IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FRED E. LUTZEIER, Plaintiff, v. CITIGROUP, INC., et al., Defendants.	Case No. 4:14-cv-00183-RWS

MOTION AND INCORPORATED MEMORANDUM OF LAW BY THE SECURITIES AND EXCHANGE COMMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF

The Securities and Exchange Commission respectfully moves this Court for leave to file an amicus curiae brief[1] in support of Mr. Lutzeier on the issue of whether he was required to provide information to the SEC to qualify as a "whistleblower" for purposes of Dodd-Frank's anti-retaliation provision. A copy of the brief has been submitted with this motion. Counsel conferred with the parties' counsel regarding their position on this motion, and they do not oppose this motion.

The SEC's Interest in This Issue. The defendants in this case ("Citigroup") argue that Mr. Lutzeier was required, as a matter of law, to make a report to the SEC

[1] The federal government can file an amicus brief without consent of the parties or leave of the court on appeal (Fed. R. App. Proc. 29(a)). There is no corresponding provision for filing as amicus in the district court, but this Court has previously permitted amicus participation by non-parties where appropriate. *See, e.g.*, *Archdiocese of St. Louis v. Kathleen Sebelius*, Case No. 4:12-cv-924-JAR, Docket Entry 22 (E.D. Mo. Aug. 22, 2012) (granting motion by non-party organization and members of Congress to file amicus brief); *United Fire & Cas. Co. v. Titan Contractors Serv., Inc.*, 2012 WL 3065517 (E.D. Mo. July 27, 2012) (denying motion to intervene but allowing participation as amicus instead).

before he was fired in order to be protected by the whistleblower anti-retaliation provisions of Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376 (2010).[2]

In Section 922, Congress amended the Securities Exchange Act of 1934 to add Section 21F, entitled "Securities Whistleblower Incentives and Protection." Among other things, Section 21F prohibits employers from retaliating against individuals in the terms and conditions of their employment when they engage in certain specified whistleblowing activities.

In May 2011, at Congress's direction, the SEC issued final rules "implementing the provisions of Section 21F[.]" *See* Dodd-Frank §924(a). Throughout the rulemaking process, the SEC considered the "significant issue" of how to ensure that its implementation did not undermine the willingness of individuals to make whistleblower reports internally *before* they make reports to the SEC. Securities Whistleblower Incentives and Protections ("Adopting Release"), 76 Fed. Reg. 34300 (June 13, 2011); *see also id.* at 34323 (explaining that an "objective" of the rulemaking was "to support, not undermine, the effective functioning of company compliance and related systems by allowing employees to take their concerns about possible violations to appropriate company officials *first* while still preserving their rights under the Commission's whistleblower program") (emphasis added); Proposed Rules

[2] Memorandum of Law in Support of Defendants' Partial Motion to Dismiss the Complaint and Motion to Strike, Docket Entry 27, filed April 9, 2014, at Argument I ("Motion to Dismiss").

for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 ("Proposing Release"), 75 Fed. Reg. 70488 (Nov. 17, 2010) (same). The SEC's final rules were carefully calibrated to achieve this objective by providing "strong incentives" for individuals in appropriate circumstances to report internally in the first instance. Adopting Release at 34301 ("[The final rules] incentivize whistleblowers to utilize their companies' internal compliance and reporting systems when appropriate."); *id.* at 34322 (explaining that the SEC's "final rules seek to enhance the incentives for employees to utilize their company's internal reporting systems").[3]

One of those rules—Rule 21F-2(b)(1), 17 C.F.R. §240.21F-2(b)(1)—is at issue in this litigation. In promulgating that Rule, the SEC recognized that there is an inherent ambiguity created by the tension between the Dodd-Frank Act's definition of "whistleblower" and other language in that Act's anti-retaliation provision. The SEC

[3] The SEC recognized that internal reporting is not always appropriate, and the decision whether to do so (either prior to reporting to the SEC or at all) is best left for whistleblowers to determine based on the particular facts and circumstances. *See* Adopting Release at 34327 ("[W]e believe that it is appropriate for us to provide significant financial incentives as part of the whistleblower program to encourage employees and other insiders to report violations internally, while still leaving the ultimate decision whether to report internally to the whistleblower"). Among the considerations a whistleblower would likely consider are: (i) whether the employer has an anonymous reporting system; (ii) whether the potential misconduct involves upper-level management; (iii) whether the misconduct is still ongoing and poses a risk of sufficiently significant harm to investors that immediate reporting to the Commission is more appropriate; and (iv) whether the employer may be prone to bad-faith conduct such as the destruction of evidence. *Id.* at 34326.

resolved that ambiguity by clarifying in Rule 21F-2(b)(1) that an employee does *not* have to make a report to the SEC to claim the protection of Section 21F.

The SEC has a strong programmatic interest in demonstrating that its reasonable interpretation of certain ambiguous statutory language was a valid exercise of its broad rulemaking authority under Section 21F. This interest arises for two related reasons. *First*, the rule helps protect individuals who choose to report potential violations internally in the first instance (*i.e.*, before reporting to the SEC), and thus is an important component of the overall design of the whistleblower program. *Second*, if the rule were invalidated, the SEC's authority to pursue enforcement actions against employers that retaliate against individuals who report internally would be substantially weakened.

The majority of courts that have considered the argument advanced here by Citigroup have rejected it in deference to the SEC's rule. But this Court has not yet considered the question, and there are courts (most notably the Fifth Circuit) that have accepted the argument advanced by Citigroup.[4]

The proposed amicus brief will assist the Court. The brief that the SEC is asking the Court to consider as amicus addresses this important issue and will aid the Court in considering the parties' arguments. While the main points are

[4] The SEC does not take a position on any other issues that may be presented in Citigroup's motion to dismiss or in this action. Our motion to file as amicus is limited to the issue of whether an employee is required to make a report to the SEC in order to the claim the anti-retaliation protections of Section 21F and the regulations thereunder.

summarized above, the brief thoroughly explains (i) the importance of internal reporting as a means for deterring, detecting, and stopping unlawful conduct that may harm investors; (ii) the context and purposes for which Section 922 was enacted; and (iii) the SEC's reasonable exercise of its authority to issue rules and regulations implementing Section 922 to resolve a statutory ambiguity inherent in that section. The SEC respectfully submits that, as the primary federal securities regulator and the agency charged with administering the Congressionally-mandated whistleblower program, its analysis and explanation of the development of Rule 21F-2(b)(1) will aid the Court in ruling on Citigroup's Motion to Dismiss.

Request to waive Federal and Local Rules of Civil Procedure regarding format and length of filings. The amicus brief the SEC proposes to file was initially filed with the Second Circuit in *Liu v. Siemens AG*, No. 13-4385, and conforms to that court's length, spacing, typeface, and other rules. The SEC intends to make the identical legal arguments here as were made in the attached brief. Therefore, to the extent the brief does not conform to this Court's requirements, the SEC respectfully requests that the Court exercise its authority to waive these requirements and permit the brief to be filed in the identical format as attached to this motion. E.D.Mo. L.R. 7-4.01(D). The SEC also asks that, if the Court does not grant this request, it be granted leave to revise the brief to conform to this Court's rules.

Conclusion. The SEC respectfully requests that the Court grant the Motion for Leave to File Amicus Curiae Brief in Support of Plaintiff; waive the rules regarding format and length of filings; and accept the attached brief for filing.

May 9, 2014

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CERTIFICATE OF SERVICE

I certify that an accurate and complete copy of the foregoing **Motion and Incorporated Memorandum of Law by the Securities and Exchange Commission to File Amicus Curiae Brief in Support of Plaintiff** was served on all parties by means of the Court's CM/ECF System as reflected in a Notice of Electronic Filing.

May 9, 2014 /s/ Karen J. Shimp

13-4385

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LIU MENG-LIN,

Plaintiff-Appellant,

v.

SIEMENS AG,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION,
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BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE* IN SUPPORT OF THE APPELLANT

STATEMENT OF THE ISSUE

The Securities and Exchange Commission ("Commission"), after notice-and-comment rulemaking, issued a rule to clarify an ambiguity in the whistleblower employment anti-retaliation provisions in Section 21F(h)(1) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78u-6(h)(1). The Commission's rule interpreted the anti-retaliation protections to extend to any individual who engages in the whistleblowing activities described in Section 21F(h)(1)(A), irrespective of whether the individual makes a separate report to the Commission. Is the Commission's rule entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)?

INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION AND SUMMARY OF ITS POSITION

The Commission—the agency principally responsible for the administration of the federal securities laws—submits this brief as *amicus curiae* pursuant to Fed. R. App. P. 29(a) to address an important securities law issue presented in this appeal.

Congress, in Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376 (2010), amended the Exchange Act to add Section 21F, entitled "Securities Whistleblower Incentives and Protection." Among other things, Section 21F directs the Commission to pay awards to individuals whose reports to the Commission about violations of the securities laws result in successful Commission enforcement actions, and prohibits employers from retaliating against individuals in the terms and conditions of their employment when they engage in certain specified whistleblowing activities. (The award program and anti-retaliation protections are referred to collectively herein as "the whistleblower program.")

In May 2011, at Congress's direction, the Commission issued final rules "implementing the provisions of Section 21F[.]" *See* Dodd-Frank §924(a). Throughout the rulemaking process, the Commission considered the "significant issue" of how to ensure that the whistleblower program does not undermine the

willingness of individuals to make whistleblower reports internally at their companies before they make reports to the Commission. Securities Whistleblower Incentives and Protections ("Adopting Release"), 76 Fed. Reg. 34300 (June 13, 2011); *see also id.* at 34323 (explaining that an "objective" of the rulemaking was "to support, not undermine, the effective functioning of company compliance and related systems by allowing employees to take their concerns about possible violations to appropriate company officials *first* while still preserving their rights under the Commission's whistleblower program") (emphasis added); Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 ("Proposing Release"), 75 Fed. Reg. 70488 (Nov. 17, 2010) (same). The Commission's final rules were carefully calibrated to achieve this objective by providing "strong incentives" for individuals in appropriate circumstances to report internally in the first instance. Adopting Release at 34301 ("[The final rules] incentivize whistleblowers to utilize their companies' internal compliance and reporting systems when appropriate."); *id.* at 34322 (explaining that the Commission's "final rules seek to enhance the incentives for employees to utilize their company's internal reporting systems").[1]

[1] The Commission recognized that internal reporting is not always appropriate, and the decision whether to do so (either prior to reporting to the Commission or at all) is best left for whistleblowers to determine based on the particular facts and circumstances. *See* Adopting Release at 34327 ("[W]e believe that it is appropriate for us to provide significant financial incentives as part of the

One of those rules—Rule 21F-2(b)(1), 17 C.F.R. §240.21F-2(b)(1)—is at issue in this litigation. The Commission has a strong programmatic interest in demonstrating that the rule's reasonable interpretation of certain ambiguous statutory language was a valid exercise of the Commission's broad rulemaking authority under Section 21F. This interest arises for two related reasons. *First*, the rule helps protect individuals who choose to report potential violations internally in the first instance (*i.e.*, before reporting to the Commission), and thus is an important component of the overall design of the whistleblower program. *Second*, if the rule were invalidated, the Commission's authority to pursue enforcement actions against employers that retaliate against individuals who report internally would be substantially weakened.

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whistleblower program to encourage employees and other insiders to report violations internally, while still leaving the ultimate decision whether to report internally to the whistleblower"). Among the considerations a whistleblower would likely consider are: (i) whether the employer has an anonymous reporting system; (ii) whether the potential misconduct involves upper-level management; (iii) whether the misconduct is still ongoing and poses a risk of sufficiently significant harm to investors that immediate reporting to the Commission is more appropriate; and (iv) whether the employer may be prone to bad faith conduct such as the destruction of evidence. *Id.* at 34326.

STATEMENT OF THE CASE

A. The securities laws recognize that internal company reporting by employees and others is important for deterring, detecting, and stopping unlawful conduct that may harm investors.

Companies' processes for the internal reporting of violations of law and other misconduct "play an important role in facilitating compliance with the securities laws." Adopting Release at 34325; *accord id.* at 34324. Among other things, these internal reporting processes can help companies to promptly identify, correct, and self-report unlawful conduct by officers, employees, or others connected to the company. *See generally* Proposing Release at 70496. In this way, "reporting through internal compliance procedures can complement or otherwise appreciably enhance [the Commission's] enforcement efforts . . . ." Adopting Release at 34359 n.450; *see also* Report of Investigation Pursuant to Section 21(A) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, 2001 WL 1301408, at *1 (Oct. 23, 2001) ("When businesses seek out, self-report and rectify illegal conduct, and otherwise cooperate with Commission staff, large expenditures of government and shareholder resources can be avoided and investors can benefit more promptly.").[2]

[2] To be clear, as the Commission has advised, "while internal compliance programs are valuable, they are *not substitutes* for strong law enforcement." Adopting Release at 34326 (emphasis added).

Recognizing the significant role that internal company reporting can play, Congress for nearly two decades has enacted a series of amendments to the securities laws to encourage, and in some instances to require, internal reporting of potential misconduct. In 1995, Congress amended the Exchange Act to add Section 10A(b), entitled "Required Response to Audit Discoveries." *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, §301. Section 10A(b) imposes a series of internal company disclosure obligations on a registered public accounting firm that, during the course of conducting an audit of a public company required by the Exchange Act, discovers that an illegal act connected to the company has occurred.[3] Section 10A(b) describes a process of disclosure by the auditor to the Commission *after* the auditor's internal disclosures occur and certain other conditions are met, including a failure on the company's part to take an appropriate response.[4]

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[3] This brief uses the term "public company" to refer to a company with a class of securities registered under Section 12 of the Exchange Act and those required to file reports under Section 15(d) of that Act.

[4] An early version of the legislative proposal that became Section 10A would have required auditors to report immediately to the Commission. SEC Chairman John Shad testified before Congress at the time in opposition to such a reporting requirement. *See SEC and Corporate Audits (Part 6): Hearings on Detecting and Disclosing Financial Fraud Before Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce*, 99th Cong. 345 (1986) ("[W]hy not give management an opportunity to respond to suspicions and take corrective action?").

In 2002, Congress enacted the Sarbanes-Oxley Act ("Sarbanes-Oxley"), Pub. L. No. 107-204, 116 Stat. 745, in response to "a series of celebrated accounting debacles"[5] involving companies such as Enron and WorldCom. As part of Sarbanes-Oxley, Congress enacted several additional provisions related to the internal company reporting of wrongdoing.[6] In Section 307, for example, Congress directed the Commission to issue rules requiring attorneys appearing and practicing before the Commission in the representation of public companies "to report evidence of a material violation" of the securities laws or any "breach of fiduciary duty or similar violation by the company or any agent thereof" to specified company officials. These attorneys are not required to make reports to the Commission and, indeed, may often be precluded from doing so as a result of their ethical obligations to their clients.[7] Similarly, Sarbanes-Oxley added

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[5] *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010).

[6] A principal aim of Sarbanes-Oxley was to promote the establishment of robust internal corporate governance mechanisms and processes that could promptly identify and remedy violations. *See, e.g.*, Sarbanes-Oxley §404, 15 U.S.C. §7262 (requiring internal compliance systems and an annual audit by outside auditors).

[7] Only in limited situations—generally where it is "necessary" to report to the Commission to prevent a securities law violation that will cause substantial financial injury, or to correct past violations of similar severity where the attorney's services were used—*may* attorneys report evidence of a material violation to the Commission. 17 C.F.R. §205.3(d)(2). But even when such disclosure to the Commission is permitted, an attorney will typically need to report

Exchange Act Section 10A(m)(4), which required the Commission, by rule, to direct that national securities exchanges and national securities associations require that audit committees of listed companies establish internal company procedures allowing employees and others to submit complaints "regarding accounting, internal accounting controls, or auditing matters," and to report anonymously "concerns regarding questionable accounting or auditing matters." *See* Sarbanes-Oxley §301; 17 C.F.R. §240.10A-3(b)(3).

Further, Section 806 of Sarbanes-Oxley (as later amended by Dodd-Frank) prohibited public companies, certain related persons or entities, and nationally recognized statistical rating organizations from engaging in employment retaliation against an employee who makes certain whistleblower disclosures concerning, among other things, securities fraud (18 U.S.C. §1348), bank fraud (*id.* §1344), mail fraud (*id.* §1341), wire fraud (*id.* §1343), or any violation of a Commission rule or regulation. 18 U.S.C. §1514A(a). The whistleblower disclosures are protected if they are made to "a person with supervisory authority over the employee (or such other person working for the employer who has the authority to

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internally *first* in order to satisfy the requirement that disclosure to the Commission is actually necessary.

investigate, discover, or terminate misconduct)," or to Congress or certain governmental agencies (including the Commission). *Id.* §1514A(a)(1)(C).[8]

B. By providing new incentives and protections for individuals to engage in whistleblowing activity, the Dodd-Frank whistleblower program enhances the existing securities-law enforcement scheme, including internal company reporting.

As noted above, the Dodd-Frank Act of 2010 established the Commission's new whistleblower program by adding Section 21F to the Exchange Act. Section 21F expressly provided the Commission with authority "to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section." Exchange Act §21F(j). In May 2011, the Commission used that broad authority to adopt final rules implementing both the monetary award and employment anti-retaliation aspects of the whistleblower program.

[8] The Commission has periodically adopted rules and regulations requiring internal reporting in certain circumstances either within or among regulated entities. *See, e.g.*, 17 C.F.R. §270.38a-1(a)(4) (requiring the chief compliance officer of a mutual fund to report the details of any material compliance matters to the fund's board); 17 C.F.R. §240.17a-5(h)(2) (requiring the auditor of a broker-dealer to report material inadequacies to the chief financial officer);17 C.F.R. §275.204A-1(a)(4) (requiring each investment adviser to establish a code of ethics requiring supervised persons to report any violations thereof to the chief compliance officer); 17 C.F.R. §275.206(4)-2(a)(6)(ii) (requiring each investment adviser to obtain an internal control report with respect to custody of client assets maintained by the investment adviser or an affiliate).

1. The Commission carefully calibrated the rules implementing the monetary award component of the whistleblower program to ensure that individuals were not disincentivized from first reporting internally.

Section 21F directs the Commission to pay awards, subject to certain limitations and conditions, to individuals who voluntarily provide the Commission with original information about a violation of the securities laws that leads to the successful enforcement of an action brought by the Commission that results in monetary sanctions exceeding $1,000,000. *See* Exchange Act §21F(a)-(c). Further, Section 21F affords the Commission discretion to set the amount of each award within a range of 10% to 30% of the total monetary sanctions collected. *Id.*

A principal challenge the Commission faced in crafting rules to implement the award program was ensuring that employees and others were not dissuaded from reporting internally due to the possibility of a monetary award. *See* Proposing Release at 70488 (expressing the Commission's desire "not to discourage whistleblowers who work for companies that have robust compliance programs [from] *first* report[ing] the violation to appropriate company personnel") (emphasis added). Were this to happen, the Commission recognized, the result could be a reduction in the "effectiveness of a company's existing compliance, legal, audit and similar internal processes for investigating and responding to potential violations of the Federal securities laws," which in turn could weaken

corporate compliance with the securities laws. Proposing Release at 70488.[9] The Commission also recognized that "reporting through internal compliance procedures can complement or otherwise appreciably enhance [its] enforcement efforts in appropriate circumstances." Adopting Release at 34359 n.450.

> For instance, the subject company may at times be better able to distinguish between meritorious and frivolous claims, and may make such findings available for the Commission. This would be particularly true in instances where the reported matter entails a high level of institutional or company-specific knowledge and/or the company has a well-functioning internal compliance program in place. Screening allegations through internal compliance programs may limit false or frivolous claims, provide the entity an opportunity to resolve the violation and report the result to the Commission, and allow the Commission to use its resources more efficiently.

Id.[10]

Accordingly, the Commission "tailored the final rules to provide whistleblowers who are otherwise pre-disposed to report internally, but who may

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[9] *Cf.* Proposing Release at 70516 (explaining that "allow[ing] a company a reasonable period of time to investigate and respond to potential securities laws violations (or at least begin an investigation) prior to [an individual making a report] to the Commission" is "consistent with the Commission's efforts to encourage companies to create and implement strong corporate compliance programs").

[10] *See also* Proposing Release at 70516 (explaining that if the rules discouraged individuals from first reporting internally, "the overall effect could be . . . a large number of tips of varying quality—causing the Commission to incur costs to process and validate the information"); *id.* (explaining that allowing individuals to first report internally "provides a mechanism by which some of th[e] erroneous [tips] may be eliminated before reaching the Commission").

also be affected by financial incentives, with additional economic incentives to continue to report internally." *Id.* at 34360. The final rules seek to do this in three principal ways:

- An individual "who reports internally can collect a whistleblower award from the Commission if his internal report to the company or entity results in a successful covered action." *Id.* at 34360 (discussing Exchange Act Rule 21F-4(c)(3), 17 C.F.R. §240.21F-4(c)(3)).

- An individual "who *first* reports [pursuant] to an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law and within 120 days reports to the Commission" will be treated for purposes of an award as "if [the submission to the Commission] had been made at the earlier internal reporting date." Adopting Release at 34322 (emphasis added) (discussing Exchange Act Rule 21F-4(b)(7), 17 C.F.R. §240.21F-4(b)(7)). "This means that even if, in the interim, another whistleblower has made a submission that caused the [Commission's] staff to begin an investigation into the same matter, the [individual] who had first reported internally will be considered the first whistleblower who came to the Commission . . . ." Adopting Release at 34322.

- "In addition, the final rules provide that when determining the amount of an award, the Commission will consider as a plus-factor the whistleblower's participation in an entity's internal compliance procedures." Adopting Release at 34360 (discussing Exchange Act Rule 21F-6(a)(4), 17 C.F.R. §240.21F-6(a)(4)).[11] The ability to adjust an award upward based on internal reporting, the Commission explained, would "allow [the Commission] to account for a reduced monetary sanction … where the internal reporting potentially resulted in a lower monetary sanction" because the company responded to the

[11] Relatedly, the Commission's rules also provide that "a whistleblower's interference with internal compliance and reporting is a factor that can decrease the amount of an award." Adopting Release at 34301, 34331 (discussing Exchange Act Rule 21F-6(b)(3), 17 C.F.R. §240.21F-6(b)(3)).

internal report by engaging in remediation, self-reporting and cooperating with the Commission. Adopting Release at 34360 n.455.

Beyond the tailored financial incentives that the Commission crafted to encourage individuals to report internally in appropriate situations, the final rules also require that officers, directors, trustees, and partners, as well as other specified personnel having internal audit or compliance responsibilities, must in certain instances *first* internally disclose the information about potential securities law violations and then wait 120 days before reporting the information to the Commission. *See* Exchange Act Rule 21F-4(b)(4), 17 C.F.R. §240.21F-4(b)(4). The Commission determined that this restriction was necessary to discourage "whistleblower submission[s] [that] might undermine the proper operation of internal compliance systems" that companies have established for responding to violations of law. Adopting Release at 34317.

2. Using its broad rulemaking authority, the Commission adopted a rule clarifying that employment retaliation is prohibited against individuals who engage in any of the whistleblowing activity described in Section 21F(h)(1)(A)(iii)—including making internal reports at public companies of securities fraud violations.

Section 21F(h)(1) is designed to protect employees who engage in certain specified whistleblowing activities. It does this in two significant ways.

First, subparagraph (A) seeks to *prevent* employment retaliation by placing employers on notice that they may not retaliate against employees who engage in

certain whistleblowing activity. This is clear from the express terms of the subparagraph, which is drafted as a prohibition directed to employers:

> (A) In General. No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*), this chapter [*i.e.*, the Exchange Act], including section 78j-1(m) of this title [*i.e.*, Section 10A(m) of the Exchange Act], section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.[12]

Second, subparagraphs (B) and (C) address the legal remedies that employees can pursue against employers who have failed to heed subparagraph (A)'s prohibition.[13]

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[12] As discussed *infra* 19-20, the disclosures listed in clause (iii) include the internal company reporting disclosures described above in Part A.

[13] Subparagraph (B) provides a cause of action in federal district court for any "individual who alleges discharge or other discrimination in violation of subparagraph (A)." Exchange Act §21F(h)(1)(B)(i). Subparagraph (C) provides that relief in a successful action shall include reinstatement, two times back pay,

The Commission, employing its broad rulemaking authority under Section 21F, adopted two clarifying rules related to the prohibition in subparagraph (A). The first rule expressly stated that the Commission possesses authority to bring civil enforcement actions and proceedings against employers who violate the retaliation prohibition. *See* Exchange Act Rule 21F-2(b)(2), 17 C.F.R. §240.21F-2(b)(2).

The second rule, Exchange Act Rule 21F-2(b)(1), clarified that the retaliation prohibition in subparagraph (A) protects any employee who engages in any of the whistleblowing activities specified in clauses (i)-(iii) above, irrespective of whether the employee separately reports the information to the Commission. *See* 17 C.F.R. §240.21F-2(b)(1)(ii). It provides in pertinent part:

> For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you are a whistleblower if:
>
> (ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).

As the Commission explained in the adopting release, this rule reflects the fact that clause (iii) prohibits employers from retaliating against "individuals who report to persons or governmental authorities *other than the Commission*." Adopting Release at 34304 (emphasis in original). In particular, clause (iii)

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compensation for litigation costs, expert witness fees, and reasonable attorneys' fees. Exchange Act §21F(h)(1)(C).

prohibits employers from retaliating against employees who make the "disclosures that are required or protected under the Sarbanes-Oxley Act" or the other securities laws, including the internal company disclosures described above in Part A. For example:

- Disclosures that Sarbanes-Oxley Section 307 requires attorneys for the public company to make to the company's general counsel regarding potential evidence of a material violation of the securities laws or a breach of fiduciary duty by a corporate director;

- Disclosures to an audit committee pursuant to Section 10A(m) of the Exchange Act concerning "questionable accounting or auditing matters" at a public company; and

- Disclosures protected under Sarbanes-Oxley Section 806 to a supervisor or compliance official at a public company concerning possible securities fraud, wire fraud, bank fraud, or mail fraud.

Significantly, by clarifying that the prohibition on employment retaliation extends to individuals who report internally in instances such as these (irrespective of whether they have reported to the Commission), Rule 21F-2(b)(1) complements the overall goal of the whistleblower program rulemaking to maintain incentives for individuals to first report internally in appropriate circumstances. In the adopting release, the Commission recognized that the prohibition on employment retaliation would help preserve these incentives for internal reporting, since "[e]mployees who report internally in this manner will have anti-retaliation employment protection to the extent provided for by [Section 21F(h)(1)(A)(iii)], which

incorporates the broad anti-retaliation protections of Sarbanes-Oxley Section 806." Adopting Release at 34325 n.223. *See generally* Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1250 (2009) ("[I]nternal protections are particularly crucial in view of research finding that … employees are more likely to choose internal reporting systems.").

STANDARD OF REVIEW

"The interpretation of a statute by a regulatory agency charged with its administration is entitled to deference if it is a permissible construction of the statute." *Haekal v. Refco, Inc.*, 198 F.3d 37, 41 (2d Cir. 1999). *See also United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) ("administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"). Consideration of whether an agency interpretation is permissible involves two steps. *First*, this Court considers whether there is an "unambiguously expressed intent of Congress" on "the precise question at issue." *McNamee v. Dept. of the Treasury*, 488 F.3d 100, 105 (2d Cir. 2007) (quoting *Chevron*, 467 U.S. at 842-43) (internal quotation marks omitted). Ambiguity exists where two statutory provisions are "in

considerable tension," thereby affording the agency "discretion to resolve the apparent conflict." *Career College Assoc. v. Riley*, 74 F.3d 1265, 1271-72 (D.C. Cir. 1996); *accord N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 327-29 (2d Cir. 2003).

Second, this Court determines whether the agency's interpretation is reasonable, which means the interpretation is rational and not inconsistent with the statute. *See, e.g.*, *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990). To find an agency's interpretation rational, this Court "need not conclude that the agency construction was the only one it permissibly could have adopted" or "even the reading [this Court] would have reached if the question initially had arisen in a judicial proceeding." *Mei Juan Zhang v. Holder*, 672 F.3d 178, 183-84 (2d Cir. 2012) (internal quotation omitted).

ARGUMENT

I. Section 21F does not unambiguously demonstrate a Congressional intent to restrict employment anti-retaliation protection to *only* those individuals who provide the Commission with information relating to a violation of the securities laws.

Congress did not unambiguously limit the employment anti-retaliation protections in Section 21F(h)(1) to only those individuals who provide the Commission with information relating to a securities law violation. Rather, there is ambiguity on this issue given the considerable tension between clause (iii) of Section 21F(h)(1)(A), which as discussed above lists a broad array of

whistleblowing activity to entities and persons other than just the Commission, and Section 21F(a)(6), which defines "whistleblower."

To appreciate the significant tension between these two provisions, it is useful to first examine the language and structure of Section 21F(h)(1)(A). As quoted in full *supra* 14, Section 21F(h)(1)(A) prohibits an employer from retaliating against a whistleblower: (i) for "providing information to the Commission in accordance with this section"; (ii) for assisting in an investigation or action of the Commission "based upon or related to such information"; or (iii) for "making disclosures that are required or protected under" Sarbanes-Oxley, the Exchange Act, 18 U.S.C. §1513(e), "and any other law, rule, or regulation subject to the jurisdiction of the Commission."

As the quoted language makes evident, clauses (i) and (ii), together, protect individuals for whistleblowing to the Commission about securities law violations. But the anti-retaliation protection that clause (iii) affords reaches beyond just disclosures involving securities law violations and disclosures to the Commission. It covers, among other things, an employee's submission to a public company's audit committee about questionable accounting practices (including those questionable practices that do not rise to the level of a securities law violation) under Section 10A(m)(4) of the Exchange Act, or an in-house counsel's disclosure

under Section 307 of Sarbanes-Oxley about a potential breach of the CEO's fiduciary duty.[14]

Yet, the interplay of Section 21F(h)(1)(A) with the definition of "whistleblower" in Section 21F(a)(6) may suggest a different result. Section 21F(h)(1)(A) protects "a whistleblower in the terms and conditions of employment," and Section 21F(a)(6) in turn defines a "whistleblower" as "any individual who provides … information relating to a violation of the securities law to the Commission." If Section 21F(a)(6)'s narrow whistleblower definition is read as a limitation on the overall scope of Section 21F(h)(1)(A), the disclosures protected under clause (iii) would be significantly restricted. Specifically, an individual would be protected for making one of the whistleblower disclosures identified in clause (iii) *only if* two preconditions are met:

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[14] The legislative history adds no clarity concerning Congress's intention in adding clause (iii) to Section 21F(h)(1)(A). Indeed, the provision was added relatively late in the Dodd-Frank legislative process; it was not included either in the original version of the bill that passed the House, *see* H.R. 4173, 111th Cong. §7203(a) (as passed by House December 11, 2009), or in the version of the bill that initially passed the Senate, *see* H.R. 4173, 111th Cong. §922(a) (as passed by Senate May 20, 2010). The language first appeared in the base conference committee draft that the Senate in May 2010 approved for use in the Dodd-Frank conference committee, *see* H.R. 4173, 111th Cong. §922(a) (conference base text), and it remained in the final version of the committee bill that the House and Senate subsequently approved. Notably, the nearly identical statutory provision of Dodd-Frank that authorized a whistleblower program for the Commodity Futures Trading Commission does not include language comparable to clause (iii). *See* Dodd-Frank §748 (enacting employment anti-retaliation protections as new section 23(h)(1) to the Commodity Exchange Act, codified at 7 U.S.C. §26(h)(1)).

(1) the individual has separately submitted that same information to Commission, and

(2) that information involves a securities law violation.

But this reading raises an immediate question: If Congress had actually intended to protect only those "required or protected" disclosures that satisfy these two conditions, why would Congress craft clause (iii) to unnecessarily suggest that it protects a much broader class of disclosures than it actually does? Surely Congress could have been more explicit and more direct if it in fact intended to protect only those disclosures that involve securities law violations, and only if the employee has made a separate disclosure to the Commission. *See In re Air Cargo Shipping Servs. Antitrust Litig.*, 697 F.3d 154, 163 (2d Cir. 2012) (rejecting "mechanical use of a statutory definition that would 'destroy one of the major purposes of' enacting the provision") (quoting *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)).

That Congress did not unambiguously intend such a result becomes apparent by considering the bizarre consequences that such a narrow reading produces. With one possible exception, clause (iii) becomes superfluous. If an employer knows that an individual has made a disclosure listed in clause (iii), such as an internal report about a potential securities fraud violation, and the employer is also aware that the individual has provided the same information to the Commission, then as a practical matter the individual will be protected from retaliation under

clauses (i) and (ii). An employer will not be able to disaggregate the whistleblowing to the Commission from the internal whistleblowing so as persuasively to claim that any retaliation was solely in connection with the latter. Thus, where an employer knows that an individual has reported to the Commission, clauses (i) and (ii) would already sufficiently protect the individual from retaliation should the individual also wish to make the disclosures specified in clause (iii).

That leaves only one situation where clause (iii) might conceivably have independent utility—where the employer, unaware that the individual had already reported to the Commission, takes an adverse employment action against the employee for a disclosure listed in clause (iii). Although the Fifth Circuit has reasoned that this potential scenario saves clause (iii) from being superfluous under the narrow reading of Section 21F(h)(1)'s employment anti-retaliation protection, *Asadi v. G.E. Energy (U.S.A.), L.L.C.*, 720 F.3d 620, 627-28 (5th Cir. 2013), that is far from clear for two reasons. *First*, as discussed above, subparagraph (A) principally operates as a prohibition directed to employers; it seeks to *prevent* retaliation by placing employers on notice that they may not take adverse employment action against employees who engage in certain whistleblowing activity. But under the scenario posited by the *Asadi* court, clause (iii) would be utterly ineffective as a preventive measure. Put simply, because in this scenario

employers would not know that a report was made to the Commission, clause (iii) would have no appreciable effect in deterring employers from taking adverse employment action for internal reports or the other disclosures listed in clause (iii).

Second, it is unlikely that an employee who suffers an adverse employment action in this situation could even rely on clause (iii) to successfully pursue a private action against the employer under Section 21F(h)(1)(B). Whether an individual's disclosures constitute a "protected activity" under the Fifth Circuit's narrow reading of clause (iii) would turn on whether the individual has made a separate disclosure to the Commission. But if an employer is genuinely unaware that the employee has separately disclosed to the Commission, any adverse employment action that the employer takes would appear to lack the requisite retaliatory intent—*i.e.*, the intent to punish the employee for engaging in a protected activity.[15] *Cf. Zann Kwan v. Andalex Group* LLC, 737 F.3d 834, 844 (2d Cir. 2013) (to establish employment retaliation claim, plaintiff must show "defendant's knowledge of the protected activity" and "a causal connection

[15] As the district court below recognized, the alternative would be to construe the anti-retaliation provision to impose strict liability on an employer (*i.e.*, intent would not be an element of a retaliation claim). *See Meng-Lin Liu v. Siemens, A.G.*, No. 13 Civ. 317, 2013 WL 5692504, at *7 (S.D.N.Y. Oct. 21, 2013). But we are aware of no precedent for treating an employment anti-retaliation provision as a strict liability scheme.

between the protected activity and the adverse employment action") (internal quotation omitted).[16]

This examination of the relevant statutory language demonstrates, at a minimum, considerable tension and inconsistency within the text, thus revealing that Congress did not unambiguously express an intent to limit the employment anti-retaliation protections under Section 21F(h)(1) to only those individuals who report securities law violations to the Commission.

Although the Fifth Circuit reached a contrary conclusion in *Asadi*, the court's holding that the statutory language compels the narrow reading described above is based on a flawed understanding of the statutory scheme. The court approached Section 21F as though its sole purpose is "to require individuals to report information to the SEC to qualify as a whistleblower." *Asadi*, 720 F.3d at 630. But this fails to consider the role that Section 21F occupies within the broader securities-law framework, particularly the internal reporting processes that Congress has previously established. As discussed *infra* Part II, the Commission reasonably chose to interpret clause (iii) of Section 21F(h)(1)(A) against that

[16] A further anomaly resulting from this interpretation is that the individual, in order to successfully maintain a retaliation claim, would be required to "out" himself as someone who reported information to the Commission. This conflicts with Congress's strong desire to shield a whistleblower's identity from public disclosure to the fullest extent possible. *See* Exchange Act §21F(h)(2) (confidentiality provisions); *see also id.* §21F(d)(2)(A) (permitting anonymous disclosures to the Commission).

broader securities-law framework, construing the statute to afford the same employment anti-retaliation protections for individuals regardless of whether they report to the Commission under the new procedures established by Section 21F or instead make the disclosures "required or protected" under the other provisions of the securities laws.

The Fifth Circuit also erroneously believed that its interpretation was necessary to avoid rendering the private cause of action under Sarbanes-Oxley Section 806, "for practical purposes, moot." *Asadi*, 720 F.3d at 628. The court, after observing that clause (iii) covers (among other things) the disclosures protected by Section 806, reasoned that "[i]t is unlikely … that an individual would choose to raise a [Sarbanes-Oxley] anti-retaliation claim instead of a Dodd-Frank whistleblower-protection claim" because: (i) Section 21F provides "for greater monetary damages because it allows for recovery of two times back pay, whereas [Section 806] provides for only back pay," and (ii) "the applicable statute of limitations is substantially longer for Dodd-Frank whistleblower-protection claims." *Id.* at 628-29.

But the Fifth Circuit ignored at least two countervailing advantages of a Sarbanes-Oxley Section 806 claim over a Dodd-Frank Section 21F claim:

- For individuals who want to avoid the burdens of pursuing the claim in court, including potential high litigation costs that they might bear if they do not prevail, actions under Section 806 may be an attractive option because the claims are heard (at least in the first instance) in an

administrative forum at the Department of Labor ("DOL"). Moreover, DOL assumes responsibility for investigating the retaliation claim and preparing the evidence for an administrative law judge's review.[17]

- Depending on the nature of the injury, a claim under Section 806 may afford a greater recovery. Unlike Section 21F, Section 806 provides for "all relief necessary to make the employee whole" and for "compensation for any special damages." 18 U.S.C. §1514A(c)(1) & (c)(2)(C). This language has been held to authorize compensation for emotional pain and suffering.[18] Thus, individuals who have experienced minimal pay loss, but significant emotional injuries, may find Section 806 actions more attractive.

Finally, the Fifth Circuit expressed concern that any other reading of Section 21F "would read the words 'to the Commission' out of the definition of 'whistleblower' for purposes of the whistleblower-protection provision." *Asadi*, 720 F.3d at 628. But applying the Section 21F(a)(6) definition of whistleblower to Section 21F(h)(1)(A) makes the phrase "to the Commission" in clause (i) and the similar reference in clause (ii) superfluous. That either of two competing interpretations yields superfluous statutory language confirms that Congress did

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[17] DOL has delegated to its sub-agency the Occupational Safety and Health Administration ("OSHA") responsibility for receiving and investigating claims under Section 806. *See generally* 29 C.F.R. §1980. If OSHA finds that the employee was subjected to retaliation, it may order immediate reinstatement. *Id.* §1980.105. OSHA's findings are subject to a *de novo* hearing before an administrative law judge and review by DOL's Administrative Review Board. *Id.* §§1980.106-110.

[18] *See Kalkunte v. DVI Fin. Servs., Inc.*, ARB Case Nos. 05-139 & 05-140, 2009 WL 564738, at *13 (A.R.B. Feb. 27, 2009) (sustaining damages for "'pain, suffering, [and] mental anguish'" under Section 806).

not speak unambiguously on the issue. *See Adirondack Med. Ctr. v. Sebelius*, No. 12-5366, __ F.3d __, __, 2014 WL 259678, at *6 (D.C. Cir. Jan. 24, 2014) ("The canon [against surplusage] is particularly unhelpful when both interpretive outcomes lead to some sort of suplusage . . . .").

II. In light of the ambiguity here, the Commission adopted a reasonable interpretation in Rule 21F-2(b)(1) that warrants judicial deference.

By adopting Exchange Act Rule 21F-2(b)(1) to specify what persons are whistleblowers for purposes of the anti-retaliation provisions, the Commission revealed its view that Section 21F(h)(1)(A) is best read as an implied exception to the definition of whistleblower in Section 21F(a)(6). *See, e.g., Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202, 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011).[19] The Commission thus promulgated Exchange Act Rule 21F-2(b)(1) to clarify that, "[f]or purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act, you are a whistleblower if … [y]ou provide that information in a manner described in Section 21F(h)(1)(A)."

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[19] Several other district courts have also shared the Commission's reading of Section 21F(h)(1)(A). *Rosenblum v. Thomson Reuters (Markets) LLC*, No. 13 Civ. 2219, 2013 WL 5780775, at *3-5 (S.D.N.Y. Oct. 25, 2013); *Ellington v. Giacoumakis*, No. 13-11791, 2013 WL 5631046, at *2-3 (D. Mass. Oct. 16, 2013); *Murray v. UBS Sec., LLC*, No. 12 Civ. 5914, 2013 WL 2190084, at *3-7 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106-07 (D. Colo. 2013); *Kramer v. Trans-Lux Corp.*, No. 11 Civ. 1424, 2012 WL 4444820, at *3-5 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 993-95 (M.D. Tenn. 2012). *But see Banko v. Appple, Inc.*, No. 13-02977, 2013 WL 6623913, at *2-3 (N.D. Cal. Dec. 16, 2013); *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381, 2013 WL 3786643, at *4-6 (D. Colo. July 19, 2013).

In doing so, the Commission concluded "that the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category [*i.e.*, clause (iii)] includes individuals who report to persons or governmental authorities *other than the Commission*." Adopting Release at 34304. The Commission explained that, accordingly, the anti-retaliation protections will extend to, among others, employees of public companies who make certain disclosures internally to "a person with supervisory authority over the employee or such other person working for the employer who has authority to investigate, discover, or terminate misconduct." *Id.*

The Commission's interpretation is reasonable because it resolves the statutory ambiguity in a manner that effectuates the broad employment anti-retaliation protections that clause (iii) contemplates. The Commission's interpretation is also reasonable because, by ensuring that individuals who report internally first will not be potentially disadvantaged by losing employment anti-retaliation protection under Section 21F, it better supports a core overall objective of the whistleblower rulemaking—avoiding disincentivizing individuals from reporting internally first in appropriate circumstances. By establishing parity between individuals who first report to the Commission and those individuals who first report internally, the Commission's rule avoids a two-tiered structure of anti-retaliation protections that might discourage some individuals from first reporting

internally in appropriate circumstances and, thus, jeopardize the benefits that can result from internal reporting, *supra* 5, 16-17. The Commission's decision to adopt this interpretation was reasonable in light of its view, based on its experience and expertise, that if internal compliance and reporting procedures "are not utilized or working, our system of securities regulation will be less effective." Proposing Release at 70500.[20]

Lastly, the Commission's interpretation was reasonable because it enhances the Commission's ability to bring enforcement actions when employers take adverse employment actions against employees for reporting securities law violations internally. A contrary result that narrowly cabined this enforcement authority to only those situations where the employee has separately reported to the

[20] Rule 21F-2(b)(1) also supports the whistleblower program by extending anti-retaliation protection to individuals who first report to designated authorities *other than the Commission*. Section 21F(b) & (c) authorize awards to such individuals under certain circumstances when their information leads to successful "related actions" by the other designated authorities. To facilitate this reporting, the Commission adopted Rule 21F-4(b)(7), under which individuals who first provide information to a designated authority and then within 120 days submit the same information to the Commission will be treated as though they reported to the Commission as of the date of the original report to the designated authority. 17 C.F.R. §240.21F-4(b)(7). Rule 21F-2(b)(1) ensures that individuals who follow this reporting approach will not lose anti-retaliation protection during the period prior to their report to the Commission.

Commission would significantly weaken the deterrence effect on employers who might otherwise consider taking an adverse employment action.[21]

CONCLUSION

For the foregoing reasons, this Court should defer to the Commission's rule and hold that individuals are entitled to employment anti-retaliation protection if they make any of the disclosures identified in Section 21F(h)(1)(A)(iii) of the Exchange Act, irrespective of whether they separately report the information to the Commission.

Respectfully submitted,

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February 2014

[21] The Commission lacks such authority under Sarbanes-Oxley Section 806.

STATUTORY ADDENDUM:

SECTION 21F(a)-(d), (h), (j)
OF THE SECURITIES EXCHANGE ACT OF 1934,
15 U.S.C. §78u-6(a)-(d), (h), (j)

(a) Definitions. In this section the following definitions shall apply:

(1) Covered judicial or administrative action. The term "covered judicial or administrative action" means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000.

(2) Fund. The term "Fund" means the Securities and Exchange Commission Investor Protection Fund.

(3) Original information. The term "original information" means information that--

(A) is derived from the independent knowledge or analysis of a whistleblower;

(B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and

(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

(4) Monetary sanctions. The term "monetary sanctions", when used with respect to any judicial or administrative action, means--

(A) any monies, including penalties, disgorgement, and interest, ordered to be paid; and

(B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.

(5) Related action. The term "related action", when used with respect to any judicial or administrative action brought by the Commission under the

securities laws, means any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

(6) Whistleblower. The term "whistleblower" means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.

(b) Awards

(1) In general. In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to--

(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

(2) Payment of awards. Any amount paid under paragraph (1) shall be paid from the Fund.

(c) Determination of amount of award; denial of award

(1) Determination of amount of award

(A) Discretion. The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.

(B) Criteria. In determining the amount of an award made under subsection (b), the Commission--

(i) shall take into consideration--

(I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;

(II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;

(III) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and

(IV) such additional relevant factors as the Commission may establish by rule or regulation; and

(ii) shall not take into consideration the balance of the Fund.

(2) Denial of award. No award under subsection (b) shall be made--

(A) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the commission, a member, officer, or employee of--

(i) an appropriate regulatory agency;

(ii) the Department of Justice;

(iii) a self-regulatory organization;

(iv) the Public Company Accounting Oversight Board; or

(v) a law enforcement organization;

(B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;

(C) to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to

the requirements of section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1); or

(D) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.

(d) Representation

(1) Permitted representation. Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.

(2) Required representation

(A) In general. Any whistleblower who anonymously makes a claim for an award under subsection (b) shall be represented by counsel if the whistleblower anonymously submits the information upon which the claim is based.

(B) Disclosure of identity. Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information as the Commission may require, directly or through counsel for the whistleblower.

. . .

(h) Protection of whistleblowers

(1) Prohibition against retaliation

(A) In general. No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower--

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this

chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

(B) Enforcement

(i) Cause of action. An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).

(ii) Subpoenas. A subpoena requiring the attendance of a witness at a trial or hearing conducted under this section may be served at any place in the United States.

(iii) Statute of limitations

(I) In general. An action under this subsection may not be brought--

(aa) more than 6 years after the date on which the violation of subparagraph (A) occurred; or

(bb) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subparagraph (A).

(II) Required action within 10 years. Notwithstanding subclause (I), an action under this subsection may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

(C) Relief. Relief for an individual prevailing in an action brought under subparagraph (B) shall include--

(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;

(ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and

(iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.

(2) Confidentiality

(A) In general. Except as provided in subparagraphs (B) and (C), the Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of Title 5, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C). For purposes of section 552 of Title 5, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section.

(B) Exempted statute. For purposes of section 552 of Title 5, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(C) Rule of construction. Nothing in this section is intended to limit, or shall be construed to limit, the ability of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

(D) Availability to Government agencies

(i) In general. Without the loss of its status as confidential in the hands of the Commission, all information referred to in subparagraph (A) may, in the discretion of the Commission, when determined by the Commission to be necessary to accomplish the purposes of this chapter and to protect investors, be made available to--

(I) the Attorney General of the United States;

(II) an appropriate regulatory authority;

(III) a self-regulatory organization;

(IV) a State attorney general in connection with any criminal investigation;

(V) any appropriate State regulatory authority;

(VI) the Public Company Accounting Oversight Board;

(VII) a foreign securities authority; and

(VIII) a foreign law enforcement authority.

(ii) Confidentiality

(I) In general. Each of the entities described in subclauses (I) through (VI) of clause (i) shall maintain such information as confidential in accordance with the requirements established under subparagraph (A).

(II) Foreign authorities. Each of the entities described in subclauses (VII) and (VIII) of clause (i) shall maintain such information in accordance with such assurances of confidentiality as the Commission determines appropriate.

(3) Rights retained. Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement.

. . .

(j) Rulemaking authority. The 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 of this section.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,986 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-Point Times New Roman.

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February 20, 2014

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on February 20, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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February 20, 2014