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September 12, 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  
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rule-comments@sec.gov

**Re: SECOND SUPPLEMENTAL COMMENT  
Improper Resurrection of the U.S. ex rel.  
State of Wisconsin v. Dean Precedent in DFA Cases**

**Proposed Amendment to Rule 21F-9(e)  
File Number S7-16-18**

Dear Chairman Clayton and Secretary of the Commission:

We are writing to further comment on the Securities and Exchange Commission's ("SEC" or "Commission") proposed amendment to Rule 21F-9(e) (hereinafter "Proposed Rule 9(e)" or "the proposed rule").<sup>1</sup> See Letter from Kohn, Kohn & Colapinto, LLP (May 6, 2019).

The second supplemental comment is being filed because Proposed Rule 9(e) resurrects, for the first time in U.S. law, the key holding of a completely discredited line of cases which undermined the False Claims Act after that law was amended in 1943. This radically anti-whistleblower line of cases was explicitly targeted by Congress for reversal as part of the 1986 amendments to the False Claims Act.

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<sup>1</sup> See Whistleblower Program Rules, 83 Fed. Reg. 34, 702 at 34, 723-24, 734, 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.

The core problem which resulted in the dismissal of most whistleblower *qui tam* cases between 1943-1986 was a provision in the 1943 law that barred whistleblowers from obtaining rewards if the government knew of their allegations prior to the filing of the formal FCA lawsuit. This provision of the 1943 law applied, even if the whistleblower was the source of the government's knowledge. Thus, if a whistleblower informed a government agency that it was being defrauded prior to filing the *qui tam* lawsuit, that whistleblower would automatically be barred from collecting a reward under the FCA, or pursuing a *qui tam* case. Because most whistleblowers take action to alert authorities as to legal violations prior to filing a formal lawsuit or reward claim, this 1943 provision effectively destroyed *qui tam* until it was rescinded by Congress in 1986.

Proposed Rule 9(e) resurrects the most harmful part of this 1943 provision by similarly barring whistleblowers who inform the SEC of the frauds prior to filing a formal complaint known as a "TCR." Just like under the now discredited 1943 amendments, whistleblowers who did the right thing and alerted the appropriate authorities of the frauds at the earliest moment, and did not delay disclosures in order to prepare a formal claim application, were barred from recovery.

Just as this jurisdictional bar undermined the FCA in 1943, so will Proposed Rule 9(e). If implemented it will result in severe harm to numerous whistleblowers and discredit the SEC's commitment to oversight and accountability.

As previously explained in our May 6<sup>th</sup> letter, Section 9(e), if approved, would 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*, 138 S.Ct. 767, 773 (2018) (quoting S. Rep. 111-176 at 38). The proposed rule Section 9(e) makes the filing of a TCR *mandatory, prior to any other form of contact with the Commission*. Under the proposed rule, a whistleblower who provided "original information" about a securities violation to *anyone* at the SEC without *first* having filed formal reward claim with the Commission on the proper "form" (known as a "TCR") would be *automatically ineligible* for an award. The Commission's ability to address any hardships arising from this jurisdictional bar to recovery would be *extremely* limited and the whistleblower would forever lose his or her right to the mandatory 10% minimum reward required under the Dodd-Frank Act ("DFA").<sup>2</sup>

In 1986, the U.S. Congress amended the False Claims Act ("FCA") to fix a number of problems created by amendments to the original FCA enacted in 1943. Chief among these problems was a bar against whistleblowers initiating formal *qui tam* lawsuits if the the government had information regarding the potential fraud prior to the filing of the suit, even when the whistleblower seeking to bring the lawsuit was the source of the government's information. Under the now-discarded 1943 rule, whistleblowers were summarily denied rewards with no regard to the value of the information

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<sup>2</sup> As previously noted in our May 6<sup>th</sup> filing, although the proposed rule has an extremely narrow procedure to cure this problem, the implementation of that procedure is purely discretionary. Also the exemption 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 new 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.

they provided to the government, or the risks whistleblowers took by telling the government about fraud.

Similarly, under proposed Rule 9(e), a whistleblower who is the source of information to the SEC prior to filing an official Dodd-Frank Act reward claim (i.e. the filing of the official TCR), would be ineligible for a reward. Like the disclaimed decisions under the 1943 version of the FCA, a Rule 9(e) exemption decision will be made based solely on whether the government was informed before the whistleblower submitted the formal paperwork, without regard to the merits of the whistleblowers claim and act as a bar to the whistleblowers award petition.

One of the key cases cited in the legislative history of the False Claims Act as being **wrongly decided** was *United States ex Rel. State of Wis. v. Dean*, 729 F.2d 1100 (7th Cir. 1984) (“*Dean*”). *Dean* concerned a case in which the government was informed by the “whistleblower” of the underlying frauds prior to the “whistleblower” filing the formal False Claims Act *qui tam* lawsuit. The rule of law approved by *Dean* (which had also been followed in other courts of the time) was clear:

*The district court properly recognized that the jurisdictional bar of Section 232(C) applies whenever the government has knowledge of the "essential information upon which the suit is predicated" before the suit is filed, **even when the plaintiff is the source of that knowledge.***

*United States ex Rel. State of Wis. v. Dean*, 729 F.2d at 1103.

*Dean* cited to a number of prior cases that followed this harsh, anti-whistleblower rule, including *Pettis ex Rel. U.S. v. Morrison-Knudsen*, 577 F.2d 668, 669 (9th Cir. 1978), explaining: “For example, the *Pettis* court denied jurisdiction for a *qui tam* plaintiff despite the plaintiff's contention that Section 232(C) was inapplicable ‘when an informer prior to bringing suit supplies the government with the information which under 31 U.S.C. § 232(C) invokes the bar.’”

The Senate Report on the 1986 False Claims Act amendments specifically cited *Dean* as a case Congress wanted to overturn to “rectify the unfortunate results” the jurisdictional bar outlined above. Senate Rep. 99-345, pp 12-13. That report also cited to *U.S. ex Rel. Lapin v. IBM*, 490 F.Supp. 244 (D. Hi. 1980). Like *Dean*, *IBM* was a case in which a whistleblower was barred from filing a False Claims Act lawsuit because the whistleblower had provided the government with the information prior to filing the *qui tam* case in Court (“Plaintiff-relator in this case makes no allegation that his suit is based on information beyond what he gave the government before he bought this suit.” *Id.* at 246. See Senate Rep. 99-345, p. 12.

In short, the proposed SEC rule resurrects much of the mischief the 1986 amendments to the False Claims Act fixed. It was clear prior to 1986, that a rule barring whistleblowers from reward laws solely because they informed the government of the violations prior to filing a formal False Claims Act lawsuit was absolutely wrong and counter the core purposes of the False Claims Act. The same can be said of the SEC’s proposed rule. It will create the same hardships and absurd results

that were cured by the 1986 Amendments to the False Claims Act, when Congress thought it had put cases like *Dean* to rest.

The 1986 amendments to the False Claims Act fixed the problem proposed Section 9(e) resurrects, and ensured that a whistleblower who did the “right thing” by alerting the appropriate government regulators of a violation of law would be protected and covered under the reward law - especially when the whistleblower had the common sense and decency to alert to appropriate government officials of the violations prior to drafting and filing a formal lawsuit. There were no grounds for such a restriction in 1986, and there is no grounds for such a restriction today.

There is no public policy whatsoever that would justify denying a whistleblower a reward because he or she told someone in the SEC about the violations prior to filing the formal TCR.<sup>3</sup>

As the Commission is fully aware, Congress looked at the post-1986 version of the False Claims Act as a model for the Dodd-Frank Act’s securities reward provision. S. Report No. 111-176, p. 111 (referencing the “DOJ” rewards program). Nothing in the Dodd-Frank Act overturns or contradicts the FCA’s complete rejection of the *Dean* rule.

Thank you for your careful attention to these matters. Based on the importance of these issues we request a meeting with the relevant Commission staff and each individual Commissioner to address any questions and further explain the practical harm that will be caused if Proposed Rule 9(e) is implemented

Respectfully submitted,

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<sup>3</sup> Obviously, if a whistleblower made such a non-TCR related disclosure, and that information was never forwarded to the appropriate investigators the whistleblower would be denied a reward not based on a technical anti-whistleblower/anti-informant rule, but because the SEC did not rely on the information to issue the sanction.