NWC | NATIONAL WHISTLEBLOWERS CENTER

3238 P STREET, N.W. WASHINGTON, DC 20007 | 202-342-1902 (tel) 202-342-1904 (fax) | WWW.WHISTLEBLOWERS.ORG

February 10, 2011

Commissioners
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: SEC Rule Making Proceeding -File Number S7-33-10
Whistleblower Regulations – Dodd-Frank Act
Foreign Corrupt Practices Act

Dear Commissioners:

We are writing to raise a concern over a specific proposed rule set forth in the pending Dodd-Frank whistleblower enforcement regulations. The provision at issue is section 21F-8(c)(2). This provision directly impacts the ability of the United States to enforce the requirements of the Foreign Corrupt Practices Act ("FCPA").

The Dodd-Frank Act contains specific exclusions exempting certain classifications of persons from filing whistleblower claims under § 21F of the Securities Exchange Act. These exclusions do not include any exemption for employees working for foreign governments. However proposed rule 21F-8(c)(2) includes such an exemption.

If foreign government workers (which would also include employees of state-owned companies) are excluded from coverage under § 21F by a broad blanket exemption, the ability of the United States to properly detect violations of the Foreign Corrupt Practices Act will be crippled. The FCPA prohibits corporations from paying or *offering* bribes to foreign government officials. As worded, honest civil servants from countries around the world will be exempted from the protections afforded under Dodd-Frank if they were to expose attempts by covered industries to pay bribes. As worded, the proposed exclusion would also include barring employees of state industries from blowing the whistle on bribery.

The impact on this exclusion is potentially radical. It would exempt not only civil servants who may be the target of bribery attempts, but also employees who work for state-owned industries. It would be troublesome to place international private companies at a severe competitive disadvantage to international state-owned industries by exempting employees of government-owned companies from Dodd-Frank, while at the same time accepting that private sector employees are covered. For example, in the People's Republic of China, which is now a major player in the world economy, many employees working for state-owned companies would now be exempted Dodd-Frank provisions.

Moreover, the proposed rule is in conflict with over ten years of case law developed in the United States concerning foreign government whistleblowers. The United States is a signatory of international anti-corruption treaties that pledge to provide support for

employees who blow the whistle on corruption.[1] Stripping all foreign state employees of protection would strike a major blow against the Department of State and Department of Justice's ongoing campaigns to stop corruption in foreign markets, and indirectly undercut the obligation of the United States under international law. It would be inconsistent with the current international policy of the United States.

The United States courts and government recognize that civil servants employed by foreign countries need whistleblower protection, and in fact the United States regularly grants political asylum to foreign civil servants who expose corruption by their governments. For example, since 2000 the United State Courts of Appeal have recognized the legitimacy of political asylum applications from foreign government civil servants who exposed corruption in Albania, Armenia, China, Guatemala, Italy, Philippines, Russia, and Ukraine.[2]

We recommend a modification of the proposed rule that is consistent with the actual statutory mandates of the law and the fundamental purposes of the Dodd-Frank Act. The single most important goal of the Dodd-Frank whistleblower reward provisions is to use the significant deterrence powers contained in *qui tam* to strengthen the ability of the United States Government to detect fraud, obtain witnesses that will help in the successful prosecution of fraud cases and to encourage/protect insiders, with critical information, to step forward and risk their jobs, careers and even their lives, to stop corruption.

In the context of the Foreign Corrupt Practices Act, where many of the witnesses to bribes will be foreign nationals employed by their respective governments, either as state employees working in government owned businesses or civil servants. The ability of these foreign nationals to report bribery committed outside of the geographical jurisdiction of the United States, often by other foreign nationals who work for companies subject to the broad jurisdictional reach of the FCPA, is absolutely essential for the enforcement of that law, and in order for the United States to best fulfill its obligations under international anti-corruption conventions, none of which recognize an exemption for foreign civil servants.

---

[1] Article III, 8 Inter-American Convention Against Corruption of 29th March 1996 and Article 33 United Nations Convention against Corruption of 31st October 2003, *UN Treaty Series*, vol. 2349, p. 41.

[2] Aleksanyan v. Gonzales, 246 Fed. Appx. 471 (9th Cir. 2007), Aroyan v. Gonzales, 183 Fed. Appx. 634 (9th Cir. 2006), Bu v. Gonzales, 490 F.3d 424 (6th Cir. 2007), Cao v. AG of the United States, 407 F.3d 146 (3d Cir. 2005), Ghazaryan v. Gonzales, 215 Fed. Appx. 585 (9th Cir. 2006), Glistin v. Mukasey, 284 Fed. Appx. 429 (9th Cir. 2008), Grava v. INS, 205 F.3d 1177 (9th Cir. 2000), Hayrapetyan v. Holder, unpublished (9th Cir. 2010), Harutyunyan v. Ashcroft, 104 Fed. Appx. 86 (9th Cir. 2004), Haxhiu v. Mukasey, 519 F.3d 685 (7th Cir. 2008), Mamouzian v. Ashcroft, 390 F.3d 1129 (9th Cir. 2004), Massetti v. Gonzales, 151 Fed. Appx. 519 (9th Cir. 2005), Pashalyan v. Gonzales, 185 Fed. Appx. 603 (9th Cir. 2006), Rodas Castro v. Holder, 597 F.3d 93 (2d Cir. 2010), Sagaydak v. Gonzales, 405 F.3d 1035 (9th Cir. 2005), Wang v. Mukasey, 259 Fed. Appx. 763 (6th Cir. 2008), Zhu v. Mukasey, 537 F.3d 1034 (9th Cir. 2008).

Thank you in advance for your kind attention to these most important matters. We look forward to an opportunity to discuss these concerns with you.

Respectfully submitted,

Stephen M. Kohn
Executive Director

PROPOSED REVISION TO SEC RULE 21F-8(c)(2)

In order to ensure that SEC Rule 21F-8(c)(2) does not violate the express statutory requirements and/or the Congressional intent behind the Dodd-Frank Act, the exclusion for employees of foreign governments should be modified in the following manner, and limited to persons who: *"are, or were at the time [they] acquired original information, a member, officer or employee of a division of a foreign government which performs the functions of the United States Department of Justice, the Securities Exchange Commission, or the Commodity Exchange Commission. However, any exclusion of a foreign national shall not be undertaken without the consultation of the U.S. Department of State. Where the State Department determines that the employee's disclosures were necessary for the detection of the violations, and protecting or rewarding that employee would be consistent with United States foreign policy and international anti-corruption and/or international human rights conventions, the Department of State shall inform the SEC and/or the CFTC that the foreign government employee should obtain protection and/or a reward, and the exclusion set forth in this provision shall not apply. The United States Department of State shall also be consulted in all cases in which an employee of a foreign government (but not an employee of a state-owned company) applies for a reward under this regulation. For exceptional good cause shown, the SEC or CFTC may deny a reward based on information provided by the Department of State. Exceptional good cause includes documentation that a reward would have a negative impact on U.S. foreign relations, interfere with foreign government cooperation with the United States under existing treaties or otherwise encourage corruption. There shall be no limitation on the right of an employee of a state-owned industry, company or concern to file claims or obtain protections as afforded under the Dodd-Frank Act."*