NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

815 16TH STREET, N.W., WASHINGTON, DC 20006 • PHONE 202-737-5315 • FAX 202-737-1308

MARK H. AYERS
CHAIRMAN

RANDY G. DEFREHN
EXECUTIVE DIRECTOR
E-MAIL: RDEFREHN@NCCMP.ORG

VIA WWW.REGULATIONS.GOV

December 17, 2010

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

Re: Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 [File Number S7-33-10; RIN 3235-AK78]

Dear Ms. Murphy:

On behalf of the National Coordinating Committee for Multiemployer Plans (NCCMP), we submit these comments in response to the Securities and Exchange Commission's ("Commission") Proposed Rule for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer plans for retirement, health and other benefits. Our purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit organization, with members, plans and plan sponsors in every major segment of the multiemployer plan universe, including in the building and construction, retail food, trucking and service and entertainment industries.

Multiemployer plans are institutional investors that rely heavily on investment returns to provide promised pension and welfare benefits to the millions of workers who rely on those benefits. Single employer plans rely just as heavily on investment returns but those plans have a greater ability to adjust contributions, and to a limited extent benefits, in response to market fluctuations. Contributions to and often benefits of multiemployer plans are collectively bargained in bargaining cycles may be from two (2) to five (5) years. Therefore, multiemployer plans have less ability than single employer plans to adjust to market fluctuations.

Market fluctuations, even extreme fluctuations, are part of the risk of investing. But neither institutional nor individual investors should be subject to additional market risk created by violations of the securities laws. These proposed regulations can provide additional protections to institutional and individual investors and to the pension benefits and health benefits provided by multiemployer plans.

I. The Importance of the Proposed Rulemaking

The recent financial crisis has demonstrated the painful and calamitous effects that are felt by all Americans when the federal securities laws are evaded. These laws play a vital role in protecting the American economy and safeguarding the decision of both large and small investors to place their money into the hands of companies who then use it to create jobs and increase the wealth of its officers and employees, in addition to its shareholders. However, not all companies have played by the rules. The most notable and flagrant examples in recent years have been the widespread accounting fraud that led to the bankruptcy of Enron and the massive ponzi scheme orchestrated by financier Bernard Madoff. Unfortunately, the Enron and Madoff scandals may just be the tip of the iceberg of corporate malfeasance in which almost all Americans have felt the impact.

On July 21, 2010, the *Wall Street Reform and Consumer Protection Act* (also referred to as the "Dodd-Frank" law after its chief sponsors) was enacted into law putting into place a number of new safeguards for policing the financial industry and preventing another economic collapse from occurring.

A key problem with combating acts of theft and fraud is that such conduct is, by nature, conducted in secret, deliberately hidden from government regulators, investors and public view. Without detection, an Enron or Madoff type networks of fraud may be launched, expanded and perpetrated into multi-billion dollar schemes until it is too late. The harm done shakes our financial and economic system to the core and leads to literally tens of billions of dollars of losses to individual and institutional investors, including pension funds created to protect the life-savings of millions of working families. The latest scandals very nearly caused complete economic collapse for many of their victims, including a number of multiemployer pension funds which were heavily invested in them.

One of the few ways to expose such conduct is to motivate individuals with knowledge of it to step forward and speak out. Some will do this simply as a matter of conscience. But those persons are often concerned, and rightfully so, about threats to their jobs and livelihoods, which can be protected by anti-retaliation measures provided under whistleblower protection laws, measures which fortunately were included in the Dodd-Frank Act. In addition, however, experience with the federal False Claims Act, also known as the Qui Tam Act, has demonstrated that to effectively fight serious fraud the indisputably best tool is a provision that provides for a reward to individuals, i.e., whistleblowers, who risk their jobs, future careers and even their lives, by having the courage to detect, expose and report illegal conduct to the proper authorities. Recognizing this reality, the Dodd Frank Act, in another prudent move, provides that substantial financial rewards should be provided to such persons

Thus, the whistleblower protection and reward provisions adopted by Dodd-Frank were envisioned to create a strong, effective, and user-friendly system to combat serious wrongdoing by encouraging whistleblowers to disclose valuable information. Specifically, Section 922 of Dodd-Frank directs the Securities Exchange Commission to establish a new awards program that would provide whistleblowers who voluntarily report original information that leads to a successful enforcement action in which the Commission obtains monetary sanctions of over

$1,000,000 a bounty of between 10-30% of the amount collected. This provides a concrete and tangible award for whistleblowers and will encourage the reporting of valuable information that could stop a securities violation before it escalates into a massive fraud that could cost investors tens of millions of dollars.

The Commission was authorized under Dodd-Frank to issue regulations to implement this new whistleblowers award program. It is essential that the new rules faithfully follow the statute they are intended to serve and that the whistleblower protection features of the law are implemented in the most effective manner possible to fully protect investors and the general public. The recommended reforms to the proposed rules set forth in these comments are designed to help realize these goals. We appreciate the thoughtfulness of the Commission in its proposed rules but also believe that substantial changes need to be made for the final regulations to be true to the requirements specified by the statute and for it to be effectively implemented to protect investors and the American people.

II. Overview of NCCMP Recommendations to Proposed Rulemaking

We suggest that the Commission adopt the seven recommendations below that we believe properly reflect the Congressional intent behind Section 922 of Dodd-Frank. If adopted these recommendations will help to ensure that the newly implemented whistleblower award program is able to most effectively combat serious wrongdoing by the financial industry to protect the hard-earned investment dollars of millions of Americans.

1. **Streamline Whistleblower Application Process:** The Commission should adopt a process similar to the whistleblower process adopted by the Internal Revenue Service, which is more user-friendly and provides an efficient system for rewarding whistleblowers who report tax law violations. The proposed rule currently requires a whistleblower to submit three (3) separate forms and also track the progress of an action that was initiated by the original information that he or she provided in order to claim an award.

2. **Limit Excluded Classifications Per Statute:** In Section 922 of Dodd-Frank, Congress provides a specific list of certain limited categories of individuals who have a legal responsibility to disclose information pertaining to securities violations and excludes them from participating in whistleblower recoveries. (Such persons cannot be considered to be making "voluntary" disclosures as required by the Act). Allowing these exceptions to be expanded in too broad a fashion would undermine the statute's central purpose of uncovering fraud and abuse. Thus, the Commission should not adopt a blanket exclusion of "*other similarly situated persons*" as proposed, but should institute a case-by-case analysis as to whether a potential whistleblower should be precluded from a recovery due to a pre-existing legal duty.

3. **Mandatory Self-Reporting of Violations to the Commission:** The Commission should ensure that the internal compliance programs are as effective as possible by requiring that any violation of the securities laws by an internal compliance program be reported to the Commission. Moreover, companies should be obligated to adopt more stringent internal

compliance programs similar to those required by other federal agencies. In addition, a person who reports a potential violation through an internal compliance program that leads to a successful action by the Commission should be given up to one (1) year from the date of making a report to the internal compliance program to file an application with the Commission to participate in a whistleblower recovery.

4. **Effective Use of Internal Compliance Programs:** A company's internal compliance program is not a surefire method of preventing or uncovering securities violations (which have, in fact, continued to increase even as more companies have adopted such programs). Therefore, the Rule should not unfairly limit recoveries of whistleblowers that bypass an internal compliance program and choose to go directly to the Commission with violation disclosures, but should protect the recovery rights of such persons since there could likely be reasonable grounds for not using an internal compliance program (such as a legitimate fear of retaliation, etc.).

5. **Regulatory Violation for Whistleblower Retaliation:** The Commission should demonstrate its commitment to preventing retaliation against whistleblowers by finding that any company that retaliates against a whistleblower commits *a separate and independent violation* of the securities laws that subjects the company to the maximum penalties for such violation provided for under the law, up to and including a delisting of the company.

6. **Public Disclosure of the Rights of Whistleblowers:** The effectiveness of the Commission's award program is dependent upon all potential whistleblowers knowing that it exists and the benefits that could come from reporting and disclosing violations of the securities laws. The Commission should establish simple and easy to understand materials that companies must distribute to their employees fully informing them of their rights as a potential whistleblower.

7. **Establish Reasonable Whistleblower Appeal Rights:** A whistleblower who provides information that the Commission decides not to pursue should be given the opportunity to appeal the decision declining to pursue the alleged violation to the Commission's Office of Inspector General. Otherwise, wholly legitimate claims that could expose fraud and other serious violations could be dismissed without appropriate investigation.

III. NCCMP Recommendations to Proposed Rulemaking

The reasons why we are suggesting that the Commission adopt these seven recommendations are discussed in greater detail below.

1. **Streamline Whistleblower Application Process:**

The most effective means for the Commission to expand the number of individuals who take advantage of the awards program and disclose information pertaining to potential violations of the securities laws is to make the process as simple as possible. The proposed regulations require the whistleblower to complete "a two-step process" for submitting original information

and making a claim for an award. (Proposed Rule ("P.R.") 60.) The whistleblower must submit to the Commission both a form detailing the original information that led to a successful enforcement action and also a declaration form attesting to the veracity of the information provided and the whistleblower's eligibility for an award. (P.R. 60.)

However, that is not the end of the process for the whistleblower. It becomes particularly onerous when the Commission requires a whistleblower to track on the Commission's website the disposition of the covered action. (P.R. 69.) Within sixty days after a notice is posted on the Commission's website, without any notification by the Commission to the whistleblower that his original information did lead to a successful enforcement action, a third form has to be submitted by the whistleblower to actually request the award that he or she is entitled to under the statute. (P.R. 70.) This is a far too complicated and burdensome process for whistleblowers to file not only a claim but also to make a separate application to receive the award. Successful whistleblower programs provide an easy process to submit a claim and are otherwise user-friendly. Whistleblowers place much at risk when choosing to disclose information of securities violations. Congress understood this when it adopted the award program and knew that it would serve a vital purpose in encouraging whistleblowers to come forward with information.

The Commission must ensure that the process is as simple as possible. There is no administrative reason why each individual who submits original information and submits a declaration form is not assigned a case number. If a claim leads to a successful enforcement action, the Commission should be able to have a record of who submitted the original information thereby eliminating the need for the whistleblower to submit another form later in the process. In particular, the sixty-day period after a notice of covered action has been listed online is far too narrow a window to allow the whistleblower to complete an application for his or her award. It creates the possibility that a whistleblower who courageously reports original information about a securities violation may unintentionally forfeit the award. This would be an absurd result under the clear Congressional mandate of Dodd-Frank. The Commission instead should implement a procedure similar to the whistleblower program established by the Internal Revenue Service for whistleblowers who report an underpayment of taxes. *See* 26 U.S.C. § 7623. In such instances, the whistleblower only has to submit IRS Form 211. *See* IRS Notice 2008-4. It is unnecessary for the whistleblower to file any subsequent forms after the IRS has concluded that he or she is entitled to an award. *Id.* There is no reason why a process that is good enough to protect the interests of taxpayers should not be adopted by the Commission to protect the interests of shareholders and investors.

2. **Limit Excluded Classifications Per Statute:**

Dodd-Frank explicitly excludes an award from being made to "a member, officer, or employee of – (i) an appropriate regulatory agency; (ii) the Department of Justice; (iii) a self-regulatory organization; (iv) the Public Company Accounting Oversight Board; or (v) a law enforcement organization . . . or to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws . . . ." 15 U.S.C. § 78u-6(c)(2). Congress sought to establish a delicate balance of the need to encourage whistleblowers to come forward with information versus not wanting to reward individuals who were already required to disclose relevant information. The legislation was enacted with a clear

and definitive list of those individuals who should be excluded from eligibility for an award. Congress made a conscious decision not to include other categories of individuals in that list. It recognized that this would dampen the incentive for whistleblowers to report serious allegations that should be made known to the Commission or other relevant agencies.

The Commission has inappropriately and unnecessarily sought to expand that definition by including "other similarly-situated persons who are under a pre-existing legal duty to report information about violations to the Commission." (P.R. 14.) This is against the clear intent of Congress to provide a set limit on the types of individuals who would be ineligible for an award. The Proposed Rule provides examples of government contracting officers or city employees whose pre-existing duty to report violations would automatically deny them the right to claim an award. (P.R. 14.) There is no limit as to how broadly such a pre-existing duty could be expanded to exclude an untold number of individuals who hold a variety of positions from being able to participate in the award program. This would erode the program's ability to perform the crucial function that Congress intended.

It would be inappropriate for the Commission to adopt a blanket rule that would exclude individuals in "similarly situated positions" from the program. Only Congress can determine what groups of individuals should not be eligible to participate in the program, and no such language was inserted into Dodd-Frank to preclude "other similarly-situated" individuals. While the Commission should not be awarding certain individuals who are legally directed or obligated to turn over pertinent information, the Commission should not base such a determination just on the position the individual holds. The Commission would still have the discretion to determine on a case-by-case basis whether an individual failed to voluntarily disclose information because the person had a preexisting legal duty. It is not necessary for the Commission to a priori decide that the position a person holds precludes him or her from submitting information voluntarily.

All individuals should be encouraged to come forward with information that could be critical for ascertaining whether the securities laws have been violated. The role of the Commission should not be to find ways of denying whistleblowers access to this critical program. Instead, it should respect the careful balance adopted by Congress. Whistleblowers whose positions are not specifically excluded under Dodd-Frank should be eligible for an award.

3. **Mandatory Self-Reporting of Violations to the Commission:**

The Commission must adopt a policy of mandatory self-reporting by companies that violate the securities laws. The information reported must be made available to the public and the investing community. This is especially important in circumstances where a company's internal compliance program has detected and cured a securities violation. A violation of the securities law occurs regardless of whether a company is able to remedy the situation before the Commission has to initiate an action. Investors have to be confident that the companies in which they invest adhere to the securities laws, and the failure of a company to do so is legitimate information for an investor to have. The risk to an investor's portfolio is enormous when a company surreptitiously violates the law and then never discloses it. This only encourages a cycle of violations followed by belated fixes.

This problem has been solved in similar circumstances where it has been taxpayers who were defrauded instead of investors. The "Close the Contractor Fraud Loophole" requires that the Federal Acquisition Regulations include provisions "that require timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts." P.L. 110-252, § 6102. The same policy should be adopted for violations of the securities laws. The markets are only able to work properly if investors and the public are aware of securities violations and can take appropriate actions to safeguard their money.

Internal compliance programs should also be bolstered to ensure that they are able to properly perform their role of detecting instances of fraud. The Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67064, provide important guidance as to how company's internal compliance programs should be strengthened to ensure that violations are detected and that appropriate action is taken to prevent their recurrence. This regulation applicable to federal contractors not only provides for stronger internal controls but also requires mandatory self-reporting of violations to an agency's Office of Inspector General. These are reasonable and effective methods of providing a check on the internal compliance programs to ensure that they are actually ensuring proper compliance with the laws and not just rubberstamping dubious company actions. Just as taxpayer should not be forced to bear the brunt of renegade contractors, investors have an equally important interest in ensuring that companies are playing by the rules.

4. **Effective Use of Internal Compliance Programs**

At the same time that the Commission should require stronger and more effective internal compliance programs, whistleblowers should not in any way be obligated to use such programs. Internal compliance programs are just one method to ensure that the federal securities laws are being properly enforced. While the proposed rule notes that "compliance with the federal securities laws is promoted when companies have effective programs for identifying, correcting, and self-reporting unlawful conduct," (P.R. 33), these programs often fail to provide an effective means for employees to feel comfortable about reporting potential violations. Dodd-Frank explicitly envisions that whistleblowers who report information directly to the Commission would be eligible for an award. *See* 15 U.S.C. § 78u-6(a)(6) (defining whistleblower as an individual who provides "information relating to a violation of the securities laws *to the Commission*) (emphasis added).

The proposed rules should not seek to punish employees who choose to bypass an internal compliance program. The Commission should abide by the clear statutory language. The Commission should remove as a consideration for the amount of an award "whether, and to 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." (P.R. 51.) Although the proposed rule states that "whistleblowers will not be penalized if they do not avail themselves of this opportunity for fear of retaliation or other legitimate reasons," (P.R. 51), this should not be a consideration employed by the Commission at all in determining the amount of an award. It detracts from the overall purpose of the legislation to encourage employees to disclose relevant information to the Commission—not to an internal

compliance program. The Commission is obligated to do whatever it can to ensure that whistleblowers who come forward with valuable information are properly rewarded. Unnecessarily limiting the award that whistleblowers are able to receive provides impediments to the success of the program.

5. **Regulatory Violation for Whistleblower Retaliation:**

Whistleblowers are a critical resource in stopping securities violations. The best means for a crooked company to persist in its illegal actions is to prevent whistleblowers from reporting violations to the authorities. A company that retaliates against a whistleblower sends a clear message to all employees that their jobs and livelihoods are at risk if information is disclosed. The Commission should institute strong penalties against companies that engage in such flagrant violations of the law. Retaliation against an employee whistleblower should be recognized as a separate and independent violation of the securities laws. For instance, the Nuclear Regulatory Commission provides that an employer cannot retaliate against an employee who provides the agency with information about an alleged violation of the law. *See* 10 C.F.R. § 50.7. An employer that takes retaliatory action is found to have committed an independent violation of the law, and there would then be sufficient grounds for the license of that company to be revoked or suspended, in addition to having civil penalties levied against it.

The Commission should send a strong message to employers that taking action against whistleblower employees cannot be tolerated at any level. A company that retaliates against an employee for disclosing information about a potential violation of the securities laws should subject itself to the maximum penalties under the law. These penalties should be mandatory and widely disseminated to all companies. It should be abundantly clear to a company what the consequences are if it retaliates against an employee. When retaliation is combined with a serious infraction of the securities laws, evidenced by monetary sanctions in excess of $1,000,000, the Commission should have the ability to de-list the company from any applicable stock exchange in order to ensure that similar violations are not allowed to reoccur.

6. **Public Disclosure of the Rights of Whistleblowers:**

The Commission should also adopt regulations requiring that information about the whistleblower award program be advertised widely. Employees should realize that disclosure of potential securities violations is not just the right thing to do. The federal government through the Commission should actively encourage the reporting of original information as demonstrated by its willingness to pay significant sums of money to individuals who report potential violations. The Commission has the authority to employ any number of methods to accomplish this task, including the implementation of a notice posting requirement or dissemination of information to newly hired employees. The Commission should also develop a brochure explaining in simple and easy to understand terms the requirements of the new whistleblower awards program and how individuals with original information can submit it to the Commission and file a claim. This is an easy and effective method of ensuring that the awards program can accomplish the purpose intended by Congress.

Prior to the enactment of Dodd-Frank, the SEC had a predecessor bounty program that existed for more than twenty years to award individuals who reported information leading to a recovery of civil penalties for an insider trading violation. A March 29, 2010 Assessment of the SEC's Bounty Program by the Commission's own Inspector General noted serious deficiencies in the program that led to very few payments and an inability of the program to serve its stated function. Office of Inspector General, S.E.C., Assessment of the SEC's Bounty Program at iii (Mar. 29, 2010). In this report, the Inspector General noted that: "The SEC bounty program has made very few payments to whistleblowers since its inception and received a relatively small number of bounty applications. As a result, the program's success has been minimal and its existence is practically unknown." *Id.* at 4. The Commission must make sure that the whistleblowers award program is not plagued by the same problems. The whistleblower awards program under Dodd-Frank is the best tool available to the Commission to learn about and prevent securities violations. The Inspector General report also noted that while a pamphlet made about the program is "a good tool for marketing [it]," there was "no evidence that staff members are generally aware of the pamphlet and provide it routinely to potential bounty applicants." *Id.* at 7. Even the Commission's staff had varying knowledge about the existence of that program. *Id.* The lack of any discussion in the regulations as to how information about the program would be disseminated to potential whistleblowers and the general public, in addition to the Commission's staff who could assist whistleblowers in submitting original information, must be corrected in the final regulations. The success of the program is dependent upon an awareness of its existence.

7. **Establish Reasonable Whistleblower Appeal Rights:**

The Commission must establish reasonable appeal rights for whistleblowers in instances in which the Commission has determined not to pursue an enforcement action. This process should allow a whistleblower to file an appeal with the Commission's Office of Inspector General after the Commission has decided not to follow through with information of a potential violation. This is a necessary check on the actions of the Commission to maximize its effectiveness in pursuing all credible leads that could demonstrate that a company has violated the securities laws. The risk faced by whistleblowers in disclosing original information about a potential violation of the law is the same regardless of whether the Commission decides to pursue an enforcement action against a company. The possibility of serious repercussions against the whistleblower still exists. The awards program provides an effective incentive to the whistleblower if it is evident that it works fairly. Providing an appeal mechanism overseen by the Commission's Office of Inspector General in instances in which the Commission decides not to pursue a claim provides reassurances to the whistleblower of the integrity of the program and also provides an additional layer of oversight to ensure that all possible violations are properly evaluated and that appropriate administrative action has been taken.

IV. Conclusion

We urge the Commission to adopt the proposed recommendations discussed above. We believe that these measures provide the necessary steps to ensure that all companies are properly adhering to the securities laws and that violators will be exposed. The whistleblowers award program provided for under Dodd-Frank provides an invaluable tool to the Commission to obtain

crucial information to prosecute instances of securities violations, which ultimately safeguards the money of investors and the American public. It is essential that the Commission take the necessary steps now while the program is being developed to allow it to be as effective as possible for years into the future.

Thank you for the opportunity to provide comments on this important proposed rule. We will be pleased to provide any additional information that you might find useful.

Sincerely,

Randy G. DeFrehn
Executive Director