United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

December 17, 2010

VIA EMAIL (Rule-Comments@sec.gov)

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

RE: File Number S7-33-10, Proposed Rule Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934

Dear Ms. Murphy:

The purpose of this letter is to express support for rules proposed by the Securities and Exchange Commission (SEC) to implement the new whistleblower provisions in Section 21F of the Securities Exchange Act of 1934. By providing leads or information concerning violations of federal securities laws, whistleblowers can make an important contribution to the efficiency and effectiveness of the SEC's enforcement program, one of the goals of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd Frank Act). Section 922 of the Dodd-Frank Act essentially directs the SEC to establish stronger whistleblower incentives and protections for individuals who provide the SEC with original and useful information about potential violations of the federal securities laws, and the proposed rules effectively outline the procedures and scope of a stronger whistleblower program. The proposed rules also effectively anticipate and address concerns that the program may adversely impact companies' internal compliance programs. This letter respectfully recommends, however, that Rule 21F place reasonable monetary limits on awards that will protect against inappropriate monetary incentives, while still encouraging potential whistleblowers to come forward.

Whistleblower Contributions. As Chairman Schapiro recently noted, whistleblowers can provide invaluable information to government investigators that may otherwise not come to light. Whistleblowers who are corporate insiders may also be able to act as trail guides within in a company to uncover schemes that are designed to go undetected. They can also help uncover major frauds that would otherwise be hidden for years and cause substantial harm to public investors or the U.S. treasury.

The U.S. Senate Permanent Subcommittee on Investigations, which I chair, conducts complex investigations into, among other matters, allegations of corporate misconduct, securities fraud, and misleading accounting. Some of the Subcommittee's most successful investigations have benefited from leads or information provided by cooperative insiders. Without their

information, our investigations would have been much more difficult and time consuming. With the insider information, our investigations proceeded more quickly, made more efficient use of our investigative resources, and resulted in greater understanding of the issues and greater accuracy in our findings. A nearly two-year Subcommittee investigation into abusive tax shelters, for example, culminated in a series of hearings and a report detailing misconduct by accountants, lawyers, and financial professionals involved in the design, marketing, and implementation of a variety of tax schemes. A case history focusing on KPMG benefited from several insiders who provided the Subcommittee with detailed information about the company's actions. KPMG ultimately admitted criminal wrongdoing and paid $456 million in fines, restitution, and penalties.

Insider assistance also advanced a Subcommittee investigation into how tax haven banks help U.S. clients evade U.S. taxes through concealed offshore accounts. Insiders at UBS AG in Switzerland and LGT Bank in Liechtenstein, for example, provided the Subcommittee with detailed information about the assistance provided by those banks to their U.S. clients. The Subcommittee held hearings and released a report disclosing the banks' conduct. UBS subsequently entered into a deferred prosecution agreement with the Department of Justice, in which the bank admitted helping to defraud the United States out of tax revenue and agreed, among other measures, to pay a $780 million fine. Both Switzerland and Liechtenstein also agreed to enter into stronger tax information exchange agreements with the United States and to disclose to the IRS future bank accounts opened for U.S. persons. As a result, thousands of U.S. taxpayers disclosed previously hidden offshore bank accounts to the IRS in connection with a voluntary disclosure program with reduced tax penalties.

These and other Subcommittee investigations have succeeded in part because of the assistance provided by insiders -- some of whom were whistleblowers -- reporting inappropriate conduct. The SEC can expect to receive the same benefits as a result of establishing the more vigorous whistleblower program mandated by the Dodd-Frank Act.

Corporate Compliance Programs. Some corporations have expressed concerns that the stronger whistleblower program may undermine their internal compliance programs set up after the 2002 Sarbanes-Oxley law to encourage employees to report problems internally. The concern is that whistleblowers will go straight to the SEC with their claims, bypassing corporate internal compliance programs and eliminating any opportunity for companies to self correct identified problems. These concerns, however, are addressed in the proposed rule which explicitly encourages whistleblowers to report problems to their own companies before approaching the SEC.

The proposed rule encourages whistleblowers to contact their own companies before coming to the SEC in two ways. First, proposed Rule 21F-4(b)(7) would preserve the whistleblower's "place in line" for a possible reward from the SEC if the whistleblower reports a violation or potential violation internally to the relevant company first, as long as the whistleblower reports the same information to the SEC within 90 days of the internal report.

Second, proposed Rule 21F-6 would support internal compliance programs by allowing the SEC to take into account, and potentially offer higher rewards to, whistleblowers who report

potential violations to their internal compliance programs before contacting the SEC. This monetary incentive should encourage employees to go first to their companies' internal compliance programs. Employees who bypass their compliance programs despite this monetary incentive may be concerned about retaliation or want to remain anonymous for other reasons. But the bottom line is that, under the proposed rule, whistleblowers who proceed directly to the SEC will forgo a potentially larger reward.

Some critics have expressed concern that the proposed rule "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."[1] This analysis fails to take into account, however, that a stronger SEC whistleblower program is likely to encourage companies to handle whistleblower claims more promptly and with greater care, because the failure to do so may expose the company to greater liability. Conversely, if a company handles such claims expeditiously to aid enforcement efforts, a company may receive greater leniency and thus potentially limit its liabilities. Contrary to the concern expressed, a stronger SEC whistleblower program may revitalize corporate compliance programs by encouraging companies to invest resources and attention to these offices and to whistleblower claims that now may receive little attention.

Proposed Rule 24F-4(b)(4) further protects corporate compliance programs by excluding certain employees and others from consideration for an award. These exclusions include lawyers who obtain the information through privileged communications; individuals who have a legal or contractual duty to report information; independent accountants who may obtain the information through work required under the securities laws; and employees who learn about violations through a company's internal compliance program or have responsibility to take action when the information is reported to them.

Reasonable Awards. Section 922 of Dodd-Frank authorizes the SEC to create a whistleblower program that will pay monetary rewards of between 10 and 30 percent of the penalties collected in successful SEC enforcement actions to individuals who provide the SEC with original information that leads to those enforcement actions. To be considered for an award, a whistleblower must voluntarily provide the SEC with original information that leads to the successful enforcement by the SEC in a federal court or administrative action in which the SEC obtains monetary sanctions totaling more than $1 million. Section 21F(c)(1) provides the SEC with the "discretion" to determine the amount of the award from funds actually collected from wrongdoers in response to monetary sanctions imposed on them by the SEC.

Because the SEC sometimes imposes large monetary sanctions involving hundreds of millions of dollars, careful thought should be given to how the SEC should exercise the discretion provided by the law. Persons who envision receiving tens or hundreds of millions of dollars in exchange for information may even unconsciously exaggerate a situation and, as a result, unfairly damage the reputation and activities of particular corporations or individuals. Although these persons may ultimately be denied an award, excessive monetary incentives may lead to misreporting that could lead to the waste of investigative resources and unnecessarily

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[1] Comment letter from Americans for Limited Government, Ryder Systems, Financial Services institute Inc., U.S. Chamber of Commerce, Verizon, White & Case LLP, December 7, 2010, at 3.

harm reputations. Even in the case of a whistleblower who accurately exposes misconduct, an excessive award may deprive victims of the wrongdoing with adequate recovery or deprive the SEC of funds needed to reimburse investigative expenses. In addressing this problem, the proposed rule should consider using the discretion provided in Section 21F(c)(1) to place reasonable limits on the amount of funds that can be awarded to any single whistleblower in any one matter.

The proposed rule to establish greater whistleblower incentives and safeguards, as called for in the Dodd-Frank Act, is well designed to encourage whistleblowers to come forward, strengthen the SEC's enforcement program, and provide greater investor protections. Thank you for the opportunity to comment on the proposal.

Sincerely,

Carl Levin
Chairman
Permanent Subcommittee on Investigations