MEMORANDUM

To: File No. S7-33-10

From: Sarit Klein
Counsel to the Director, Division of Enforcement

Date: February 14, 2011

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

On February 9, 2011, I met with Stuart D. Meissner of Stuart D. Meissner, LLC along with the following representatives of the SEC: Jordan Thomas, Assistant Director, Division of Enforcement; William Shirey, Counsel to the General Counsel; and Thomas Karr, Assistant General Counsel. During this meeting, we discussed the Commission's proposed rules implementing the whistleblower provisions of Section 21F of the Securities Exchange Act of 1934. The specific areas discussed are reflected in the attached agenda. In addition, Mr. Meissner provided the attendees with a copy of the attached comment letter dated February 8, 2011.

AGENDA

Dodd–Frank Wall Street Reform and Consumer Protection Act, §21 F Whistleblower Provision

Stuart D. Meissner, Esq.

February 9, 2011

AGENDA FOR STUART D. MEISSNER ESQ. MEETING WITH SEC REGARDING THE NEWLY PROPOSED SECTION 21F WHISTLEBLOWER PROVISIONS OF THE DODD FRANK ACT ("ACT")

1) **Proposed Rules Are Not "User Friendly" as Mandated By Congress.**

2) **Rule Proposal Which May Completely Eviscerate The Dodd/Frank Whistleblower Law With Regard to All Current and Future Employees of Businesses.**

3) **Lack of User Friendliness Related to Proposed Rules Which Prohibits Key Personnel in Legal, Compliance, Audit, Supervisory, or Governance Responsibilities, Who Would Most Likely Be Aware of Wrongdoing, from Recovering Unless He/She is Able to Determine that, After the Whistleblower Responded "Appropriately" to the Wrongdoing, the Violations Were Not Reported by the Company to the SEC and "Reasonable Time" has Passed or That the Company Acted in "Bad Faith". (Proposed Rule 21F-4(b)(4), Pages 4, 24-27, 36, 106-107, 129, 130).**

4) **21F-2 Definition of Whistleblower Suggestion.**

5) **Payment of Award - Unclear Guidance With Respect to Payment of Bounty as a Result of Collateral Regulatory or Law Enforcement Action Due to the Whistleblower's Information and Assistance (Rule 21F-3, See Pages 3, 8-9, 44, 48).**

6) **21F(b)(1) (P. 11) and 21F-4(a)(1) (P.12) Definition of "Voluntary Submission" and Lack of Rules Which Encourage and Protect the Whistleblower Consistent with Dodd Frank.**

7) **Proposed Rules Improperly Legislates By Adding to the Short List of Categories of People Who Congress Specifically Identified As Not Being Eligible For Whistleblower Awards.**

   a) **P. 128 - Definition of "Administrative Hearing" In Relation to Defining "Original Information" – No Historic Basis and Contrary to the Goals of Dodd-Frank.**

   b) **Issue - Prohibiting information that was derivative of "attorney client privilege" and from an entity's "legal, compliance, audit or other similar functions", unless the entity did not disclose such to the Commission within a reasonable time or proceeded in bad faith (P.129, 130).**

   c) **Issue - Prohibiting the provision of information derived "by a means of in a manner that violates applicable federal or state criminal law" p.130.**

8) **Proposed Rules Obsessive Focus on Absurd Overblown Fears And At the Same Time Fails to Address Almost All Legitimate Concerns Of Whistleblowers, Which Concerns Were Provided to the SEC Staff Prior to The Rule Proposals.**

   a) **Proposed rules indicate that multiple SEC actions arising from the whistleblower action but involving the same subject matter or people, will not be aggregated so as to account for the one million dollar threshold.**

9) **Proposed Rules Regarding Whistleblowers Counsel Conflict With Current SEC Rules and Guidance and Would Inhibit the Ability of Whistleblowers from Even Retaining Qualified Counsel. Also Such May Interfere With Significant Ongoing SEC/Regulatory/Prosecutorial Investigations Which Resulted from the Legislation.**

10) **While Addressing Concerns Over the Cost of "*Postage*" (p.116) to the Whistleblower in Submitting Three Forms, the "*Overflow of Noisy Signals*" (P.113) and Private Attorney Fee Arrangements of the Whistleblowers (P.55), None of the 180 Pages of Rules Make a Single Solitary Mention to "FINRA," Despite FINRA Being Purportedly Supervised By The SEC and it Being the Prime Regulatory Body and Dispute Resolution Forum For All Brokerage/Investment Banking Institutions, As Well As All Registered Representatives and Supervisors Within Such Institutions.**

11) **Lack of Rules Suggesting the Modification of the SEC's Own "Enforcement Manual" dated January 13, 2010, Significantly and Immediately Impacting Upon the Success of the Statute.**

12) **Lack of Rules Providing for Updates to Whistleblowers.**

13) **Lack of Rules Relating to the Revolving Door at the SEC and the Need to Propose Related Rules to Promote and Provide Comfort to Whistleblowers.**

14) **Apparent Faulty Premise of the Proposed Rules.**

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February 8, 2011

Via Email Only
rule-comments@sec.gov
Elizabeth M. Murphy,
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-33-10 – Dodd Frank Whistleblower Award Program

Dear Ms. Murphy:

This letter is being submitted with regard to File No. S7-33-10 and the Securities and Exchange Commission's ("SEC" or "Commission") request for Comment on the Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934. This submission is submitted as per our last comment on December 18, 2010 and is meant to replace our submission of December 17, 2010 which was incomplete due to the concern related to the deadline imposed by the Commission with regard to comments. This letter is a follow-up to my pre-rule proposal submissions of August 17, 2010, my personal meeting on September 23, 2010 with the SEC's Tom Sporkin, Sarit Klein and Jordan Thomas from the Division of Enforcement, and Brian Ochs and Tom Karr from the Office of General Counsel, as indicated on the Agenda and SEC Memo of the same date. We hereby incorporate by reference such submissions and meeting, as well as our November 2, 2010 submission.

I respectfully submit the instant commentary to the Commission with the following twenty-two (22) years of legal experience:

1) Former long-term prosecutor, both in the Manhattan District Attorney's Office Trial Division under the Hon. Robert M. Morgenthau and the New York State Attorney General's Office Financial Crimes Section, which worked on similar matters as that of the United States Attorney's Office for the Southern District of New York, as well as a securities regulator for the Investor Protection Unit of the New York State Attorney

General's Office under Eliot Spitzer and his predecessor, which also often worked in tandem with the SEC.

2) Former defense attorney for a boutique securities law firm on Wall Street, defending brokerage firms/employees in regulatory actions, criminal matters as well as FINRA proceedings.

3) Former General Counsel for a successful private start-up internet firm

4) Private practitioner for almost the last decade, primarily representing small and large investors, retirees, etc., in FINRA/NASD/NYSE arbitrations against brokerage firms for negligence and frauds related to their investment accounts, as well as individual investment banking, brokerage, and hedge fund employees in all matters involving their employers, including Whistleblower Claims.

4) Author for Forbes.com, authoring one of the first published articles on the new Dodd- Frank Whistleblower Statute following it being signed into law this past Summer.

5) Attorney who has promoted Dodd-Frank Whistleblower Statute ever since it had been signed into law, including in movie theatres throughout the New York City region and thus, on the front-line of attempting to make the statute a success

6) Attorney whose law firm has already screened approximately sixty to seventy (60-70) potential Dodd Frank Whistleblower submissions.

7) Attorney who has already actually submitted to date, six (6) formal submissions (and currently in the process of preparing to file a seventh), all relating to apparent significant securities violations, involving major investment banking firms and/or major hedge funds. Subject matters of such filings range from serious allegations of improper sales of structured products leading up to and including the 2008 market meltdown; distorted asset valuations; conflicts of interest between investment banks/hedge funds and investors, both large and small, including US pension funds as victims; fraudulent sales of market linked Certificates of Deposits to retail investors in the State of California; insider trading which evidence is related to an ongoing prosecution, both by the SEC and Justice Department; the falsification of business records, along with knowingly supplying such to regulators in response to a document subpoena, without advising the regulator of such; potential influence peddling related to a state securities regulator involving a major brokerage firm, and other clearly significant matters supported by credible evidence.

Introduction

The SEC and all the individual members of its current Commission is at a crossroad in history, starting from the very first Chairman of the Commission, Joseph P. Kennedy Sr.,

appointed in 1934 (whose grandson, the late John F. Kennedy Jr. I previously worked with and was friends with while at the Manhattan District Attorney's Office). Contrary to some attorneys on the other side of this issue, who now are paid to defend the securities industry for a living, I have never been an SEC Commissioner, let alone the Chairperson of such, or a former head of Enforcement. Nor do I claim to be one of the most knowledgeable securities attorneys in New York, let alone in the country. However, I do believe, based on my unique long term and recent experience, detailed above, that the historic Dodd-Frank Whistleblower law has the potential to be the most significant securities related legislation since the 1933 and 1934 Securities Acts, which, as the Commission knows, followed the 1929 market collapse and the Great Depression. I strongly urge the Commission to not miss this historic opportunity that is presenting itself through the instant legislation, which, in essence, seeks to protect every single citizen of the United States from securities frauds and financial meltdowns like the one which this Country recently faced, by neutering this historic statute through the instant proposed SEC rules, while at the same time doing very little to encourage the very whistleblowing which the statute sought to encourage. In effect, the proposed rules, if they remain as is, and especially if the SEC in fact adopts some of the additional possible proposals it has asked for comment on within the rule proposal submission[1], will in effect toss the legislation into the ash heap of history and the law will be dead on arrival. Already, the proposed rules has had the effect, whether the Commission knows it or not, of, at the instant time, freezing some high quality potential submissions in their tracks, in effect, preventing any enforcement proceeding from even being commenced, as the future is unclear, even with regard to submissions already made pursuant to the statute. Further, I can in good faith state that the lack of clarity within the rules and failure to positively address issues of great concern to numerous whistleblowers, as expressed personally by me to the Commission in my comment letter of last August and in person to the SEC staff last September,

[1] Notably such possible proposals, to a large extent, parroted the commentary of a large law firm Baker Donelson who did not state what clients views they represented, and whose Oct 12, 2010 comments to our knowledge were first posted on the SEC web site the last week of October (along with the four line Sunshine Act mandated "Agenda" of the meeting, first posted on Friday October 29, 2010 of a unique Oct 26, 2010 meeting the Staff apparently had with a of lawyer and/or officers from ten large public companies/investment firms from around the country and the law firm, Gibson Dunn that represents them). Such took place just days before the Commission's Nov 3, 2010 Open Meeting, which then unanimously approved the publication of the instant proposed rules. Notably Gibson Dunn has in its employ a former SEC Deputy Director of Enforcement and the former NY SEC Regional Office Director, among many other former senior SEC officials.

is, as this is being written, detrimentally impacting a prominent ongoing SEC Enforcement proceeding.

It has been only two years since the September 2008 collapse of Lehman Brothers and the near collapse of the U.S. Banking system, yet it would appear from the general theme of the proposed rules, as well as the commentary to the SEC by the attorneys for many of the banks which were just bailed out by taxpayer funds due to their being too big to fail, that collective memories are very short. True, some of these companies would assert that the government appears to be making a profit on their "investments", yet many Americans would argue the very same occurrence would result if the same banks similarly provided them a blank check to bail them out of their debts until several years pass, so that they may have the opportunity to similarly recover, and they are not the ones who caused the crises, unlike those who received the bailouts. I personally supported the Troubled Asset Relief Program ("TARP") program of October 3, 2008, as I believe our system of commerce, as we knew it, would have completely collapsed, but for such program. However, I also believe such legislation was simply the lesser of two evils. Unlike financial institutions, which had leverage over the government due to the very threat of their failure and the impact of such on the economy, ordinary Americans cannot leverage the size of their debts, so as to be in a similar powerful negotiating position with banks.

The source of funds for TARP was supported by every individual and corporate tax-payer in this country. The large corporations and banks who now have been lobbying in force with the SEC on the instant provision, and utilizing all sorts of former senior SEC attorneys and even Commissioners who now defend the companies they once regulated, were all directly or indirectly dependent upon such TARP funds being provided to the financial industry. As such, the hundreds of thousands of dollars apparently currently being utilized to pay corporate lobbyists and highly paid corporate attorneys who work for Gibson Dunn, Bakery Donelson, among others, including, but not limited to companies like **Citigroup, JP Morgan Chase, Prudential,**[2] is in essence being spent to pay for such high priced attorneys who generally charge from $500 to $1,000 dollars per hour, if not more, for their "services". Such may be

[2] All of whom met with the SEC on October 25, 2010, along with their Counsel from Gibson Dunn and Crutcher, LLP, with regard to the instant proposed rules according to the SEC's own public disclosure.

considered the norm pre-2008, if it were only the shareholders of such public companies paying such fees, although one would think the SEC, rather than be concerned about whistleblower attorneys' retention terms negotiated between two private parties, would be more concerned about such questionable expenditures being paid by public companies in the name of public shareholders, so as to, in essence, seek to protect senior management from liability (criminal and/or civil), directly due to the whistleblower leads the statute was meant to encourage. However, now in 2011, after all that has been revealed of corporate excesses, the SEC should clearly be more focused on the explicit and unseemly showering of public shareholder funds on such defense law firms today, no different than the Commission's focus on excessive Officer compensation in public companies including TARP recipients. In addition, certainly the SEC should be more focused on ensuring that tax-payer funds are not being permitted to be expended, directly or indirectly, on such lawyers and lobbyists with the clear aim of seeking to create multiple barriers for whistleblowers who may file claims which may result in senior management of such companies being removed from office, forced to pay civil penalties and/or be criminally prosecuted for misdeeds. It is frankly mind-boggling that the SEC and its intelligent staff of attorneys appears to have knowingly or unknowingly placed blinders on with regard to such grave concerns and contradictions, when it is blatantly clear to the public at large and will be in the coming months.

We hereby submit the following comments with the aim of correcting the false premise that many of the proposed rules are apparently based upon and in an attempt to constructively modify the proposed rules so as not to create apparent barriers for whistleblower filings pursuant to the statute, something which the instant rules in fact do, whether intentional or not. Further, we hope that the instant comments can assist in making the proposed rules "user friendly", as mandated by Congress, and to again suggest rules that for some reason were not included or even suggested in the proposed rules (unlike several suggestions submitted by the Corporate lobby which were incorporated into the proposal), notwithstanding that the whistleblower advocates, including this firm, explained to the SEC staff the dire need for such rules, so as to in fact encourage whistleblowers to come forward and not explicitly discourage them as the proposals in fact do. As one of the founding fathers of this country, John Adams stated "facts are stubborn things." One fact that the Commission Staff seems to ignore, a seemingly reoccurring theme in

the proposed rules, is the extent to which whistleblowers, especially the quality senior whistleblowers in any organization which the Commission purportedly seeks to encourage, have been and will continue to be "tarred and feathered" and thus, from the start, are reluctant to come forward, notwithstanding any potential bounty at the end of the rainbow. According to the Commission's own statistics in the instant submission, based on submissions already made to the Commission since the passage of Dodd Frank, it expects 30,000 submissions per year (See p. 97 of the Proposed Rules) and that only 117 submission would even be eligible for any award. Thus only .39 of 1% of submissions would even be eligible for an award. **To highlight the point of the remoteness that any one whistleblower could hope to obtain any bounty, let alone anything significant, according to the MegaMillions Lottery web site, the overall chances of a lottery purchaser winning a prize in such lottery is 2.5% or one in every forty tickets played. In other words, based on the SEC's own statistics provided in the rule proposals, MegaMillion lottery players are more than 600% more likely to win something from such multi-state lottery than even be considered for a bounty as a result of a SEC Dodd Frank whistleblower submission**[3].

We can appreciate that the SEC Staff devoted a fair amount of time drafting the proposed rules with the assistance of input from the corporate lobbyists. Perhaps well intentioned, it appears that, at best, the proposed rules demonstrate a naïve view of the world. At worst, it demonstrates corporate lobbying gone wild. The proposed rules ignore the overarching fact that the SEC is in fact the "gate keeper". The Statute currently does not provide for any private right of action and thus there are no "plaintiff attorneys" involved in these matters, contrary to what

[3] We do believe however, based on recent personal experience and common sense, that the odds of such award increase exponentially to the whistleblower when a whistleblower seeks out qualified, experienced credentialed counsel knowledgeable about securities violations and prosecutions, whether or not the whistleblower wishes to be utilize the anonymous provision of the statute, who after thorough review and screening of the whistleblower, as well as the facts presented along with the evidence the whistleblower may have, chooses to accept retention. Such Counsel then may properly presents such to the SEC and continue to assist the SEC both during the investigatory process. Then after the launching of an investigation, assists the SEC in seeking out more evidence and proving its case. Counsel also may be involved, as we have already been in several of our submissions, in presenting a stream of additional evidence to the SEC that the whistleblower may become aware of after the initial presentation, whether or not the Commission had yet even notified the whistleblower or their counsel of the opening of a case. Notably, the SEC staff in its rule proposals unfortunately did not account for the significant time involved in such process, which has little if anything to do with simply filling out forms and can involve hundreds, if not thousands of hours of legal work, all of which, at the end of the day assists the U.S. government (as well as the whistleblower) in the pursuit of legitimate claims of securities violations, if the in fact the submission is successfully pursued by the Commission or related regulators or entities.

the corporate lobby and their law firms would like to portray. The only attorneys that would be involved with regard to these rules are "whistleblower attorneys". Such distinction is significant, as any case that the SEC, for whatever reason (for example their not being happy with the whistleblower's counsel, their being uncomfortable with who the Whistleblower is, their being unhappy with whether the whistleblower waited to report the violations to the SEC and why, etc), chooses not to pursue, presumably the SEC will not choose to pursue such matter. As such, one must ask why the SEC is proposing 180 pages of rule and interpretations which mostly serve to create barriers and in effect provide multiple reasons to warn people away from submitting Whistleblower complaints

1) Proposed Rules Are Not "User Friendly" as Mandated By Congress.

As stated in the proposed rules Dodd Frank §922(d)(1) requires that the Commission's whistleblower rules be clearly defined and user-friendly. We submit that the one-hundred and eighty page submission is the complete opposite. Such submission is only usurped by the US Tax Code in its complexity. In preparing the instant commentary this firm consulted with several other counsel as well as former SEC Enforcement attorneys who had difficulty understanding not only the logic behind the proposals but how to interpret the proposals. Nevertheless, the Commission expects non-lawyer whistleblowers to be able to understand the proposed rules and be comfortable knowing they are complying with such. If experienced counsel cannot easily interpret and apply many aspects of the rules, we wonder exactly how a whistleblower could do so, with or without the advice of counsel. Such is especially of concern given the severe consequences of non-compliance.

We are at a loss to understand why the Commission feels the need, in advance, to attempt to try and add complexity to the existing statute by spending countless pages attempting to limit and prohibit various people from being eligible for an award and numerous references to subjective criteria, like privileged communication – See Page 20 Rule 21F-4(b)(4) (as such may be applied to attorneys who may happen to work in-house, rather than a whistleblower attorney as the proposed rules do not appear to make a distinction) or evidence that somehow was gained "by means or in a manner that violates federal or state criminal law [See P.28 Rule 21F-

4(b)(4)(vi)]; both of which on the surface may sound reasonable. However, even State and Federal Appellate Courts have much difficulty in often determining whether attorney client privilege applies to a communication, which is why privilege logs are required in litigation and why there are hundreds if not more court opinions on such issue. Further, who shall decide whether evidence was gathered in violation of State or Federal criminal law and what standard of proof? Shall the SEC decide such issue when no prosecutor has even alleged such regarding such evidence, let alone any jury decided such beyond a reasonable doubt as required? Such is not explained by the rules. As an example there is one state statute, unlike most other states, which makes it a crime for a participant to record others who have a reasonable expectation of privacy for such communications, (having nothing to do with a phone conversation), but such has then been refined by such state's case law regarding when one could have a "reasonable expectation of privacy". These are just two examples of the unnecessary over-analysis and fear of "shadows" exemplified by the proposed rules and, in the process, making two inch thick maze of proposals which directly conflict with the Congress' mandate that such rules be "user [as in whistleblower] friendly," not corporate fraud friendly.

Once again, it must be emphasized that at the end of the day, the SEC is the gatekeeper for all submissions and what happens to such submissions. As such, the SEC can and will decide whether to pursue any submission. Such is exemplified by the SEC's own admission in the instant proposal that in effect statistically only .39 of 1% of all submissions will in fact be pursued (See P.97-98). As such, there is simply no rational basis for the vast majority of these 180 pages of rules other than to appease the corporate lobby who desperately seek to water down the statute and Congress' intent. Notably to our knowledge such rules were not proposed for the prior SEC Whistleblower program in existence since 1989 and the SEC apparently had no problem limiting such awards to a grand total of **five (5) claimants** for a grand **total of $159,537 in total bounties** from 1989 until March 2010, according to the SEC's Office of Inspector General's Assessment of the SEC's Bounty Program, dated March 29, 2010.

2) **Rule Proposal Which May Completely Eviscerate The Dodd/Frank Whistleblower Law With Regard to All Current and Future Employees of Businesses.**

Proposed Rule 240.21F-4(a)(3) states as follows:

> *(3) In addition, your submission will not be considered voluntary if you are under a pre-existing legal or contractual duty to report the securities violations that are the subject of your original information to the Commission or to any of the other authorities described in paragraph (1) of this section.*

And such appears to be referred to on page 15

> *21F-4(a)(2)* [which reference appears to be incorrect] *also includes a similar exclusion for information that the whistleblower is contractually obligated to report to the Commission or to other authorities. This exclusion is intended to preclude awards to persons who provide information pursuant to preexisting agreements that obligate them to assist Commission staff or other investigative authorities.*

Such appears nowhere in the original statute and we predict that such submissions, if maintained, will completely eviscerate the statute as it relates to current employees and future former employees of the subject companies. We have no doubt that if such is approved, many, if not all, companies will include a reference to a requirement to report all such violations to the SEC in their Employee Handbooks and/or all their employment contracts, knowing that the overwhelming majority of employees are in no rush to run to the SEC and be tagged for the rest of their lives as a "whistleblower" with the sole possibility of less than a half of one percent chance of obtaining any award. Such is also reflected in a well known recent US Department of Labor Case of Josef Walters vs. Deutsche Bank, Case No 2008 SOX 70 March 23, 2009 the Court held the following:

> *Complainant contends that he warned his supervisors and other Schweiz and Deutsche Bank officials about DIAM's infrastructure weaknesses and lack of ability to service its clients' portfolios even as Deutsche Bank personnel were publicly touting to U.S. investors the growth potential and stability of DIAM and Schweiz Compl.¶¶ 29, 55-66. Complainant alleges he was, thereafter, terminated for blowing the whistle on problems in DIAM's Frankfort, Germany, operations. On August 26, 2008, OSHA, noting that Complainant was located in Switzerland when the alleged adverse action took place, dismissed his complaint, because: "adverse employment actions occurring outside the United States are not covered by § 806 of SOX." (See, OSHA Decision dated August 26, 2008). Complainant thereafter requested a hearing.*
>
> *"We learn from Sherron Watkins of Enron that these corporate insiders are the key witnesses that need to be encouraged to report fraud and help prove it in court. Look what [Enron was] doing on this chart. There is no way we could have known about this without that kind of a*

whistleblower." See, Senate Banking Committee Legis. History, Vol. III, at 1632.

We learn from Sherron Watkins of Enron that these corporate insiders are the kind of witnesses that need to be encouraged to report fraud and help prove it in court." Id. at 1632. 12

12 Apparently, neither Ms. Watkins' situation as a whistleblower nor the Enron experience was unique. See, e.g., The Road to Reform; A White Paper From The Public Oversight Review Board, S. Hrg. 107-938, Vol. II, at 1040. The Senate Judiciary Committee Report noted that: "According to media accounts, this (Watkins) was not an isolated example of whistleblowing associated with the Enron case•••• A top Enron risk management official alleges he was cut off from financial information and later resigned from Enron after repeatedly warning both orally and in writing as early as 1999 of improprieties in some of the company's off-balance sheet partnerships.... These examples further expose a culture, supported by law, that discourages employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally. This 'corporate code of silence' not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. ***The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied."*** *Senate Judiciary Committee Report, supra, at 4-5.*

Whistleblowers act on a wholly voluntary basis; and if they remain silent, their jobs are not in jeopardy. They can "get along" if they "go along." Inaction and silence will provide all the protection they need.

I suggest that such is enlightening as to what barriers senior quality whistleblowers face and which the SEC must overcome in proposing rules. The instant enticement provided for under Dodd/Frank is an incentive, but certainly based on the odds a small one, considering the almost certain ostracization and likely tarring and feathering of the whistleblower's career. Unfortunately, the entire premise of the rules, and their lack of positive reinforcement for whistleblowers assumes the exact opposite.

3) **Lack of User Friendliness Related to Proposed Rules Which Prohibits Key Personnel in Legal, Compliance, Audit, Supervisory, or Governance Responsibilities, Who Would Most Likely Be Aware of Wrongdoing, from Recovering Unless He/She is Able to Determine that, After the Whistleblower Responded "Appropriately" to the Wrongdoing, the Violations Were Not Reported by the Company to the SEC and "Reasonable Time" has Passed or That the Company Acted in "Bad Faith". (Proposed Rule 21F-4(b)(4), Pages 4, 24-27, 36, 106-107, 129, 130).**

One of the most troubling components of the proposed rules is the limitation Legal, Compliance, Audit, Supervisory, or Governance Responsibilities from accessing the statute. Common sense and this counsel's actual experience in representing such whistleblowers dictates that these individuals are perhaps the most valuable people when it comes to the "high quality" tips Congress meant to encourage with the statute. However, the proposed rules apparently are based on a false premise that a) the whistleblower and/or his attorney can determine in advance that he/she responded "appropriately" in the eyes of the Commission, b) that he/she is aware whether or not the violations were reported to the SEC and c) that a "reasonable time" in the eyes of the SEC has passed since he or she had responded "appropriately" internally. All of which assumptions are faulty and not based on reality. For the purpose of the instant submission, we have sought input from one of this firm's prior whistleblower clients, who fell into this very category of whistleblower, as a senior national compliance related employee to a major multinational investment bank, and who filed a FINRA arbitration against such entity. Such former employee was isolated and eventually dismissed, following his/her raising numerous red-flags internally regarding securities violations and even with the audit committee of the Board of Directors. After seeking input from such former client with regard to such specific rule proposal he/she provided us with the following commentary to pass on to the Commission:

> *Once you report an issue internally above your direct supervisor, you are considered " persona -non- grata". You are kept at arms length and not informed of who was informed, what has been investigated, what was discovered, who was interviewed, who was informed of the internal investigation, or what remedial action was taken and who made the decisions."*

In the end, our client and my firm reported the issues raised to regulators and N.Y. State Attorney General took action on the issue raised. In addition, the arbitration claim, which the firm claimed was a simply "lay-off" (of just one employee) was settled for a significant confidential settlement. However, such employee would have difficulty today complying with the SEC's proposed whistleblower rules because once he reported the issues internally, he was kept out of the loop as to what his firm did, if anything, in response to his internal whistleblowing and such is typical, once a significant matter is reported up the chain of command by honest employees.

4) **21F-2 Definition of Whistleblower Suggestion.**

In response to the Commission's inquiry on page 8 of its submission we suggest that the Commission should refer to "potential violations of securities laws" involving another person or entity not controlled by the whistleblower, rather than the suggested reference to "potential violations of the securities laws by another person" . Often times the whistleblower may not be able to articulate which specific securities laws they believe have been violated by a particular person, but rather may describe what went on within an organization which would then lead to specific questions by enforcement which will likely identify individuals at such point.

5) **Payment of Award - Unclear Guidance With Respect to Payment of Bounty as a Result of Collateral Regulatory or Law Enforcement Action Due to the Whistleblower's Information and Assistance (Rule 21F-3, See Pages 3, 8-9, 44, 48).**

Under the proposed rules, the whistleblower, at great risk to him or her self may provide significant quality information to the Commission. Yet the Commission may refer such information to the U.S. Attorney, FINRA or a State regulatory body, as the Commission often does and the whistleblower then provides significant assistance, testimony, etc., leading to the separate body recovering millions in fines or restitution. However, according to proposed rules the whistleblower would receive nothing unless the SEC determines it as well will initiate some sort of action and recover, let alone seek, at least one million dollars which often they do not, as the Commission may yield to the other government or regulatory body who had determined to follow-through with the investigation. Such not only would be inequitable, but would once again send the wrong message to the whistleblower community that the government will use them, waste their time, ruin their future, with nothing to show for it despite all the fanfare of Dodd Frank. Once again the alternative would be that whistleblowers will not come forward and frauds will continue. As such, the SEC should make clear in the proposed rules that the under such circumstances the whistleblower shall receive the bounty if the other body (SRO, State, regulatory agency, etc) obtains monetary sanctions of $1,000,000 or more as a result of the whistleblower who provided the SEC with the information which the SEC then chose to refer out.

6) **21F(b)(1) (P. 11) and 21F-4(a)(1) (P.12) Definition of "Voluntary Submission" and Lack of Rules Which Encourage and Protect the Whistleblower Consistent with Dodd Frank.**

First, we suggest that the Commission make clear that such rules, which seek to define "voluntarily" shall solely refer to the original whistleblower submission. Obviously following an initial submission, if the SEC decides that it is interested in such submission and makes follow-up requests of the whistleblower or their counsel as they always do, such follow-up requests by the Commission could be considered an "informal request," but such should not in any way serve to invalidate the additional information from being credited to the whistleblower. As an example, of this firm's filings pursuant to the statute, several of the submissions were followed up by further requests and interaction by the Commission. Obviously responding to such continues to be "voluntary" and should be treated as such with regard to the instant proposed rules.

Further, by mandating on page 12 and page 127 that the whistleblower come forward with detailed information (filing of forms, etc) before receiving any formal or informal request, inquiry or demand from the Commission staff or from any other authority about a matter to which the whistleblower information is relevant, such mandate ignores the common circumstance where the individual whistleblower may be subject to a private confidentiality agreement and/or confidentiality order from a FINRA arbitration panel directly impacting their ability to seek to provide critical information of securities violations, learned of during such proceedings either through documents produced in discovery or through testimony. As this firm specifically discussed with the SEC staff prior to the proposed rules, almost all employment disputes within the brokerage industry are heard by FINRA which purportedly is overseen by the SEC. In addition, in almost every case the brokerage firm seeks a blanket confidentiality agreement or order from the FINRA panel and often times such is granted contrary to law and FINRA guidance due to the well known influence securities firms have over arbitrators and FINRA staff itself, as the firms are constant "customers" of such forum and panelists, while the individuals are not. In addition, in one recent instance this firm was involved in, a FINRA panel issued a blanket confidentiality order within the Award itself, notwithstanding that the testimony and documents of the proceeding contained evidence of criminal acts and FINRA violations, including evidence of the falsification of business records (See Dever v. Oppenheimer & Co.,

FINRA Case #08-00912, Vacated in part, June 28, 2010 & December 22, 2010, Mass Superior Court). Such award was provided to the Staff and discussed in detail during this firm's prior meeting with the Commission staff on September 28, 2010. Further we informed the Staff that the Massachusetts Superior Court ruled in 2010 (and reinforced such ruling once again recently in December 2010) that such FINRA Award/Order was "against public policy" and a violation of Free Speech. However, such required the individual brokerage employee to actually pay and retain counsel in order to successfully move to vacate such order, so as to obtain such ruling. Such action should not be left for an individual employee to have to accomplish, but rather it should be the regulators, especially the SEC that should be insuring that such orders are never issued by a securities Self Regulatory Organization or arbitration body, which orders, among other things, clearly inhibit and obstruct Dodd/Frank whistleblowing of significant information, which may stop frauds before they grow too large[4].

In order to account for the concerns regarding what takes place within FINRA arbitrations and considering the proposed rule requiring that whistleblowers affirmatively approach the SEC, without an informal request, let alone a subpoena, again as this firm previously urged, the Staff must propose rules that mandate that FINRA (which it oversees) issue conduct rules making it a violation of such rules for a firm to encourage such blanket confidentiality orders or agreements and mandating that any confidentiality provision urged by any members during any FINRA arbitration proceedings require an exclusion in relation to the ability to report any documents, information or testimony to the SEC at any time. In addition, we urged the Commission to propose rules mandating FINRA prohibit its arbitration panelists from issuing any order which inhibits in any way a party from reporting any document or testimony to the SEC at any time, before during or after the proceedings and deem any Order contrary to such

[4] See Satterfield v. Stanford et. al. FINRA Case #07-03093. Former Stanford employee and managing director of fixed income filed a pro se FINRA arbitration in October of 2007 against Stanford and various employees , including the Chief of Compliance, for defamation due to Stanford firing him after he demanded that top executives place in writing that they wanted him to solely recommend to fixed income customers the bank's CDs (which after the award turned out to be part of a fraudulent huge ponzi scheme), after he had reported such internally to the senior executives including the Chief Compliance Director. The firm then wrote on Mr. Satterfield's CRD record that he was "unable to meet expectations". The FINRA panel awarded zero to Satterfield, finding in favor of Stanford and required Satterfield to pay half the forum fees. Approximately six months after the award the Stanford CD ponzi scheme was "uncovered" in 2009 and criminal charges were brought and the firm closed. See Denver Post.com Dow Jones, Al Lewis, *Unable to Meet Expectations at Stanford*, October 28, 2009.

to be null and void. Unfortunately, the proposed rules are devoid of any such proposals as suggested, which would actually encourage and assist securities employee related whistleblowers, which would likely form a large proportion of the subject Dodd/ Frank whistleblowers.

Similarly, often times, a former employee may have a contractual agreement of confidentiality preventing such employee from acting upon Dodd/Frank out of fear of civil liability by the firm. Therefore, the Commission should propose a rule that retroactively voids any provision in any contractual agreement which prevents or inhibits, directly or indirectly any employee or former employee from reporting information or evidence to the Commission pursuant to the Dodd Frank Whistleblower law. Once again such a rule would actually encourage and assist whistleblowers rather than the opposite, as almost all of the instant proposed rules currently do, contrary to the intent of Dodd Frank. There would appear to be no legitimate reason for the SEC to wish to encourage such contractual provisions and yet such encouragement is accomplished implicitly if the SEC does not propose a rule invalidating any such provisions, as being against public policy (similar to what the Massachusetts Superior Court held in the Dever matter). Once again this concern is not theoretical, as my law firm has already entertained inquiries of potential significant whistleblowers who have quality leads and information for the SEC, but who are subject to contractual agreements of confidentiality. At this time, we have advised such people to take a "wait and see" approach to any submission, pending the instant rule making, with the hope that the Commission would actually propose rules that encourage such quality whistleblowers and provide comfort to them in coming forward.

7) **Proposed Rules Improperly Legislates By Adding to the Short List of Categories of People Who Congress Specifically Identified As Not Being Eligible For Whistleblower Awards.**

The statute specifically details what classes of the public are not eligible for awards under the Dodd Frank Whistleblower provisions. 21F(c) (2) under Denial of Award specified four (4) categories of people who would be disqualified. Thus, Congress considered this issue and legislated that such categories should be the only categories of people prohibited from an award. As such, there is simply no basis for the Commission to add to such list as the proposed rules do

and thus legislate through such rules. Congress did not authorize the Commission to legislate through rule making, let alone controvert issues detailed and considered within the statute, via SEC fiat rule making. The law solely prohibits awards to a) someone who, at the time they acquired the information submitted to the SEC was a member, officer, or employee of an appropriate regulatory agency, Dept of Justice, SRO, the Public Company Accounting Oversight Board, or a law enforcement organization b) any whistleblower convicted of a criminal violation related to the judicial or administrative action for which the whistleblower could receive an award c) any whistleblower who gains the information through performance of an audit of financial statements required under securities laws and for whom such submission would be contrary to section 10A of the 34 Act or d) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.

The law was not an invitation for the SEC to add to such very limited categories of people carefully considered by Congress. **However, the instant rule as detailed in #2 herein above, the Commission's attempt at significantly broadening such provision via proposed rule 240.21F-4(a)(3) p.128 and p.15, is a completely misguided, penny wise/pound foolish approach, made with a completely false premise, and having the capacity to completely eviscerate the entire whistleblower law.** As noted previously, such in effect would encourage, and likely result in all public companies placing in their internal Employee Handbooks and/or actual employment agreements and/or promissory notes (brokerage registered representatives) with employee, etc, a duty to report securities violations to the authorities, knowing that few if any employees would wish to jeopardize their careers by being tagged as a whistleblower, if they did not have to and since they would be ineligible for Dodd Frank if the instant rule were to be passed, there would be absolutely no incentive for them to do so. The so called "contractual obligation" that supposedly would lead to such individuals reporting such without a Dodd Frank incentive, will certainly never be enforced by their employer who would not want the employee to report such in the first place. In short, such a rule would be a clear gift to corporate America and a neon sign from the SEC for them to create written policies and so called contractual duties for all employees, so as to not have to worry about the ramifications of the instant whistleblower law, not withstanding all the media and interest.

As for additional new categories of people the SEC apparently wishes to for some reason discourage from coming forward by proposing that they be deemed in advance as ineligible for any award, (in apparent direct contradiction to the legislation limiting such categories), there are several that cause great concern both in practically applying such prohibition, as well as what appears to be a misguided effort with little rationale. Section 240.21F-4(b) & 21F(a)(3) [p.128 and P.17] defining "original information", in effect, disqualifies a host of potential quality tipsters which would appear to be contrary to the intent of Dodd Frank and only serves to benefit securities fraudsters and swindlers.

a) P. 128 - Definition of "Administrative Hearing" In Relation to Defining "Original Information" – No Historic Basis and Contrary to the Goals of Dodd-Frank.

On page 128 the SEC states that information shall not be considered "original information" and thus not eligible for Dodd Frank awards if the information is exclusively derived from an allegation made in a judicial or administrative hearing. Such language is derived from the statute. However, on page 17 of the proposed rules, in footnote #19 the SEC for some reason goes out of its way to improperly define "judicial or administrative hearing" as "including hearing in arbitration proceedings." There is no logical or historic basis for such interpretation and by doing so the SEC once again seeks to eliminate an entire class of potential quality tips that may stop ongoing fraud in its tracks. As referred to previously, all non-discriminatory statutory claims between securities employees and their employer are adjudicated in FINRA arbitration. During such proceedings, which are held behind closed doors out of the spotlight of the media, with no FINRA representative, let alone SEC representative present, the employee often receives numerous sensitive documents, and hears and elicits hours, if not days of sworn testimony from various supervisors and in some cases, CEOs, Chief Compliance Officers, Members of Boards of Directors, General Counsel and Deputy General Counsel (the Dever case cited to above, for example, involved all of such people). Further, almost all customer investment cases are similarly heard in the same closed FINRA arbitration forum and similarly, many lawyers for such customers successfully obtain various sensitive documents and/or elicit significant testimony from senior management that are evidence of significant securities violations. As a result, it seems odd that the SEC would go out of its way to close the door to

receiving such information by proposing the current rule and definition. If anything, we suggest that the SEC should be doing the opposite and deeming FINRA arbitration not to be a judicial or administrative hearing, which is in fact accurate as such proceedings are not either a judicial proceeding or administrative proceeding which is the exact language utilized in the legislation. A real life example of the significance of such issue was the Satterfield v. Stanford et. al. FINRA Case #07-03093 cited to in footnote #4 above, which if regulators took a careful look at the case while it was pending could have uncovered and stopped the Stanford Ponzi scheme which was second only to Madoff as the largest Ponzi scheme in history, only worse because the investors thought they were investing in safe Certificates of Deposit. FINRA responded to an inquiry from the Dow Jones reporter Al Lewis, as detailed in his article on such arbitration *Unable to Meet Expectations at Stanford*, October 28, 2009, by accurately stating:

> *"Arbitrators are not Finra employees," said Finra spokeswoman Nancy Condon. "If they did not refer allegations made in a counter-claim to Finra, we would not have been aware of the allegations made."*

As such if FINRA arbitrators are not employees of FINRA or any other Government agency let alone Court, how can such a proceeding be considered an "Administrative" anything? In fact, FINRA arbitrators have no power to impose Enforcement penalties on members as they can simply refer a matter to Enforcement, after the case is over, if they so desire and even then, history shows that they rarely do (and did not in the Stanford case). Further FINRA itself notably does not consider its own arbitration proceedings to be "administrative proceedings". One only needs to examine FINRA NTM 08-44 of August 2008 which apparently was approved by this same SEC, providing for Chairperson Eligibility Requirements in FINRA arbitrations. Such Notice specifically states that one of the factors they will consider instead of a panelist having taken Chairperson Training, is an arbitrator's past experience as "administrative hearing officers". Such specifically does not simply state experience being a Chair of a FINRA panel. Thus it is clear that FINRA itself does not refer to its own proceedings as "administrative" hearings or proceedings. The SEC should not now, when it is convenient to corporate interests to neuter the instant law, for purposes of this statute and suddenly interpret such proceedings as

"administrative" as they are not. In addition, in a search of definitions of the term "Administrative Hearing" it is clear that FINRA arbitration is not considered such.

> *Administrative hearing is an administrative agency proceeding* ***before an administrative law judge.*** *The hearing that is* ***conducted before any governmental agency of the state is also called as administrative hearing.*** *Such hearings can extend from simple arguments to a lengthy trial and evidence can be adduced for the same. In these types of hearings juries will not be present.* USLegal.com. Definitions.

FINRA arbitration has no Administrative Law Judge and is not conducted before any government agency, which there is significant legal precedent supporting such proposition, including FINRA's continuous successful denials of Freedom of Information requests on the basis that it is not a government agency. Case law corroborating such can be provided if requested. Further, obviously such proceedings are not in any open Court and the only manner for a non party to obtain evidence submitted during such proceeding or testimony provided at the hearing would be through the provision of such by a party. Such again is not indicative of any known "administrative hearing".

b) **Issue - Prohibiting information that was derivative of "attorney client privilege" and from an entity's "legal, compliance, audit or other similar functions", unless the entity did not disclose such to the Commission within a reasonable time or proceeded in bad faith (P.129, 130).**

We understand the intent of this proposal, with regard to privilege, but are at a loss as to the need for a rule related to such issue. If the information cannot be utilized by the SEC because it is deemed to be attorney client privileged information, then obviously there will be no enforcement action and thus no bounty to be paid. However, the issue of attorney-client privilege has been the subject of hundreds of court opinions across the country and is impacted by numerous factors. For example, communications regarding the intent to commit a crime (such as obstruction of justice, or falsification of business records, both of which are likely to be raised in the context of the whistleblower provisions) are not privileged, even if between the attorney and a client. Further, the communication must be with the intent of seeking legal advice. There are many in-house attorneys who rather than providing legal advice are providing supervisory input in relation to overseeing customer complaints, etc. within the brokerage industry and such

communications may not be deemed privileged. Thus such issue is a complicated one and we are not sure how the SEC will determine that the subject communications were in fact privileged. In sum, we do not see the purpose of such rule and it would appear to simply make implementing the statute much more complicated, less user friendly, as mandated by Congress, and may again deter an entire category of quality whistleblowers. Again this is not a theoretical concern, but rather includes an individual who approached this firm for whistleblower assistance, happens to be an in-house attorney for a large international public corporation and is now awaiting the outcome of the proposed rules as the proposed rules has succeeded in deterring him from proceeding with a complaint. Further the requirements that the internal "legal, compliance, audit" or other similar personnel having to wait some unknown reasonable time and know that the entity proceeded in bad faith is as previously stated practically difficult to understand and logically absurd. Therefore, such places barriers in front of employees who would have many of the quality leads the commission seeks.

c) Issue - Prohibiting the provision of information derived "by a means of in a manner that violates applicable federal or state criminal law" p.130.

Such provision, as previously referred to herein, while again on its surface seems logical and easy to apply, when carefully considered, the opposite is true. Every state has different criminal laws and each have numerous court decisions interpreting such statutes. Practically speaking who at the SEC will be the one to determine that there was "a violation of law" and what standard will they use. As all Americans know there is a presumption of innocence. Thus until someone is convicted of a crime, with proof beyond a reasonable doubt, they are not deemed to have violated any criminal law, state or otherwise. The Dodd Frank bill under the Denial of Award section specifically in relevant part limits such prohibition to whistleblowers who are "convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award." As such, it would appear that until a whistleblower is so "convicted," which obviously would not be determined by the SEC, the SEC cannot limit via rule creation as it appears to be doing the availability of the Dodd Frank statute to people they would assume had in fact violated state or federal law.

8) **Proposed Rules Obsessive Focus on Absurd Overblown Fears And At the Same Time Fails to Address Almost All Legitimate Concerns Of Whistleblowers, Which Concerns Were Provided to the SEC Staff Prior to The Rule Proposals.**

a) **Proposed rules indicate that multiple SEC actions arising from the whistleblower action but involving the same subject matter or people, will not be aggregated so as to account for the one million dollar threshold.**

We submit that this again is not "user friendly" and serves to discourage whistleblowers, which is the exact opposite of Congress' intent. Such also permits the Commission to divide up claims, with the intended or unintended results of having to avoid paying the whistleblower the bounty provided for. Therefore, if the SEC successfully pursues ten separate claims involving the same people as a result of the whistleblower information and in total the Commission obtains just under ten million dollars, but each prosecution is settled for $999,000 the whistleblower would then receive no award. Such is clearly absurd and once again serves to discourage whistleblowers, rather than encourage them. Thus, such rule should be deleted and the rules should specifically allow for aggregation of the financial penalties derived from the information provided by the whistleblower.

9) **Proposed Rules Regarding Whistleblowers Counsel Conflict With Current SEC Rules and Guidance and Would Inhibit the Ability of Whistleblowers from Even Retaining Qualified Counsel. Also Such May Interfere With Significant Ongoing SEC/Regulatory/Prosecutorial Investigations Which Resulted from the Legislation.**

a) Neither the SEC, nor any other regulator to our knowledge has issued rules regulating counsel fees interfering with private party contracts. Nor has the SEC chosen to regulate fees charged by Counsel to public companies which result in costs to the public shareholder and now often to the taxpayer, as it relates to TARP recipients.

i) It would appear that Gibson Dunn and Baker Donelson's - Matt Heiter Esq. who was quoted in public sources stating that his law firm represented an employee WorldCom in criminal and civil proceedings and apparently has no litigation or prosecutorial experience we submit is hardly the source the SEC should be taking advice from.

ii) We hereby incorporate by reference our SEC submission dated December 18, 2010 which details the various concerns related to this topic. Such details the significant amount of time that must be devoted to such matters by counsel which apparently the

Commission is either not cognizant of or simply parroting corporate lobbying interests such as Gibson Dunn who suggested such rule making. Further, such ignores the significant contribution whistleblower attorneys provide in screening and rejecting many potential claims. As our office alone has rejected over 90% of the submissions and calls we have received, which fact directly contradicts the continuous incorrect notion of whistleblower attorneys filing anything and everything.

iii) There is no basis under the law for the SEC to regulate attorneys who make whistleblower submissions, as at such time of the submission there would not be an investigation or proceeding before the SEC. Further, such attorneys are obviously subject to individual State Bar disciplinary rules, which have experience with such rules. The SEC is not an expert in legal ethics and thus should not seek to regulate such attorneys who simply seek to assist whistleblowers, and in so doing assist the SEC. The Commission should be encouraging Counsel, rather than discouraging them by threatening some unknown actions against such Counsel. Notably, once again the instant proposal parrots the suggestions of attorneys who represent the corporate lobby seeking to inhibit whistleblowing.

10) **<u>While Addressing Concerns Over the Cost of "*Postage*" (p.116) to the Whistleblower in Submitting Three Forms, the "*Overflow of Noisy Signals*" (P.113) and Private Attorney Fee Arrangements of the Whistleblowers (P.55), None of the 180 Pages of Rules Make a Single Solitary Mention to "FINRA," Despite FINRA Being Purportedly Supervised By The SEC and it Being the Prime Regulatory Body and Dispute Resolution Forum For All Brokerage/Investment Banking Institutions, As Well As All Registered Representatives and Supervisors Within Such Institutions.</u>**

As Chairman Schapiro who as the former the Chief Executive Officer of FINRA is well aware of FINRA, we are at a loss as to why there is no mention of FINRA in the proposed rules, as such would appear to be the "pink elephant" in the room, at least when it comes to securities related whistleblowing, as noted herein.

11) **Lack of Rules Suggesting the Modification of the SEC's Own "Enforcement Manual" dated January 13, 2010, Significantly and Immediately Impacting Upon the Success of the Statute.**

It would appear that in drafting the proposed rules the Commission is under the mistaken belief that such proposals and Dodd Frank itself is an island onto itself. Nothing could be further from the truth. One large category of quality whistleblowers are those who may have been close to the wrongdoer and thus has quality information that could stop the fraud and assist the SEC in pursuing the mastermind(s). However, logically such people would be reluctant to come forward if there is any possibility that they would be prosecuted by the SEC or criminal authorities. An SEC prosecution obviously can lead to monetary penalties which could easily reverse any benefit the whistleblower obtains from having come forward. Once again we refer to our December 18, 2010 submission regarding this issue. Specifically we suspect that if the SEC actually polled the Madoff victims, which we urge it do to garner the empirical evidence the SEC apparently seeks, as to whether they would rather have had an internal senior Madoff whistleblower come forward years before, and be paid a 10-30% bounty as well as receive in advance immunity from civil and criminal prosecution which common sense dictates such whistleblowers will want, as otherwise the potential of any bounty is likely useless (something the proposed rules not only fails to address but seems to incredibly outright discourage) but at the same time stop the Madoff fraud, years before hundreds of millions were lost versus what actually happened. We have no doubt that the overwhelming majority of the victims would instruct the SEC and prosecutors to pay the bounty and provide the requested immunity sought, and by doing so save future investors (and past investors) much more than any bounty, as well as prevent hundreds of thousands of other future victims of the fraud. Unfortunately the proposed rules take the opposite approach and thus, in effect, encourages such frauds to simply go on undetected under the false premise that such people will simply wait in line at the SEC and come forward simply because of the instant program which is a literal mine-field for them with a lot of downside and little if any potential upside (again the odds of a bounty overall on any given submission, according to the SEC, is .39 of 1% which includes all submissions not assisted by counsel).

Once again this is not a theoretical discussion as we are actively engaged with an Enforcement matter of critical importance to the SEC. The Enforcement staff would currently

like to meet with our client who submitted an anonymous complaint pursuant to the Dodd Frank statute regarding an apparent significant insider trading scheme. In response, we have stated that our client would be willing to drop the anonymous nature of his submission and personally assist the Commission and well as criminal prosecutors, but would want assurances that if he provides information that is consistent with what this firms provides in advance of such meeting he will not be prosecuted, either by the Commission or by criminal prosecutors. The Enforcement staff referred us to the SEC's "new" Enforcement Manual which provides for deferred prosecution and/or immunity, but such requires that the witness come forward and identify himself in providing a proffer. Obviously such requirement is inconsistent with Dodd Frank which permits anonymous submissions and cooperation through an attorney. The Enforcement Manual is based on the faulty premise that all those who the Commission is considering offering immunity to are already identified by Enforcement and have their own interest in providing a proffer. However, as a result of Dodd/Frank that is no longer true. As such, the Commission must make a choice between promoting quality leads and assistance versus, maintaining the status quo which will lead to more Madoffs and Stanfords.

12) <u>Lack of Rules Providing for Updates to Whistleblowers</u>.

A common issue raised by whistleblowers is that the Commission sends a confirmation letter and than leaves the whistleblower out to pasture. Nothing could be worse in discouraging whistleblowing then not being made aware if the submission is being followed-up upon or not. We understand the Commission's interest in maintaining the secrecy of its investigation, but such must be balanced with the interest of making the Dodd Frank law successful or having it be simply window dressing. We suggest that simply confirming to the whistleblower or their counsel that a submission is not being pursued at this time would not significantly impact the Commission's goals. Further, certainly the SEC can later on, due to changes or more information contact the same whistleblower to inform them that the investigation has been reopened and would welcome any further information. Otherwise, neither the whistleblower nor their counsel will waste their time continuously sending more and more information relating to a submission that the Commission, for whatever reason including if it determined that there is no securities violations involved, chose not to pursue. It is unfair and contrary to the goals of the law which is

to encourage whistleblowers, to leave such individuals and their counsel in the dark as to whether a submission is being pursued or not. However, once again the rules do not appear to address such issue and they must.

13) Lack of Rules Relating to the Revolving Door at the SEC and the Need to Propose Related Rules to Promote and Provide Comfort to Whistleblowers.

It is no secret that every year senior and junior SEC officials leave the Commission to work for either the entities they once regulated or a law firm which represents such entities. As we suggested to the Staff during our last meeting, if the SEC wishes to encourage whistleblowers it should propose rules prohibiting its own employees from working for any entity or law firm representing such entity which was the subject of a whistleblower complaint in which the employee was involved in or in any way supervised. However, once again no such rules which would provide comfort to whistleblowers were proposed.

One only needs to review the well publicized circumstances surrounding former SEC employee George Demos and the purported provision of information to JP Morgan regarding a J.P. Morgan whistleblower who complained about market timing issues to understand the need for such rules. Further, the facts related to the Counsel of Overstock.com who also formerly worked at the SEC raises similar issues of concern. In addition, the SEC itself had its own very recent issues of how it dealt with its own internal whistleblowers which provides little comfort to potential whistleblowers and thus creates a severe credibility problem for the SEC that one would think the SEC would be seeking to overcome with the proposed rules. The facts related to former Senior Counsel of the Division of Enforcement, Gary Aguiree's law suit against the SEC which was recently settled for 28 million dollars, have been well reported following his firing from the SEC after he sought to subpoena John Mack who was is now the Chairman of the Board at Morgan Stanley. Similarly, in response to a report issued by the SEC's Office of Inspector General (which report was reportedly initially withheld by the SEC), Republican Senator Grassley this past Fall issued a letter to Chairman Schapiro raising concerns about the "extremely disturbing" culture of whistleblower retaliation at the Fort Worth office of the SEC which was responsible for the reported bungling of the SEC investigation relating to the Allen Stanford's 7.2 billion dollar Ponzi scheme. As a result, we submit that the SEC desperately needs

to demonstrate that far from obstructing whistleblowers, it is in fact encouraging them and thus the rule proposals must be modified to match that theme.

14) Apparent Faulty Premise of the Proposed Rules.

In conclusion, it would appear that the proposed rules were built upon several faulty premises, including, but not limited to:

a) Obsessive concern over overload of frivolous complaints;
b) Assumption that the SEC eventually tracks down all securities violations with or without whistleblowers;
c) Assumption that current senior employees and industry participants are rushing to be whistleblowers for the SEC because of the potential bounty and would continue to do so no matter what rules are proposed or not;
d) Assumption that Attorney time is limited to completing proposed forms;
e) Ignores the fact that most, if not all, quality whistleblowers will want counsel;
f) Ignores the fact that most if not all quality whistleblower will wish to be anonymous and thus counsel would need to be (and already are) the mouthpiece for such whistleblower throughout;
g) Ignores the fact that numerous submissions have already been filed by retained counsel which are being followed up upon by the SEC and related entities and thus even the proposal of rules seeking to regulate such retention impacts upon the continued cooperation for such investigations.

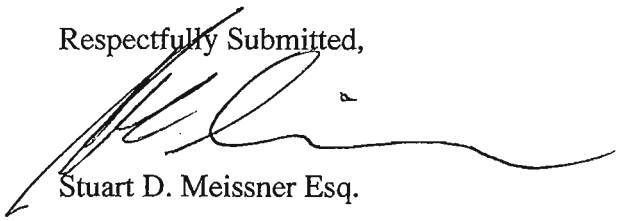
Conclusion

Until the Commission addresses all of the above, I must state that as a practitioner on the front lines of the instant statute, I submit that the success of this historic law is in doubt and countless future frauds and market meltdowns will continue to plague this country, many of which may be avoided.

This firm respectfully suggests, on behalf of its current and future whistleblower clients, as well as for the benefit of the country at large, that the Commission "seize history" and not waste this historic moment in time by in effect neutering the Dodd-Frank Whistleblower Law through the current proposed rules.

We look forward to our second in-person meeting with the Commission staff on February 9, 2011 to discuss the suggestions herein.

Respectfully Submitted,



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