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March 23, 2015

Honorable Thomas Perez
Secretary
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Re: PETITION FOR RULEMAKING

Dear Secretary Perez:

The Government Accountability Project (GAP) and Zuckerman Law hereby submit the attached Petition for Rulemaking under 5 U.S.C. § 553(e) of the Administrative Procedure Act to request that the Department of Labor (DOL) promulgate rules prohibiting de facto gag clauses (provisions in settlement agreements that dissuade whistleblowers from engaging in protected activities).

For additional information, contact Tom Devine, Legal Director of GAP, at (202) 408-0034, extension 124, or Jason Zuckerman, Principal of Zuckerman Law, at (202) 262-8959.

Sincerely yours,

Thomas Devine /EC

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Enclosure
cc:
Honorable Paul Igasaki, Chair, Administrative Review Board
Honorable David Michaels, Assistant Secretary, Occupational Safety and Health Admin.
Honorable Stephen R. Henley, Acting Chief Judge, Office of Administrative Law Judges
Honorable Patricia Smith, Solicitor of Labor

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Petition for Rulemaking

I. Summary

For more than two decades, the U.S. Department of Labor (DOL) has reviewed settlement agreements in whistleblower cases. That policy helps to ensure that these agreements do not include a "gag" provision. Common gag provisions may restrict the whistleblower's ability to participate in investigations or to testify in proceedings relating to matters that arose during the whistleblower's employment. This policy largely has been effective in eliminating express gag clauses from settlement agreements, but increasingly employers are including provisions in settlement agreements that discourage protected activities. As a result, these agreements have the same impact as express gag clauses, and can be direct obstacles to the exercise of statutory rights for which the DOL is responsible to enforce. Speech-related examples in settlement terms or as conditions for employment include -- 1) provisions barring the employee from confidentially disclosing information to investigating agencies, and requirements to obstruct government law enforcement investigations; 2) waiver of entitlement to statutory whistleblower incentives; 3) unlimited confidentiality or non-disparagement contracts; and 4) statements of corporate innocence, coupled with demands to reveal evidence that also could constitute obstruction of justice. This Petition refers to such clauses as "de facto gag clauses."

De facto gag clauses undermine the operation and frustrate the intent of the approximately twenty-two whistleblower protection laws that DOL enforces (DOL

Whistleblower Protection Laws)[1] by chilling or discouraging employees from disclosing to regulatory and enforcement agencies information about threats to public health and safety, financial fraud, consumer safety, food safety, nuclear safety, transportation safety, and other vital public concerns. Moreover, requiring employees to agree to de facto gag clauses as a condition of settling whistleblower retaliation cases constitutes unlawful discrimination under the DOL Whistleblower Protection Laws.[2] Accordingly, we petition DOL to issue a rule prohibiting employers from including de facto gag clauses in settlement agreements, and clarifying that an attempt to implement or enforce direct or indirect restraints that would have a chilling effect on protected activity or access to DOL-enforced remedies is *per se* illegal discrimination under relevant whistleblower statutes. This Petition also requests that DOL evaluate the prevalence of de facto gag clauses in settlement agreements that DOL approves in whistleblower cases. Finally, this petition requests that DOL formulate guidance prohibiting such clauses.[3]

The increased prevalence of de facto gag clauses coincides with a pernicious trend. Employers are aggressively prosecuting whistleblowers in an effort to coerce them to

[1] A complete list of DOL Whistleblower Protection Laws can be found on the DOL website at http://www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf.

[2] *Rudd v. Westinghouse Hanford Co*., 88-ERA-33, D&O of Remand by ARB, 8 (Nov. 10, 1997). *See also Connecticut Light & Power Co. v. Sec'y of U.S. Dep't of Labor*, 85 F.3d 89 (2d Cir. 1996).

[3] In conjunction with Jordan A. Thomas, Chair of the Whistleblower Representation Practice at Labaton Sucharow LLP, GAP has submitted a petition for rulemaking to the SEC respectfully requesting that the Commission engage in rulemaking and the issuance of a policy statement to clarify certain rules governing the SEC's Dodd-Frank whistleblower program (the "SEC Whistleblower Program"). In particular, the petition for SEC rulemaking requests that the SEC provide 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. A copy of the petition is attached as Exhibit 1.

abandon their claims and to avoid defending claims on the merits. This tactic can backfire[4] and give rise to an additional claim of retaliation and substantial damages. Nonetheless, employers may still manage to chill other employees from exercising their rights under whistleblower protection laws, because other employees will be dissuaded by the significant cost of defending a suit brought by the employer. Indeed, prominent defense firms increasingly are advising clients not only to sue whistleblowers that have engaged in "self-help discovery," but also to refer them for criminal prosecution.[5]

Petitioners are attorneys and advocates for whistleblowers, including numerous complainants in DOL whistleblower proceedings. 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

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[4] Bringing a baseless claim or lawsuit designed to deter a claimant from seeking legal redress constitutes an impermissible adverse retaliatory actions under various anti-retaliation statutes. *See Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 740, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983) (bad faith or groundless counterclaims and other legal proceedings against employees who assert statutory rights are actionable retaliation precisely because of their *in terrorem* effect); *Darveau v. Detecon, Inc.*, 515 F.3d 334 (4th Cir. 2008) (employer's filing of a retaliatory counterclaim against a former employee can constitute prohibited retaliation under the Fair Labor Standards Act); OSHA Regional News Release, Region 1 News Release: 13-1796-BOS/BOS 2013-179 (Oct. 23, 2013), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=24987

[5] *See, e.g.*, Christopher Robertson, *"But I'm a Whistleblower!": Is an Employee Who Takes Confidential Documents Invincible?*, Seyfarth Shaw LLP Workplace Whistleblower, Jan. 14, 2014, http://www.seyfarth.com/dir_docs/publications/WPWB011414.pdf; Jean F. Keuei & Michael R. Kleinmann, *Health Care Employers Take Note: New Weapons Are Available When Defending False Claims Act Suits*, FORBES, June 20, 2014, http://www.forbes.com/sites/theemploymentbeat/2014/06/20/health-care-employers-take-note-new-weapons-are-available-when-defending-false-claims-act-suits/print/; Marissel Descalzo, *Employers Fight Back Against Whistleblowers*, Inside Counsel, June 24, 2014, http://www.insidecounsel.com/2014/06/24/employers-fight-back-against-whistleblowers; Ben James, *5 Questions to Ask Before Suing Over Whistleblower Theft*, Law360, https://www.law360.com/articles/533633/5-questions-to-ask-before-suing-over-whistleblower-theft, May 21, 2014,https://www.law360.com/articles/533633/5-questions-to-ask-before-suing-over-whistleblower-theft.

expose wrongdoing to the public and actively promotes government and corporate accountability. Since its founding in 1977, GAP has represented whistleblowers in the court of law and in the court of public opinion. Since 1978, GAP has been a leader in campaigns to enact or defend all federal whistleblower protection statutes.

Thomas Devine is GAP Legal Director, and has worked at the organization since 1979. Since that time, Mr. Devine has assisted over 6,000 whistleblowers in defending themselves against retaliation and in making real differences on behalf of the public. His work with whistleblowers has helped to shutter accident-prone nuclear power plants, rebuff industry ploys to deregulate government meat inspection, block the next generation of the bloated and porous "Star Wars" missile defense systems, and spark the withdrawal of dangerous prescription drugs such as Vioxx. Tom has been a leader in the campaigns to pass or defend 32 major national or international whistleblower laws or policies, including nearly every one enacted over the last two decades. These include the Whistleblower Protection Act of 1989 for federal employees, twelve breakthrough laws since 2002 creating the right to jury trials for corporate whistleblowers, and new United Nations, World Bank, Organization of American States and African Development Bank policies legalizing public freedom of expression for their own whistleblowers.

Mr. Devine has also served as "Whistleblower Ambassador" in over a dozen nations on trips sponsored by the U.S. State Department. He has authored or co-authored numerous books, including 2011's *The Corporate Whistleblowers Survival Guide: A Handbook for Committing the Truth*, *Courage Without Martyrdom: The Whistleblower's Survival Guide;* as well as numerous other books, law review articles, magazine articles and newspaper op-eds, and is a frequent expert commentator on television and radio talk shows. He has received

numerous public service awards for advocacy of freedom of speech in the workplace.

Zuckerman Law represents whistleblowers in retaliation and reward matters. Firm Principal Jason Zuckerman served as Senior Legal Advisor to the Special Counsel at the U.S. Office of Special Counsel (the federal agency charged with protecting whistleblowers in the federal government) and was appointed by the Secretary of Labor to serve on the Whistleblower Protection Advisory Committee.[6] He has substantial experience litigating whistleblower retaliation cases and has trained administrative law judges, agency EEO directors, senior OIG officials and delegations from more than thirty countries on federal whistleblower protections. Mr. Zuckerman serves as Co-Chair of the Whistleblower Subcommittee of the ABA Labor and Employment Section's Employee Rights and Responsibilities Committee. Previously, he has served as Co-Chair of the National Employment Lawyers Association's Whistleblower Committee, Co-Chair of the Sarbanes-Oxley Subcommittee of the ABA Labor and Employment Fair Labor Standards Legislation Committee, and Co-Chair of the Whistleblower Committee of the District of Columbia Bar's Labor and Employment Section.

II. Current DOL Policy Bans Express Gag Clauses

The regulations implementing most DOL whistleblower protection laws require that settlements be approved by DOL to ensure that they are "fair, adequate, reasonable, and consistent with the purpose and intent of the relevant whistleblower statute in the public interest."[7] OSHA reviews settlement agreements primarily to ensure that complainants do not

[6] Zuckerman does not currently serve on the WPAC.

[7] Whistleblower Investigation Manual, OSHA Directive No. CPL 02-03-003, 6-10 (Sept. 20, 2011), https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-003.pdf. *See also* DOL

waive their right to engage in protected conduct. According to its Whistleblower Investigation Manual:

> OSHA will not approve a provision that prohibits, restricts, or otherwise discourages an employee from participating in protected activity in the future. Accordingly, although a complainant may waive the right to recover future or additional benefits from actions that occurred prior to the date of the settlement agreement, a complainant cannot waive the right to file a complaint based either on those actions or on future actions of the employer. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: "Nothing in this Agreement is intended to or shall prevent or interfere with Complainant's nonwaivable right to engage in any future activities protected under the whistleblower statutes administered by OSHA." […]
>
> OSHA will not approve a "gag" provision that restricts the complainant's ability to participate in investigations or testify in proceedings relating to matters that arose during his or her employment. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: "Nothing in this Agreement is intended to or must prevent, impede or interfere with Complainant's providing truthful testimony and information in the course of an investigation or proceeding authorized by law and conducted by a government agency."

Whistleblower Investigation Manual at 6-11. DOL reviews settlement agreements to ensure that they are just, reasonable, and in the public interest because whistleblower protection laws do not just provide a remedy for the employee who suffered retaliation, but also protect public interest.[8]

Review of Whistleblower Settlements (Rev Aug. 16, 2011), http://www.oalj.dol.gov/PUBLIC/WHISTLEBLOWER/REFERENCES/REFERENCE_WORKS/WBSETT.HTM (settlements reached during the investigative stage must be reviewed and approved by OSHA and settlements reached after OSHA issues its findings must be approved by the ALJ or ARB); 29 C.F.R. § 24.111(d)(1).

[8] "The Department of Labor does not simply provide a forum for private parties to litigate their private employment discrimination suits. Protected whistleblowing under the ERA may expose not just private harms, but health and safety hazards to the public. The Secretary represents the

III. De facto gag clauses[9]

DOL's policy guidance largely has been effective in dissuading employers from including express "gag" clauses in severance or settlement agreements. Perhaps as a consequence of that success, employers are including various forms of subtle gag provisions that are equally as pernicious as express restraints. Although whistleblowers theoretically can object to these provisions, many are compelled to accept them because they need a severance or settlement payment to make ends meet while they search for another job. A DOL rule barring *attempts* to implement or enforce offending provisions would enable employees to release claims without appearing to waive their right to communicate with federal or state enforcement agencies concerning alleged violations of law.

Four types of de facto gag clauses increasingly are common in settlements of whistleblower retaliation cases and severance agreements.[10]

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public interest by assuring that settlements adequately protect whistleblowers." Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provisions of Six Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as Amended, 76 Fed. Reg. 2808, 2817 (Jan. 18, 2011) (citations omitted).

[9] This Petition does not call into question typical provisions in settlement or severance agreements, including a release of claims arising out of facts or any set of facts occurring before the date of the agreement (excluding claims for a whistleblower reward), a general non-admission of liability, a non-disparagement clause that does not hinder lawful whistleblowing, a confidentiality clause barring the disclosure of the amount of a settlement, or a confidentiality clause barring employees from disclosing protecting proprietary information or trade secrets. Moreover, the Petition is not intended to impede the ability of DOL or parties to employment-related disputes to settle whistleblower retaliation claims, nor is it intended to alter OSHA's general policy "to defer to adequate privately negotiated settlements." Whistleblower Investigation Manual, at6-9-6-10.

[10] The types of *de facto* gag clauses discussed in this petition are culled from matters that GAP has worked on and settlement agreements that were obtained from OSHA through a FOIA request.

1. Clauses Affirming that Employee Has Not Engaged in Confidential Whistleblowing and Requiring Advanced Notice of Cooperation with Government Investigations

This type of de facto gag clause may require the employee to represent that he or she has not disclosed information to a federal or state agency. It may also require the employee to attest that he or she has not filed a whistleblower reward claim with the Securities and Exchange Commission (SEC), Commodity Futures Trading Commission (CFTC), Internal Revenue Service (IRS), or Department of Justice (DOJ) (or any other whistleblower reward program). This type of clause may also demand assurance that the employee has not provided any confidential company documents or information to any government agency, and it typically requires the employee to provide advance notice prior to disclosing purportedly "confidential" company information to any government agency. Troublingly, this can include disclosures compelled by subpoena.

While these provisions do not expressly prohibit disclosures to the government, their practical effect may be the same. In addition, these provisions purport to eliminate employees' right to make confidential whistleblower disclosures to the government civil or criminal investigations; and seemingly require *qui tam* relators to violate the statutorily mandated seal.[11] Finally, these provisions at best interfere with and at worst obstruct civil and criminal government investigations by tipping off the targets of such investigations through advance notice of law enforcement fact-finding, as well as the identity of incriminating evidence often before the government sees it.

[11] A relator may not reveal to anyone the existence of the qui tam action while the government is investigating the allegations to decide whether or not to intervene in the action.

2. Clauses Waiving the Right to Recover a Whistleblower Reward

This type of de facto gag clause requires the employee to waive his or her right to recover a relator share or whistleblower reward from any federal or state agency or in any litigation. Although such clauses do not expressly bar the employee from providing information to a government agency, they chill or dissuade employees from reporting fraud by purporting to eliminate the financial incentive that Congress created for whistleblowers who "often face the difficult choice between telling the truth and the risk of committing 'career suicide.'"[12] Whistleblower reward statutes incentivize private citizens to participate in the detection and investigation of fraud against the government, and with good reason. Whistleblowers are among the most likely group of individuals to initially discover such fraud.[13] In reviewing settlement agreements, DOL should not approve provisions that impede whistleblowing by undercutting the incentives Congress specifically created to protect employees.

3. Overly Broad Confidentiality and Non-Disparagement Clauses, Often Accompanied by Penal Liquidated Damages Provisions

This Petition does not call into question the legitimacy of narrowly tailored

[12] 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)

[13] 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. *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.").

confidentiality or non-disparagement provisions designed to protect an employer's legitimate interests, such as the protection of trade secrets or proprietary information. However, some employers are using overly broad confidentiality and non-disparagement provisions that send a clear signal to employees that whistleblowing to the government will expose them to liability.

An overly broad confidentiality provision defines confidential information to include any and all information that the employee acquired through the course of his or her employment. It may also bar disclosure of any information to anyone for any reason, except where authorized by the employer or required by court order. An overly broad non-disparagement clause without exception forbids the employee from making any statement that is in any way derogatory concerning the company's products, services or practices. Such provisions have a chilling effect on the willingness and ability of individuals to come forward with information that may be of critical import to a government agency. This sharply hampers the efficacy of government investigations and enforcement proceedings. Moreover, these provisions undercut the "public interest in assuring that settlement agreements do not restrict the flow of information vital to the investigations and administrative proceedings that are conducted by the Department of Labor." *Bittner v. Fuel Economy Contracting Co.*, 88-ERA- 22 (Sec'y Dec. 13, 1989) (citation omitted).

The chilling effect of overly broad confidentiality and non-disparagement clauses is especially pernicious where the clause includes liquidated damages or other penalties for breaching such clauses, including payment of attorneys' fees. These penalties are an especially strong deterrent against whistleblowing to the government. Even though they might be unenforceable, employees who have signed such agreements are loath to risk defending against their former employer's aggressive prosecution of a breach of contract claim. It is unrealistic to expect that unemployed whistleblowers can afford to call the bluff of a free speech SLAPP suit

fueled by an unlimited litigation budget. Lawsuits filed in retaliation for protected activity also should constitute illegal discrimination that violates the rule sought by this petition.

4. Affirmations or Attestations Disclaiming Knowledge of Any Violation of Law Committed by the Employer

This type of de facto gag clause requires the employee to affirm that she has no knowledge that the company is failing to comply with various laws. For example, in the settlement of a Sarbanes-Oxley ("SOX") claim, the employee would be required to affirm that she lacks knowledge of any fraudulent financial reporting or any activities that would evidence securities fraud or any violation of the SEC rule. In the settlement of a claim in which the whistleblowing could implicate a violation of the False Claims Act, the employee would be required to affirm that she lacks knowledge of any false certification, any kickback, any inflated cost report, any false billing, or any other activity that would evidence a false claim for reimbursement.

This Petition does not take issue with an employer *asking* an exiting employee whether the employee is aware of any violations of law committed by the employer (or an agent thereof), unless under contrary instructions from government authorities, and so long as the employee need not disclose whether she has communicated any such violation to a government agency. However, an employer simply should not require an employee to obstruct justice, or to sign affirmations or attestations that the employee could deem false as a condition to settling an employment claim. Forcing the employee to sign affirmations or attesting that the employer has acted lawfully at all times and denying knowledge of any wrongdoing deters the employee from reporting unlawful conduct to regulatory agencies or law enforcement and sends a clear

message to the employee that there is no such thing as a confidential whistleblowing disclosure. That creates a severe chilling effect, and contradicts a long-established first principle of whistleblower statutes and regulatory policies globally.

IV. Argument

A. Requiring Whistleblowers' Submission to Gag Clauses is Unlawful Discrimination Under the DOL Whistleblower Protection Laws

Requiring a whistleblower to agree to gag clause restraints as a condition of settling a case itself is an act of discrimination that violates DOL Whistleblower Protection Laws. *Connecticut Light & Power Co. v. Sec'y of U.S. Dep't of Labor,* 85 F.3d 89 (2d Cir. 1996). In that case, a former employee ("Delcore") brought a claim of whistleblower retaliation under Section 210 of the Energy Reorganization Act ("ERA").[14] 85 F.3d at 91. Connecticut Power offered a settlement to Delcore containing a provision that restricted his ability to provide information to regulatory agencies. *Id.* When Delcore asked that the gag clause be removed, Connecticut Power withdrew from settlement talks, and he filed a complaint under the ERA alleging that Connecticut Power's attempt to force him to agree to a gag clause constitutes retaliation under the ERA. *Id.,* at 92

The Second Circuit held that by offering the gag provisions, Connecticut Power had taken "an act adverse to Delcore's statutory rights," because it was an impermissible attempt to force Delcore to choose between a settlement offer and his statutory right to communicate with regulatory agencies. *Id.,* at 96. Similarly, a Maryland district court held that it was unlawful retaliation under the anti-discrimination laws to offer a severance agreement with a waiver of

[14] 42 USC § 5851.

the right to file or participate in the investigation of an EEOC discrimination charge where the employer either "(i) attempts to enforce the agreement against an employee who signed the agreement but nevertheless files or participates in an EEOC charge, or (ii) withholds benefits already promised or owed from an employee who refuses to sign the agreement." *E.E.O.C. v. Nucletron Corp.*, 563 F. Supp. 2d 592, 595 (D. Md. 2008)

Moreover, Supreme Court and DOL precedent recognize that an adverse action is not limited to a tangible employment action. Rather, an adverse action also includes actions taken subsequent the complainant's protected activity that "well might have dissuaded a reasonable worker" from engaging in further protected activity, such as making or supporting a charge of discrimination. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). Both DOL and federal courts of appeals have applied the *Burlington Northern* standard to SOX and other DOL Whistleblower Protection Laws. *See, e.g., Allen, et al. v. Administrative Review Bd.*, 514 F.3d 468 (5th Cir. 2008); *Menendez v. Halliburton*, Inc., ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-005 (ARB Sept. 13, 2011); *Williams v. American Airlines, Inc.*, ARB 09-018, (ARB December 29, 2010). Allowing employers to impose de facto gag clauses does not just create a chilling effect against whistleblowers making protected disclosures – it in effect locks whistleblower disclosures in the deep freezer.

(a) Overly Broad De Facto Gag Clauses Are Contrary to Public Policy

The right to disclose evidence of violations of federal laws has a basis in public policy and the Constitution that supersedes local tort or contract rights. *See Maddox v. Williams*, 855 F. Supp. 406, 415 (D.D.C. 1994) ("There is a constitutional right to inform the government of

violations of federal laws – a right which under Article VI supersedes local tort or contract rights and protects the 'informer' from retaliation.") (citing *In re Quarles*, 158 U.S. 532, 536-38 (1895)). To be sure, employers have a legitimate interest in keeping trade secrets or proprietary information confidential. Nonetheless, as the Southern District of New York has observed, "courts are increasingly reluctant to enforce secrecy arrangements where matters of substantial concern to the public -- as distinct from trade secrets or other legitimately confidential information -- may be involved." *McGrane v. Readers Digest Association, Inc.*, 822 F. Supp. 1044, 1046 (S.D.N.Y. 1993). The district court further noted, "Any arrangement, formal or informal, designed to preclude a former employee from reporting wrongdoing by a former employer to proper authorities would be unenforceable." *Id*., at 1051. As the Ninth Circuit stated in *Caesar Electronics, Inc., v. Andrews*, 905 F.2d 287 (9th Cir. 1990), *cert. denied sub nom.* *Caesar Electronics, Inc. v. Fairchild Semiconductor Corp.,* 498 U.S. 984 (1991): "However high the duty an agent may owe its principal, society's interest in preventing the commission of criminal acts overrides that duty. . . ." 905 F.2d at 289. Accordingly, an overly broad confidentiality agreement barring the disclosure of any information that the employee acquired during the course of her employment is void as against public policy.

Indeed, it is a well-established principle of contract law that a promise is unenforceable if its underlying interest is outweighed by a public policy that would be undermined by its enforcement. *See Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987); Restatement (Second) of Contracts § 178 (1981). Additionally, public policy interests can outweigh the private interest in a confidentiality agreement where there is fraud on the government. For example, a relator in a *qui tam* action can disclose "documents [demonstrating employer fraud] to the government under any circumstances, without breaching the confidentiality agreement."

United States ex rel. Grandeau v. Cancer Treatment Centers of America, 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004); *see also Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 923 (D. Nev. 2006); *Maddox v. Williams*, 855 F. Supp. 406, 415 (D.D.C. 1994) (citing *In re Quarles* 158 U.S. 532, 535-36 (1895)).

Similarly, in *X Corp. v. Doe*, 805 F. Supp. 1298 (E.D. Va. 1992), a lawyer sought to disclose information about his former corporate client concerning a fraud on the government. 805 F. Supp., at 1300. The client contended the lawyer could not disclose it due to the corporation's confidentiality agreement. *Id.* The court held that "[t]o the extent it prevented disclosure of evidence of a fraud on the government, that Agreement would be void as contrary to public policy. In other words, X. Corp cannot rely on any contract to conceal illegal activity." *Id.* at 1310, n. 24. The premise for non-enforcement was "the public interest, which must be considered in every case." *Id.* at 1311.

If the employer is a government contractor, de facto gag clauses also flatly violate federal appropriation law and the Whistleblower Protection Enhancement Act.[15] Under Section 743 of Division E, Title VII, of the Consolidated and Further Continuing Resolution Appropriations Act, 2015 (Pub. L. 113-235), appropriated funds must not be provided to an entity that requires employees or subcontractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or contactors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information. Section 115(b) of the WPEA requires that contractors' nondisclosure forms, policies or agreements "shall also make it clear that such forms do not bar disclosures to

[15] S. 743, P.L. 112-199 (November 27, 2012)

Congress or to an authorized official of an executive agency or the Department of law, consistent with the protection of [classified] sources and methods."

In sum, DOL should closely scrutinize confidentiality and non-disparagement provisions in settlement agreements to ensure not only that they lack an express gag provision, but also to ensure that they are not so broad as to explicitly or implicitly discourage the whistleblower from engaging in further protected conduct. DOL also should closely scrutinize liquidated damages provisions in settlement agreements that can serve as a powerful deterrent against the whistleblower making further disclosures to the government.[16]

(b) De Facto Gag Clauses Waiving the Right to Recover a Whistleblower Reward or Otherwise Participate in a Whistleblower Action Undermine Congressional Efforts to Encourage Whistleblowing

The waiver of the right to recover a whistleblower reward is not an express restriction on an employee's ability to provide information to a government agency, but the effect of the provision is the same: dissuading the complainant from reporting fraud. As the ARB noted in *Vannoy v. Celanese Corp.*, ARB No. 09-118, at 8 (Sept. 28, 2011), "Passage of these bounty

[16] A liquidated damages provision might be unenforceable if the amount of liquidated damages is clearly disproportionate to the loss caused by the breach. *See* Restatement (Second) of Contracts § 356(1) (1981) ("Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy."). *See also Cuneo Law Group, P.C. v. Joseph*, 669 F. Supp. 2d 99, 114 (D.D.C. 2009) ("[I]f a liquidated damages clause bears no reasonable relation to foreseeable damages, does not serve as a reasonable protection against uncertain future litigation, or 'appears' to make the 'default of the party against whom it runs more profitable to the other party than performance would be,' then the clause 'will be void as a penalty.'") (citing *Order of Am. Hellenic Educ. Progressive Ass'n v. Travel Consultants, Inc.*, 367 A.2d 119, 126 (D.C. 1976)).

provisions demonstrate that Congress intended to encourage federal agencies to seek out and investigate independently procured, non-public information from whistleblowers . . . to eliminate abuses" *Id.*, at 16. Settlement provisions requiring a complainant to waive the right to recover a statutory reward undermine the incentives for whistleblowing that Congress established as key to the enforcement of certain anti-corruption statutes.

Four years ago, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank").[17] Section 922 of Dodd-Frank authorized the SEC to pay a monetary award where original information voluntarily provided by a whistleblower leads to successful enforcement by the Commission, resulting in the recovery of total sanctions exceeding $1 million.[18] The purpose of Dodd-Frank's SEC whistleblower reward program is to "promote effective enforcement of the Federal securities laws by providing incentives for persons with knowledge of misconduct to come forward and share their information with the Commission."[19] Testifying for the Senate Banking Committee, Certified Fraud Examiner and Madoff whistleblower Harry Markopolos urged Congress to create a strong SEC whistleblower program. Markopolos cited statistics showing that "whistleblower tips detected 54.1% of uncovered fraud schemes in public companies," and external auditors and SEC exam teams "detected a mere 4.1% of uncovered fraud schemes."[20]

Section 748 of Dodd-Frank also established a whistleblower reward program at the CFTC. *See* 7 U.S.C. § 26. In 2006, Congress enacted legislation requiring the IRS to pay a whistleblower award ranging from 15 percent to 30 percent of the proceeds recovered in an

[17] Pub. L. No. 111-203, 124 Stat. 1376 (2010).
[18] 15 U.S.C. § 78u-6(b).
[19] 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, 34308 (June 13, 2011).
[20] S. Rep. No. 111-176, at 110 (2010).

administrative or judicial action initiated based on information provided by the whistleblower where the tax, penalties, interest, additions to tax, and additional amounts in dispute must exceed in the aggregate $2 million . *See* 26 U.S.C. § 7623. The IRS is also authorized to pay for information leading to recovery of unpaid taxes that fall below that threshold. *Id.*

These recently established whistleblower reward programs originated from the highly successful *qui tam* provisions of the False Claims Act ("FCA"), which permit private citizens to bring actions on behalf of the United States. *See* 31 U.S.C. § 3730(b)(1). Where those suits result in a recovery, the whistleblower may receive 15 to 25 percent of the amount recovered by the government. *See* 31 U.S.C. § 3730(d)(1).[21] Recovery levels are "tied to the importance of the [whistleblower's] participation in the action and the relevance of the information brought forward," illustrating Congress's desire to "create the greatest incentives for those [whistleblowers] best able to pursue claims that the government could not, and bring forward information that the government could not obtain." *United States ex rel. E. Green v. Northrop Corp.*, 59 F.3d 953, 964 (9th Cir. 1995).[22] Subsequent to the passage of the 1986 amendments to the *qui tam* provisions of the FCA, federal and state governments have recovered more than $55 billion as a result of lawsuits brought by *qui tam* relators.[23] This represents a jump from $26 million in 1985, to nearly two billion dollars annually. This phenomenal success rate is close to doubling. Recoveries from January 2009 through the end of 2014 amounted to $22.75 billion – more than half the total recovery since Congress amended the False Claims Act 28 years ago to strengthen the statute and increase the incentives for whistleblowers to file

[21] If the government does not intervene in the realtor's FCA action, the realtor can recover up to 30 percent of the proceeds of the action or settlement of the claim. 31 U.S.C. § 3730(d)(2).

[23] Taxpayers Against Fraud Education Fund, http://www.taf.org/fraud-cases#case661, (last visited March 16, 2015).

suit.[24] This shows that the rewards component of a whistleblower program is essential not only to encouraging citizen participation, but to securing government recovery, too.

Even where an employer does not directly attack an employee's ability to receive a reward, it should not be allowed to block an employee from participating in a predicate whistleblower action. The FCA's purpose is to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government." *United States and State of Illinois ex rel. Jackie Grandeau v. Cancer Treatment Centers of America, et al.*, 350 F. Supp. 2d 765, 769 (N.D. Ill. 2004) (citing S. Rep. No. 99-345, at 1 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266). Efficient detection and investigation of fraud requires the assistance of private citizens, and FCA's provisions encourage "coordinated effort between private citizens and the government." *See United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995).

Consistent with the purpose of the FCA, courts have held that secrecy agreements are unenforceable where enforcement would deter the disclosure of fraud or impede participation in the investigation of fraud against the government. Such agreements may also be unenforceable if they would otherwise thwart the effectiveness of the False Claims Act's provisions.[25] In *United States ex rel. Green v. Northrop Corporation*, 59 F.3d 953, 962-63 (9th Cir. 1995), the employer sought dismissal of a relator's suit, as a settlement release barred future litigation against the employer. The court refused to enforce the agreement and bar the employee's False Claims Act *qui tam* suit, noting that enforcement would "threaten to nullify the incentives Congress intended to create in amending the provisions of the False Claims Act

[24] Department of Justice, http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014, (last visited Feb. 26, 2015).
[25] There is, however, some case authority enforcing the waiver of an FCA claim where the whistleblower has already disclosed the fraud to the government prior to signing a waiver. *U.S. ex rel. Radcliffe v. Perdue Pharma., L.P.*, 600 F.3d 319, 332 (4th Cir. 2010).

in 1986." *Id.*, at 963. Specifically, the court found that the purpose of the False Claims Act was to incentivize employee participation in the investigation of false claims, and that the FCA was passed "against the background assumption that relators' incentives to bring claims would not *otherwise* be frustrated." *Id.*, at 965

Similarly, in *United States ex rel. Head v. Kane Co.*, 668 F. Supp. 2d 146, 152 (D.D.C. 2009), the court dismissed an employer's breach of contract claim against a *qui tam* relator arising from the relator's refusal to return an email evidencing an alleged FCA violation. The court held that the agreement was unenforceable as against public policy, because enforcement would "unduly frustrate the purpose" of the FCA's provision requiring relators to "serve upon the United States 'written disclosure of substantially all material evidence and information the person possesses' in order to enable the government's own investigation to proceed expeditiously." *Id.* (citing 31 U.S.C. § 3730(b)(2)). In *United States ex rel. Grandeau v. Cancer Treatment Centers of America*, 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004), the court dismissed an FCA defendant's counterclaim for breach of a confidentiality agreement, holding that a confidentiality agreement "cannot trump the FCA's strong policy of protecting whistleblowers who report fraud against the government."

DOL's enforcement of whistleblower protection statutes complements other agencies' enforcement of laws protecting public health and safety and maintaining the integrity of financial markets.[26] Therefore, DOL should not approve settlement agreements that eliminate

[26] For example, DOL has entered into memoranda of understanding with the Federal Aviation Administration and Nuclear Regulatory Commission to share information about underlying safety violations alleged in whistleblower retaliation complaints brought under AIR21 and the ERA. *See, e.g.*, Memorandum of Understanding Between the Federal Aviation Administration and the Occupational Safety and Health Administration (Aug. 9, 2000), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=MOU&p_id=283; Memorandum of Unsterstanding Between the U.S. Nuclear Regulatory Commission and the

the incentives Congress created to encourage whistleblowing. Moreover, any provision that discourages voluntary cooperation with a government law enforcement investigation should be deemed void as against public policy. *See SEC v. Lipson*, 1997 WL 801712 (N.D. Ill. 1997) (settlement agreement that barred signatories from "directly or indirectly discuss[ing] or caus[ing] to be discussed by any person ... the terms of this Agreement or the Lipson Parties with ... any governmental agency" without a subpoena was void as against public policy because it could preclude voluntary cooperation by potential witnesses with the SEC). District courts have also noted that:

> It has been recognized that at least in some circumstances, agreements obtained by employers requiring former employees to remain silent about underlying events leading up to disputes, or concerning potentially illegal practices when approached by others can be harmful to the public's ability to rein in improper behavior, and in some contexts ability of the United States to police violations of its laws. Absent possible extraordinary circumstances not present here, it is against public policy for parties to agree not to reveal, at least in the limited contexts of depositions or pre-deposition interviews concerning litigation arising under federal law, facts relating to alleged or potential violations of such law.

In re JDS Uniphase Corp. Sec. Litig., 238 F. Supp. 2d 1127, 1135 (N.D. Cal. 2002) (quoting *Chambers v. Capital Cities/ABC*, 159 F.R.D. 441,444 (S.D.N.Y. 1995)). *See also 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.").

DOL should not allow employers to impose settlement terms that block an employee from participating in an action that could lead to a reward, or accepting such an award if the whistleblower's participation merited one.

Occupational Saftey and Health Administration (Sept. 6, 2013), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=MOU&p_id=1245.

(c) Clauses "Outing" Confidential Whistleblowing Are Unlawful Discrimination and Are Contrary to the Mechanisms Congress Established to Report Fraud Confidentially

Applying *Burlington Northern,* the Fifth Circuit and the ARB have held that revealing a whistleblower's identity can constitute an adverse action under SOX. *See Menendez v. Halliburton, Inc.*, ARB 09-002, 09-003 (ARB Sept. 13, 2011), *aff'd*, *Halliburton, Inc. v. Admin. Rev. Bd.*, No. 13-60323, 2014 WL 5361790 (5th Cir. Nov. 12, 2014). While working as Director of Technical Accounting Research and Training in the finance and accounting department at Halliburton, Anthony Menendez raised concerns internally about questionable accounting practices. In particular, Menendez disclosed to his supervisor his belief that Halliburton's practices involving revenue recognition did not conform with generally accepted accounting principles. Menendez's supervisor initially responded by telling Menendez that he was not a "team player" and should try harder to work with colleagues to resolve accounting issues.

After Halliburton failed to address his concerns, Menendez filed a confidential disclosure with the SEC about Halliburton's accounting practices. In addition, Menendez sent a memo to Halliburton's board of directors raising the same issues he disclosed to the SEC, and that memo was forwarded to Halliburton's general counsel. When Halliburton received a notice of investigation from the SEC requiring Halliburton to retain documents, the company's general counsel inferred from Menendez's internal disclosures that he was the source of the SEC inquiry. The general counsel sent an email to Menendez's colleagues instructing them to retain certain documents because "the SEC has opened an inquiry into the allegations of Mr. Menendez."

Subsequent to the general counsel outing Menendez as a whistleblower, Menendez's colleagues began treating him differently, refusing to work and associate with him. Menendez described the day that he saw the general counsel's email outing him as a whistleblower as one of the worst in his life. Halliburton granted his request for paid administrative leave and, within a year, Menendez resigned. Affirming the ABR's decision, the Fifth Circuit applied the Supreme Court's Burlington Northern material-adversity standard to SOX and concluded that Halliburton's outing of a whistleblower to his colleagues and informing them that the whistleblower caused them to be the subject of an SEC investigation "created an environment of ostracism" for the whistleblower, which well might dissuade a reasonable employee from whistleblowing.

The ARB's holding in *Menendez* rested largely on Section 301 of SOX, 15 U.S.C.A. § 78j-1(m)(4), which requires that publicly traded companies to establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters. The ARB wrote:

> We consider Section 301 a critical component of SOX, legislation composed of a number of separate and distinct provisions designed to address corporate fraud and financial wrongdoing. To further this legislative intent, we necessarily construe the protection Section 301's requirement (that covered employers establish confidential channels of communication for their employees) affords consistently with SOX Section 806's anti-retaliation provisions and hold that Section 806 provides whistleblower protection to employees who make use of such channels. We agree with Menendez's argument that the right to confidentiality Section 301 affords effectively establishes a 'term and condition' of employment within the meaning of Section 806's whistleblower protection provision, and that the exposure of Menendez's identity in connection with his complaint to Halliburton's Audit Committee constituted a violation of that employment term and condition.

Menendez, ARB 09-002 at 24 (footnotes omitted). The ARB wrote that "Menendez need only demonstrate that such activity would deter a reasonable person from engaging in protected activity. Clearly, a reasonable employee in Menendez's position would be deterred from filing a confidential disclosure regarding misconduct if there existed the prospect that his identity would be revealed to the very people implicated in the alleged misconduct." *Id*., at 26 (footnote omitted). By requiring a complainant to reveal the whistleblowing that he or she has engaged in confidentially, an employer undermines the mechanism that Congress established for whistleblowers to make confidential disclosures and engages in an adverse action.

Similarly, settlement provisions requiring whistleblowers to disclose whether they have provided information to a government agency to potentially recover a whistleblower reward are contrary to express statutory provisions protecting a whistleblower's identity. For example, Dodd-Frank authorizes whistleblowers to make disclosures to the SEC anonymously (through an attorney)[27] and prohibits the SEC from disclosing information that "could reasonably be expected to reveal the identity of a whistleblower."[28] The IRS whistleblower reward program requires the agency to protect a whistleblower's identity using the IRS' common law informer privilege. *See* I.R.S Notice 2008-4, 2008-2 I.R.B. 253, § 3.06.

Moreover, requiring an employee to disclose whether she has reported fraud to the government runs afoul of the FCA's seal provision. The seal allows the government to "study and evaluate, out of public view, the relator's information" and decide what steps to take in investigating fraud. *See Under Seal v. Under Seal*, 326 F.3d 479, 486 (4th Cir. 2003) (*citing Lujan v. Hughes Aircraft Co*., 67 F.3d 242, 245 (9th Cir. 1995)). *See also U.S. ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 743 (D.C. Cir. 1998). ("The purpose of the [seal] provisions is to

[27] 17 C.F.R. § 240.21F-7(b).
[28] 15 U.S.C. 78u–6(h)(2). *See also* 17 C.F.R. § 240.21F-7(a).

'protect the Government's interest in criminal matters' by enabling the government to investigate the alleged fraud without 'tip[ping] off' investigation targets."). Requiring a complainant in a whistleblower retaliation action to violate the seal in order to settle the retaliation action would relinquish the relator's ability to recover any relator share and would undermine the government's investigation of the FCA action by tipping off the defendant.

V. Conclusion

De facto gag clauses pose a serious threat to the whistleblower protection laws that DOL enforces and to Congress' intent to ensure the free flow of information from corporate insiders to regulatory agencies and law enforcement. Accordingly, DOL should consider issuing a regulation or, at a minimum, policy guidance, that identifies the types of *de facto* gag provisions that either violate DOL Whistleblower Protection Laws or that cannot be included in an agreement resolving a whistleblower retaliation claim at DOL.

EXHIBIT 1:
PETITION FOR RULEMAKING TO THE
U.S. SECURITIES & EXCHANGE COMMISSION

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 2010[1] ("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

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[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

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[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,

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[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.

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[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 staff[19] or to make a representation that

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[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. 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

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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

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[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*,

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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 prefiling 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

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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

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[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 forms 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

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[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.

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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 whethaer 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.

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[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 "vitally 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.

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[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,

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[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

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[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

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[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, predicating 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. Giacoumakis*, 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 *favored* 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

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[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]

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[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 1 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 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.

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[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]

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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]

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[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

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[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]

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[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. Giacoumakis*, 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.

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[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]

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[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.").