May 23, 2011

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

Via email: rule-comments@sec.gov

Re: Additional Comments in Support of Proposed Protections for the Attorney-Client Relationship and Privileged Communications, File Number S7-33-10, Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Release No. 34-63237 (Nov. 3, 2010).

Dear Ms. Murphy:

The U. S. Chamber of Commerce Center for Capital Markets Competitiveness and the U.S. Chamber Institute for Legal Reform (collectively referred to as "the Chamber") appreciate the opportunity to submit additional comments regarding the U.S. Securities and Exchange Commission's ("SEC" or "Commission") proposed rules implementing the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). As explained in our December 17, 2010 joint letters regarding the Proposed Rules, we have very serious concerns about the impact the proposed whistleblower requirements will have on key aspects of sound governance of public companies and on those companies' responsibilities to act in the best interests of their shareholders.[1]

[1] On December 17, 2010, the Chamber joined a coalition of companies and organizations including, among others, Americans for Limited Government, Ryder Systems, Inc., Financial Services Institute, Inc., Verizon, and White & Case, LLP in submitting a comment letter to the Commission on the Proposed Rules. Also on December 17, 2010, the U.S. Chamber of Commerce Center for Capital Markets Competitiveness and the U.S. Chamber Institute for Legal Reform jointly submitted a separate comment letter to the Commission. Both letters outlined the Chamber's broad concerns with the proposed whistleblower rules and suggested numerous improvements to the Proposed Rules that would maintain the vitality of internal compliance programs, while also faithfully implementing the requirements of the Dodd-Frank legislation.

One of the concerns voiced in the earlier joint letters was that the Proposed Rules lack clarity in excluding information obtained by those with a legal or compliance role. As explained in those letters, the lack of clarity in the Proposed Rules could create a perverse financial incentive for those with the job of identifying and investigating wrongful conduct. By making such individuals eligible to serve as whistleblowers and receive a substantial bounty, the Proposed Rules would put these professionals in the position of potentially deciding between self-interest and the interest of their employer.[2] The December 17, joint letters made specific recommendations for reforming Proposed Rule 21F-4(b) to address these concerns by helping to eliminate potential conflicts of interest through clear guidance.

Since our submissions in December 2010, at least one commenter has recommended that the Commission revise its Proposed Rules in ways that would create even greater conflict of interest concerns and lead directly to whistleblower production of information covered by the attorney-client privilege. In particular, these comments have faulted the Commission for proposing to exclude privileged information and information derived from a legal representation from the independent knowledge or analysis requirement for whistleblower eligibility. The Chamber disagrees with these recent comments and believes the Commission should not revise subsections (b)(4)(i) and (ii) of Proposed Rule 21F-4, as suggested by others, but should retain these provisions and strengthen others to provide the strongest possible protection for the attorney-client relationship. After all, the Commission has made clear in its Enforcement Manual that, "[a]s a matter of public policy, the SEC wants to encourage individuals, corporate officers and employees to consult counsel about potential violations of the securities laws."[3] The changes to subsections (b)(4)(i) and (ii) that have been recommended by other comments would reverse this well-reasoned policy and discourage, rather than encourage, the seeking of legal advice in aid of compliance efforts.

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[2] As we explained in the December 17 coalition letter:

> If personnel charged with responding to internal reports of wrongdoing were in a position to benefit financially from disclosing such information to the SEC, corporate compliance functions could soon grind to a halt. The very people charged with orchestrating a company's response could choose financial self-interest over corporate responsibility. These persons also would have a personal incentive to maximize any eventual fine or other penalty paid by the company. For this reason, the exclusion from eligibility for persons who have compliance or similar responsibility within a company, or who learn information through a compliance or similar function, needs to be carefully drawn, strongly enforced, and any exceptions limited as much as possible consistent with the parameters of the enabling statute.

Coalition Ltr. at 9.

[3] U.S. Sec. & Exch. Comm'n, Division of Enforcement, Enforcement Manual at 97 (Feb. 8, 2011) *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

The Commission should reject arguments that would seek to weaken the attorney-client relationship or the protection of privilege in any way. In view of the substantial incentives created by the Dodd-Frank whistleblower bounty provisions, subsections (b)(4)(i) and (ii) of the Proposed Rules are vital to protecting both the attorney-client relationship and the privilege that enables that relationship to function.

Subsection (b)(4)(i) Properly Protects Against the Misuse of Privileged Information

At least one commenter has faulted subsection (b)(4)(i) of the Proposed Rules because the subsection could "unnecessarily" limit the information the Commission may receive from whistleblowers. We disagree with the claim that the proposed subsection's protection of privilege is in any way unnecessary.[4]

The protection and certainty of the attorney-client privilege is vitally important to effective corporate compliance programs. As a 2005 study by the Association of Corporate Counsel demonstrated, the attorney-client privilege strengthens compliance efforts by enhancing candor, encouraging earlier proactive engagement on compliance matters, and improving lawyers' abilities to enforce and improve compliance programs.[5] Proposed subsection (b)(4)(i) would help ensure that robust compliance efforts are not undermined by whistleblower leaks that could weaken trust in the attorney-client privilege. The consequences of a weakened privilege could be devastating to existing compliance programs. In many ways, these consequences are easy to predict. As former SEC Commissioner Paul Atkins explained in a related context, "[a]s knowledge of its weakening spreads, corporate employees will be less candid and forthcoming, corporate internal investigations will be less trustworthy, and shareholders and government investigators will be frustrated in their efforts to prevent misdeeds."[6]

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[4] Policymakers have been clear over time about the essential importance of the attorney-client privilege to broader constitutional rights. For example, at a September 12, 2006 hearing, Senator Patrick Leahy, the current Chairman of the Committee on the Judiciary, described the attorney-client privilege as "the bedrock of our constitutional legal system . . . ." *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations*, S. Hrg. 109-835, at 9 (Sept. 12, 2006).

[5] Ass'n of Corporate Counsel, Is the Attorney-Client Privilege Under Attack? at 2-3 (Apr. 6, 2005) (showing that 95% of lawyers believe there would "be a 'chill' in the flow or candor of information from clients," absent the protection of privilege, and 97% of respondents believe privilege "improves the lawyer's ability to monitor, enforce, and/or improve company compliance initiatives") *available at* http://www.acc.com/vl/public/Surveys/loader.cfm?csModule=security/getfile&pageid=16315&page=/legalresources/resource.cfm&qstring=show=16315&title=ACC%20Survey%3A%20Is%20the%20Attorney%2DClient%20Privilege%20Under%20Attack.

[6] Paul S. Atkins, Commissioner, U.S. Sec. and Exch. Comm'n, Remarks at the Federal Society Lawyers' Chapter of Dallas, Texas (Jan. 18, 2008) *available at* http://www.sec.gov/news/speech/2008/spch011808psa.htm.

Proposed subsection (b)(4)(i) makes clear that the Commission will not treat a whistleblower's report as information derived from independent knowledge or analysis – and therefore not "original information" – if it was learned "through a communication that was subject to the attorney-client privilege. . . ." The proposed subsection is not a blanket rule, but contains a limited exception for disclosure of information consistent with existing Commission regulations and state bar rules. In sum, the Commission has proposed a common-sense rule that would disqualify whistleblowers who seek to trade on attorney-client privileged information, while allowing established exceptions to the privilege to remain in place.

The Commission's proposed protection of privileged communications reflects an understanding and acknowledgment that the attorney-client relationship cannot function effectively without a certain and predictable protection of privileged information. The U.S. Supreme Court made the same point very clear in its *Upjohn* ruling, when it explained, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected."[7] Proposed subsection (b)(4)(i) would help ensure a certain and predictable protection of attorney-client communications and would thereby foster open and early dialogue about potential compliance problems. Thus, the Chamber urges the Commission to resist weakening proposed subsection (b)(4)(i).

Subsection (b)(4)(ii) Appropriately Prevents Self-Interest from Clouding the Attorney-Client Relationship

As with subsection (b)(4)(i), at least one commenter has recently suggested that proposed subsection (b)(4)(ii) is overly broad and places an unnecessary limitation on whistleblower eligibility. We strongly disagree with these comments and believe proposed subsection (b)(4)(ii) is necessary to prevent deep conflicts from developing and ultimately compromising the attorney-client relationship.

Proposed subsection (b)(4)(ii) would bar the Commission from treating whistleblower information as "derived from independent knowledge or independent analysis" if it was obtained from or otherwise based on a "legal representation of a client. . . ." The subsection's bar would apply whether the legal services were provided by a whistleblower personally or by the whistleblower's employer or firm. In recognition of certain preexisting policies, the subsection provides a limited exception where the disclosure to the Commission is already authorized by the Commission's regulations or by state bar rules.

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[7] *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

We urge the Commission to retain subsection (b)(4)(ii) to safeguard legal representations from the taint of self-interest and self-dealing. Courts have made clear that lawyers should not put themselves in a position where they are tempted to trade on privileged information or be disloyal to an existing or past client in the interests of a new client or claim.[8] In the same vein, courts have dismissed suits where attorneys have turned against former clients by filing suit in a representative capacity as a named plaintiff or relator. As the United States District Court for the Southern District of New York wrote just last month in dismissing a False Claims Act whistleblower action brought, in part, by a former in-house lawyer, "[c]ourts in this District have not hesitated to dismiss claims brought by lawyers in situations similar to those at issue here."[9] The Commission should not endorse a policy that has been so frowned upon by the courts.

Just as allowing individuals to obtain awards for disclosing privileged information would undermine open attorney-client dialogue, encouraging attorneys to blow the whistle on clients would undermine the sanctity of the attorney-client relationship, as well as the fundamental professional duties of confidentiality and loyalty each lawyer owes to his clients. Compliance-related legal relationships would likely be the most compromised if the Commission were to weaken subsection (b)(4)(ii). Counsel retained to assist in these important roles typically receive information regarding potential misconduct, investigate credible allegations of wrongdoing, and when appropriate, recommend remedial and disciplinary actions to the client. But the powerful financial incentive created by the whistleblower program could encourage attorneys to ignore their essential duties and instead, report information of any misconduct directly to the SEC. Under the current Proposed Rules, subsection (b)(4)(ii) works to protect against such breaches of client loyalty. We believe it would be a mistake to weaken that subsection in ways that could undermine the attorney-client relationship and limit the effectiveness of compliance efforts.

The Commission's Rules Should Foster Attorney Consultation in an Effort to Strengthen Compliance Efforts

The Commission's policies reflect a general commitment to protecting shareholder value and supporting corporate efforts to do the same. The Dodd-Frank whistleblower program should be implemented in a manner that recognizes these important goals, while

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[8] *Ercklentz v. Inverness Management Corp.*, No. 7167, 1984 WL 8251, at *2 (Del. Ch. Oct. 18, 1984) ("Lawyers should not put themselves in the position 'where, even unconsciously, they might take, in the interests of a new client, an advantage derived or traceable to, confidences reposed under the cloak of a prior, privileged relationship.'" (quoting T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 269 (S.D.N.Y. 1953))) (unpublished).

[9] *United States ex rel. Fair Laboratory Practices Assocs. v. Quest Diagnostics Inc.*, No. 05 Civ. 5393 (RPP), 2011 WL 1330542, at * 11 (S.D.N.Y. Apr. 5, 2011).

also fostering early and frequent consultation with counsel on compliance issues. Although recent comments have faulted proposed subsections (b)(4)(i) and (ii) for being overly broad and unnecessary, the Chamber believes these subsections are essential to protecting the attorney-client relationship within the corporate compliance function. Accordingly, we urge the Commission to retain both subsections without change and encourages the Commission to consider further changes to its Proposed Rules, to strengthen internal compliance measures and avoid potential conflicts of interest among legal and compliance personnel.

We thank you for your consideration and would be happy to discuss these views further with you and your staff.

Sincerely,

The U. S. Chamber of Commerce Center for Capital Markets Competitiveness and
The U.S. Chamber Institute for Legal Reform

CC: The Honorable Mary L. Schapiro, Chairman
The Honorable Kathleen L. Casey, Commissioner
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
Mr. Robert S. Khuzami, Director, Division of Enforcement