NWC | NATIONAL WHISTLEBLOWERS CENTER

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

November 1, 2010

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

Re: File No. DF-Title IX-Whistleblower Award Program

Dear Ms. Murphy:

This letter is in response to information provided to the Securities and Exchange Commission ("SEC") by representatives from SEC-regulated corporations regarding the protection of whistleblowers. This letter is also provided in response to the SEC's request for comments concerning the rulemaking process to implement the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").

The National Whistleblowers Center ("NWC") intends to file formal comments concerning the Securities Whistleblower Incentives and Protection Program in Title IX of the Dodd-Frank Act. However, the NWC believes it is necessary for it to immediately address certain requests made to the SEC by the law firms of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. ("Baker") and Arent Fox and representations made by the law firm of Gibson, Dunn and Crutcher (along with their clients), as these requests are inconsistent with the law, threaten the integrity of the Dodd-Frank Act's whistleblower provisions, and should therefore be rejected. These law firms, and their clients, are hereafter collectively referred to as the "Corporate Lobby."

As a threshold matter, the Corporate Lobby failed to take into consideration the Congressional mandate that the rules implemented by the SEC be "user-friendly." Section 922(d)(1)(A). None of the proposals requested by the Corporate Lobby are "user-friendly," nor do they further the Congressional intent behind the whistleblower provisions. Beyond this general objection, the NWC also sets forth the following specific objections to the Corporate Lobby's proposals:

Requiring Employees to Utilize Internal Corporate Whistleblower Procedures Would Violate the Law

This proposal has no basis in law or fact. Any rule that would allow a corporation to make whistleblower protection contingent on compliance with an internal reporting scheme would illegally limit and chill the right of employees to anonymously disclose information to law enforcement agencies. Such a rule would be contrary to the explicit language of both the Dodd-Frank and Sarbanes-Oxley ("SOX") Acts, and any

corporation that implemented such a policy on its own accord would almost certainly be guilty of obstruction of justice.

Indeed, Congress has explicitly protected all employee contacts with the SEC, regardless of whether those employees also contacted their employers' internal compliance programs. Securities Exchange Act, 21F(h)(1)(A); Sarbanes-Oxley Act, 18 U.S.C. § 1514A(a)(1)(A); Obstruction of Justice Act, 18 U.S.C. § 1513(e). These laws provide employees with a *right* to directly contact federal law enforcement with their concerns, and it would be illegal for the SEC to implement a rule that undermines these statutory protections.

For example, the SOX Act explicitly protects all disclosures made to "a Federal regulatory or law enforcement agency." 18 U.S.C. § 1514A(a)(1)(A). Congress could not have been clearer. No limitations exist on this right, and the Corporate Lobby's attempt to read into the SOX a policy or rule mandating initial contacts with internal compliance is unsupportable as a matter of law.

In addition to 18 U.S.C. § 1514A [the most commonly used whistleblower provision in SOX], the SOX law also amended the federal obstruction of justice act. That law, 18 U.S.C. § 1513(e), makes it a felony, subject to a ten year prison sentence, to "take 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."

By explicitly criminalizing any attempt to "interfere" with a person's right to make disclosures to federal law enforcement, including any interference that could impact a person's "employment or livelihood," Congress strongly reinforced the illegality of making whistleblower protection contingent on compliance with internal corporate procedures. Any penalty or adverse action that an employer attempted to impose on an employee for contacting the SEC without complying with such a scheme would be per se illegal. Benefits to employees cannot be limited in any manner whatsoever based on an employee's lawful contacts with the SEC or any other federal law enforcement agency. The Corporate Lobby cannot be permitted to circumvent the federal obstruction of justice statute through a rulemaking process.

Nor do the protections in SOX for employees who contact managers that have "supervisory authority over the employee," or internal offices that have the "authority to investigate, discover, or terminate misconduct" in any way limit an employee's right to make disclosures directly to the government. Instead, this language *expands* whistleblower protection by *also* protecting internal disclosures, and was inserted in direct response to repeated complaints, by companies, and several court decisions that held that contacts with internal compliance programs were *not* protected by federal law. This protection, however, does not in any way suggest that internal compliance programs to replace the protection for the other avenues of disclosure mandated by Congress.

These protections are necessary because, even to this day, corporations argue forcefully and effectively that whistleblower laws *require* employees to contact governmental agencies in order to obtain protection. *See Talhelm v. ABF Freight Systems*, 2010 U.S. App. LEXIS 1663 (6th Cir. 2010). The recent case of *Hill v. Mr. Money Finance*, 2009 U.S. App. LEXIS 2228 (6th Cir. 2009) is indicative. In that case the whistleblower contacted the compliance officer and wrote a letter to compliance stating that the bank he worked for had violated "banking regulations" and various "state and federal laws." He also informed compliance that the bank had engaged in "insider abuse." The bank successfully argued in court that such contacts with compliance were *not protected* under either federal law or state whistleblower laws. The whistleblower lost his job, his case and perhaps his career.

A similar decision was reached by the U.S. Court of Appeals for the Eleventh Circuit in *Lippert v. Community Bank*, 438 F.3d 1275 (11th Cir. 2009). There the bank employee had contacted the bank's Audit Committee and raised concerns. Once again, the employee was denied protection under the law. The Court held as follows:

"We believe that the internal reports in the instant case are more remote from the whistleblowing contemplated by the statutory language than were the communications in Taylor. Such internal reports partake much less clearly of the characteristics of whistleblowing. Congress may well have had some reluctance to interfere with, and potentially chill, such internal self-criticism. We conclude that the language of the instant statute does not protect Lippert's internal reports to the Audit Committee, management, and Board of Directors."

Although communications with audit committee and other internal compliance programs should be fully protected under law, Congress' act of merely protecting these communications (in response to terrible court rulings) does not somehow transform compliance departments into the Congressionally mandated "front line of defense to address potential wrong doing." Far from it, in the SOX Act (and Dodd-Frank) Congress mandated numerous protected avenues for employees to expose wrongdoing, and only one of these concerned internal corporate compliance programs.

The NWC's opposition to the Corporate Lobby's proposal does not, however, mean that the NWC is opposed to internal corporate compliance offices and hotlines. Rather, the NWC opposes making participation in these internal procedures a pre-requisite for whistleblower protection. The NWC strongly supports the rights of employees to work with their supervisors and compliance departments to ensure safety or expose fraud, and have vigorously condemned legal rulings that have stripped protection for these activities. *See Kansas Gas & Electric v. Brock*, 780 F.2d 1505 (10th Cir. 1985) (*amicus* brief filed by Government Accountability Project, co-written by S. Kohn); Kohn and Carpenter, "Nuclear Whistleblower Protection and the Scope of Protected Activity under Section 210 of the Energy Reorganization Act," 4 *Antioch Law Journal* 75 (Summer, 1986) (arguing that contacts with internal compliance should be protected under current federal law); *Macktal v. Brown & Root*, 171 F.3d 323 (5th Cir. 1999) (unsuccessfully arguing that contact with an internal compliance program should have been protected).

It is critical that employees retain the right to make disclosures directly to law enforcement because, although communications with internal corporate compliance programs should be fully protected as a matter of law, such protection does not mean that internal corporate-run programs actually work. There is a long record demonstrating that such programs have often failed to fully investigate wrongdoing, to honor employee confidentiality and to act in a truly independent manner. As such, employees must have a *choice* as to how they blow the whistle, based on their own assessment of the wrongdoing they intend to expose, the reputation of a company's ethics and compliance program and/or their desire to remain as anonymous as possible. Congress has created various options for whistleblowers, they have not -- directly or indirectly -- attempted to limit the avenues opened to employees under Dodd-Frank and SOX.

However, because the Corporate Lobby apparently recognizes the importance of these internal compliance programs, we hope that this Lobby joins with the NWC in strongly supporting concrete action to ensure that these programs do in fact work when employees utilize them.

The SEC Should Implement a Rule that Prevents the Regulated Industry from eviscerating the ability of Internal Corporate Compliance Programs to Properly Detect and Prevent Fraud

Corporate internal compliance programs have not worked. They did not work to prevent Enron, WorldCom and the other corporate scandals that resulted in the enactment of the Sarbanes-Oxley Act. Nor did the Audit Committees set up by SOX work to prevent the scandals and financial crisis that resulted in the passage of the Dodd-Frank Act.

The United States Government has fully recognized that the current framework most companies employ when establishing and managing internal compliance programs is deficient. By rulemaking, the United States has now mandated that internal compliance programs adhere to stricter rules in the context of federal contracting. The rule was enacted initially by a request from the U.S. Department of Justice to the Office of Federal Procurement Policy. After that request was made, Congress strongly endorsed strengthening the rules governing internal compliance programs, and enacted P.L. 110-252, Title VI, Chapter 1, in order to ensure that new standards would be created increasing the quality and effectiveness of such programs. When made Final, the rule required government contractors to:

"Establish and maintain specific internal controls to detect and prevent improper conduct in connection with the award or performance of any Government contract or subcontract."

The NWC hereby requests that the SEC formally review the Final Rule adopted by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council on November 12, 2008. These rules are published at 73 *Federal Register* 67064 (November 12, 2008). The NWC hereby requests that these rules be made applicable to

all publicly traded corporations in the United States, all subsidiaries of such corporations and all corporations that are regulated under the Securities and Exchange Act and/or the Dodd-Frank Act.

The rules are necessary to ensure that the "front line of defense" protecting investors from fraud actually does protect investors. The rule is needed to ensure that shortsighted corporate policies that have "eviscerated a key element of Sarbanes-Oxley" are corrected.

As a matter of policy, it simply does not make sense for major corporations to have two levels of compliance -- one designed to protect taxpayers from fraud and another designed to protect shareholders from fraud. There should be one uniform standard for compliance programs. The Final Rule issued by the Councils reflects the true intent of Congress, and reflects the result of a careful rulemaking process that looked into internal corporate compliance programs and recommended systemic improvements in these programs. When it comes to the detection and prevention of corporate fraud, shareholders and investors deserve the same level of protection, as do taxpayers.[1]

Baker Donelson's Request that the SEC Implement Rules to Stop Frivolous Complaints is Without Merit and Demonstrates Animus Against Whistleblowers

The law firm of Baker Donelson requests a series of regressive rules designed to prevent "abusive and frivolous whistleblower claims." The record does not support this demeaning allegation. The Sarbanes-Oxley whistleblower law has a provision in which whistleblowers can be sanctioned for filing a frivolous or abusive complaint, and the Department of Labor ("DOL") publishes a Digest of SOX cases with a summary of all requests for sanctions under this provision. In the eight years of SOX's existence, despite more than 1,000 SOX cases filed, the DOL only lists *five* requests by employers for sanctions. After adjudicating the merits of each of these requests, the DOL judges and/or Administrative Review Board *denied every request for sanctions. See*, http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/REFERENCE_WORKS/SOX_DIGEST_FRIVOLOUS_COMPLAINT_SANCTIONS.HTM.

Based on the actual record, there is no justification whatsoever for the SEC to implement any rules based on an unsupported fear of frivolous complaints. In fact, any such rule would be completely counterproductive to the very goals the Corporate Lobby purports to

---

[1] Significantly, the Final Rule covers corporate abuses that are also covered under the whistleblower provisions of the False Claims Act. When the Rule was approved, no one argued that the False Claims Act's whistleblower provisions should be limited, or that relators should obtain smaller shares of a reward simply because they did not utilize these new and improved compliance procedures. The Final Rule was designed to promote accountability, not undermine whistleblower protections. Strong and effective internal compliance programs serve the same purpose as whistleblower protection laws: the prevention, detection and ultimate punishment of persons who defraud the American people, regardless of whether those being defrauded are taxpayers or shareholders.

advocate. The leading professional organizations that have studied the detection of corporate fraud actually promote the over-reporting of such allegations. For example, the Association of Certified Fraud Examiners, in its highly respected and statistically sound 2010 Global Fraud Study entitled "Report to the Nations on Occupational Fraud and Abuse," found that "tips have consistently been the most common way to detect fraud" and that "not surprisingly, employees are the most common source of fraud tips." Report, page 17. As a result, the ACFE strongly recommends that any effective anti-fraud program protect and encourage reporting by employees who simply identify "suspicious activity." Report, page 80. Employees are the most important source of information about fraud. However, employees fear retaliation. Thus, programs must be established that both prevent retaliation and encourage employees to step forward and report "suspicious activity." That is the intent behind the Dodd-Frank Act.

The Restrictions on Attorney Fees Urged by Baker Donelson Are Radical and Without Support in Law or Policy

The law firm of Baker Donelson proposed that the SEC place restrictions on attorneys who represent whistleblowers. These restrictions would completely undermine the requirement that the Dodd-Frank whistleblower rules be "user-friendly." They are unprecedented in law, and none of the numerous federal whistleblower laws, including the False Claims Act, contain any of the restrictions urged by Baker Donelson. If implemented, these proposals would make it nearly impossible for corporate whistleblowers to obtain attorneys to represent them in Dodd-Frank cases.

First, unlike Baker Donelson's clients, most (if not all) whistleblowers cannot afford to pay private attorneys their full market rate for representation. If whistleblowers had to pay attorneys market rate hourly fees, these employees simply would not be able to locate attorneys.

Second, there are bar rules in every state that prohibit excessive attorney fees. Anyone is free to file a bar charge against any attorney who charges clients an excessive fee. There is no need for the SEC to waste its time and resources policing attorneys who simply represent employees (many of whom have been fired and have no income whatsoever), when Bar Councils exist that already have the time, expertise and jurisdiction to police potential fee abuses by attorneys.

Third, there is no legal authority for the SEC to interfere with the contractual relationship between a whistleblower and his or her attorney. Whistleblowers already have a very difficult time finding representation. Few attorneys are willing to undertake the tremendous risk, with no certainty of recovery, of litigating against powerful corporations. The proposal set forth by Baker Donelson would make matters much worse for these courageous individuals.

Finally, the rule proposed by Baker Donelson could and would result in numerous whistleblowers obtaining no reward whatsoever. Hourly fees could and would regularly be far larger then the total reward obtained under Section 21F of Dodd-Frank.

The Other Proposals Should Be Summarily Rejected

The Corporate Lobby also set forth other proposals that would frustrate the purposes of Dodd-Frank and are inconsistent with the mandate that the new whistleblower rules be "user-friendly." These proposals should all be rejected. Indeed, the SEC must be very clear during this rulemaking proceeding that any final rule will be "user-friendly." The rulemaking proceeding is not an invitation for the Corporate Lobby to undermine the Dodd-Frank Act by using its influence to create rules that undermine the ability of whistleblowers to find attorneys, to meet with SEC investigators and/or to limit the rights of whistleblowers to provide information directly to the SEC or law enforcement entities.

Should you have any questions please do not hesitate to contact us. We look forward to submitting additional comments to the SEC in order to ensure that the Congressional intent behind the Dodd-Frank Act is effectuated, and that the whistleblower provisions actually work.

Respectfully submitted,

Stephen M. Kohn
Executive Director

Lindsey M. Williams
Director of Advocacy and Development