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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.



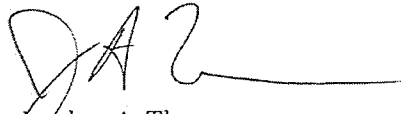
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Despite these positive signs, to ensure the program's long-term success, there are two areas that require immediate action by the Commission. First, there is a great deal of uncertainty regarding the interpretation of certain program rules, including, 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 un navigable 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

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

1. By this petition, and pursuant to Rule 192 of the Rules of Practice of the United States Securities and Exchange Commission (the “SEC” or the “Commission”), the Government Accountability Project and Labaton Sucharow LLP respectfully request that the Commission engage in rulemaking and the issuance of a policy statement to clarify certain rules governing the SEC’s whistleblower program. The SEC’s whistleblower program (the “SEC Whistleblower Program” or the “Program”) arose in response to a long series of corporate scandals that defrauded countless investors and were either not detected by or not reported to law enforcement authorities. Since its establishment in 2010, the Program has already helped the SEC and other law enforcement and regulatory organizations to become more effective and efficient in policing the marketplace.

2. As valuable as the Program is, however, uncertainty has arisen regarding the proper interpretation of certain Program rules, including, among others, the scope of the anti-retaliation protections available for whistleblowers, and the extent to which employers can use private agreements to limit or condition employees’ rights to receive the incentives offered through the Program. Clarifying these crucial issues through rulemaking and the release of a policy statement 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 securities violations, both internally and to the Commission, do so with a full understanding of the applicable risks and rewards. We believe that clarifying these important issues will also encourage more potential whistleblowers to come forward, helping the Commission better fulfill its investor protection mission.

3. Petitioners are attorneys and advocates for whistleblowers, including numerous SEC whistleblowers. The Government Accountability Project (“GAP”) is the nation’s leading whistleblower protection and advocacy organization. A non-profit, non-partisan § 501(c)(3) organization that litigates whistleblower cases, GAP helps expose wrongdoing to the public and actively promotes government and corporate accountability. Since its founding in 1977, GAP has represented over 6,000 whistleblowers in the court of law and in the court of public opinion, including hundreds of whistleblowers who have reported financial misconduct. Since 1978, GAP has been a leader in campaigns to enact or defend all federal whistleblower protection statutes, including those in the Sarbanes-Oxley and Dodd-Frank laws. Labaton Sucharow LLP is one of the country’s leading private securities litigation firms and the first law firm in the country to establish a practice exclusively focused on representing SEC whistleblowers. The chair of Labaton’s whistleblower representation practice group, Jordan Thomas, was formerly an Assistant Director in the SEC’s Division of Enforcement and had a leadership role in the development of the SEC Whistleblower Program, including leading fact-finding visits to other federal agencies with whistleblower programs, drafting the proposed legislation and implementing rules, and briefing House and Senate staff members on the proposed legislation.

The SEC Whistleblower Program

4. In 2010, in response to the Financial Crisis and a wave of other corporate scandals, Congress mandated through Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010¹ (“Dodd-Frank”) that “the SEC would have more help in identifying securities law violations through a new, robust whistleblower program designed to

¹ Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841-1849 .

motivate people who know of securities law violations to tell the SEC.”² “Recognizing that whistleblowers often face the difficult choice between telling the truth and the risk of committing ‘career suicide,’”³ Congress created three primary incentives to counter the risks that whistleblowing entails and encourage more individuals to report possible violations of the federal securities laws to the SEC: (1) the ability to report such violations anonymously;⁴ (2) protections from, and remedies for, whistleblowing-related retaliation;⁵ and (3) the potential to obtain a monetary award where the “original information” voluntarily provided by the individual “leads to a successful enforcement action” by the Commission, resulting in the recovery of total sanctions exceeding \$1 million.⁶ Each of these incentives has been further defined by Regulation 21F, the set of administrative rules enacted by the SEC pursuant to Section 922 of Dodd-Frank (the “SEC Whistleblower Rules”).⁷

5. Since the SEC Whistleblower Rules became effective in August 2011, the SEC Whistleblower Program has achieved notable successes: in 2013 alone, more than 3,000 individuals from around the world used the Program to report securities violations,⁸ allowing the Division of Enforcement to “turbocharge[]” many of its investigations.⁹ As Chair White stated

² S. REP. NO. 111-176, at 38 (2010). 111 S. Rpt. 176 (*found at* <http://www.gpo.gov/fdsys/pkg/CRPT-111srpt176/pdf/CRPT-111srpt176.pdf>).

³ *Id.* at 111.

⁴ See 15 U.S.C. § 78u-6(d). Under Dodd-Frank, whistleblowers choosing to report anonymously must file their whistleblower complaint through an attorney, follow prescribed certification procedures, and disclose their identities to the Commission only for verification of eligibility before receiving any award.

⁵ See 15 U.S.C. § 78u-6(h).

⁶ See 15 U.S.C. § 78u-6(b). 15 U.S.C. § 78u-6(a)(1) defines a “covered judicial or administrative action” as “any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding \$1,000,000.”

⁷ See generally 17 C.F.R. § 240.21F.

⁸ U.S. SEC. & EXCH. COMM’N., 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, 8 (2014) (*found at* <http://www.sec.gov/about/offices/owb/annual-report-2013.pdf>).

⁹ *SEC’s Cohen Predicts Major Whistleblower Awards Soon*, Corporate Crime Reporter (June 12, 2013), <http://www.corporatecrimereporter.com/news/200/seccohenwhistleblower06122013>; see also C. Bartholomew, Adam Safwat, and Brianna Benfield Ripa, *SEC Speaks 2014: Charting a New Course for Enforcement Efforts* (Mar. 17, 2014) http://www.weil.com/files/upload/SEC_Speaks_March_17_2014_Sec_Enf_Lit_Alert.pdf (noting that

in October 2013, the Program “has rapidly become a tremendously effective force-multiplier, generating high quality tips and, in some cases, virtual blueprints laying out an entire enterprise, directing us to the heart of an alleged fraud... We believe this program is already a success.”¹⁰ The SEC has already awarded eight whistleblowers monetary awards in connection with the Program, including an award of \$14 million.¹¹

6. The first three years of the SEC Whistleblower Program demonstrate not only the potential of the Program, but also that the SEC Whistleblower Rules generally work well in practice,¹² and already are helping the SEC to more effectively and efficiently detect securities violations. With the benefit of practical experience, however, we have identified certain areas that could be clarified – either through a rule amendment or the issuance of a policy statement – to help the Program better fulfill its Congressional mandate. We believe that the best time to make these clarifications is now, in order to limit the risk that these areas of uncertainty will derail the early progress the Program has already made and/or prevent the program from reaching its full potential to protect investors.

Director of the San Francisco Regional Office Jina Choi and FCPA unit chief Kara Brockmeyer identified whistleblower tips as a significant driver of enforcement efforts).

¹⁰ Mary Jo White, Chair, U.S. Sec. & Exch. Comm’n, Remarks at the Securities Enforcement Forum (Oct. 9, 2013); *see also* Andrew Ceresney, Director of Enforcement, U.S. Sec. & Exch. Comm’n, Keynote Address at the International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2013) (“Companies must keep in mind that the risk of not coming forward grows by the day as our whistleblower program continues to pick up steam. We are increasingly sourcing our own cases through whistleblower tips — which have come from individuals in nearly 70 different countries — and just last month, we made our largest-ever whistleblower award: over \$14 million.”)

¹¹ *See* Order Determining Whistleblower Award Claim, Exchange Act Release No. 70554 (Sept. 30, 2013). *See also* Order Determining Whistleblower Award Claim, Exchange Act Release No. 72301 (June 3, 2014); Order Determining Whistleblower Award Claim, Exchange Act Release No. 70775 (Oct. 30, 2013); Order Determining Whistleblower Award Claim, Exchange Act Release No. 69749 (June 12, 2013); Order Determining Whistleblower Award Claim, Exchange Act Release No. 67698 (Aug. 21, 2012). [Add any others entered before submission of petition].

¹² *See* U.S. SEC. & EXCH. COMM’N., OFFICE OF THE INSPECTOR GENERAL, EVALUATION OF THE SEC’S WHISTLEBLOWER PROGRAM V (2013) (“The implementation of the final rules made the SEC’s whistleblower program clearly defined and user-friendly for users that have basic securities laws, rules, and regulations knowledge.”).

The Need for Rulemaking Regarding Private Agreements that Undermine the SEC Whistleblower Program

7. The first significant area of uncertainty involves the extent to which employers can lawfully limit or otherwise impede their employees' or former employees' rights to report possible securities violations to the Commission staff and/or preclude employees from receiving the full benefits of the three primary incentives (anonymous reporting, anti-retaliation protections and the potential for a monetary award) of the SEC Whistleblower Program for doing so.

8. The Commission staff recognized when drafting the SEC Whistleblower Rules that there was a danger private agreements, especially confidentiality agreements, "could inhibit [] communications [with the Commission staff] even when such an agreement would be legally unenforceable, and would undermine the effectiveness of the countervailing incentives that Congress established to encourage individuals to disclose possible violations to the Commission."¹³ Accordingly, to protect the Program and its objectives from being thwarted by private agreements, the Commission promulgated Rule 21F-17, which makes it a separate violation for any individual to

... take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by § 240.21F-4(b)(4)(i) and § 240.21F-4(b)(4)(ii) of this chapter related to the legal representation of a client) with respect to such communications.¹⁴

9. As the use of the word "including" in the rule – and the reference in the rule's Adopting Release to agreements that "undermine the effectiveness of the countervailing

¹³ Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545; File No. S7-33-10, at 201, 76 Fed. Reg. 34300, 34352 (June 13, 2011).

¹⁴ 17 C.F.R. § 240.21F-17(a).

incentives that Congress established”¹⁵ – make clear, the intent of Rule 21F-17 is not simply to prevent employers from enforcing confidentiality agreements and orders that purport to completely prohibit communications with the Commission staff. Instead, the rule is more broadly intended to prevent employers from “imped[ing]” SEC whistleblowing, including through agreements that undercut the crucial incentives associated with the Program. In short, the rule is meant to protect the congressionally-designed structure of the SEC Whistleblower Program from being dismantled by private agreements.

10. In spite of Rule 21F-17, we, along with numerous other lawyers in the employment and whistleblower bars,¹⁶ have seen repeated examples of employment, severance and confidentiality agreements that purport to limit the extent to which employees or former employees can participate in the SEC Whistleblower Program, and/or receive congressionally-mandated incentives for doing so. For example, a recent decision from the United States District Court for the District of Columbia revealed that military contractor Kellogg, Brown & Root (“KBR”) required employees interviewed during the course of an internal compliance investigation to sign confidentiality agreements that purported to prohibit them from discussing either the interviews or the subject matter thereof with any party, including government officials,

¹⁵ Release, at 201,76 Fed. Reg. 34300, 34352.

¹⁶ See, e.g., Brian Mahoney, *SEC Warns In-House Attys Against Whistleblower Contracts*, Securities Law360 (Mar. 14, 2014), <http://www.law360.com/articles/518815/sec-warns-in-house-attys-against-whistleblower-contracts> (quoting Sean McKessy, Chief of the Office of the Whistleblower, as stating that the SEC is “‘actively looking for examples of confidentiality agreements, separation agreements, employee agreements that...in substance say ‘as a prerequisite to get this benefit you agree you’re not going to come to the commission or you’re not going to report anything to a regulator.’”); Letter from Katz, Marshall & Banks LLP to the Commissioners of the U.S. Sec. & Exch. Comm’n. (May 8, 2013), <http://kmblegal.com/wordpress/wp-content/uploads/130508-Letter-to-SEC-Commissioners.pdf> (noting that “our law firm and others that represent SEC whistleblowers are nonetheless seeing an increase in proposed settlement language that is intended to achieve the result” of impeding communications with the Commission staff). We whole-heartedly agree with the Katz, Marshall & Banks LLP letter, which also respectfully urged the Commission to issue a regulation or opinion “clarifying the breadth of actions that the Commission views as likely to ‘impede’ communications with the Commission,” and encourage the Commission to carefully consider its request.

without prior authorization from KBR's General Counsel.¹⁷ Similarly, yet perhaps more troubling, we have seen several companies publicly known to be under investigation by the SEC or other law enforcement authorities require their employees to sign confidentiality agreements that prohibit the employees from even producing these agreements or disclosing the terms of the agreements to any individual or entity, without a carve out for law enforcement and regulatory authorities.

11. Other examples of commonly-used contractual provisions that impede whistleblowing include:

(a) Provisions that prohibit employees from disclosing corporate information that effectively prevent them from consulting independent legal counsel and/or filing an anonymous whistleblower submissions in accordance with SEC rules;

(b) Provisions stating that the employee may make a complaint or claim to any federal, state or other government agency, but waives his or her right to receive any individual compensation or relief arising from such a complaint or claim;

(c) Provisions requiring employees to receive employer approval prior to responding to any request for information from, and/or notify their employer of any communications with the SEC or other governmental agencies; and

(d) Provisions mandating employees to represent that they have not made a prior claim or complaint about the employer to the SEC or other government agencies, and/or has not shared confidential company information with any third-party, including the SEC and/or other government agencies.

¹⁷ See *U.S. ex. rel. Barko v. Halliburton Co., et. al.*, Case No. 1:05-CV-1276 (D.D.C. Mar. 6, 2014). The agreement KBR employees signed read, in part, "I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the specific advance authorization of KBR General Counsel." *Id.*

12. In many cases, these agreements purport to impose legal fees, liquidated damages or other penalties on an employee if he or she breaches one or more of these provisions. In the KBR case, for example, the applicable agreement warned employees that any disclosure of information about the internal investigation or its subject matter could result in their termination. Other contracts we have reviewed indicate that the employee will be responsible for all legal fees and damages resulting from any claim or “complaint” made by the employee regarding the employer.

13. Each of these types of provisions undermine the basic statutory structure of the SEC Whistleblower Program by removing (or attempting to remove) one or more of the primary incentives that Congress created to encourage whistleblowers to report possible securities violations. First, provisions that purport to eliminate an employee’s right to receive a monetary award obviously remove the potential financial motivation for whistleblowers to come forward, which was intended to serve as a vital counter-balance to the economic harm – such as a job loss, demotion or blacklisting – that many whistleblowers have faced or could face as a result of their disclosures and cooperation with law enforcement and regulatory organizations.¹⁸

14. Second, provisions that require employees or former employees to notify their company before communicating with the Commission staff¹⁹ or to make a representation that

¹⁸ As described in paragraph 41, recent reports indicate more than one in five individuals who report workplace misconduct can expect to experience retaliation. *See* 2013 National Business Ethics Survey, Ethics Resource Center (2013), <http://www.ethics.org/nbes>.

¹⁹ For example, the Code of Conduct Bank of America requires its employees to sign states, “You need to be aware of and comply with any applicable line of business specific policies and procedures regarding contact with regulators, which among other things, may require you to report such contact to either your manager and/or compliance officer. Additionally, you must immediately inform your manager if you are the subject of an external investigation or contribute/participate in an external investigation unless laws, regulations or the investigating authority prohibit you from doing so.” [file:///C:/Users/Owner/Downloads/Code%20of%20Conduct%20\(English\).pdf](file:///C:/Users/Owner/Downloads/Code%20of%20Conduct%20(English).pdf). Also troubling is the Wells Fargo Team Member Code of Ethics and Business Conduct, which states that “[i]f a provision of the Code requires that a team member make a disclosure or request for approval or consent, the team member must set forth in writing all relevant facts and submit the disclosure or request to his or her Code Administrator.”

they have not already communicated with the Commission staff effectively eliminate an employee's statutory right to report securities violations anonymously – another pillar of the SEC Whistleblower Program. These restrictions may be communicated through corporate codes of conduct that are distributed company-wide, as well as through specific employment contracts.²⁰ Surveys have consistently shown employees are the most likely group to detect fraud,²¹ yet are often reluctant to report problems because they doubt their organizations will appropriately act on internal reports of wrongdoing and protect them from retaliation.²² In our collective experience, the ability to report anonymously is the single best protection against such retaliation and blacklisting, since an individual is far less likely to face retribution or reputational harm if the organizations or individuals engaged in the wrongdoing do not know that he or she blew the whistle. For that reason, the ability to remain anonymous is the decisive factor for many potential whistleblowers when deciding whether to come forward, and many whistleblowers would choose to remain silent if they could not report anonymously.

15. Particularly when used in combination with each other, these types of contractual provisions strip current and prospective whistleblowers of their statutory rights and leave them in

https://www08.wellsfargomedia.com/downloads/pdf/about/team_member_code_of_ethics.pdf?https://www.wellsfargo.com/downloads/pdf/about/team_member_code_of_ethics.pdf.

²⁰ To illustrate, JP Morgan Chase's Code of Conduct instructs employees that, unless they know clearly to the contrary, "to assume that ... all information you possess about the Company and its business" is confidential. Employees are further instructed that means, "[D]on't send internal communications, including intranet postings, outside the Company without authorization." JP Morgan Chase and Co., *Code of Conduct, Integrity: It Starts with You*, at 5.

²¹ 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/extweb/home.nsf/docid/29CAE5B1F1D40EE38525736A007123FD>.; Society of Certified Fraud Examiners, *2008 Report to the Nation on Occupational Fraud and Abuse* (2008), at 4. 30. See also Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYULR 1107, 117 (Stating that In fact, even with few corporate or legal incentives provided to whistleblowing employees, roughly one-third of fraud and other economic crimes against businesses are reported by whistleblowers.").

²² See 2013 National Business Ethics Survey, Ethics Resource Center (2013), <http://www.ethics.org/nbes/key-findings/nbes-2013/> (34% of respondents who were aware of wrongdoing in the workplace declined to report it because they feared retaliation from senior leadership), 2013 U.S. Financial Services Industry Survey, Labaton Sucharow (2013) <http://www.labaton.com/en/about/press/Wall-Street-Professional-Survey-Reveals-Widespread-Misconduct.cfm> (24% of respondents feared retaliation if they reported wrongdoing in the workplace).

the same position they would have been in absent the passage of Dodd-Frank – the apparent intent of many companies who utilize such agreements. As a result, these individuals face huge personal and professional risks and almost no tangible rewards if they choose to report securities violations – a cost-benefit calculus that is entirely contrary to the scheme Congress intended. For many whistleblowers, the decision to break their silence is one of the most significant and difficult they will have to make in their lives. As seen below, these provisions not only remove financial incentives, but expose whistleblowers to liability that may require crippling financial burdens to defeat. Accordingly, if current trends persist, fewer individuals will choose the challenging path of coming forward, undermining the SEC Whistleblower Program’s ability to protect investors.

Such Contractual Provisions Impede Whistleblowing Even Though They Are Unenforceable

16. Both the plain language of Rule 21F-17 and existing case law compel the conclusion that these contractual provisions, if tested by a court, would be found to be unenforceable as contrary to public policy.²³ It is well-established that “*a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy,*” as the agreements at issue here do.²⁴ It

²³ See generally *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) (“The relevant principle is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.”). *Connecticut Power & Light Co., Sec’y of U.S. Dep’t Labor*, 85 F.3d (2d Cir. 1996) (requiring acceptance of gag clause as a condition of settlement *per se* violates the Energy Reorganization Act whistleblower provision in 42 USC 5851) See also *EEOC v. Astra USA*, 94 F.3d 738, 744 (1st Cir. 1996); *Fields v. Thompson Printing Co.*, 363 F.3d 259, 268 (3d Cir. 2004) (Noting that “It is axiomatic that a court may refuse to enforce a contract that violates public policy. See *W.R. Grace & Co. v. Local 759*, 461 U.S. 757, 766, 76 L. Ed. 2d 298, 103 S. Ct. 2177 (1983) (citing *Hurd v. Hodge*, 334 U.S. 24, 34-35, 92 L. Ed. 1187, 68 S. Ct. 847 (1948)).”); *United States v. Blick*, 408 F.3d 162, 175 (4th Cir. 2005); *United States v. Purdue Pharma L.P.*, 600 F.3d 319, 327 (4th Cir. Va. 2010); *United States ex rel Longhi v. Lithium Power Techs., Inc.*, 575 F.3d 458, 474 (5th Cir. 2009); *Dye v. Wargo*, 253 F.3d 296, 306 (7th Cir. 2001); *United States v. Berke*, 170 F.3d 882, 885 (9th Cir. 1999); *McCall v. United States Postal Serv.*, 839 F.2d 664, 666 (Fed. Cir. 1988); *United States ex rel Wildhirt v. AARS Forever, Inc.*, 2013 U.S. Dist. LEXIS 133982 (N.D. Ill. Sept. 19, 2013).

²⁴ See *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 704 (1945) (internal citations omitted) (emphasis added). See also *DiVittorio v. HSBC Bank USA, NA (In re DiVittorio)*, 670 F.3d 273, 287 (1st Cir. Mass. 2012); *Nall v. Mal-*

is also well-established that an employer cannot use confidentiality agreements to prevent employees from reporting possible violations of law to government agencies, as agreements like those used by KBR and other companies would seek to do.²⁵ In fact, preventing or attempting to prevent employees from disclosing criminal violations of law, as many SEC violations also are, may subject an employer to liability under federal obstruction of justice statutes or state law compounding statutes.²⁶

17. Likewise, case law developed interpreting the False Claims Act (“FCA”) also strongly suggests that any contractual provision purporting to waive a whistleblower’s right to receive a monetary award from the SEC would be deemed invalid, since such provisions would remove “the critical component of the Whistleblower Program”²⁷ and thereby undermine a significant federal interest.²⁸ As the Ninth Circuit recognized in the FCA case *U.S. v. Northrup,*

Motels, Inc., 723 F.3d 1304, 1307 (11th Cir.2013); *Taub v. World Fin. Network Bank*, 950 F. Supp. 2d 698, 703 (S.D.N.Y. 2013); *Walthour v. Chipio Windshield Repair, LLC*, 944 F. Supp. 2d 1267, 1272 (N.D. Ga. 2013); *Dees v. Hydradry, Inc.*, 706 F. Supp. 2d 1227, 1233 (M.D. Fla. 2010); *Abercrombie v. Wells Fargo Bank, N.A.*, 417 F. Supp. 2d 1006, 1008 (N.D. Ill. 2006); *Ricke v. Armco, Inc.*, 882 F. Supp. 896, 901 (D. Minn. 1995)..

²⁵ See, e.g., *E.E.O.C. v. Astra U.S.A., Inc.*, 94 F.3d 738, 745 (1st Cir. 1996) (“We agree wholeheartedly with the lower court that non-assistance covenants which prohibit communication with the EEOC are void as against public policy.”); *United States ex rel. Head v. Kane Co.*, 668 F. Supp. 2d 146, 152 (D.D.C. 2009) (“Enforcing a private agreement that requires a qui tam plaintiff to turn over his or her copy of a document, which is likely to be needed as evidence at trial, to the defendant who is under investigation would unduly frustrate the purpose of [the False Claims Act].”); *United States v. Cancer Treatment Centers of Am.*, 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004) (“Relator and the government argue that the confidentiality agreement cannot trump the FCA’s strong policy of protecting whistleblowers who report fraud against the government. Their position is correct... Relator could have disclosed the documents to the government under any circumstances, without breaching the confidentiality agreement.”).

²⁶ For example, 18 U.S.C § 1512(b) makes it a federal crime to “corruptly persuade[] another person...to prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense.” This statute is applicable to the SEC context given that nearly any violation of the federal securities laws can constitute a criminal offense if perpetrated with the requisite level of intent. 18 U.S.C. § 1513(e), which is directly tied both to Dodd Frank and Sarbanes Oxley whistleblower protections under 15 U.S.C. § 78u-6(h)(1)(A)(iii), similarly provides, “Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both. See, also. 15 U.S.C. § 78ff(a) (applying criminal penalties to “[a]ny person who willfully violates” securities laws.).

²⁷ S. Rep. No. 111-176, at 111.

²⁸ See, e.g., *United States v. Northrop Corp.*, 59 F.3d 953, 963 (9th Cir. 1995) (“enforcing the release at issue in this case would impair a substantial public interest. Specifically, we find that enforcing the Release would

a waiver provision that undercuts statutory incentives designed to encourage whistleblowing should be considered unenforceable, even where the agreement purports to allow general participation in a whistleblower claim or proceeding:

And although, as Appellees maintain, enforcing the Release at issue in this case would not prohibit a relator from coming forward with information concerning Appellees' alleged misconduct, our analysis of the structure and purposes of the Act demonstrates that this consideration is not dispositive. If the *qui tam* provisions *never* had been enacted, presumably whistleblowers still could come forward. *The Act reflects Congress's judgment that incentives to file suit were necessary for the government to learn of the fraud or to spur government authorities into action; permitting a pre-filing release when the government has neither been informed of, nor consented to, the release would undermine this incentive, and therefore, frustrate one of the central objectives of the Act.*²⁹

18. Provisions that purport to restrict an employee or former employee from receiving an award through the SEC Whistleblower Program are, if anything, less defensible than similar agreements used in the FCA context because, unlike an FCA relator, an SEC whistleblower does not have an individual private right of action against the company and is not seeking any individual relief or remedy from the company. Instead, any potential claims against the company belong only to the Commission (or, in the case of certain “related actions,” other law enforcement agencies), and only the Commission has the right and sole discretion to grant a monetary award to the whistleblower. Therefore, even where a company has provided its employee or former employee with a substantial severance payment or other monetary

threaten to nullify the incentives Congress intended to create in amending the provisions of the False Claims Act in 1986”); *United States ex rel. Head v. Kane Co.*, 668 F. Supp. 2d 146, 152 (D.D.C. 2009); *U.S. ex rel. McLean v. Cnty. of Santa Clara*, C05-01962 HRL, 2008 WL 1947015 (N.D. Cal. Apr. 30, 2008) (“this court is unpersuaded that the 2004 Settlement Agreement should be enforced so as to preclude McLean from proceeding with this action on behalf of the federal and state governments.”); *U.S. ex rel. McNulty v. Reddy Ice Holdings, Inc.*, 835 F. Supp. 2d 341, 360 (E.D. Mich. 2011) (“the Court concludes that public policy concerns on balance would not favor enforcement of the Release in this case”); *U.S. ex rel. Longhi v. Lithium Power Technologies, Inc.*, 481 F. Supp. 2d 815, 820 (S.D. Tex. 2007) (“To enforce the release against him would not only ignore the public policy objectives Congress has expressly spelled out in the FCA, it would disincentivize future relators.”).

²⁹ *Northrop*, 59 F.3d at 965.

consideration in connection with an employment agreement, the company has no valid basis to assert that this third party payment “covers” or compensates the employee for the monetary award he or she could have received from the Commission.

19. For many of the same reasons, contractual representations that a whistleblower has not provided information to the Commission staff, or will provide information to the Commission staff only after notifying his or her employer, should be considered unenforceable. These provisions purport to waive “a statutory right conferred on a private party [that] affect[s] the public interest”³⁰ in contravention of Dodd-Frank’s statutory policy, by forcing current or prospective whistleblowers to “out” themselves to their employers and forgo their right to report securities violations anonymously.³¹

20. Although courts would very likely find these provisions or ones similar to them invalid, the use of such agreements by employers nonetheless impedes SEC whistleblowing and presents a grave danger to the SEC Whistleblower Program. As a preliminary matter, many individuals enter into these type of agreements without the benefit of representation by legal counsel. These provisions often are part of general employment provisions presented as job prerequisites, and it is not realistic to expect that individuals routinely will hire an attorney to accept an employment offer. These individuals, and those represented by less experienced or knowledgeable counsel, may not recognize that such provisions are of dubious validity, and simply accept them as a normal part of employment-related negotiations. Other potential

³⁰ See *Brooklyn Sav. Bank*, 324 U.S. at 704 (internal citations omitted) (emphasis added).

³¹ Requiring employees to notify their employers before filing a whistleblower complaint or otherwise communicating with the Commission staff is also contrary to the Commission’s well-considered decision not to require internal reporting as a prerequisite to participation in the SEC Whistleblower Program, as many employers and business interest groups had urged during the public comment period for the proposed SEC Whistleblower Program. See para. __, *infra*. Instead, the Commission determined that “a general requirement that employees report internally as a condition of participating in the whistleblower program would impose a barrier that in some cases would dissuade potential whistleblowers from providing information to the Commission, contrary to the purpose of the whistleblower provision.” Adopting Release at 105.

whistleblowers may recognize that such provisions are likely unenforceable, but decide that staying silent is preferable to acting as a “test case” and risking personal liability by blowing the whistle – particularly when the relevant agreement purports to impose legal fees or other penalties on employees who breach their confidentiality or notification obligations.

Compounding the problem, individuals often believe that the entities and individuals engaged in the wrongdoing have all the cards— greater financial resources, access to top legal counsel and possible connections with politicians and regulators—and will be nearly impossible to successfully challenge in any litigation. Prospective whistleblowers are also likely to be particularly reticent to push back against such provisions given the challenging economic climate, in which jobs remain scarce and most employees are economically unable to forgo a severance payment or other benefits in order to retain their statutory rights. Financially, the cost for an unemployed whistleblower merely to prevail in associated litigation may well be prohibitive. In the long term, the notoriety of having just won a lawsuit about disclosing corporate information may be its own form of self-blacklisting, since few employers are likely to find the legal victory reassuring. On balance, even a legal victory is insufficient to thaw the chilling effect of these traditional and increasingly creative restraints on speech .

21. Even an informal assertion of “anti-gag” rights can invite retaliation. As a practical matter, the mere existence of these corporate policies creates the desired chilling effect. Where current or prospective whistleblowers recognize and are able to advocate for their rights, the very inclusion of such provisions in draft agreements puts those individuals and their counsel in an untenable position. If they object to the provisions, those objections will immediately signal to the employer that the employee is or plans to become an SEC whistleblower; if they do not object, they may compromise their future rights or be forced to sign an agreement by which

they do not intend to abide. Congress did not intend for whistleblowers to be forced to choose between receiving the benefits of an employment-related agreement (such as a severance payment) and remaining anonymous.

22. Perhaps the most troubling legal tactic occurs when employers seek to brand whistleblowers as wrongdoers, because they discovered and reported wrongdoing. Increasingly, employers are seeking civil or criminal liability on grounds such as breach of a confidentiality clause or theft of company property, through enforcement of broad confidentiality policies or agreements, without an exception for whistleblowing. SEC disclosures are particularly vulnerable, because Section 922(h) of the Dodd Frank Act, 15 U.S.C. 78u-6(h), does not contain an “anti-gag” provision. Although generally those restraints are outweighed on public policy grounds, in numerous statutes analogous to Section 922’s disclosure or retaliation provisions, the courts have enforced confidentiality restraints, holding that acquiring or disclosing restricted information was not protected, or that a valid contract had been breached.³² In one case a False Claims Act relator had to pay \$300,000 in attorney fees.³³ Whistleblowers even have faced criminal prosecution for “stealing” evidence to prove alleged misconduct.³⁴ When there is

³² See, e.g., *Watkins v. Ford Motor Co.*, 2005 WL 3448036 (S.D. Ohio 2005) (rejected that copying confidential records was protected activity for Sarbanes Oxley disclosures and anti-retaliation action); *Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253 (4th Cir. 1998); *O’Day v. McDonnell Douglas Helicopter*, 79 F.3d 756 (Ninth Cir. 1996) (taking sensitive documents to prove Age Discrimination Act claim was not protected activity). See also *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352, 362 (U.S. 1995) (allowing a court to limit the recovery of an employee who had copied employer’s confidential documents); *Saini v. Int’l Game Tech.*, 434 F. Supp. 2d 913, 922 (D. Nev. 2006) (Holding that “...confidentiality agreements between employers and employees do not become unenforceable just because the employee decides that the employer has committed a wrongful or illegal act.”).

³³ *Cafasso v. General Dynamics C4-Sys*, 2009 WL 1457036 (D. Ariz. 2009), *aff’d* 637 F.3d 1047 (Ninth Cir. 2011). Though overturned on appeal, a district ordered a relator to pay a defendant \$500,000 in attorneys’ fees. 2010 U.S. Dist. LEXIS 41559 (E.D. Va. Apr. 28, 2010), *overturned by United States ex rel. Ubl v. IIF Data Solutions*, 650 F.3d 445, 460 (4th Cir. 2011). Sizable awards at the district court level may tend to discourage potential relators from initiating legal action.

³⁴ *State v. Saavedra*, 2013 WL 6763248 (N.J. App. Dec. 24, 2013) (upholding criminal indictment for theft of confidential records for employment discrimination claim); Natalie Singer, *Was Inspector Source of Leak at Boeing?*, *The Seattle Times* (Mar. 26, 2008), (felony trial for disclosure of records to prove quality control

discretion on the issue, courts have relied on a balancing test to weigh the public benefits against damage to the employer from using “secret” records as evidence.³⁵ This inherently creates a chilling effect, because it means the employee will not know until after a trial whether getting the evidence to prove charges was protected or illegal. Again, even if the whistleblower defeats the legal counterattack, the financial consequences can still be ruinous.³⁶ For the SEC Whistleblower Program to achieve its mission, it is essential that employees be legally protected when they engage in the “homework” necessary to prove violations. Although Rule 21F is helpful, a clearer mandate is necessary to prevent the chilling effect of retaliatory litigation, balancing tests and after the fact judgments. It is essential for the Rules to eliminate any uncertainty that it is legally protected for whistleblowers to prove their charges. The safe zone must extend both to the time spent researching and preparing a disclosure, as well as to the act of gathering and disclosing evidence to the Commission.

violations); <http://www.nytimes.com/2010/02/12/us/12nurses.html> (felony trial for anonymous disclosure to state medical board a doctor was selling sham herbal medicines to hospital patients).

³⁵ In *Niswander v. Cincinnati Insur. Co.*, 529 F.3d 714, 725 (Sixth Cir. 2008), the court reviewed criteria for whether to enforce a confidentiality agreement, or whether removal of confidential records was protected activity in a discrimination lawsuit: how the information was obtained; to whom it was produced; contents, in terms of need to maintain confidentiality and relevance to legal claim; the employer’s privacy policy; and availability of alternative channels to preserve the evidence. See also *Harris v. Richland Cmty. Health Care Ass’n*, 2009 U.S. Dist. LEXIS 83832 (D.S.C. Sept. 14, 2009); *Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 260 (4th Cir. 1998); *O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir. 1996) (Holding that “We have previously adopted a balancing test for determining whether an employee’s conduct constitutes ‘protected activity’ under Title VII, and here adopt the same balancing test for retaliation claims under the ADEA. The court must balance “the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress’ equally manifest desire not to tie the hands of employers in the objective selection and control of personnel.” *Wrighten v. Metropolitan Hosp., Inc.*, 726 F.2d 1346, 1355 (9th Cir. 1984) (quoting *Hochstadt v. Worcester Foundation*, 545 F.2d 222, 231 (1st Cir. 1976)).”); *Jefferies v. Harris County Community Action Ass’n*, 615 F.2d 1025, 1036 (5th Cir. 1980); At the state level, New Jersey expanded this analysis by adopting a seven factor balancing test in *Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239, 269-271 (N.J. 2010).

³⁶ Devine and Maassarani, *The Corporate Whistleblower’s Survival Guide: A Handbook for Committing the Truth* (Barrett Koehler 2011), at 56-57.

A Clarifying Amendment to Rule 21F-17 Would Reduce the Use of Private Agreements or Restrictions to Impede Participation in the SEC Whistleblower Program

23. These types of provisions undermine the effectiveness and potential of the SEC Whistleblower Program, for all of the reasons described above. We believe that this harm could be substantially mitigated if the Commission amended Rule 21F-17 to make it clearer to both employers and employees that it is a violation of law not only to enforce, or seek to enforce, private agreements that purport to prohibit communications with the Commission staff, but also to use, or seek to use, private agreements to undermine the primary statutory incentives of the Program.

24. In particular, we respectfully request that the Commission consider the following proposed amendment to Rule 21F-17:

No person may take any action to impede an individual or associated person who communicates, is about to or has communicated directly with the Commission staff about a possible securities law violation, including, but not limited to: (a) proposing, issuing,³⁷ enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by § 240.21F-4(b)(4)(i) and § 240.21F-4(b)(4)(ii) of this chapter related to the legal representation of a client) with respect to such communications; (b) requiring an individual to waive, release or assign any monetary award he or she may receive from the Commission, or conditioning an individual's right to receive any contractual or employment-related benefit on such a waiver, release or assignment; (c) requiring an individual to disclose to any private party whether he or she has, or in the future intends to, communicate with the Commission staff about a possible securities law violation; (d) conditioning an

³⁷ In the Whistleblower Protection Enhancement Act, recent legislation to modernize whistleblower rights for civil service employees, as a preventive measure Congress made the mere issuance of a nondisclosure policy, form or agreement an illegal prohibited personnel practice. 5 U.S.C. §§ 2302(a)(2)(A)(xi), 2302(b)(8), and 2302(b)(13) (which effectively voids any nondisclosure agreement that does not explicitly state, ““These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.””).

individual's right to receive any contractual or employment-related benefit on a representation that they have not communicated with, or provided documents or other information to, the Commission staff; (e) seeking civil or criminal liability for acquiring and communicating information to the Commission or other activity protected by this Rule; or (f) engaging in any other discrimination that would chill the exercise of activity protected by this Rule.

25. We also respectfully request that the Commission consider making a corresponding amendment to Rule 21F-4(a)(4)(v), which provides exceptions to the general rule that information obtained by compliance, legal, audit and other personnel in the course of identifying and investigating possible violations of law cannot constitute "independent knowledge" or "independent analysis" for purposes of determining eligibility for a whistleblower award.³⁸ Currently, Rule 21F-4(a)(4)(v)(b) provides an exception to this general principle where the prospective whistleblower has "a reasonable basis to believe that the relevant entity is engaging in conduct that will impede an investigation of the misconduct."³⁹ We respectfully request that the Commission clarify that "imped[ing] an investigation" may include using confidentiality agreements to prevent the entity's employees from communicating with the Commission staff by amending this subsection as follows:

(B) You have a reasonable basis to believe that the relevant entity is engaging in conduct that will impede an investigation of the misconduct, including the use of confidentiality or other agreements or restrictions on disclosure to impede the relevant entity's employees from communicating with independent legal counsel or the Commission staff;

26. These proposed clarifications would protect the effectiveness of the SEC Whistleblower Program by educating responsible organizations and deterring all companies from demanding contractual provisions like those described above, and making it easier for employees and their counsel to argue against such provisions when they are included in draft agreements.

³⁸ 17 C.F.R. § 240F-4(a)(4)(v).

³⁹ 17 C.F.R. § 240F-4(a)(4)(v)(b).

In time, we believe this proposed amendment would substantially reduce the use of private agreements that impede participation in the SEC Whistleblower Program.⁴⁰ By providing all interested parties notice, it will also strengthen any future SEC enforcement actions brought against companies that attempt to use these agreements to obstruct justice or as a form of “hush money.”

27. Significantly, since this proposed clarification is narrowly tailored to protect whistleblowers’ rights to anonymously share information with the Commission staff, and to receive a monetary incentive provided by statute for doing so – and does not affect an employer’s ability to obtain a settlement and release of claims that the employee could have brought against the employer directly – it does not impair employers’ legitimate interests in resolving employment disputes through settlement or protecting confidential information from competitors or other private parties. To the contrary, the proposed clarification would benefit responsible employers by helping them define the line between lawfully protecting their confidentiality rights and exposing themselves to liability under Rule 21F-17. The proposed clarification would also benefit employers by ensuring that they do not place mistaken reliance on agreements that are very likely unenforceable, and by decreasing related negotiation and litigation costs.

28. Ultimately, we believe that there are many benefits, and very few drawbacks, to the proposed clarification. Whistleblowers will only come forward, and the SEC Whistleblower

⁴⁰ Under prevailing law, the Commission staff would have the right to obtain and use draft agreements and other evidence of settlement negotiations to prove a violation of this rule, since Federal Rule of Evidence 408 – the rule commonly used to preclude the discovery or admission of compromise negotiations – expressly permits the use of such evidence for purposes other than “to prove liability for or invalidity of the claim” that was the subject of the compromise negotiations or its amount, including without limitation “proving an effort to obstruct a criminal investigation or prosecution.” Fed. R. Evid. 408. The Commission may wish to remind the public of this exception to ensure that individuals and their counsel understand that they may properly alert the Commission staff if they receive agreements or draft agreements that appear to violate Rule 21F-17.

Program can only fulfill its potential, if the primary incentives built into the Program by Congress remain intact. Accordingly, we respectfully urge the Commission to take steps to protect them from private interference.

**The Need for a Policy Statement Regarding the Applicability of
Dodd-Frank's Anti-Retaliation Provisions to Internal Whistleblowers**

29. In addition to the issues surrounding private agreements that may deter individuals from communicating with the Commission staff, uncertainty has also arisen regarding the extent to which the anti-retaliation employment protections offered by Dodd-Frank and the SEC Whistleblower Rules extend to employees who have reported possible securities law violations to their employers, but have not filed a complaint with the Commission staff. While the majority of courts to consider this issue have agreed with the Commission's interpretation that certain kinds of internal reports constitute protected conduct under Dodd-Frank, other courts have concluded that only direct communications with the Commission staff can give rise to an actionable Dodd-Frank retaliation claim. This split among courts, particularly when coupled with the fact that the Commission has taken significant steps to encourage internal reporting, has confused or misled many prospective whistleblowers regarding the risks and rewards that come with internal reporting. Accordingly, we respectfully request that the Commission issue a policy statement clarifying the current state of the law, so that whistleblowers do not decide to report securities violations internally based on an incomplete or inaccurate information about the legal consequences of doing so.

Factual and Legal Background

30. During the rulemaking process that resulted in the SEC Whistleblower Rules, one of the most heavily debated issues was whether individuals should be required to report possible securities violations to their employers or former employers before or simultaneous when filing a

whistleblower complaint with the Commission in order to be eligible for a monetary award.⁴¹

Many corporations and business groups forcefully argued in comment letters to the SEC that it was “vitaly important that the Commission require prospective whistleblowers to first make use of internal reporting and investigative systems before submitting their reports to the Commission if they wish to be considered for a related reward”⁴² and that “the Proposed Rules [which did not include such a requirement] may undermine the functioning of effective corporate compliance programs by relegating them to the sidelines in the process of identifying and remedying violations of the securities laws.”⁴³

31. After receiving and carefully considering these comments, the Commission determined that “a general requirement that employees report internally... would impose a barrier that in some cases would dissuade potential whistleblowers from providing information to the Commission, contrary to the purpose of the whistleblower provision.”⁴⁴ However, the Commission also recognized that internal whistleblowing can “play an important role in facilitating compliance with the securities laws,” and therefore tailored the final SEC Whistleblower Rules to encourage internal whistleblowing in several ways.

⁴¹ Adopting Release at 5 (“A significant issue discussed in the Proposing Release was the impact of the whistleblower program on corporate internal compliance processes. While we did not propose a requirement that whistleblowers report through internal compliance processes as a prerequisite to eligibility for an award, we requested comment on this topic, and we included in the proposed rules several other elements designed to encourage potential whistleblowers to utilize internal compliance. Commenters were sharply divided on the issues raised by this topic...”).

⁴² Letter from S. Hackett, General Counsel, Ass’n of Corp. Counsel to the U.S. Sec. & Exch. Comm’n. (Dec. 17, 2010); *see also, e.g.*, Letter from I. Hammerman, General Counsel, SIFMA to the U.S. Sec. & Exch. Comm’n. (Dec. 17, 2010) (“We believe that individuals, at least in the financial services industry if not more broadly, should be required to report potential misconduct to effective internal compliance reporting systems”); Letter from General Electric, *et. al.* to the U.S. Sec. & Exch. Comm’n. (Dec. 17, 2010) (“we believe that the best way to balance the desires for strong compliance functions and an effective whistleblower program is to require internal reporting to be eligible for an award except in cases where the whistleblower’s company does not maintain an effective compliance program with an acceptable reporting process.”).

⁴³ Letter from S. Johnson, the U.S. Chamber of Commerce to the U.S. Sec. & Exch. Comm’n. (Dec. 17, 2010).

⁴⁴ Adopting Release at 105.

32. First and most importantly, the Commission promulgated a rule, Rule 21F-2(b)(1), which clarifies that Dodd-Frank’s key anti-retaliation prohibition, Section 21F(h)(1), applies to many whistleblowers who report internally. Rule 21F-2(b)(1) achieves this objective by providing that “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... You provide information in a manner described in Section 21F(h)(1)(A).”⁴⁵

33. Section 21F(h)(1)(A), in turn, provides that:

- (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.

34. Subsection iii of this provision encompasses whistleblowers who “mak[e] disclosures that are required or protected under the Sarbanes-Oxley Act of 2002” (“SOX”). Many of the “disclosures that are required or protected under” SOX are internal disclosures, including reports to “a supervisor or compliance officer at a public company concerning possible securities fraud, wire fraud, bank fraud, or mail fraud.”⁴⁶ Thus, by clarifying that Dodd-Frank’s anti-retaliation provisions cover all whistleblowers who provide information in the manner described in Section 21F(h)(1)(A), the Commission clarified that many types of internal reports,

⁴⁵ 17 C.F.R. § 240.21F-2(b)(1).

⁴⁶ Brief for the U.S. Sec. & Exch. Comm’n. as *amicus curiae* at 16, *Liu Meng-Lin v. Siemens AG*, No. 13-4385 (2d Cir. filed Feb. 20, 2014).

including those covered by Section 806 of SOX, can give rise to an actionable Dodd-Frank retaliation claim by the employee or, pursuant to Section 21F(h)(1)(C), the Commission itself.⁴⁷

35. In addition to clarifying that Dodd-Frank protects many internal whistleblowers from retaliation, the Commission also took other steps to “mitigate any diversion from internal reporting of individuals who would be pre-disposed to report internally in the absence of the whistleblower program, and incentivize new individuals who otherwise might never have reported internally to enter the pool of potential internal whistleblowers.”⁴⁸ In particular, the Commission incentivized internal reporting by providing in the SEC Whistleblower Rules that:

(a) “a whistleblower’s voluntary participation in an entity’s internal compliance and reporting systems is a factor that can increase the amount of an award,” while “a whistleblower’s interference with internal compliance and reporting is a factor that can decrease the amount of an award”;⁴⁹

(b) a whistleblower may “receive an award for reporting original information to an entity’s internal compliance and reporting systems, if the entity reports information to the Commission that leads to a successful Commission action”;⁵⁰ and

(c) “a whistleblower who first reports to an entity’s internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law and within

⁴⁷ The Commission rule is consistent with those governing corporate whistleblower laws generally, which normally are enforced by the U.S. Department of Labor. *See, e.g.*, 29 C.F.R. § 24.102(c)(1) (2011). “Under the Energy Reorganization Act, and by interpretation of the Secretary under any of the other statutes listed in § 24.100(a), it is a violation for any employer to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner retaliate against any employee because the employee has: (1) Notified the employer of an alleged violation of such statute or the A[tomic] E[nergy] A[ct] of 1954.... *See Connecticut Light and Power Co.*, 85 F.3d at 92, 96.

⁴⁸ *Id.* at 102-03.

⁴⁹ Adopting Release at 5; *see also* 17 C.F.R. §240.21F-6(a)(4).

⁵⁰ Adopting Release at 5-6; *see also* 17 C.F.R. §240.21F-4(c)(3).

120 days reports to the Commission could be an eligible whistleblower whose submission is measured as if it had been made at the earlier internal reporting date.”⁵¹

36. In light of these provisions, an individual reviewing the SEC Whistleblower Rules in anticipation of becoming a whistleblower would reasonably conclude that he or she would be protected from retaliation, and receive a potential financial benefit, for utilizing internal reporting mechanisms, particularly if the individual was an employee or private contractor for a public company covered by Section 806 of SOX.⁵²

37. Despite the fact that many employers and business groups lobbied heavily to require internal reporting during the public comment period for the SEC Whistleblower Rules, some of those same parties have taken the position in subsequent litigation that internal reporting is not protected conduct under Section 21F(h)(1). While many courts have rejected this argument, and have instead deferred to the Commission’s interpretation that the activities described in Section 21F(h)(1)(A) are protected conduct,⁵³ other courts have reached the opposite conclusion.⁵⁴ In *Asadi v. G.E. Energy (USA) L.L.C.*, the Fifth Circuit Court of Appeals found that Rule 21F-2(b)(1) is inconsistent with “Congress’s intention to require individuals to report information to the SEC to qualify as a whistleblower under Dodd-Frank” and that only

⁵¹ *Id.* at 89-90; *see also* 17 C.F.R. §240.21F-4(b)(7).

⁵² In *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1161, 188 L. Ed. 2d 158 (2014), the Supreme Court held that SOX’s anti-retaliation provisions extend to private contractors who provide services to public companies, predicated its conclusion on “...the text of §1514A, the mischief to which Congress was responding, and earlier legislation Congress drew upon.” *Lawson*, at 1161.

⁵³ *See, e.g., Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202, 2011 WL 1672066, at *5; *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. Giacomakis*, 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). *See also Bussing v. COR Clearing, LLC*, 2014 U.S. Dist. LEXIS 69461 (D. Neb. May 21, 2014) (noting that “under *Asadi*, not only does the law fail to protect the majority of whistleblowers, it fails to protect those who are most vulnerable to retaliation.”).

⁵⁴ *See, e.g., Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013); *Banko v. Apple Inc.*, 2013 WL 7394596 (N.D. Cal. Sept. 27, 2013); *Wagner v. Bank of Am. Corp.*, 2013 WL 3786643 (D. Colo. July 19, 2013); *Englehart v. Career Educ. Corp.*, 2014 U.S. Dist. LEXIS 64994 (M.D. Fla. May 12, 2014).

whistleblowers who report to the Commission staff are entitled to the statute's anti-retaliation protections.⁵⁵ The Second Circuit Court of Appeals is currently considering similar questions in *Liu Meng-Lin v. Siemens AG*, and may also soon weigh in on whether, and the extent to which, internal reporting is protected under Dodd-Frank.⁵⁶

38. We strongly agree with the Commission that Rule 21F-2(b)(1) appropriately resolves the ambiguity in the anti-retaliation provisions of Dodd-Frank and is entitled to *Chevron* deference for the reasons articulated in the Commission's *amicus curiae* brief in *Liu Meng-Lin v. Siemens AG*.⁵⁷ We also strongly agree that, as the Commission argued in the amicus brief, "reporting through internal compliance procedures can complement or otherwise appreciably enhance [the Commission's] enforcement efforts."⁵⁸ As valuable as internal reporting may be, however, we believe that the current uncertainty in the law, along with the structure of the SEC Whistleblower Rules, creates a significant risk that prospective whistleblowers will be unintentionally misled regarding the potential costs and benefits of internal reporting.

39. In particular, any individual who is considering reporting a possible securities violation and reads the SEC Whistleblower Rules would very likely conclude that internal reporting is not only a protected activity under the anti-retaliation provisions of Dodd-Frank and the Rules, but in fact an activity *avored* by the Commission, which could potentially increase the size of any monetary award. Thus, a prospective whistleblower – particularly one who is not yet represented by counsel – might decide to report internally using his or her company's compliance or legal mechanisms before filing a complaint with the Commission staff, in the

⁵⁵ *Asadi*, 720 F.3d at 630.

⁵⁶ *See Liu Meng-Lin v. Siemens AG*, No. 13-4385 (2d Cir. filed Nov. 14, 2013).

⁵⁷ *See generally* Brief for the U.S. Sec. & Exch. Comm'n. as *amicus curiae*, *Liu Meng-Lin v. Siemens AG*, No. 13-4385 (2d Cir. filed Feb. 20, 2014).

⁵⁸ *Id.* at 5 (citing Adopting release at 34359 n. 450).

belief that doing so will constitute protected conduct and increase his or her chance of receiving a significant award.

40. Based upon the current text of the Rules and current SEC guidance, this prospective whistleblower is unlikely to understand that, if he or she chooses to report internally and is retaliated against as a result, he or she may not have any right to legal redress under Dodd-Frank, as the prospective whistleblower would have had if he or she had reported directly to the Commission staff. This prospective whistleblower may therefore undertake an internal reporting path encouraged by the Commission that, while beneficial in many respects, also has substantial potential risks and costs to the individual.⁵⁹

41. This risk of retaliation is not hypothetical, as the substantial number of cases already addressing internal reporting indicate. To the contrary, the 2013 National Business Ethics Survey, a well-respected survey conducted by the independent non-profit group Ethics Resource Center (“ERC”), “more than one in five workers who reported misconduct said they experienced retaliation in return.”⁶⁰ As these figures make clear, “retaliation against workers who reported wrongdoing continues to be a widespread problem.”⁶¹ We see evidence of such troubling retaliation in our practices on a routine and growing basis.⁶²

⁵⁹ As explained above, certain internal whistleblowers, including those employed by public companies, may be able to bring a retaliation claim under SOX. A SOX retaliation claim, however, lacks many of the benefits of a Dodd-Frank retaliation claim. For example, an employee bringing a Dodd-Frank claim need not exhaust administrative remedies. 15U.S.C. § 78u-6(h)(1)(B)(i). 18 U.S.C. § 1514A(b)(1)(B). A SOX plaintiff must wait at least 180 days for the Department of Labor to issue a final decision before bringing his or her claim in federal court. Additionally, a Dodd-Frank plaintiff may receive “2 times the amount of back pay otherwise owed to the individual.” 15U.S.C. § 78u-6(h)(1)(C)(ii). SOX plaintiffs may only receive his or her “amount of back pay, with interest.” 18 U.S.C. § 1514A(c)(2)(B).

⁶⁰ See 2013 National Business Ethics Survey, Ethics Resource Center (2013), <http://www.ethics.org/nbes>.

⁶¹ *Id.*

⁶² Given the pervasive nature of retaliation against whistleblowers, we also respectfully suggest that the Commission amend Rule 21F-6(a)(2), which lists the Factors that may increase the amount of a whistleblower’s award,” to clarify that one of the upward factors, “Any unique hardships experienced by the whistleblower as a result of his or her reporting and assisting in the enforcement action,” expressly includes any type of retaliation, including post-employment retaliation.

42. Real people are grappling every day with the costs and benefits of using internal compliance systems, and are facing life-changing consequences as a result of their decisions. These individuals – who are very likely to look to the Commission for direction on these issues – need and deserve clear guidance about the current state of the law, so that they can make informed decisions about whether, when and how to report possible securities violations. Accordingly, until the law is settled by Congress or the Supreme Court, we believe that prospective whistleblowers would greatly benefit from the issuance of a policy statement or similar guidance that neither encourages or discourages internal reporting, but instead fairly and objectively informs prospective whistleblowers of the key facts regarding internal reporting. In particular, we respectfully request that the Commission alert prospective whistleblowers that, although the SEC Whistleblower Program provides certain incentives for individuals who utilize internal reporting mechanisms and the Commission itself interprets Dodd-Frank as protecting certain types of internal reporting, courts have reached different conclusions regarding whether internal whistleblowers are protected by Dodd-Frank. We have attached a proposed policy statement providing such guidance as Exhibit I hereto, which we respectfully request that the Commission consider.

43. This type of policy statement would allow prospective whistleblowers to undertake the difficult choice of coming forward with their eyes wide open to the legal consequences of their actions and would ensure that whistleblowers do not follow the incentives offered for internal reporting without understanding the attendant risks. At the same time, we believe that responsible employers would have little reason to oppose this policy statement, since it does not change the applicable rules relevant to internal reporting, but instead merely informs prospective whistleblowers of an area of legal uncertainty and the existence of a legal debate that

many employers and business interest groups have themselves encouraged by challenging the rights of internal whistleblowers to seek relief from retaliation using Dodd-Frank. Personal values, deeply rooted traditions and cultural pressure mean that the vast majority of whistleblowing disclosures will continue to be made inside the corporation. Indeed, based on data from the 2013 National Business Ethics Survey – which found that “more than nine out of ten (92 percent) reporters [of perceived workplace misconduct] turned to somebody inside the company when they first complained about misconduct” – we believe that most prospective whistleblowers remain likely to use internal reporting mechanisms even without retaliation protections, particularly if their employers have strong culture of integrity where reporting is encouraged and policies against retaliation for internal reporting.⁶³ For employees of companies who lack such a culture or policies, or who otherwise have reason to suspect that they may face retaliation for reporting misconduct, however, knowing their rights with respect to internal reporting is crucial and may be a substantial factor in their decision-making process.

44. Our experience representing numerous individuals who are, or are considering becoming, whistleblowers indicate that providing greater clarity and certainty regarding the rules of the SEC Whistleblower Program will ultimately lead more individuals with information about possible securities violations to come forward—internally and externally. The more individuals who come forward, the better able the SEC Whistleblower Program will be to fulfill its Congressional mandate of detecting, investigating and prosecuting misconduct in the securities markets. We thank the Commission for its consideration of this petition, and would welcome the opportunity to provide any additional information that may be helpful to the Commission.

⁶³ See 2013 National Business Ethics Survey, Ethics Resource Center (2013), <http://www.ethics.org/nbes>.

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EXHIBIT A – PROPOSED POLICY STATEMENT

The Securities and Exchange Commission is issuing a statement regarding the extent to which the anti-retaliation provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), Pub. L. No. 11-203, 124 Stat. 1376 (2010), apply to individuals who have reported possible violations of the federal securities laws to their employers using internal reporting mechanisms, but have not filed a whistleblower complaint with the Commission. This statement does not provide, and should not be construed as, legal advice or a recommendation to engage, or not engage, in any particular course of action.

Congress, through Section 922 of Dodd-Frank, added a new section to the Exchange Act, Section 21F, which provides a set of incentives and protections for whistleblowers who report possible violations of the securities laws. In particular, Section 21F allows eligible whistleblowers to obtain a monetary award where the “original information” voluntarily provided by the individual “leads to successful enforcement by the Commission,” resulting in the recovery of total sanctions exceeding \$1 million.¹ Section 21F also seeks to protect whistleblowers by allowing them to report possible misconduct to the Commission on an anonymous basis and by prohibiting employers from retaliating against individuals in the terms and conditions of their employment based on certain whistleblower activities.² For example, entities are prohibited from retaliating against any individual who participates in the SEC Whistleblower Program by filing a whistleblower complaint with the Commission.³

¹ See 15 U.S.C. 78u-6(b).

² See 15 U.S.C. 78u-6(d); 15 U.S.C. 78u-6(h)(2).

³ 15 U.S.C. 78u 6(h)(2).

In addition to establishing these incentives and protections, Section 922 gave the Commission “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.”⁴ Pursuant to this authority, the Commission adopted a set of rules implementing the provisions of Section 21F, 17 C.F.R. § 240.21F (the “SEC Whistleblower Rules” and, together with Section 21F, “the SEC Whistleblower Program”). In developing the SEC Whistleblower Rules, one of the Commission’s objectives 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.”⁵ Accordingly, although the Commission made clear that a whistleblower is *not required* to report internally to his or her employer to be eligible for an award from the Commission, the final rules “incentivize whistleblowers to utilize their companies’ internal compliance and reporting systems when appropriate.”⁶ Specifically, the final rules incentivize whistleblowers to use internal reporting mechanisms by providing that:

(a) “a whistleblower’s voluntary participation in an entity’s internal compliance and reporting systems is a factor that can increase the amount of an award,” while “a whistleblower’s interference with internal compliance and reporting is a factor that can decrease the amount of an award”;⁷

⁴ 15 U.S.C. 78u-6(j).

⁵ Securities Whistleblower Incentives and Protections (“Adopting Release”), 76 Fed. Reg. 34300, 34323 (June 13, 2011).

⁶ *Id.* at 34301.

⁷ Adopting Release at 5; *see also* 17 C.F.R. §240.21F-6(a)(4).

(b) a whistleblower may “receive an award for reporting original information to an entity’s internal compliance and reporting systems, if the entity reports information to the Commission that leads to a successful Commission action”;⁸ and

(c) “a whistleblower who first reports 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 could be an eligible whistleblower whose submission is measured as if it had been made at the earlier internal reporting date.”⁹

At the same time, the Commission adopted a rule to clarify that Section 21F of Dodd-Frank prohibits retaliation against individuals who have reported possible securities violations to the Commission and, in certain cases, individuals who have reported possible securities violations to persons or governmental authorities *other than the Commission*. Specifically, the Commission adopted Rule 21F-2(b)(1), which makes clear that, for purposes of Dodd-Frank’s retaliation provisions, a “whistleblower” is defined by reference to Section 21F(h)(1):

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... You provide information in a manner described in Section 21F(h)(1)(A).¹⁰

Section 21F(h)(1)(A) of Dodd-Frank, in turn, provides that:

- (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

⁸ Adopting Release at 5-6; *see also* 17 C.F.R. §240.21F-4(c)(3).

⁹ *Id.* at 89-90; *see also* 17 C.F.R. §240.21F-4(b)(7).

¹⁰ 17 C.F.R. § 240.21F-2(b)(1).

- (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.

Thus, under Rule 21F-2(b)(1) any individual who engages in one of the three types of activities listed in Section 21F(h)(1)(A) will be covered by the anti-retaliation provisions of Dodd-Frank if they are retaliated against in the terms and conditions of their employment as a result of such activities.

Significantly, subsection iii of this provision includes “disclosures that are required or protected under the Sarbanes-Oxley Act of 2002” (“Sarbanes-Oxley”). The disclosures that are required or protected under Sarbanes-Oxley include numerous types of internal company disclosures, including (but not limited to) the following:

- “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”;
- “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”; and
- “Disclosures to an audit committee pursuant to Section 10A(m) of the Exchange Act concerning “questionable accounting or auditing matters” at a public company.”¹¹

Accordingly, the Commission takes the position that, pursuant to Rule 21F-2(b)(1), whistleblowers who make internal company disclosures that are protected or required by Sarbanes-Oxley, including disclosures by employees or private contractors of public companies

¹¹ See Brief for the U.S. Sec. & Exch. Comm’n. as *amicus curiae*, *Liu Meng-Lin v. Siemens AG*, No. 13-4385, at 16 (2d Cir. filed Feb. 20, 2014) (the “Amicus Brief”).

to their supervisors or compliance officials, are also protected under the anti-retaliation provisions of Dodd-Frank.¹²

Since the implementation of the SEC Whistleblower Rules, individuals, including some individuals who made internal company disclosures of possible securities violations, have begun to bring Dodd-Frank retaliation claims against their employers or former employers. In some of these cases, the defendants have taken the position that internal company disclosures cannot give rise to a valid Dodd-Frank retaliation claim: in other words, they have argued that a whistleblower must report a possible securities violation to the Commission to be able to bring a retaliation claim under Dodd-Frank.

In many instances, courts hearing these claims have agreed with the Commission's interpretation that Section 21F(h)(1)(A) protects *both* whistleblowers who report possible violations to the Commission *and* whistleblowers who have made internal company disclosures covered by Sarbanes-Oxley (such as disclosures to a supervisor or compliance official at a public company concerning possible securities fraud, wire fraud, bank fraud, or mail fraud).¹³ As of the date of this release, a majority of courts have held that Dodd-Frank retaliation claims may be brought by, or on behalf of, such internal whistleblowers.¹⁴

¹² In *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1161, 188 L. Ed. 2d 158 (2014), the Supreme Court held that Sarbanes-Oxley's anti-retaliation provisions extend to private contractors who provide services to public companies.

¹³ See, e.g., *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202, 2011 WL 1672066, at *5; *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. Giacomakis*, 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).

¹⁴ *Id.*

A minority of courts, however, have reached a different conclusion.¹⁵ These courts have found that Section 21F(h)(1)(A) applies *only* to whistleblowers who have reported possible securities violations to the Commission, and *not* to whistleblowers who have made only internal company disclosures.¹⁶ While the Commission respectfully disagrees with these decisions for the reasons articulated in its *amicus curiae* brief in *Liu Meng-Lin v. Siemens AG*, No. 13-4385 (2d Cir. filed Feb. 20, 2014) (available here), these cases affect the rights of whistleblowers, especially those who live or work in the jurisdictions in which those cases were filed. As more cases are filed or litigated, Courts will continue to consider the extent to which internal whistleblowers are covered by Dodd-Frank's anti-retaliation provisions.

The Commission continues to believe that internal company disclosures play an important role in facilitating compliance with the securities laws. 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."¹⁷ However, the Commission also believes that individuals should be aware of the current state of the law regarding internal company disclosures when deciding whether to report possible securities violation, either internally or to the Commission staff.

In particular, the Commission believes that individuals should be aware that:

- The SEC Whistleblower Program provides certain incentives to individuals who utilize internal reporting mechanisms before filing a whistleblower complaint with the Commission staff.

¹⁵ See, e.g., *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013); *Banko v. Apple Inc.*, 2013 WL 7394596 (N.D. Cal. Sept. 27, 2013); *Wagner v. Bank of Am. Corp.*, 2013 WL 3786643 (D. Colo. July 19, 2013).

¹⁶ *Id.*

¹⁷ Brief for the U.S. Sec. & Exch. Comm'n. as *amicus curiae*, *Liu Meng-Lin v. Siemens AG*, at 5 (citing Proposing Release at 70496).

- Notwithstanding these incentives, there is currently uncertainty in the law regarding whether internal whistleblowers are protected under the anti-retaliation provisions of Dodd-Frank, and some courts may not agree with the Commission that internal disclosures required or protected by Sarbanes-Oxley are also protected from retaliation under Dodd-Frank.
- Whistleblowers that are retaliated against may be eligible for a larger monetary award.¹⁸

Additionally, the Commission believes that companies should be aware that:

- The Commission believes that responsible organizations, regulatory agencies and law enforcement authorities cannot as effectively and efficiently police the marketplace if knowledgeable individuals are unwilling to report potential wrongdoing and a significant impediment to reporting—internally or externally—is actual or perceived retaliation.¹⁹
- The Commission is troubled by any reports of retaliation against whistleblowers, whether those individuals have reported possible securities violations internally or to the Commission.²⁰

¹⁸ 17 C.F.R. §240.21F-6(a)(4).

¹⁹ See, e.g., Mary Schapiro, Former Chairman, U.S. Sec. & Exch. Comm'n., Opening Statement at SEC Open Meeting (May 25, 2011) ("For an agency with limited resources like the SEC, I believe it is critical to be able to leverage the resources of people who may have first-hand information about potential violations."); Elise Walter, Former Commissioner, U.S. Sec. & Exch. Comm'n., Opening Statement at SEC Open Meeting (May 25, 2011) ("If we want our whistleblower program to work, we must encourage potential sources of information to come forward. And, I believe that we cannot do so without assuring those who fear for their jobs, their livelihood and their families' welfare that they have an avenue to come directly to the government.").

²⁰ See, e.g., SEC Charges Hedge Fund Adviser With Conducting Conflicted Transactions and Retaliating Against Whistleblower, SEC Press Release (June 17, 2014) (quoting SEC Enforcement Director Andrew Ceresney as stating: "Those who might consider punishing whistleblowers should realize that such retaliation, in any form, is unacceptable."); U.S. SEC. & EXCH. COMM'N., 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 2 (2014) ("The protection of whistleblowers from retaliation by their employers is important to the success of the whistleblower program.").

- In cases where retaliation is found, the Commission will not hesitate to exercise its new authority under Dodd-Frank to charge companies with retaliation and seek greater enforcement sanctions against all those involved to the extent permitted under applicable law.²¹

In conclusion, the Commission encourages any individual who is considering reporting possible securities violations, whether internally or to the Commission staff, to educate themselves regarding their reporting options and rights under the SEC Whistleblower Program and Sarbanes-Oxley. More information may be found by visiting the Office of the Whistleblower website, at <http://www.sec.gov/whistleblower>.

²¹ See, e.g., SEC Charges Hedge Fund Adviser With Conducting Conflicted Transactions and Retaliating Against Whistleblower, SEC Press Release (June 17, 2014) (quoting OWB Chief Sean McKessy as stating: “We will continue to exercise our anti-retaliation authority in these and other types of situations where a whistleblower is wrongfully targeted for doing the right thing and reporting a possible securities law violation.”); U.S. SEC. & EXCH. COMM’N., 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 2 (2014) (“OWB is coordinating actively with Enforcement Division staff to identify matters where employers may have taken retaliatory measures against individuals who reported potential securities law violations or have utilized confidentiality, severance, or other agreements in an effort to prohibit their employees from voicing concerns about potential wrongdoing.”).