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December 17, 2010

U.S. Securities and Exchange Commission
100 F. Street, NE
Washington, DC 20549-1090

Attention: Elizabeth M. Murphy, Secretary

Re: Comments on the Proposed Rules Relating to Whistleblower Awards Under Section 21F of the Securities Exchange Act of 1934
File No. S7-33-10

We respectfully submit this response to Release No. 34-63237 (the "Proposing Release") in which the Securities and Exchange Commission (the "Commission") solicited comments on its proposed rules (the "Proposed Rules") for implementing the whistleblower provisions of Section 21F of the Securities Exchange Act of 1934 ("Section 21F"). We appreciate the opportunity to comment on the Proposed Rules.

I. Introduction

As discussed in more detail below, we have two significant concerns about how the Proposed Rules will affect the staff of the Commission, public companies and investors. In both cases, we fear that the Proposed Rules will not achieve the Commission's goals and will have unintended consequences for all three constituencies. These concerns are as follows:

- The Proposed Rules do not achieve the Commission's purpose of maximizing the submission of high quality tips while deterring whistleblowers from making false reports. Rather, because they contain no mechanism to screen or substantiate all reports before they are submitted to the staff, we believe that the staff, registrants, and, ultimately, investors and taxpayers, will waste substantial resources responding to tips that are irrelevant, unfounded or fraudulent.

- The Proposed Rules provide strong incentives for whistleblowers to circumvent registrants' internal reporting mechanisms and no effective incentives for whistleblowers to use them. Consequently, we believe that these rules will undermine, rather than support, existing internal compliance systems and will discourage registrants from improving their internal systems or developing new ones.

As described in more detail below, we recommend the following:

- The Commission's final rules should require that all reports for which a whistleblower seeks an award be certified by a third-party professional who attests to their good faith, foundation, accuracy and relevance. Professionals giving false

certifications would be subject to sanction under the Commission's Rules of Practice. We believe that a mechanism that uses private, professional gatekeepers and holds them responsible for the integrity of submissions under the whistleblower award program is an effective and equitable way to relieve the staff and registrants of the burden of addressing a substantial number of meritless submissions without discouraging whistleblowers with genuinely valuable information from making reports.

- The Commission's final rules should make awards available only to whistleblowers who have used the registrant's internal reporting procedures in good faith before making a report to the Commission, or who can demonstrate the futility of attempting such internal reporting. Although we believe that a rule requiring internal reporting is the far preferable approach, if the Commission rejects this approach, we recommend amending Proposed Rule 21F-6 to include internal reporting (where it is not demonstrably futile) as one of the criteria that must be considered in determining the amount of an award, with awards limited to the 10% statutory minimum for whistleblowers who do not use available internal reporting procedures in good faith before reporting to the Commission. In either case, we recommend extending the 90-day look-back period in Proposed Rule 21F-4 to one year.

II. Professional certification of all reports

Irrelevant, unfounded and fraudulent reports impose a heavy burden on the staff and on registrants, and they are likely to thwart the purposes of the Proposed Rules. The staff has limited resources to evaluate the many tips it receives, and every meritless tip the staff must address leaves it with fewer resources to identify and pursue tips that do have merit. The substantial cash awards contemplated by Section 21F will undoubtedly result in a substantial increase in the number of tips submitted to the Commission,[1] and as the Commission acknowledges, they may result in a particular increase in meritless tips.[2] If, as the Commission estimates, the whistleblower award program results in the staff receiving 30,000 tips each year,[3] meritless tips may place a very significant strain on staff resources, especially if current budget uncertainties delay or prevent the creation and staffing of the Whistleblower Office.

Likewise, as the Commission acknowledges in the Proposing Release, false or spurious allegations are tremendously costly to public companies and their shareholders.[4] A company facing investigation based on a whistleblower's unfounded tip may devote months or years of work, and potentially millions of dollars, to investigating and responding to a complaint that has no merit. Worse, responding to such complaints diverts the attention and energy of a company's senior management and legal and compliance teams from important tasks, which can be devastating in a difficult business environment where these personnel are already stretched very thin. For companies hit hard by the current downturn, these costs may be crushing, and we expect that many smaller companies will struggle to find the resources to manage their businesses effectively while they are responding to unfounded reports. The company's

[1] The volume of tips, complaints and referrals the Commission has received has increased significantly since Section 21F was enacted. Proposing Release, at 96, n. 92.
[2] *Id.* at 104-105.
[3] *Id.* at 96-97.
[4] *Id.* at 104-105.

reputation also may suffer, with the potential for long-term damage to the company's performance and its share price. In each case, it is investors, the very constituency that Section 21F is meant to protect, who will ultimately bear the cost of false reports.

It is therefore essential, both to achieve Congress's purposes in adopting Section 21F and to protect the resources of the staff, registrants, taxpayers and investors, to structure the whistleblower award program in a manner that minimizes the number of meritless tips the staff receives. It is equally important, however, that any system that screens out meritless reports or punishes fraudulent whistleblowing not discourage reporting by good faith whistleblowers who have useful information.

Under the Proposed Rules, the mechanisms for deterring fraud and screening out meritless reports are very limited. While Proposed Form WB-DEC does require whistleblowers to attest to the accuracy of the information they provide to the Commission under penalty of perjury, we expect this attestation alone will do little to protect the staff and registrants from meritless submissions. The perjury penalty would apply only in cases in which a whistleblower intentionally misleads the staff,[5] and it will do nothing to screen the staff from reports that are not fraudulent, but prove meritless nonetheless. These include both situations in which a whistleblower's report is accurate and well-founded, but does not describe relevant misconduct, and reckless "fishing expeditions," where the whistleblower makes a report based on little more than suspicion and the hope of an award. We expect that screening out a large number of these types of report before they reach the staff will substantially expand the staff's ability to address reports that do have merit.

Both the lack of credible deterrents to fraud and the inadequate screening mechanisms in the Proposed Rules can be addressed by using third-party professionals, such as accountants and attorneys,[6] as gatekeepers for all tips for which a whistleblower seeks an award. Where appropriate, gatekeepers who fail in this duty and permit fraudulent, unfounded or patently irrelevant tips would be subject to sanction by the Commission under Rule 102 of the Commission's Rules of Practice ("Rule 102"). Because it is substantially easier, both legally and administratively, for the Commission to levy sanctions under Rule 102 than it is for the United States to obtain a perjury conviction, we believe the prospect of sanctions would be a much more credible deterrent than the questionable threat of a perjury prosecution. Moreover, because the primary punishment would be directed against professionals rather than whistleblowers, we believe that such sanctions would have a less chilling effect on whistleblowing than sanctions against the whistleblowers themselves. As discussed in more detail below, we believe that

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[5] In light of the substantial legal difficulties in prosecuting perjury cases, the lack of prosecutorial resources to pursue even strong cases and the significant policy arguments against prosecuting whistleblowers in connection with tips, it seems unlikely that the United States will successfully bring perjury charges against a meaningful number of fraudulent whistleblowers. Consequently, especially in the long term, the threat of a perjury charge is unlikely to appear credible to many whistleblowers or to deter those intent on committing fraud, much less those who would make a reckless or speculative report.

[6] We have identified accountants and attorneys in this letter because the relevance of their professional expertise and the application of Rule 102 to them are clear. We expect that other professionals, particularly those with substantial experience in compliance, ombuds and human resources functions, also may be able to serve as effective gatekeepers for many submissions and that they may be able to do so at a lower cost to the whistleblower than attorneys. The Commission may wish to consider whether it is necessary to amend paragraph (b) of Rule 102 (or provide appropriate guidance) to permit non-attorneys to serve in this function and to clarify the Commission's disciplinary authority over them.

making gatekeepers responsible for the facial integrity of their clients' disclosures is fair and reasonable under the circumstances, and that, because the Commission has the power to adopt rules regulating professional fees in these cases, the cost of complying with the requirement that all whistleblowers seeking awards have their disclosures certified by a professional advisor need not discourage individuals with valuable information from making reports to the Commission.

To place professionals in this gatekeeping role, we recommend:

- Revising Proposed Rule 21F-9 to require that all individuals seeking an award under the program retain a professional advisor who is qualified to practice in front of the Commission and has not been denied the privilege of doing so;

- Revising Form WB-DEC to require professional advisor certification for all tips for which an award is sought; and

- Expanding the Form WB-DEC advisor's certification to address the good faith, foundation, relevance and accuracy of the whistleblower's tip.

Under the Proposed Rules, the attorney's certification on Form WB-DEC applies only for anonymous whistleblowers and requires that attorney to certify only that the attorney has verified the whistleblower's identity, has reviewed the Form WB-DEC (but not the Form TCR or the whistleblower's other disclosures) for completeness and accuracy, and has retained the Form WB-DEC completed by the individual. Instead, we recommend that every Form WB-DEC submitted by a whistleblower be required to include a professional advisor's certification verifying the whistleblower's identity and certifying to the Commission that, after reasonable inquiry:

- Such advisor has no reason to believe that the whistleblower's disclosures to the Commission, on the accompanying Form TCR and otherwise, are materially inaccurate or are being made in bad faith or for an improper purpose; and

- Such disclosures are supported by evidence and, on their face, provide the basis for a claim that the federal securities laws have been violated.

If these recommendations are implemented, we expect that they will deter many individuals who would otherwise be tempted to make fraudulent or unfounded claims. Professionals with expertise in the applicable legal and accounting standards also will be able to weed out claims that well-intentioned individuals submit in good faith but that, even if true in all respects, do not describe a violation of the federal securities laws. Moreover, we believe that this certification requirement will improve the quality of tips that do reach the staff, as certifying professionals push whistleblowers to articulate their disclosures as clearly as possible and substantiate them as fully as possible. Professionals can thus serve as the front line of defense against fraudulent claims, reckless ones and innocent but meritless ones, reducing the staff's burden of sorting through such claims in order to identify and pursue those that have merit, and preventing needless harm to innocent registrants and their investors.

While we recognize that a universal professional certification requirement may impose an additional cost on whistleblowers, we do not believe the requirement will prevent a significant

number of whistleblowers with valuable information from reporting to the Commission. Among other things, the Commission can control whistleblowers' cost of using professional advisors by adopting fee-limiting rules of the sort contemplated by Request for Comment 29 in the Proposing Release. A rule that limits professional fees to a reasonable amount based on the actual work done by the professional, rather than on the amount of the whistleblower's award, would prevent excessive expense to the whistleblower and may limit the development of the sort of opportunistic and aggressive contingent-fee plaintiff's bar that exists in other whistleblower regimes. We believe that limiting the development of such a bar would provide the staff additional protection from overly speculative submissions and overly demanding advocates. We also believe that a fee-limited regime will help foster the development of more reasonably priced professional advisors to assist whistleblowers, and may make it easier for professional organizations, law school clinics and similar entities to advise whistleblowers on a discounted or pro bono basis.[7]

Likewise, we believe that using sanctions against certifying professionals as the Commission's primary mechanism for punishing inappropriate whistleblowing will not limit the number or quality of professionals available to whistleblowers. The professional certification we recommend is substantially similar to the representations required from attorneys practicing in the federal courts under Rule 11 of the Federal Rules of Civil Procedure ("Rule 11"), while the sanctions available to the Commission under Rule 102 are meaningfully less severe that those available for violations of Rule 11.

III. Internal reporting

Like the Commission, we strongly believe that "[c]orporate compliance programs play a role in preventing and detecting securities violations that could harm investors. If these programs are not utilized or working, our system of securities regulation will be less effective."[8] Indeed, we believe that such programs are essential to the integrity of our capital markets, both because they provide the first, broadest and most effective means of identifying and remedying corporate fraud and because their presence and functioning fosters the development of strong compliance cultures in the companies they serve. Consequently, we believe that any whistleblower award system that has the effect of undermining, rather than enhancing, the functioning of registrants' internal compliance mechanisms will ultimately reduce, rather than improve, the overall quality of corporate compliance among U.S. public companies. Because the Proposed Rules provide a strong incentive for whistleblowers to bypass internal reporting structures and no countervailing incentive or requirement to use them, we believe that the Proposed Rules are likely to have a deeply damaging effect on registrants' carefully developed and costly internal reporting systems and, ultimately, a similarly damaging effect on the overall integrity of our capital markets. Under the Proposed Rules, whistleblowers who report information to the Commission have the prospect of a cash award of at least $100,000, while

[7] We believe that it is in the best interest of both the staff and registrants for the Commission to use its rulemaking authority to actively encourage the development of alternative, less profit-centered mechanisms for delivering appropriate advice to potential whistleblowers. Among other things, professional advisors who are not motivated primarily by the prospect of obtaining a share of the whistleblower's award are more likely to give the whistleblower objective advice, to be frank with the staff about the strengths and weaknesses of particular claims, and to actively discourage whistleblowers from making reports that lack merit.

[8] *Id.* at 51-52.

whistleblowers who report internally have no such prospect.[9] It is difficult to see how, under these circumstances, even the best-intentioned whistleblower would report internally and risk giving up the opportunity to obtain an award for his or her information.

While we recognize that the ninety-day look-back period provided for in Proposed Rule 21F-4(b)(7) is intended to give whistleblowers who wish to report internally before reporting to the Commission some protection from losing their "place in line" to a whistleblower who reports to the Commission only, the Proposed Rules do not give whistleblowers any independent incentive to report internally before reporting to the Commission. Indeed, we expect that whistleblowers who are motivated primarily by the prospect of a cash award will find nothing in Proposed Rule 21F-4(b)(7) other than a three-month delay to their pay day. Likewise, although the Commission states that one of the factors it *may* consider when determining the amount of an award is whether the whistleblower first reported violations internally,[10] it also states that internal reporting "is not a requirement for an award above the 10 percent statutory minimum."[11] Consequently, the Proposed Rules give whistleblowers no clear reason to believe that reporting violations internally before they report them to the Commission will increase the amount or likelihood of an award. Moreover, even the 10% statutory minimum award, which will equal at least $100,000, is likely to be far more attractive to a whistleblower than the prospect of receiving no award at all if he or she reports using the registrant's in-house system and the reported violation is remedied internally. Similarly, potential whistleblowers motivated by the prospect of pecuniary gain may be tempted to allow minor problems to fester rather than reporting them internally, in the hope that they will worsen over time and eventually become significant enough to garner them an award under Section 21F.

In Request for Comment 18, the Commission asks whether it should consider a rule that requires whistleblowers seeking awards first to use internal compliance and reporting procedures as one means of promoting robust corporate compliance programs. Because the Proposed Rules contain no incentives for whistleblowers to use internal reporting procedures and a large pecuniary incentive to bypass them, we strongly believe that such a requirement is essential to ensure survival of existing programs and to encourage registrants that lack such programs to develop them. We also believe that the Commission's primary reason for not including such a requirement in the Proposed Rules, that not all companies have effective and confidential internal compliance programs in place, can be effectively addressed by including a provision in the final rules that excuses whistleblowers from the internal reporting requirement if they demonstrate that reporting internally would have been futile.

Although we believe that a rule requiring internal reporting is the far preferable approach, if the Commission rejects this approach, we believe that some of the negative effects the Proposed Rules are likely to have on registrants' internal compliance programs can be reduced by giving whistleblowers a pecuniary incentive to report internally before reporting to the Commission. Accordingly, if the Proposed Rules are not amended to include an internal reporting requirement, we recommend amending Proposed Rule 21F-6 to include internal reporting (where it is not demonstrably futile) as one of the criteria that must be used in

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[9] Although some registrants have programs that reward internal whistleblowers, many others have strong, principled reasons for not adopting such programs. We do not believe it is the intention of the Commission to force registrants to adopt internal bounty programs merely to prevent employees from abandoning their internal reporting systems.

[10] *Id.* at 51.

[11] *Id.*

determining the amount of an award, with awards limited to the 10% statutory minimum for whistleblowers who do not use available internal reporting procedures before reporting to the Commission.

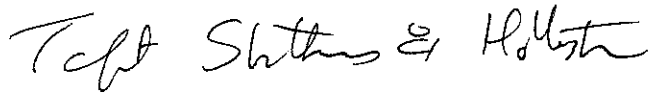
Similarly, we fear that the 90-day look-back period provided in Proposed Rule 21F-4 will not provide registrants enough time to complete an investigation of a whistleblower's report, take appropriate remedial action, and inform the whistleblower about the results of their work. Particularly in cases that involve complex allegations, entail investigation in many jurisdictions (for example, FCPA matters) or that require substantial involvement of the registrant's board of directors or audit committee, a registrant is likely to have great difficulty completing a thorough investigative and remedial process in only three months. Moreover, registrants conducting internal investigations typically keep them confidential during the pendency of the process and generally cannot give whistleblowers updates until the investigation is completed. Consequently, although a registrant is in the process of performing a thorough, good faith investigation, a whistleblower may hear nothing about his or her report for many months and so may believe it is being neglected. Additionally, registrants that investigate a whistleblower's report and determine that no misconduct occurred are likely to need additional time to satisfy both themselves and the whistleblower that this determination is accurate. Accordingly, whether or not the Proposed Rules are amended to include an internal reporting requirement, we recommend allowing a whistleblower who reports internally to preserve his or her position and priority as an "original source" if he or she reports to the Commission within one year of his or her internal disclosure.

IV. Conclusion

We believe that our recommendations will increase internal reporting to corporate compliance programs and decrease the number of meritless claims that reach the staff. As a result, companies with robust corporate compliance programs will be able to expend fewer resources defending against meritless claims and more resources remedying violations as soon as they are reported. Similarly, the staff of the Commission will need to devote fewer resources to evaluating and weeding out meritless claims and will have a greater proportion of its resources left to pursue high quality tips that identify genuine wrongdoing.

We appreciate the opportunity to participate in this rule making process and we would be happy to respond to any questions regarding this letter. If you would like to discuss our comments, please contact Arthur McMahon, III at (513) 357-9607.

Respectfully,



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