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URGENT MATTER

Jay Clayton
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Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
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rule-comments@sec.gov

Re: **SEVENTH SUPPLEMENTAL COMMENT: PROPOSED RULES OVERVIEW**
File Number S7-16-18

Update: **Overview of Proposed Rule Language Modifications**

Dear Chairman Clayton and Secretary Countryman:

We are writing to further comment on the Securities and Exchange Commission's ("SEC" or "Commission") proposed amendments to the whistleblower program.[1] We are filing this comment in order to provide the Commission with language changes that can help guide the staff in finalizing the proposed rules in a manner consistent with the intent of the Commission to enhance the current program and ensure that whistleblowers are properly incentivized and protected under the law.

The Proposed Rules for which modifications or enhancements are needed set forth below, in BOLD:

[1] *See* Whistleblower Program Rules, 83 Fed. Reg. 34,702 (2018), Release No. 34-83557; File No. S7-16-18.

I. Proposed Rule 21F-9(e) -- the TCR filing Requirement.

Proposed Rule 21F-9(e) would have a significant negative impact on the SEC whistleblower program by disqualifying otherwise fully qualified whistleblowers from obtaining a mandatory reward under the Dodd-Frank Act ("DFA"). On October 25, 2019 the former Chief of the SEC Office of the Whistleblower, the former Assistant Director and Assistant Chief Litigation Counsel, SEC Division of Enforcement, and the undersigned Chairman of the Board of Directors of the National Whistleblower Center (35+ years representing corporate whistleblowers) submitted a proposal to address the issues raised by Proposed Rule 21F-9(e). This proposal is attached hereto.[2]

Given the stated programmatic interest the SEC has in having whistleblowers timely file TCR forms, the attached proposal would we would give the Commission the discretion to reduce awards pursuant to Rule 21F-6(b) should the TCR not be filed or filed late.

II. Proposed Rule 21F-6(d) -- Commission Discretion to Reduce Awards in large Cases.

Senator Charles Grassley and all of the commentators with experience working directly with major whistleblowers have vigorously opposed Proposed Rule 21F-6(d). This proposed rule should be abandoned in its entirety.

However, should the Commission seek to approve a modified version of proposed rule, care needs to be taken that any such modification is not misinterpreted by potential whistleblowers (and their representatives) as indicating that the Commission would support a hard or soft "cap," *or that simply based on the amount of an award, an award could be reduced*. Additionally, it needs to be made extremely clear that whistleblowers in large cases, who meet the criteria for enhanced rewards, will not be prejudiced simply based on the size of a sanction. In other words, the criteria in section 21F-6(a) should be fully applicable in large cases, and the Commission should grant the maximum award of 30% in large cases, when justified under the current criteria in 21F-6(a). To do otherwise would not fully incentivize the conduct endorsed by Congress and reflected in Rule 21F-6(a).

III. Proposed Rules 21F - 3, 10 and 11 -- Rule Changes to Help Expedite the Decision-Making Process.

The Commission has proposed a number of reforms that should help expedite the decision-making process. However, as expressed in the September 18, 2018 Comment filed by Senator Grassley (and comments cited to by Senator Grassley), the timing of final award determinations is a major concern for which the proposed rules should fully address.

[2] As previously discussed in Comments filed by Kohn, Kohn and Colapinto ("KKC"), the proposed rule conflicts with decisions under the Commodity Exchange Act and IRS whistleblower programs, both of which are substantially similar to the SEC program and both of which require mandatory rewards be paid to whistleblowers who fail to file or late-file TCR or related forms. It also conflicts with the 1986 Amendments to the False Claims Act, prior decisions of the SEC and various pages published on the SEC's web page regarding how to report violations or concerns with the Commission. *See* Comments filed by KKC dated May 6, September 12, October 8, 16, and 21 and November 22, 2019.

In reviewing the proposed rules, we suggest a number of modest additions to the rules that would significantly address the concerns raised by Senator Grassley, and others.

The additions are as follows:

21F-3(b)(5) [Note: KKC is proposing a new paragraph (b)(5)]:

*"***The Commission may adjudicate a related action claim separately from a Commission Action claim in order to expedite the resolution of a claim for a whistleblower reward."**[3]

21F-10 [Procedures for making a claim for a whistleblower award in SEC actions]: [4]

(e) Within 90-days of the publication of a Notice of Covered Action the enforcement official (or other commission employee) with first-hand knowledge as to the contribution of any individual who provided original information to the Commission that either initiated the investigation or contributed to the investigation that led to the sanction, shall submit an affidavit to the Office of the Whistleblower setting forth the identity of this individual (if known) and explain the contributions made by this individual to the successful enforcement action, related action or other prosecution.

(f) In order to expedite a final decision on an award application the Commission, Office of the Whistleblower or Claims Review Staff may engage in negotiations and/or mediation with a whistleblower(s) in order to reach an agreement on the amount of an award.

21F-11 [Procedures for determining awards based upon a related action]:

"The Commission shall not delay a decision in a Commission Action award based on delays that may be experienced in an application for a whistleblower reward in a related action adjudication."

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[3] This section is added in order to permit the SEC to expedite the decision-making process on an award predicated only on the SEC enforcement action, without delays predicated on issues that arise in attempting to resolve legal or factual issues that can arise in a related action proceeding. Resolving a "related action" claim can result in delay as the firsthand information concerning a related action case can depend on obtaining information from a sister federal agency, whereas in a Commission Action claim the SEC has direct access to the information.

[4] A number of comments were submitted in regard to the long delays experienced by some whistleblowers in the adjudication of their reward applications. *See Comment submitted by Senator Grassley* ("The Commission's Proposed Rule fails to adequately address the long delay experienced in whistleblower cases that are not frivolous") (Sept. 18, 2018). The new sections (e) and (f) are necessary in order to provide a procedural framework to expedite award decisions consistent with the concerns expressed by Senator Grassley, especially in cases in which the SEC enforcement staff are able to the individual(s) who contributed to the successful enforcement action.

IV. Proposed Rule 21F-7(a) -- Proposed Rule Confidentiality of Commission Sources.

Senator Grassley and other commenters expressed concern over some of the language in the Proposed Rule that could be interpreted as reducing the confidentiality protections afforded whistleblowers. The following modifications and additional language address these concerns and would accurately represent the Commissions confidentiality safeguards:

21F-7(a) [Confidentiality of Submissions]:

(a) Pursuant to Section 21F(h)(2) of the Exchange Act (15 U.S.C. 78u–6(h)(2))and § 240.21F-2(c) ~~**requires that**~~ the Commission will not disclose information that could reasonably be expected to reveal the identity of a whistleblower provided that the whistleblower has submitted information utilizing the processes specified in § 240.21F-9(a), except that the Commission may disclose such information in the following circumstances or sources of information to the Commission . . . In addition, the Commission shall protect the confidentiality of persons who are confidential informants to **another agency of the federal government or the United States Congress. The Commission shall not reveal the identity of a whistleblower if such disclosure is not permitted under the Privacy Act, is inconsistent with the procedures set forth in the SEC Division of Enforcement's Enforcement Manual, or if the disclosure of the information is prohibited under an exemption to the FOIA.**[5]

V. Proposed Rule 21F-12(a)(3) -- Filing New Information with the Commission After the Filing of an APP application.

A number of Comments were submitted in regard to the proposed rule limiting the right of a whistleblower to supplement the record after the filing of a WB-APP application. Although these limits are generally acceptable, exceptions [set forth below in bold] are necessary to ensure due process and a complete record in each case.

Rule 21F-12(a)(3):

> (3) The whistleblower's Form WB– APP including attachments, any supplemental materials submitted by the whistleblower before the deadline to file a claim for a whistleblower award for the relevant Notice of Covered Action, and any other ~~filings or submissions from~~ materials timely submitted by the whistleblower in response either:
>
> (i) To a request from the Office of the Whistleblower or the Commission; ~~**or**~~
>
> (ii) To the Preliminary Determination or Preliminary Summary Disposition*;*
>
> **(iii) Upon granting a request from the applicant to provide additional information;**

[5] *See*, Concern raised by Senator Charles Grassley regarding protecting whistleblower confidentiality of whistleblowers. Comment dated Sept. 18, 2018)("the Commission should take steps to ensure that whenever the whistleblower is required to share his or her information, or with whatever entity the Commission shares the information, that the entity will take all necessary steps to safeguard the whistleblower's identity.").

(iv) Submission of information that could not reasonably have been known to the whistleblower at the WB-APP deadline;[6] or
(v) Upon a showing of newly discovered evidence or for other good cause.[7]

VI. Proposed Rule 21F-2(d)(4) -- *Digital* and Changes to the Anti-Retaliation Provisions.

The Supreme Court's decision in *Digital Realty v. Somers,* No. 16–1276 (February 21, 2018) raised a number of issues regarding the scope of the SEC's authority to issue sanctions in response to retaliation. The below rule changes, set forth in bold, simply explain that the SEC's jurisdiction over potential retaliation cases arising strictly as a result of internal disclosures was not changed as a result of the Supreme Court decision. Although pursuant to the Supreme Court's decision in *Digital* the Commission's jurisdiction over internal whistleblowing was limited under the DFA, the Commission's pre-existing authority to police such misconduct within the regulated industry under the Sarbanes-Oxley Act SOX) was not negated and was implicitly recognized by the Supreme Court.

As the Supreme Court noted:

> Endeavoring to root out corporate fraud, Congress passed the Sarbanes-Oxley Act of 2002, 116 Stat. 745 (Sarbanes-Oxley), and the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376 (Dodd-Frank). Both Acts shield whistleblowers from retaliation, but they differ in important respects. ***Most notably, Sarbanes-Oxley applies to all "employees" who report misconduct*** to the Securities and Exchange Com- mission (SEC or Commission), any other federal agency, Congress, ***or an internal supervisor***. 18 U. S. C. §1514A(a)(1). Dodd-Frank delineates a more circum- scribed class; it defines "whistleblower" to mean a person who provides "information relating to a violation of the securities laws to the Commission."
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> Slip op. p. 1 (emphasis added)

The changes to the rules recommended below simply add references to SOX to explain the basis for the SEC's regulatory authority:

[6] This is a recommendation proposed by TAF, Comment pp. 11-12.

[7] The new language simply provides for filing supplemental evidence or argument consistent with standard rules of due process.

(4) Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1) **and Section 806 (18 U.S.C. § 1514A) of the Sarbanes-Oxley Act [incorporated into the Exchange Act in accordance with Section 3(b)(1) of the SOX, 15 U.S.C. § 7202(b)(1)]**[8], including any rules promulgated thereunder, shall be enforceable in an action or proceeding brought by the Commission.

Once the Commission clarifies that it has jurisdiction pursuant to SOX regarding retaliation against internal whistleblowers, the current rules defining who is a whistleblower and explaining the basis for taking regulatory action to prevent or address retaliation need not be corrected or amended.

Thank you for your careful attention to these matters.

Respectfully submitted,

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ATTACHMENT (on page 7)

[8] This change will continue to permit the SEC to engage in regulatory actions where retaliation stems from an internal disclosure, such as a disclosure to a company's Audit Committee or compliance department. This change would further the Commission's interest in continuing to promote effective internal compliance programs and prevent retaliation against persons who report internally. Furthermore, given the provisions of the rules that encourage internal reporting, incorporating the definition of a protected disclosure from the Sarbanes-Oxley Act is required. If not, all SEC rules that promote internal reporting should be cut from the regulations.

ATTACHMENT TO KKC COMMENT DATED 12-10-2019

PROPOSAL REGARDING 21F-9(e)

(e) **(1)**You must follow the procedures specified in paragraphs (a) and (b) of this section **within thirty days of** the first time you provide the Commission with information that you rely upon as a basis for claiming an award. If you fail to do so, then you will be deemed ineligible for an award in connection with that information**. ~~(even if you later resubmit that information in accordance with paragraphs (a) and (b) of this section). Notwithstanding the foregoing, the Commission, in its sole discretion, may waive your noncompliance with paragraphs (a) and (b) of this section if the Commission determines that the administrative record clearly and convincingly demonstrates that you would otherwise qualify for an award and you demonstrate that you complied with the requirements of paragraphs (a) and (b) of this section within 30 days of the first communication with the staff about the information that you provided.~~**

(2) For good cause shown the requirement in section (e)(1) shall be waived and the individual shall be considered a whistleblower under §§ 240.21F-2(a) and 240.21F-3. For purposes of this provision good cause is defined as follows:

(A) the individual provided original information to the Commission;

(B) the original information caused the Commission to commence an examination, open or reopen an investigation, or inquire into different conduct as part of a current Commission examination or investigation under Rule21F-4(c)(1) of the Exchange Act;

(C) the original information significantly contributed to the success of a Commission judicial or administrative enforcement action under Rule 21F-4(c)(2) of the Exchange Act or that the information was otherwise relied upon by the Commission as required under 15 U.S.C. §§ 78u-6(b) and (c);

(D) the individual's information materially contributed to a sanction of over $1 million;

(E) this exception may only be applied if the contributions of the individual are confirmed by the appropriate Commission staff who can confirm that individual's contributions as set forth in paragraphs (e)(2)(A)-(D) of this section.

(F) the deadline for applying for this good cause exception shall be at the time the individual(s) file a timely WB APP application.

(G) the Commission may take into consideration the failure to file a timely TCR when evaluating the factors set forth in sections 21F-6(a) and (b) in determining whether to increase or decrease an award.