



D I S T R I C T O F C O L U M B I A B A R
S e c t i o n s

December 17, 2010

Securities and Exchange Commission
Attention: Elizabeth M. Murphy, Secretary
100 F Street, N.E.
Washington, D.C. 20549-1090

RE: Comments on Proposed Whistleblower Rules (File No. S7-33-10)

Dear Chairman Schapiro and Commissioners:

We are pleased to submit the following comments on behalf of the District of Columbia Bar's Corporation, Finance and Securities Law Section in connection with the Commission's proposed rules for implementing the whistleblower provisions of Section 21F of the Securities Exchange Act of 1934.¹

We commend the Commission for an excellent proposal overall, and our comments are limited to particular areas where we feel that we can contribute positively to the ongoing discussion.

I. Formal Procedures to Obtain Quality Information

The proposal contains a detailed system of forms and procedures that should encourage whistleblowers to evaluate carefully the merits of the information they are supplying, articulate that information more clearly in their submissions, and furnish appropriate supporting documents and other evidence. However, it would hurt the program if the Commission were to apply the technical requirements strictly to deny, or discourage, meritorious whistleblower tips. For this reason, we recommend that the Commission simplify its forms and retain the flexibility to exercise its discretion to waive technical requirements as appropriate in particular circumstances.

II. Simplify the Forms Whistleblowers must file with the Commission

The forms that whistleblowers, or their counsel, must file with the Commission to provide disclosures of potential violations should be simplified.

¹ The views expressed herein represent only those of the Corporations, Finance and Securities Law Section of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors. The Steering Committee of the Section has voted without dissent (with one abstention and one not available for the vote) on December 8, 2010 to submit these comments on the Section's behalf concerning the Commission's proposed whistleblower regulations. The Corporations, Finance and Securities Law Section of the D.C. Bar represents over 2,400 D.C. Bar members who practice in or have an interest in securities and other corporate law areas.

The proposed Rules require whistleblowers to submit three forms to receive an award. Whistleblowers must first submit a Form TCR (Tip, Complaint or Referral) to bring “original information” to the attention of the Commission. A separate Form WB-DEC (Declaration Concerning Original Information Provided to Sec. 21F of the Securities Exchange Act of 1934) must also be filed. If the tip results in a successful prosecution, the Commission will post a “Notice of Covered Action” on a website, after which a whistleblower has 60 days to file Form WB-APP.

A less daunting procedure to whistleblowers would be to combine SEC Forms TCR and WB-DEC into one less complicated form similar to IRS Form 211, used by the Internal Revenue Service for its Whistleblower Program. This form requests information on the whistleblower, what information is being provided, and the source of that information. Additional information the Commission may need to investigate and prosecute a violation can then be obtained by Commission Staff during subsequent interviews.

It also stands to reason that, since the Commission will have a record notice of whistleblower tips that resulted in a successful prosecution of a violation, proposed Rule 240.21F-10(a) should be amended to require the Commission to mail or transmit a “Notice of Covered Action” to the last known address provided by the whistleblower to the Commission, if the whistleblower is to be required to file a another form, Form “WB-APP”, within 60 days of that Notice.

III. Encouraging Company Compliance Programs to Work

We applaud the Commission’s efforts to encourage potential whistleblowers to take advantage of internal compliance systems that many companies have established to deal with issues raised by employees. This encourages companies to maintain robust programs and employees to report compliance issues to robust compliance programs by removing disincentives to their use, and, thereby, gives company compliance programs an opportunity to respond immediately and effectively to problems that are identified by these compliance systems. In particular, Rule 21F-4(b)(7) provides that whistleblowers who first report internally will not lose priority in the Commission’s whistleblower queue if they then report to the Commission within 90 days, thus giving the entity 90 days for its internal system to quickly address a problem. Further, the proposing release (p. 51) provides, as a “consideration” but not as a “criterion” of the rule, that whistleblowers who first report internally may be awarded an enhanced award over those who only report to the Commission.

A. Anonymous Reporting to Entity.

Employees sometimes fear they are putting their careers, or possible advancement in their careers, at risk when they report misconduct involving their superiors. Some, but not all, companies, have established policies and procedures for employees to submit complaints anonymously. Section 301 of the Sarbanes-Oxley Act (Securities Exchange Act §10A(m)(4)(B))

[15 U.S.C. § 78j-1(m)(4)(B)] requires audit committees of issuers to establish procedures that allow their employees to report anonymously their concerns regarding accounting or auditing matters. Robust compliance programs that have anonymous reporting procedures with effective anti-retaliation policies should be encouraged.

The Commission expressed concerns about the impact that the Dodd-Frank Whistleblower Program may have on fostering robust corporate compliance programs, and has asked in Requests for comment 18 and 19 whether the Commission should consider rules that require whistleblowers to use employer-sponsored complaint and reporting procedures to minimize the impact on SOX Section 301 Programs, and, in Request for comment 27, whether the Commission should include as a criterion the consideration of whether, the extent to which, a whistleblower reported the potential violation through effective internal whistleblower, legal or compliance procedures before reporting the violation to the Commission.

The best balance for encouraging legitimate whistleblowers and encouraging use of existing compliance programs is to amend proposed Rule 240.21F-6 by adding the following new criteria:

(e) Whether and the extent to which the whistleblower reported the suspected violation to the company's internal reporting procedures before reporting the suspected violation to the Commission, and whether the company had a robust legal or compliance program with anonymous reporting procedures and an effective anti-retaliation policy.

This modification to the Criteria for determining amount of award, and not eligibility for an award, will put all companies and potential whistleblowers on record notice that the Commission will continue its "approach," as stated on page 35 of the Release, to promote robust compliance programs that have anonymous tip reporting procedures and strong anti-retaliation programs. If this criteria is not added, the amount of awards may be challenged in courts on the ground that the Commission impermissibly considered whether the whistleblower made a report to their company, and that agency guidelines and "approaches" will be given less weight than agency rules.

B. Anonymous Internal Whistleblowing.

The Commission should encourage all companies to adopt effective internal compliance procedures by modifying proposed Rule 21F-4(b)(7) and the proposing release to expressly provide that the 90-day report date provision and the enhanced award consideration apply to employees who whistleblow to their entities anonymously, regardless of whether the entity's program makes provision for anonymous whistleblowing. Such anonymous internal whistleblowing could be accomplished through the use of an attorney or other means.

C. Anti-Retaliation Protections for Internal Reporting.

For an entity's processes to work effectively, it must have an effective, enforceable anti-retaliation provision. Rule 21F-2(b) applies the anti-retaliation provisions of Section 21F(h)(1) only where the individual supplies information "to the Commission." To enhance the effectiveness of entities' internal programs, the Commission may want to broaden Rule 21F-2(b) to have it apply where the individual supplies information "to the Commission or to any of the persons described in Rule 21F-4(b)(4)(iv) and (v)," which would have the effect of expanding the anti-retaliation protections to whistleblowers who report to persons with legal, compliance, audit, supervisory or governance responsibilities for the entity. It would appear that Section 21F(h)(1)(A)(iii) allows the Commission to so expand the anti-retaliation protections to apply to internal programs.

IV. Narrowing Exclusions to Make Incentives Meaningful

The rules attempt to strike a balance between encouraging individuals to reporting information while at the same time guarding against windfalls to persons who in fairness should not be compensated for providing information. In general, the balance the rules strike is appropriate. However the rules provide for certain exclusions from the whistleblower program that may require further consideration, as discussed below.

A. Exclusion of Persons Whose Employers Get Information Requests.

Rule 21F-4(a)(2) excludes a person from the Commission's whistleblower program if the "documents or information" the person provides would be "within the scope" of "a request, inquiry, or demand" the person's employer receives – perhaps even an industry-wide request – from the Commission or (referring back to Rule 21F-4(a)(1)) from Congress, another federal state or local authority, an SRO or the PCAOB. This means that once the Commission or another authority begins investigating, the Commission's whistleblower program effectively shuts down, because any relevant documents or information would almost certainly be covered by an even marginally comprehensive investigative request. For example, in the current DOJ investigation into insider trading by hedge funds and others, it would appear that any employee of any entity receiving any kind of request from the Commission would be barred from being a whistleblower. Individuals with documents or information that may substantially assist the Commission's inquiries should be encouraged to provide them to the Commission, even after an inquiry is underway. Such individuals, for example, may be able to explain the significance of statements in documents when it would not be readily apparent to an investigator. We suggest eliminating the Rule 21F-4(a)(2) exclusion.

B. Exclusion of Persons With "Known" Information.

Rule 21F-4(b)(1)(ii) excludes a person from the Commission's whistleblower program if the person's information is "already known" to the Commission. The problem with such a blanket exclusion is that "information" does not always come in neat pieces. Persons may come to the

Commission with information that enhances or provides additional and more direct support for information the Commission already has. In such situations we would suggest that the Commission not automatically exclude the second person in the door, but rather determine an appropriate award allocation in the Commission's discretion.

C. Exclusion of Informed and Sophisticated Persons.

Rule 21F-4(b)(4)(iv) and (v) may have the effect of excluding from the Commission's whistleblower program many, if not most, of the individuals likely to have the best information and sophistication to report a violation to the Commission. This broad group of excluded individuals includes:

- Persons with supervisory or governance responsibilities for the entity, where they obtained the information in circumstances where it was reasonably expected they would act on the information. (Rule 21F-4(b)(4)(iv)) On its face, this category potentially would include not just senior executives, but also middle and lower management personnel, and thus sweep across all operating and service divisions of the entity.
- Persons with audit responsibilities for the entity. (Rule 21F-4(b)(4)(v)) This would include virtually any person involved in the financial reporting function, from the CFO right down to bookkeepers and clerical personnel with audit-related duties.
- Persons with legal and compliance responsibilities for the entity. (Rule 21F-4(b)(4)(v)) This would include non-privileged information obtained by the persons at the entity most likely to appreciate the potentially improper nature of the conduct in question, and to have the integrity and professional commitment to report a violation.

The rule only allows these individuals to whistleblow to the Commission if the entity "did not disclose the information to the Commission within a reasonable time" or otherwise proceeded in bad faith. The rule thus appears to suggest that an individual in these categories must (i) first whistleblow internally and risk prompt termination or demotion; (ii) after waiting for some undefined period that the individual would have to guess was a "reasonable" time, then whistleblow to the Commission; and (iii) after doing so, perhaps have to challenge a technical determination over whether the individual had waited a "reasonable" enough time or over another technical disqualification. As a practical matter, few individuals in these important whistleblower categories will want to walk down such an uncertain path.

As an alternative, we suggest modifying the proposed rule as follows: (i) allow individuals in the foregoing categories to qualify for awards to encourage them to whistleblow; (ii) require such individuals to first whistleblow internally if their entity has a credible program, but provide that they may do so anonymously and subject to the anti-retaliation protections; (iii) provide that they must wait 75 days for the entity to respond appropriately, and that if the entity does not do so, the individual may within 90 days whistleblow to the Commission; (iv) provide that the date of providing information to the Commission shall be retroactively deemed to be the date that the

individual or the individual's attorney whistleblow to the entity; and (v) provide that in determining the amount of any bounty to be paid to the individual, the Commission will consider the value of the individual's aggregation of information obtained from other sources within the entity, as well as the individual's analysis.

D. Exclusion of Lawyers and Accountants.

Rule 21F-4(b)(4)(i), (ii) and (iii) excludes lawyers and public accountants from the Commission's whistleblower program. The underlying assumption of this approach seems to be that legal and accounting professionals always have the power to effect change within an entity. Often this is the case, but sometimes it is not. For example, a junior assistant general counsel may in some situations serve under a general counsel unwilling to oppose management. Likewise, outside counsel may learn, in litigation through discovery or depositions, or through independent research or otherwise, of fraud being committed by an adversary (or by a client). In view of the importance of lawyers and accountants to the whistleblowing process and the pressures they like others face in raising difficult issues, we would suggest modifying the rule to treat them in much the same manner as we would propose treating persons with supervisory, governance, audit, and other legal and compliance responsibilities, as discussed above. Essentially, they would have to whistleblow internally first, have the ability to do so anonymously, and then be able to whistleblow after 75 days but within 90 days to the Commission.

E. Exclusion of persons who "should have" provided information earlier.

The Act provides that certain specified government employees should not benefit from becoming whistleblowers, such as employees of regulatory agencies, law enforcement officials, and auditors. The law sets forth these categories specifically, Sec. 21F(c)(2)(A). The proposed rules would broaden that prohibition to "other similarly-situated persons..." (Release at p. 14). Thus government contracting officers cannot be whistleblowers on government contracts. But neither can a broadly defined group of corporate managers who under recent procurement rule changes are now themselves obligated to report "credible evidence" of violations of various federal criminal laws, False Claims Act violations and overpayments on government contracts. 73 Fed. Reg. 67064 (December 2008); FAR Subpart 9.4. The Commission commentary offers this observation: "a city officer or employee with responsibility for the city's pension fund might have a pre-existing legal duty to report fraud in connection with the fund's management or financial reporting to appropriate city authorities." (Release at p.14). The proposal even asks if the rule should "preclude submissions from all Government employees." (Release at p. 16).

Congress addressed the issue of denying awards to persons with "unclean hands" by barring recovery to those "convicted of a criminal violation related to the...action for which the whistleblower could otherwise receive an award...." Sec.21F(c)(2)(B). Congress did not disqualify those who "should have" reported the matter but failed to do so.

Many government agencies and self-regulatory organizations require that entities under their jurisdiction (and thus their employees and managers) may be under such "a pre-existing legal or contractual duty to report the securities violations" (Proposed Rule 240.21F-4(3) (Release at p. 128)). These potential whistleblowers should not be disqualified if they failed to report internally before they report to the SEC. However, failure to report potential violations internally before reporting to the Commission should be an express consideration in determining the amount of an award.

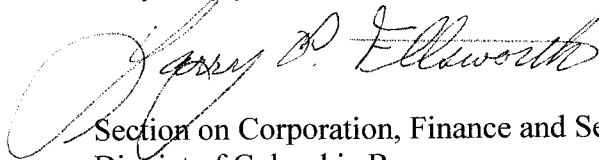
The Commission should not require that it decide whether whistleblowers from within state or municipal corporations have pre-existing obligations to report internally. This analysis of another agency's regulations may be beyond the Commission's expertise and may invite litigation with rejected whistleblowers. Likewise, such a rule may dissuade potential whistleblowers from reporting anything to anyone if they fear punishment for not previously reporting the information internally. A whistleblower in this situation may not risk reporting violations to the Commission when they may later be declared ineligible for any award because they are determined to have had a duty to report internally to an ineffective compliance program.

F. Partial Exclusion of Violators.

Rule 21F-15 provides that sanctions ordered against a whistleblower and the related entity will be deducted from the computation of the \$1 million "threshold" amount and the computation of total amount collected. This has the effect of disincentivizing persons even marginally involved in the wrongful conduct from helping the Commission bring a successful case. Often a marginal violator will be the most helpful whistleblower, and serious violators will not come forward because they fear criminal prosecution. We would suggest instead providing that the Commission deduct only the sanctions against the whistleblower and not those against the entity, unless the Commission determines that the individual was a primary cause of the entity's violation.

In conclusion, in addition to commending the Commission for an excellent rule proposal, we would also like to express our appreciation for the transparency that has been the hallmark of the rule proposal and comment process for this and other rules being promulgated under the Dodd-Frank Act.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Jerry D. Ellsworth". The signature is fluid and cursive, with a large initial "J" and "E".

Section on Corporation, Finance and Securities Law
District of Columbia Bar