

PROPOSED RULE 21F WHISTLEBLOWER PROGRAM

SUMMARY OF SELECTED COMMENT LETTERS TO THE SEC

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**SUMMARY OF COMMON THEMES AND
ISSUES IDENTIFIED BY SEC COMMENT LETTERS**

SEC Comment Letter Authors	UNDERMINING INTERNAL COMPLIANCE SYSTEMS	ENCOURAGING CORPORATE WRONGDOING	FALSE, OPPORTUNISTIC OR UNSUBSTANTIATED CLAIMS	MISCELLANEOUS
<p>American Bar Association Section of Business Law, Committee on Federal Regulation of Securities</p>	<p>Require, as condition of award, use of internal whistleblower programs prior to SEC reporting.</p> <p>Redefine definition of “voluntary” to exclude information submitted after: (1) request, inquiry or demand from foreign securities regulator or law enforcement organization, (2) commencement of civil action to which whistleblower’s submission is relevant, and (3) commencement of any inquiry or investigation by company’s in-house counsel, outside counsel, compliance staff, internal or external auditors or others with supervisory and governance responsibilities which is known to whistleblower.</p> <p>Narrow “original information” to exclude all information derived from allegations made in any investigative or enforcement activity or proceeding. Restrict “independent knowledge” and “independent analysis” to direct, first-hand knowledge of possible violations. Exclude information obtained in violation of corporate policies.</p> <p>Extend 90-day grace period for whistleblowers to report information to SEC after reporting internally to 180-days.</p>	<p>Prohibit persons engaged in culpable conduct from award eligibility and protection of anti-retaliation provisions.</p> <p>Redefine whistleblower to include only persons who provide information about potential violations “by another person.”</p>	<p>Set minimum standards for whistleblower status, such as reasonable basis standard, to foster SEC receipt of high-quality information and minimize false, spurious or frivolous claims.</p> <p>Require information submitted be “material” to alleged securities laws violations.</p>	<p><u>Privileged and Confidential Information</u></p> <p>Provide that attorney disclosing confidential client information not be protected by anti-retaliation provisions to avoid undermining professional and ethical standards.</p>
<p>GE, Google, Microsoft, JPMorgan Chase & Co, Honeywell Inc., Northrop Grumman</p>	<p>Require employees of companies with “effective compliance and reporting systems” to report any potential violation internally for award eligibility.</p>	<p>Exclude individuals who make false, fictitious or fraudulent reports from protections of anti-retaliation provisions.</p>		<p><u>Big Brother SEC and Race-to-Report</u></p> <p>SEC policy of providing</p>

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Corp.	<p>Exclude from award eligibility, employees involved in compliance, legal, audit or supervisory roles, as well as those who obtain information as result of participation in compliance investigation or function.</p> <p>Exclude professionals with “fiduciary-like” duties from award eligibility.</p> <p>Exclude from “voluntary information” any information withheld by an employee from an internal compliance inquiry.</p> <p>Clarify that scope of privileged information subject to exclusions from “independent knowledge” or “independent analysis” is not limited to information possessed by lawyers or others working for lawyers.</p>	<p>Adopt rules establishing burden of proof on plaintiffs to prove retaliation if employer has legitimate, non-retaliatory grounds for adverse employment action.</p>		<p>appropriate cooperation credit to companies undertaking voluntary investigations, remediation and self-reporting.</p> <p align="center"><u>Privileged and Confidential Information</u></p> <p>SEC adoption of formal procedures for handling potentially privileged information obtained from whistleblowers, and clarification that SEC will not seek or obtain privileged information, outside the presence of counsel, from communications with directors, officers or other entity employees.</p>
<p>Americans for Limited Government, Ryder Systems, Inc., Financial Services Institute, Inc., U.S. Chamber of Commerce, Verizon, White & Case, LLP</p>	<p>Condition award eligibility on use of available internal reporting system.</p> <p>Exclude individuals with legal, compliance, audit or ethics responsibilities, or those who have a professional privilege from award eligibility, subject to narrow exceptions.</p> <p>Establish SEC policy under which the SEC shares information received with entities subject of complaints, providing those entities opportunities</p>	<p>Exclude culpable individuals from award eligibility, which are those who engage in, perpetuate, or fail to take action to stop internal wrongdoing.</p> <p>Clarify that good-faith employment actions taken by corporations are not retaliatory if based on factors other than individuals’ whistleblower status.</p>		

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	<p>to fully investigate allegations before SEC review.</p> <p>Extend 90-day grace period for whistleblowers to report information to SEC after reporting internally to 180-days.</p>			
Association of Corporate Counsel	<p>Require timely internal submission of suspected wrongdoing.</p>	<p>Bar individuals who engaged in underlying misconduct from award eligibility.</p> <p>Require prospective whistleblowers' compliance with corporate policies in obtaining or disclosing any information submitted to SEC.</p> <p>Clarify scope of anti-retaliation provisions, primarily that: (1) corporate policies creating responsibility to internally report misconduct or participate in corporate internal investigations are not barred by anti-retaliation provisions; and (2) prospective whistleblower cannot rely on anti-retaliation provisions when terminated, or otherwise disciplined, for conduct unrelated to whistleblower status.</p>	<p>Require disclosure of financial conflict of interest, and bar short-sellers from obtaining award.</p>	<p><u>Plaintiff's Attorneys</u></p> <p>Issue rules of practice for attorneys seeking to represent prospective whistleblowers.</p>
Arent Fox LLP	<p>Require internal reporting of suspected wrongdoing before reporting to SEC. If appropriate action not taken by company within reasonable time, employee permitted</p>			<p><u>"One-Bite Rule"</u></p> <p>Adopt "one-bite rule," prohibiting SEC from receiving ongoing assistance and information from</p>

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	<p>to report to SEC under whistleblower program.</p> <p>Exclude professionals with fiduciary duties from award eligibility.</p>			<p>whistleblowers.</p> <p align="center"><u>“No-Bite Rule”</u></p> <p>Adopt “no-bite rule,” precluding SEC from accepting information from public company representatives with fiduciary responsibilities.</p> <p align="center"><u>Privileged and Confidential Information</u></p> <p>Before using information, SEC should determine whether information submitted is subject to certain privileges, and if so, whether those privileges have been waived in whole or in part. Require whistleblower or anonymous whistleblower’s counsel to certify understanding of attorney-client privilege and verify that not aware of any potential privilege-related issues relating to information submitted.</p>
<p>National Society of Compliance Professionals (“NSCP”)</p>	<p>Necessary that rules actively encourage internal reporting rather than intending to merely “not discourage” internal reporting.</p> <p>Monetary award acts as a strong disincentive to the use of internal reporting mechanisms.</p>		<p>Require whistleblower’s excuse for not using internal reporting systems (<u>e.g.</u>, fear of retaliation) be based on clear, objective standards, not the whistleblower’s subjective viewpoint.</p> <p>Exclude from award</p>	<p align="center"><u>Privileged and Confidential Information</u></p> <p>Whether the attorney-client privilege should be recognized should be determined by federal, state or foreign law, not by the SEC.</p>

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	<p>Require internal reporting for award eligibility or at least include internal reporting as a heavily weighted criteria in the award calculation.</p> <p>Reserve SEC discretion to determine whether, under the particular facts, the employee may objectively and appropriately be excused from internal reporting obligations, rather than relying on the whistleblower's subjective viewpoint.</p> <p>Narrow the scope of employees who may qualify for awards by emphasizing the duty employees owe to employers to voluntarily bring concerns regarding possible wrongdoings to relevant supervisory and other personnel and to cooperate fully in the internal review.</p> <p>Clarify that information learned as part of an internal review should not be deemed "voluntary."</p> <p>Determine subjectively, on a case-by-case basis, whether a company discloses information to the SEC within a "reasonable time."</p>		<p>consideration information whistleblower becomes aware of after an internal review, unless such information is outside the scope of that review.</p>	<p>Allowing attorneys or other persons subject to the attorney-client privilege (1) would have a chilling effect on open communications, (2) would be a disincentive to firms and their employees to be forthright with their attorneys, and (3) would have an adverse effect in the conduct by firms of internal reviews.</p>
<p>Securities Industry and Financial Markets Association ("SIFMA")</p>	<p>Require internal reporting for award eligibility where company has an "effective internal compliance system."</p> <p>Implement bright-line rule: if company has effective internal compliance reporting system and internal reporting</p>	<p>Prohibit those liable for civil violations and breaches of SRO rules and regulations from award eligibility.</p> <p>Redefine whistleblower to include only persons who</p>	<p>Deem ineligible a whistleblower who refuses to cooperate with internal investigations or who provides inaccurate or incomplete information or hinders an internal</p>	<p align="center"><u>Competing Regulatory Regimes</u></p> <p>FINRA has an active whistleblower program and broker-dealers investigate and report many types of potential</p>

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	<p>would not be futile, company should be allowed at least 180 days to complete internal investigation before whistleblower reports to SEC.</p> <p>Effective internal compliance system could include: (1) complaint-reporting hotline, (2) CCO/officer that oversees investigations and has access to executive officers, (3) protections against retaliation for submitting a complaint.</p> <p>Prohibit from award eligibility whistleblowers who refuse to cooperate with internal investigations or provide inaccurate or incomplete information, or otherwise hinder internal investigations.</p> <p>Suggest persons with a duty to report internally be broken down into 3 groups: (1) legal (should apply to in-house and outside counsel), (2) control functions (not limited to compliance and audit) and (3) supervisory personnel (should not undercut “failure-to-supervise” provisions of the securities laws.</p> <p>Clarify that exceptions apply after an individual has left the firm, otherwise, Proposed Rules create an incentive for a whistleblower to quit.</p>	<p>provide information about potential violations “by another person.”</p> <p>Categorically disqualify from award eligibility anyone directing, planning, supporting, or initiating misconduct.</p> <p>Clarify companies permitted to take adverse employment action against whistleblower for any appropriate reasons other than whistleblower status.</p>	<p>investigation.</p> <p>Exclude from award consideration information a whistleblower becomes aware of after an internal review unless such information is outside the scope of that review (e.g., “after the fact” or “piggy-back” reports).</p>	<p>misconduct to their SROs rather than the SEC (<u>see</u> NASD Rule 3070, NYSE Rule 351, pending FINRA Rule 4530).</p> <p>A whistleblower who reports to an SRO should have the same award eligibility as a whistleblower who reports to the SEC.</p> <p>If a company reports potential misconduct to an SRO, that information should not qualify as “original info” if a whistleblower later reports to SEC.</p> <p>Investment advisers and mutual funds are already subject to rigorous compliance program requirements under Rule 206(4)-7 and Rule 38a-1.</p> <p>SEC and CFTC whistleblower eligibility standards should be the same.</p> <p><u>Anti-Retaliation Protection</u></p> <p>Clarify that companies are permitted to take adverse personnel actions against whistleblowers for any appropriate reason other than their whistleblower status.</p> <p>Clarify that if a company</p>

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				<p>determines an individual was aware of violations but failed to report as required by firm policies, company may discipline that individual.</p> <p><u>SEC Cooperation Initiative</u></p> <p>Explicitly state that SEC will give companies full cooperation credit if after being notified of whistleblower complaint, company investigates matter appropriately and provides thorough report to the SEC.</p> <p>Clarify that SEC will not deem a company to have failed to cooperate because whistleblower chose to report first to SEC rather than using company internal reporting process.</p>
<p>Investment Company Institute (“ICI”)</p>	<p>Mandate internal reporting for award eligibility.</p> <p>Clarify that a whistleblower will not be eligible for an award if the whistleblower had a §301-compliant means to report the information but did not do so.</p> <p>Revise Form WB-DEC to inquire, under penalty of perjury, whether the original information could have first been reported internally through other</p>		<p>Narrow the definition of “original information” to information relating to a violation that has not been addressed by the company that is alleged to have violated the securities laws.</p> <p>Amend award criteria to include the whistleblower’s duty to act reasonably and in good faith in providing the information to the SEC, thus</p>	<p><u>Competing Regulatory Regimes</u></p> <p>Clarify that to the extent laws of the EU/foreign jurisdiction either prohibit providing information to regulators anonymously or require information to be provided anonymously, the SEC will respect and give deference to the laws of the jurisdiction to which the whistleblower is subject.</p>

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	<p>channels that were compliant with §301 of the Sarbanes-Oxley Act.</p> <p>Require SEC notify the company of the whistleblower allegation (while preserving the whistleblower's anonymity) and provide the company an opportunity to investigation and report back to the SEC.</p>		<p>enabling the SEC to evaluate other factors including the whistleblower's motives, level of cooperation to its employer, contributions to the alleged violations.</p> <p>Amend award criteria to include an express standard that goes to the materiality of the whistleblower's original information.</p> <p>Expressly prohibit any whistleblower who provides original information from being paid by a third-party to provide the information or similar information relating to the violation of the securities laws.</p> <p>Prohibit any person from collecting an award as a whistleblower if the person is or becomes a plaintiff in a civil litigation that is based on any original information that has been provided to the SEC by the whistleblower.</p> <p>Expressly preserve SEC authority to determine that no award should be granted to the whistleblower.</p>	<p>Investment advisers and mutual funds are already subject to rigorous compliance program requirements under Rule 206(4)-7 and Rule 38a-1.</p> <p><u>Imposition of New Reporting Obligations</u></p> <p>Proposed Rules incorrectly presume that entities have a duty to report to the SEC each and every violation of the federal securities laws, regardless of how minor or immaterial.</p> <p>The federal security laws do not impose <u>any</u> duty on registrants to report to the SEC all violations of the federal securities laws.</p> <p>The only way for a company to avoid unintentionally – and at its own detriment – enabling a person to acquire whistleblower status would be to report all violations of the federal securities laws to the SEC, notwithstanding the SEC's statements that the proposed rules do not impose new reporting requirements on registrants.</p>

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				<p><u>Anti-Retaliation Protection</u></p> <p>Expressly affirm that rules are not intended to protect employees from firing, demotion, or other adverse action if the employer can demonstrate that such action is unrelated to employee's whistleblower status.</p> <p><u>Competing Regulatory Regimes</u></p> <p>Expressly clarify that information reported to the SEC under the rules only extent to matters within the SEC'S jurisdiction. To the extend that laws of the EU or other foreign jurisdiction either prohibit providing information to regulatory anonymously or require that it be provided anonymously, the SEC will respect and give deference to the laws of the jurisdiction to which the whistleblower is subject.</p>
<p>Financial Services Roundtable and the American Bankers Association</p>	<p>Require internal reporting for award eligibility where a company implements a robust program in which employees can report activity that may violate applicable law.</p> <p>Encourage companies to review and improve their programs continually to</p>	<p>Should exclude from the definition of whistleblower any person who engages in or participates in the conduct giving rise to the action and resulting monetary sanction. It would be an outrageous result for a whistleblower who</p>	<p>Legal, compliance and audit persons eligible to become whistleblowers if the company does not disclose the information to the SEC "within a reasonable time" or if the entity proceeds in "bad faith" should not be able to use</p>	<p><u>Anti-Retaliation Protection</u></p> <p>Clarify that companies would be permitted to discipline employees who violate company policies and procedures by withholding information from the company</p>

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	<p>ensure that they remain sufficient to justify having whistleblowers use them.</p> <p>SEC could look to §302 of SOX or to a company's use of a third-party to report wrongdoing anonymously as factors to determine the sufficiency of an internal reporting program.</p> <p>If SEC does not require whistleblowers to report internally first, then the SEC should notify the company as soon as possible after receiving a whistleblower complaint and provide the company a chance to respond.</p> <p>Provide companies at least 180 days, rather than 90 days, to review, investigate and respond to whistleblower claims, not prejudicing the whistleblower as long as they can document when they made the report to the company.</p> <p>Provide that a whistleblower's failure to utilize available internal procedures without clear, appropriate justification, will generally result in receiving a bounty of no more than the statutory minimum of 10% of the award. Determine subjectively, on a case-by-case basis whether a company discloses information to the SEC within a "reasonable time."</p>	<p>participated in the wrongdoing to receive an award paid for out of the victim's pocket.</p> <p>Should clarify that whistleblowers who obtain information in violation of privacy laws, regulations or orders will not be protected by the anti-retaliation provisions and will be subject to criminal prosecution and/or civil action under applicable state and federal law.</p>	<p>such information for profit since they have an existing duty to the company to bring such information to the company's attention and are already compensated by the company for doing so. The proposed rules do not offer much protection for companies faced with false and frivolous claims, such as baseless claims by a disgruntled employee, a competitor seeking to gain an unfair advantage, or a shareholder who is unhappy that a proposal was not carried at the annual meeting.</p>	<p>and taking that information straight to the SEC – in essence rewarding employees financially for violating company compliance procedures. Rules must permit a company to take good faith actions that are not retaliatory if they are based on factors other than a whistleblower's status.</p> <p><u>Privileged and Confidential Information</u></p> <p>Apply proposed attorney-client information exclusion with equal force to exclude privileged information obtained by the client (e.g., officers, directors and employees) as well as the attorney.</p> <p>Financial services companies are particularly concerned about data breaches since much of their corporate information consists of non-public customer information.</p> <p>Clarify that whistleblowers who obtain information in violation of privacy laws, regulations or orders (1) will not be protected by the anti-retaliation provisions and (2) will be subject to criminal prosecution and/or civil action under applicable state</p>

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				<p>and federal law.</p> <p>Incorporate safeguards to ensure that privileged information is not collected in the investigative process through whistleblowers' disclosures.</p> <p>Withdraw Proposed Rule 21F-16(b), which would allow staff to "communicate directly" with a director, officer, member, agent or employee of an entity that has counsel" who is a whistleblower without seeking the consent of the entity's counsel, and instead follow ABA Model Rule 4.2 and the procedures set forth in the SEC Division of Enforcement's Enforcement Manual.</p>
MetLife	<p>Require internal reporting through company's internal compliance program.</p> <p>Provide company with a reasonable amount of time to investigate and take appropriate actions.</p> <p>Deem an employee's initial report to the company to be "original information" under the Proposed Rules and thus qualify the employee for any appropriate award.</p>	<p>Clarify that companies may take employment actions based on factors other than whistleblower status, including where employee was involved in the misconduct reported or for other legitimate business reasons.</p> <p>Employees that are aware that they may face adverse employment action based on conduct unrelated to their whistleblower activity may seek</p>		<p><u>Anti-Retaliation Protection</u></p> <p>Clarify that companies may take employment actions based on factors other than whistleblower status, including where employee was involved in the misconduct reported or for other legitimate business reasons.</p>

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		<p>to avoid legitimate terminations by filing frivolous complaints with the SEC.</p> <p>An employee's ability to immunize his or herself for misconduct may encourage employees to engage in such misconduct, which is directly contrary to the purpose of the Dodd-Frank Act.</p>		