Eric Dixon LLC
116 West 23rd Street
Fifth Floor
New York NY 10011
Ph. 917-696-2442
E-mail: edixon@NYBusinessCounsel.com

December 19, 2010

By E-mail to rule-comments@sec.gov

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

Re: File Number S7-3310
Dodd-Frank Proposed New Exchange Act Section 21F
Concerns Regarding Proposed Rule 21F-7 and 21F-12

To Whom It May Concern:

The following comments are to express concerns about proposed Rules 21F-7 and 21F-12 contained in Regulation 21F, which would implement the new Section 21F of the Exchange Act of 1934, as amended, entitled "Securities Whistleblower Incentives and Protection." The new Section 21F is added by Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010, Pub. L. No. 111-203, § 922(a), 124 Stat 1841 (2010)("Dodd-Frank").

Proposed Rule 21F-7 would require identifying whistleblowers (pursuant to proposed Rule 21F-10) before the Securities and Exchange Commission (the "Commission") would pay any award. Proposed Rule 21F-12 provides that awardees may not appeal the amount of an award if it is within a certain range, and that the record for any appeal shall not include "internal deliberative process materials" used to determine the claim.

The provision of monetary awards for whistleblowers is made to encourage people with knowledge or suspicion of corporate wrongdoing to provide such information. The awards support an inference that they are ***necessary*** to induce people to come forward with information about suspected corporate wrongdoing. On the other hand, they may create improper motivations for putative whistleblowers and induce false or reckless allegations that potentially may harm their subjects.

Whatever the motivations for whistleblowers, it is important to recognize that whistleblowers assume tremendous risk just by reporting an allegation of wrongdoing. The identification of whistleblowers exposes them to serious risk, including physical harm to them and their families, professional or career reprisals and community ostracization. Whistleblowers may also face retaliation from alleged wrongdoers or their associates, including civil suits. In an era which has seen revelations of huge, shocking financial frauds perpetuated by some of the pillars of the financial community (e.g., Bernard Madoff, Allen Stanford) and legal community (e.g., Marc Dreier, Scott Rothstein) that went undetected by government regulators, prosecutors, auditing firms and banking institutions for years, prospective whistleblowers can hardly be assured that government investigators will "get it right" with future investigations.

Whistleblowers fearing employment reprisals, retaliation or physical harm to themselves or their families will likely refrain from reporting wrongdoing if their anonymity to the public – and by extension, their safety -- cannot be assured. Given the Commission's recent performance, many prospective whistleblowers – however motivated – will take cold comfort in the proposed Rule's confidentiality provisions which will induce almost all informants to make anonymous submissions through counsel in order to protect themselves.

Proposed Rule 21F-7 reflects the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act (15 U.S.C. 78u-6(h)(2)) with respect to information that could reasonably be expected to reveal the identity of a whistleblower. The Commission asserts that it treats all information obtained during its investigations as confidential and nonpublic. However, the proposed rule provides for the Commission to have wide latitude for deciding when to reveal an informant's identity. Paragraph (a)(2) would authorize disclosure of a whistleblower's identity not only to domestic authorities, but also to foreign securities and law enforcement authorities when the Commission believes such disclosure is necessary to achieve the purposes of the Exchange Act and to protect investors. Disclosure of a United States person-whistleblower's identity to foreign authorities from which the whistleblower cannot seek or obtain relief, can hardly be in the interest of American whistleblowers – or investors -- who are being asked to trust their country's regulators. The Commission's wide latitude belies its claim of a standard policy of keeping confidential its investigative sources, and as a practical matter, gives prospective whistleblowers absolutely no assurance of confidentiality. A prospective whistleblower concerned about adverse consequences or reprisals cannot reasonably be asked to trust the Commission not to share his identity with **foreign** regulators. Only the naïve would expect foreign authorities to respect the wishes of a United States informant.

The Commission apparently expects many whistleblowers to provide information anonymously. Paragraph (b) of proposed Rule 21F-7 allows for anonymous submissions under certain conditions. Paragraph (b)(1) would require that anonymous whistleblowers be represented by an attorney and that the attorney's contact information be provided to the Commission at the time of the whistleblower's initial submission. However, a careful reading of the Commission's discussion accompanying the text of the proposed Rule supports the inference that the Commission intends to hold anonymous whistleblowers' lawyers responsible for any "fraudulent submissions."

The discussion accompanying Rule 21F-7 provides that the "purpose of this requirement is to ***prevent*** fraudulent submissions and to facilitate communication and assistance between the whistleblower and the Commission's staff." This statement implies that the retention of an attorney, and the attorney's performance, is designed to prevent fraudulent submissions. In essence, the ***attorney*** is the one charged with the responsibility to prevent fraud. Implicit in a delegation or mandate of responsibility (however unwarranted) is a further consequence for the failure to so prevent that fraud. Further troubling is the flexibility and potential for unbridled Commission discretion in defining "fraudulent submission" beyond its plain English meaning and potentially as broad as encompassing any reported wrongdoing which does not eventually yield a financially successful Commission action – with the anonymous whistleblower's lawyer facing uncertain civil and even criminal liability under broad statutes like Section 1001 of Title 18 of the United States Code.

It is doubtful that Congress intended either such a draconian shifting of responsibility or a major chilling effect on lawyers (which in turn would inhibit and deter whistleblowers under any circumstances). Moreover, a whistleblower intending a fraudulent submission must (in almost all cases) successfully conceal the nature of that fraud from his or her lawyer. Rule 21F-7 should be amended to narrowly define "fraudulent submission" and to further clarify that lawyers will not be held liable for their clients' fraudulent submissions the nature of which they were unaware. Such revision would protect lawyers from their clients who are inclined to make fraudulent submissions ***and*** to conceal such fraud from their lawyer.

Proposed Rule 21F-12, governing procedures for appeals, also raises concerns. Paragraph (a) of the proposed Rule provides that "the determination of whether or to whom to make an award" is appealable. However, the amount of any award, if within a range of between 10 and 30 percent of the ***collected*** sanctions, is not appealable. In addition, paragraph (b) specifying the items constituting the record on appeal deliberately excludes "internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim."

These two exclusions strongly suggest a desire to shield the award process from judicial scrutiny. Even casual observers of corporate fraud cases know that secrecy is often equated with "having something to hide." Perhaps the Commission wishes to avoid criticism from judges like the Honorable Jed Rakoff, sitting in the Southern District of New York and who famously rejected the Commission's initial $33 million settlement with Bank of America in 2009. Unfortunately, the exclusions suggest a process that is not open, transparent or likely to protect the capital markets. Such a process can hardly be optimal for encouraging whistleblowers – already facing significant deterrents – to come forward to report suspected wrongdoing. I recommend that both exclusions be deleted or amended in a manner consistent with encouraging legitimate reports of suspected wrongdoing.

Sincerely

/s/ Eric Dixon, Esq.

Eric Dixon, Esq.
Eric Dixon LLC
116 West 23rd Street
Fifth Floor
New York NY 10011
Ph. 917-696-2442
E-mail: edixon@NYBusinessCounsel.com

Eric Dixon LLC
116 West 23rd Street
Fifth Floor
New York NY 10011
Ph. 917-696-2442
E-mail: edixon@NYBusinessCounsel.com

December 13, 2010

By E-mail to rule-comments@sec.gov

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

Re: File Number S7-3310
Dodd-Frank Proposed New Exchange Act Section 21F

To Whom It May Concern:

This letter raises concerns about proposed Rule 21F-4(b)(4), contained in Regulation 21F, which would implement the new Section 21F of the Exchange Act of 1934, as amended, entitled "Securities Whistleblower Incentives and Protection." The new Exchange Act section is contained within the Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010 ("Dodd-Frank"). Rule 21F-4(b)(4) disqualifies attorneys and other specified compliance professionals from being recognized as whistleblowers who voluntarily provide the Securities and Exchange Commission (the "Commission") with "original information" about a securities laws violation that leads to a Commission enforcement action yielding monettary sanctions exceeding $1,000,000. This exclusion carves out from the definition of "independent knowledge" or "independent analysis" any information derived by attorneys and to persons such as accountants and experts when they assist attorneys on client matters, ostensibly because of the special duties they owe to clients. This letter confines its concerns to attorneys on account of their unique responsibilities to clients and the law's recognition of the attorney-client privilege.

Dodd-Frank's exclusion of attorneys from eligibility for whistleblower awards is a troubling sign of the Commission's approach towards the legal profession. However, it must be viewed in conjunction with the Commission's position recently declining to affirm an administrative law judge's dismissal of a Commission petition, seeking sanctions against a broker-dealer's general counsel for failure to supervise. See *Matter of Urban*, Exchange Act Rel. No. 63456, December 7, 2010. In its order, the Commission wrote that *Urban* raised "important legal and policy issues" including "whether Urban's professional status as an attorney and the role he played as (the broker-dealer's) general counsel affect his liability for supervisory failure," and that such issues should be resolved as part of the normal appellate process. The Commission conveyed its message that attorneys assume liability, not for any of their own actions (or inactions), but merely on account of their *status* as attorneys. This is the functional equivalent of imposing strict liability upon lawyers and making them *guarantors* of their corporate clients' compliance. As explained below, this is both unfair and counterproductive.

The Commission implies that attorneys are expected -- if not required -- to succeed (that is, not merely attempt) in deterring, detecting and preventing corporate misconduct, while given no powers or tools beyond their personal abilities and diligence to fulfill this mission and motivated only by altruism. This proposal is the latest move to "deputize" lawyers and auditors as enforcement agents of the government -- vassals of the Commission.

The unrewarded burden upon attorneys will grow. Attorneys (deemed to be unofficial, statutory deputies) would enjoy no governmental immunity (nor would they enjoy the other benefits of government employment), but in fact would bear enhanced liability and legal exposure for others' misconduct. Moreover, attorneys would have imposed upon them the difficult and unenviable task of ferreting out misconduct or fraud, essentially on an "or else" basis, while surrounded by people with both the motive and opportunity to actively defraud, deceive or interfere with attorneys trying to effect compliance, due diligence or other tasks, or try to defraud or deceive them in order to conceal a fraud or scheme. Some of these people will be the direct "bad actors," the architects of a scheme. Others can be anyone else discovering or aware of the scheme. Attorneys (and accountants) will have to contend with active interference from each group. The first class merely seeks to avoid detection. The second class may be more dangerous, as Dodd-Frank gives its members the incentive to uncover and then *conceal* evidence of fraud or illegality – including deliberately hiding it from the attorneys and accountants this proposal deems responsible for its discovery – in order to personally profit from this proposal's whistleblower rewards.

I submit that the best investigative, muckraking lawyer would have a hard time uncovering many instances of corporate wrongdoing, where the lawyer is without the actual power to obtain or compel the production of documents or preservation of evidence. Such a lawyer faces an unenviable and nearly impossible task, for his or her performance will be entirely dependent on *others*. This means depending on the honesty and obedience of the same people who gain from obstructing, deceiving or defrauding that same attorney, either to continue the fraud or scheme, or to conceal their knowledge in order to profit from a subsequent whistleblower report. The latter group could rely on proposed Rule 21F-4(a)(1) which, if enacted, would credit an individual with acting "voluntarily" in certain circumstances where the individual was aware of fraudulent conduct for an extended period of time, but chose not to come forward as a whistleblower until after he became aware of a governmental investigation or examination, such as by observing document requests being served on his employer or colleagues, but before he received an inquiry, request, or demand himself, assuming that he was not within the scope of an inquiry directed to his employer.

The Commission ignores these practical considerations, choosing instead to reserve special, negative treatment for attorneys, to make them a "targeted class" specifically chosen to bear the legal liability – and quite possibly, the jail time – for others' actions. The moral hazard this creates is obvious. The shifting of responsibility towards non-actors encourages wrongdoers to engage in further misconduct. If this misguided policy is an effort to compel greater diligence by lawyers or adherence to the "law," such an objective is based on its own set of troubling assumptions.

The Commission seems to want to redirect attorneys' duty away from their clients and towards the government. This ignores the duty of the attorney, which is and has been to zealously represent his/her client. Instead, the Commission (and often also the Department of Justice) implies that the attorney's *primary* responsibility is to *prevent* his/her corporate client's misconduct. While almost all attorneys would agree with the desirability of preventing a client's wrongdoing (in short, to save a client from itself), the reality is that an attorney who fails to represent his or her client's lawful interests will face clients' complaints to the state judiciary or bar association, abandonment by clients and an eventual diminution in his or her business generation.

It is encouraging to see that the drafters of Dodd-Frank recognized the sanctity of the attorney-client privilege. However, the recognition of that privilege as both an impediment and burden upon lawyers is far less complete. An attorney who discovers wrongdoing is permitted to withdraw from representation, but often cannot avail himself of the crime-fraud exception to the privilege. The attorney is thus strongly dissuaded from taking actions to alert others to even a suspicion of a crime or fraud. An attorney who steps forward without possessing proof of fraud or criminality beyond a reasonable doubt, even with the strongest indications and clearest of consciences, risks disciplinary proceedings (of which one potential consequence is the loss of one's professional license) and possibly-ruinous civil litigation from a client who was not ultimately prosecuted or convicted. As a result, an attorney-witness wishing to act altruistically or morally faces the choice of imperiling his or her career and risk ruinous litigation. The reasonable attorney, unlike his layperson colleagues, is most often unable to proactively confront or prevent corporate wrongdoing, both for reasons of personal, financial or professional self-preservation, and because lawyers are already viewed as whistleblowers – or de facto government agents -- by corporate wrongdoers.

Attorneys who discover wrongdoing by corporate clients face an additional conundrum. While whistleblowing can mean career ruin, as explained in the preceding paragraph, the alternative of remaining silent to ensure one's obedience to the attorney-client privilege (if merely to preserve one's career and avoid ruinous litigation) can trigger a hostile, accusatory response from regulators and prosecutors who realize that lawyers (that is, *other* lawyers) are a politically unpopular class (and also generally derided by the public and news media) and hence are vulnerable targets. Add to the mix that any report or allegation about a lawyer breaking some law or rule is likely to generate press attention, and one can see where career-ambitious and politically-ambitious regulators and prosecutors can be motivated to create lawyer-targets.

Moreover, compliance professionals like attorneys and auditors are increasingly vulnerable to criminal liability (even when there is no criminal intent!). This is especially possible when a criminal charge such as conspiracy to commit a substantive offense can be predicated on theories such as conscious avoidance and where evidence of the professional's alleged involvement may take the form of the professional's own efforts to investigate suspected wrongdoing or, even worse, uncorroborated and prospectively perjurious testimony by an admitted co-conspirator who would be able to take advantage of a perceived government animus towards the "disfavored professions" to scapegoat someone in an effort to gain leniency at sentencing.

In such a scenario, the lawyer -- through no fault of his own -- can end up with a choice of picking his battle. Remain faithful to his professional obligations and invite government "scrutiny," or succumb to pressures to assist a government inquiry (or else face investigation), thus imperiling oneself professionally. As a policy matter, it is incongruous how regulators can fairly expect members of any profession to sustain increasing expectations and burdens, increasing liabilities and penalties, and continue to be motivated only by altruism and regulators' self-serving declarations as to the scope of such professionals' duties.

The Commission has justified its attorney exclusion by citing the need to preserve the integrity of the attorney-client privilege and remove the financial incentives for attorneys or others to breach the attorney-client privilege by submitting tips disclosing privileged communications. However, proposed Section 21F's objective of combating and reducing corporate fraud is incompatible with its predicted operational effect of discouraging, deterring and interfering with the abilities of capable, conscientious lawyers and auditors from performing their duties. Rather, it will make attorneys increasingly conscious of their membership in a politically-unpopular group to which Congress seeks to shift liabilities and assign a "designated defendant" status.

It should not be assumed that such lawyers will willingly assume such liabilities and, unique among all actors (save for auditors) in the corporate world, continue to practice in a thankless, perilous regulatory environment out of altruism. It is far more likely – and economically rational -- that such able, conscientious lawyers will abandon their jobs and the legal profession entirely rather than remain as targets of convenience for others. The end result will be that the professions whose members are declared to be most able to discover or deter wrongdoing – in essence, to do the *government's* job – will become increasingly populated by the ineffective, incompetent or corrupt.

If Congress and the Commission are of the view that attorneys are ineligible for whistleblower rewards because they should not benefit from doing their jobs, simple fairness and the desire to avoid creating a moral hazard dictate that this principle should extend to all corporate employees and affiliated persons. Accordingly, I suggest that Dodd-Frank's Section 21F be revised to exclude from eligibility any employee, independent contractor, vendor, or affiliated person (such as relatives of any of the foregoing) of the company or entity which is the subject of an alleged securities law violation. Government should not reward people for doing what they should be doing in the first place. Government should also not be "playing favorites" and singling out members of certain professions for disfavored status.

Sincerely

/s/ Eric Dixon, Esq.

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Eric Dixon LLC
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New York NY 10011
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