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18 January 2011

Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington DC 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).*

Dear Ms. Murphy:

CFA Institute<sup>1</sup> is pleased to comment on the Proposed Rule for Implementing the Whistleblower Provision of Section 21F of the Securities Act of 1934 (the “Proposed Rule”) issued by the Securities and Exchange Commission (the “SEC” or the “Commission”). CFA Institute represents the views of investment professionals before standard setters, regulatory authorities, and legislative bodies worldwide on issues that affect the practice of financial analysis and investment management, education and licensing requirements for investment professionals, and on issues that affect the efficiency, integrity, and accountability of global financial markets.

### **Executive Summary**

CFA Institute supports the SEC’s efforts to establish a strong and clearly understood whistleblower rule that will encourage the reporting of high-quality tips to the Commission. We believe that a strong and easily understood whistleblower program can help to discourage certain behavior by some market participants and enhance the effectiveness of the Commission’s enforcement program. However, for a whistleblower program of this type to be effective, certain tensions must be balanced. First, the regulations must establish the proper process to sort out meritorious claims. Second, it must recognize the importance of honoring the internal compliance and reporting process in balancing the whistleblower incentives so as not to override what is a core corporate function. Third, the rule must offer legitimate whistleblower protection to those with the courage to step forward.

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<sup>1</sup> CFA Institute is a global, not-for-profit professional association of over 105,000 investment analysts, advisers, portfolio managers, and other investment professionals in 137 countries, of whom more than 93,000 hold the Chartered Financial Analyst® (CFA®) designation. The CFA Institute membership also includes 135 member societies in 58 countries and territories.



## **Comments on Specific Proposals**

### **Request for Comment No. 1**

CFA Institute agrees that whistleblowers should not be paid awards based on monetary sanctions arising from their own misconduct. Consistent with this, we support the proposal to define “whistleblower” in a manner to make clear that it is not the person at the root of the potential misconduct.

### **Request for Comment No. 7**

In defining the circumstance under which individuals can be eligible for whistleblower awards, we support including as “independent knowledge” that knowledge that is not direct, first-hand knowledge, but is instead learned from others, subject to the accuracy of the information and an exclusion for knowledge learned from publicly available sources. A whistleblower may not always receive firsthand knowledge of illegal activity, but may instead learn of such activity from others. An exclusion of such “second-hand” sources may discourage whistleblowers with meaningful information from coming forward.

### **Request for Comment No. 16**

CFA Institute agrees with the proposed 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. We feel that the whistleblower process should work with a company’s internal compliance mechanisms and should not be seen as a way to circumvent a company’s internal reporting structures.

### **Request for Comment No. 18**

We feel that the Commission should encourage potential whistleblowers to utilize employer-sponsored complaint and reporting resources. The proposed rule should not be seen as a substitute for internal reporting procedures. As noted in our comment above, any potential whistleblower should receive credit with providing original information to the Commission as of the date of their submission to any company legal, compliance or audit position, thereby encouraging potential whistleblowers to work first and foremost through company channels.

### **Request for Comment No. 23**

CFA Institute disagrees slightly with the Commission’s proposed definition of “action.” As proposed, all claims and amounts would be aggregated for purposes of determining whether the potential damages amount to \$1 million or more. This is a key factor in determining whether the



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case can benefit from the whistleblower structure proposed here. This would be the case even where the whistleblower's information involved only one person or claim, provided that all were brought under one captioned heading in court.

As also proposed, the rule would *not* aggregate sanctions that are imposed in separate judicial or administrative actions for purposes of determining whether the \$1 million threshold is satisfied, even if the actions arise out of a single investigation. CFA Institute questions this approach, given the rule's stated purpose to provide incentives to whistleblowers to come forward. On its face, the distinction being drawn between these two approaches appears arbitrary and contravenes reasonable incentives for whistleblowers. We thus encourage the SEC to modify this approach in the final rule in a manner that clarifies reasons for limiting the applicability of the rule to single-captioned cases.

CFA Institute also encourages the Commission to periodically revisit the \$1 million threshold to ensure that it provides the intended incentive. For example, sanctions exceeding \$1 million may become a low hurdle in future decades if not indexed in some manner or raised periodically.

#### **G. Proposed Rule 21F-7 - Confidentiality of Submissions**

CFA Institute believes that all submissions should be kept confidential to the extent permitted by law and encourages the Commission to establish internal steps to ensure this. While we understand that certain whistleblowers may wish to remain anonymous, we also appreciate the SEC's need to verify the legitimacy of the individual and to discourage the submission of fraudulent claims. To this end, we generally support the proposed procedures that would apply to anonymous whistleblowers and their legal counsel.

#### **Request for Comment No. 32**

We believe that the Commission should remain open to receiving submissions by both mail and fax, even if these methods may increase administrative costs, as some potential whistleblowers may still wish to communicate with the Commission through these methods.

#### **Request for Comment No. 36**

CFA Institute does not believe a whistleblower should be required to file a claim in order to qualify for such a reward. As proposed, the rule would require the filing of such a claim within 60 days of a final judgment on a covered action being published on the Commission's website. As a way of streamlining the process, we encourage the SEC to consider assuming the burden of tracking these claims and informing those deserving a reward immediately upon final judgment by the Commission on a covered action.



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## **P. Proposed Rule 21F-16 - Staff Communications with Whistleblower**

CFA Institute supports proposed provision 21F-16 which provides that no person may take any action to prevent a whistleblower from communicating directly with the Commission staff about a potential securities law violation. Such efforts would include trying to enforce, or threatening to enforce, a confidentiality agreement with respect to such communications. This approach continues to encourage whistleblowers to step forward to disclose potential violation in keeping with the underlying intent of the rule.

### **Concluding Comments**

CFA Institute is pleased to submit its views on the Commission's *Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*. If you or your staff have questions or seek clarification of our views, please feel free to contact either Kurt Schacht, CFA, at +1.212.756.7728 or [kurt.schacht@cfainstitute.org](mailto:kurt.schacht@cfainstitute.org), or James C. Allen, CFA, at +1.434.951.5558 or [james.allen@cfainstitute.org](mailto:james.allen@cfainstitute.org).

Sincerely,

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