December 17, 2010

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Securities and Exchange Commission

100 F Street, NE

Washington, DC 20549-1090

RE: Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934

Dear Commission Members:

The Auditing Standards Committee of the Auditing Section of the American Accounting Association is pleased to provide comments on the *Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*. We very much appreciate the opportunity to provide input.

The views expressed in this letter and attachments are those of the members of the Auditing Standards Committee and do not reflect an official position of the American Accounting Association. In addition, the comments reflect the consensus view of the Committee, not necessarily the views of every individual member.

We hope that our attached comments and suggestions are helpful and will assist in finalizing the proposed guidance. If the Commission has any questions about our input, please feel free to contact our committee chair for additional follow-up.

Respectfully submitted,

Eileen Taylor, North Carolina State University

James Bierstaker, Villanova University, Past Chair, Auditing Standards Committee

Joseph Brazel, North Carolina State University, Chair, Auditing Standards Committee

General Comments

We commend the efforts of the SEC to establish a bounty program for whistleblowers. Recent research (ACFE 2010) suggests that employees are important for discovering fraud and illegal acts at companies, but monetary incentives are needed to balance the risks of coming forward (Brickey 2003; Zinglaes 2004; Bowen et al. 2009; Dyck et al. 2010). In the following paragraphs, we highlight and summarize issues that we believe to be most important to successful implementation of the program. Specifically, several issues may *reduce* the likelihood that whistleblowers will report illegal acts.

1. Requirement for successful enforcement: We find that the requirement for successful enforcement may lower the likelihood that individuals will provide information to the Commission. The successful enforcement criterion requires the whistleblower to risk much for *a chance* at an award. Successful prosecution is beyond the whistleblower's control. The whistleblower may report, in good faith, an illegal act to the Commission, but for reasons beyond his control (e.g. budgetary constraints, political influence, successful defense due to extraordinary financial means, or death of the defendant before adjudication or while on appeal); the case does not result in a fine or judgment, leaving the whistleblower with no award. For example, the vast majority of OSHA cases are not resolved in favor of the whistleblower, sometimes for reasons other than the validity of the whistleblowers claims or lack of financial misconduct (Bowen et al. 2009; New York Times 2009).
2. Requirement for the fine or judgment to be a minimum of $1,000,000. We see little support for the $1,000,000 minimum. If a case was settled for just under the minimum, the whistleblower would receive nothing.
3. Cases brought about based on whistleblower reports may take an extended time to litigate, leaving the whistleblower uncertain as to his award and the timing of such award. We suggest the Commission consider providing a lesser sum to whistleblowers upon receipt of critical information that results in an investigation, as long as the information is provided in good faith. Such action would be similar to providing small amounts for tips leading to solving crimes, but not requiring a particular outcome to make the award. Larger amounts based on final judgments can be paid after the disposition of the case(s).

   The above criteria for successful prosecution, the minimum fine, and the wait to receive an award require whistleblowers to make decisions based on their judgment of the likely outcome of a case, rather than on whether they know of and have evidence of securities or other illegal violations.

4. There is uncertainty associated with the current 10-30% range (which differs from the 15-30% range related to False Claims Act Qui Tam lawsuits). The Commission should consider clarification of determinants of the actual awards. For instance, the Commission may consider the absolute amount of the award, rather than the relative (percentage) amount, as 10% of a large fine may equate to 30% of a small fine.
5. Much discussion centers on the effectiveness of internal compliance systems and the use of those systems as a first resort. The literature demonstrates that the Sarbanes Oxley Act whistleblower provision has not necessarily resulted in better detection of illegal acts, nor has it adequately protected whistleblowers from retaliation (Earle and Madek 2007). While effective compliance systems do exist, if all systems were effective, there would be little need for this rule or this award program. Further, there are cases of securities violations for which internal control systems are not designed to prevent, detect, or correct and for which companies cannot take sufficient action (e.g., insider trading). Forcing whistleblowers to use a specific private system administered by the organization suspected of the wrongdoing would severely limit the effectiveness of the program. We believe that, in only rare cases, should the Commission deny a whistleblower an award for not first reporting through a company-sponsored compliance system. Requiring reporting through a private hotline may at the extreme, place the whistleblower in harm's way,

allow the perpetrator time to destroy evidence, or may simply create ambiguity, as in cases where two or more companies are involved, raising questions about which system to use.

Overall, the Commission should be cognizant that additional exclusions and risks will only serve to reduce the effectiveness of the bounty program. While we would wish for all those who observe illegal activities to report them, the costs to whistleblowers of reporting are severe and well documented. Whistleblower awards have been successful in other areas, and they have the potential to be successful here, perhaps even changing corporate culture and creating an environment of trust.

Responses to Questions

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"?

While it would set a bad precedent to reward individuals who report on themselves, limiting the definition of a whistleblower to someone who reports on others' wrongdoing may restrict or prevent individuals who are tangentially involved from reporting wrongdoing. There may be cases where individuals believe they have participated in an event because they did not initially report their observance of the wrongdoing. Further, fraud schemes frequently involve more than one individual (i.e., collusion) and some participants are more active than others are in the scheme. By limiting whistleblowing to those outside of a fraud scheme, the very individuals with the most knowledge and evidence will be reluctant to come forward and the result could be fraud schemes that go on for longer than they otherwise might. One example would be Betty Vinson in the WorldCom fraud. She and other accountants cooperated initially under duress and appeared to have continued to cooperate under severe pressure from superiors. Had they been able to report and recover compensation to mitigate their job loss, they may have blown the whistle early on and prevented much of the subsequent losses (Cooper 2008).

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?

We concur that to be voluntary, whistleblowers must come forward on their own and not as a part of regular job duties or contractual obligations.

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?

We agree with those exclusions.

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?

Whistleblowers should be able to earn rewards after they are aware of an SEC investigation, provided that they are still able to contribute *significant new information* that is material to that investigation. Whistleblowers should not be discouraged from coming forward simply because an investigation is underway.

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?

In order to qualify, an individual must come forward with the information on a timely basis. Whistleblowers should not be rewarded for coming forward only when they know that the wrongdoing has already been exposed (or will likely be exposed). However, if they provide significant information in good faith, they should be considered for an award (perhaps a flat sum), even if the case is not successfully prosecuted. If there are too many exclusions individuals may be reluctant to risk coming forward. Recent research (Dyck et al. 2010) suggests that employees have low costs to accessing information but monetary incentives are needed to overcome the risks of coming forward.

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?

Government employees should be excluded only if they have specific job responsibilities to investigate and report that information (i.e., SEC, DOJ).

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?

We agree that this is appropriate.

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

Analysis would include new insights gained that would not otherwise be clear from publicly available sources. For example, Harry Markopolos conducted detailed financial analytics to gain new insights into the viability of Madoff's stated trading strategy (Markopolos 2010).

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?

We see potential issues with exclusion of certain other specific privileges. With respect to spousal privilege, we do not see the need for limitations or exclusions. However, with respect to physician-patient privilege, in which there is a stated expectation of privacy, we would support exclusion. For example, physicians should not be able to benefit from confidential incriminating evidence provided to them from perpetrators in a physician-patient situation. Such incentives (i.e., large monetary payoffs) could improperly motivate physicians to break confidentiality. On the other hand, patients who gain knowledge of physician-related fraud should be able to earn rewards for reporting.

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?*

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?

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?

In questions 10, 11, and 12 above, we would exclude any individuals who have been specifically hired to investigate wrongdoing. This would include CPAs, CFEs, fraud investigators, forensic accountants, and others (including those who are not professionally certified).

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?

It is difficult to define a reasonable time, but it seems fair to require whistleblowers to come forward on a timely basis and follow up after they have internally reported an issue. A specific time frame should certainly be considered, as we can envision situations where internal compliance committees intentionally or under pressure from management purposely delay investigations in hopes of discouraging the whistleblower from coming forward. Retaliation can be swift and damaging. A defined time frame, perhaps 90 days, would encourage those in charge to prioritize and expedite the investigation.

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?

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?

It seems appropriate to exclude any illegally obtained information, whether domestically or abroad. However, with respect to information provided in violation of administrative or protective orders, there needs to be clarification. There are varying circumstances that could affect this exclusion: (1) information under protective order provided by a whistleblower who has no awareness of that order may be admissible, (2) information under protective order provided by a whistleblower who has awareness of the order, but has not agreed to the order may be admissible, and (3) information under protective order provided by a whistleblower who has awareness and has agreed not to disclose the information may be excluded. Overall, where public safety and welfare are at risk, the right of the whistleblower to divulge protected information may take precedence over protective orders in private litigation. We can even envision a situation in which a potential whistleblower is prohibited from reporting due to unrelated, unsubstantiated, or frivolous litigation by perpetrators designed to restrict information sharing by the whistleblower.

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?

Individuals should be encouraged to use internal compliance processes when they are robust, but advised to contact the SEC directly if they lack confidence in those processes. For example, fraudsters should not be given an opportunity to destroy evidence because of information obtained through an internal tip line. Additionally, there are cases where the organization can take no other action than reporting the violation to the proper authorities. In the case of insider trading, for instance, the organization does not have the authority to take sufficient action against the perpetrator. In these cases, it may be appropriate to allow the whistleblower to bypass the internal compliance function and report directly to the SEC.

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?

A short time frame is appropriate if the whistleblower believes the company will proceed in bad faith. In fact, this is exactly the circumstance where they should go to the SEC first.

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?

Whistleblowers could be encouraged to use internal mechanisms such as hotlines if administered by qualified independent third party providers – who investigate independent of management or the suspected perpetrator. However, in only rare cases should whistleblowers be denied an award for not going through the employer-sponsored complaint and reporting procedures.

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 SarbanesOxley 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?

Although this is a risk, timely communication by the SEC with the Board of Directors or Audit Committee may help to mitigate this concern. Again, individuals who have access to report to effective compliance programs will likely do so early on. Although Dyck et al. (2010) suggest that Sarbanes-Oxley has enhanced SEC and auditor whistleblowing, they do not find evidence that *internal compliance structures* and systems set up since Sarbanes-Oxley have lead to increased whistleblowing activity absent

the presence of monetary incentives. Perhaps over time, internal compliance structures will become more effective, making the need for the SEC bounty program obsolete.

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

Yes, we believe this is appropriate.

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?

Additional guidance is needed regarding what constitutes a significant contribution. Does this mean the case would not have been sustainable without it, or that it led to additional charges, or something else? The Commission should consider timeliness as well, as evidence may eventually become known, but a whistleblower could accelerate the process. Perhaps the "timely reporting of new material information" could be part of what defines a significant contribution.

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?

The information should be critical to the successfulness of the action. It seems that the decision of whether a whistleblower should receive an award should be based on whether or not the wrongdoing would have been exposed and successfully prosecuted in a timely manner had the whistleblower not reported the activity. The Commission loses nothing by awarding a whistleblower money in cases where the Commission would not have known of or successfully prosecuted the wrongdoing without the whistleblower's action, as payments come from the fines (that would not otherwise exist without the action of the whistleblower).

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?

The definition of action seems appropriate. We agree with the limitation, as it may prevent a whistleblower from reporting a single, perhaps minor questionable act and receiving an award related to an unknown fraud, as well as frivolous or unsupported reports in the hopes that there is undiscovered fraud.

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

In cases involving auditors, it seems that the PCAOB could also be considered an appropriate regulatory agency.

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

This definition seems appropriate.

24 (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?

Additional guidance is needed on how percentages will be determined, particularly in the scenario you describe where multiple parties receiving different percentages are involved. An example of circumstance fitting a 10% versus 30% award might be helpful. In addition, in some cases the SEC could consider absolute values for awards (set some minimum and maximum thresholds).

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?

The SEC should clarify the consideration of "any unique hardships experienced by the whistleblower as a result of his or her reporting and assisting in the enforcement action." It may set a bad precedent to base awards on individuals' circumstances. This might mean that a highly paid executive would receive a greater or lower award than a lower-paid employee, simply because of their "unique" hardships. The award should be based primarily on its effectiveness in uncovering and successfully putting an end to violations that would otherwise remain unknown.

The SEC should also reconsider awards based on "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." Again, we would be hesitant to reduce an award solely because an individual did not first report internally. Such a consideration would require the SEC to independently determine the effectiveness of an internal control compliance program and make subjective conclusions about the whistleblower's specific circumstances and mindset. Compliance systems, if effective, should prevent, detect, and/or correct wrongdoing, negating the necessity for the whistleblower to report externally in the first place.

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?

We think it is entirely reasonable to reduce awards for those who are culpable, however, they should still be rewarded for providing critical information about wrongdoing that someone else planned and initiated (see response to question 1).

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?

Industry guidelines could be consulted for determining reasonable fees. Representing a whistleblower requires specialized knowledge and experience, as they will likely become targets of the perpetrator(s). It is especially important to remove the burden from the whistleblower, as it should not be cost-prohibitive to "do the right thing."

It is our understanding that an attorney is only required when the whistleblower reports anonymously. Research suggests that there is little difference in likelihood of reporting between "anonymous" and "protected" channels (Curtis and Taylor 2009). In other words, as long as the whistleblower's identity is not publicly disclosed, anonymity is not required.

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?

Eliminating submission by fax and mail could discourage whistleblowing in some cases. For example, potential whistleblowers may have concerns about security and privacy using company computers and internet connections to file these reports, have concerns about internet security or privacy in general, or have documents and analysis that they prefer to submit as hardcopies (e.g., Harry Markopolos).

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.

It may be unnecessary, and perhaps prejudicial, to ask someone for their occupation. In addition, in some cases it may risk the anonymity of the whistleblower.

From Commission's perspective, if background information about the whistleblower is included on the forms, it is likely that perceptions regarding source competence and source objectivity (related to the whistleblower) will be developed by the Commission at the onset. One could compare the Commission's evaluation of whistleblower reports and related evidence (if any) to auditors evaluating evidence when testing a company's financial statements. Research shows that both the competence and objectivity of sources affect auditor reliance on the source and related evidence (e.g., Bamber 1993; Hirst 1994; Brazel and Agoglia 2007). This research also illustrates that auditor responses are typically in the expected / normative direction (i.e., auditors are prone to rely more on evidence / reports from more

competent and objective sources). Thus, requiring background information from the whistleblower will likely affect the Commission's response to a whistleblower report (and perhaps improve the efficiency of the SEC's review of whistleblower reports). However, we believe that such an evaluation of the source reliability at the onset of the investigation is unnecessary and may lead to reports being rejected early in the process based on the merits of the whistleblower and not the merits of the report itself. We believe the evaluation of source reliability would serve a better purpose at a later stage of the Commission's investigation.

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?

We agree with this requirement to ensure that anonymous whistleblowers are legitimate and not fictitious.

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.

Perhaps splitting the award evenly between whistleblowers and victims would help to alleviate this tension. However, these cases may be likened to class-action lawsuits, where victims may receive very low individual awards but the outcome of the case is to uncover and punish perpetrators, preventing future acts and harm. In these cases, without whistleblowers coming forward, there might not be any compensation at all for victims.

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?

Yes, we agree with these exclusions, and note "liability is based substantially on conduct that the whistleblower directed, planned or initiated" is the key concept that was missing from some of the related previous questions.

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?

We believe employees who have acted in bad faith (i.e., deliberately falsely accusing someone else), should not be protected by the anti-retaliation provisions. Certainly concerns have been raised about frivolous complaints (Miceli and Near 1992), "Machiavellian" whistle-blowers who act in bad faith (Gobert and Punch 2000), and ineffective workers who try to hide behind whistleblower protections (Schmidt 2003). However, in contrast to those concerns, recent research by Bowen et al (2009) provides evidence that whistleblowing is an effective mechanism for discovering agency problems at companies and indirect evidence that Section 806 of SOX is an important mechanism to uncover agency issues at companies. In addition, Dyck et al. (2010) find that employees are an important source of information about corporate fraud, can obtain this information at low cost, but monetary incentives are important to balance the high personal cost for employees of coming forward (Brickey 2003; Zinglaes 2004).

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