduct or that were mere aiders and abettors should be eligible for awards if they substantially contribute to the success of a Commission action or a related action. Superiors and major shareholders have the power to retaliate against employees who refuse to engage in certain conduct. As a consequence, employees may engage in conduct out of fear of retaliation by their employers. In addition, employees, especially foreign employees may not have sufficient knowledge of U.S. securities law in order to know that they are violating the law.

*Question 39: Is the proposed exclusion of monetary sanctions ordered against an entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated appropriate? Is the proposed exclusion sufficient to permit the Commission to deny awards in cases where the payment of an award would be against public policy? Should we instead exclude any wrongdoer from being eligible to receive an award categorically, or in*

[8] U.S. Securities and Exchange Commission, Annual Report on Whistleblower Program, October 29, 2010, http://www.sec.gov/news/studies/2010/whistleblower_report_to_congress.pdf, p. 6

*particular circumstances? Should an individual's level of culpability be considered as a factor in determining whether the person is eligible for an award? Are there other ways in which we should limit the payment of awards to culpable individuals?*

The proposed exclusion of monetary sanctions ordered against an entity whose liability is based substantially on conduct that the whistleblower directed, planned or initiated is appropriate. An individual's level of culpability should be considered as a factor in determining whether the person is eligible for an award. It should also be considered as a factor in determining the percentage amount of the award.

*Question 40: Should these provisions be narrowed and, if so, why and in what manner? Would these provisions encourage whistleblowers to provide information to the Commission regarding potential securities law violations? Are there additional measures that the Commission could consider to encourage and facilitate whistleblowers' communications with Commission staff?*

These provisions should not be narrowed. The Commission should also ban persons to notify or to threaten to notify foreign law enforcement agencies or foreign prosecutors of potential violations of foreign laws that would sanction the disclosure of information to the Commission.

*Question 41: Should the Commission consider rules to address other potential issues that may arise from state bar professional responsibility rules when the Commission staff receives information about potential securities law violations from whistleblowers? For example, are there circumstances where the staff's receipt of information from whistleblowers potentially conflicts with the state bar professional responsibility rules that are modeled on ABA Model Rules of Professional Responsibility 4.4(a) and 8.4(a)? If so, should the Commission consider promulgating rules to address these potential conflicts?*

I am not knowledgeable in state bar professional responsibility rules, so I do not feel qualified to comment on this matter.

*Question 42: Should the anti-retaliation protections set forth in Section 21F(h)(1) of the Exchange Act be applied broadly to any person who provides information to the Commission concerning a potential violation of the securities laws, or should they be limited by the various procedural or substantive prerequisites to consideration for a whistleblower award? Should the application of the anti-retaliation provisions be limited or broadened in any other ways? For example, should the Commission consider promulgating a rule to exclude frivolous or bad faith whistleblower claims from the protections afforded by the anti-retaliation provisions? If so, what rules should be adopted to address these problems?*

This is also a question how the anti-retaliation protections in section 21F(h)(1) of the Exchange Act and the congressional intent behind those protections should be interpreted in the context of other parts of section 21F and in the context of the legislative history of section 21F. The Congressional purpose underlying Section 21F of the Exchange Act is to encourage whistleblowers to report potential violations of the securities laws by providing financial incentives, prohibiting employment-related retaliation, and providing various confidentiality guarantees.

In my opinion, the anti-retaliation protections in section 21F(h) of the Exchange Act should be applied broadly to any person who provides information to the Commission concerning a

potential violation of the securities laws. They should not be limited by the various procedural or substantive prerequisites to consideration for a whistleblower award.

The Commission should promulgate a rule that interprets section 21F(h)(1) of the Exchange Act that covers each of the subsections (A)(i), (A)(ii) and A(iii) separately. Especially the meaning of subsection (A)(iii) is not clear. The Commission could provide more legal certainty through an interpretation in a rule. The interpretation should clarify whether the statute has extraterritorial application to U.S. and non-U.S. employees of U.S. and non-U.S. employers that have their principal place of work in a foreign country. If the Commission does not think that the statute was intended to have extraterritorial application, the Commission should consider what alternative measures it can take to encourage foreign whistleblowers and to make those whistleblowers whole, including higher percentage amount awards to foreign whistleblowers that do not enjoy anti-retaliation protections, rules and liaising with Congress to change the statute.

The Commission should not promulgate a rule that interpretes the anti-retaliation protections in section 21F(h)(1) to exclude frivolous or bad faith whistleblower claims. I think that the U.S. district courts are in the best position to determine whether whistleblower claims are frivolous or were made in bad faith based on the facts and circumstances of the case.

In addition, the Commission should issue rules that clarify the legal obligations under section 21F(h)(2) of the Exchange Act and to install internal controls that ensure that all staff that handle information from whistleblowers to protect the identity of whistleblowers and to protect information, that could reasonably be expected to reveal the identity of a whistleblower from falling into the hands of the employer of the whistleblower or its representatives in order to protect the whistleblower from retaliation from his or her employer.

I appreciate the opportunity to comment on these matters and hope that my comments are useful in the rulemaking process. Please do not hesitate to contact me by e-mail if you have any follow-up questions.

Respectfully submitted,

Georg Merkl