GOOD. SMART. BUSINESS. PROFIT.
ETHISPHERE

address 1133 Broadway, Suite 708 // New York, NY 10010
phone 800-369-7583 // fax 602-712-0019
email info@ethisphere.org // web www.ethisphere.org

DESIGNATOR OF
WORLD'S MOST ETHICAL COMPANIES RANKING

December 17, 2010

United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Attention: Elizabeth M. Murphy, Secretary

Re: File Number S7-33-10, Comments on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934

To Whom It May Concern:

On behalf of the Ethisphere Institute, we submit the following comments on the Security and Exchange Commission's ("SEC") proposed rules for implementing the whistleblower provisions of Section 21F of the Securities Exchange Act of 1934 as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). In general, we are concerned that the SEC's initial approach to the Proposed Rules governing the whistleblower provisions of Dodd-Frank diminish the effectiveness of many organizations' internal ethics and compliance efforts, and might unintentionally render moot the significant resources and effort that companies have invested into their internal compliance reporting mechanisms and investigation departments. We have reserved our commentary to only those questions where we felt we had guidance to provide, and so have answered only a subset of the questions posed in the proposed rules.

Commentary 11:

The SEC writes:

Should the exclusion for "independent knowledge" or "independent analysis" go beyond attorneys and auditors, and include other professionals who may obtain information about potential securities violations in the course of their work for clients? If so, are there appropriate ways to limit the nature or extent of the exclusion so that any recognition of relationships of professional trust does not undermine the purposes of Section 21F?

GOOD. SMART. BUSINESS. PROFIT.
ETHISPHERE
address 1133 Broadway, Suite 708 // New York, NY 10010
phone 800-369-7583 // fax 602-712-0019
email info@ethisphere.org // web www.ethisphere.org

Yes, the Ethisphere Institute believes that this definition should be broader. We are concerned that, by limiting the exclusion for "independent knowledge" or "independent analysis" to attorneys and auditors, the Commission may unintentionally compromise the ability of organizations to engage other outside professionals to render necessary services to the organization. For example, an organization must periodically evaluate the effectiveness of its ethics and compliance programs under the standards established by the Federal Sentencing Guidelines. The Guidelines, DOJ Opinion Letter 02/04, the OECD Good Practice Guidelines and the proposed Principles supporting the new UK Bribery Act all cite periodic evaluation of a program by external advisors as a best practice. Indeed, in the most recent ACC-Corpedia Benchmarking Survey, 71 percent of surveyed companies reported engaging in periodic assessments.[1] These assessments regularly result in significant improvements to the quality and reach of internal compliance mechanisms, and these services are frequently performed by risk professionals who are not affiliated with professional services firms. This critical function could be significantly impacted by the suggested language, and potentially undermine the efforts by many companies to maintain best in class compliance programs that prevent misconduct and harm to shareholders.

Commentary 13:

The SEC writes:

Do the proposed exclusions for information obtained by a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity under an expectation that the person would cause the entity to take steps to respond to the violation, and for information otherwise obtained from or through an entity's legal, compliance, audit, or similar functions strike the proper balance? Will the carve-out for situations where the entity does not disclose the information within a reasonable time promote effective self- policing functions and compliance with the law without undermining the operation of Section 21F? Should a "reasonable time" be defined in the rule and, if so, what period should be specified (e.g., three months, six months, one year)? Does this provide sufficient incentives for people to

[1] Association of Corporate Counsel & Corpedia, *2010 Compliance Program and Risk Assessment Benchmarking Survey*. This number was up from70 percent of surveyed companies in 2007and 58 percent of surveyed companies in 2005.

GOOD. SMART. BUSINESS. PROFIT.
ETHISPHERE
address 1133 Broadway, Suite 708 // New York, NY 10010
phone 800-369-7583 // fax 602-712-0019
email info@ethisphere.org // web www.ethisphere.org
DESIGNATOR OF
WORLD'S MOST ETHICAL COMPANIES RANKING

continue to utilize internal compliance processes? Are there alternative or additional provisions the Commission should consider that would promote effective self-policing and self-reporting while still being consistent with the goals and text of Section 21F?

First, the Ethisphere Institute suggests that the Commission consider the standards of reporting adopted by the U.S. Department of Justice and the U.S. Sentencing Commission. The Department and Sentencing Commission most often use the terms "timely" and "prompt," respectively. Defining "reasonable" reporting to mean timely and/or prompt reporting would avoid setting different standards among various federal agencies. The Department and the Sentencing Commission have consistently used these terms with regard to organizational reporting, including in the most recent amendments to the Federal Sentencing Guidelines (effective November 1, 2010) and the USDOJ US Atty Manual, Title 9, Chapter 9-28 ("Principles of Federal Prosecution of Business Organizations"). Additionally, "reasonable" is a less definitive standard and provides little guidance to compliance officers determining when to make a report to the SEC.

Second, the Ethisphere Institute suggests that defining a specific time period within the rule will not afford the flexibility to examine the characteristics of each organization and each reported case on its own particular merits. For example, a prompt or timely report in a case involving an event that takes place in a remote location, and therefore must also take more time to properly investigate, will necessarily take much longer than an event that has occurred in the same location as the organization's compliance function. A blanket deadline approach will not properly reflect the circumstances of each individual case.

Third, the Ethisphere Institute suggests that the Proposed Rules would *remove* internal reporting incentives for employees with information related to compliance concerns and prevent organizations from investigating these issues and determining whether disclosures are necessary. We believe this framework is at odds with the principles of other federal directives, such as the Federal Sentencing Guidelines, which encourage the development of effective internal compliance programs. The Ethisphere Institute strongly supports efforts to encourage compliance with anti-corruption rules, but believes that such efforts should not come at

GOOD. SMART. BUSINESS. PROFIT.
ETHISPHERE
address 1133 Broadway, Suite 708 // New York, NY 10010
phone 800-369-7583 // fax 602-712-0019
email info@ethisphere.org // web www.ethisphere.org

the expense of robust compliance programs and internal reporting mechanisms.

Finally, the Ethisphere Institute advises that the Commission consider requiring whistleblowers to utilize internal complaint and reporting procedures, where available, *before* making a submission to the SEC. Qualifying this requirement to be necessary only when a company has robust compliance procedures in place addresses the SEC's concern that not all companies have adequate compliance mechanisms. Under the Proposed Rules, whistleblowers can sidestep internal compliance programs without risking their eligibility for a considerable reward. Hinging eligibility for a reward on whether a whistleblower first made a reasonable attempt to report the concern internally would strengthen the SEC's goal of promoting effective self-policing and self-reporting.

Commentary 16:

The SEC writes:

> *Is the provision that would credit individuals with providing original information to the Commission as of the date of their submission to another Governmental or regulatory authority, or to company legal, compliance, or audit personnel, appropriate? In particular, does the provision regarding the providing of information to a company's legal, compliance, or audit personnel appropriately accommodate the internal compliance process?*

The Ethisphere Institute suggests that the Proposed Rules require potential whistleblowers to utilize internal compliance reporting mechanisms *before* becoming eligible for a reward. While it is commendable that the SEC attempts to protect a whistleblower's "place in line" when the whistleblower first makes a report to internal compliance officers, the Ethisphere Institute is not convinced that this provision extends far enough to protect effective corporate compliance programs. Further, we recommend that whistleblower rewards be considered only if the company fails to properly disclose any violations after a reasonable amount of time has passed to conduct a thorough investigation of the reported allegations.

Commentary 18:

The SEC writes:

GOOD. SMART. BUSINESS. PROFIT.
ETHISPHERE
address 1133 Broadway, Suite 708 // New York, NY 10010
phone 800-369-7583 // fax 602-712-0019
email info@ethisphere.org // web www.ethisphere.org
DESIGNATOR OF
WORLD'S MOST ETHICAL COMPANIES RANKING

> *Should the Commission consider other ways to promote continued robust corporate compliance processes consistent with the requirements of Section 21F? If so, what alternative requirements should be adopted? Should the Commission consider a rule that, in some fashion, would require whistleblowers to utilize employer-sponsored complaint and reporting procedures? What would be the appropriate contours of such a rule, and how could it be implemented without undermining the purposes of Section 21F? Are there other incentives or processes the Commission could adopt that would promote the purposes of Section 21F while still preserving a critical role for corporate self-policing and self-reporting?*

The Ethisphere Institute suggests that the Commission can best promote continued robust compliance programs by requiring potential whistleblowers to utilize internal compliance reporting mechanisms *before* becoming eligible for a reward. Such a rule would likely require the potential whistleblower to make a reasonable effort to report, allow the organization a reasonable amount of time given the particular circumstances to investigate and respond appropriately, and would make clear that a potential whistleblower is ineligible for reward unless he or she follows the organization's established reporting process.

Commentary 19:

> The SEC writes:
>
> *Would the proposed rules frustrate internal compliance structures and systems that many companies have established in response to Section 10A(m) of the Exchange Act, as added by Section 301 of the Sarbanes-Oxley Act of 2002, and related exchange listing standards? If so, consistent with Section 21F, how can the potential negative impact on compliance programs be minimized?*

As noted in our opening commentary, the Ethisphere Institute is very concerned that the Proposed Rules would indeed frustrate internal compliance structures and systems that many companies have put in place, by providing a financial incentive to individuals to bypass or ignore such internal systems, even in circumstances where the company would address the issue if they knew about it. We strongly recommend adoption of some of the modifications

GOOD. SMART. BUSINESS. PROFIT.
ETHISPHERE
address 1133 Broadway, Suite 708 // New York, NY 10010
phone 800-369-7583 // fax 602-712-0019
email info@ethisphere.org // web www.ethisphere.org
DESIGNATOR OF
WORLD'S MOST ETHICAL COMPANIES RANKING

discussed in our response to other commentary; specifically, the adoption of a requirement that whistleblowers utilize internal compliance reporting mechanisms before becoming eligible for a reward. This would minimize the potential negative impact on existing compliances structures while simultaneously supporting the intent of Section 21F, and would place the focus on those companies who declined to take appropriate action when notified of an issue.

Commentary 27:

The SEC writes:

Should the Commission identify, by rule, additional criteria that it will consider in determining the amount of an award? If so, what criteria should be included? Should we include as a criterion the consideration of whether, and the extent to which, a whistleblower reported the potential violation through effective internal whistleblower, legal or compliance procedures before reporting the violation to the Commission? Should we include any of the other considerations described above?

The Ethisphere Institute refers the Commission to our responses to other commentary submitted herein.

Commentary 31:

The SEC writes:

We also request comment on the ineligibility criteria set forth in Proposed Rule 21F-8(c). Are there other statuses or activities that should render an individual ineligible for a whistleblower award?

The Ethisphere Institute refers the Commission to our responses to other commentary submitted herein.

Conclusion

The Ethisphere Institute recommends taking these steps to address the potential impact that the Proposed Rules would have on existing compliance structures within listed organizations. We thank you for affording us the opportunity to comment upon the Commission's Proposed Rules.

Sincerely,

/s/Alexander F. Brigham
Executive Director
The Ethisphere Institute

/s/Erica Salmon Byrne
Managing Director
The Ethisphere Council

/s/Eric Morehead
Director
The Ethisphere Council

/s/Jennifer Campisano
Director
The Ethisphere Council

About The Ethisphere Institute
The research-based Ethisphere Institute is a leading international think-tank dedicated to the creation, advancement and sharing of best practices in business ethics, corporate social responsibility, anti-corruption and sustainability. The Institute's associated membership groups, the Ethisphere Council and Business Ethics Leadership Alliance, are forums for business ethics that includes over 200 leading corporations, universities and institutions. These groups are dedicated to the development and advancement of members through increased efficiency, innovation, tools, mentoring, advice, and unique career opportunities. Ethisphere Magazine, which publishes the globally recognized World's Most Ethical Companies Ranking™, is the quarterly publication of the Institute. Ethisphere provides the only third-party verifications of compliance programs and ethical cultures, Ethics Inside Certification®, Anti-Corruption Leader Verification and Compliance Program Verification. More information on the Ethisphere Institute, including ranking projects and membership, can be found at http://www.ethisphere.com.

GOOD. SMART. BUSINESS. PROFIT.
ETHISPHERE
address 1133 Broadway, Suite 708 // New York, NY 10010
phone 800-369-7583 // fax 602-712-0019
email info@ethisphere.org // web www.ethisphere.org