KOHN, KOHN & COLAPINTO, LLP
ATTORNEYS AT LAW
3233 P STREET, N.W.
WASHINGTON, D.C. 20007-2756

TELEPHONE: (202) 342-6980 TELECOPIER (202) 342-6984

May 6, 2019

URGENT MATTER

Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
chairmanoffice@sec.gov

Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
rule-comments@sec.gov

Re: SUPPLEMENTAL COMMENT
Proposed Amendment to Rule 21F-9(e)
File Number S7-16-18

Dear Chairman Clayton and Secretary of the Commission:

We are writing to alert you to a serious and urgent matter regarding the Securities and Exchange Commission's ("SEC" or "Commission") proposed amendment to Rule 21F-9(e) (hereinafter "Section 9(e)" or "the proposed rule").[1]

In our continued review of the proposed rule, we noticed that a change that appeared to be a minor technical amendment, would in fact have a catastrophic impact on the SEC's Whistleblower Program.[2] Proposed rule Section 9(e) makes the filing of a TCR *mandatory*, *prior* to *any other form of contact with the Commission*. If a whistleblower contacts *anyone* at the SEC without first having filed a TCR, that whistleblower automatically ineligible for an award.[3] Consequently,

[1] *See* Whistleblower Program Rules, 83 Fed. Reg. 34,702 at 34,723-24, 34,750 (July 20, 2018), https://www.govinfo.gov/content/pkg/FR-2018-07-20/pdf/2018-14411.pdf. This letter is submitted for the official record and constitutes a formal supplemental comment to our initial comment filed on July 24, 2018.

[2] We note that the failure to understand the devastating impact the proposed rule would have on the SEC whistleblower and enforcement programs appears to have been widely shared, as there were almost no mention of proposed rule Section 9(e) in the numerous comments submitted on the record, there was no publicity about the potential impact of this proposal, and it is inconceivable that the SEC staff would have drafted such a rule, had they fully understood its sweeping and radical implications which are in conflict with the Congressional purpose of the whistleblower award program.

[3] Although the proposed rule has an extremely narrow procedure to cure this problem, as discussed further in this letter, the implementation of that procedure is purely discretionary, would not work in practice, and also

Section 9(e) would, if approved, undermine the core purpose of the Dodd-Frank Act, i.e. "motivat[ing] people who know of securities law violations to *tell the SEC*." *Digital Realty Trust, Inc. v. Somers,* 583 U.S. __, 138 S.Ct. 767, 773 (2018) (quoting S. Rep. 111-176 at 38).

Although we are certain that it was not the intent of the Commission to undermine its Whistleblower Program, this would be the effect were the SEC to approve this rule change. We assume that the proposed rule was drafted without fully understanding its impact on the overall regulatory scheme and the effect it would have to undermine the purpose of the Act. We hope with the clarifications and information in this supplemental comment the Commission will ensure that this serious problem is fixed.

I. THE PROPOSED RULE DISQUALIFIES A VAST NUMBER OF WHISTLEBLOWERS WHO LAWFULLY DISCLOSE SECURITIES FRAUDS TO THE SEC, INCLUDING MAKING DISCLOSURES PERMITTED OR ENCOURAGED ON THE COMMISSION'S OWN WEBSITE.

Proposed Rule 9(e) disqualifies from a Dodd-Frank Act reward anyone who communicates his or her whistleblower information to an employee of the SEC, prior to filing a form known as a "TCR." In relevant part, the proposed rule states:

> You must follow the procedures specified in paragraphs (a) and (b) [i.e. filing a TCR form] of this section **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).

Proposed Rule 21F-9(e) (emphasis added).

On its face this proposed rule would disqualify a vast number of whistleblowers who lawfully inform the SEC of securities frauds, undermining the core purpose of the Dodd-Frank Act, and the core purpose of the Securities Exchange Act (i.e. the protection of investors). On the current SEC website there are numerous potential methods for "individuals" who may qualify for a reward under the statute to communicate original information about securities frauds to employees of the Commission without first filing the TCR form. In some cases, these disclosures are encouraged, and in others they represent common sense methods to alert the Commission to a fraud. *For example, if an individual communicated his or her whistleblower allegations using any of the following procedures, he or she would be* ***disqualified from a*** *reward*:

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requires the filing of a TCR within 30 days of any contact with the Commission, regardless of any other factor. If this 30-day deadline is missed, then the Commission would not have any discretion to waive the rule, regardless of hardships faced by the whistleblower, the quality of his or her information, the reason for not filing a TCR prior to other contact with the Commission, or the contribution the whistleblower made to the collection of restitution for investors.

- Contacting the SEC at its "Contacting Us" line, or leaving a voicemail;
- Filing any complaints through the Investor Complaint Form;
- Filing any complaints with the Chairman of the Commission or a Commissioner;
- Sending a letter or fax to the Commission;
- Communicating to the Director of Enforcement;
- Providing whistleblower information by calling or writing to SEC divisions;
- Contacting the Office of the Investor Advocate;
- Submitting an Ombudsman Matter Management System Form;

In addition to these means of communicating whistleblower concerns available on-line, there are numerous other methods in which whistleblower concerns are communicated to employees of the SEC prior to a whistleblower filing a formal TCR form. This would include

- Discussing his or her whistleblower complaint with any of the SEC's 4,200 employees;
- Speaking with a member of the SEC enforcement staff;
- Agreeing to a voluntary interview SEC staff and or enforcement investigators;
- Providing any testimony, including on-the-record testimony, in a Commission proceeding[4];
- Providing information to other federal or state regulators or law enforcement officials in a meeting in which SEC employees are attending;
- Engaging in any oral or written communication with any SEC employee where the facts related to a whistleblower disclosure are revealed, prior to the filing of the formal TCR.

It is our experience that numerous good faith whistleblowers make their initial concerns known to the SEC in the manners identified above, and only later file a TCR. All of these whistleblowers

[4] The Form TCR – which must be completed truthfully in order for the whistleblower to remain eligible for an award – includes a question regarding previous contact with the SEC (Section D.3). With the addition of Section (e) in the proposed rules, this question would serve no law enforcement purpose. To the contrary, it will serve only as a method to quickly and quietly disqualify whistleblowers from award eligibility, or perhaps discourage whistleblowers who communicated with the SEC about their allegations prior to filing a TCR from filing a Form TCR altogether.

would be disqualified, despite being able to make significant contributions in protecting investors and preventing securities frauds prior to filing the Form TCR.

Below are realistic hypotheticals, many of which are based on our own personal experience representing whistleblower clients, which would result in the disqualification of bona fide whistleblowers who serve the public interest and were intended by Congress to be rewarded pursuant to the Dodd-Frank Act.

Example # 1: An employee is terminated from a publicly traded company for raising whistleblower concerns, and files a retaliation complaint with the U.S. Department of Labor pursuant to the Sarbanes-Oxley Act ("SOX"). The whistleblower describes his or her protected disclosures in the complaint. The whistleblower sends a copy of the DOL complaint to the SEC's Whistleblower Office. *That whistleblower is disqualified under the proposed rule* because the SOX complaint is not a Form TCR.

Example # 2: Same facts as above, but the whistleblower sends his/her complaint to the SEC Division of Enforcement. *That whistleblower is disqualified under the proposed rule.*

Example # 3: The same facts as above, but the Department of Labor transmits the complaint to the SEC's Office of Enforcement. An employee of that office realizes that the complaint relates to an ongoing investigation and contains extremely useful information. That SEC employee contacts the whistleblower and they discuss his or her information. *That whistleblower is disqualified under the proposed rule.*

Example # 4: A whistleblower discusses his or her allegations with a neighbor who works for the SEC, and that neighbor recommends that s/he file a TCR with the Office of the Whistleblower. The whistleblower follows this advice and files the TCR. *That whistleblower is disqualified under the proposed rule.*

Example # 5: Same facts as in Example 4. The TCR filed by the whistleblower was used to trigger a major SEC investigation that resulted in protecting investors, recovering millions of dollars from the fraudsters and stopping a major securities violation. The whistleblower was fired and lost his/her career and job and was forced into bankruptcy. *That whistleblower is disqualified under the proposed rule* because the whistleblower contacted a member of the SEC prior to filing the TCR.

Example # 6: An investor learned that his investment advisor was engaging in a large-scale fraud. The investor decides to become a whistleblower, goes onto the SEC website, locates the "Investor Complaint Form," and files it with the Commission as set forth in the SEC's investor protection webpage. The complaint describes the fraud. *That whistleblower is disqualified under the proposed rule.*

Example # 7: Same facts as set forth in Example # 6. Instead of filing the Investor Complaint Form, the investor decides to blow the whistle directly to the Chairman of the SEC. The Chairman of the SEC forwards the letter to the Office of the Whistleblower, which advises the investor to

submit the complaint on an official TCR form. The investor complies with this advice and files the TCR. *That whistleblower is disqualified under the proposed rule.*

Example # 8: A whistleblower contacts the SEC Office of the Whistleblower and describes his/her allegations to an intake officer. The intake officer advises the whistleblower to file a TCR. The whistleblower agrees and files the TCR. *That whistleblower is disqualified under the proposed rule.*

These are just a small sample of the numerous ways in which legitimate whistleblowers would be severely prejudiced by the proposed rule.

As can be seen from these examples, the proposed rule is contrary to the statutory language and clear intent of the Dodd-Frank Act ("DFA"). It conflicts with the central goal of the DFA. As recognized by the U.S. Supreme Court, the primary purpose of the DFA is "motivat[ing] people who know of securities law violations to *tell the SEC." Digital Realty Trust, Inc*., 138 S.Ct. at 773 (quoting S. Rep. 111-176 at 38 (Apr. 30, 2010), internal quotations omitted) (emphasis in the original). The proposed rule does not motivate potential whistleblowers to "tell the SEC" about frauds. Rather, it does the opposite, and discourages reporting in all but the very narrowest circumstances. It directly harms the very persons the law was designed to incentivize, protect, and reward. If enacted, the proposed rule would turn the SEC's whistleblower program into a cruel hoax for corporate whistleblowers who risk their careers to report securities fraud.

II. THE COMMISSION'S JUSTIFICATION FOR THE PROPOSED RULE IS WITHOUT MERIT AND THE COMMISSION LACKS THE AUTHORITY TO APPROVE THE PROPOSED RULE.

The rulemaking authority granted to the Commission under the DFA was limited only to approving rules that promote the Congressional intent to encourage reporting to the SEC. The controlling statutory provision states as follows:

> The Commission shall have the authority to issue such rules and regulations as may be **necessary or appropriate** to implement the provisions of this section **consistent with the purposes of this section**.

15 U.S.C. § 78u-6(j) (emphasis added).

In its rulemaking commentary the Commission failed to adequately explain how the proposed rule was "necessary or appropriate" or "consistent with the purposes" of the DFA.

As explained in section I, the proposed rule is not "consistent with the purposes" of the DFA.

The justification provided by the Commission staff that drafted the rule does not overcome the requirement that the rule be "necessary or appropriate to implement" the DFA's "purpose."

The Commission staff provided the following justification for the proposed rule:

> *We believe that the proposed rule language would provide additional clarity to potential whistleblowers to further alert them to the importance of following the procedures specified in Rules 21F–9(a) and (b).*
>
> *In proposing this amendment, we observe that compliance with the procedures in Rules 21F–9(a) and (b) advances many programmatic purposes. These include allowing the Commission to promptly determine whether an individual who submits information is subject to heightened whistleblower confidentiality protections; helping the staff efficiently process the information and other documentation provided by the individual and assess its potential credibility; and assisting the Commission in eventually evaluating the individual's potential entitlement to an award.*

83 *Federal Register* at 34724 (July 20, 2018).

This justification is completely without merit to justify enacting the proposed Section 9(e) and certainly does not address the Congressional purpose of motivating whistleblowers to report violations.

First, if a whistleblower who was cooperating with an SEC investigation were to learn that s/he was disqualified from an award because s/he had reported the concern initially to the Chairman of the SEC, it is reasonable to assume that the whistleblower (and his or her counsel) would be very upset, and may stop cooperating. In fact, it is safe to assume that many such persons who lawfully alerted the SEC to violations prior to submitting a TCR, upon learning that they could not get a reward, would publicly attack the SEC and the entire whistleblower program, thus eroding public confidence in the Commission and destroying the reputation of the whistleblower program.

Consequently, not only would the SEC lose access to important witnesses, the Commission would create tremendous ill-will between whistleblowers who will legitimately believe they were betrayed and the Commission.

Second, it is hard to imagine any set of facts that would discredit the SEC more than having a whistleblower disqualified from receiving an award by the proposed rule simply because they blew the whistle to the Chairman of the SEC (or made other contact with the SEC) prior to filing the TCR. The disqualifications mandated under the proposed rule will result in distrust between potential whistleblowers and the Commission and will discourage other whistleblowers from participating in the program.

Third, the rule lacks any rational justification that is consistent with the purpose of the DFA. It serves no legitimate interest in punishing whistleblowers simply for contacting the SEC prior to submitting a TCR form. If the failure to file a TCR results in actual prejudice to the Commission, there are other ways to sanction the whistleblower, including reducing an award amount or denying a claim on the merits. In fact, if a whistleblower's disclosure did not trigger the investigation and/or contribute to a successful enforcement action, the whistleblower is not entitled to any award whatsoever. Furthermore, if a whistleblower files a TCR late, the whistleblower is at risk that

another employee may have filed a TCR and the other whistleblower would get full credit for the disclosure.

Fourth, the rationale is in contrast with the whistleblower laws upon which the SEC program is based. The IRS whistleblower law permits the filing of the formal Form 211 (the equivalent of the SEC's Form TCR) at any time, including after the IRS completes its enforcement action.

Fifth, under the False Claims Act ("FCA"), the most highly successful whistleblower reward law, whistleblowers are strongly encouraged to provide the government with information *prior to* the filing of the qui tam complaint in court (which is the equivalent formal reward claim under the FCA).[5] In other words, the False Claims Act, by statute, encourages the type of conduct the SEC is proposing to prohibit. Congress's intent to promote whistleblowers contacting the government as quickly as possible, even prior to filing formal complaint or request for a reward claim, is confirmed both by the text of the False Claims Act, the case law decided under the IRS whistleblower reward law, and the legislative history of the DFA.

Sixth, whatever ostensible purpose is served by disqualifying whistleblowers who contact the Commission in the manner outlined in Section I it is clear that it will have a disastrous effect on motivating whistleblowers to file complaints with the Commission. In fact, the proposed rule will only serve to frustrate whistleblowers by creating unnecessary procedural hurdles that will result in disqualifying bona fide whistleblowers from obtaining a DFA award.

Seventh, what purpose is served by disqualifying whistleblowers, if they file a TCR form after they contact an employee of the SEC, especially if the information they provided was actionable and helped the enforcement staff to demonstrate fraud?

Eighth, there are better ways to educate potential whistleblowers than disqualifying a massive number of otherwise qualified individuals from receiving an award due to contacting the SEC prior to filing a Form TCR.

Ninth, the Commission has numerous methods to educate potential whistleblowers and provide "clarity" as to the importance of filing a TCR than a blanket disqualification of numerous qualified whistleblowers.

Tenth, even if the justifications provided had any merit, it does not explain why whistleblowers would still be disqualified even if they cured the so-called defective filing and properly submitted a TCR, especially if there is no evidence that the failure to file the TCR prejudiced the investigation.

Eleventh, if the failure to file a TCR actually had a negative impact, the Commission has numerous means to address this matter without enacting a rule that contains a sweeping disqualification, divorced from any actual prejudice that was actually caused by the late-filing of a TCR.

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[5] Although a pre-filing disclosure is not required, whistleblowers are considered to be an "original source" of the information if they have "voluntarily provided the information to the Government before filing an action under" the FCA. 31 U.S.C. § 3730(e)(4)(B).

Twelfth, the concern over protecting a whistleblower's confidentiality is disingenuous. If a whistleblower fails to use the procedures created by Congress to protect his or her confidentiality, that falls on the whistleblower or his/her attorney. It makes no sense to double-sanction such an individual. Furthermore, there are numerous other laws that protect the identity of a whistleblower who does not specifically invoke the special protections afforded under the DFA, such as the Privacy Act or other law enforcement confidentiality provisions of the Securities Exchange Act. Furthermore, there are law enforcement and privacy exemptions in the Freedom of Information Act that permits or requires the SEC to maintain the confidentiality of source and which the SEC regularly cites to prevent public dissemination of ongoing SEC investigations. Confidential source protections were not created by the DFA, they were simply enhanced.

Thirteenth, it is not clear how severely sanctioning whistleblowers who initially provide information to persons such as the Chairman of the SEC, the Division of Enforcement, the Whistleblower Office and/or provide testimony in SEC proceedings, "*advances many programmatic purposes.*" Even if there was justification for a narrow disqualification, perhaps in circumstances where the failure to file a TCR results in actual prejudice to the Commission, the blanket disqualification set forth in the proposed rule undermines the "programmatic" goals and purposes of the Securities Exchange Act.

Fourteenth, the filing of a TCR form does not help Commission staff "assess" the "credibility" of the whistleblower and/or the information provided by the whistleblower. Such credibility determinations occur over time, and as part of any investigation. They have nothing to do with the simple, on-line filing of a TCR form.

Finally, although the filing of a TCR form can help "the staff efficiently process the information and other documentation provided by the individual" the TCR form itself is not the only method available to the SEC to effectuate this purpose. For example, it is currently common practice that if a whistleblower is aware of a pending investigation, the whistleblower will directly reach out to the SEC investigators or the Division of Enforcement to ensure that his or her information quickly gets to the relevant investigators. A formal TCR may not be filed until weeks or months later, but the goal with these types of disclosures is to get the relevant information to the key persons as quickly and efficiently as possible. Under the proposed rule this important avenue of disclosure, which the undersigned counsel have successfully used in at least one case that resulted in a paid-reward, would be cut off. Far from helping the staff "efficiently process" information, the proposed rule would cut off sources of information to critical SEC employees, and also interfere with the ability of a whistleblower to provide testimony about whistleblower related matters ion SEC proceedings.

III. THE EXCEPTION TO PROPOSED RULE 9(e) PROPOSED BY THE COMMISSION WILL NOT MITIGATE THE HARM CAUSED BY RULE.

The Commission proposed a narrow exception to Rule 9(e). However, as set forth below, this exception will not mitigate the harm caused by the proposed rule, and in fact actually reduces the ability of the Commission to ever remedy the problems that will be created by the proposal.

The Commission proposed the following exception to the disqualifications required under Rule 9(e):

> 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.

Proposed Rule 9(e) (emphasis added).

This exception actually limits the ability of the SEC to cure the hardships and injustices that will occur if the rule is approved. Under the current SEC whistleblower rules, the Commission has the authority to waive any procdureal rule. The proposed rule actually limits that discretion, and makes it nearly impossible for the SEC to ever approve an award to an otherwise bona fide and deserving whistleblower who contacts the SEC staff prior to filing a TCR with an award.

To be clear, if proposed Rule 9(e) is enacted there would be a *per se* rule that denies an award to whistleblowers who communicate their concerns to any SEC employee or Commissioner prior to filing a TCR form. Nothing in the exception cited above alters that draconian rule.

Without this so-called exception, under the current rules, the Commission could waive proposed Rule 9(e) and grant an award but only if the whistleblower has cured the deficiency by filing a TCR within 30 days of first contacting the SEC and clears other procedural and substantive barriers. Indeed, proposed Rule 9(e) places so many strict limits on the Commission's ability to ever waive the rule, it is unlikely that many whistleblowers would satisfy that criteria. First, the whistleblower must meet a high standard that the information they provided resulted in the enforcement action that resulted in a successful securities fraud case. The whistleblower must demonstrate that their information triggered a sanction of over $1 million by "clear and convincing" evidence. This standard begs a far more serious question. Why would the SEC ever want to deny an otherwise qualified whistleblower, who can demonstrate by "clear and convincing evidence" that their original information resulted in protecting shareholders and holding a fraudster accountable. Why should the SEC have discretion to deny an award in such a case?

Regardless, even if the SEC did waive the rule, once the award becomes discretionary, the Commission has the authority to issue an award far below the minimum 10% basis. In other words, the Commission can exercise its discretion, waive the rule, and award the whistleblower just 1% of the collected sanctions, and the whistleblower would have no recourse or appeal.

But the exception if more insidious. In order for the Commission to exercise its discretion and waive the rule, the whistleblower would have to file the TCR within 30-days of his or her initial contact with an employee of the Commission or a Commissioner.

If a whistleblower had contact with an employee of the Commission, and filed an TCR form with in thirty days, why should that whistleblower ever be denied a reward? Any so-called problem caused by the failure to file would have been immediately cured. Why sanction any whistleblower who files the TCR within 30 days of contact with the Commission?

Moreover, the 30-day statute of limitations is very short, and most likely the vast majority of whistleblowers would miss this deadline.

But the deadline serves an insidious purpose. Once the 30-day time period has expired, the Commission cannot exercise its discretion and grant an award. No other provision in the Dodd-Frank Act rules creates this type of limitation on the right of the Commission to waive a rule. Thus, the so-called exception will block the Commission from using its discretion to cure manifest injustices in most cases, both by creating a high burden of proof on the whistleblower, and then implementing a short statute of limitations, that itself serves no purpose.

Thus, not only does proposed Rule 9(e) a create a per se rule stripping otherwise fully eligible whistleblowers from obtaining a reward, the so-called exception creates a 30-day statute of limitations which, if missed, forever prohibits the Commissioners from granting an award, regardless of the facts, equities and/or hardships suffered by the whistleblower.

It creates a situation where a whistleblower can contact the Chairman of the SEC and inform the Chairman of a serious securities fraud. The Chairman immediately notifies the Division of Enforcement as to the information, and an investigation is triggered. The whistleblower thereafter hires and attorney and files the Form TCR within 31 days of that contact. The whistleblower fully cooperates with the investigation, and it is not contested that but for the information provided by the whistleblower the fraud would not have been stopped, and the fraudsters held accountable.

In the meantime, the fraudsters identify the whistleblower, fire and blacklist him. The whistleblower is driven into bankruptcy and suffers severe emotional distress as a result of the termination and his economic ruin. Two years later the Commission completes its investigation that was based on the information provided by the whistleblower to the Chairman. The SEC collects $100 million from the fraudsters, and investors are saved even more by the fraud being stopped. The whistleblower is automatically denied an award pursuant to rule 9(e). The whistleblower appeals to the Commission and seeks justice. Under the so-called exception, the Commission's hands are tied, and the whistleblower gets nothing. In this case:

- Investors are protected and compensated;
- The Commission obtains $100 million;
- The whistleblower get *nothing,* and his life is ruined.

Even if the Chairman of the Commission, who knew that the whistleblower did everything right, wanted to fix this problem, s/he cannot. Because of the rule the Commissioners are powerless to fix this injustice because the whistleblower filed his TCR 31 days after contacting the Chairman.

Is such an outcome "*consistent with the purposes*" of the DFA are required under 15 U.S.C. § 78u-6(j)? Absolutely not. As explained below, proposed Rule 9(e) not only discourages and

frustrates whistleblowers it actually turns the mandatory payment of awards to whistleblowers into an absurd exercise of SEC discretion simply because a whistleblower contacted the SEC before filing a TCR form.

IV. THE PROPOSED RULE IS INCONSISTENT WITH THE PURPOSES AND STATUTORY LANGUAGE OF THE DFA.

The proposed rule is contrary to the purposes of the Dodd-Frank Act ("DFA"). As found by the Supreme Court in *Digital Realty Trust v. Somers*, the "core objective" of the DFA's whistleblower program is to aid the Commission's enforcement efforts by "motivat[ing] people who know of securities law violations to *tell the SEC*." 138 S.Ct. at 777–78 (quoting S. Rep. 111-176 at 38 (Apr. 30, 2010), internal quotations omitted)(emphasis in the original).

The Court further affirmed that "Congress undertook to improve SEC enforcement and facilitate the Commission's 'recover[y] [of] money for victims of financial fraud' … [by] provid[ing] substantial monetary rewards to whistleblowers who **furnish actionable information to the SEC**." *Id*. (quoting S. Rep. 111-176 at 38, citing 15 U.S.C. § 78u-6(b)) (emphasis added).

The Commission's rulemaking authority requires that all of its rules promote the purposes behind the DFA, 15 U.S.C. § 78u-6(j). Proposed Section 9(e) is at war with Congressional intent. Not only does the proposes rule punish whistleblowers who "furnish actionable information to the SEC," it disqualifies persons who provide the SEC with information, "*even if [the whistleblower] later resubmit[s] that information in [a TCR]*." *See* 83 Fed. Reg. at 34,750 (emphasis added).

The proposed rule is a radical restructuring of the DFA. Numerous logical and important methods of reporting or disclosing securities violations to the SEC are cut-off or disincentivized. Employees who use common sense procedures to make initial disclosures are severely punished. Denying employees who initially provide actionable information to employees of the Commission will damage the reputation of the SEC and encourage fraudsters.

Rather than "motivating" whistleblowers to come forward with information regarding securities laws violations, the proposed rule *prohibits* all initial whistleblower reports to the SEC unless submitted on the official Form TCR. This is true even if the whistleblower were to inform an employee of the SEC – *including* the Chairman of the Commission – prior to submitting that TCR. The proposed rule destroys the largest incentive of the whistleblower program – the presence of a predictable level of an award – for whistleblowers that risk their lives and livelihoods to report crimes to the SEC. *See* S. Rep. 111-176 at 112.

Additionally, the DFA is "modeled after [the] successful IRS Whistleblower Program." S. Rep. 111-176 at 111. The Tax Court has held that a whistleblower's submission of information to an IRS division other than the Whistleblower Office, prior to submission such information with the Whistleblower Office, does not render the whistleblower ineligible for an award under the IRS whistleblower laws. *See Whistleblower 21276-13W v. Commissioner of Internal Revenue*, 144 T.C. No. 15, 22-27 (2015). By requiring that whistleblowers must first file a TCR before disclosing information to *any*one else at the SEC, the Commission's proposed rule flouts the spirit of the law.

Furthermore, this proposed rule converts the SEC's *mandatory* whistleblower reward program into a *discretionary* program for a large number of potential whistleblowers. Under the proposed Section 9(e), "the Commission in its *sole discretion*, may waive" the fact that the whistleblower did not file a TCR, but *only* if the whistleblower can show that they filed a TCR "within 30 days of the first communication with the staff about the information that [the whistleblower] provided." *See* 83 Fed. Reg. at 34,750 (emphasis added). Although very limited, the Commission has given itself the ability to decide which whistleblowers it deems worthy of an award, not "in accordance with the degree of assistance that was provided" as was the Congressional intent, but based on its own, scrutiny-protected discretion. *See* S. Rep. 111-176 at 111-12; 15 U.S.C. § 78u-6 (the Commission "*shall* pay an award" (emphasis added)); 17 C.F.R. § 240.21F-5.

The proposed rule results in a chilling effect on whistleblowers providing the very information the DFA was designed to cultivate – rather than "motivat[ing] those with inside knowledge to come forward and assist the Government" – in direct contravention of the DFA. *See* S. Rep. 111-176 at 110.

Should there be any doubt as to Congress' intent, Congress explicitly spelled out the type of information the Commission should consider when deciding the amount of award. Congress directed the SEC to "take into consideration":

- *"[T]he significance of the information provided by the whistleblower to the success of the covered judicial or administrative action*." The proposed rule violates this mandate by failing to take into consideration the significance of the information provided by the whistleblower when automatically disqualifying him/her from an award.

- *"[T]he degree of assistance provided*." Again, the rule ignores the degree of assistance provided, which is far more significant then whether or not the TCR was filed after the whistleblower provided information to the SEC staff.

- *"[T]he programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws*." Again, the timing of the filing of a TCR has no relevancy to this determination.

Not only would proposed Rule 9(e) defeat the "core objective" of DFA by discouraging whistleblowers from reporting fraud to the SEC, it would turn what Congress intended to be fairly straightforward mandatory whistleblower award provisions on their head. Proposed Rule 9(e) would make filing a whistleblower award a procedural game that is a trap for the unwary and subject whistleblowers to bizarre procedural hurdles that defeat all claims where a whistleblower contacts the SEC before filing a TCR, with one discretionary exception that is subject to conditions that would be difficult, if not impossible, to meet. That's not the mandatory whistleblower award program that Congress enacted and it's not consistent with Congress "core objective" to encourage and motivate people to report securities violations to the Commission.

V. THE COMMISSION CAN ENCOURAGE THE FILING OF TCR'S WITHOUT PUNISHING WHISTLEBLOWERS.

The current rules governing the SEC's whistleblower program can be administered to prevent any legitimate harm. First, because an award can only be given if the whistleblower's original information results in a sanction, it is simply impossible for a whistleblower whose information was not used by the Commission to obtain any reward whatsoever. Thus, the entire program is predicated on the Commission's use of "actionable information" obtained from a whistleblower, regardless to whom the whistleblower initially filed a report.

Second, all whistleblowers are required to file a separate application for an award, which is completely separate from the TCR. This application, known as the WB APP, must be filed within 90-days of the Commission publishing notice that it obtained over $1 million in sanctions from a fraudster. Once an application is filed the SEC investigator(s) responsible for the case generally submit an affidavit to the Office of the Whistleblower/Claims Review Staff explaining which whistleblowers provided the actionable information for which the enforcement action was predicated. Thus, the WB-APP process provides the real safety net, ensuring that only the whistleblowers who filed actionable information actually used by the Commission will obtain a reward. In practice, the affidavit by the investigators is not tied to the information provided in the initial TCR. The investigators can (and do) rely on any information they obtained from the whistleblowers, whether it was put into a TCR, obtained in an interview, provided indirectly by reports in the news media attributed to the whistleblower, or even based on information the whistleblower never directly gave to the Commission, such as testimony the whistleblower provided to Congress.

Thus, if a whistleblower fails to timely file a TCR, he or she is at risk of not being eligible for a reward because the Commission never relied upon his or her information. However, under proposed Section 9(e), even if the whistleblower's information was the sole basis for the sanction, a whistleblower that did not file a timely TCR – or did not file a TCR within the Commission's arbitrary 30-day deadline and receive an exemption based solely upon the Commissions discretion – will receive *nothing*.

The fact that a whistleblower greatly benefits from filing a TCR as quickly as possible, the Commission has other tools at its disposal to promote the early filing of a TCR. For example, under the current rules any action taken by a whistleblower to delay an investigation can be taken into consideration in *lowering* the amount of a reward. As explained in the Commission's 2011 rulemaking on the whistleblower program:

> Finally, to minimize any incentive for whistleblowers to conceal misconduct or to delay reporting it, we have included in Rule 21F-6 a provision that requires the ***Commission*** to consider whether it would be appropriate to decrease a whistleblower's award percentage because of the culpability of the whistleblower or any substantial and unreasonable reporting delay by the whistleblower.

76 *Federal Register* 34300, 3450-51 (June 13, 2011).

> The revisions to final Rule 21F-6, governing the criteria used in determining the amount of an award, are designed to provide strong incentives for the whistleblower to report violations with increasing levels of quality, timeliness, and validity. Rule 21F-6 allows the Commission to set the award percentage based, among other things, on the significance of the information provided by the whistleblower **and any unreasonable delay by the whistleblower in making the submission**. Taken together, these rules provide for greater awards for more timely and more useful information, and **reduced awards for whistleblowers whose dilatory or uncooperative conduct may impair our enforcement efforts**.

76 *Federal Register* 34300, 34358 (June 13, 2011)(emphasis added).

Instead of disqualifying whistleblowers in a manner that will have a catastrophic impact on the whistleblower program, the SEC can use its existing authority to encourage timely filed TCR. There are many other techniques for promoting the filings of TCRs, rather than the manner in which the Commission has chosen in this proposed rule. For example, the SEC could choose to enhance its website by adding directions for whistleblowers to file a TCR on webpages that discuss other means for whistleblowers to report to the SEC. *See* Websites linked above. The SEC could also make regular use of its deficiency letters, or reduce awards if the non-filing of a TCR results in prejudice or delay in an SEC proceedings.

These above steps encourage whistleblowers to file TCRs, rather than dissuading whistleblowers from reporting to the SEC at all, as the proposed rule will unquestionably do. If the SEC approves a rule punishing whistleblowers for reporting to the SEC through *all* methods other than the TCR, the success of the entire SEC Whistleblower Program will be undermined, jeopardizing detection of future securities laws violations and thus Commission actions. Worse, numerous (if not a majority) of whistleblowers who risk their jobs and careers, promote the public interest, and protect investors will be denied the rewards Congress intended, and in many cases will also be denied any economic relief for the retaliation they will suffer.

VI. CONCLUSION

Proposed rule 9(e) will have a radical and detrimental impact on the whistleblower program. It is inconsistent with the goals of the Securities Exchange Act, the Congressional intent and statutory mandates of the Dodd-Frank Act, and will discourage they very behaviors which are at the core of the whistleblower program. It will undermine the entire whistleblower program. Depending on the reaction of whistleblowers who fall victim to the proposed rule, the negative fall-out triggered by unjustified award denials or disqualifications will undermine ongoing investigations and has the potential to destroy all of the good-will currently enjoyed by the Commission based on the excellent track record of the current Whistleblower Office.

REQUEST FOR MEETING

Given the importance of the issues raised by the proposed rule, we hereby request a meeting with representatives of the Commission to answer any questions you may have, and to further explain the destructive nature of this proposed rule. We hereby request that the meeting be scheduled as quickly as possible, but no later than the close of business, May 10, 2019.

Thank you in advance for your careful consideration. We look forward to hearing from you and working together to ensure your highly successful whistleblower program continues to protect investors and hold fraudsters accountable.

Respectfully submitted,

/s/ Stephen M. Kohn
Michael D. Kohn
David K. Colapinto
Kohn, Kohn and Colapinto, LLP
3233 P Street, N.W.
Washington, D.C. 20007
[redacted]
[redacted] (fax)
[redacted]

cc: Commissioner Robert J. Jackson Jr., CommissionerJackson@sec.gov

Commissioner Hester M. Peirce, CommissionerPeirce@sec.gov

Commissioner Elad L. Roisman, CommissionerRoisman@sec.gov

Jane Norberg
Chief, Office of the Whistleblower
U.S. Securities and Exchange Commission
NorbergJ@SEC.GOV