NWC | NATIONAL WHISTLEBLOWERS CENTER

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March 17, 2011

Hon. Mary L. Schapiro
Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-2736

RE: Provision-by-Provision Analysis of Proposed Rule 240.21F-8 for Implementing Whistleblower Provisions of the Dodd-Frank Act

Dear Chairman Schapiro:

On the behalf of the National Whistleblower Center we would like to thank your fellow Commissioners and your staff for taking the time to meet with us and discuss the Commission's proposed rules regarding the whistleblower provisions of the Dodd-Frank Act.

During some of our meetings it was suggested that we provide a review of the proposed rule and make specific recommendations regarding those portions of the proposed rules that should be changed. Attached please find our line-by-line review regarding a number of the key provisions contained in the proposed rues. We are also providing recommendations for specific changes to proposed rules. These changes are necessary to ensure that the final rule conforms to the specific statutory mandates contained in the Dodd-Frank Act, the requirements of the Administrative Procedures Act and with Congress' intent.

Please feel free to contact us with any questions regarding the attached proposal or any other matter related to the whistleblower rules.

Respectfully submitted,

Stephen M. Kohn
Executive Director
National Whistleblower Center

ATTACHMENT: SEC Proposed Rule/Suggested Revisions

CC:
Commissioner Kathleen L. Casey
Commissioner Elisse B. Walter
Commissioner Luis A. Aguilar
Commissioner Troy A. Paredes
Stephen Cohen, Associate Director, Division of Enforcement
Sean McKessy, Director, Whistleblower Office
Elizabeth Murphy, Secretary, Securities Exchange Commission

SEC Proposed Rule	Suggested Revisions
§240.21F-3(c) "The Commission may seek assistance and confirmation from the authority bringing the related action in making this determination. If the Commission determines that the criteria for an award are not satisfied, or if the Commission is unable to obtain sufficient and reliable information about the related action to make a conclusive determination, the Commission will deny an award in connection with the related action."	**Suggested Revision** *"The Commission may seek assistance and confirmation from the authority bringing the related action,* ***and from the whistleblower,*** *in making this determination. If the Commission determines that the criteria for an award are not satisfied, or if the Commission is unable to obtain sufficient and reliable information about the related action to make a conclusive determination, the Commission will deny an award in connection with the related action."* **Basis for Revision** The Commission regulations should be "user friendly" and should facilitate staff-whistleblower communications on all matters material to a whistleblower claim. Communications between the Commission Staff and the whistleblower should be encouraged where such communications may promote a voluntary resolution of potential issues that may result in the wrongful denial of a claim or in unnecessary litigation expenses incurred by either the Commission or the whistleblower.
§240.21F-4(a) "Your submission of information is made voluntarily within the meaning of 240.21F of this chapter if you provide the Commission with the information before you or anyone representing you (such as an attorney) receives request, inquiry or demand from the Commission, the Congress, any other federal state or local authority, any self-regulatory organization or the Public Company Accounting Oversight Board about a matter to which the information in your submission is relevant. If the Commission or any of these other authorities make a request, inquiry or demand to you or your representative first, your submission will not	**Suggested Revision** This portion of the proposed rules should be cut. **Basis for Change** No such explicit statutory exclusion exists under the FCA or any regulation implementing the FCA. Section 21F of the Securities Exchange Act does not authorize the exclusion of information that is provided voluntarily to the Commission, even if the Commission or a similar organization asks for the information prior to the submission. The proposed regulation will result in the Commission not obtaining invaluable information from persons with direct first hand knowledge of frauds, and will result in the loss of

be considered voluntary, and you will not be eligible for an award, even if your response is not compelled by subpoena or other applicable law."	numerous investigatory leads. Consistent with the practices of the U.S. Department of Justice, the Commission should follow the procedures utilized by DOJ under the FCA in resolving issues concerning how to define "original" information obtained from a whistleblower. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011. **Proposed Compromise** As a matter of law this should be cut, but if it is not cut, NWC proposes the following compromise: *"Your submission of information is made voluntarily within the meaning of 240.21F of this chapter if you provide the Commission with the information before you or anyone representing you (such as an attorney) receives* ***a subpoena or other demand for information for which you are under a legal duty to reply and for which you may not assert a lawful privilege in objecting to the involuntary demand for information*** ~~*request, inquiry or demand*~~ *from the Commission, the Congress, any other federal state or local authority, any self-regulatory organization or the Public Company Accounting Oversight Board about a matter to which the information in your submission is* ***directly*** *relevant. If the Commission or any of these other authorities make* ***such*** *a request, inquiry or demand to you or your representative first, your submission will not be considered voluntary, and you will not be eligible for an award*~~*, even if your response is not compelled by subpoena or other applicable law*~~*.* ***Any information provided to the Commission, the Congress, any other federal state or local authority, any self-regulatory organization or the Public Company Accounting Oversight***

	Board about a matter to which the information in your submission is directly relevant, pursuant to a subpoena, an immunity agreement or other similar compelled process, will not be considered voluntary. *"*
§240.21F-4(a)(2) "For purposes of this paragraph, you will be considered to have received a request, inquiry or demand if documents or information from you are within the scope of a request, inquiry, or demand that your employer receives unless, after receiving the documents or information from you, your employer fails to provide your documents or information to the requesting authority in a timely manner."	**Suggested Revision** This portion of the proposed rules should be cut. **Basis for Change** The mere fact that a whistleblower's employer obtained a request for information should have no impact whatsoever on the right of a whistleblower to obtain a reward under Section 21F. The opposite should be true. The SEC has an interest in obtaining original information from employees, and help from employees in understanding that information. An employer's "document dump" on the SEC should not result in the denial of an award that an otherwise qualified whistleblower should obtain. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011. **Proposed Compromise** As a matter of law this should be cut, but if it is not cut, NWC proposes the following compromise: *"For purposes of this paragraph, you will be considered to have received a request, inquiry or demand if documents or information from you are within the* ***direct*** *scope of a request, inquiry, or demand that your employer receives* ***from a federal law enforcement agency (including the Commission), you are aware that your employer has received such a request and you were under a work-related obligation to provide those documents to the company so they could***

	respond to the Commission request, *unless after receiving the documents or information from you, your employer fails to provide your documents or information to the requesting authority in a timely manner."*
§240.21F-4(a)(3) "In addition, your submission will not be considered voluntary if you are under a pre-existing legal or contractual duty to report the securities violations that are the subject of your original information to the Commission or to any of the other authorities described in paragraph (1) of this section."	**Suggested Revision** This portion of the proposed rules should be cut. **Basis for Change** No such explicit exclusion exists under the FCA nor is such an exclusion required under the Dodd-Frank Act. The rule must be narrowed to cover disclosures that are, in fact, involuntary. The clause of the proposed rule related to a "contractual duty" violates § 21F(e)(1) of the SEA and must be cut. Consistent with the practices of the U.S. Department of Justice, the Commission should follow the procedures utilized by DOJ under the FCA in resolving issues concerning the definition of a voluntary disclosure. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011. **Proposed Compromise** As a matter of law this should be cut, but if it is not cut, NWC proposes the following compromise: *"In addition, your submission will not be considered voluntary if you are under* ***an explicit and binding*** *pre-existing legal* ~~*or contractual*~~ *duty to report the securities violations that are the subject of your original information to the Commission,* ***and the whistleblower is aware of this requirement*** ~~*or to any of the other*~~

	~~*authorities described in paragraph (1) of this section*~~. ***This exclusion does not apply to information covered under general criminal or civil laws, such as 'misprision of felony' laws.***"
§240.21F-4(b)(1)(ii) "In order for your whistleblower submission to be considered original information, it must be not already known to the Commission from any other source, unless you are the original source of the information."	**Suggested Revision** *"In order for your whistleblower submission to be considered original information, it must be not already known to the Commission from any other source, unless you are the original source of the information* ***or unless the Commission has not already docketed a formal investigation and/or proceeding based on such information.****"* **Basis for Change** Under the FCA, the 1986 amendments eliminated a blanket "government knowledge" exemption. The mere fact that the information at issue may be filed somewhere within the Commission does not mean that the Commission understands that a violation has occurred, understands the scope of the violation or, based on the data in its possession, will docket an enforcement proceeding. This rule would encourage the filing of documents and materials to the SEC that will overwhelm the Commission, and waste Commission resources. This rule should be activated only when the Commission can demonstrate that it had already opened a formal investigation and/or proceeding -- with a verified docket number -- prior to obtaining the information from a whistleblower that is directly related to the proceeding at issue. Consistent with the practices of the U.S. Department of Justice, the Commission should follow the procedures utilized by DOJ under the FCA in resolving issues concerning how to determine whether a whistleblower is an "original source" of information.
§240.21F-4(b)(4)(iv) "The Commission will not consider	**Suggested Revision** This portion of the proposed rule should be cut.

information to be derived from your independent knowledge or independent analysis if you obtained the knowledge or the information upon which your analysis is based . . . . Because you were a person with legal, compliance, audit, supervisory or governance responsibilities for an entity and the information was communicated to you with the reasonable expectation that you would take steps to cause the entity to respond appropriately to the violation, unless the entity did not disclose the information to the Commission within a reasonable time or proceeded in bad faith."	Consistent with the practices of the U.S. Department of Justice, the Commission should follow the procedures utilized by DOJ under the FCA in resolving issues concerning potential improper evidence collection by a whistleblower. **Basis for Change** The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011. Exclusion not recognized under False Claims Act. 31 U.S.C. § 3730(e) nor under the IRS whistleblower rewards law. Empirical data does not support the need for any such exclusion. Senate Report on 1986 FCA amendments does not support exclusion, and cites to case of compliance official in context of employees who need protection under FCA. Additionally, the rule is silent as to who will make a decision that an entity acted in "bad faith" or did not provide information to the Commission within a "reasonable" period of time. Any such decision must be made by a Commission staff member, based on a sworn declaration. The whistleblower must be able to challenge that declaration in an on-the-record proceeding. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. This provision, as set forth in the proposed rule, violates the Administrative Procedure Act. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.

	Proposed Compromise As a matter of law this provision must be cut. However, if the Commission does not cut this exclusion, the NWC suggests the following revision to the last clause of the rule: *". . . unless the* ***whistleblower had a good faith belief that he or she should provide the information directly to the Commission without first using an internal procedures and/or reporting the issue with his or her supervisor, or unless the*** *entity did not disclose the information to the Commission within a reasonable time* ***(not to exceed thirty days)*** *or proceeded in bad faith.* ***Additionally, this exclusion only applies to an entity that has an internal compliance program which is independent and that operates consistent with the requirements of Public Law 110-252, Title VI, Chapter 1, and 48 C.F.R. subpart 3.900, and any other rule of the Commission setting forth requirements for audit or compliance functions.*** *"* Although this proposed compromise will mitigate some of the potential harm caused by this rule, because there is no empirical justification for the rule, and because the rule is not supported either by the language contained in the FCA or the Dodd-Frank Act, the NWC preserves the right to file a judicial appeal to any rule that exempts compliance or audit personnel from the scope of protection and/or eligibility for rewards contained in the Dodd-Frank Act.
§240.21F-4(b)(4)(v) "The Commission will not consider information to be derived from your independent knowledge or independent analysis if you obtained the knowledge or the information upon which your analysis is based . . . . from or through an entity's legal, compliance, audit or other similar functions or processes for identifying, reporting and	**Suggested Revision** This provision of the Proposed Rules should be cut. **Basis for Change** See comments on § 240.21F(b)(4)(iv) **Proposed Compromise**

addressing potential non-compliance with law, unless the entity did not disclose the information to the Commission within a reasonable time or proceeded in bad faith."	See comments on § 240.21F(b)(4)(iv) The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
§240.21F-4(b)(4)(vi) "The Commission will not consider information to be derived from your independent knowledge or independent analysis if you obtained the knowledge or the information upon which your analysis is based . . . by a means or in a manner that violates applicable federal or state criminal law."	**Suggested Revision** As written, the exclusion should be cut. Consistent with the practices of the U.S. Department of Justice, the Commission should follow the procedures utilized by DOJ under the FCA in resolving issues concerning potential improper evidence collection by a whistleblower. If the Commission relies upon information provided by a whistleblower to obtain a sanction, the whistleblower is entitled to a reward. If the Commission does not believe that the information was lawfully obtained, then the Commission can either close the inquiry based on the fact that the evidence justifying the proceeding was tainted. But if the information is used in any manner, then the whistleblower must be entitled to a reward. **Basis for Change** No such exclusion exists under the FCA. Under the FCA whistleblowers are required to provide the United States with "substantially all" the evidence they possess. 31 U.S.C. § 3730(b)(2). The term "violates applicable federal or state criminal law" is vague and open to abuse. The commission is not an expert in state criminal laws, and state laws cannot be used as a basis to undermine federal law enforcement authority. Also, the proposed regulation is not clear as to who has the authority to conclude that information was obtained in violation of law. Does the exclusion only apply to cases in which a

	person is convicted of violating the state or federal laws at issue? Any such exclusion should be based on the evidentiary utility of the information provided by the whistleblower. If the Commission as a basis for a penalty uses the whistleblower's information, then a reward must be given. However, if the whistleblower's information is tainted and cannot be used as a basis for initiating an investigation or the payment of a penalty, then the information cannot form the basis for a reward. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011. **Proposed Compromise** *"The Commission will not consider information to be derived from your independent knowledge or independent analysis if you obtained the knowledge or the information upon which your analysis is based . . . by a means or in a manner that violates applicable federal or state criminal law,* ***resulting in the inability of the Commission to use the information as the basis for initiating an investigation or proceeding or obtaining a penalty****."*
§240.21F-4(b)(4)(vii) "The Commission will not consider information to be derived from your independent knowledge or independent analysis if you obtained the knowledge or the information upon which your analysis is based: From any of the individuals described in paragraphs (b)(4)(i) – (vi) of this section."	**Suggested Revision** *"The Commission will not consider information to be derived from your independent knowledge or independent analysis if you obtained the knowledge or the information upon which your analysis is based: From any of the individuals described in paragraphs (b)(4)(i) – (vi) of this section* ***and the Commission finds that you are acting as a surrogate for a person who is otherwise disqualified under the Dodd-Frank Act from obtaining a reward****."* **Basis for Change**

	The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. This provision, as set forth in the proposed rule, violates the Administrative Procedure Act. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011. The provision should be eliminated. If not eliminated, it should be made clear that persons who obtain information from a wrongdoer may still be eligible for a reward, if they are not a family member of the wrongdoer. For example, a secretary who works for the wrongdoer may obtain information about the underlying crimes from her boss, but the secretary should not be disqualified from obtaining a reward for turning her boss in, simply because she learned of the violations from an "individual" disqualified under this rule.
§240.21F-4(b)(7) "If you provide information to Congress or any other federal sate, or local authority any self-regulatory organization, the Public Company Accounting Oversight Board, or to any of the persons described in paragraphs (b)(4)(iv) and (v) of this section, and you, within 90 days, submit the same information to the Commission pursuant to 240.21F-9 of this chapter."	**Suggested Revision** Eliminate the 90-day filing requirement. **Basis for Change** There is no authority for the 90-day notification requirement in the Dodd-Frank Act. The False Claims Act has not such requirement, and FCA claims are considered timely filed if they are filed within the time period related to the controlling statute of limitations. The 90-day deadline will result in serious hardship and the denial of rewards to whistleblowers that are otherwise deserving and eligible under the statute. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
§240.21F-4(b)(7)(c)(1) "The Commission will consider that you	**Suggested Revision** *"The Commission will consider that you provided*

provided original information that led to the successful enforcement of a judicial or administrative action in the following circumstances: your information significantly contributed to the success of the action"	*original information that led to the successful enforcement of a judicial or administrative action in the following circumstances: your information significantly contributed to the success of the action* ***or led to the successful enforcement of the law.*** *"* **Basis for Change** No such standard exists under the FCA. This standard is inconsistent with the standard mandated by Congress in the Dodd-Frank Act. Under the law, whistleblowers are entitled to a reward if their disclosures "led to the successful enforcement" of the law. *See* 21F(b)(1) and 23(b)(1). It would be illegal and be inconsistent with the intent of Congress for the Commissions to impose a higher burden of proof. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
§240.21F-4(b)(7)(d) "Action means a single captioned judicial or administrative hearing."	**Suggested Revision** *"Action means a single captioned judicial or administrative hearing* ***or multiple judicial or administrative hearings or proceedings derived from the whistleblower's information****."* **Basis for Change** Under the statute, the whistleblower is entitled to a reward of the total sanctions obtained by the SEC equals one million or more dollars. The administrative or judicial procedures used to "caption" a proceeding or investigation should have no bearing on the Commission's requirement to pay a reward if the total number of all sanctions obtained by the Commission based on the whistleblower's information was equal to or greater then one million dollars.

	The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
§240.21F-7(a) "The law requires that the Commission not disclose information that could reasonably be expected to reveal the identity of a whistleblower, except that the Commission may disclose such information in the following circumstances…"	**Suggested Revision** The following should be added to this provision: *"Prior to the disclosure of any information related to the identity of a whistleblower, the Commission shall give the whistleblower reasonable notice of its intent to disclose the information, and the whistleblower shall have a reasonable opportunity to obtain file an administrative or civil complaint seeking a protective order or other relief that would result in the protection of the whistleblower's identity."* **Basis for Change** The Dodd-Frank Act contains specific rules protecting the confidentiality of whistleblowers. It is in the public interest to ensure the maximum confidentiality for whistleblowers.
§240.21F-8(a) "To be eligible for a whistleblower award, you must give the Commission information in the form and manner that the Commission requires."	**Suggested Revision** The following should be added to this provision: *"Prior to the denial of a reward, the whistleblower shall be given reasonable notice of any technical defect in his or her application, and shall be given a reasonable opportunity to correct the application."* **Basis for Change** The policy that the whistleblower provisions must be "user friendly" and the policy that the Commission should use the payment of rewards as a method to induce and encourage other employees to step forward with credible and useful information.
§240.21F-8(b)(1) "In addition to any forms required by these	**Suggested Revision** *"In addition to any forms required by these rules,*

rules, the Commission may also require that you provide certain additional information. If requested by the Commission, you may be required to: Provide explanations and other assistance in order that the staff may evaluate and use the information that you submitted."	*the Commission may also* ~~*require*~~ ***request*** *that you provide certain additional information. If requested by the Commission, you may be* ~~*required*~~ ***asked*** *to: Provide explanations and other assistance in order that the staff may evaluate and use the information that you submitted.* ***The failure to provide this information may result in a reduction in the size of a reward or a denial of a reward, if the staff is unable to properly determine your eligibility based on the information previously provided.*** " **Basis for Change** The Dodd Frank statute sets forth a minimum threshold for which a whistleblower must meet in order to qualify for a reward. The Commission cannot legally deny a reward to a whistleblower that meets that statutory minimum. Thus, requiring a whistleblower to provide more information then is mandated by the statute would violate the Act. However, the proposed changes would empower the staff to request such additional information, and would authorize the staff to reduce or deny a reward if additional information was not provided, and the staff could not adequately evaluate the whistleblower's eligibility. The NWC would recommend that the Commission rules for filing initial applications mirror the FCA filing requirements. The FCA requires a whistleblower to provide the government with a "written disclosure of substantially all material evidence and information the [whistleblower] possesses" at the time the initial complaint is filed. 31 U.S.C. § 3730(b)(2). Also, under the FCA, if the government initiates a proceeding based on the whistleblower allegations, the whistleblower is not required to take any additional steps to help the government, but does retain the right to participate in the proceeding an aid the government's efforts. 31 U.S.C. § 3730(c)(1).

	The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
§240.21F-8(b)(2) "In addition to any forms required by these rules, the Commission may also require that you prove certain additional information. If requested by the Commission staff, you may be required to: Provide all additional information in your possession that is related to the subject matter of your submission in a complete and truthful manner, through follow-up meetings, or in other forms that our staff may agree to"	**Suggested Revision** See suggested revisions for §240.21F-8(b)(1)
§240.21F-8(b)(4) "Enter into a confidentiality agreement in a form acceptable to the Whistleblower Office, including a provision that a violation may lead to your ineligibility to receive an award."	**Suggested Revision** *"**The staff may request that the whistleblower*** ~~***E***~~*enter into a confidentiality agreement in a form acceptable to the Whistleblower Office, including a provision that a violation may lead to your ineligibility to receive an award.* ***The failure of the whistleblower to enter into any such agreement may result in the whistleblower being denied access to information in the control or possession of the staff, including information concerning the status or progress of any non-pubic investigation or proceeding related to the whistleblower disclosures.****"* **Basis for Change** No such requirement exists in the FCA. These provisions should be modified in a manner consistent with the FCA, 31 U.S.C. § 3730(b)(2) and (c)(1). The whistleblower cannot be required to enter into a confidentiality agreement. However, the

	Commission can request such an agreement in order to obtain access to any information that the Commission may have concerning the underlying investigation, the existence of an investigation and/or other information relevant to the reward and/or any ongoing enforcement proceeding. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
§240.21F-8(c)(1) "The Commission will consider that you provided original information that led to the successful enforcement of a judicial or administrative action in the following circumstances: If you gave the Commission original information that caused the staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning new or different conduct as part of a current examination or investigation, and your information significantly contributed to the success of the action"	**Suggested Revision** *"The Commission will consider that you provided original information that led to the successful enforcement of a judicial or administrative action in the following circumstances: If you gave the Commission original information that caused the staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning new or different conduct as part of a current examination or investigation, and your information significantly contributed to the success of the action* ***or led to the successful enforcement of the law.*** *"* **Basis for Change** No such standard exists under the FCA. This standard is inconsistent with the standard mandated by Congress in the Dodd-Frank Act. Under the law, whistleblowers are entitled to a reward if their disclosures "led to the successful enforcement" of the law. *See* 21F(b)(1) and 23(b)(1). It would be illegal and be inconsistent with the intent of Congress for the Commissions to impose a higher burden of proof. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.

§240.21F-8(c)(2)	**Suggested Revision**
"You are not eligible to be considered for an award if you do not satisfy the requirements of paragraphs (a) and (b) of this section. In addition, you are not eligible if . . . . you are, or were at the time you acquired original information, a member, officer, or employee of a foreign government, any political subdivision, department, agency or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Exchange Act (15 USC 78c(a)(52)"	The revised rule should state as follows: *"In addition, you are not eligible if you are, or were at the time [they] acquired original information, a member, officer, or employee of a division of a foreign government which performs the functions of the United States Department of Justice, the Securities Exchange Commission or the Commodity Exchange Commission. However, any exclusion of a foreign national shall not be undertaken without the consultation of the U.S. Department of State. Where the State Department determines that the employee's disclosures were necessary for the detection of the violations, and protecting or rewarding that employee would be consistent with the United States foreign policy and international anti-corruption and/or international human rights conventions, the Department of State shall inform the SEC and/or the CFTC that the foreign government employee should obtain protection and/or a reward, and the exclusion set forth in this provision shall not apply. The United States Department of State shall also be consulted in all cases in which an employee of a foreign government (but not an employee of a state-owned company) applies for a reward under this regulation. For exceptional good cause shown, the SEC or CFTC may deny a reward based on information provided by the Department of State. Exceptional good cause includes documentation that reward would have a negative impact on U.S. foreign relations, interfere with foreign government cooperation with the United States under existing treaties or otherwise encourage corruption. There shall be no limitation on the right of an employee of a state-owned industry, company or concern to file claims or obtain protections as afforded under the Dodd-Frank Act"* **Basis for Change** The exclusion contained in the proposed rule is

	not authorized under the Dodd Frank statute. The exclusion would also undermine the enforcement of the Foreign Corrupt Practices Act. Additional basis for this change in the proposed rule is set forth in the *Letter from Kohn/NWC to SEC* posted on the rule-making docket on February 10, 2011. There is no empirical evidence that such a provision is needed. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
§240.21F-8(c)(7) "In your whistleblower submission, your other dealings with the Commission, or your dealings with another authority in connection with a related action, you knowingly and willfully make any false, fictious or fraudulent statement or representation or use any false writing or document, knowing that it contains false, fictious or fraudulent statement or entry."	**Suggested Revision** *"In your whistleblower submission, your other dealings with the Commission, or your dealings with another authority in connection with a related action, you knowingly and willfully make any false, fictious or fraudulent statement or representation or use any false writing or document, knowing that it contains false, fictious or fraudulent statement or entry,* ***that is material to the application and which constitutes a violation of section 1001 of Title 18 of the United States Code****."* **Basis for Change** The proposed rule provides broad discretion to the Commission staff. The proposed revision moderates that discretion in a manner consistent with federal law on false statements.
§240.21F-9 "The submission of original information to the Commission is a two-step process"	**Suggested Revision** "*Any applicant for a reward shall, at the time of the initial application, provide the government with a written disclosure of substantially all material evidence and information the whistleblower possesses at the time the initial application is filed. The whistleblower may supplement this application, in writing, prior to the Commission's issuance of a reward*

	determination. The failure of an applicant to set forth the all material evidence and information to the Commission in a timely manner may result in the reduction of an award or the denial of a reward as to any sanctions paid to the Commission that were not part of the initial or supplemental application." **Basis for Change** These provisions are inconsistent with the minimum filing requirements set forth in the Dodd-Frank Act. They are not "user-friendly." They will create numerous administrative problems and will result in the denial of otherwise qualified applications. The FCA filing provisions, as set forth in 31 U.S.C. § 3730(b)(2), are a good working model for the SEC rule. This provision of the FCA requires a whistleblower to provide the government with a "written disclosure of substantially all material evidence and information the [whistleblower] possesses" at the time the initial complaint is filed.
§240.21F-10(a) "Whenever a Commission action results in monetary sanctions totaling more than $1,000,000 the Whistleblower Office will cause to be published on the Commission's website a "Notice of Covered Action." A claimant will have sixty (60) days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred."	**Suggested Revision** See revision set forth in § 240.21F-9. **Basis for Change** See comments made related to § 240.21F-9. The two-step process set forth herein does not serve the interests of the Commission or the interests of full enforcement. The Commission's rules should require that whistleblowers provide all of the material information they have to the Commission at the earliest possible time, so that the Commission staff can use that information to determine the validity of the allegations, determine whether to initiate an investigation or proceeding based on the allegations and in order to use the information provided to assist, to the

	greatest extent possible, in an enforcement action. Thus, a premium should be set on having the whistleblower make a full and complete initial disclosure and to have the whistleblower supplement the disclosure on a regular basis. Requiring information to be provided to the Commission after a sanction is taken against a wrongdoer does not serve the public interest or the goal of the Act. This two-step process will also result in administrative difficulties; the denial of rewards to otherwise qualified applicants and is not "user-friendly." The statutory language of Section 21F of the Securities Exchange Act does not authorize this procedure. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
§240.21F-10(d) "Once the time for filing any appeals of the Commission's judicial or administrative action has expired, or where an appeal has been filed, after all appeals in the action have been concluded, the Whistleblower Office and designated staff ("Claims Review Staff") will evaluate all timely whistleblower award claims submitted on Form WB-APP."	**Suggested Revision** "*The Whistleblower Office shall docket all applications and ensure that related applications are properly considered. The WO shall, wherever practicable, attempt to reach a stipulated agreement between the Commission and the whistleblower(s) regarding the basis for a reward and the percentage of the reward. After the Commission obtains the initial monetary sanction that constitutes the basis for the reward payment, the WO shall publish to the Commission its recommendation for the payment of the reward and/or shall present to the Commission the signed stipulation. The identity of the whistleblowers shall not be released unless the whistleblowers consent to the disclosure, or the disclosure is otherwise required under law. Any objection to the WO's recommendation and/or to the stipulation of the parties shall be filed with the Commission within 15 working days. If no objection is filed, the recommendation of the WO shall be final, unless three members of the Commission vote to reject or modify the recommendation within 30 calendar days of the*

	WO's filing. Should any person with standing to file said objections file objections to the stipulation and/or the WO's recommendation, the Commission may refer the matter to an administrative judge for review. The Commission shall issue its final order on the payment of whistleblower rewards within 90 days of receipt of the initial sanction." **Basis for Change** The rule should encourage the WO to negotiate a stipulated resolution of the reward payment. If an objection to the WO reward recommendation is filed, the rule should mandate an expeditious resolution of any such dispute. Encouraging the settlement of claims will reduce the administrative costs of operating the program and avoid costly judicial appeals.
§240.21F-10(h) "The Whistleblower Office will then notify the Commission of each Proposed Final Determination. Within thirty 30 days thereafter, any Commissioner may request that the Proposed Final Determination be reviewed by the Commission."	**Suggested Revision** See proposed revisions for §240.21F-10(d). **Basis for Change**
§240.21F-11(a) "If you are eligible to receive an award following a Commission action that results in monetary sanctions totaling more than $1,000,000, you also may be eligible to receive an award based on the monetary sanctions that are collected from a related action (as defined in 240.21F-3 of this chapter)."	**Suggested Revision** *"~~If you are eligible to receive an award following a Commission action that results in monetary sanctions totaling more than $1,000,000, you~~* ***You*** *also may be eligible to receive an award based on the monetary sanctions that are collected from a related action (as defined in 240.21F-3 of this chapter)."* **Basis for Change** Whistleblowers are eligible for a reward based on sanctions obtained pursuant to a "related action" even if the Commission does not institute its own proceeding.

§240.21F-11(b)	**Suggested Revision**
"You must also use Form WB-APP to submit claim for an award in related action."	The filing procedure for such rewards should be modified to be consistent with the procedures set forth in the proposed revisions to § 240.21F-9. **Basis for Change** Whistleblowers should be required and encouraged to provide the maximum amount of information to the government at the earliest time.
§240.21F-13	**Suggested Revision**
"Procedures applicable to the payment of awards."	See comments made related to §§ 240.21F-9 and 10. **Basis for Change**
§240.21F-15	**Suggested Revision**
"In determining whether the required $1,000,000 threshold has been satisfied for purposes of making any award, the Commission will not take into account any monetary sanctions that the whistleblower is ordered to pay, or that are ordered against any entity whose liability is based substantially on conduct that the whistleblower directed, planned or initiated."	This provision should be cut. However, if it is not cut, an additional clause should be inserted into the rule as follows: *". . . directed, planed, or initiated,* ***provided that the whistleblower undertook such actions without approval, knowledge or consent of his or her employer."*** **Basis for Change** No such exclusion exists in the FCA. There is no empirical record that whistleblowers have abused the FCA in a manner reflected in this proposed rule. Regardless, the rule should clearly differentiate wrongdoing engaged in by an employee working at the direction of his or her employer with wrongdoing that an employee engages in on his or her own initiative. This distinction is well recognized in other areas of whistleblower law. *See* 42 U.S.C. § 5851(g) ("[the whistleblower provision] shall not apply with respect to any employee who, *acting without*

	direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter." (Emphasis added). The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
Code of Ethics	**Suggested Revision** *See attached Exhibit #1* **Basis for Change** During the rule making proceeding, a number of Commissioners and commentators recognized the importance of internal corporate compliance programs in ensuring that investors are protected from fraud and misconduct. The Dodd-Frank Act does not authorize or permit the Commission to reduce the protections afforded whistleblowers under the Act in order to enhance internal corporate compliance programs. Any such interference with employee rights under Dodd-Frank would constitute a violation of the Administrative Procedure Act. *See* NWC Letter posted on SEC rule-making docket on January 25, 2011. However, the NWC strongly supports the establishment of independent and ethical corporate compliance programs, which are not compromised by any conflicts of interest. Thus, the NWC proposes that the Commission institute a rule based on the FAR rules governing internal corporate compliance programs. These rules will help ensure that corporations operate truly independent and ethical programs, and will protect the interests of employees who utilize the programs, companies that have a real interest in ensuring compliance and the government.

Anti-Retaliation	**Suggested Revision** *See attached Exhibit #2* **Basis for Change** This rule is necessary in order to ensure that corporations do not retaliate against employees who provide information to internal corporate compliance programs. As set forth in various briefing papers filed with the Commission by the NWC, since 1984 corporations have argued in court that employee contacts with internal compliance programs was not a protected activity. The Commission, by rule, can ensure that all such contacts are fully protected. This rule is absolutely necessary if the Commission's goal of promoting the use and development of internal corporate compliance programs will be implemented. Furthermore, the Commission must send a strong message that retaliation against employees will not be tolerated, and will constitute a violation of Commission rules, permitting the Commission to sanction persons or corporations that engage in retaliation. Sound precedent exists for this rule. *See* 10 C.F.R. § 50.7.

EXHIBIT #1
PROPOSED RULE – PROTECTION AND ENCOURAGEMENT FOR CORPORATE COMPLIANCE PROGRAMS

[Note: The proposed rule is based on 48 C.F.R. § 52.203-13. The parts of the current rule that are recommended for being cut are struck out, the new additions to the rule are in bold]

~~48 C.F.R. § 52.203-13~~ Contractor Code of Business Ethics and Conduct.

(a) *Definitions.* As used in this clause—

"~~Agent~~ **Employer**" means any **corporation or publicly traded entity (including subsidiaries) subject to the requirements of section 23 of the Securities Exchange Act.** ~~individual, including a director, an officer, an employee, or an independent Contractor, authorized to act on behalf of the organization~~.

"Full cooperation"—

(1) Means disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors' and investigators' request for documents and access to employees with information;

(2) Does not foreclose any ~~Contractor~~ **employer** rights arising in law, **or under the Securities Exchange Act** ~~the FAR, or the terms of the contract~~. It does not require—

(i) ~~A Contractor~~ **An employer** to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner, or employee of the ~~Contractor~~ **employer**, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights; and

(3) Does not restrict a ~~Contractor~~ **employer** from—

(i) Conducting an internal investigation; or

(ii) Defending a proceeding or dispute arising under the ~~contract~~ **Securities Exchange Act** or related to a potential or disclosed violation.

"Principal" means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a subsidiary, division, or business segment; and similar positions).

~~"Subcontract" means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.~~

~~"Subcontractor" means any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor.~~

"United States," means the 50 States, the District of Columbia, and outlying areas.

(b) *Code of business ethics and conduct.*

(1) Within 30 days after contract award, unless the ~~Contracting Officer~~ **CFTC Commission** establishes a longer time period, the ~~Contractor~~ **employer** shall—

(i) Have a written code of business ethics and conduct; and
(ii) Make a copy of the code available to each employee ~~engaged in performance of the contract~~.
(2) The ~~Contractor~~ **employer** shall—
(i) Exercise due diligence to prevent and detect criminal conduct; and
(ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.
(3)(i) The ~~Contractor~~ **employer** shall timely disclose, in writing, to the **CFTC Office of Enforcement** ~~agency Office of the Inspector General (OIG)~~, with a copy to the **CFTC Whistleblower Office** ~~Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has~~ credible evidence that a **employer, or any** principal, employee, agent, or subcontractor of the ~~Contractor~~ **employer** has committed—
(A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code **or any Federal criminal law enforced by the CFTC or for which a violation may result in civil penalties awarded by the CFTC**; or
(B) A violation of the **Securities Exchange Act, or any other law, rule or regulation enforced by the CFTC** ~~civil False Claims Act (31 U.S.C. 3729-3733).~~
(ii) The Government, to the extent permitted by law and regulation, will safeguard and treat information obtained pursuant to the Contractor's disclosure as confidential where the information has been marked "confidential" or "proprietary" by the company. To the extent permitted by law and regulation, such information will not be released by the Government to the public pursuant to a Freedom of Information Act request, 5 U.S.C. Section 552, without prior notification to the Contractor. The Government may transfer documents provided by the Contractor to any department or agency within the Executive Branch if the information relates to matters within the organization's jurisdiction.
~~(iii) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the Contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract.~~
(c) Business ethics awareness and compliance program and internal control system. ~~This paragraph (c) does not apply if the Contractor has represented itself as a small business concern pursuant to the award of this contract or if this contract is for the acquisition of a commercial item as defined at FAR 2.101.~~ The ~~Contractor~~ **employer** shall establish the following within 90 days **of the enactment of this rule** ~~after contract award, unless the Contracting Officer establishes a longer time period~~:
(1) An ongoing business ethics awareness and compliance program.
(i) This program shall include reasonable steps to communicate periodically and in a practical manner the ~~Contractor's~~ **employer's** standards and procedures and

other aspects of the ~~Contractor's~~ **employer's** business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities.
(ii) The training conducted under this program shall be provided to the Employer's principals and employees, and as appropriate, the Employer's agents and subcontractors.
(2) An internal control system.
(i) The Employer's internal control system shall—
(A) Establish standards and procedures to facilitate timely discovery of improper conduct in connection with **any violation of the Securities and Exchange Act or any other law, rule or regulation enforced by the CFTC** ~~Government contracts~~; and
(B) Ensure corrective measures are promptly instituted and carried out.
(C) Ensure that the employer have policies and procedures in place that protect employees from retaliation who provide any information or file allegations of fraud, violations of law or misconduct to the internal control procedures. The Employer shall notify every employee who contacts the internal control system of his or her rights under section 23(h) and provide an employee with a copy of section 23(h).
(ii) At a minimum, the Employer's internal control system shall provide for the following:
(A) Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system. **The Chief Compliance Officer shall report directly to the employer's Chief Executive Officer and/or the employer's Audit Committee.**
(B) Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Employer's code of business ethics and conduct.
(C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Employer's code of business ethics and conduct and the special requirements **of the CFTC** ~~Government contracting~~, including—
(1) Monitoring and auditing to detect criminal conduct;
(2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and
(3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.

(D) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.
(E) Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.
(F) Timely disclosure, in writing, to the **CFTC Office of Enforcement** ~~agency OIG~~, with a copy to the **CFTC's Whistleblower Office** ~~Contracting Officer~~, whenever, ~~in connection with the award, performance, or closeout of any Government contract performed by the Employer or a subcontract thereunder,~~ the Employer has credible evidence that a principal, employee, agent, or subcontractor of the Employer has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. **any law, rule or regulation enforced by the CFTC,** or a violation of the **Securities Exchange Act or any civil law, rule or regulation enforced by the CFTC** ~~civil False Claims Act (31 U.S.C. 3729-3733).~~
~~(1) If a violation relates to more than one Government contract, the Employer may make the disclosure to the agency OIG and Contracting Officer responsible for the largest dollar value contract impacted by the violation.~~
~~(2) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the Employer shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract, and the respective agencies' contracting officers.~~
~~(3) The disclosure requirement for an individual contract continues until at least 3 years after final payment on the contract.~~
(4) The Government will safeguard such disclosures in accordance with paragraph (b)(3)(ii) of this clause.
(G) Full cooperation with any Government agencies responsible for audits, investigations, or corrective actions.

(d) **If an employee disclosure resulted in the report identified in subsection (F) above, the employer shall also report to the CFTC Enforcement Division and Whistleblower Office this fact, and shall provide to the CFTC information demonstrating that the employer has not engaged in any retaliation against the employee based on his or her disclosures. The employer shall also inform the employee that a disclosure was made in accordance with subsection (F), and shall inform the employee that the employee may be entitled to a reward under section 23 of the Securities Exchange Act. The employer shall provide the CFTC Office of Enforcement and Whistleblower Office proof that the employee was informed of his or her section 23 rights.**

(e) Within a reasonable period of time from notification from the employer as set forth in subsection (d), but no later then 90 days after the Whistleblower Office provides the employee with written notification of his or her potential eligibility for a reward, the employee who initially contacted the corporate compliance department and/or otherwise made the report that resulted in the referral set forth in subsection (F), may file for a reward under section 23 of the Securities Exchange Act. For purposes of determining the date of filing the 23 claim, that date shall be the date in which the employee can demonstrate that he or she initially contacted the employer's compliance program or otherwise made the report that resulted in the employer's subsection (F) disclosure to the CFTC.

(f) Nothing in this section shall be interpreted as interfering with the employee's right to directly file a section 23 claim with the CFTC at any time. ~~(d) *Subcontracts.*~~

~~(1) The Employer shall include the substance of this clause, including this paragraph (d), in subcontracts that have a value in excess of $5,000,000 and a performance period of more than 120 days.~~

~~(2) In altering this clause to identify the appropriate parties, all disclosures of violation of the civil False Claims Act or of Federal criminal law shall be directed to the agency Office of the Inspector General, with a copy to the Contracting Officer.~~

EXHIBIT #2
PROPOSED RULE - PROTECTING EMPLOYEE WHISTLEBLOWERS

[Note: The proposed rule is based on 10 C.F.R. § 50.7. The parts of the current rule that are recommended for being cut are struck out, the new additions to the rule are in bold]

~~10 C.F.R. § 50.7~~

Employee protection:

(a) Discrimination by ~~a~~ **an employer regulated by the Securities and Exchange Commission** ("Commission")~~ licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant~~ against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section **21F of the Securities Exchange Act** ~~211 of the Energy Reorganization Act of 1974~~, as amended, and in general are related to the administration or enforcement of a requirement imposed under the **Securities Exchange Act or any other law, rule or regulation enforced by the Commission** ~~Atomic Energy Act or the Energy Reorganization Act~~.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the statutes named in paragraph (a) introductory text of this section or possible violations of requirements imposed under either of those statutes;

(ii) Refusing to engage in any practice made unlawful under either of the statutes named in paragraph (a) introductory text or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the statutes named in paragraph (a) introductory text~~.~~**;**

(v) Providing information to an employer's Audit Committee, compliance department or to an employee's supervisor concerning information about alleged

violations of either of the statutes named in paragraph (a) introductory text of this section or possible violations of requirements imposed under either of those statutes;

(vi) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the **Securities Exchange Act** ~~Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954~~, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor **under the Sarbanes Oxley Act and/or by filing an action in federal court pursuant to section 23(h) of the Securities Exchange Act**. ~~The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.~~

(c) A violation of paragraph (a), (e), or (f) of this section by ~~a~~ **an employer regulated by the** Commission **or subject to the requirements of section 23(h) of the Securities Exchange Act,** ~~licensee, an applicant for a Commission license,~~ or a **subsidiary, agent,** contractor or subcontractor of **an employer** ~~a Commission licensee or applicant~~ may be grounds for--

(1) Denial, revocation, or suspension of **listing on an exchange** ~~the license~~.

(2) Imposition of a civil penalty on the **employer, subsidiary, agent** ~~licensee, applicant, or a~~ contractor or subcontractor ~~of the licensee or applicant~~.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e)(1) Each **employer subject to the requirements of section 23 of the Securities Exchange Act, including subsidiaries or agents of such employer,** ~~licensee and each applicant for a license~~ shall prominently post ~~the revision of NRC~~ Form ____ ~~3~~, "Notice to Employees~~,~~." ~~referenced in 10 CFR 19.11(c).~~ This form must be posted at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. **Form ____ shall inform employee's of their rights under section 23 of the Securities Exchange Act, and shall include a copy of the text of section 23.** ~~Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.~~

(2) Copies of NRC Form 3 may be obtained by writing to _____**.** ~~the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in appendix D to part 20 of this chapter, by calling (301) 415-5877, via e-mail to forms@nrc.gov, or by visiting the NRC's Web site at http://www.nrc.gov and selecting forms from the index found on the home page.~~

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee **under section 23 of the Securities Exchange Act or** with the Department of Labor pursuant to **the Sarbanes Oxley Act** ~~section 211 of the Energy Reorganization Act of 1974, as amended~~, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the ~~NRC~~ **Commission** or to his or her employer on potential violations or other matters within ~~NRC's~~ **Commission's** regulatory responsibilities.