December 17, 2010

Electronically and Via UPS

Elizabeth M. Murphy
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: File Number S7-33-10- Comments of Voices for Corporate Responsibility, the Government Accountability Project, Change to Win, and the National Employment Lawyers Association on the Securities and Exchange Commission's Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934

Dear Ms. Murphy:

This document encompasses the comments of Voices for Corporate Responsibility, the Government Accountability Project, Change to Win, and the National Employment Lawyers Association on the Securities and Exchange Commission's ("SEC" or "Commission") Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 ("the Exchange Act") .

I. Overview

The Dodd Frank Wall Street Reform and Consumer Protection Act, PL 111-203, 2010 HR 4173 (The "Dodd-Frank Act" or "Act") was passed to protect consumers and investors by preventing the type of financial fraud that has recently destroyed the

1250 Connecticut Avenue NW
Suite 300
Washington, DC 20036

retirement savings of millions of U.S. citizens. The Act provides a myriad of mechanisms to increase the accountability and oversight of Wall Street and key players in America's financial sector. Some of the most powerful provisions of the Act are those accorded by Section 21F "Securities Whistleblower Incentives and Protection."[1] If the SEC is able to heed the information brought forth by whistleblowers, the Commission will be in a position to take action before wrongful conduct causes injury to investors.

Our comments raise serious concerns that the Proposed Regulations indicate that the SEC does not have or does not plan to implement a process to work closely with meritorious whistleblowers and utilize their information and testimony. Curiously, the Proposed Rules set forth a process, to occur after a successful SEC enforcement action, requiring the whistleblowers to petition the SEC to advise the Commission of his or her status as a whistleblower with an entitlement to an award. If the Commission was working closely with the whistleblower, such a petition would not be necessary as the Commission would be cognizant of the whistleblower's contribution.

The text of the Proposed Rules similarly reveals an attempt to balance a tension between SEC compliance enforcement and self regulation through internal compliance mechanisms. The Proposed Rules provide too much deference, however, to internal compliance procedures. In its rulemaking efforts, the Commission must be reminded

[1] The legislative history behind the enactment of the Act reveals a clear Congressional mandate to encourage whistleblowers to come forward. In an impassioned speech on the importance of the Act, Congressman Charlie Melancon of Louisiana pledged his support, stating: "One thing we have learned through this tragedy is that the greed of criminals . . . is matched only by the danger of deregulation. The Securities and Exchange Commission, which was designed to prevent this very situation, is deeply flawed. The bill we are now considering reforms the agency and strengthens its authority to effectively and forcefully protect investors and our securities markets . . .. the bill creates incentives for whistleblowers to expose crooks. . .. Through a new whistleblower bounty program, we will reward individuals who provide tips that lead to the prosecution of fraud." Encouraging whistleblowers to come forward was an important consideration for Congress in passing the Act and the proposed SEC regulations must effectuate that intent.

that deference is not warranted where, by definition, securities fraud occurs with the knowledge and consent of the highest levels of corporate governance. Against this backdrop, internal compliance programs will almost certainly fail to effect change.[2]

These comments address these and other concerns.

II. Background on Those Filing Comments

Voices for Corporate Responsibility, www.voicsforcorporateresponsibility.com, is a project of the law firms of Grant & Eisenhofer PA, Mehri & Skalet PLLC, and the Employment Law Group, which was formed with an advisory board[3] to accomplish the following goals:

- To help corporate employees, including professionals, to stand up against officer and director decision-making that is motivated by their own personal greed and short-term interests;
- To encourage corporate employees, including professionals, to participate in regulatory and legislative reform that protects their right to address conduct that adversely impacts the corporation, shareholders, and consumers;
- To prompt corporate employees, including professionals, to recognize wrongdoing in their own place of employment, and to take action;
- To enable corporate employees, including professionals, who have lost their jobs or have been injured as a result of wrongful conduct, to network with one another in order to make themselves whole.

The Government Accountability Project (GAP) is a non-partisan, non-profit organization specializing in legal and other advocacy on behalf of whistleblowers. GAP has a 30-year history of working on behalf of government and corporate employees who

[2] Accordingly, to the extent the Commission has required a comment on whether whistleblower should be required to utilize employer-sponsored complaint and reporting procedures, the answer is there should be no such requirement. (See request for comment no. 18).

[3] Information about "Voices" is contained at www.voicesforcorporateresponsibility.com.

expose illegality, gross waste and mismanagement, abuse of authority, substantial or specific dangers to public health and safety, or other institutional misconduct undermining the public interest. GAP played a lead role in the passage of the whistleblower provisions of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), 18 U.S.C. §1514A, and is cited in its legislative history. *See* 148 CONG. REC. 6439-6440, 107th Congress, 2d Session (2002). Additionally, GAP was instrumental in implementing the anti-retaliation provisions and Sarbanes-Oxley revisions in the Dodd-Frank Act.

Change to Win is a labor federation of four national and international labor unions - the International Brotherhood of Teamsters, Service Employees International Union, United Farm Workers of America, and United Food and Commercial Workers International Union - which collectively represent approximately 5.5 million working men and women throughout the United States. As set forth in Change to Win's constitution, among the objects and purposes of the organization are to protect the rights of working people and to gain for them "affordable, quality health care" and "a retirement with dignity." To these ends, the Change to Win Investment Group works to encourage long-term shareholder returns necessary to enable funds established by its affiliates and workers themselves to invest safely and without fear of fraud or mismanagement. For their own part and on behalf of the Unions and workers they represent, Change to Win and the Change to Win Investment Group therefore have a strong interest in insuring the effective implementation of Section 12F and in promoting the adherence to the law and corporate responsibility that was the primary purpose for its enactment.

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment, and civil rights disputes such those challenging retaliation against whistleblowers. NELA provides assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar. NELA and its 68 state and local affiliates have more than 3,000 members nationwide committed to working for those who have been illegally treated in the workplace. A great many of NELA's members specialize in representing whistleblowers who face retaliation for having uncovered fraudulent or other unlawful conduct in their workplaces.

The constituencies of Voices for Corporate Responsibility, the Government Accountability Project, Change to Win, and the National Employment Lawyers Association share a particular interest in the implementation of Section 21F of the Securities Exchange Act as introduced by Section 922 of the "Dodd-Frank Act." This provision is critically important to providing early warning information to the SEC before wrongful conduct causes massive injury to shareholders as was the case with those that invested in Enron, Madoff, and Tyco. Because of the damage that securities fraud can cause to individual investors, retirees and institutional investors, efficient implementation of this legislation is critical. And efficient implementation requires strong protections for employees who blow the whistle.

III. The Dodd-Frank Enabling Legislation

The Dodd-Frank Act establishes a whistleblower program requiring the Commission to pay an award, subject to certain limitations and conditions, to whistleblowers who voluntarily provide original information to the Commission about violations of the federal securities laws leading to the successful enforcement of the covered judicial or administrative action, or related action.

These comments address: (1) matters not addressed by the Proposed Rules, (2) specific Proposed Rules, and (3) specific requests by the SEC for comments on the Proposed Rules. The following areas are covered:

- No requirement to utilize employer-sponsored complaint and reporting procedures (page 3 footnote 2);
- Matters not covered by the Proposed Rules, including the coordination of inter-government agency investigations (page 6);
- The proposed definition of a whistleblower, limited to the "individual" (page 8);
- The payment of awards and related actions (page 9);
- The proposed definition of "original information" (page 14);
- The requirements for information that leads to successful enforcement (page 17);
- The proposed definition for the term "action" (page 18)
- The proposed procedures to make a claim for an award (page 19);
- Confidentiality of submissions (page 20); and
- Staff communication with the whistleblower (page 21)

IV. Comments

A. Matters Not Covered by the Proposed Rule

1. Coordination of Inter-Government Agency Investigation

The Proposed Rules do not address the coordination of investigations by overlapping Federal agencies. While the Proposed Rules acknowledge the likelihood of related actions by other agencies (*see, e.g.,* Proposed § 240.21F-3(b)), the Rules omit any method of coordinating investigations so as not do duplicate efforts or interfere with respective inter-agency investigations while allowing the SEC to tap the expertise of agencies as to predicate conduct within their jurisdiction.

The need for coordination is particularly critical where the SEC has limited resources and must respond to claims originating from a universe of approximately 6,700 publicly traded companies and related advisors and entities. The SEC must develop a transparent process for coordination of filing and that process must begin with a disclosure on the intake form of (1) other venues where the whistleblower has made claims and (2) the identity of the agency personnel overseeing those claims.

This process is of paramount importance where the whistleblower has filed a False Claims Act, 31 U.S.C.S. 3729, *et seq.,* complaint in court and the Department of Justice (the "DOJ") and the Federal Bureau of Investigation (the "FBI") are investigating predicate conduct that may also implicate securities law violations.[4] Not only must there

[4] See head note B(2) "Payment of Awards and Related Actions" below for additional discussion.

be coordination to ensure the efficiency of the investigation, but coordination must occur to ensure that investigation of the False Claims Act allegations is not disrupted.

The False Claims Act is but one example of where there may be overlapping investigations of predicate conduct and thus the SEC must plan for coordination with multiple agencies.[5]

B. Matters Covered by the Proposed Rule

1. Definition of a Whistleblower

The proposed definition, under subsection (a), states "[y]ou are a whistleblower if, alone or jointly with others, you provide the Commission with information relating to a potential violation of the securities laws. A whistleblower must be an individual. **A company or other entity is not eligible to be a whistleblower.**" (Proposed § 240.21F-2, emphasis added).

Although the word "individual" is used in the enabling statute, use of this word in similar whistleblower legislation, i.e., the False Claims Act, 31 U.S.C. § 3730 (d), has been construed to allow non-governmental organizations (NGOs) and/or worker representatives, including labor unions, to bring claims. *See In U.S. ex rel. Koch v. Koch Industries, Inc.*, 1995 WL 812134, at *12 (N.D.Okl. Oct 6, 1995) (the Court held "the whistle-blowing insider is not the only type of person that can qualify as a *qui tam* plaintiff . . . A *qui tam* plaintiff may qualify as an original source where the 'core'

[5] See section 2, "Payment of Awards and Related Actions," 7-13 for additional comments.

information on which Plaintiffs' (complaint) is based was obtained through their own investigation."); *U.S. ex rel. Plumbers and Steamfitters Local Union No. 38 v. C.W. Roen Const. Co.*, 183 F.3d 1088 (9th Cir. 1999) (no question that a union had standing to bring a *qui tam* action alleging a contractor and its president and office manager violated the False Claims Act.); *U.S. ex rel. Local 342 Plumbers and Steamfitters v. Dan Caputo Co.*, 321 F.3d 926 (9th Cir. 2003) (local unions sued contractors under the False Claims Act for failure to pay prevailing wage rates. While the claim was not successful, it was not because the unions lacked standing).

The SEC faces a daunting task in weeding through claims made by whistleblowers. Accordingly, the rules should encourage claims made by those individuals and entities who are in the best position to document and analyze the wrongdoing. Labor unions and NGOs have the institutional capacity to digest and analyze relevant information in order to bring well documented claims. Labor unions and NGOs, by their very nature, understand the complexities of the administrative compliance process and potentially have the experience to manage claims. Therefore, discouraging these institutions from acting as whistleblowers and bringing claims to the SEC, defeats the overall intent of the Act. If these regulations are meant to serve the public interest, they must encourage whistleblowers with the capacity to bring the most meritorious claims to come forward.

2. Payment of Awards and Related Actions

a. General Comments

The SEC has acknowledged that there may be "related actions" brought by the Attorney General of the United States, an appropriate regulatory agency, a self-regulatory organization, or a state attorney general. *See* 240.21F-3(b)(1)-(4). While the SEC has Proposed Rules on the entitlement of a whistleblower to a bounty from a successful related action, the rules, as articulated earlier in these comments, provide no guidance on: (1) coordination of related investigations, and (2) cross-filing of related information.

There are, for example, numerous instances where False Claims Act (FCA), 31 U.S.C. § 3729, *et. seq.,* violations, or conduct giving rise to an FCA case, serve as the predicate for a securities law violation. For example, a pharmaceutical company which reports revenue that is the product of marketing activities proscribed by the Food Drug and Cosmetics Act of 1938, 21 U.S.C. §301 *et seq.* (2002) (the "FDCA") may similarly violate securities laws where the unlawful conduct is concealed from the market and the unlawful revenue is reported as a legal and reliable revenue stream. *See In re Pfizer Inc. Shareholder Derivative Litigation*, 2010 WL 2747447 (S.D.N.Y. July 13, 2010). The cases listed in Table 1 below illustrate some of the largest settlements resulting from federal and state government intervention in a number of cases filed by private whistleblowers.

Table 1. FCA Drug Settlements Following Government Intervention

Company	Allegations	Settlement Date	Total Settlement Amount	Criminal Fine + Disgorgement of Profits	Civil Settlement

Pfizer	Off-label marketing of Geodon, Bextra, Zyvox and Lyrica; kickbacks to doctors	September 2009	$2.3 billion	$1.3 billion	$1 billion
Eli Lilly	Off-label marketing of antipsychotic drug Zyprexa	January 2009	$1.4 billion	$615 million	$800 million
Cephalon	Off-label marketing of Gabitril, Actiq and Provigil between 2001 and 2006	September 2008	$425 million	$50 million	$375 million
Bristol-Myers Squibb	Illegal kickbacks to doctors, pharmacies and wholesale customers; price inflation on drugs including Serzone; off-label marketing of Abilify between 2002 and 2005	September 2007	$515 million	$25 million	$490 million
Serono	Off-label marketing and kickbacks for AIDS drug Serostim	October 2005	$704 million	$136.9 million	$567 million
Warner-Lambert	Off-label marketing of Neurontin between 1994 and 2002	May 2004	$430 million	$240 million	$190 million

Table 2 reported here below shows instances where courts evaluated FCA violations as securities law violations and denied defendants' motion to dismiss.

Table 2. Securities Class Action Cases Arising from Off-label Marketing of Drugs – Defendants' Motion to Dismiss Denied

#	*Case*	*Plaintiff's Name*	*Claims*	*Disposition / result*
1	*Minneapolis Firefighters' Relief Association v. Medtronic, Inc. et al*, No.08-cv-06324-PAM-AJB(D. Minn.,	Medtronic Institutional Investor Group, consisting of the: 1) Teachers Retirement	Misrepresented the true facts concerning the off-label use of the medical device maker's InFuse spinal graft.	On February 3, 2010, Judge Paul Magnuson ruled the case is allowed to proceed, but ruled that some of the company's allegedly misleading

	filed December 10, 2008)	System of Oklahoma, 2) Oklahoma Firefighters Pension Fund, 3) Union Asset Management Holding AG, and 4) Danske Invest Management A/S.		statements aren't actionable. The judge ruled that plaintiffs had successfully alleged materiality and scienter with respect to statements by Medtronic and its officers that InFuse was experiencing growth in sales primarily because of increased on-label use, and that it would likely to continue to experience sales growth for this reason.

Securities Class Action Cases Arising from Off-label Marketing of Drugs, continued...

#	*Case*	*Plaintiff's Name*	*Claims*	*Disposition / result*
2	*In re Amgen Sec. Litig.*, No. 07-cv-02536 (C.D. Calf. filed April 17, 2007)	Connecticut Retirement Plans and Trust Funds	Amgen makes and sells Epogen and Aranesp, erythropoiesis-stimulating agents, a type of drug which encourages the creation of oxygen carrying red blood cells. Defendants marketed Aranesp and Epogen to doctors for off-label uses. As a result, Amgen sold several hundred million dollars worth of drugs each year for these off-label uses. In October 2006, researchers halted a clinical cancer study because more deaths occurred in patients taking Aranesp than in those taking a placebo. Defendants did not disclose these results to investors. On February 16, 2007, *The Cancer Letter* published the results of the study and on March 9, 2007, the FDA mandated a Black Box warning regarding the off-label use of Aranesp and Epogen. These revelations caused Amgen's stock price to decline.	On February 1, 2008, the judge denied Amgen's motion to dismiss. Judge Philip Gutierrez granted Amgen's motion to toss charges against five of the nine individual Amgen officers and directors named in the suit. On August 12, 2009, the judge granted plaintiff's motion for class certification. On December 11, 2009, defendants filed a Rule 23(f) appeal with the Ninth Circuit, and asked for a stay of the case. On January 4, 2010, the judge granted plaintiff's leave to file Second Consolidated Amended Complaint.

Securities Class Action Cases Arising from Off-label Marketing of Drugs, continued...

#	*Case*	*Plaintiff's Name*	*Claims*	*Disposition / result*
3	*Yanek v. Staar Surgical Co.*, 388 F. Supp. 2d1110 (C.D. Cal. 2005) (No. 04-cv-8007, 04-cv-8263, 04-cv-8613 SJO(CWX)).	Eugene N. Yanek	Investors sued manufacturer and its president seeking to offer implantable contact lenses used by ophthalmologists and other eye care professionals to improve or correct vision in patients with cataracts, refractive conditions and glaucoma, asserting claims for securities fraud and control person liability. Company failed to notify market that they had received FDA form noting objectionable conditions at their manufacturing facilities, plaintiffs alleged.	On September 19, 2005, the court denied defendant's motion to dismiss, finding that investors sufficiently identified statements alleged to be false or misleading. On March 22, 2006, the parties announced a $3.7 million settlement, and on May 26, 2006, the judge approved the settlement.

Similarly, and by way of further example, for-profit education companies have been the target of FCA compliance actions, which served as the predicate to securities actions. *See In re Apollo Group, Inc. Securities Litigation*, 251 F.R.D. 12 (D.D.C. 2008).

Section (c) of Proposed Rule 240.21F-3 sets forth the requirements for awards in connection with related actions. In determining whether the information meets the criteria used to evaluate awards for the Commission actions, the Commission may seek confirmation of the relevant facts regarding the whistleblower's assistance. This provision highlights the need for coordination. If there were a mechanism to coordinate inter-agency investigations, the SEC would presumably understand the contribution of the whistleblower in terms of his/her value with regard to: (1) the provision of documents

that may be used in an enforcement action, (2) analysis underlying a claim, or (3) testimony in a proceeding.

Ignoring the need to know the whistleblower (assuming he or she has meritorious claims) and coordinate investigations with related agency actions, the Proposed Rule establishes that the award may be denied if "the Commission is unable to obtain sufficient and reliable information about the related action to make a conclusive determination" about whether the original information met the criteria used to evaluate awards for Commission actions.

In sum, the proposed text not only fails to find any support in the Dodd-Frank Act; it underscores the need to coordinate investigations and work with whistleblowers so that there will be no doubt about the whistleblower's contribution.

b. Request For Comment No. 3

The Commission's request for comment no. 3 seeks to establish whether the Proposed Rule should exclude from the definition of "voluntarily" situations where the information was received from a whistleblower after he/she received a request, inquiry or demand from a foreign regulatory authority, law enforcement organization or self-regulatory organization.

The Dodd-Frank Act does not support such an exclusion. Any request for information received from a foreign authority would not compel the whistleblower to provide information to the Commission. To the extent the whistleblower does provide information, it should qualify as a "voluntary" submission.

3. Original Information

a. General Comments

Proposed Rule 21F-4(b)(2) defines "independent knowledge" as factual information in possession of the whistleblower that is not derived from "publicly" available sources. The Proposed Rule further clarifies that the whistleblower may gain independent knowledge from his or her experiences, communications and observations from his or her business or social interactions.

b. Specific Requests for Comments

1. Request for Comment No. 7

Request for comment no. 7 asks whether it is appropriate to include knowledge that is learned from others as "independent knowledge" subject only to an exclusion for knowledge learned from publicly-available sources. The use of the word "publicly" provides an exclusion not found in the statute, and eviscerates the intent of 21F-4(b)(4), which mirrors the False Claims Act's limited definition of "publicly."[6] The sentence stating that "you may gain independent knowledge from your experience, communications and observations in your business and social interactions" is reasonable guidance and should serve as the definition of independent knowledge.

[6] 31 U.S.C. §§ 3730(e)(4)(A)-(B). This section of the FCA states, "[f]or purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section. False Claims Act 31 U.S.C. § 3730(e)(4)(B).

2. Request for Comment No. 14

Request for comment no. 14 elicits comments about whether the proposed exclusion for information obtained by a violation of federal or state criminal law should be extended to information obtained in violation of the criminal laws of foreign countries. This provision should not be included. If a foreign country prohibits conduct that is not a violation of U.S. federal or state criminal laws, that violation would have no relevance for the Commission's purposes and should not deter whistleblowers from coming forward or limit their right to an award. Subjecting a whistleblower to this limitation, which is not included in the Dodd-Frank Act, may undermine the whistleblower program and, in turn, prevent the Commission from uncovering violations of federal securities laws occurring in the United States.

3. Request for Comment No. 15

Request for comment no. 15 seeks comments, *inter alia*, on whether an award should be granted to a whistleblower providing information in violation of protective orders in private litigation. Protective orders are many times negotiated with the ultimate purpose of protecting non-public, highly sensitive confidential information and may be issued in compliance with the parties' obligations to respect confidentiality agreements or other agreements.

While parties have the right to protect confidential sensitive information involving business or private information, the purpose of the protective order is not to conceal violations of law by shielding essential documents from regulatory agencies.

Whistleblowers who provide information in violation of such orders should not be excluded from receiving an award.

c. Definition of Independent Analysis

Proposed section 21F-4(b)(3) defines "independent analysis" as "your own analysis, whether done alone or in combination with others. Analysis means your examination and evaluation of information that may be generally available, but reveals information that is not generally known or available to the public."

The proposed definition of independent analysis should be clarified to state that while the analysis cannot be one that is known to the Commission or published in any of the sources identified in subsections 21F-4(b)(4)(i) through (vii), "analysis" can be one which relies on facts that are derived from public sources including those identified in those subsections. To construe this section otherwise would eliminate whistleblowers such as Harry Markopolis, whose analysis, although unknown to the Commission, may rely on public information.

4. Information that Leads to Successful Enforcement

The requirements introduced by this Proposed Rule were not intended by Congress and do not otherwise find a basis in the enabling legislation. In particular, the Proposed Rule provides that the Commission will consider that the whistleblower provided original information that led to the successful enforcement of a judicial or administrative action in the following circumstances:

> "(1) If you gave the Commission original information that caused the staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning

> new or different conduct as part of a current examination or investigation, and your information **significantly contributed** to the success of the action; or (2) if you gave the Commission original information about conduct that was already under examination or investigation by the Commission, Congress, any other federal, state, or local authority, any self-regulatory organization, or the Public Company Oversight Board (except in cases where you were an original source of this information as defined in paragraph (b)(4) of this section), and your information **would not otherwise have been obtained and was essential to the success of the action.**" (Proposed Rule 21F-4(c), emphasis added).

The requirements introduced by this rule are excessively burdensome and not sufficiently defined. In the first instance, the rule requires the whistleblower to prove that the information "significantly contributed" to the success of the action. This language cannot be found in the Dodd-Frank Act and imposes an excessive burden on the whistleblower. We agree with the Commission's position that the information needs to be reliable, but we do not believe that the language of the rule successfully conveys that requirement.

Similarly, we disagree with the language of paragraph two, which imposes the unnecessary requirement that the information "would not otherwise have been obtained and was essential" to the success of the action. These requirements are also vague and do not serve the purpose of the rule. The whistleblower should not be disqualified because the staff could have obtained the information "in the normal course of the investigation." This approach would bar a whistleblower from a bounty where it is theoretically possible that the SEC could have obtained the information. The SEC is responsible for the oversight of over 6700 publicly traded companies. While it is possible to allocate resources to secure specific information, it is not possible for the SEC to be all places at all times. This provision should be reconsidered especially in light of the difficulty of

establishing a whistleblower office, as required by the Dodd-Frank Act, for lack of funding. Any assistance provided by the whistleblower to the Commission's staff with original information leading to a successful enforcement action, or related action, should be rewarded, as provided by the Dodd-Frank Act.

5. Definition of Action

Under Proposed Rule 21F-(4)(d), the Commission defines the term "action" as "a single captioned judicial or administrative proceeding." This proposed approach, as explained by the Commission, would cause the Commission "not to aggregate sanctions that are imposed in separate judicial or administrative actions for purposes of determining whether the $1,000,000 threshold is satisfied, even if the actions arise out of a single investigation."

The Proposed Rule will reach results that were not intended by Congress. The Dodd-Frank Act defines covered judicial or administrative action as "any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000." The statute does not contemplate any further limitations on the right of the whistleblower to receive an award. If the original information generates a successful action, or if a single investigation generates two related actions based on the same original information, the sanctions obtained by the Commission should be combined for the purposes of assessing whether the threshold amount has been met. A variety of reasons may cause the Commission to bring multiple actions against multiple parties although the actions were generated by the whistleblower's single submission of "original information." Accordingly, the whistleblower should not be penalized by the Commission's legal strategy.

6. Confidentiality of Submissions

We strongly agree that, as provided in Proposed Rule 21F-7, submissions should be kept confidential or anonymous. Whistleblowers are often discouraged from revealing information clearly leading to violations of laws, for fear of retaliation or any other form of discrimination. The submissions should be kept confidential to the extent permitted by law, and further steps to protect the identity of the whistleblower should be established for anonymous submissions.

7. Procedures to Make a Claim for an Award

Proposed section 21F-10 outlines the steps a whistleblower must follow to make a claim for an award. Proposed Rule 21F-10(a) places a burden on a whistleblower to check the Commission's website for Notice that an action brought by the Commission resulted in monetary sanctions exceeding $1,000,000. If the whistleblower sees the Notice, the whistleblower must file a claim (discussed below) for an award within sixty days of the publication of the Notice. Nothing in the Proposed Rule indicates that the Commission will notify the whistleblower individually or that they will be informed when Notice is published on the website. The Proposed Rule establishes that "[a] claimant's failure to timely file a request for a whistleblower award would bar that individual later seeking recovery." The proposed text has no support in the Dodd-Frank Act and places an undue burden on the whistleblower who provided original information leading to the successful enforcement of an action by the Commission. If the Commission were committed to maintaining contact with the whistleblower, its witness, the whistleblower, would not have to periodically check the Commission's website to see if his or her claim was successful. The Commission should be committed to keeping the

whistleblower informed and the burden should not be on the whistleblower to seek out information on the outcome of the action.

Proposed section 21-F-10(b) requires a whistleblower to submit a claim for an award on proposed Form WB-APP. The purpose of Proposed Form WB-APP is "to provide an opportunity for the whistleblower to 'make his case' for why he is entitled to an award by describing the information and assistance he has provided and its significance to the Commission's successful action." The requirement that the whistleblower must "make his case" in order to receive his award underscores a concern that once the whistleblower provides the Commission with the information necessary to successfully pursue an action, the Commission will do nothing to maintain contact with the whistleblower. If, after the whistleblower came forward with original information, the Commission kept a file on the whistleblower and remained committed to maintaining a transparent and open dialogue with the whistleblower, there would be no need for this section or Proposed Form WB-APP. Maintenance of contact is of critical importance if the SEC pursues an enforcement action and must secure testimony from the whistleblower.

8. Staff Communications with Whistleblower

We strongly support provision 21F-16, providing that no person may take any action to prevent a whistleblower from communicating directly with Commission staff about a potential securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement with respect to such communications. We agree that any effort to prevent whistleblower's direct communications with Commission staff about a

potential securities law violation would conflict with the purpose of the statute, which aims at encouraging whistleblowers to report violations of securities laws.

***

We appreciate the opportunity to provide our comments.

Respectfully,

Voices For Corporate Responsibility

Reuben Guttman
Lydia Ferrarese
Reena Liebling

Voices For Corporate Responsibility

Jason Zuckerman

Change to Win

Patrick Szymanski, General Counsel

National Employment Lawyers Association

Terisa E. Chaw, Executive Director

Government Accountability Project

Tom Devine, Legal Director