March 4, 2022

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Supplement to Request No. 4-783 - Dodd-Frank Act Media Whistleblowers Petition

Dear Secretary Countryman:

We are writing in support of Petition, File No. 4-783, filed on February 7, 2022, by National Whistleblower Center, Whistleblower News Network, and Kohn, Kohn and Colapinto, LLP. The Petition requests that the Securities and Exchange Commission ("SEC" or "Commission"):

> [T]ake immediate action to address problems caused by two rules [] located at 17 C.F.R. § 240. These rules are [§ 240.21F-4(a)], excluding the news media from the list of organizations with whom a whistleblower can make "voluntary" disclosures that qualify for a reward; and § 240.21F-9, regarding the "form" of communication that must be used to qualify for a reward.

These two rules, as currently written, exclude whistleblowers that originally provide information to the news media ("media whistleblowers") from SEC award eligibility, even if the SEC receives that information from the media and directly relies on that information to open, or expand, an investigation that ultimately results in sanctions being collected by the SEC. This is the case even though the Dodd-Frank Act ("Dodd-Frank") explicitly mandated that awards could be based upon "original information" the SEC learned from the news media, so long as the whistleblower seeking the award was the news media's source of the information. 15 U.S.C. § 78u-6(a)(3).

Interest of the Firm

The law firm of Zerbe, Miller, Fingeret, Frank and Jadav, LLP has a strong interest in this Petition. The firm represents whistleblowers, many of whom have had contact with the news media. The firm's founding partner, Dean Zerbe was Senior Counsel and Tax Counsel for the Chairman of the Senate Finance Committee, Senator Charles E. Grassley, 2001-2008. At the direction of Chairman Grassley, Dean was the counsel responsible for the modern IRS whistleblower law – signed into law in 2006 — which established the IRS Whistleblower Office and created an award program for tax whistleblowers. As stated in the Senate Report on the Dodd-Frank Act, the DFA was modelled on the tax whistleblower law. That law, like the False Claims Act, insures that whistleblowers who initially provide their allegations of fraud to the news media are fully protected, if the government later learns of these allegations from the news media. The firm is not only concerned about the impact the current SEC rules have on DFA whistleblowers, but is also concerned that the precedent set by the SEC could be used to undermine the rights of IRS whistleblowers.

The Administrative Procedure Act Requires that the Commission Grant the Petition

In addition to the policy arguments raised in the Petition, the SEC's current rules are in direct conflict with fundamental pillars of administrative law regarding their application to media whistleblowers. It is well-established that separate provisions in a single statute must be read in a harmonious manner.[1] This uncontroversial principle naturally applies also to agency rulemaking, as regulations which are promulgated under authority granted by Congress must exist in harmony with all provisions of the operative statute. Doing otherwise and promulgating regulations that implement one statutory provision while, at the same time, negate a separate provision "would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other."[2]

However, this is the exact effect of the current SEC whistleblower rules on media whistleblowers. Congress expressly sought to "promote" media whistleblowers through Dodd-Frank by allowing those who provided original information to the news media to maintain award eligibility. However, the two regulations at issue in the Petition, as currently applied by the SEC, instead "paralyze" media whistleblowers and close them off to any possible award.

The SEC was clearly aware that such an issue could be an unintended consequence of its regulations.[3] As explained in the Petition, the SEC solved this dilemma for all the other authorities that Dodd-Frank authorizes whistleblowers to initially provide original information to while still maintaining SEC award eligibility. It must likewise do so for news media disclosures.

As they currently stand, the rules are not merely implementing Dodd-Frank but rather are improperly amending Dodd-Frank and stripping media whistleblowers of their statutorily provided right to award eligibility.[4] The rules effectively substitute the provisions of Dodd-Frank with the

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[1] *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 489 (1947) (explaining that differing provisions in a statute must be given "the most harmonious, comprehensive meaning possible"); *Weinberg v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631 (1973).

[2] *Clark*, 332 U.S. at 480; *Weinberg*, 412 U.S. at 631; *Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 421 (1983) (rejecting a purported reading of agency regulations that would undermine the overall statutory scheme and purpose of the statute); *Grace v. Barr*, 965 F.3d 883, 894 (D.C. Cir. 2020) (rejecting agency policy negating a statutory provision in favor of a reading that "gives full effect to the two provisions").

[3] 76 Fed. Reg. 34300, 31319 (June 13, 2011) (recognizing the possibility of "the unintended consequence of precluding a submission form being considered as 'voluntary' in circumstances where the whistleblower provided the information to another authority, the other authority referred the matter to the Commission, and our staff contacted the whistleblower before he or she had the opportunity to file a whistleblower submission with us").

[4] *Miller v. United States*, 294 U.S. 435, 440 (1935) ("The only authority conferred, or which could be conferred, by the statutes is to make regulations to carry out the purpose of the act – not to amend it.").

SEC's own requirements, criteria, and judgment.[5] Such regulations violate basic administrative law principles and must be corrected.[6]

The SEC simply does not have the authority to exclude media whistleblowers from award eligibility through regulatory requirements. Further, it is unconscionable that the SEC is seeking through this proposed regulation – unsupported by the statute – to go directly against the policy goals of Congress of encouraging whistleblowers to come forward. As such, we join in seeking the specific relief requested in the Petition.

Respectfully submitted,

Dean Zerbe
On behalf of Zerbe, Miller, Fingeret, Frank and Jadav, LLP

CC: Siri Nelson, Executive Director of the National Whistleblower Center
Senator Charles Grassley, Chairman of the Senate Whistleblower Caucus

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[5] *Lynch v. Tilden Produce Co.*, 265 U.S. 315 (1924) (nullifying a Treasury Department regulation that "prescribes a standard which Congress has not authorized the [Treasury Department] to fix," "conflicts with [the standard] contained in the act," "cannot be read in harmony" with the statute, and which, "[i]f given effect, [] would eliminate from the [statute] the conditions specified in the act and strike out words and phrases and substitute others for them"); *Gardner v. Brown*, 5 F.3d, 1456, 1464 (Fed Cir. 1993) (invalidating a Department of Veterans Affairs' regulation which imposed an additional requirement beyond those found in the statute to gain eligibility for payment).

[6] *Miller*, 294 U.S. at 440; *Elliott v. Fed. Home Loan Bank Bd.*, 233 F. Supp. 578, 592 (S.D. Cal. 1964) ("The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.")