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BY ELECTRONIC MAIL

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

Re: File No. S7-33-10 – Comment on Proposed Rule 240.21F-4(b)(4)(iv), (v) for Implementing the Dodd-Frank Whistleblower Program

Dear Ms. Murphy:

I write to submit a comment to the SEC'S Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, based on legal developments occurring after the December 17, 2010 original deadline for comments on the Proposed Rules. In particular, on December 21, 2010, a New York State Appellate Court held that compliance officers ordinarily have no state law remedy for being fired in retaliation for internally reporting wrongdoing. *Sullivan v. Harnish*, 915 N.Y.S.2d 514 (1st Dept. 2010). The *Sullivan* decision highlights a potential problem created by Proposed Whistleblower Rules 21F-4(b)(4)(iv) and (v).

Proposed Rules 21F-4(b)(4)(iv) and (v) would make information the SEC receives from compliance, audit and legal employees ineligible for a whistleblower award unless those employees first reported wrongdoing internally, without clarifying that these employees have a remedy if they are fired in retaliation. Although this laudibly bolsters internal compliance programs, the lack of a clear retaliation remedy leaves such employees in a Catch-22 of having to make an internal report not protected by the Whistleblower statute to qualify for an Award. The lack of a remedy is confirmed by case law interpreting the Whistleblower Protection Act ("WPA") and False Claims Act ("FCA") as generally *not* providing a retaliation remedy for *internal* reporting by compliance, audit and legal employees – as opposed to *external* reporting. *See, e.g., Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, 1352 (Fed. Cir. 2001) (no WPA retaliation remedy for internal reporting employee who "as part of his normal duties" has "been assigned the task of...reporting wrongdoing"); *Eberhardt v. Integ. Design & Constr., Inc.*, 167 F.3d 861, 868 (4th Cir. 1999) (no FCA retaliation remedy for internal reporting by compliance personnel absent "expressly stating an intention to bring" or putting "employer on notice" of *qui tam* claim). Yet such employees are not required to report internally to be eligible under the WPA or FCA Whistleblower programs, so the lack of a clear retaliation remedy will only create a Catch-22 in the SEC Whistleblower context under the Proposed Rules.

Attached as Exhibit 1 hereto is an article I have written explaining this problem, and suggesting that the SEC solve it by clarifying that compliance, audit and legal employees have a federal Whistleblower retaliation remedy when they are fired for internally reporting wrongdoing. See "Sullivan v. Harnisch and SEC Proposed Whistleblower Rules Bolster Internal Compliance Programs While Creating Catch-22 for Compliance Officers," Hedge Fund Law Report, vol. 4 no. 10 (March 18, 2011). If the SEC will require such employees to report internally to qualify for a Whistleblower Award, then it should protect them against retaliation for acting pursuant to that requirement. Doing so will ensure the proper balance of bolstering internal compliance programs while adequately protecting the employees most important both to internal compliance and the effectiveness of the Whistleblower Program. Further, this would strike a compromise between the comments that endorse Proposed Rules 21F-4(b)(4)(iv) and (v), and those that propose eliminating them. Compare Feb. 18, 2011 Comment of Messrs. Long, Martin and Fagell at 3-5, with, Mar. 17, 2011 Comment of Stephen M. Kohn at 4-5.

Respectfully submitted,



Samuel J. Lieberman

Enclosure

EXHIBIT 1

Copyrighted material redacted. Author cites:

Lieberman, Samuel J., and Jennifer Rossan. "Sullivan v. Harnisch and SEC Proposed Whistleblower Rules Bolster Internal Compliance Programs While Creating Catch-22 for Compliance Officers." *The Hedge Fund Law Report*. Vol. 4, Number 10. 18 Mar. 2011. Web. 31 Mar. 2011.
<<http://www.hflawreport.com/articles/by/topic/435>>.