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Submitted Electronically

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

17 December 2010

Re: File No. S7-33-10 - Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934

Dear Ms. Murphy:

Ernst & Young LLP submits this comment on the SEC's proposed implementation of the whistleblower provisions of the Dodd-Frank Act ("the Rule Proposal").

As a general matter, we believe that whistleblowing is an effective and necessary mechanism to uncover wrongdoing. We support giving appropriate encouragement and protection to whistleblowers because they clearly aid in fighting financial reporting fraud and in protecting investors. Thus, we have supported the enactment of Section 301 of the Sarbanes-Oxley Act, as implemented by Rule 10A-3(b)(3) under the Exchange Act, which requires public company audit committees to establish whistleblower procedures. This provision requires audit committees to provide for the receipt and retention of reports regarding potential financial wrongdoing and to afford confidential and anonymous treatment to such reports.

By making available potentially substantial bounties, the Dodd-Frank Act will increase the frequency of whistleblower reports related to accounting and auditing matters. While that could well have a salutary effect, we caution against undermining the existing framework for responding to such whistleblower reports. As discussed below, the Rule Proposal may harm the ability of audit committees and their auditors to promote financial reporting accuracy and therefore is not in the best interest of investors.

From our perspective, the way things work under the existing framework governing the reporting of potential improprieties is typically as follows. A whistleblower will use a company's hotline, or some other means, to surface a potential wrongdoing at a company. Under our standard audit engagement letter with an issuer, which we believe is typical for the profession, the company is required to notify us of whistleblower reports alleging financial improprieties.[1] Depending on the significance of the matter, we will then require that the company perform an appropriate inquiry and notify the audit committee. If the company refuses to perform an appropriate investigation, or if we conclude after conducting our own procedures that the company's investigation is inadequate, our obligation to report the matter to the SEC under Section 10A(b) of the Exchange Act may be triggered. Accordingly, existing professional and statutory requirements establish roles for the company's management, the company's audit committee, and the auditor in tailoring an appropriate response to whistleblower reports of this nature.

The Rule Proposal may undermine this process. This is because the Proposal does not require that whistleblowers report the information to the company either before or at the same time as they report to the SEC. The Proposing Release states that whether an employee first reported the alleged violation in accordance with the company's internal procedures will be a "consideration" but "not a requirement" in setting the

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[1] Our standard engagement letter states as follows: "Management is responsible for apprising us of all allegations involving financial improprieties received by management or the Audit Committee (regardless of the source or form and including, without limitation, allegations by "whistle-blowers"), and providing us full access to these allegations and any internal investigations of them, on a timely basis. Allegations of financial improprieties include allegations of manipulation of financial results by management or employees, misappropriation of assets by management or employees, intentional circumvention of internal controls, inappropriate influence on related party transactions by related parties, intentionally misleading EY, or other allegations of illegal acts or fraud that could result in a misstatement of the financial statements or otherwise affect the financial reporting of [the company]. If [the company] limits the information otherwise available to us under this paragraph (based on [the company's] claims of attorney/client privilege, work product doctrine or otherwise), [the company] will immediately inform us of the fact that certain information is being withheld from us. Any such withholding of information could be considered a restriction on the scope of the audit and may prevent us from opining on [the company's] financial statements; alter the form of report we may issue on such financial statements; or otherwise affect our ability to continue as [the company's] independent auditors. We will disclose any such withholding of information to the Audit Committee."

amount of award (between 10% and 30%). Rel. at 51. The Rule Proposal does include a 90-day "grace period" for persons to report to the company before going to the SEC, but with no financial incentive to do so, and with such substantial monetary incentives in going to the SEC, it seems likely that whistleblowers will bypass the company's internal reporting procedures.

Government policy should not create disincentives for the use of established and appropriately functioning internal mechanisms, including the important oversight and governance roles performed by boards and audit committees. We believe government policy implementing the Dodd-Frank Act whistleblower provision should be established in a manner that supports the effective performance of such governance functions. Like auditors, audit committees play an important role on behalf of shareholders in deterring financial reporting fraud. While audit committees may not be able to prevent every fraud, removing access to warnings of potentially fraudulent behavior will not strengthen their ability to deter and detect fraud. Thus, we believe SEC rulemaking to implement the Dodd-Frank whistleblower provision should support rather than weaken the effective performance of such core governance functions.

Moreover, as SEC officials themselves have stated, the SEC is likely to receive tens of thousands of whistleblower reports each year as a result of this new law. SEC staff will need to sift diligently through these reports and follow up quickly on meritorious allegations. Otherwise, there will be instances in which the SEC will receive a report about potential wrongdoing that is not acted upon quickly, and the company might then unknowingly make erroneous statements about its financial condition or other matters, or the auditor might render an opinion on false financial statements due to a lack of the information that is in the hands of the SEC. We have confidence in the diligence of the SEC's staff, but we are concerned that, with the large quantity of whistleblower reports that will be made, some reports might not be followed up in time, and investors may be misled as a result.

Such a negative result can be avoided. We believe the SEC should require that whistleblowers report concurrently to the SEC and to the company as a condition of eligibility for financial reward under the Dodd-Frank provision. We urge the Commission to allow well-established processes and procedures for the handling of whistleblower reports, both by issuers and their auditors, to continue - with, of course, the SEC having the opportunity to step in to the internal investigative process when it might be warranted. If the SEC believes it necessary to more fully specify the minimum requirements or qualifications of such internal processes or procedures, we would encourage it to do so.

An additional concern is that the proposal might upend well-established principles of confidentiality and the ethical obligations that exist within the accounting profession. The proposal goes out of its way to recognize the importance of preserving confidentiality with respect to attorneys, stating that attorneys are excluded from obtaining a bounty with respect to "any information obtained by the attorney in the course and as a result of representation of the client." Thus, even where the attorney obtains "evidence of securities violations through document discovery from an opposing party in litigation," the attorney could not use that information to make a whistleblower submission to the SEC. Rel. at 21.

But the Rule Proposal does not similarly extend deference to the confidentiality and ethical concerns that exist in the accounting profession. The proposed rule would exclude bounty payments "if the information relates to a violation by the engagement client or the client's directors, officers or other employees." Rel. at 23. But, the Proposing Release states, awards would be available "with respect to the independent public accountant's performance of the engagement itself, such as a violation of the accountant's requirements with respect to the engagement." Rel. at 23.

We do not believe this aspect of the Rule Proposal is workable or necessary, and it is likely to disrupt the traditional sort of trust and dialogue that must exist within an audit engagement team to perform an effective audit. It is not workable because it is generally difficult to separate information about a client's potential securities law violation and information about "the accountant's requirements with respect to the engagement." Information about the company's financial statements, and information about the auditor's audit of those financial statements, is typically intertwined. There may be some exceptions, *e.g.*, with respect to the independence of the auditor or possibly to other matters, but these are unlikely to be the typical situation in which potential securities law violations are present.

Thus, to obtain the award, the audit firm employee will necessarily breach his or her substantial duties of confidentiality owed to the client. The AICPA Code of Professional Conduct, ET Section 301.01 (which has been adopted by numerous state boards), provides: "A member in public practice shall not disclose any confidential client information without the specific consent of the client." Likewise, many state legislatures have also codified an accountant-client privilege, a privilege which would be undermined by the proposed whistleblower rule.[2] Absent an expectation by the

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[2] *See, e.g.*, *FMC Corporation v. Liberty Mutual Insurance Company*, 236 Ill. App. 3d 355, 603 N.E. 2d 716 (App. Ill. 1992) (accountant-client privilege does not apply to documents provided to third parties but encompasses audit workpapers and communications between auditor and client).

client that an auditor will keep information confidential (except, of course, where judicial process has been initiated and a subpoena is issued), much of the candor that is necessary to an effective audit may be lost. (Of course, there may be instances in which the information possessed by an auditor has nothing to do with "the performance of the engagement itself," such as information about another auditor's insider trading or other types of securities law violations. Such non-engagement-related information is not subject to professional confidentiality requirements and should be treated like any other information that could appropriately be reported to the SEC through whistleblower procedures; bounties should be available for such information.)

This is not to say that we believe misconduct should not be reported and treated extremely seriously in the context of an audit engagement. Instead, we believe the approach in the proposed rule is not necessary because of the substantial procedures that currently exist for reporting of accountant misconduct. Our internal procedures require that disagreements among members of the audit engagement team be raised to senior persons outside of the engagement team until they are resolved. Moreover, it is our understanding that major accounting firms have uniformly established ethics hotlines. Within our firm, we have established EY/Ethics, a global ethics hotline to provide EY personnel, clients and others outside of the organization with a means to report, confidentially, activity that may involve unethical or illegal behavior that is in violation of professional standards or otherwise inconsistent with the firm's Global Code of Conduct. EY/Ethics is operated by an independent external organization which provides confidential, and if so desired anonymous, hotline reporting.

Moreover, unlike the typical corporate employee, for whom Congress clearly thought a bounty could encourage reporting of wrongdoing, accountants are already subject to reporting requirements by virtue of their professional status. The AICPA's Code of Conduct prohibits "permit[ing] or direct[ing] another to sign, a document containing materially false information." Further, again unlike anything in the corporate setting, accountants' work is subject to inspections by the PCAOB (and this is also unlike anything in the attorney-client sphere.) Further, our internal hotline, and how we respond to reports under the hotline, itself can be inspected and reviewed by the PCAOB.

Finally, the Rule Proposal's approach could disrupt the candor and routine give-and-take that must exist for an audit to be effective. Many issues arising in the audit require the exercise of professional judgment, and issues of judgment are properly discussed and debated within an engagement team. At EY, we are proud of our consultative culture, which strongly supports collaboration and consultation and places special emphasis on the importance of consultation in dealing with complex or subjective accounting, auditing, reporting, SEC and independence matters. We would be concerned if matters of professional judgment or internal disagreements could give rise to the reporting by an EY employee - contrary to his or her professional obligations, and contrary to the law of many jurisdictions - to seek a potential bounty payment from the SEC.

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We appreciate the opportunity to provide these comments and would be pleased to discuss them further with the Commission or its staff.

Respectfully submitted,

Ernst + Young LLP