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December 17, 2010

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

Re: File Number S7-33-10 Comments on Proposed Regulation Section 21F

Dear Ms. Murphy:

It is a pleasure to comment on Proposed Regulation 21F. I write from the perspective of more than twenty years working in the financial reporting arena as a CPA, attorney, accounting professor, author and investor. While the Commission's proposal contains some laudable features, on balance it materially conflicts in multiple ways – several of which are highlighted below -- with the Commission's investor-protection mandate and the objectives of the Dodd-Frank Wall Street Reform Act.

Corporate Compliance and Self-Investigation Are Ineffective

I endorse the comments of Patrick C. Burns regarding the Proposed Regulation's apparent reliance on corporate compliance programs as means of resolving the high-level corporate corruption that Congress sought to curtail with Dodd-Frank:[1]

> Let us disenthrall ourselves of the notion that corporate fraud is an accident, or that compliance programs actually work to ferret out fraud. It is simply not true.
>
> Corporate compliance programs can work to ferret out petty pilfering and embezzlement… But corporate compliance officers simply do NOT have the throw weight, within a corporation's hierarchy, to stop large-scale fraud planned within the highest levels of a company.

[1] Patrick C. Burns comments, submitted December 16, 2010, can be accessed via http://www.sec.gov/comments/s7-33-10/s73310-131.pdf.

Dodd-Frank was a knowing Congressional repudiation of the Sarbanes-Oxley school of preventative corporate-compliance. On several levels, the proposed rules effectively reverse this repudiation. Of special concern is the Commission's intention to effectively identify some whistleblowers (no telling which) to the very corporate compliance officers suspected of complicity or incompetence *before the Commission itself does anything to investigate* the whistleblower's allegations:

> We emphasize, however, that our proposal not to require a whistleblower to utilize internal compliance processes does not mean that our receipt of a whistleblower complaint will lead to internal [corporate compliance] processes being bypassed. We expect that in appropriate cases, consistent with the public interest and our obligation to preserve the confidentiality of a whistleblower, our staff will, upon receiving a whistleblower complaint, contact a company, describe the nature of the allegations, and give the company an opportunity to investigate the matter and report back… This has been the approach of the Enforcement staff in the past, and the Commission expects that it will continue in the future.[2]

It is hard to imagine a more counterproductive approach. How such an "opportunity" to self-investigate would ever be consistent with the public interest or with the whistleblower's confidentiality is unclear. What is abundantly clear is that if the Commission had employed this approach to Bernie Madoff, it would have had no impact whatever on Madoff's ability to continue operating his Ponzi. My experience representing whistleblowers tells me that such an opportunity will almost invariably result in the whistleblower's immediate outing and expulsion from employment. The mere threat posed by this attitude on the part of the Commission will stop many would-be whistleblowers in their tracks. It is a godsend to all would-be Bernie Madoffs.

<u>Original Information</u>

[2] Proposed Regulation 21F, page 34.

In direct conflict with the language of Dodd-Frank, Proposed Rule 21F-4(b)(4) gratuitously excludes from its definition of "original information" qualifying for a reward any information obtained through violation of state criminal law. Bernie Madoff would be delighted. Why? Because many states criminalize mere unauthorized access to a primary source of evidence of securities fraud: the fraudster's computer. For example, New York's Penal Code Section 156.30 makes it a class E felony to "duplicate in any manner any computer data or computer program and thereby intentionally and wrongfully deprive or appropriate from an owner thereof an economic value or benefit in excess of two thousand five hundred dollars."

Imagine if ten years ago, one of Madoff's employees had a strong suspicion that Madoff was running a Ponzi. As Harry Markopolos' 2009 testimony before the House of Representatives attests, persuading the Commission to investigate a Madoff-like scheme requires specific evidence of the kind typically available only on the computer to which only the fraudster himself has authorized access. Under the proposed rule the would-be-whistleblower employee would be obligated to run the risk of a New York felony conviction without any possibility of an SEC whistleblower reward. No rational employee would attempt it and, even with a brilliant outsider like Harry Markopolos pointing the way, Madoff would (and did) continue fleecing investors.

The Commission's rationale for leaving such evidence under wraps is unpersuasive:

> While Congress clearly intended through Section 21F to provide greater incentives for whistleblowers to come forward with information about wrongdoing, we think it is questionable that Congress intended to encourage whistleblower assistance to a law enforcement authority where the assistance itself is undertaken in violation of federal or state criminal law.[3]

This exclusion will cause the Commission to miss vital early signs of securities violations. It seems even more questionable that Congress meant the Commission to (a) turn a blind eye to such information, or (b) adjudicate violations of state or federal laws entirely beyond the jurisdiction and expertise of the Commission without writing as much into the Dodd-Frank statute. Hence, if the Commission retains this informational exclusion least it should at the very least narrow the exclusion by specifying that the information will be disqualified only where the

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[3] Proposed Regulation 21F, page 28.

act of obtaining the information is an element of a criminal offense for which the whistleblower is convicted by a court of competent jurisdiction.

The Meaning of "Analysis"

Proposed § 21F-4(b)(3) states: "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." In this context, the second instance of the term "information" seems redundant, circular and insufficient. It would seem more instructive and consistent with the underlying statute if Regulation 21F's definition of "analysis" were extended to include something along the lines of "insights that clarify, recontextualize or refocus publicly available information in a way that facilitates successful enforcement through detection of SEC violations or collection of monetary fines and penalties."

The Good Stuff

On a positive note, some features of the proposal represent improvements of False Claims Act and IRS whistleblower regimes. Two examples, both from § 240.21F-16, Staff Communications with Whistleblowers, are (a) the effective nullification of confidentiality agreements and other actions to "impede a whistleblower from communicating directly with the Commission staff about a potential securities law violation" and (b) the empowerment of the Commission staff to communicate directly with whistleblowers regardless of state bar ethics rules governing communications with represented parties.

In the False Claims Act arena, confidentiality agreements have been a roadblock to whistleblowers. Likewise, the IRS and Department of Justice often find themselves hamstrung by efforts to comply with the patchwork of state ethics rules governing communications with represented parties. These elements of Section 240.21F-16 are a step in the right direction. The Commission should be applauded for them.

Sincerely,

Kurt S. Schulzke