13-4404

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LARRY STRYKER,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Review of a Final Order of
the U.S. Securities and Exchange Commission

BRIEF FOR THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS AMICUS CURIAE SUPPORTING PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae certifies that it has no outstanding shares or debt securities in the hands of the public, and has no parent company. No publicly-held company has a 10% or greater ownership interest in amicus curiae.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Statutes, Rules, and Regulations:

Other Authorities:

Other Authorities (Continued): Page

INTEREST OF AMICUS CURIAE[1]

Amicus curiae National Coordinating Committee for Multiemployer Plans ("NCCMP") is a nonprofit, tax-exempt organization that was formed after the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*. NCCMP has participated for over a quarter of a century in the development of the law applicable to employee benefit plans and represents members, plans and plan sponsors in every major segment of the multiemployer plan universe, including in the building and construction, retail, food, trucking and service and entertainment industries. Organizations affiliated with NCCMP currently hold over a half-trillion dollars of investments now on Wall Street, representing the assets of a major segment of U.S. institutional investors.

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[1] This brief is filed with the consent of all parties. *See* Fed. R. App. P. 29(a). Pursuant to Fed. R. App. P. 29(c)(5), amicus certifies that no party's counsel authored this brief, in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no other person—other than amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

The NCCMP's primary purpose is to participate in legislative and regulatory matters relating to ERISA and other laws affecting multiemployer employee benefit plans. Currently, hundreds of multiemployer plans and their labor-management sponsors across the country are affiliated with the NCCMP. These plans represent a majority of the participants in multiemployer plans throughout the nation and are representative of the multiemployer plan community as a whole.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer plans for retirement, health and other benefits by advocating on their behalf in Congress, the courts, and in the regulatory process. With respect to pension plans specifically, approximately 240 multiemployer defined benefit pension plans and related international unions, with a nationwide participant base, are affiliated with the NCCMP.

Multiemployer plans are institutional investors that rely heavily on investment returns to provide promised pension and

welfare benefits to the millions of workers and their families who rely on those benefits. To protect these investments, NCCMP strongly supported financial market reforms enacted by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or "Act") and the implementing regulations for this statue developed by the Securities Exchange Commission ("SEC" or "Commission"). See NCCMP, *Comments to Proposed Rules for Implementing the Whistleblower Provisions of Secction 21F* (S7-33-10), Dec. 17, 2010, *available at* http://goo.gl/qfUY2m.

Simply stated, it is NCCMP's view that the new protections enacted by Congress under Dodd-Frank are not only critically needed, but indeed essential to protecting the investment community and the general public. Amicus strongly believes that the Dodd-Frank Act's whistleblower provisions in particular are an essential law enforcement tool, and is concerned that the Commission's rulemaking will erode the provisions' effectiveness, and that the SEC is failing to provide whistleblowers the strong incentives to disclose information that Congress intended.

ARGUMENT

Experience has demonstrated that whistleblower programs that actively reward whistleblowers who come forward with information are an invaluable enforcement tool, and that knowledgeable insiders are an information source with vast potential.[2] When it enacted the Dodd-Frank Act, Congress sought to employ whistleblowers in policing the financial markets. It did so by establishing a program providing for substantial rewards to whistleblowers. Such rewards are not only necessary—they are effective as a law-enforcement tool in unearthing, exposing, and deterring misconduct. Whistleblower awards, however, are not only meant as a reward for whistleblowers. They have another purpose: to encourage others to come forward. Award payments publicize the program, and their payment demonstrates to others that the program is active and effective. The functioning of the program in practice is among the most important of the factors that

[2] The FCA has yielded approximately $40 Billion in recoveries to date. *See* U.S. Dep't of Justice, *Fraud Statistics* (Dec. 23, 2013), *available at* http://goo.gl/H4Yxyz.

can overcome the many disincentives—such as retaliation—to providing information.

The SEC's rulemaking adds limits to the statutory definition of 'original information,' and has the effect of delaying award payments, perhaps for years. This delay has the cumulative effect of discouraging potential whistleblowers. Congress, however, wisely did not limit eligibility to post-enactment information because it intended to pay awards as soon as possible, and thereby maximize whistleblowing's benefits.

1. Whistleblowers Are Key to the Detection of Fraud

In 2008, the U.S. Senate Committee on the Judiciary issued a report examining the history and implementation of the federal False Claims Act ("FCA"). It concluded that "the need for a robust FCA cannot be understated," for "a great deal of fraud would go unnoticed absent the assistance of [whistleblowers]." S. Rep. No. 110-507, at 6 (2008). Moreover, the report found that whistleblowers are "particularly instrumental" in uncovering complex frauds, where "only a very few individuals may actually understand the fraudulent scheme." *Id.* at 8. Congress saw whistleblowers as a

valuable tool in detecting complex financial frauds, and, accordingly, directed that the Commission establish a whistleblower awards program. Pub. L. 111–203 § 922; 124 Stat. 1376, 1841.

Fraud and other illegal conduct in the financial industry is by definition 'secret'—purposefully hidden from the public, investors, and government regulators. As a consequence, such fraud is not only complex, but in most cases may never be detected unless a stakeholder with inside information steps forward to assist law enforcement. Even with well-funded and dedicated government oversight, the financial markets are not a level playing field. This is why Congress has passed numerous whistleblower laws, such as those in the Internal Revenue Code and the Dodd-Frank provision at issue here. That law enforcement increasingly depends on whistleblowers is underscored by courts' willingness to broadly interpret the provisions of whistleblower laws. *E.g.*, *Lawson v. FMR LLC*, 571 U.S. ___ (2014); 188 L. Ed. 2d 158, 179 (2014) (broadly construing Sarbanes-Oxley Act's whistleblower provisions in ac-

cordance with the Act's purpose of "ward[ing] off another Enron debacle").[3]

2. Monetary Awards Are Necessary to Encourage Disclosure

Retaliation against whistleblowers is pervasive. A University of Chicago study of whistleblower programs—which was reviewed by Congress when it drafted the Dodd-Frank whistleblower provisions—found that:

> in 82 percent of cases, the whistleblower was fired, quit under duress, or had significantly altered responsibilities. In addition, many employee whistleblowers report having to move to another industry and often another town to escape personal harassment.

Alexander Dyck, et al., *Who Blows the Whistle on Corporate Fraud?*, 23, Dec. 2009, *available at* http://goo.gl/kxNUpp. Given the financial and personal costs faced by whistleblowers, "the sur-

[3] Numerous whistleblower provisions of other federal laws have also been interpreted broadly: *See, e.g.*, *Lambert v. Ackerley*, 180 F.3d 997, 1001 (9th Cir. 1999) (*en banc*) (Fair Labor Standards Act); *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12 (1st Cir. 1998) (Surface Transportation Act); *Baker v. Bd. of Mine Operations Appeals*, 595 F.2d 746 (D.C. Cir. 1978) (1969 Federal Mine Safety Act); *Donovan v. Peter Zimmer America, Inc.*, 557 F. Supp 642 (D. S.C. 1982) (OSHA).

prising part is not that most employees do not talk; it is that some talk at all." *Id.* at 24.

Because the disincentives to blowing the whistle are strong, an effective whistleblower program cannot rely solely on whistleblowers' sense of justice—it must provide monetary awards to overcome the real costs of whistleblowing, and rebalance the incentives in favor of disclosing valuable information to the government. Moreover, monetary awards work: "[a] strong monetary incentives to blow the whistle does motivate people with information to come forward," and "has a significant impact on the probability a stakeholder becomes a whistleblower. *Id.* at 1, 30. (concluding that "natural implication of our findings" is to expand the role for monetary incentives).

In addition, to rewarding whistleblowers themselves, monetary awards serve as an important signal to potential whistleblowers, encouraging them, too, to come forward with information. Aside from the publicity of award payments, their very payment demonstrates the effectiveness of the program, and their payment *in fact* is a more concrete inducement than the mere statutory

promise that such awards are available. And whistleblower awards do not only influence other whistleblowers: they can indirectly influence corporations' own compliance efforts, by encouraging them to take internal reporting of misconduct more seriously. *See* Amy Hamilton, *New York AG's Tax Probes Energize Whistleblowers, Set Advisers on Edge*, Tax Analysts, (Oct. 16, 2012), *available at* http://goo.gl/LuIHuS.

3. Congress Intended to Begin Payment of Awards Immediately

By limiting awards to only those cases involving post-enactment information, the SEC has delayed the payment of whistleblower award by years. The effect is evident in the small amount of money that has been paid out through the SEC's whistleblower program in the almost four years since the Dodd-Frank Act was enacted.

That Congress did not include a date limitation on 'original information' has been extensively briefed by petitioner. The absence of such a limitation, moreover, represents a deliberate policy choice on behalf of Congress. Given the effectiveness of whistleblowers as an enforcement tool, the need for monetary incentives,

and—most important to the case at hand—the effect of monetary incentives in *publicizing* the whistleblower program, *demonstrating* its effectiveness, *inducing others* to participate, and *encouraging compliance* with the law, Congress wisely chose to authorize awards for those who have already provided the SEC information prior to the Act's enactment. Whether or not such awards could further incentivize those pre-enactment whistleblowers themselves, they would doubtlessly incentivize many *potential* whistleblowers to come forward.

That this is so is further evident when considering that the Dodd-Frank whistleblower provisions are modeled after the IRS whistleblower law.[4] Pet. Add. 45. Significantly, the IRS whistleblower law, as enacted, has a specific "effective date" provision, providing that "[t]he amendments […] shall apply to information provided on or after the date of the enactment of this Act." Pub. L.

[4] In the SEC's own assessment of its prior 'bounty program' the SEC specifically consulted with the IRS regarding the implementation of the IRS's own program, and made recommendations to Congress regarding the best practices of other whistleblower programs, including the IRS program. *See* SEC Office of Inspector General, *Assessment of the SEC's Bounty Program*, Report No. 474 (March 29, 2010), available at http://goo.gl/tCzLSO.

109–432 § 406(d); 120 Stat. 2922, 2960. Congress clearly knew how to limit the scope of the Dodd-Frank whistleblower provisions, and yet it did not.

That the Act does not have such a limitation is a purposeful omission. Congress intended to award whistleblowers as soon as possible in order to begin a virtuous cycle whereby the award program is more widely known, more whistleblowers participate, and financial institutions step up their own internal compliance efforts. The end effect comports with the goals of the Dodd-Frank Act: ensuring that financial markets are policed effectively in order that investors—such as those amicus represents—are protected.

CONCLUSION

For the foregoing reasons, this Court should hold that the Commission exceeded its rulemaking authority in limiting 'original information' beyond the statutory language of the Dodd-Frank Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2014, a copy of the foregoing was served by mail on:

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