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October 12, 2010

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: Dodd-Frank Wall Street Reform and Consumer Protection Act – Securities Whistleblower Incentives and Protection Program

Dear Ms. Murphy:

This letter is in response to the request by the Securities and Exchange Commission (the "Commission") for comments about proposed rulemaking by the Commission relating to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). In particular, this letter addresses comments relative to the Securities Whistleblower Incentives and Protection Program in Title IX of the Dodd-Frank Act. Some of the comments in this letter were discussed with members of the Commission staff at a meeting held with attorneys from Baker Donelson on October 4, 2010 at the offices of the Commission.

Section 922 of the Dodd-Frank Act adds a new Section 21F to the Securities Exchange Act of 1934 (the "Exchange Act"). Section 21F(j) gives the Commission the authority to issue rules and regulations to implement the provisions of Section 21F. The Commission has yet to publish proposed rules relative to Section 21F and has solicited comments in advance of its proposed rulemaking.

Overview

Section 922 of the Dodd-Frank Act provides incentives to whistleblowers by awarding to whistleblowers who provide original information leading to a successful Commission enforcement action resulting in monetary sanctions of more than $1 million between 10% and 30% of the amount recovered in that action. The Dodd-Frank Act also provides increased protections for whistleblower employees by prohibiting retaliation against those employees. With the enactment of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) ("Sarbanes-Oxley"), companies with a class of listed securities have been required to develop and implement whistleblower complaint policies and procedures covering accounting and auditing practices. Securities Exchange Act § 10A, 15 U.S.C. § 78j-1. Accordingly, since the enactment of Sarbanes-Oxley, the primary responsibility for handling employee whistleblower complaints relative to U.S. public companies and public securities markets has resided with public companies and their audit committees. Our experience and observation, and we believe that of the securities industry generally, is that public companies have responded to the mandate of Sarbanes-Oxley by developing robust, confidential and effective internal whistleblower programs as part of their compliance and ethics policies. Our purpose in making the comments and suggestions expressed in this letter is to seek to harmonize the objectives and accomplishments of the Sarbanes-

Oxley whistleblower programs in expanding and improving internal compliance and ethics programs with the objectives and mandates of the Dodd-Frank Act.

We have researched other federal whistleblower statutes, such as the qui tam provisions of the False Claims Act, 31 U.S.C. § 3729-3733, and the Internal Revenue Service whistleblower reward program, 26 U.S.C. § 7623, in an effort to determine whether other federal statutes provide any guidance or precedents for balancing internal corporate whistleblower policies with the federal whistleblower process. Our research has not identified any precedents that are useful in suggesting how to achieve the balance we believe is necessary between public and private whistleblower efforts in the case of the securities markets. We believe these precedents are absent because those statutes, unlike the Dodd-Frank Act, involve in each case the potential violation of federal criminal laws as opposed to violations of securities laws, which are not in every case a criminal offense. Thus, the federal government has a much stronger primary interest in prevention and interdiction in claims made under statutes like the False Claims Act. In the case of the Dodd-Frank Act, we believe public companies have an interest in preventing and identifying securities law violations, and rapidly remedying any compliance failures, that is at least as compelling as the interest of the Commission.

Effectiveness of Internal Whistleblower Procedures

Since the enactment of Sarbanes-Oxley and the implementation of the Sarbanes-Oxley whistleblower mandates by the securities exchanges, we have observed that most public companies with listed securities have adopted effective internal whistleblower programs. We define effectiveness as consistently receiving notice of, investigating and remedying potential or actual internal accounting and audit problems, and problems in other areas of internal compliance, and maintaining the anonymity of the employee whistleblower where such anonymity is desired by the whistleblower. We have seen these programs improved and broadened over time as they have been tested in real world situations. Most importantly, we have observed that internal whistleblower programs have become an accepted part of corporate cultures and have helped to foster an atmosphere in which legal compliance is an important corporate objective.

In this context success is difficult to measure objectively, as the successful resolution of a whistleblower complaint has no measurable financial impact, and successfully resolved complaints do not necessarily result in public filings or official actions that can be quantified or tallied. To confirm this, we researched public databases and have not identified academic or industry studies measuring or evaluating empirically the success or effectiveness of corporate whistleblower programs. The purpose of a whistleblower program, and compliance and ethics policies in general, is to detect potential problems before they occur or become material. Thus, a problem detected early and resolved would avoid a material, adverse effect on a company, and thus the success of that early detection is typically not reported.

In the aftermath of the adoption of the Dodd-Frank Act, a variety of business and general publications have published articles expressing concerns that successful internal whistleblower programs will be undermined if the reward provided under the Dodd-Frank Act have the effect of encouraging

employees to report problems directly to the Commission instead of using internal whistleblower processes. Among the commentators expressing these views are a number of attorneys who formerly were in the Commission's Enforcement Division.[1]

Moreover, we have serious concerns that the avoidance of internal whistleblower procedures in response to the carrot of whistleblower awards will not only prevent companies from taking their own remedial actions, but will also prevent companies from self-reporting and realizing the benefits of self-reporting under federal sentencing guidelines. U.S.S.G., § 8C2.5. We believe there are important public policies supporting the preservation of those benefits.

Our comments and suggestions below are designed generally to explore methods by which the Commission, by rulemaking or other public pronouncement, consistent with the language of the Dodd-Frank Act, can encourage and support existing corporate whistleblower programs and discourage the emergence of abusive and frivolous whistleblower claims when adequate internal whistleblower avenues are available. We believe by supporting existing internal corporate whistleblower programs, the Commission not only will preserve current systems for deterring, identifying and correcting accounting and auditing problems, but will encourage and motivate publicly listed companies, non-listed public companies and privately-held companies to create, broaden and improve their internal corporate whistleblower programs. Thus, instead of weakening internal whistleblower programs, we believe the Commission can implement the Dodd-Frank Act in ways that would actually strengthen corporate whistleblower programs.

Preservation and Enhancement of Internal Corporate Whistleblower Programs

- Exercise of Discretion in Determining Percentage Awards. New Section 21F(b) directs the Commission to pay awards equal to 10% to 30% of the amount of monetary sanctions collected resulting from original information relating to a violation of the securities laws if the monetary sanctions exceed $1 million. The actual percentage between 10% to 30% is determined in the discretion of the Commission. Section 21F(c)(1)(B)(i) lists three specific factors the Commission should consider (listed as items I, II and III), and adds in paragraph IV: "such additional relevant factors as the Commission may establish by rule or regulation". We believe that an important policy underlying the creation of Section 21F in the Dodd-Frank Act is to provide a way for individuals to report securities law violations when they either (i) have no other means to report and stop those violations, or (ii) have exhausted all available means. Accordingly, we believe that a relevant factor in determining the appropriate level of

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1 Grant, Justin, (October 6, 2010) Dodd-Frank Whistleblower Provision Sparks Concerns Over Costs and False Claims. *Advanced Trading*, http://advancedtrading.com/regulations; Atwood, John Filar (Oct. 5, 2010) US Financial Services News, Panelists Discuss Dodd-Frank's Impact on SEC Enforcement. *CCH*, http://prod.resource.cch.com/resource/scion/document; Carlon, Bruce (Sept. 8, 2010) Pitfalls Emerge in Dodd-Frank Bounty Provision. *Compliance Week*, http://complianceweek.com/article.

an award should be whether the whistleblower had access to internal whistleblower procedures and, if so, whether he or she made a reasonable effort to pursue those internal procedures.

We therefore respectfully suggest that the Commission consider the adoption of a rule or regulation providing that, when exercising its discretion in setting the percentage of an award between 10% to 30% of the amount of monetary sanctions collected, the Commission will consider:

(i) whether the whistleblower had access to an effective means of reporting the violation within the organization by virtue of the whistleblower's status as an employee, independent contractor, shareholder, supplier, customer or otherwise;

(ii) if the whistleblower's claim is filed anonymously with the Commission, whether the whistleblower had the means to make his internal whistleblower complaint on an anonymous basis; and

(iii) if the whistleblower did have access to an effective means of reporting the violation as described in (i) above and had access to anonymous means if desired as described in (ii) above, whether the whistleblower took steps deemed by the Commission to be reasonable to pursue the reporting of the violation through internal whistleblower procedures.

- Protection of Whistleblowers Who Pursue Internal Whistleblower Procedures Initially. In promoting the use of internal whistleblower procedures, we recognize the need to address a possible concern of a prospective whistleblower that the information may lose its character as "original information" within the meaning of that term in Section 21F(a)(3). This could happen, for example, if the information first is reported internally within a company's internal whistleblower system and subsequently self-reported by the company or reported by another person under Section 21F before the original whistleblower files a complaint under Section 21F. In order to prevent this unfair result, and to further promote the use of internal whistleblower systems, we respectfully suggest that the Commission consider the adoption of a rule or regulation providing that:

(i) if a whistleblower files a complaint with the Commission in accordance with the requirements of Section 21F ("Commission complaint"); and

(ii) if that whistleblower previously filed an internal whistleblower complaint reporting the same violation of securities laws as reflected in the Commission complaint ("prior internal complaint"); and

(iii) if the Commission deems the prior internal complaint to have included detail sufficient to enable the company to initiate a meaningful investigation of the same violation;

then for purposes of determining whether the Commission complaint included information constituting "original information" the information will be evaluated as of the date the prior internal complaint was delivered within the internal whistleblower system.

Discouraging Abusive Legal Practices.

- Practice Before the Commission. We believe it is important that any attorney representing a whistleblower under Section 21F(d)(1) or (2) adhere to the same high standards required of any attorney appearing or practicing before the Commission. We further believe that it is important to clarify and confirm that such an attorney will deemed to be "appearing or practicing before the Commission" and thereby be bound by Section 4C of the Exchange Act and Section 102 of the Rules of Practice of the Commission. Accordingly, we respectfully request that the Commission adopt by rule or otherwise publicly state that any attorney representing a whistleblower under Section 21F(d)(1) or (2) will be deemed to be "appearing or practicing before the Commission." We believe such rule adoption or public statement by the Commission (i) will at least partially address concerns that Section 21F will give rise to frivolous claims and (ii) will provide attorneys with unequivocal notice that his or her actions and conduct, in representation of a whistleblower, will be subject to potential censure by the Commission, including the potential for suspension and disbarment under Section 102(e) of the Rules of Practice.

- Place Limitations on Payment of Contingent Legal Fees. In some cases, a whistleblower may be required to engage counsel to assist him in the complaint process, such as if the whistleblower desires to make the complaint anonymously. In fact, Section 922 of Dodd-Frank requires that a whistleblower who desires to be anonymous be represented by counsel. The whistleblower also may elect to engage counsel to assist him in the complaint process for a variety of reasons unrelated to confidentiality. Particularly for whistleblowers who do not have the financial means to pay an attorney, it is rational to assume that some portion of any award may be utilized by the whistleblower to compensate his counsel. In private securities litigation, an attorney representing a plaintiff typically charges a fee contingent on recovery of between 30-50% of the amount recovered. However, in a Section 922 complaint, a whistleblower's counsel is not likely to participate materially in the investigation, prosecution, and ultimate recovery of any monetary sanctions or disgorgement of funds. We are concerned that public companies may be inundated with frivolous claims or claims based on incomplete information brought by attorneys who represent multiple complainants, hoping that one of them will be successful in an award from the SEC.

Accordingly, we respectfully request that the Commission adopt by rule or otherwise publicly state that an attorney representing a whistleblower will not be entitled to receive a contingency fee based on any amount ultimately rewarded to the whistleblower. We believe that this position is consistent with Congress's intent in adopting Section 21F and is consistent with other provisions of Section 21 of the Exchange Act. Section 21(d)(4) of the Exchange Act prohibits the payment of attorneys fees from Commission disgorgement funds unless ordered by a court upon motion by the Commission, or in the case of an administrative action, is otherwise ordered by the Commission. Section 21F(c)(B)(i)(ii) requires the Commission, in determining the amount of an award, to consider the degree of assistance provided by the whistleblower and its counsel. Further, Section 21F(f) provides that any determination by the Commission as to "whether, to whom or in what amounts to make awards" shall be in the discretion of the Commission. Therefore, we believe Commission action to limit the payment of

contingency fees to counsel in connection with a whistleblower award is consistent with the existing provisions of the Exchange Act and with Section 922 of the Dodd-Frank Act.

Clarification of Disclosure Obligations

It has been our experience in a variety of transactional contexts that securities counsel have varying interpretations of the disclosure obligations of a public company when that company receives notice of a government investigation, whether formal or informal, including an investigation initiated by the Commission. In some instances, we have observed that counsel for a party to a transaction has taken the position that any governmental investigation triggers a disclosure obligation, regardless of the substance or significance of the underlying facts. The decision whether a particular government investigation must be disclosed under Item 103 of Regulation S-K in the context of a filing under the Securities Act of 1933 or the Exchange Act, or under general anti-fraud principles, typically will be based on subjective factors. We anticipate that the whistleblower provisions of Section 21F adopted under the Dodd-Frank Act will lead to an increase, and perhaps a substantial increase, in the number of Commission investigations of possible securities law violations, and a corresponding increase in the frequency with which public companies receive notice from the Commission that an investigation is pending. Thus, although the dilemma faced by public companies about disclosure of pending government investigations will not be a new issue created by the whistleblower provisions of Section 21F, the issue will arise with greater frequency, and will have greater potential for creating material disruption and delay as a result of differing opinions about whether there is a *per se* obligation to make a publicly disclosuree in the event of an SEC investigation.

We believe, therefore, that the creation of whistleblower incentives under Section 21F creates an opportunity for the Commission to issue a clarifying pronouncement that at least partially mitigates the impact of the increased number of government investigations. We respectfully suggest that the Commission consider clarifying, in its release proposing or adopting rules relating to Section 21F, that the existence of a pending government investigation, including an investigation by the Commission of a whistleblower complaint, gives rise to a disclosure obligation if the existence of the investigation meets existing standards of materiality as articulated in specific SEC forms or in court interpretations of the term "material," but that there is not otherwise a *per se* requirement to disclose such an event.

Conclusion

In closing, we believe the new whistleblower incentives and protections created under the Dodd-Frank Act have the potential to strengthen the integrity of securities markets and sound corporate governance and support a culture of compliance generally. We are concerned, however, that an unintended consequence of these new incentives will be to weaken existing internal whistleblower programs and compliance and ethics programs that have contributed to advancing these same goals. We believe that by harmonizing the Dodd-Frank Act whistleblower incentives and protections with internal corporate whistleblower programs the Commission can enhance public confidence in securities markets and at the same time promote effective corporate governance and compliance.

Should you have any questions or need additional information, please do not hesitate to contact Tonya Mitchem Grindon at (615) 726-5607; Matt Heiter at (901) 577-8117; or Henry Levi at (404) 221-6508.

Sincerely,

Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.

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