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**Submitted via Federal eRulemaking Portal: http://www.regulations.gov**

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

Re: File Number S7-33-10, Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, RIN 3235-AK78, 75 Fed. Reg. 70,488 (November 17, 2010)

Dear Ms. Murphy:

The Equal Employment Advisory Council (EEAC) is pleased to submit these comments in response to the Securities and Exchange Commission's Notice of Proposed Rulemaking (NPRM) pertaining to the whistleblower provisions of Section 21F of the Securities Exchange Act of 1934, added by § 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

EEAC's comments make two specific recommendations: (1) We respectfully request that the Commission modify the Final Rule to require putative whistleblowers to first raise their concerns within internal company processes designed for that purpose as a condition precedent to filing with the SEC; and (2) the Commission should provide the public with an opportunity to comment on any specific regulations designed to implement the anti-retaliation provisions of Section 21F before they are finalized.

**EEAC's Interest in the SEC's Proposed Whistleblower Regulations**

EEAC is a national nonprofit association of major employers formed in 1976 to promote sound approaches to the elimination of employment discrimination. EEAC's membership is comprised of 300 of the nation's largest private sector companies, collectively providing employment to more than 20 million people throughout the United States alone. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation of fair employment policies and practices. EEAC's members are firmly committed to the principles of equal employment opportunity.

Nearly all of EEAC's members are publicly-traded companies subject to the federal securities laws, and thus will be affected directly by the SEC's final whistleblower regulations. In addition, most if not all of EEAC's member companies have established internal complaint procedures designed to encourage employees who wish to report unlawful or just inappropriate conduct to bring their issues forward within the company. These procedures allow the company to investigate and resolve employee concerns quickly and effectively.

**Internal Reporting Should Be Made a Condition Precedent To Receiving a Whistleblower Award**

Most if not all EEAC member companies have established internal dispute resolution procedures that afford employees the opportunity to "blow the whistle" on conduct they view as illegal, inappropriate, or otherwise objectionable in the workplace. Some of these programs are directly responsive to the requirements of the Sarbanes-Oxley Act mandating the creation of procedures for "the confidential, anonymous submission by employees ... of concerns regarding questionable accounting or auditing matters" as well as other complaints regarding accounting, internal controls, and auditing. 15 U.S.C. § 78j-1(m)(4).

Some grew out of the efforts of conscientious companies to comply with the anti-discrimination laws. *See generally Faragher v. Boca Raton*, 524 U.S. 775 (1998). Others were developed in direct response to negative experiences with litigation. Indeed, the U.S. Supreme Court acknowledged the value of internal employment dispute resolution programs when it observed in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) that they "allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation."

U.S. corporations have expended millions of dollars setting up these internal procedures, many of which are "multi-step" programs that begin with a very informal process, and, if the dispute is not resolved, proceed in a linear direction to successively more formal techniques. Each company has paid careful attention, and committed significant resources, to designing a program that will best fit within its individual corporate culture and encourages employees to participate.

As a result, internal dispute resolution programs have been extremely successful in resolving employee concerns in a timely way that has proven to be mutually satisfactory to both employees and employers. In fact, an effective internal program opens and widens communication channels between employees and management and advances the twin goals of improved employee relations and the likely consequence of reduced litigation.

Regrettably, we respectfully submit that the NPRM as drafted will have the counterproductive effect of encouraging putative whistleblowers to circumvent existing internal company whistleblower procedures, no matter how effective they have proven to be, including those procedures that were specifically mandated by the Sarbanes-Oxley Act. The whole purpose behind these programs is to permit the company to take prompt and appropriate action when a concern is raised. By not including some provision making it a condition precedent for a

whistleblower to utilize her or his company's internal procedure before filing with the SEC, the rule will as a practical matter bypass any benefit that might be gained by utilizing these internal procedures.

Notably, the preamble to the NPRM acknowledges the negative effect that the SEC's whistleblower regulations are likely to have on the effectiveness of a company's existing processes for identifying and acting on potential securities violations. Although the agency claims that it has tried to limit the damage, as a practical matter, the proposed rule does nothing to encourage an employee to try to resolve his or her complaint first with the company before going to the SEC.

While we applaud the SEC for not attempting to craft a rule that would actually discourage employees from going to internal channels, we respectfully submit that the proposal as drafted will have exactly that effect.

The NPRM would not in any way *require* potential whistleblowers to first report their concerns via the company's internal process. In our view, the final rule should do so unequivocally. Only in this way will the internal processes be guaranteed a chance to work. The reality is that conscientious employees with legitimate concerns about the practices of the company they work for are more likely than not to use the internal programs to get an issue resolved. In contrast, more opportunistic individuals, whose motives are driven more by the cash bounty Section 21F offers, are likely to go right to the SEC without any consideration of bringing forth a concern internally. In either situation, company programs that are designed specifically to address employee concerns efficiently and effectively should be given the first chance to resolve potential problems.

The fact is that nothing in the SEC's proposal, the forms to be completed, or the instructions accompanying the forms, say anything that might suggest to a potential whistleblower that he or she should go through the company's compliance process before contacting the SEC. Form TCR (Tip, Complaint or Referral), for instance — the initial contact form — merely asks "Have you taken any prior action regarding your complaint," and the accompanying instructions explain this question as including "whether you reported the violation to [your company], including the compliance office, whistleblower hotline, or ombudsman." It does not in any way suggest that one *should* do so, or about the proven effectiveness of internal programs in resolving disputes.

Accordingly, EEAC respectfully urges the SEC to include in the final rule a provision that *requires* putative whistleblowers to report concerns through internal company processes, particularly those processes that are already federally mandated, as a condition precedent to filing a complaint with the SEC. The provision should instruct SEC staff to direct putative whistleblowers to the company program and give the company an opportunity to resolve the issue before the SEC proceeds with its investigation.

Moreover, the SEC can retain the provision in the proposal stating that if within 90 days the whistleblower provides information to the SEC after first complaining internally, then the

whistleblower, for bounty award purposes, will be considered to have given the information to the SEC as of the date it was provided elsewhere, and could even expand it to, for example, 180 days in order to preserve whatever rights need to be protected while giving the internal program a chance to succeed.

**Stakeholders Should Be Given Opportunity To Comment on Section 21F Retaliation Regulations Before Anything Is Finalized**

The NPRM asks for comment on whether the SEC should promulgate rules regarding the retaliation provisions of Section 21F. If the agency decides to do so, EEAC urges the SEC to first publish the regulations in proposed form to provide notice of the agency's intentions and allow interested parties the opportunity to comment. Any rules regulating the scope and handling of whistleblower retaliation claims will have a significant impact on employers. Accordingly, employers as well as any other interested parties should be afforded the opportunity to comment before any such rules become final.

In addition, a well-established body of case law already exists under the various federal laws prohibiting employment discrimination and retaliation, including but not limited to the Sarbanes-Oxley Act, and we urge the SEC to consider that precedent thoroughly before proposing regulations implementing the Section 21F anti-retaliation provisions.

For example, as the NPRM suggests in Question 42, any rules promulgated by the SEC should exclude frivolous or bad faith whistleblower claims from retaliation protection. All too often, employees who are already in jeopardy of adverse employment actions due to poor performance, violation of company rules, and the like, seek to use retaliation protection as a shield against their own misconduct. *See, e.g., Hervey v. County of Koochiching*, 527 F.3d 711 (8th Cir. 2008). Any rules adopted by the SEC should preclude this type of behavior. Rather, and in response to Question 43, any rules interpreting the retaliation provisions certainly should ensure that the anti-retaliation provisions cannot be used to shelter employees from legitimate, appropriate employment actions.

**Conclusion**

EEAC is grateful to the SEC for providing us with the opportunity to submit comments on the NPRM. We would welcome further opportunity to discuss our views with agency officials at any time.

Respectfully submitted,

Jeffrey A. Norris
President