United States of America
Securities and Exchange Commission

Proposed Rule for Implementing	)	**SEC Release No.**
Whistleblower Provisions of Section 21F	)	**34-63237**
Of the Securities Act of 1934	)	**File No. S7-33-10**
	)	

Comments of the Edison Electric Institute

I. Introduction

The Edison Electric Institute ("EEI") appreciates the opportunity to comment on the Securities and Exchange Commission's ("Commission") proposed rule implementing the whistleblower provisions of Section 21F of the Securities Exchange Act of 1934. The Commission published the proposed rule at 75 Fed. Reg. 70488 on November 17, 2010 ("proposed rule"), and invited comments by December 17, 2010.

EEI is the association of the United States shareholder-owned electric companies, international affiliates, and industry associates worldwide. Our U.S. members serve 95 percent of the ultimate customers in the shareholder-owned segment of the industry, and represent approximately 70 percent of the U.S. electric power industry.

EEI supports the goal of identifying and remedying violations of the federal securities laws in the most prompt and efficient manner. Prompt identification provides the best ability to stop violations and to minimize harm to employers and their investors. While we support the goal, we differ with the proposed rule in that we believe that employees should be required to avail themselves of employer-sponsored complaint and reporting procedures as a prerequisite to their being entitled to receive a bounty for reporting a violation to the Commission. In this regard, our comments below respond to Request for Comment No 18 on pages 36 and 37 of the release.

EEI's members are generally heavily regulated, both by state public service commissions and by various federal agencies, including the Nuclear Regulatory Commission and the Federal Energy Regulatory Commission. These companies have a long-standing tradition of a commitment to compliance and a supportive approach to employees who wish to express concerns, all consistent with law and prevailing guidance, including the Sarbanes Oxley Act, New York Stock Exchange standards, and the Federal Sentencing Guidelines for Organizations. In fact, we are unaware of any EEI member that does not have an employer-sponsored complaint and reporting process. These processes work

well and provide a prompt and effective means for reporting violations and enabling an employer to remediate the violation promptly and efficiently. We believe that retaining these processes as the first reporting mechanism is an excellent management tool, controls the costs incurred by employers, and serves as a screening mechanism for the Commission under which companies can investigate and screen complaints, thereby reducing the burden on the SEC.

EEI requests that the Commission adopt rules that will continue to promote the efficacy of these types of internal reporting mechanisms while furthering the purpose and intent of Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") to compensate employees who ultimately bear the burden of reporting violations to the Commission.

The following comments will further describe EEI's concerns with the Commission's proposed rule and suggest an alternative.

II. EEI Comments on the Commission's Proposal

EEI is concerned that the Commission's rule, as proposed, will have the unintended consequence of rendering internal compliance and reporting programs ineffectual.

Employers can guard against legal and ethical violations only if employees are trained to recognize an obligation, to immediately report misconduct to the employer, and to remediate adverse situations as quickly as possible. For years, this has been the approach presented as a "best practice" by regulators and compliance and legal professionals. Companies have expended substantial amounts of time and money training employees to these criteria and structuring internal whistleblower structures to meet these best practices. Any proposal by the Commission should optimally support these best practices, not work against them.

An approach that supports the extensive efforts of companies in building compliance programs and whistleblower structures would be consistent with the mandate of Sarbanes-Oxley, pursuant to which they were structured, and with the intent of the Dodd-Frank whistleblower requirements. Sarbanes-Oxley mandated the primary responsibilities for whistleblower complaints should reside with the public companies and their audit committees. The Commission should harmonize its approach to Dodd-Frank to support these effective programs that have been implemented under Sarbanes Oxley.

EEI has five primary concerns with the approach taken in the proposed rule to allow complaints to go directly to the Commission:

- **First, the proposed rule is likely to result in slower identification and remediation.** Under the proposed rule, the Commission will have to process a complaint and assess its facial validity before taking any action. In addition, the Commission may, in its discretion, decide not to contact the employer which would undermine the employer's ability to take action. A complaint directed to the Commission in the first instance will not be reported to the employer or be investigated as quickly, as would otherwise be likely if employer-sponsored procedures are used as an employer has every incentive to investigate a complaint quickly. Thus, under the proposed rule, investigation and remediation are likely to be delayed. Moreover, given the nature of the businesses of EEI's members, where safety is critical, any miss-directed or delayed complaint could have dangerous consequences.

- **Second, the proposed rule is likely to increase the costs of investigating and remediating violations.** When an employer learns of a potential violation, it frequently can investigate and remediate the violation using its internal legal counsel, internal audit function, and other internal resources. However once an employee notifies the Commission regarding a potential violation, an employer's management or its board of directors may feel it needs to engage outside consultants or external counsel because of the high profile nature of a Commission investigation. As a result, under the proposed rule, all complaints, even small or modest ones, are likely to result in duplicative and more costly investigations, even where there was no violation.

- **Third, the proposed rule may encourage employees to misuse the Commission's process.** If complaints may be filed directly with the Commission without prior use of the employer's complaint process, some employees (such as those who are on the verge of a performance-based termination) could be motivated to identify and report even the most far-fetched or tenuous perceived violations in order to convert a fully-justified termination into a wrongful-discharge claim. Regrettably such attempts are a common occurrence already, and are likely to increase in frequency if employees are allowed to bypass the employer's s internal reporting system and report all issues directly to the Commission. In order to address this issue, the Commission should require a "whistleblower" to first report the alleged violation to the employer, in accordance with the employer's internal procedures, and to satisfy the provisions of the employer's code of conduct in order to meet the Commission statutory definition of a whistleblower and to be eligible for a bounty.

- **Fourth, under the proposed rule, the burden for screening meritless complaints would fall upon the Commission.** While whistleblower complaints may be filed for many reasons, many, if not most, do not result in a finding of a

violation either of employer policies or federal laws. Although most employees raise a concern because they believe in good faith that a violation has occurred, employers frequently determine upon further investigation that no violation has occurred. For example, the perceived violation often is due to a misunderstanding or because the complainant does not have access to all the facts or information. Employers are in the best position, as an initial matter, to assess the validity of a concern that is reported and either to explain to the employee why no violation occurred or to implement the appropriate remediation. Avoiding meritless complaints benefits not just the employer and its investors (and even the employee), but also the Commission, which otherwise will have to consider a steady flow of meritless complaints on limited resources.

- **Fifth, the proposed rule is inconsistent with the framework of complaints processes established under Sarbanes-Oxley and other federal laws.** Sarbanes-Oxley and other federal laws require many employers to establish fair procedures for employees to raise complaints and concerns and for employers to respond to those complaints. These processes also protect whistleblowers against retaliation and contain the explicit commitment to remediate wrongdoings and prevent reoccurrences. We believe it is important to combine the implementation of Dodd Frank with these processes. As we said earlier, this approach enables companies to screen out meritless complaints and to take prompt action regarding those which have merit. If an employer fails to take action on a complaint that an employee believes has merit, the employee would still be able to file a complaint at the Commission.

  As an additional matter, the cost-benefit analysis contained in Part V of Release 34-63237 is insufficient because it does not include essential analysis of (1) the incremental cost of employers responding to investigations by the Commission as contrasted with addressing a violation initially through an internal investigation, or (2) the incremental cost of responding to meritless complaints that would not have been submitted to the Commission had the employee been required to first report the complaint through an employer-sponsored complaint and reporting process. These two costs are so certain to occur that the Commission must consider them as part of its rule-making process in order to provide an adequate cost-benefit analysis.

III. EEI urges the Commission promulgate a rule consistent with any CFTC proposal.

EEI is concerned that the Commission's proposed rule and that of the Commodities Futures Trading Commission ("CFTC") (See RIN 3038-AD04) are not fully consistent. As an example, the "90 day look back" provision of the Commission's rule is not reflected in similar language or approach in the proposed CFTC rule. A lack of

consistency of rules between the two agencies could subject both a whistleblower and an employer to confusing or even conflicting requirements.

The issue of cooperation and consistency of approach between the SEC and the CFTC is supported by these two Commissions and by the Congress as reflected in:

- The efforts of the Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues, established May 11, 2010; and
- Sections 712 and 719 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

We strongly recommend that the Commission seek to achieve a consistent approach with the CFTC prior to final adoption of the rule.

IV. Alternative to the Proposed Rule

EEI believes that the solution to the concerns expressed above is simple: Where an employer has a complaint and reporting process that

(i) is well-disclosed to all employees and is accessible to employees,
(ii) includes the ability to report violations anonymously, and
(iii) tracks each complaint, whether or not anonymous, in a manner that documents the time and content of the complaint,

Then the employee should be required to first report the violation in reasonable detail through the employer-sponsored complaint and reporting process and allow the employer a reasonable time (at least 60 days) to investigate and, if necessary, address the violation before the complaint can be filed with the Commission.

In the event that the employee is unsatisfied with the action of the employer in response to the complaint, the employee would then have the option of reporting the alleged violation to the Commission and, if warranted, receive the bounty.

This modest delay in reporting the violation to the Commission in most cases will result in a more timely and efficient remediation of the violation. It also will allow the employer the opportunity to address all complaints and to timely and efficiently resolve many meritless complaints before they go any further. Through the required tracking feature, an employee would be able to document the time of her or his complaint and thereby entitlement to the bounty. Most importantly, this gating process is entirely consistent with the purpose and intent of Section 922 of the Dodd-Frank Act to compensate employees in situations where they needed to bear the burden of reporting violations to the Commission because the employer did not respond to the employee's concern with appropriate action.

V. Conclusion

In summary, while EEI supports the goal of identifying and remedying violations of the federal securities laws in the most prompt and efficient manner, we do not believe the proposed rule implements Section 922 of the Dodd-Frank Act in a manner that is beneficial to investors. We believe that the simple change of requiring employees to report violations first through an employer's complaint and reporting process eliminates this concern and does so without raising any significant policy concerns.

If the Commission has any questions about these comments, please contact me at (202) 508-5571. Thank you.

Respectfully submitted,

Richard F. McMahon, Jr.
Executive Director
Edison Electric Institute
701 Pennsylvania Avenue, NW
Washington, DC 20004

December 17, 2010