United States Senate
WASHINGTON, DC 20510

September 17, 2020

The Honorable Jay Clayton
Chair
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chair Clayton:

We write regarding the Securities and Exchange Commission's (SEC or Commission) rule proposal: Whistleblower Program Rules, Release No. 34-83557, File No. S7-16-18 (the Proposal).[1] We are concerned that the Commission is considering[2] detrimental revisions to the existing whistleblower rules[3] by adopting the Proposal with significant elements of discretion and uncertainty that would substantially undermine the SEC's whistleblower program. The Commission must preserve the whistleblower program's incentives and structure to ensure that it remains effective as a means to uncover fraud and misconduct.

As you know, the Dodd-Frank Wall Street Reform and Consumer Protection Act created the SEC's whistleblower program[4] to expose securities law violations and identify risks to prevent another financial crisis. Under the program, the SEC may issue awards to eligible whistleblowers who provide original information that leads to successful enforcement actions with total monetary sanctions (i.e., penalties, disgorgement, and interest) in excess of $1 million. A whistleblower may receive an award of between 10% and 30% of the monetary sanctions collected.

By all measures, the program has been an unqualified success. Since August 2011, the SEC Office of the Whistleblower has received more than 33,300 tips, some of which led to enforcement actions resulting in more than $1.4 billion in financial remedies from wrongdoers. As of this month, the SEC Whistleblower Office paid approximately $520 million in awards to whistleblowers.

Regrettably, the Proposal could deter whistleblowers and impede an individual's ability to recover an award for reporting wrongdoing. Upon its release, the Proposal created confusion because it suggests the SEC could cap awards. The Proposal would give the SEC discretion to

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[1] Whistleblower Program Rules, Release No. 34-83557, File No. S7-16-18, 83 FR 34702, RIN 3235-AM11 (proposed June 29, 2018) [hereinafter the Proposal], https://www.sec.gov/rules/proposed/2018/34-83557.pdf; https://www.federalregister.gov/documents/2018/07/20/2018-14411/whistleblower-program-rules.
[2] The SEC postponed the September 2, 2020, open meeting to consider the Proposal, https://www.sec.gov/news/upcoming-events/open-meeting-090220.
[3] 17 C.F.R. Sec. 240.21F-1.
[4] Pub. L. 111-203, Sec. 922; 15 U.S.C. Sec. 78u-6.

reduce the award percentage, so that it would yield an award "that does not exceed an amount that is reasonably necessary to reward the whistleblower and to incentivize other similarly situated whistleblowers."[5]

During your December 10, 2019, testimony before the Banking Committee, when asked to commit that the final whistleblower rule will be consistent with the statute and not create a cap, you assured the Committee that, "[a]bsolutely, and any characterization of our proposal as a cap is completely misguided."[6] Accordingly, based on your testimony, we expect the Commission will not adopt a mechanism to reduce or cap awards that is contrary to the letter and spirit of the statutory provisions. Moreover, you must ensure that the final rule does not afford the Commission or SEC staff undue discretion to reduce the dollar value of an award that would create uncertainty or discourage future whistleblowers. Specifically, cloaking the ability to reduce or limit the dollar amount of an award as an "adjustment" to "achieve the goals and interests" of the whistleblower program is disingenuous and would impair the integrity and proven success of the program. Such an "adjustment" is contrary to Congressional intent, public policy and the goal of investor protection.

The Proposal includes interpretive guidance that introduces additional hurdles that could deter whistleblowers or second guess reported violations and thereby deny an award. The Commission inexplicably proposes to modify components of what qualifies as "original information" in a whistleblower's tip that leads to an SEC enforcement action. Instead of the current "independent analysis" basis for original information, defined as an "examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public,"[7] the Proposal would require a whistleblower to show "evaluation, assessment, or insight beyond what would be reasonably apparent to the Commission from publicly available information."[8] Furthermore, the SEC would then be able to determine "based on its own review of the relevant facts during the award adjudication process whether the violations could have been inferred from the facts available in public sources."[9]

This proposed interpretation would permit the SEC to create an insurmountable hurdle for a whistleblower to establish original information based on "independent analysis". Even the Commission itself concedes that its Proposal creates uncertainty in stating that, "[w]hile we recognize that this standard does not constitute a bright line, we believe that it should provide a solid foundation for the Commission to apply when assessing awards".[10] The Commission's proposed approach has it backward—an individual that could report otherwise unknown violations needs a bright line in order to come forward at great personal risk. Given the risk the SEC will apply a subjective, vague standard to determine what qualifies as independent analysis based on public information, a potential whistleblower may opt to stay silent—again, this would be contrary to public policy and the legislative purpose of the whistleblower law.

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[5] The Proposal at 34704.
[6] Oversight of the U.S. Securities and Exchange Commission: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs, 116 Cong. (Dec. 10, 2019) (Questioning of Jay Clayton), https://www.banking.senate.gov/hearings/oversight-of-the-securities-and-exchange-commission.
[7] 17 C.F.R. Sec. 240.21F-4(b)(3).
[8] The Proposal at 34728.
[9] *Id*.
[10] *Id*.

At a time when members of Congress have proposed bipartisan legislation[11] to strengthen whistleblower protections, the SEC should not seek to reduce awards or inject uncertainty and ambiguity in the evaluation of whistleblower tips. The SEC should instead work with Congress to protect whistleblowers and ensure that successful tips result in awards as intended under the law.

Sincerely,

Sherrod Brown
U.S. Senator

Jack Reed
U.S. Senator

Elizabeth Warren
U.S. Senator

Patrick Leahy
U.S. Senator

Chris Van Hollen
U.S. Senator

Christopher A. Coons
U.S. Senator

[11] Whistleblower Program Improvement Act, S. 2529, 116th Cong. (2019); Whistleblower Protection Reform Act of 2019, H.R. 2515, 116th Cong. (2019).