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February 18, 2011

BY ELECTRONIC MAIL

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Proposed Rules for Implementing the Whistleblower Provisions of
Section 21F of the Securities Exchange Act of 1934 (File No. S7-33-10)

Dear Ms. Murphy:

This letter is submitted on behalf of Apache Corporation; Cardinal Health, Inc.; The Goodyear Tire & Rubber Company; Hewlett-Packard Company; Merck & Co., Inc.; Microsoft Corporation; Newmont Mining Corporation; Procter & Gamble Co.; TRW Automotive Holdings Corp.; and United Technologies Corporation (collectively, “the Companies”) to supplement the Companies’ letter of December 17, 2010 regarding the Commission’s proposed rules for implementing the whistleblower provisions of Section 21F of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-6.

In their letter of December 17, the Companies urged the Commission to promulgate rules that fully reflect the importance and benefits of strong corporate compliance programs. Specifically, the Companies suggested that the Proposed Rules be modified to make compliance with internal reporting procedures a condition of eligibility for an award, unless (a) the employer does not have an effective internal corporate compliance program, or (b) the employee can show that extraordinary circumstances should excuse such reporting.

We believe that the Commission has ample authority to promulgate the rule proposed by the Companies (or even to promulgate a categorical rule requiring internal reporting), and this letter discusses the Commission’s legal basis to do so.

I. Congress has granted the Commission broad authority to implement the whistleblower provisions of Section 21F.

Section 21F(j) of the Securities Exchange Act of 1934 (the “Exchange Act”) provides that “[t]he Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes

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of this section.” 15 U.S.C. § 78u-6(j). This statutory language confers broad rulemaking authority on the Commission. *See, e.g., Krukowski v. Comm’r*, 279 F.3d 547, 552 (7th Cir. 2002) (provision authorizing agency “to prescribe such regulations as may be necessary or appropriate” is “a broad grant of authority”) (internal quotation marks omitted); *Mobile Commc’ns Corp. of Am. v. FCC*, 77 F.3d 1399, 1404 (D.C. Cir. 1996) (broadly construing agency’s “necessary and proper” clause). A congressional delegation of authority to promulgate such regulations as are “necessary or appropriate” vests the agency with “significant responsibility for the administration of” the statute. *S. Cal. Edison Co. v. United States*, 226 F.3d 1349, 1358 (Fed. Cir. 2000) (construing provision authorizing Secretary of the Interior to promulgate “necessary or appropriate” regulations to carry out the purposes of the Boulder Canyon Project Act).

The language of Section 21F(j) authorizes the Commission to promulgate rules that are “necessary *or* appropriate” to implement the statute. Congress’s use of the disjunctive “or”—in contrast to other congressional delegations of authority that use a conjunctive formulation, *e.g.*, 16 U.S.C. § 3124 (“necessary and appropriate”), or a singular formulation, *e.g.*, 29 U.S.C. § 2654 (“necessary”)—is significant. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (“Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise.”). Courts have recognized that even provisions utilizing the conjunctive or singular formulations constitute broad delegations of authority. *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1191 (9th Cir. 2000) (“necessary and appropriate” formulation grants “broad authority”); *O’Dea-Evans v. A Place For Mom, Inc.*, 2009 WL 2143739, at *5 (N.D. Ill. July 15, 2009) (slip op.) (“necessary” formulation is a “broad delegation of rulemaking authority”). Here, Congress went even further. Indeed, because the term “appropriate” invokes a “more expansive” concept than does “necessary,” the use of the two words in the disjunctive signals an extremely broad delegation of authority to the Commission. *Grider v. Keystone Health Plan Cent., Inc.*, 500 F.3d 322, 328 n.2 (3d Cir. 2007); *cf. Reiter*, 442 U.S. at 339.

The exceptionally broad rulemaking authority conferred by Section 21F(j) is limited only by the requirement that the rule be “consistent with the purposes of this section.” 15 U.S.C. § 78u-6(j). This language confirms that the Commission is authorized to consider other important statutory and regulatory objectives in implementing the whistleblower provisions, so long as these objectives are consistent with the Commission’s efforts to prevent, discover, and prosecute illegal conduct.

In short, Congress has conferred “extraordinarily broad” rulemaking authority on the Commission. *Accord Nat’l Ass’n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1229 (D.C. Cir. 2007). In reviewing rules adopted pursuant to such broad grants of rulemaking authority, courts have recognized that judicial “[d]eference is particularly appropriate.” *BNSF Ry. Co. v. Surface Transp. Bd.*, 526 F.3d 770, 776 (D.C. Cir. 2008) (quoting *Cent. & S. Motor Freight Tariff Ass’n v. United States*, 757 F.2d 301, 321-22 (D.C. Cir. 1985)).

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II. The Commission has authority to make utilization of effective internal reporting procedures a prerequisite for whistleblower recovery.¹

In addition to granting extraordinarily broad rulemaking authority to the Commission, the statute contains three separate provisions that would support a Commission rule conditioning a whistleblower award on utilization of effective internal reporting procedures, in the absence of countervailing extraordinary circumstances.²

- *First*, the statute defines a “whistleblower” as “any individual who provides . . . information relating to a violation of the securities laws to the Commission, *in a manner established, by rule or regulation, by the Commission.*” 15 U.S.C. § 78u-6(a)(6) (emphasis added).
- *Second*, the statute provides that the Commission shall, “*under regulations prescribed by the Commission and subject to subsection (c),*” pay an award to a whistleblower who “voluntarily provided original information to the Commission that led to the successful enforcement of the covered” action. *Id.* § 78u-6(b)(1) (emphasis added).
- *Third*, the statute provides that an award is unavailable to, *inter alia*, “any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.” *Id.* § 78u-6(b)(2)(D).³

¹ The Commission also has authority to make such compliance a relevant factor in determining the *amount* of any award under Section 21F(b)(1). In determining the amount of an award, the Commission must consider, *inter alia*, such “relevant factors as the Commission may establish by rule or regulation.” 15 U.S.C. § 78u-6(c)(1)(B)(i)(IV). One such factor could be compliance with an effective internal reporting program. The Companies are concerned, however, that this approach would not be sufficient to preserve the effectiveness of corporate compliance programs. Whistleblowers might well conclude that the advantages of bypassing internal procedures (in terms of maximizing the probability of an award) outweigh the possibility that an award might be reduced by an unspecified amount. For this reason, the Companies believe that the Commission should exercise its extensive rulemaking authority to make an award available only if the whistleblower has utilized effective internal reporting procedures, absent extraordinary countervailing circumstances.

² Employees, officers, and directors should be subject to this condition for receiving an award; it would not apply to whistleblowers outside of the company.

³ The Commission could, for example, require that a whistleblower attest to having complied with internal reporting procedures.

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These provisions, combined with the extraordinarily broad grant of rulemaking authority discussed above, authorize the Commission to make utilization of effective internal reporting procedures a precondition for receiving an award.

For at least two reasons, such a requirement would be both “appropriate” and “consistent with the purposes of” the statute.

First, by encouraging the use of two mechanisms—internal reporting, and reporting to the Commission—the rule would bolster the Commission’s efforts to prevent, detect, and punish unlawful conduct. *See* Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Release No. 34-63237, 75 Fed. Reg. 70488, 70493 70516 (Nov. 3, 2010) (highlighting the important benefits of internal compliance programs).

Second, such a rule would allow the Commission to harmonize Section 21F with other federal statutes and policies that promote effective internal compliance programs as an important adjunct to federal law enforcement. *See, e.g.*, 15 U.S.C. § 78j-1(m)(4); U.S. Sentencing Guidelines § 8B2.1; *see also* Principles of Federal Prosecution of Business Organizations, § 28.800 (“The Department [of Justice] encourages . . . corporate self-policing,” i.e., through effective internal compliance programs).⁴ The Commission would be well within its authority to promulgate a rule with that objective in mind. *See generally Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007) (sustaining an EPA action in part because it harmonized statutory commands).⁵

Because the statute authorizes the Commission to require internal reporting (whether categorically or subject to the exceptions the Companies have proposed), the canon *expressio unius est exclusio alterius* (“the expression of one thing is the exclusion of another”) does not apply to this situation. But even if that canon of statutory interpretation applied, it would not limit the Commission’s authority. It is well settled that “the *expressio unius* canon ‘has little

⁴ Available at <http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf>.

⁵ Section 21F(h)(2)(A) prohibits the Commission from disclosing information provided by a whistleblower which could reasonably be expected to reveal the identity of the whistleblower, except in accordance with 5 U.S.C. § 552a and unless and until disclosure is required in connection with a public proceeding. 15 U.S.C. § 78u-6(h)(2)(A). Based on the Companies’ proposal, however, a whistleblower’s identity would be protected because one of the hallmarks of effective internal compliance programs is the availability of anonymous reporting, something the SEC could underscore in adopting final rules. *See Carnero v. Bost. Scientific Corp.*, 433 F.3d 1, 9-10 (1st Cir. 2006) (noting that Sarbanes-Oxley, 15 U.S.C. § 78j-1(m)(4), “encourage[s]” companies to implement anonymous whistleblowing by employees).

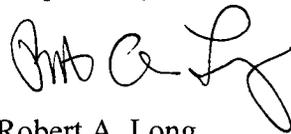
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force' in the context of challenges to an agency's interpretation of a statute, 'where [courts] defer to an agency's interpretation unless Congress has directly spoken to the precise question at issue.'" *St. Marks Place Hous. Co., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 610 F.3d 75, 82 (D.C. Cir. 2010) (quoting *Mobile Commc'ns Corp.*, 77 F.3d at 1404-05). The courts have recognized that "[e]xpressio unius 'is simply too thin a reed to support the conclusion that Congress has clearly resolved [an] issue.'" *Mobile Commc'ns Corp.*, 77 F.3d at 1405 (quoting *Tex. Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991)). Here, Congress has not directly spoken to "the precise question at issue," i.e., whether a whistleblower award can be conditioned on compliance with internal reporting procedures. Accordingly, the Commission has authority to answer that question in the affirmative.⁶

* * *

For the reasons identified in the Companies' December 17, 2010 letter, the Commission should require potential whistleblowers to utilize internal reporting procedures as a condition of eligibility for an award. Whether that requirement is imposed categorically or subject to the exceptions set forth in the Companies' December 17 letter, we believe the Commission would be well within its legal authority to promulgate such a rule.

Respectfully submitted,



Robert A. Long
David B.H. Martin
Steven E. Fagell

cc: Honorable Mary L. Schapiro, Chairman
Honorable Luis A. Aguilar, Commissioner
Honorable Kathleen L. Casey, Commissioner
Honorable Troy A. Paredes, Commissioner
Honorable Elisse B. Walter, Commissioner

⁶ It is even true that "a congressional prohibition of particular conduct may actually *support* the view that the administrative entity can exercise its authority to eliminate a similar danger." *Tex. Rural Legal Aid*, 940 F.2d at 694. In that respect, the Commission could reasonably consider the proposals from many commentators to expand the bar on wrongdoers from recovering a whistleblower award.