SOCIETY OF CORPORATE SECRETARIES
& GOVERNANCE PROFESSIONALS

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December 17, 2010

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

Re: Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, File No. S7-33-10

Dear Ms. Murphy:

The Society of Corporate Secretaries & Governance Professionals (the "Society") appreciates the opportunity to respond to the Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, SEC Rel. No. 34-63237 (November 3, 2010) issued by the Securities and Exchange Commission (the "SEC" or the "Commission").

Founded in 1946, the Society is a professional membership association of over 3,100 attorneys, accountants, and other governance professionals who serve approximately 2,000 companies of most every size and industry. Society members are responsible for supporting the work of corporate boards of directors and their committees and the executive management of their companies regarding corporate governance and disclosure. Our members generally are responsible for their companies' compliance with the securities laws and regulations, corporate law, and stock exchange listing requirements.

I. Introduction

The Society appreciates the Commission's efforts, in designing the Proposed Rules, to recognize the role of corporate compliance programs in promoting compliance with law, including the securities laws. However, the Society believes that, in several important respects, the Proposed Rules, if implemented as proposed (as so implemented, the "Rules"), could undermine corporate compliance programs.

Corporate compliance programs serve several important functions. They provide a source of invaluable information to a company to enable it to detect and help prevent violations of law, are used to educate employees with respect to codes of conduct and legal and compliance matters, and are important components of remediation actions. Compliance programs are integral to the early investigation and remediation of possible misconduct by employees and others. These critical functions may be undermined by the Rules as currently proposed. For example, the Proposed Rules could discourage an employee who becomes aware of a potential violation from speaking up to prevent a violation from occurring and, instead, only reporting his or her concerns to the company or the Commission after the company has actually incurred the violation. The

employee would be motivated to do this in the hopes that, by ensuring that once the company has in fact violated the law, the employee can blow the whistle and receive an award. Rather than preventing a violation from occurring, the Proposed Rules could, in fact, provide significant monetary incentives for employees to turn a blind eye to such violations when they first come to the employee's attention.

The modifications we suggest to the Proposed Rules set forth below are intended to strike the proper balance in preserving the purposes of effective corporate compliance programs while also fulfilling the mandate of the Dodd-Frank Act to "maximize the submission of high-quality tips and to enhance the utility of the information reported to the Commission".

II. General Comments on the Proposed Rules

A. In Order to be Eligible for a Bounty, a Whistleblower Must First Use the Company's Corporate Tip Line Program

Corporate tip lines (or hot lines) are an integral part of compliance programs. As noted above, they function as valuable mechanisms for revealing and remedying violations of law, including securities law violations. The Commission should not undermine these federally mandated programs which already exist at most public companies. Rather, these corporate compliance programs should be the first line for reporting violations (and potential violations). Accordingly, persons seeking to be eligible for a whistleblower bounty should be required to first report the information to the company, so long as the company has an effective corporate compliance program.

Most responsible public companies have spent a significant amount of time and money implementing compliance and hot line policies and procedures and these companies continue to devote valuable resources to monitoring and updating these procedures. These programs have been established over the years to comply with the requirements of (i) the Federal Sentencing Guidelines related to "Effective Compliance and Ethics Program"; (ii) the requirements of Section 17A-3 and 17A-4 of the Securities Exchange Act of 1934 related to books and record keeping; and (iii) Section 301 of the Sarbanes-Oxley Act ("SOX")(adopted as Rule 10A-3 in the Securities Exchange Act of 1934)--which requires companies to establish tip line procedures for anonymous reporting relating to accounting, internal accounting controls, and auditing matters. The Society believes the processes and procedures in place to comply with SOX can be readily modified and expanded to include the anonymous reporting of potential securities law violations.

These compliance and hot line programs and policies generally require employees to internally report any potential violations of law. In fact, it is a violation of most companies' codes of conduct for an employee to not report violations of policy. It is important that the Rules work in tandem with, and not in contravention of, these processes and procedures. The Society believes that unless there is an express requirement in the Rules that an employee be required to report first through the company's compliance and tip reporting programs (absent evidence that his or her efforts would be futile (as further discussed below)), such programs will be totally undermined. If this were to occur, the positive benefits, such as promoting a culture of compliance at companies, will be weakened, and the internal controls of a company would be

significantly diminished. We believe that rather than this result, the Commission should take this opportunity to implement Rules that foster, encourage and support companies in developing and maintaining effective compliance and tip reporting processes and procedures.

The Society recognizes that not all companies have effective compliance programs. In certain circumstances, it may be appropriate for an individual to report first to the Commission. Such circumstances would include: (i) if the company does not have any reporting process or procedure in place that protects anonymous or confidential reporting; or (ii) if the company's audit committee has not adopted procedures for the handling of reports relating to securities violations (which procedures include the audit committee receiving information about such reports). These exceptional circumstances should be expressly defined in the Rules, and the employee, when submitting Form TRC to the Commission, should provide an explanation with evidence of these specified circumstances.

B. If a Company Has a Compliant Tip Line, the Company Should Have 120 Days to Investigate, Remediate and Report

Once notified by a whistleblower through the company's internal compliance processes that there may be a securities law violation, the company should have a 120 day period to investigate, remediate and report back to the tipper. If the tipper is not satisfied with the report from the company, the tipper may commence the SEC process, with the date of first reporting being the date the person first reported under the company's compliant corporate tip line program.

We believe there are several benefits to both companies and the Commission in permitting companies this 120 day investigative period:

First, by having the employee report first to the company and giving the company an opportunity to investigate the matter, responsible companies will have the opportunity to stop wrongdoing promptly and take appropriate remedial action quickly--and without the need for the Commission to use its limited resources to (i) evaluate the merit of the tip and (ii) communicate it to the company and (iii) conduct the investigation. In circumstances where the Commission first receives the tip (as currently contemplated would occur under the Proposed Rules) and then notifies the company of such fact, there could be unnecessary delay in the company learning of the violation, and therefore delay in its ability to initiate any remediation actions. As noted above, the Proposed Rules could have the unintended result of encouraging employees to withhold information from companies until after a violation of law has occurred, thus resulting in undue harm to companies and their shareholders.

Further we believe most employees will be under the impression that having once raised an issue by calling a hot line, they have satisfied their obligations under a company's code of conduct to reported suspected violations of law. If that first call goes to the Commission, and if the alleged wrongdoing does not involve a securities violation (for example, a personnel matter), we question whether the Commission will have the staff and resources to report all such tips to companies. If not every call reported to the Commission is reported to the company, companies will not learn crucial information they need whether or not such information would be of interest to the Commission. Thus, the Proposed Rules put a wedge between the company and employees who would otherwise raise their concerns--large and small--through company hot lines.

Second, if allowed a reasonable, but limited, amount of time to investigate the alleged violation, companies will be able to weed out matters unrelated to potential securities law violations. For example, it has been estimated that over 50% of claims on a typical corporate tip line relate solely to human resources matters.[1] As noted above, we believe that by requiring companies to undertake the necessary investigation of the complaint in the first instance, the Commission will be spared processing a large volume of poor quality submissions or submissions that are unrelated to securities law violations. This may be particularly relevant given the potentially significant increase in the number of tips, complaints, and referrals anticipated to be made as a result of the bounty.

Third, once the 120 day period is over, the whistleblower can report to the Commission if he or she believes it is appropriate to do so. Once notified, the Commission can conduct its own investigation as it determines, including evaluating how well and responsibly the company responded to the employee's complaint. As a result, the 120 day period will not detract from the Commission's own investigative efforts.

C. Whistleblowers Who Participate in Wrongdoing Should Not Be Awarded a Bounty

The Rules should encourage both companies and their employees to do the right thing in deterring, and remediating, violations of laws. However, the Proposed Rules, by permitting awards to be granted to persons who participated in the violation, would reward wrong-doers. The Society believes individuals who actively participated or facilitated the violation (even if such person did not "substantially direct, plan or initiate" the misconduct) should not be awarded a whistleblower's bounty. Accordingly, not only should amounts that may be imposed in enforcement actions be excluded from the calculation of the $1 million threshold, but such employees should not be entitled to awards at all.

D. Information should be protected from Freedom of Information requests

We note that records of "an ongoing investigation by law enforcement agencies" are exempt from disclosure under the Freedom of Information Act (FOIA). We respectfully request the Commission confirm it intends to assert the exception for any tips received by it prior to its determination to open an investigation as well as with respect to any information regarding a closed investigation where no enforcement action was recommended. This would exempt all such information from FOIA disclosure.

III. Specific Comments on Certain of the Proposed Rules

Section 21F-2

The Commission should more clearly specify the "securities laws" to which the Rules relate. We believe the Rules should make clear that a whistleblower will not receive an award unless it is determined that the securities law violation that is the subject of the tip was material. While the

[1] According to the 2009 Corporate Governance and Compliance Hotline Benchmarking Report, fully 50% of tips received on corporate hotlines in 2008 pertained to "personnel management," further underscoring the possibility of the SEC being inundated with unnecessary claims.

Society understands that it may not be possible to determine at the time the tip is first reported whether the alleged violation is material or not, we believe that persons who understand that an award will only be made for material violations of securities laws will take that into consideration in determining whether to report in the first place. This could reduce the number of frivolous submissions—while not interfering at all with submissions by persons who believe that a material violation has occurred.

We commend the Commission for requiring that whistleblowers report on information related to "another person" and for generally supporting the concept that people should not be incentivized to commit wrongdoing at companies, report it, and then be financially rewarded for their malfeasance. Accordingly, the Rules should be expanded to define a whistleblower as an individual who did not actively participate in or facilitate the violation.

In addition, the Society strongly supports anti-retaliation protections for employees and recognizes such provisions are an important component of effective, successful compliance programs. Without having the protection and security provided by anti-retaliation provisions, employees may not be appropriately motivated to report wrongdoing to companies. However, as presently drafted, the Proposed Rules may shield employees from proper termination or other disciplinary actions and prevent employers from exercising legitimate rights. For example, it may be appropriate for a company to terminate the employment of a person convicted of a criminal violation, or who has engaged in unethical behavior or has materially breached the company's code of conduct. Not permitting a company to take appropriate action with respect to an employee who has engaged in improper conduct would send an inappropriate message to the rest of the company's workforce. We recommend therefore that the Rules make clear that personnel actions by a company for reasons other than the employee's whistleblower status do not violate the anti-retaliation provisions.

Section 21F-3

We commend the Commission for its inclusion of paragraph (d), which states that "the Commission will not make an award in a related action if an award already has been granted to the whistleblower by the Commodity Futures Trading Commission ("CFTC") for that same action pursuant to its whistleblower award program under section 23 of the Commodity Exchange Act." Double payments are clearly inappropriate.

We commend the Commission for noting in footnote 12 on page 13 that whistleblowers will not be allowed to thwart the aim of Section 21F by causing an employer to fail to respond to a request in a timely manner. This is absolutely critical for allowing companies to continue to operate effectively and remediate the situation as quickly and efficiently as possible. This should become a formal part of the Rules and not just be noted in the preamble or adopting release.

Section 21F-4

With respect to the definition of "voluntary," the Society recommends that a whistleblower be ineligible for an award with respect to: (i) requests or inquiries by foreign securities regulators and/or law enforcement entities; or (ii) a civil action that has been threatened or commenced in relation to the matter. In these instances, it is clear that the information to be provided relates to

a request, inquiry or demand concerning facts that a violation may have occurred that have first come to the attention of someone other than the whistleblower.

Under Section 21F-4 of the Proposed Rules, the provisions exclude from "original information" knowledge obtained by a person with legal, compliance, audit, and supervisory or governance responsibilities or that is otherwise obtained through an entity's legal, compliance, audit or similar functions. The provisions, however, carve out from the exclusions situations where the company acts in bad faith *or does not disclose the information to the Commission within a reasonable period of time*. The Society believes that the italicized language should be deleted so that compliance, legal, audit or governance personnel involved in a company's internal reporting and investigation processes would not be entitled to a bounty unless the company acts in bad faith--but not if the company fails to disclose the information within a reasonable period of time.

The phrase "reasonable period of time" can vary depending on whether the company's or the employee's perspective is applied. Various objective factors can justifiably affect what would be considered a "reasonable period of time" including: (i) the extent to which outside legal and accounting experts may need to be retained; (ii) how complex the facts involved in the violation are and how extensive a documentary investigation is entailed; (iii) whether the allegation involves activities in locations outside the U.S.; (iv) the extent to which unaffiliated third party cooperation is required for the company to complete its investigation; and (v) the extent to which additional auditing, legal, accounting or other staffing is required in connection with an investigation, a factor that may be of particular significance for smaller companies.

Further, there may be very legitimate reasons why a company does not self-report--for example, a company may choose not to report the matter if it does not involve a securities violation. The Society believes, that while what is a "reasonable period of time" may be difficult to determine, acts of bad faith are more easily determinable—and more clearly indicative of a company's attitude with respect to the particular allegation. Thus, only if the company engaged in bad faith should such information be a permitted subject of a whistleblower claim by legal, compliance, auditing or governance personnel. In addition, the Society believes lawyers should be required to first comply with the SOX-mandated "up the ladder" procedures before any claim is lodged with the Commission. It would be inappropriate for the Dodd-Frank Act whistleblower rules to undermine these SOX-mandated rules.

As noted above, companies may determine, in good faith, that there are appropriate reasons they need not provide information to the Commission. Where a company is contacted by the Commission about a violation and is able to demonstrate that it has conducted a thorough investigation, taken appropriate corrective action, did not retaliate against the whistleblower and cooperates with the Commission regarding the Commission's inquiry, the company should receive credit as if it had self-reported; and its actions should be evaluated in accordance with the Commission's "Statement on the Relationship of Cooperation to Agency Enforcement Decisions."

Finally, we suggest that "original information" should also exclude any information gained through the violation of any privileged relationship, such as spouses, psychiatrists, and religious confidants and journalists.

Section 21F-6

In determining the amount of an award granted to a whistleblower, the Proposed Rules provide that the Commission "may" take into consideration whether a whistleblower accessed a company's internal compliance program. The Society believes, as noted above, that the employee must be required to first utilize a company's internal compliance program (where it exists and would not be futile to use) and, thus, we propose the Rules be modified to provide that the Commission "must" take that factor into account. In addition, if the employee did not utilize a company's internal compliance program, then (absent such an excuse) the employee should not be entitled to the whistleblower bounty.

Section 21F-8

With respect to eligibility for awards, the Society recommends the following additional classes of persons be deemed not eligible to receive a bounty:

(i) any person who did not first report through the company's internal compliance or tip processes or programs (unless excused by the demonstrated existence of the specified exceptions);

(ii) any person who actively participated in or facilitated the violation, irrespective of whether the person was engaged in the planning, direction, or initiation of the violation;

(iii) lawyers, compliance, audit and supervisory personnel of the company should not only be ineligible for an award and should also not be permitted to report to the Commission unless the company has nevertheless proceeded in bad faith; and, in the case of lawyers, only after they have satisfied the "up the ladder" requirements of SOX; and

(iv) any person to whom information may be relayed within a privileged relationship, such as religious confidants (priests, rabbis, ministers), psychiatrists, spouses, and journalists.

Section 21F-9

As reporting first to internal corporate compliance programs should be encouraged (and therefore mandated as discussed above), we suggest the Commission consider including a section on Form TCR that inquires as to whether the prospective whistleblower reported first to the company's internal compliance program, if so, when, and if not, why not. As the Form currently stands, there is no section requiring the whistleblower to disclose whether he or she attempted to use the company's internal compliance program before coming to the SEC, and we believe Form TCR should explicitly ask for this information.

As discussed above, the anti-retaliation measures set forth in the Rules can potentially inappropriately shield employees from termination--even for reasons unrelated to his or her whistleblowing. We therefore recommend that the Rules make clear that if a company can demonstrate that its personnel actions were for reasons other than the employee's whistleblower status, it would not violate the Rules anti-retaliation provision.

Section 21F-16

Under the Proposed Rules, the SEC does not have to gain permission from a company's counsel in order to speak with a whistleblower. While the SEC does not "need permission" to speak directly with a whistleblower, we believe that prior to doing so the Commission should be required to give the company notice that it intends to do so, particularly if the Commission determines not to revise the Proposed Rules to require the whistleblower to first report to the company.

Anonymous whistleblowing to the Commission puts companies at undue risk if they determine to take a disciplinary action against (or terminate) an employee who may then claim the protections of the anti-retaliation provisions. Companies should be aware that an employee made a whistleblower claim to ensure that any actions taken by the company does not appear to be retaliatory.

III. Conclusion

The Society appreciates the Commission's recognition of corporate compliance and tip line programs. The Society is also mindful that no compliance program is perfect, and that whistleblower programs do perform an important role in helping law enforcement agencies investigate and correct violations of law. Whistleblower programs, however, should be designed to reinforce the integrity of compliance programs, and help encourage employees not only to identify violations but also to assist their companies in taking preventative as well as corrective action. The Society believes that with appropriate modifications, the Rules can preserve the role of effective corporate compliance programs while also fulfilling the mandate of the Dodd-Frank Act of ensuring that high-quality tips are reported to the Commission.

The Society appreciates the opportunity to comment on this important proposal and members of the Society would be happy to provide you with further information to the extent you would find it useful.

Respectfully submitted,

/s/ Neila B. Radin

Chair, Securities Law Committee
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