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Gary L. Azorsky
[redacted]

September 17, 2018

VIA EMAIL

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: ***Comments on Proposed Rules Relating to the Commission's Whistleblower Program***
Release No. 34-83557; File No. S7-16-18

Dear Mr. Fields:

We respectfully submit these comments in response to the U.S. Securities and Exchange Commission's proposed rules relating to the Commission's Whistleblower Program (the "Proposed Rules").

As counsel for whistleblowers, we are appreciative of the Commission's efforts to strengthen its Whistleblower Program and we support many aspects of the Proposed Rules. Among other improvements, increasing the awards for whistleblowers who would otherwise receive a small financial incentive for reporting fraud will encourage more individuals to come forward. Likewise, empowering the Commission to efficiently dispose of frivolous claims will enable the Commission to respond more quickly to the meritorious tips it receives.

However, we believe certain aspects of the Proposed Rules would have the unintended consequence of undermining the Whistleblower Program by discouraging individuals from reporting information to the Commission and unduly denying awards to whistleblowers who provide useful information of which the Commission was, and would likely remain, unaware. Based on our experience dealing with individuals who ultimately decide to become whistleblowers as well as with those who decide the risks outweigh the benefits, we respectfully offer below our comments and suggestions on some of the Proposed Rules.

- Proposed Amendment to Definition of an "Action": We support the proposed amendment to Exchange Act Rule 21-F4(d) to include deferred prosecution and non-prosecution agreements entered into by the Department of Justice or state attorneys general under the definition of "administrative actions." As noted in the Proposed Rules, federal and state prosecutors often elect to resolve enforcement actions through these agreements rather than through litigation and settlement, and whistleblowers should be eligible to receive the same awards regardless of the procedural vehicle used by the government to obtain a monetary recovery.

- Proposed Amendment to Definition of "Related Action": We acknowledge the Commission's goal to prevent situations in which an individual would obtain two or more awards under different whistleblower programs totaling more than 30% of the same recovery in the same matter. However, we believe the proposed amendment to Rule 21F-3(b) is overbroad and would potentially deprive an otherwise-eligible SEC whistleblower of an appropriate award in cases in which that whistleblower provided information to the Commission that led to a monetary recovery in a related action but was not granted a substantial whistleblower award under a separate whistleblower program that was potentially applicable to the same action. We believe a simpler rule would more effectively achieve the Commission's aim: in cases in which the Commission independently determines that a whistleblower is entitled to a larger award (say, 20% of the recovery) than the whistleblower receives from a different agency program (say, 15% of the recovery), the Commission will make a separate partial award to the whistleblower in an amount (5% of the recovery) that provides the whistleblower with a combined total award that the Commission believes is appropriate (20%). This approach would avoid payments for multiple "bites of the apple," while also ensuring that a whistleblower is given the highest award that either the Commission or another whistleblower program determines is appropriate.

- Proposed Amendments to Criteria for Determining Amount of Awards: We support Proposed Rule 21F-6(c) to allow the Commission to adjust upwards any award that would otherwise be below $2 million to a single whistleblower. By increasing the incentive for potential whistleblowers to report all types of frauds, including those that have not yet resulted in widespread investor harm, this amendment will strengthen the ability of the Whistleblower Program to prosecute frauds in their early stages and thereby enhance its protection of investors.

  In contrast, Proposed Rule 21F-6(d) – allowing the Commission to decrease awards where the total monetary sanctions collected is at least $100 million and the potential payout to a single whistleblower would exceed $30 million – would lessen the incentive to report wrongdoing in those cases in which harm to investors is greatest. Oftentimes those with the best evidence of widespread fraud are at the highest levels and earn the highest compensation in their industry. These are also the individuals with the most to lose if

their future career prospects are impaired by disclosure, or even rumors suggesting, that they acted as a whistleblower. We believe the necessity for increased incentives to report the largest frauds is why Congress did not instruct the Commission to consider a large award as a reason to *lower* it, and instead expressly prohibited the Commission from considering the status of the Investor Protection Fund when determining awards.[1]

- Proposed Amendment to Address Individuals who make False or Frivolous Claims: We support Proposed Rule 21F-8(e) allowing the Commission to bar applicants who submit three frivolous award applications from seeking future awards under the Whistleblower Program. Individuals who abuse the procedures of the Whistleblower Program make it more difficult for the Commission to investigate and act on meritorious whistleblower submissions, and a permanent bar is an appropriate sanction for those who repeatedly file clearly frivolous applications so long as the appropriateness of such a sanction in any specific case is reviewable in a court of law.

- Proposed Guidance Regarding the Meaning and Application of "Independent Analysis": The opportunity for financial professionals to provide non-public (and previously unknown) information derived from their own analyses to the Commission is an important aspect of the Whistleblower Program, as many sophisticated investment frauds require substantial application of time and resources to uncover. In its proposed guidance for interpreting when whistleblower information constitutes "independent analysis" as that term is defined in Exchange Act Rule 21F-4 and utilized in the definition of "original information," the Proposed Rules risk weakening this crucial incentive by applying a restrictive and retrospective test for determining a potential whistleblower's eligibility for an award.[2] We are concerned that, among other things, by focusing on whether the Commission determines (after being informed of the conclusions of the whistleblower's analysis) that an "inference of the possible violations" alleged was apparent from publicly-disclosed facts, the concept that "hindsight is 20/20" will operate to deprive deserving whistleblowers of awards. A more appropriate standard, in our opinion, would be to condition eligibility for a whistleblower award on the provision of "independent

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[1] The repeated references in the Proposed Rules to the size of the IPF, the effect on the IPF of future large awards, and the ramifications if the IPF were to fall below $300 million raises concern that the Proposed Rules do not follow the prohibition in § 21F(c)(1)(B)(ii) against considering the status of the IPF as a factor in determining the amount of whistleblower awards.

[2] In response to the Proposed Rules' reference to jurisprudence concerning the False Claims Act's public disclosure bar, we note that the False Claims Act expressly permits the government to allow relators to pursue actions notwithstanding public disclosure objections, 31 U.S.C. § 3730(e)(4)(A), and permits courts to grant awards to relators even where the action is based primarily on public information, 31 U.S.C. § 3730(d)(1).

analysis" that supplies the Commission with non-public information (its conclusions) that the Commission did not previously possess.

Thank you in advance for your consideration of the views expressed in this letter. Should you have any questions regarding the points we have raised, or any other issues related to the Commission's Whistleblower Program, please contact the co-chairs of our Whistleblower Practice Group, Gary L. Azorsky or Jeanne A. Markey at [redacted].

Sincerely,

Cohen Milstein Sellers & Toll PLLC

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