

July 18, 2014

VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

Elizabeth M. Murphy, Esq.
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Petition for Rulemaking and the Issuance of a Policy Statement
Regarding Certain Aspects of the Dodd-Frank Whistleblower Program

Dear Ms. Murphy:

Pursuant to Rule 192 of the Rules of Practice of the United States Securities and Exchange Commission, I write on behalf of Labaton Sucharow LLP, the Government Accountability Project and a growing coalition, representing more than 250 organizations and nearly 2 million citizens, to respectfully request that the Commission clarify and strengthen certain aspects of the SEC Whistleblower Program. Attached, please find two petitions that urge the Commission, among other things, to conduct public hearings, establish an Advisory Committee on Whistleblower Reporting and Protection, engage in appropriate rulemaking and issue a policy statement.

The SEC Whistleblower Program, an initiative in which I am proud to have had a leadership role during my tenure as an Assistant Director in the Division of Enforcement, has shown—by virtually all accounts—early success and great investor protection potential. Since Dodd-Frank was enacted in 2010, the program has enabled the SEC and other law enforcement and regulatory organizations to become more effective and efficient in policing the marketplace. As awareness of it grows, in the coming years, records will be broken and many of the Commission's most significant cases will be the result of courageous whistleblowers.

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Despite these positive signs, to ensure the program's long-term success, there are two areas that require immediate action by the Commission. First, there is a great deal of uncertainty regarding the interpretation of certain program rules, including, among others, whether reporting possible securities violations within the workplace are included in the scope of anti-retaliation protections available for SEC whistleblowers. Given the troubling statistics on workplace retaliation, there is simply no room for grey area when it comes to this issue. Second, and even more alarming, is the proliferation of increasingly creative private agreements designed to silence or otherwise limit employees' rights to act as SEC whistleblowers with all of the incentives and protections Congress provided by statute.

Until these and other problem areas are addressed, many corporate whistleblowers will be forced to choose between silence and walking an unnavigable path. Accordingly, we strongly urge the Commission not to allow legal bullying or retaliation to dismantle this landmark investor protection initiative. We have come too far, and investors have lost too much, to settle for anything less.

Respectfully submitted,



Jordan A. Thomas

Enclosures

cc: Mary Jo White, Chair
Luis A. Aguilar, Commissioner
Daniel M. Gallagher, Commissioner
Kara M. Stein, Commissioner
Michael S. Piwowar, Commissioner
Andrew J. Ceresney, Director of the Division of Enforcement
Sean McKessy, Chief of the Office of the Whistleblower

July 18, 2014

The Honorable Mary Jo White
US Securities and Exchange Commission
100 F Street, NE
Washington DC 20549

Dear Ms. White:

We, the undersigned organizations, write to express our concern for the widespread and growing problem of retaliatory conduct against corporate whistleblowers. Not merely a threat to public policy, retaliation of this nature has a deleterious effect on corporate culture and growth. And, ultimately, such conduct undermines the force and efficacy of the SEC Whistleblower Program.

Retaliation against whistleblowers is a quiet and growing epidemic. In a 2012 supplement to its National Business Ethics Survey, the Ethics Resource Center (ERC) found that a near record-setting 22% of employees who reported misconduct faced retaliation, up from 12% in 2007.¹ More than a third of those who declined to report misconduct pointed to fear of retaliation as the reason for their silence. A culture in which employees are retaliated against or fear to speak up is a cancer that slowly grows but consistently kills and has been responsible for countless high-profile corporate scandals. Most alarming, increases in the incidence of retaliation are outpacing the overall rate of increases in Whistleblowing disclosures. Various other studies confirm the prevalence of retaliation and fear of retaliation in the corporate workplace.²

The commercial marketplace wants and needs guidance. We believe the majority of corporations want to do the right thing and many invest in robust ethics and compliance programs to do so. Unfortunately, corporate compliance is not a panacea. While there is a low incidence of whistleblower retaliation in companies with strong ethical program, the ERC survey found that these organizations also represent the greatest uptick in reports of retaliation. In other words, even strong ethics programs alone are an inadequate deterrent. The proposed guidance would benefit employers and whistleblowers alike by reducing the litigation expenses associated with legal uncertainties, helping companies more effectively reduce their risk of retaliation-related liability, and ensuring that individuals who report possible misconduct, both internally and to the Commission, do so with a full understanding of their reporting options and the applicable risks and rewards. It also would benefit corporations, because most whistleblowers disclose fraud against their employer, and every study has shown that in this role they are more effective than audits, compliance programs and law enforcement combined.³

¹ Ethics Research Center, *Retaliation: When Whistleblowers Become Victims* (2012), <http://www.ethics.org/files/u5/RetaliationFinal.pdf>.

² See 2012 Corporate Governance and Compliance Hotline Benchmarking Report commissioned by The Network; Wall Street in Crisis: Labaton Sucharow Survey of Financial Services Industry 2013.

³ PricewaterhouseCoopers and Martin Luther University Economy and Crime Research Center, *Economic Crime, People, Culture and Controls: The 4th Biennial Global Economic Crime Survey* (2007), http://www.pwc.com/gx/en/economic-crime-survey/pdf/pwc_2007gecs.pdf; Society of Certified Fraud Examiners, *2008 Report to the Nation on Occupational Fraud and Abuse* (2008), at 4. 30.

The success of the SEC Whistleblower Program, the health of our markets and the broader public interest are protected and served when employees can safely report wrongdoing. Indeed, an open and transparent workplace is a key barometer of a working democracy. For these reasons, we urge the SEC to take the following actions:

- (1) Engage in appropriate rule-making to clarify and strengthen protections available to those who report misconduct internally or externally. Specifically, clarify that whistleblowers are in fact eligible for protection when they make disclosures within their respective corporations. Further, clarify that any actions made by the wrongdoer in effort to block the flow of whistleblowing evidence are illegal. Finally, clarify that it is legally protected to disclose evidence of crime or other violations of SEC rules, despite any assertions by wrongdoers that employees have stolen their “property.” These suggested solutions warrant a public hearing and careful consideration by the Commission.
- (2) Launch a series of field hearings around the country to discuss the problem of workplace retaliation and explore new ways to increase reporting—both internally and externally; and
- (3) Create an Advisory Committee on Whistleblower Reporting and Protection. Leveraging the staff reports from the field hearings described above and the expertise of a diverse group of participants that meet regularly, this committee will serve as a vehicle for the Commission to collate advice, best practices and recommendations related to whistleblower reporting and protection.

We thank you for the opportunity to comment on this important investor protection problem. As the SEC places more emphasis on the role of whistleblowers in the national enforcement program, it must also use its authority to mandate integrity, transparency and accountability in the marketplace. This is good for whistleblowers, good for business and good for our country.

Sincerely,

American Association of Small Property
Owners

Americans for Financial Reform
(coalition of 200+ organizations)

Atlantic States Legal Foundation

Bernabei & Wachtel, PLLC

Californians Aware

Circumpolar Conservation Union

Citizen Works

Citizens for Responsibility and Ethics in
Washington

Community Research

Consumer Action

Corporate Action Network

Defending Dissent Foundation

Employment Justice Center

Evangelicals for Social Action	New Orleans Women's Shelter
Evans Law Firm, Inc.	OpenTheGovernment.org
Faculty Against Rape	Peace Fund and Peace Action Education Fund
Forest Service Employees for Environmental Ethics	Pentecostals and Charismatics for Peace and Justice
Government Accountability Project	Privacy Times
Global Witness	Project On Government Oversight
Heart of America Northwest	Public Citizen
Implode-Explode Heavy Industries, Inc.	Public Concern at Work
Institute for Agriculture and Trade Policy	RootsAction.org
International Association of Whistleblowers	Sustainable Energy and Economy Network
Investor Environmental Health Network	Taxpayers Protection Alliance
Kentucky Resources Council, Inc.	The Coalition For Change, Inc.
Labaton Sucharow	The Multiracial Activist
Lower Ninth Ward Living Museum	Tri-Valley CAREs
Minnesota Coalition On Government Information	WarIsACrime.org
National Coalition of Organized Women	WESPAC Foundation
National Consumers League	West Virginia Citizen Action Group
National Employment Lawyers Association	Wild Earth Guardians
National Organization for Women	Workplace Fairness
National Whistleblower Center	Zuckerman Law
New Jersey Citizen Action	
New Jersey Work Environment Council	