Association of Corporate Counsel

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425
tel 202.293.4103
fax 202.293.4701
www.acc.com

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

Re: Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, File No. S7-33-10

Dear Ms. Murphy:

The Association of Corporate Counsel ("ACC")[1] and the leading in-house legal executives[2] co-signing this letter appreciate the opportunity to present our views to the Commission regarding its above-referenced proposed rules. We urge the Commission to reconsider their proposals in order to assure that the robust and effective corporate internal compliance and reporting systems we value, and that regulators have mandated, may continue to cultivate healthy and responsible corporate cultures. We believe that the Commission's proposals will have the impact of thwarting internal compliance and reporting programs in a manner inconsistent with the intent of the Dodd Frank legislation that authorized them.[3]

ACC and its co-signers propose modifications to the rule that would require an individual with information regarding corporate misconduct to first use existing internal compliance and reporting systems and then to give the company a reasonable time to resolve the issue before making any submission to the Commission.[4] Failure to do so raises the specter of two equally troubling and certainly unintended results: first, by

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[1] ACC is the bar association for attorneys employed in the legal departments of corporations and private-sector organizations worldwide. ACC has more than 26,000 members in over 75 counries, employed by over 10,000 organizations. In addition, our membership brings to these important issues the unique views of in-house counsel who are at the very intersection of the compliance and reporting functions. As such, our membership speaks not only for in-house counsel, but also for the interests of their client organizations and the stakeholders who will be affected by the proposed rules.

[2] The co-signers are particularly well-suited to offer the SEC an important perspective on this issue, as they are responsible for the compliance and reporting functions within their companies. They lead companies of all sizes and industries, and many have direct or supervisory responsibility for the implementation of both reporting systems and whistleblower protection programs within their often multinational companies.

[3] ACC will file a separate comment letter addressing a variety of issues raised by the proposed rule. However, ACC and the co-signers wish to make clear in this standalone submission the immediate need to safeguard internal compliance and reporting systems.

[4] The Commission will receive many useful suggestions as to how to modify its proposed rule to accommodate the concerns we raise in this comment letter. We do not wish to preempt consideration of those approaches by offering a more detailed suggestion here, but rather to make clear the absolute minimum change required to protect the role of internal compliance and reporting systems.

undermining the internal compliance and reporting systems that allow responsible companies to comply with critical regulations and conduct themselves in an ethical manner; and second, by proposing an alternative system which fails to replace existing corporate reporting systems with any effective mechanism to ensure companies obtain early warnings of burgeoning failures or frauds within their organizations. While we commend the Commission for acknowledging these concerns in the commentary accompanying the proposed rules, the rules themselves do little to address them, and indeed, create a dynamic that works at odds with their resolution.

* * *

The vast experience of the thousands of companies with excellent records of compliance due to robust internal reporting procedures teaches us the practical reality that creating a culture of compliance requires a substantial effort. These efforts include the need to communicate and inculcate a shared value that all employees are responsible for ensuring that the company operates within the bounds of the law and ethics.

Stakeholders across the spectrum demand that organizations establish reliable systems to monitor and manage employees' adherence to the law, as well as effectively remediate problems that arise. That principle was articulated by Congress in a number of mechanisms in Sarbanes-Oxley, legislated against the backdrop of a series of significant corporate frauds; similarly, that principle drove the United States Sentencing Commission to make clear the need for effective and robust compliance systems in issuing its organizational sentencing guidelines, codified in Chapter 8 of the United States Sentencing Guidelines.[5]

But quite apart from regulatory obligations, effective compliance and reporting systems yield a variety of benefits to companies, investors and the government.[6] First, and most importantly, they serve as an early tripwire for the detection of illegal or unethical conduct. Senior executives and boards – especially those in large companies who by definition are likely removed from the ability to personally monitor day-to-day operations at all levels – depend on these systems to empower employees to trigger the early warning systems that allow the company to respond to problems before misconduct can fester and expose the company to significant liabilities. Second, compliance systems are the principal vehicles for educating employees about what the law requires, particularly given rapid, complex, and multijurisdictional legal obligations that managers with all kinds of responsibilities in the company must navigate. Finally, these

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[5] United States Sentencing Commission, Guidelines Manual §8B2.1 ("Effective Compliance and Ethics Program") (Nov. 2010).

[6] It is true that not all companies use structured compliance and reporting mechanisms. As the Sentencing Commission recognized in promulgating its organizational sentencing guidelines, the size of the company and availability of resources sometimes prevent the creation of formal mechanisms. United States Sentencing Commission, Guidelines Manual §8B2.1 App. Note 2(c) (Nov. 2010). Nevertheless, the Commission should require individuals to make use of whatever procedures do exist, so that these smaller companies are not saddled by the costs of a Commission investigation for which the first notice was a phone call from Commission staff.

mechanisms, while directed at keeping companies out of trouble and protecting stakeholders, can also help to improve overall business performance and the maintenance of a strong, vibrant corporate culture.

But none of these important compliance mechanisms work if employees are not vested in and do not feel they will be protected in fulfilling their roles in reporting wrongdoing. ACC and its co-signers strongly support protections for individuals who identify and report misconduct. Indeed, in-house counsel are the pioneers in establishing and facilitating corporate whistleblowing systems and safeguards. Thus, we join the Commission in its desire to promote rules that reinforce important whistleblower principles, since they are crucial to unearthing otherwise hidden or ignored problems in companies so that they may be addressed.

Blowing the whistle on bad actors serves both the interests of companies who are playing by the rules and the interests of the investor community, but internal reporting systems are incented only when they operate in a manner that provides the company with the opportunity to successfully police its own house. Establishment of a successful reporting system thus incorporates a variety of features, from ongoing training and education designed to help employees recognize wrongdoing, to the facilitation of reporting mechanisms and anonymous hotlines for reporting allegations.

The *sine qua non* requirement for these programs to work and for companies to comply with the law is the expectation that employees will report misconduct internally so that the company can timely address and correct problems reported.[7] Otherwise, reporting systems have no capacity to remediate rogue actions, and companies are deprived of the means to redress their own shortcomings before breakdowns in appropriate behaviors rise to the level of catastrophic failures.

Unfortunately, the Commission's proposed approach, while ostensibly accommodating these concerns, fails to resolve them:

1. The Commission's proposed rules disincent employees from looking for ways to improve or correct corporate behaviors, and incent them to find ways to profit from corporate wrongdoing. Fraudulent misconduct, the bane of good compliance systems, then becomes the gold mine, rather than an impetus for companies with effective compliance systems to address the underlying issues.

2. The Commission's proposed approach invites employees to focus on timing their report so as to maximize the bounty they'll receive, potentially allowing

[7] Given their integral importance to the success of compliance programs, policies articulating employee responsibilities for helping the company to comply with the law and requiring cooperation with internal investigations have been incorporated into employee handbooks directly in many sophisticated companies. Employees who fail to comply with these policies can be subject to termination or other forms of discipline.

misconduct to fester in order to allow them to more easily evidence their claim or increase the damages caused by the misconduct (by which their bounty will be calculated) before approaching the Commission.

3. Encouraging those who wish to report suspected wrongdoing to end-run internal investigations invites waste and promotes less effective responses to serious problems. Companies confronted with a report can more timely address the underlying situation, and, if necessary, self-report to the Commission; knowing that employees with legitimate complaints can take their concerns to the Commission if the company does not respond is a very effective brake on burying bad behavior.[8]

4. While we commend the Commission for acknowledging that the bounty program could undermine corporate compliance regimes, the proposed rule's approach is not sufficient.[9] We note three particular concerns:

   First, the ninety-day look-back period merely permits the whistleblower an option of reporting internally first. That option places the prospect of significant financial compensation for reporting to the Commission in competition with internal reporting if the corporation then does what it should to remediate the problem. Prospective whistleblowers will quickly learn that waiting to allow the problem to fester and then to report directly to the Commission will yield a better award than reporting to their compliance officials soon after learning of the misconduct.

   Second, the Commission's proposal to reduce the eventual award to an individual who does not make use of internal reporting systems is a good idea, but it is merely mentioned in the commentary without being listed in the rule

[8] If the company refused to address the issue, the individual, after waiting a reasonable period of time (we suggest 180 days), could submit their allegations directly to the Commission. Given the large fines assessed in recent years, however, we expect companies to take complaints quite seriously. Any delay will not harm the resolution of the underlying allegations, and, in fact, will likely speed up the process. The Commission itself acknowledges that it may take more time for them to sift the many reports that may flood them as a result of this rule and its opportunistic bounties; and further, the Commission also acknowledges that after it does manage to sift reports, it will likely send any that it finds should be pursued back to the company anyway. Days, if not months, will be lost, while presumably illegal activity continues, resulting – ironically— in the potential for the company's liability to increase and the problems and impacts to worsen.

[9] Some have argued that Dodd-Frank did not give the Commission the ability to require a whistleblower to exhaust the internal compliance route first. That proposition is flatly incorrect. In defining "whistleblower," Congress specifically required covered individuals to submit their allegations "in a manner established, by rule or regulation, by the Commission." In an effort to reconcile the myriad governmental and stakeholder interests in supporting effective compliance and reporting systems, the Commission should require individuals seeking the status of whistleblower under the securities laws to demonstrate in their submission to the Commission that they had first informed their companies and that the companies had an adequate time in which to resolve the issue.

itself as a relevant factor. Even if this factor were explicitly listed, it would take years of Commission precedent before it became clear to individuals, and their counsel, how exactly such a factor would be weighed in the balance. Ambiguity over the rewards and incentives of the system undermines internal corporate compliance and reporting systems in the interim.

Third, the Commission also suggests that it would, in its discretion, contact the company after learning of the allegation to allow the company to conduct an internal investigation and obtain cooperation credit. In addition to failing to make clear how its discretion would be exercised, the Commission would place the company in the unenviable position of learning of alleged wrongdoing via a phone call from Commission staff. And, others might learn of the report before the company can make any effort to ascertain the complaint's veracity, with potentially devastating impacts on the company and the investors and employees who rely on the company's legal health and strong brand. Companies with compliance and reporting systems should be, at the very least, given an opportunity to have notice of a problem before it reaches an adversarial or publicized stage, especially if there remains a potential that the company has not done anything wrong. Otherwise, the inefficient process the Commission has unveiled will prevent the type of quick action critical to stemming problems early.

* * *

We recognize the valid concern that some employees will fear retaliation for blowing the whistle.[10] The solution to that problem is not, however, a scheme to undermine important and effective internal compliance and reporting systems; rather, employees who fear retaliation may rely on the anti-retaliation provision contemporaneously enacted by Congress. By doing so, the Commission will separate out the good corporate actors from the bad. The bad actors—who punish their employees for uncovering and reporting bad deeds—will find themselves unable to defend their actions in both the courts of law and public opinion, both for the underlying misconduct and for retaliating against employees who wanted to improve the situation. Good actors—who use their compliance and reporting systems to encourage employees to engage in responsible behavior and who act appropriately in response to meritorious tips—will benefit from the Commission requiring employee allegations to be routed internally by having an opportunity to strengthen their cultures of compliance.

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[10] From our perspective and based on the traditional understanding of the term, an individual who merely learns of a problem and heads for Door Number 1 to recover a large award is not a whistleblower. Instead, the archetypal whistleblower is an individual who attempts to solve the problem within an organization, but, finding no allies or worried that continued agitation will lead to personal retribution, reaches out to outside entities, such as the media or the government in an effort to uncover misconduct and protect their innocence as a reporter. The Commission should adopt a better definition of "whistleblower" by requiring those who would wear the title to earn it by reporting internally first.

The advent of compliance, investigative and reporting systems has been an unalloyed good for companies and their stakeholders. Today, because these systems exist, blowing the whistle does not occur in a vacuum. And, these systems continue to mature in response to the dynamic business and regulatory environment our companies confront. The undersigned would naturally appreciate the opportunity to work with the Commission and other interested regulators to strengthen these mechanisms, so that they can be more effective vehicles for ensuring compliance with the law and high standards of ethical conduct. However, the Commission must safeguard the gains and promote more "compliant" outcomes by revising its proposed rules to require individuals to first report within these systems and then to give these systems an opportunity to resolve the allegations.

Submitted on behalf of the Association of Corporate Counsel:

Susan Hackett
Senior Vice President and General Counsel, Association of Corporate Counsel

The following signatories are listed in alphabetical order by company name:

Joe B. Cogdell, Jr.
Vice President, General Counsel & Secretary
Acorn Energy

Peter Lieb
Executive Vice President and General Counsel
Aon Corporation

Paul R. Shlanta
Executive Vice President, General Counsel, and Chief Ethics and Compliance Officer
AGL Resources Inc.

Nicole C. Daniel
Vice President, Chief Compliance Officer and Secretary
Albemarle Corporation

Stephen R. Reynolds
Senior Vice President, General Counsel
Alcatel-Lucent

Samuel J. Gesten
Executive Vice President, General Counsel
Allergan, Inc.

Steve Ihm
Assistant Vice President and Assistant General Counsel
Corporate Law, Law and Regulation
Allstate Insurance Company

Kevin Connor
Senior Vice President, General Counsel & Secretary
AMC Entertainment, Inc.

Samuel A. Flax
Executive Vice President and General Counsel
American Capital, Ltd.

Mike Miller
Senior Vice President, General Counsel & Corporate Secretary
American Electric Power Company

J. Michael Gaither
Executive Vice President and General Counsel
American Tire Distributors, Inc.

Sabine Chalmers
Chief Legal & Corporate Affairs Officer
Anheuser-Busch InBev

Damian Olthoff
General Counsel and Secretary
Animal Health International, Inc.

Roy H. Stahl
Chief Administrative Officer, General Counsel and Secretary
Aqua America, Inc.

Gregory M. Birge
Senior Vice President & General Counsel
Aquilex Corporation

Wendy S. Neal
Vice President & Chief Legal Officer
Arcadia Biosciences, Inc.

Janet D. Olsen
General Counsel
Artisan Partners Limited Partnership

David L. Hausrath
Senior Vice President and General Counsel
Ashland Inc.

Ellen T. Harmon
Executive Vice President, Chief Legal Officer,
Chief Compliance Officer & Secretary
ATMI, Inc.

Pascal W. Di Fronzo
Senior Vice President, General Counsel & Secretary
Autodesk, Inc.

Claudia S. Toussaint
Senior Vice President, General Counsel and Secretary
Barnes Group Inc.

Brian E. Bomstein
General Counsel
Bayview Asset Management, LLC

Angelique A. David
Senior Managing Director, General Counsel, Corporate Secretary
B.C. Ziegler and Company

Jeffrey S. Sherman
Senior Vice President and General Counsel
Becton Dickinson and Company

Martine Turcotte
Executive Vice-President and Chief Legal & Regulatory Officer
BCE Inc. and Bell Canada

David Kennedy
General Counsel
Better Place, Inc.

Susan Dunn
General Counsel
Bill.com

Gary M. Reiff
Chief Operating Officer, Chief Legal Officer
Black Creek Group, Dividend Capital Group

Rod McDonald
Vice President, Secretary & General Counsel
Blockbuster Inc.

Denise M. Clolery
Senior Vice President, General Counsel & Secretary;
Chief Compliance Officer
BMC Software, Inc.

Simon A. Fish
Executive Vice-President and General Counsel
BMO Financial Group

Mary L. Garceau
Vice President, General Counsel and Corporate Secretary
Bob Evans Farms, Inc.

Frank D. Burt
Senior Vice President, General Counsel
Boston Properties, Inc.

Kerry Fanwick
Executive Vice President, General Counsel
BRE Properties, Inc.

Art Chong
Executive Vice President, General Counsel & Secretary
Broadcom Corp.

Marc L. Abramson, Esq.
Independent General Counsel
Brookstone Securities, Inc.

William C. Pitcher
Vice President, General Counsel & Corporate Secretary
Buckman Laboratories International, Inc.

Donald McAleenan
Senior Vice President & General Counsel
Builders FirstSource, Inc.

Jonathan Biller
General Counsel and Secretary
Bunge Limited

James J. Cowie
Senior Vice President & General Counsel
Cadence Design Systems, Inc.

Rick Rose
Vice President, General Counsel & Secretary
Calgon Carbon Corporation

Joan B. Stafslien
Executive Vice President, General Counsel, Secretary & CCO
CareFusion Corporation

Steve Euller
Corporate Vice President, General Counsel and Corporate Secretary
Cargill, Incorporated

Eric M. Margolin,
General Counsel and Chief Compliance Officer
CarMax, Inc.

Mark A. Ricca
Executive Vice President, Chief Risk Officer and General Counsel
Carver Federal Savings Bank

Bruce F. Metge
General Counsel
Catalyst Health Solutions, Inc.

Amy Fliegelman Olli
Executive Vice President and General Counsel
CA Technologies

Michael W. Gleespen
General Counsel and Corporate Secretary
CBIZ Corporate Office

Robert H. Walls, Jr.
Executive Vice President, General Counsel and Secretary
CC Media Holdings, Inc. and Clear Channel Outdoor Holdings, Inc.

Gary M. Rowen
Chief Compliance Officer
Celanese Corporation

Brace R. Mullett, Esq.
General Counsel/Senior Vice-President
City Holding Company

Richard M. Wolfson
Vice President - General Counsel & Corporate Secretary
CLARCOR Inc.

Laura Stein
Senior Vice President - General Counsel
The Clorox Company

Carlton S. Chen
Vice President, General Counsel & Secretary
Colt's Manufacturing Company LLC

Julie A. Brooks
Executive Vice President, General Counsel
Chief Compliance Officer & Corporate Secretary
Conceptus, Inc.

Janet Langford Kelly
Senior Vice President, Legal, General Counsel & Corporate Secretary
ConocoPhillips

Jennifer W. Pileggi
Executive Vice President, General Counsel & Secretary
Con-way Inc.

Rochelle Walk
Chief Executive Officer
Corporate Governance Solutions LLC

Vicki Baue
Vice President & General Counsel, CCO
Cosi, Inc.

James C. Heartfield, Esq.
General Counsel
Covenant Transportation Group, Inc.

E. Blake Hawk
Executive Vice President/General Counsel
Crown Castle

Marya M. Rose
Vice President - General Counsel and Corporate Secretary
Cummins Inc.

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Senior Vice President, Chief Legal Officer
CUNA Mutual Group

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Vice President, General Counsel, Human Resources & Secretary
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Saint-Gobain Corporation

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Eastwood Construction, LLC, and Affiliates

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Executive Vice President & General Counsel
Edison International

Timothy C. Reis
Vice President and General Counsel
EMS Technologies, Inc.

Bennett Feigenbaum, Esq.
General Counsel
Executive Mediator Services

Christine P. Richards
Executive Vice President, General Counsel and Secretary
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Aileen F. Casanave, Esq.
Vice President & General Counsel
Five9 Network Systems

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Senior Vice President, General Counsel & Secretary
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Executive Vice President and General Counsel
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Michelle Banks
Senior Vice President, General Counsel,
Corporate Secretary and Chief Compliance Officer
Gap Inc.

Andrew R. Etkind
Vice President and General Counsel
Garmin Ltd.

PJ Putnam, Esq.
Vice President and General Counsel
Gearbox Software, LLC

Roderick Palmore
Executive Vice President, General Counsel and Secretary
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General Counsel
Gilead Sciences, Inc.

Dan Troy
Senior Vice President and General Counsel
GlaxoSmithKline

Russell Robicheaux
Senior Vice President, Chief Administrative Officer and General Counsel
Global Industries, Ltd.

Matthew W. Geekie
Senior Vice President, Secretary and General Counsel
Graybar Services, Inc.

Darryl M. Burman
Vice President & General Counsel
Group 1 Automotive, Inc.

David B. Jaffe
General Counsel and Secretary
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Timothy J. Keenan
Vice President and General Counsel
H.B. Fuller Company

J. Alberto Gonzalez-Pita
Executive Vice President & General Counsel
HCP, Inc.

David Sienko
Vice President & General Counsel
Hecla Mining Company

Dr. Alan B. Rabkin
General Counsel
Heritage Bancorp (Reno, Nevada)

Michael F. Zendan II
Vice President, Deputy General Counsel
Horizon Lines, Inc.

Kent B. Magill
Executive Vice President, General Counsel and Corporate Secretary
Hostess Brands, Inc.

Jonathan L. Block
General Counsel
Hot Topic, Inc.

Paul C. Nightingale
Senior Vice President & General Counsel
HP Hood LLC

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Senior Vice President, General Counsel and Corporate Secretary
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Executive Vice President and General Counsel
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Larry C. Boyd
Executive Vice President, Secretary & General Counsel
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Vice President, Legal
Inovio Pharmaceuticals, Inc.

L. Eric Loewe
Senior Vice President, General Counsel and Secretary
InsWeb Corporation

A. Douglas Melamed
Senior Vice President & General Counsel
Intel Corporation

Steven Sprecher
General Counsel and Secretary
InterDigital Communications, LLC

Martin D. Litt
Executive Vice President and General Counsel
Intrepid Potash, Inc.

Anthony C. LaPlaca
Senior Vice President & General Counsel
Invacare Corporation

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Vice President & General Counsel
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Jamba Juice

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Vice President, Business Development and Legal Affairs
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Senior Vice President & General Counsel
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Executive Vice President Legal Affairs, General Counsel and Company Secretary
Kofax plc

Richard D. Schepp
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Kohl's Department Stores, Inc.

Sven Erik Holmes
Vice Chairman and Chief Legal Officer
KPMG LLP

Deborah S. Butera
Senior Vice-President & General Counsel, Registered In-House Counsel
Julie A. Bell
Deputy General Counsel, Vice President, Law & Compliance
Kratos Defense & Security Solutions, Inc.

F. Samuel Eberts III
Chief Legal Officer and Senior Vice President of Corporate Affairs
Laboratory Corporation of America Holdings

Jennifer Chaloemtiarana
Global Finance and Governance Counsel, Acting Co-General Counsel
Charlie Sandel
Regional General Counsel, Americas; Acting Co-General Counsel
Levi Strauss & Co.

Robert C. Levine, Esq.
General Counsel
The Lewis Group of Companies
Hampstead Area Water Company, Inc.
Atkinson Area Waste Water Recycling, Inc.

Alan K. Tse
Vice President and General Counsel
LG Electronics Mobile

John A. Cottingham
Chief Legal Officer and Secretary
Life Technologies Corporation

Lonny Townsend
Senior Vice President & General Counsel
Magellan Midstream Partners, L.P.

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Vice President, General Counsel & Corporate Secretary
Marathon Oil Corporation

Edward A. Ryan
Executive Vice President and General Counsel
Marriott International, Inc.

Emily Snyder
Corporate Counsel
Maxwell Technologies, Inc.

Jonathan J. Oviatt
Chief Legal Officer & Corporate Secretary
Mayo Clinic

Gloria Santona
Executive Vice President, General Counsel & Secretary
McDonald's Corporation

Laureen Seeger
Executive Vice President, General Counsel and Chief Compliance Officer
McKesson Corporation

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Senior Vice President, General Counsel & Secretary
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Bradley D. Kohn
Senior Vice President and General Counsel
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Robert G Ventura
General Counsel
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James T. Bellerjeau
General Counsel & Secretary
Mettler-Toledo International Inc.

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Vice President and General Counsel
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Karen Ripley
Chief Legal Officer
MillerCoors

Lee Cusenbary
General Counsel
Mission Pharmacal Company

Steve Armstrong
Vice President, General Counsel & Corporate Secretary
MSC Industrial Direct

Russ Dempsey
Vice President & Chief Legal Officer
National Investment Managers Inc.

LeRoy Johnston
Chief Ethics Officer/Interim Chief Compliance Officer
Nationwide Insurance

Patti L. W. McGlasson
General Counsel & Corporate Secretary
NetSol Technologies, Inc. (NasdaqCM: NTWK)

Lee Cheng
General Counsel
Newegg Inc.

Hilary Krane
Vice President, General Counsel
John F. Coburn III
Corporate Secretary and Global Governance Counsel
Nike, Inc.

Carrie J. Hightman
Executive Vice President and Chief Legal Officer
NiSource Inc.

Kelly R. Welsh
Executive Vice-President & General Counsel
Northern Trust

David M. Shannon
Executive Vice President, General Counsel and Secretary
NVIDIA Corporation

Elisa D. Garcia C.
Executive Vice President & General Counsel
Office Depot, Inc.

G. Sonny Cave
Senior Vice President, General Counsel, Corporate Secretary and
Chief Compliance and Ethics Officer
ON Semiconductor Corporation

Suzanne M. Shema
Senior Vice President and General Counsel
Onyx Pharmaceuticals, Inc.

Dorian Daley
Senior Vice President, General Counsel & Secretary
Oracle Corporation

Bryan J. Blankfield
Executive Vice President, General Counsel and Secretary
Oshkosh Corporation

Patrick C. Fraizer
Senior Vice President - HR, General Counsel & Corporate Secretary
Pan-American Life Insurance Group

Louise A. Rynd
General Counsel
Pennsylvania Bankers Association

Brian D. Zuckerman
Senior Vice President - General Counsel & Secretary
The Pep Boys - Manny, Moe & Jack

Thomas G. Dagger
Senior Vice President, General Counsel and Corporate Secretary
Phibro Animal Health Corporation

Lori N. Buckley
General Counsel & Vice President of Human Resources
Phoenix International Freight Services, Ltd.

Richard R. Pickard
Vice President Legal, General Counsel & Secretary
Plantronics, Inc.

Daniel L. Rikard
Senior Vice President, General Counsel & Secretary
Polymer Group, Inc.

Lisa K. Kunkle
Vice President, General Counsel and Secretary
PolyOne Corporation

Jeffrey P. Lisenby
Senior Vice President, General Counsel & Secretary
ProAssurance Corporation

Ann M. Kappler
Vice President and Chief Legal Officer, Corporate Services
Prudential Insurance Company of America

Michael L Hawkins
Vice President and General Counsel
QLogic Corporation

Kevin P. Delaney
Senior Vice President - General Counsel & Secretary
Quanex Building Products Corporation, NYSE "NX"

David P. Poole
General Counsel
Range Resources Corporation

Paul Matecki, Esq.
Senior Vice-President - General Counsel
Raymond James Financial, Inc

Henry Z. Horbaczewski
Senior Vice President and General Counsel
Reed Elsevier Inc.

Alexander G. Simpson
Vice President & General Counsel
Reis, Inc.

David Pendarvis
Global General Counsel & Secretary
ResMed Inc.

Edward J. DeMarco, Jr.,
General Counsel
The Risk Management Association

Tricia Staible
Marketing and Risk Manager
Robinson Fans, Inc.

Gary R. Chadick
Senior Vice President, General Counsel and Secretary
Rockwell Collins Inc.

Michael C. Wu
General Counsel and Corporate Secretary
Rosetta Stone

Susan Aldridge
Senior Vice President of Legal, General Counsel
Rosewood Hotels & Resorts

David Allgood
Executive Vice President and General Counsel
Royal Bank of Canada

Edward W. Moore
Vice President, General Counsel & Secretary
RPM International Inc.

Derrek Weaver
Vice President, General Counsel and Corporate Secretary
Rush Enterprises, Inc.

Robert D. Fatovic
Executive Vice President, Chief Legal Officer and Corporate Secretary
Marcia Narine
Vice President, Global Compliance and Business Standards
Ryder System, Inc.

Sterling L. Miller
General Counsel & Corporate Secretary
Sabre Holdings Corporation

Andrea Falcione
Chief Ethics Officer – Compliance Americas
Vice President - Advisory Services
SAI Global

Michael A. Brizel
Executive Vice President & General Counsel
Saks Incorporated

John Hoerster
Vice President, General Counsel, & Chief Ethics Officer
Saltchuk Resources, Inc.

Michael R. Tyler
Executive Vice President & General Counsel
Sanmina-SCI Corporation

Peter J. Bazil
Vice President, General Counsel & Secretary
Savvis

H. Katherine White
Vice President, General Counsel and Secretary
Sealed Air Corporation

Javade Chaudhri
Executive Vice President & General Counsel
Sempra Energy

Kevin E. Mann
Vice President - Ethics and Business Conduct
The ServiceMaster Company

Miriam Lefkowitz
General Counsel
Shufro, Rose & Co., LLC

Steven Shawver
Vice President, General Counsel & Secretary
Sig Sauer, Inc.

Bill Cosden
General Counsel
Silver Oak Partners

Michael Dillon
General Counsel
Silver Spring Networks

Irwin M. Shur
Vice President, General Counsel & Secretary
Snap-on Incorporated

Stephen K. Coss
Senior Vice President and General Counsel
Sonic Automotive, Inc.

Paul A. Scoff
Vice President & General Counsel
Sprague Energy Corp.

Charles Wunsch
General Counsel and Corporate Secretary
Sprint Nextel Corporation

Thomas Good
General Counsel and Secretary
SquareTwo Financial Corporation

Mark C. Mayhugh
Senior Counsel, Ethics and Compliance
SRA International, Inc.

Bruce Wobeck
Vice President and General Counsel
Sriya Innovations, Inc.

Robert N. Sacks
Executive Vice President/General Counsel
Standard Parking

Dave M. Gomez
Senior Vice President and General Counsel
StarTek, Inc. (NYSE: SRT)

David M. Lewis, Esq.
Senior Vice President and General Counsel
Stone Street Capital, LLC

Marian Harding Cochran
National Legal Counsel
Sud-Chemie Inc.

Robert A. Earnest
Vice President, General Counsel & Corporate Secretary
Superior Industries International, Inc.

Chester Te
Assistant General Counsel
SVB Financial Group

Chris B. Heaphy
Senior Vice President, General Counsel & Secretary
The Taubman Company LLC

Christopher A. Montague
Executive Vice President & General Counsel
TD Bank Financial Group

Eric I. Cohen
Senior Vice President, Secretary and General Counsel
Terex Corporation

Roger Herting
Chief Financial Officer
Terracon Consultants, Inc.

Steven J. Smart
Associate General Counsel - Ethics and Compliance
Tesco Corporation

Terrence O'Donnell
Executive Vice President and General Counsel
Textron Inc.

Robert M. Grace, Jr.
Vice President, General Counsel and Secretary
3D Systems Corporation

Danette Wineberg
Vice President, General Counsel and Secretary
The Timberland Company

Paul T. Cappuccio
Executive Vice President and General Counsel
Time Warner Inc.

Howie Wong
General Counsel and Corporate Secretary
Toronto Community Housing Corporation

Julie Pearl
General Counsel
Tracker Corp

Eric J. Bock
Executive Vice President, Chief Administrative Officer and General Counsel
Travelport Limited

Paul B. Jones
Executive Vice President, General Counsel & Regulatory Policy
tw telecom inc.

Dan Dorsky
Senior Compliance Counsel
Tyco International

Jan Schnitzer
General Counsel
u-blox AG

Steven L. Philpott
Executive Vice President, General Counsel
Umpqua Holdings Corporation

Mark E. Schell
Senior Vice President, General Counsel and Corporate Secretary
Unit Corporation

Mitchell Zamoff
Executive Vice President and General Counsel
UnitedHealth Group, Inc.

Teri P. McClure
Senior Vice President and General Counsel
United Parcel Service, Inc.

J. Scott Ellis
General Counsel
Universal Safety Response, Inc.

Kimberly S. Bowers
Executive Vice President & General Counsel
Valero Energy Corporation

Kerry Galvin
Senior Vice President, General Counsel & Secretary
Valerus Compression Services, LP

Thomas A. Witt
Vice President, General Counsel and Secretary
Veolia Energy North America

James C. Dobbs
Senior Vice President & General Counsel
Versar, Inc.

Marc L. Frohman
Senior Vice President, Corporate General Counsel & Corporate Secretary
Vishay Intertechnology, Inc.

Lawrence Gold
Senior Vice President and General Counsel
Vistaprint

George E. Bushnell III
Deputy General Counsel
Vivendi S.A.

Amy E. Hutchens, CCEP
General Counsel, Vice President Compliance & Ethics Services
Watermark Risk Management International, LLC

James A. Mullen
Executive Vice President and General Counsel
Werner Enterprises, Inc.

Michael H. Gibbs
Vice President & General Counsel
Whataburger

James J. Bender
Senior Vice President and General Counsel
The Williams Companies

J. M. Hailey
Vice President & General Counsel
Williams International Co., LLC

Mark A. Shelnitz
Vice President, General Counsel and Secretary
W. R. Grace & Co.

Michael Connelly
Vice President and General Counsel
Xcel Energy Inc.

James F. Brashear
General Counsel and Corporate Secretary
Zix Corporation

Adam R. Sand
General Counsel
ZL Technologies Inc.