

VIA ELECTRONIC MAIL

December 17, 2010

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

Dear Ms. Murphy:

On November 17, 2010, the Securities and Exchange Commission (SEC) filed in the Federal Register Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (Exchange Act) (Proposed Rules).¹ The Proposed Rules will implement Section 21F of the Exchange Act entitled "Securities Whistleblower Incentives and Protection"² and sets up a program for the SEC to pay an award of 10% - 30% of the monetary sanctions recovered in excess of \$1 million for reports of violations of the securities laws. The whistleblowers would have to supply "original information" to qualify for an award. Additionally, the Proposed Rules prohibits retaliation by employers against individuals that provide the SEC with information about potential securities violations.

The Financial Services Institute (FSI)³ welcomes this opportunity to comment on the Proposed Rules. We are filing this comment letter as a supplement to the December 7, 2010⁴ letter to the SEC signed by FSI, Americans For Limited Government, Ryder Systems, Inc., the U.S. Chamber of Commerce, Verizon, and White & Case LLP. As noted in that letter, we have very serious concerns about the Proposed Rules. Specifically, and not provided for in the December 7, 2010 comment letter, we are concerned about the potential impact the Proposed Rules may have on established compliance programs of independent broker-dealers (IBDs) and their potential to undermine an IBDs robust compliance efforts. These concerns are addressed below in more detail.

Background on FSI Members

FSI represents independent broker-dealers (IBD) and the independent financial advisors that affiliate with them. The IBD community has been an important and active part of the lives of

¹ Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Federal Register Vol. 75, No. 221, November 17, 2010, available at <http://edocket.access.gpo.gov/2010/pdf/2010-28186.pdf>.

² Public Law No: 111-20, available at http://docs.house.gov/rules/finserv/111_hr4173_finsrvcr.pdf.

³ The Financial Services Institute, Voice of Independent Broker-Dealers and Independent Financial Advisors, was formed on January 1, 2004. Our members are broker-dealers, often dually registered as federal investment advisers, and their independent contractor registered representatives. FSI has 126 Broker-Dealer member firms that have more than 188,000 affiliated registered representatives serving more than 15 million American households. FSI also has more than 14,500 Financial Advisor members.

⁴ Letter to Elizabeth M. Murphy from the Financial Services Institute, Inc., Americans For Limited Government, Ryder Systems, Inc., the U.S. Chamber of Commerce, Verizon, and White & Case LLP dated December 7, 2010, available at <http://sec.gov/comments/s7-33-10/s73310-35.pdf>.

American investors for more than 30 years. The IBD business model focuses on comprehensive financial planning services and unbiased investment advice. IBD firms also share a number of other similar business characteristics. They generally clear their securities business on a fully disclosed basis; primarily engage in the sale of packaged products, such as mutual funds and variable insurance products; take a comprehensive approach to their clients' financial goals and objectives; and provide investment advisory services through either affiliated registered investment adviser firms or such firms owned by their registered representatives. Due to their unique business model, IBDs and their affiliated financial advisors are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their financial goals and objectives.

In the U.S., approximately 201,000 financial advisors – or 64% percent of all practicing registered representatives – operate as self-employed independent contractors, rather than employees, of their affiliated broker-dealer firm.⁵ These financial advisors are self-employed independent contractors, rather than employees of the IBD firms. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans with financial education, planning, implementation, and investment monitoring. Clients of independent financial advisors are typically “main street America” – it is, in fact, almost part of the “charter” of the independent channel. The core market of advisors affiliated with IBDs is clients who have tens and hundreds of thousands as opposed to millions of dollars to invest. Independent financial advisors are entrepreneurial business owners who typically have strong ties, visibility, and individual name recognition within their communities and client base. Most of their new clients come through referrals from existing clients or other centers of influence.⁶ Independent financial advisors get to know their clients personally and provide them investment advice in face-to-face meetings. Due to their close ties to the communities in which they operate their small businesses, we believe these financial advisors have a strong incentive to make the achievement of their clients' investment objectives their primary goal.

FSI is the advocacy organization for IBDs and independent financial advisors. Member firms formed FSI to improve their compliance efforts and promote the IBD business model. FSI is committed to preserving the valuable role that IBDs and independent advisors play in helping Americans plan for and achieve their financial goals. FSI's mission is to ensure our members operate in a regulatory environment that is fair and balanced. FSI's advocacy efforts on behalf of our members include industry surveys, research, and outreach to legislators, regulators, and policymakers. FSI also provides our members with an appropriate forum to share best practices in an effort to improve their compliance, operations, and marketing efforts.

Comments on the Proposed Rule

As stated above, FSI is concerned about the potential impact the Proposed Rules may have on established compliance programs of IBDs and their potential to undermine an IBDs robust compliance efforts. Specifically, we believe that whistleblowers should have to report to the broker-dealer about potential securities violations prior to reporting to the SEC.

- **Undermining Robust Compliance Programs** – The Exchange Act defines a “broker” as “any person engaged in the business of effecting transactions in securities for the account

⁵ Cerulli Associates at <http://www.cerulli.com/>.

⁶ These “centers of influence” may include lawyers, accountants, human resources managers, or other trusted advisors.

of others,"⁷ and defines a "dealer" as "any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise."⁸ Broker and dealer (collectively broker-dealer) conduct is governed under the laws and regulations of the Securities Act of 1933 (Securities Act),⁹ the Exchange Act,¹⁰ NASD/FINRA Conduct Rules,¹¹ and the various state securities laws. Individuals who work for broker-dealers and who are licensed to sell securities products are considered registered representatives of the broker-dealer.¹² Any person engaged in the securities business of the broker-dealer who is directly or indirectly controlled by the broker-dealer, whether or not they are registered or exempt from registration to sell securities, is considered an associated person.¹³ Broker-dealers and registered representatives that conduct business in any of the 50 United States and the District of Columbia must also register and comply with the state's specific securities laws. Most states, but not all, have adopted some form of the Uniform Securities Act.¹⁴

Section 15(b)(4)(E) of the Exchange Act requires broker-dealers to adopt procedures and a system for applying such procedures "which would reasonably be expected to prevent and detect, insofar as practicable, any [such] violation . . ." ¹⁵ Moreover, NASD Rule 3010(a) requires members to "establish and maintain a system to supervise the activities of [associated persons] that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules. Final responsibility for proper supervision shall rest with the member."¹⁶ In an effort to comply with these requirements, broker-dealers, including IBDs, have developed robust and complex compliance programs to supervise the activities that take place at their firms.

In the supplementary information to the Proposed Rules, the SEC recognizes an important issue related to the monetary incentives provided to whistleblowers by Section 21F of the Exchange Act. The SEC states that the Proposed Rules may "reduce the effectiveness of a company's existing compliance, legal, audit and similar internal processes for investigating and responding to potential violations of the Federal securities laws." It goes on to state that the SEC has "included provisions in the proposed rules intended not to discourage whistleblowers who work for companies that have robust compliance programs to first report the violation to appropriate company personnel, while at the same time preserving the whistleblower's status as an original source of the information and eligibility for an award."

⁷ Securities Exchange Act of 1934, 15 U.S.C. § 78(c)(a)(1934), available at <http://www.law.uc.edu/CCL/34Act/sec3.html>.

⁸ Securities Exchange Act of 1934, 15 U.S.C. § 78(c)(a)(5)(A), available at <http://www.law.uc.edu/CCL/34Act/sec3.html>.

⁹ See generally Securities Act of 1933, 15 U.S.C. § 77a, available at <http://taft.law.uc.edu/CCL/33Act/index.html>.

¹⁰ See generally Securities Exchange Act of 1934, 15 U.S.C. § 78, available at <http://www.law.uc.edu/CCL/34Act/index.html>.

¹¹ See generally FINRA Rules, http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=607.

¹² FINRA Rule 10 (amended 1988), available at http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=8511&element_id=6474&highlight=registered+representative#r8511.

¹³ FINRA Glossary of Arbitration Terms, <http://www.finra.org/ArbitrationMediation/Glossary/>.

¹⁴ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM SECURITIES ACT (amended 2002), available at <http://www.abanet.org/buslaw/newsletter/0009/materials/uniformsecure.pdf>.

¹⁵ Securities Exchange Act of 1934, available at <http://taft.law.uc.edu/CCL/34Act/sec15.html>.

¹⁶ NASD Rule 3010(a), available at http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=4395&element_id=3717&highlight=3010#r4395.

While we are encouraged to see that the SEC has contemplated the potential incentive the whistleblower may have to bypass existing compliance, legal, and audit processes for investigating and responding to potential violations, we believe that the Proposed Rules do not go far enough to incentivize or advocate for the use of these programs. We believe that conditioning an award on the utilization of internal reporting processes would provide a strong incentive for whistleblowers to report internally. This would allow IBDs, and other companies with robust compliance systems, to continue to receive the information about potential misconduct that is essential to maintaining effective compliance programs. Moreover, we believe that an internal reporting requirement would assist in filtering out low-quality or non-securities related tips and reduce the need to consume SEC resources on such matters. Accordingly, we urge the SEC to require whistleblowers to report internally prior to reporting any potential violations to the SEC.

Conclusion

We are committed to constructive engagement in the regulatory process and, therefore, welcome the opportunity to work with you to as you implement the Whistleblower provisions of Section 21F of the Exchange Act.

Thank you for your consideration of our comments. Should you have any questions, please contact me at 202 379-0943.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dale E. Brown". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Dale E. Brown, CAE
President & CEO