December 3, 2010

Ms. Elizabeth M. Murphy, Secretary
United States Securities and Exchange Commission
Division of Corporation Finance
100 F Street, N.E.
Washington, D.C. 20549-1090

RE: File No. S7-33-10
Release No. 34-63237
Proposed Rules for Implementing the Whistleblower Provisions of
Section 21F of the Securities Exchange Act of 1934

Dear Ms. Murphy:

The Securities and Exchange Commission (the "Commission") has recently published proposed rules in Release No. 34-63237 (the "Release") to implement Section 21F of the Securities Exchange Act of 1934 titled "Securities Whistleblower Incentives and Protection," which was added by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") enacted on July 21, 2010. We are writing this letter, in response to the Commission's request for comments in the Release, upon the request and to address the concerns of our clients. We believe the rules proposed in the Release would seriously undermine corporate internal compliance programs, have the unintended consequence of undermining a company's own efforts to police and remedy its compliance with the federal securities laws, and place the Commission in the impossible role of whistleblower hotline and compliance officer for every public company in the United States.

Compliance with Internal Reporting Programs Should Be a Condition Precedent for Receiving Whistleblower Awards (Requests for Comment Nos. 18 and 19)

Although the Commission has expressed in the Release its intent "not to discourage" employees from first reporting potential SEC violations in accordance with a company's internal compliance programs, we believe that the proposed rules are likely to fail in this regard. The most effective way to encourage whistleblowers to first report violations to appropriate company personnel is to require them to do so as a condition to receiving awards under the proposed rules. An internal reporting requirement is unlikely to have a negative effect on the proposed rules, as companies would be given a more immediate opportunity to cure or mitigate potential violations and the whistleblower would remain protected by the anti-retaliation provisions in the Dodd-Frank Act. As written, the proposed rules will encourage opportunistic whistleblowers to report violations to the Commission before a company is provided the opportunity to address the matter itself.

The "safeguards" included in the Release "not to discourage" employees from first reporting potential violations in accordance with internal compliance programs do not provide sufficient incentives to employees to report potential wrongdoing to the company first. Under the proposed rules, an employee who provides information to the company's legal or compliance personnel must report the information to the Commission within 90 days to preserve his or her ability to receive a whistleblower award. Instead of

watching the calendar and risking the reporting of the matter to the Commission by another employee or the resolution of the matter by the company without any sanctions, employees will have a strong incentive to bypass internal compliance programs hoping for sanctions against the company and an award for themselves. In addition, although the Release notes that the Commission "will consider higher percentage awards for whistleblowers who first report violations through their compliance programs," it is questionable whether such an uncertain award will cause a whistleblower to jeopardize an award altogether by first reporting a violation to the company. We believe that whistleblowers are more likely to be influenced by the Commission's assurances that whistleblowers "will not be penalized" for failure to first report the matter internally, so long as they are able to concoct any "fear of retaliation" or other "legitimate" excuse.

Further, although the Release notes that "in appropriate cases" the Commission "expect[s]" to give the company notice of a reported violation and an opportunity to conduct an investigation and report back to the Commission before it commences an investigation, this expectation is not embodied in the text of the proposed rules and does not provide certainty to companies that they will gain notice of an alleged violation at the earliest possible time. We question whether it is the best use of the Commission's resources to serve as the *de facto* whistleblower hotline for every public company in the United States and how the Commission will be able to effectively discern which reported violations are credible and which are not. We are doubtful that corporate governance in the United States will, on balance, be improved by rules that facilitate keeping companies in the dark about their own alleged violations.

Internal compliance programs are widespread—if not universal—among public companies in the United States, and we believe that most public companies, particularly the largest public companies, have robust and credible programs. The Commission's efforts to ensure compliance with the federal securities laws will be most aided by rules that respect and support the efficacy of internal compliance programs.

For these reasons, we believe that whistleblower awards should be available only to employees who have reported a potential violation in accordance with the company's internal compliance programs prior to contacting the Commission.

Whistleblower Anti-Retaliation Provisions Should Expressly Permit Company Disciplinary Action for Violation of Internal Compliance Programs (Request for Comment Nos. 18, 19 and 43)

We also believe that the proposed rules should permit companies to take disciplinary action against employees who fail to comply with the reporting requirements of a company's internal compliance programs. Internal compliance programs require employees who become aware of potential legal violations to report such violations to the company, and provide for disciplinary action, up to termination of employment, for employees who do comply with this requirement. These provisions are a critical component of a company's legal and ethical compliance programs, but the whistleblower anti-retaliation provisions would render these provisions practically unenforceable.

If an employee reported a potential violation to the Commission, but failed to report the alleged violation to the company, the company would find it very difficult to take disciplinary action for the breach of the company's internal compliance program because the employee would allege retaliation against him or her

for providing information to the Commission. Even if the company could ultimately prevail in litigation of the issue, the costs and risks associated with such litigation will discourage most companies from taking disciplinary against an employee who has blatantly violated company ethics policies and thumbed his or her nose at the company's compliance program. In addition, an employee who has been aware of a violation, but has chosen not to report it (perhaps for months or years), would be incentivized to rush to the Commission upon the commencement of an internal investigation in the hopes of obtaining the protection of the anti-retaliation provisions.

A company's ability to discipline employees for failing to comply with internal reporting requirements is critical not only to ensure that such programs are robust and effective but that employees are fulfilling their overall responsibilities to the company. As an example, if a manager or officer learns of an SEC violation or other wrongdoing by a subordinate, but does not report the matter to his or her own superiors or undertakes efforts to cover-up the matter, a company may determine to take disciplinary action against the manager/officer, not only to ensure compliance with the company's internal reporting requirements but to remove an employee who has demonstrated poor judgment and ethical behavior.

Whistleblower Anti-Retaliation Provisions Should Except Company Adverse Action Based on Factors Other than Whistleblower Status (Request for Comment Nos. 42 and 43)

The proposed rules should also be written to ensure that the anti-retaliation provisions do not serve to prevent legitimate adverse actions by a company against an employee. Without such regulations, employees could attempt to preempt legitimate adverse actions by their employers by hastily reporting a "potential violation" of the securities laws to the Commission. In addition, after facing a legitimate demotion or reprimand for poor performance or violation of company policies, employees could similarly attempt to gain protection against further adverse action by making a report to the Commission. Without regulations that protect a company in taking legitimate adverse actions against employees, the proposed rules would impede the ability of companies to manage their workforces and police their internal policies. The anti-retaliation rules should not protect employees who are poor performers, have engaged in misconduct or have demonstrated poor ethical behavior.

Similarly, the anti-retaliation provisions should not protect individuals who are criminally convicted of an SEC violation or knowingly provide false or fraudulent information in their whistleblower submissions or in connection with their other dealings with the Commission. As the Commission notes on Page 59 of the Release, proposed Rule 21F-2[1] "reiterates that a determination that a whistleblower is ineligible to receive an award ***for any reason*** does not deprive the individual of the anti-retaliation protections set forth in Section 21F(h)(1) of the Exchange Act" (emphasis added). We believe that the Commission should reconsider the scope of this protection. Individuals who submit false or fraudulent whistleblower submissions to the Commission, otherwise mislead the Commission or are criminally convicted of an SEC violation—any of which would specifically render an employee ineligible for a whistleblower award under the proposed rules—should not be safe from discipline or termination by their employers. These are the types of employees that the federal securities laws should encourage employers to terminate.

[1] The Release attributes this language to paragraph (d) of proposed Rule 21F-8, which does not appear in the text of the proposed rules. It appears that this language should reference paragraph (b) of proposed Rule 21F-2.

Wrongdoers Themselves Should Not Receive Whistleblower Awards (Requests for Comment Nos. 1, 28, 31, 38 and 39)

The Commission has acknowledged in the Release that the whistleblower provisions in the Dodd-Frank Act were not intended to reward employees for blowing the whistle on their own misconduct. Consistent with this notion, employees who participated in a violation (and related persons)—and not only those individuals who have been criminally convicted—should be ineligible to receive any whistleblower awards. As suggested by the Commission, we believe this would be best accomplished by defining the term "whistleblower" as an individual who provides information about potential violations of the securities laws "by another person."

Although proposed Rule 21F-15 provides that in determining whether the $1,000,000 threshold for making an award has been reached and in determining the amount of any award to be granted in a particular case, the Commission will not consider any monetary sanctions that a whistleblower (or an entity controlled by the whistleblower) is ordered to pay or that are paid by an entity whose liability is based substantially on conduct that the whistleblower directed, planned or initiated, these provisions do not, in all cases, prevent the payment of a significant award to a whistleblower who participated in a violation. These provisions would also not prevent the payment of a significant award to a senior employee who becomes aware of a violation directed, planned and initiated by others but does nothing to remedy it or covers it up.

Under the proposed rules, the Commission will already be required to make a number of determinations about whether a particular whistleblower is eligible for an award. The Commission should therefore be able to make a determination about whether a whistleblower engaged in wrongdoing short of having "directed, planned or initiated" the wrongdoing and without a separate determination obtained through a criminal conviction. Whistleblowers who disagree with the Commission's determination would have the ability to utilize the appeal procedures contained in the proposed rules.

For these reasons, we do not believe that the Commission should bend the "common understanding of a whistleblower" or create perverse incentives for employees to engage in, cover-up or profit from SEC violations.

We appreciate this opportunity to comment on these important issues and ask the Commission to consider these comments.

Respectfully,

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