Paul Hastings

Paul, Hastings, Janofsky & Walker LLP
Park Avenue Tower
75 East 55th Street
First Floor
New York, NY 10022
telephone 212-318-6000 • facsimile 212-319-4090 • www.paulhastings.com

Atlanta
Beijing
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1(212) 318-6919
palminafava@paulhastings.com

December 16, 2010 09001.01002

VIA UPS OVERNIGHT

Elizabeth M. Murphy
Secretary
SECURITIES AND EXCHANGE COMMISSION
100 F Street, NE
Washington, DC 20549-1090

Re: Dodd-Frank Wall Street Reform and Consumer Protection Act, File No. S7-33-10

Dear Ms. Murphy:

This letter is in response to the request by the Securities and Exchange Commission ("SEC") for comments about proposed rulemaking relating to the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), generally, and the Securities Whistleblower Incentives and Protection Program ("Whistleblower Program") in Dodd-Frank, specifically.

Since the enactment of Dodd-Frank, much attention has been paid by government agencies, lawyers, businesses, and trade groups to the potential benefits and unintended consequences of the Whistleblower Program. We base our comments on the experiences of our team in representing businesses in government and internal investigations, and, prior to private practice, in representing the government as attorneys from the SEC's Enforcement Division, as well as prosecutors in U.S. Attorney's Offices around the country and in the Department of Justice ("DOJ").

First, we support the proposals that require a whistleblower to comply with established internal reporting mechanisms within his or her company's compliance program before contacting the SEC. The risk of eroding the benefits of compliance programs is significant if a whistleblower is encouraged by the financial incentives of the Whistleblower Program to be the first in the door at the SEC. Those financial incentives also create a potential conflict of interest between the company's desire to cooperate with the government in an effort to earn preferred treatment and a possible reduction in penalties, and the whistleblower's possible incentive to maximize the company's exposure and thus extract a larger personal pay-day. Allowing a whistleblower to participate in a corporate investigation or to gather additional information for the SEC from the company would only exacerbate the potential conflict, and run counter to Congress's and the SEC's intention to partner with businesses in creating compliance-minded corporate cultures.

Second, because of the potential conflict of interest, any policy that permits the whistleblower's identity to be withheld from the company representatives handling the internal investigation renders the company vulnerable to manipulation of its internal inquiry and remediation plans by the whistleblower. For example, during an internal investigation, company personnel may unknowingly interview the whistleblower and determine that he is not credible or that his information is contrary to the weight of the other evidence obtained in the investigation. If the SEC conducts its own review based on the information provided by the whistleblower, without disclosing the whistleblower's identity to at least those independent representatives of the company conducting the investigation, the SEC will not have the benefit of the company's insights into the whistleblower's credibility. Resources would be wasted and the potential for cooperation between the company and the SEC would not have been fully realized. On the other hand, disclosure of the whistleblower's identity only to those within the company with a "need to know" is highly unlikely to harm the whistleblower and should be made unless a particular law enforcement reason exists not to do so. The whistleblower would be protected from retaliation by federal and state law, and presumably by the company's code of conduct.

Third, public company representatives with fiduciary responsibilities to the company should not be permitted to serve as whistleblowers and obtain financial compensation under the Whistleblower Program. Indeed, identifying, investigating, and addressing potential wrongdoing is a core component of a fiduciary duty. Company representatives ineligible for such compensation should expressly include, but not be limited to, employees of the company's compliance, legal, and internal audit departments, as well as executive officers charged with the management of the company. Moreover, information gained through an internal corporate investigation or a proactive internal audit should not form the basis of a whistleblower claim.

Fourth, a whistleblower and his or her representatives should not be permitted to publicize the complaint without the approval of the SEC. Consider the damage that may be caused to a company's stock value by a whistleblower who acts in bad faith and uses various forms of media to publish meritless claims. It is noteworthy that the Department of Labor has upheld only two percent of over 1,000 whistleblower complaints filed under the Sarbanes-Oxley Act since the Act was passed in 2002. With current technology, a whistleblower's baseless claims will reach millions of people within seconds. We all remember well the devaluation of United Airlines' stock because of a false statement on the internet that United Airlines was filing for bankruptcy. A well-publicized false or erroneous whistleblower claim may have the same effect, causing sizable financial losses to innocent investors – the exact harm the Dodd-Frank Act was designed to prevent.

Fifth, from an employment law perspective, the regulations do not limit whistleblower status to those persons who report in good faith to the SEC. Such limitation is essential to prevent complainants without legitimate claims from gaining protected status for purposes of avoiding employment discipline. We respectfully encourage the SEC to adopt

such a limitation. Moreover, the statute of limitations for bringing a whistleblower retaliation claim under the Dodd-Frank Act is inconsistent with the majority of other federal employment statutes from which whistleblower protected status arises. Federal law has consistently recognized the need to address and reach closure quickly on workplace disputes, and other federal employment statutes contain administrative filing prerequisites and more reasonable limitations periods than the Whistleblower Program of the Dodd-Frank Act. The limitations periods set forth in the Dodd-Frank Act ignore this principle and may incent bad faith reporting to insulate employees from legitimate workplace discipline. Unless revised, these regulations may prevent a company from terminating or disciplining a whistleblower who engaged in the wrongdoing or who reported in bad faith, thereby undermining its remediation efforts and potentially eroding morale among personnel.

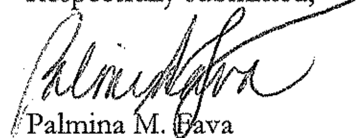
As the SEC has acknowledged, it lacks the resources necessary to investigate every allegation of wrongdoing it receives and requires cooperation from corporations in conducting exhaustive internal investigations. Just this month, the SEC deferred creating an office dedicated to handling whistleblower complaints because of the federal budget crisis, and, as recently as mid-November, representatives of the SEC publicly noted the significant cooperation credits extended to companies that have conducted comprehensive investigations. Such corporate cooperation may be eroded if whistleblowers motivated by a personal financial incentive or vindictiveness against a current or former employer run to the SEC rather than internal reporting channels. Moreover, premature corporate disclosures, precipitated by a whistleblower's disclosure to the SEC, could undermine applicable privileges, jeopardizing the company's ability to conduct an effective investigation, causing unnecessary costs of defense, and leaving the company vulnerable to shareholder derivative claims, even though an investigation reveals no material wrongdoing.

Given the difficulties in conducting a meaningful investigation within 90 days of receiving a complaint from a whistleblower, we disagree with suggestions that a "reasonable time period" should be defined as 90 days. For example, if the complaint involves potential misconduct in France, it may take several weeks simply to obtain the necessary consents to review documents and electronic files. Current modes of communication, i.e. email, text messaging, Twitter, etc., result in a more time-intensive document review before thorough witness interviews may be conducted. Accordingly, a reasonable time period should be defined as 180 days. The DOJ has utilized a 180-day rule when permitting post-closing due diligence under the Foreign Corrupt Practices Act, and the analysis which justified application of 180 days in that context is equally availing when addressing investigations of whistleblower claims. Similarly, Sarbanes-Oxley provides 180 days for the Occupational Safety and Health Administration to investigate complaints of retaliation by whistleblowers who report potential violations of the securities laws. *See* 18 U.S.C. § 1514(A)(b)(1)(B).

The goals of Dodd-Frank are met by industry working in tandem with the SEC. Implementing the Whistleblower Program in a way that complements a company's internal controls will allow the concerted efforts envisioned by Sarbanes-Oxley and Dodd-Frank to bear fruit. Allowing whistleblowers unfettered access to collect evidence for the government, irrespective of their roles with the company and while remaining anonymous, creates an unwieldy system that may generate more losses to shareholders and more costs to the SEC, rather than providing the consumer protection intended by Congress.

Please feel free to contact William Sullivan at (213) 683-6252, Thomas Zaccaro at (213) 683-6285, Barry Sher at (212) 318-6085, Ken Breen at (212) 318-6344, Alan Brudner at (212) 318-6262, Palmina Fava at (212) 318-6919, Laura Flippin at (202) 551-1797, Douglas Koff (212) 318-6772, Morgan Miller at (202) 551-1861, Keith Miller at (212) 318-6005, Thomas O'Brien at (213) 683-6146, Michael Sheehan at (312) 499-6080, Carla Walworth at (212) 318-6466, Maria Douvas at (212) 318-6072, or Sean Haran at (212) 318-6094 with any questions or comments about this submission.

Respectfully submitted,



Palmina M. Fava
of PAUL, HASTINGS, JANOFSKY & WALKER LLP

PMF:blb