

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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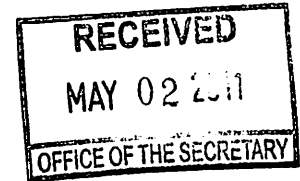
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**VIA FIRST-CLASS MAIL**

April 26, 2011

Ms. Elizabeth M. Murphy, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 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:

Please accept the enclosed comments as a supplement to the National Coordinating Committee for Multiemployer Plans' original December 17, 2010 comments in response to the Securities and Exchange Commission's Proposed Rule for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934.

Thank you very much for your attention to this matter.

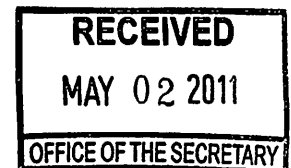
Sincerely,

/s/  
Randy G. DeFrehn  
Executive Director

Enclosure

cc: Donald J. Capuano  
Gerard M. Waites

# *How Rampant Is Fraud & Other Illicit Conduct on Wall Street?*



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## **I. Introduction**

A review of recent cases and pending investigations involving illicit practices in U.S. financial markets reveals a disturbing trend. Rampant insider trading, bribery and a host of other fraudulent financial practices appear to plague Wall Street and leading banks and financial service companies as we struggle to rebuild the economy. Undoubtedly, the conduct underlying these scandals was a factor in the greatest economic downturn since the Great Depression, a financial crisis of such magnitude it nearly brought our nation to its knees.

The harmful impact of such practices cannot be understated. Epidemic fraud in financial markets threatens valuable assets of institutional investors and modest pensions of everyday working people, as well as the stability of the economy itself.

## **II. Recent Cases & Investigations**

The cases listed below, involving investigations and enforcement actions in diverse sectors of the financial industry, highlight the broad scope of suspected or proven fraud on Wall Street. Some of these cases have been successfully adjudicated or settled; others involve claims in pending cases.

- **Abusive mortgage practices** alleged against Bank of America, Wells Fargo and Citigroup for reportedly pursuing foreclosures against homeowners without proper documentation and signing off on paperwork with only a cursory examination.<sup>2</sup>
- UBS officials accused of **widespread conspiracy** for paying public agencies below-market returns on municipal bond deals.<sup>3</sup>
- Goldman Sachs charged with **fraudulently misleading** investors by creating a mortgage security that was bet against by a hedge fund manager who was allegedly involved in establishing that very security.<sup>4</sup>

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<sup>1</sup> The National Committee for Multi-Employer Plans (NCCMP) is a non-profit membership organization that monitors, on a non-partisan basis, legislative, regulatory and legal developments from conception to implementation to enforcement on behalf of multiemployer benefit plans, many of which have substantial investments in U.S. financial markets.

<sup>2</sup> Nelson D. Schwartz & Eric Dash, *3 Banks Warn of Big Penalties in Mortgage Inquiries*, Dealbook Blog, N.Y. TIMES (Feb. 25, 2011), available at <http://dealbook.nytimes.com/2011/02/25/3-banks-warn-of-big-penalties-in-mortgage-inquiries/>

<sup>3</sup> *Ex-UBS Banker Pleads Guilty to Muni-Bond Fraud*, Dealbook Blog, N.Y. TIMES (May 20, 2010), available at <http://dealbook.nytimes.com/2010/05/20/ex-ubs-banker-pleads-guilty-to-muni-bond-fraud/>

<sup>4</sup> Sewell Chan & Louise Story, *Goldman Pays \$550 Million to Settle Fraud Case*, N.Y. TIMES (July 15, 2010), available at <http://www.nytimes.com/2010/07/16/business/16goldman.html>

- Citigroup alleged to have **willfully ignored** signs of Bernard Madoff's multi-billion dollar ponzi scheme; reportedly had notice of unlawful conduct, including mass profiting from avoidable transfers.<sup>5</sup>
- Countrywide Financial executives accused of **fraudulently disguising** risks associated with subprime mortgages and improperly making profits on insider stock sales.<sup>6</sup>
- Charges of **passing illegal tips** alleged against former Goldman Sachs and Proctor & Gamble director, Rajat Gupta, regarding the companies' earnings and incoming investments.<sup>7</sup>
- **Conflict of interest** inquiry targeting various Wall Street firms for underwriting state/local bonds and then allegedly betting against those same bonds through credit default swaps.<sup>8</sup>
- **"Window dressing"** alleged against Lehman Brothers in using Repo 105 transactions to remove assets from books at the end of each quarter to disguise its actual financial state.<sup>9</sup>
- IndyMac executives accused of **fraudulent reporting** earnings to mislead shareholders concerning large investment losses.<sup>10</sup>
- **Insider trading** charges against Galleon hedge fund manager, Raj Rajaratnam regarding information on Intel's \$1 billion investment in an Internet service joint venture.<sup>11</sup>
- Investigations into eight of the country's largest banks for allegedly **misleading credit rating agencies** for the purpose of inflating grades of certain mortgage securities.<sup>12</sup>
- Charges against officer of Petters Company, Inc involving an alleged **\$3.7 billion ponzi scheme** involving multiple claims of fraud and money laundering impacting hedge funds, pastors, missionaries and retirees.<sup>13</sup>

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<sup>5</sup> *Trustee Suit Says Citigroup Ignored Signs of Fraud in Madoff Scheme*, N.Y. TIMES (Feb. 22, 2011), available at <http://www.nytimes.com/2011/02/23/business/23madoff.html>

<sup>6</sup> Gretchen Morgenson, *Lending Magnate Settles Fraud Case*, N.Y. TIMES (Oct. 15, 2010), available at <http://www.nytimes.com/2010/10/16/business/16countrywide.html>

<sup>7</sup> Peter Lattman, *Ex-Goldman Director Accused of Passing Illegal Tips*, Dealbook Blog, N.Y. TIMES (March 1, 2011), available at <http://dealbook.nytimes.com/2011/03/01/former-goldman-director-charged-with-insider-trading/>

<sup>8</sup> Ianthe Jeanne Dugan, *Scrutiny for Bets on Municipal Debt*, WALL STREET JOURNAL (May 14, 2010), available at <http://online.wsj.com/article/SB10001424052748703950804575242753286993826.html>

<sup>9</sup> Liz Rappaport & Michael Rapoport, *Auditors Face Fraud Charge*, WALL STREET JOURNAL (Dec. 20, 2010), available at <http://online.wsj.com/article/SB10001424052748704138604576029991727769366.html>

<sup>10</sup> Ben Protess & Susanne Craig, *3 Former IndyMac Executives Are Accused of Fraud*, Dealbook Blog, N.Y. TIMES (Feb. 11, 2011), available at <http://dealbook.nytimes.com/2011/02/11/indymac-executives-face-civil-charges/>

<sup>11</sup> Azam Ahmed & Peter Lattman, *Galleon Trial Focuses on Clearwire Deal with Intel*, Dealbook Blog, N.Y. TIMES (March 21, 2011), available at <http://dealbook.nytimes.com/2011/03/21/galleon-trial-focuses-on-hilton-buyout/>

<sup>12</sup> Lousie Story, *Prosecutors Ask If 8 Banks Duped Rating Agencies*, N.Y. TIMES (May 13, 2010), available at <http://www.nytimes.com/2010/05/13/business/13street.html?dbk>

### III. A Pattern & Practice of Fraud Becoming a Business Model

Numerous high-profile cases are not the only evidence of widespread, systematic fraud in U.S. financial markets. According to the U.S. Department of Justice:

“Since July 2002, the [corporate fraud] task force has yielded . . . nearly 1,300 corporate fraud convictions to date, including more than 200 chief executive officers and presidents, more than 120 corporate vice presidents, and more than 50 chief financial officers.”<sup>14</sup>

These were only the cases the government was able to detect, expose and fully prosecute; and since these only refer to cases involving “convictions,” there are likely many more cases that resulted in settlements.

In the midst of the 2008-2009 financial meltdown, the FBI also reported that it was “conducting more than 500 investigations of corporate fraud.”<sup>15</sup> More recently, CFO Magazine summarizes a new industry report on the subject as follows:

“Last year, the Committee of Sponsoring Organizations of the Treadway Commission’s report on corporate fraud concluded that fraud continues to increase in depth and breadth despite Sarbanes-Oxley; the methods of committing financial fraud have not materially changed; and traditional measures of corporate governance have limited impact on predicting fraud. In other words, same old same old, only worse: in its 2010/2011 Global Fraud Report, risk consulting firm Kroll found that business losses due to fraud increased 20% in the last 12 months, from \$1.4 million to \$1.7 million per billion dollars of sales. The report, based on a survey of more than 800 senior executives from 760 companies around the world, also found that 88% of the respondents reported being victims of corporate fraud over the past 12 months. If fraud were the flu, this would qualify as a pandemic.”<sup>16</sup>

Finally, just last month The Washington Post published an article exposing rampant insider trading on Wall Street, including cases in which illicit gains of \$100 million from such practices were not unusual. Indeed, in this report, the U.S. Attorney for the Southern District of New York, Preet Bharara, stated that “[g]iven the scope of the allegations to date, we are not talking simply about the occasional corrupt individual; we’re talking about something verging on a corrupt business model.”<sup>17</sup>

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<sup>13</sup> *Petters Gets 50-Year Term for Ponzi Fraud*, Dealbook Blog, N.Y. TIMES (Apr. 9, 2010), available at <http://dealbook.nytimes.com/2010/04/09/petters-gets-50-year-term-for-ponzi-fraud/>

<sup>14</sup> DOJ Press Release, January 6, 2009, <http://www.justice.gov/opa/pr/2009/January/09-odag-003.html>

<sup>15</sup> *FBI Probes 530 Cases of Corporate Fraud*, The Washington Times, Feb. 12, 2009.

<sup>16</sup> Laton McCartney, *Where There’s Smoke, There’s Fraud*, CFO Magazine, March 1, 2011, <http://www.cfo.com/article.cfm/14557373/> (emphasis added).

<sup>17</sup> David Hilzenrath and Jia Lynn Yang, *Federal Investigators Expose Vast Web of Insider Trading*, The Washington Post, (February 12, 2011). (emphasis added).

#### IV. A Strong Case for Stronger Whistle Blower Protection on Wall Street

Fraud, by definition, is secret. It is carefully hidden from government regulators, investors and the public. The problem with corporate fraud is that it can yield huge dividends. Even a little cheating on Wall Street can reap millions of dollars in illicit gains; major schemes can yield hundreds of millions or billions. These incentives are the driving force behind rampant growth in corporate fraud in America.

To protect investors and ensure confidence in the markets, effective counter-measures are needed to combat fraud. Indeed, given the systematic nature of illicit conduct uncovered in recent years, it is essential that our financial markets have the strongest safeguards and counter-incentives possible to combat fraud. The whistleblower protection and whistleblower incentive provisions of the Dodd-Frank Wall Street Reform Act (Public Law 111-203) were adopted by Congress precisely for this purpose.

By enacting this law, Congress recognized that persons employed in the financial industry, directly or indirectly, are one of the most reliable means for fighting and deterring corporate fraud, as long as there are effective employment protections and adequate incentives to detect and report illegal conduct. The Dodd-Frank Act, in Section 922, includes strong provisions in these areas. These provisions establish landmark protections with respect to how the federal government, aided by private citizens, should police Wall Street and combat corporate fraud.<sup>18</sup> Thus, the debate as to *whether* corporate whistleblowers should have strong protections and incentives has been concluded, Congress has established such provisions and now they must be implemented.

It is also important to recognize that the Dodd Frank whistleblower provisions were modeled on the False Claims Act (FCA), 31 U.S.C. §§ 3729, *et. seq.* This was the result of the federal government's own extensive experience in using the FCA to successfully combat federal contract fraud. To date, the federal government has recovered over \$12 billion for the U.S. treasury under the FCA, and over 80% of these cases were initiated by whistleblowers.<sup>19</sup> Incentivizing employees to detect and expose major illegal practices works.

The Securities Exchange Commission and the Commodity Futures Trading Commission are currently reviewing comments to proposed regulations to implement Dodd Frank. For the reasons set forth above, these agencies should ensure that the Dodd-Frank Wall Street Reform Act is faithfully followed and should adopt the strongest regulations possible regarding the law's whistleblower protections and incentives, including those recommended in NCCMP's prior comments (attached hereto).

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<sup>18</sup> Congress's action in this regard is well founded. Studies pre-dating Dodd Frank have found that "employees" (whether of corporations or financial institutions) have been the single largest source of information used to expose corporate fraud. *See e.g.*, Alexander Dyck, Adair Morse, Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, The Journal of Finance, Volume 65, Issue 6, December 2010, p. 1.

<sup>19</sup> *See* <http://www.taf.org/faq.htm#q6>; <http://www.taf.org>