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November 22, 2019

URGENT MATTER

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

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

Re: **SIXTH SUPPLEMENTAL COMMENT**
PROPOSED RULE 21F-9(e)

File Number S7-16-18

Update: **SEC Rules should be consistent with CFTC decision.**

Dear Chairman Clayton and Secretary Countryman:

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"). We specifically want to call the Commission's attention to the decision of the Commodity Futures Trading Commission (CFTC) in Award Determination No. 18-WB-1.

In that case the CFTC fully rewarded a whistleblower who filed a TCR **after the Commission concluded the enforcement action**.[1] This precedent addressed the identical issues implicated in Proposed Rule 9(e). Given the similarities between the CFTC and SEC laws and regulations, and the need to harmonize the filing requirements under these two programs, this precedent is extremely significant and should be followed by the Commission.

[1] Determination No.18-WB-1, CFTC Decision (available at https://www.kkc.com/wp-content/uploads/2019/11/18-WB-01-CFTC-Decision.pdf).

As explained below, the CFTC's holding is also consistent with the holding in the IRS whistleblower case *Whistleblower 21276-13W v. Commissioner of Internal Revenue,* 144 T.C. No. 15 (2015) and the 1986 revision of the False Claims Act. Like in those precedents, the agency focused on the role of the original information provided by the whistleblower on a successful enforcement action, not on the timing of a TCR filing.

I. 18-WB-1 makes it clear that an awards should be determined *as of right* when the whistleblower has provided voluntary assistance to the Commission.

In the CFTC decision, 18-WB-1, the CFTC Commission ruled that a claimant who filed a TCR after the CFTC Commission concluded the enforcement action was none-the-less a whistleblower because the whistleblower: voluntarily provided original information that led to the successful enforcement of a covered action and provided significant information and assistance.[2] The fact that a TCR was submitted after the conclusion of the Commission's enforcement action was not used as a bar against this meritorious whistleblower.

The attached CFTC decision fortifies the concept we have consistently highlighted in earlier comments, which is that the factors in determining a whistleblowers status and eligibility for an award is their assistance to the Commission, not the timing of the TCR submission – and that once a whistleblower's voluntary and significant contributions as required under the Dodd-Frank Act have been confirmed, this eligibility should be *as of right* not left to the Commission's discretion. The programmatic interest of awarding such whistleblowers is clearly laid out in the CFTC decision.

The decision is particularly helpful as the CFTC award law and implementing regulations are substantially identical to those of the SEC, and there is an overwhelming public interest in having the rules governing the filing of initial whistleblower information to be consistent in all of the major whistleblower award programs. As explained below, the CFTC holding is consistent with the law governing IRS and False Claims Act reward cases.

II. The 18-WB-1 is consistent with *Whistleblower 21276-13W*, and the 1986 FCA revision, taken together these decisions show that qualified whistleblowers should be rewards *as of right* and never denied based on failure to file within a specified window of time.

Our October 8, 2019 comment discussed *Whistleblower 21276-13W* in detail. In that case, the Tax Court reviewed a case where the whistleblowers had properly reported a $1.2 billion dollar tax fraud, worked with the government to effectuate a successful enforcement action, and triggered the payment of a $75 million sanction – even though the Form 211 was filed **after the enforcement action** - thus holding that the failure to file the Form 211, standing alone, would not disqualify otherwise fully qualified whistleblowers.

Our September 12, 2019 comment discussed the 1986 revision of the False Claims Act (hereinafter "FCA"), which was prompted by the denial of award for qualified whistleblowers in *United States ex Rel. State of Wis. v. Dean*, 729 F.2d 1100 (7th Cir. 1984) (hereinafter "*Dean*").

[2] 18-WB-1, at pg. 2.

Together the Tax Court decision, the 1986 revision, and the the above discussion of the CFTC decision, 18-WB-1, make it clear that denying an otherwise qualified whistleblower a reward solely on the basis of the method used to disclose the violations to the appropriate regulatory agency is completely inconsistent with the purpose, structure and effective administration of a successful whistleblower program, if in fact the agency is able to use the original information as mandated under law. In short, form filing requirements should not act as an automatic bar to rewarding ***otherwise fully qualified*** whistleblowers.

The Commission should ensure that it's final rule on this issue harmonizes the Commission's practice with the rules currently in place at the IRS, DOJ, and CFTC.

Thank you for your careful attention to these matters.

Respectfully submitted,

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cc: Commissioner Robert J. Jackson Jr., via e-mail.
Commissioner Allison Herren, Lee, via e-mail.
Commissioner Hester M. Peirce, via e-mail.
Commissioner Elad L. Roisman, via e-mail.
Jane Norberg, Chief, Office of the via e-mail.

Attachments: U.S. Commodity Futures Trading Commission Award Determination, Determination No. 18-WB-1

UNITED STATES OF AMERICA
before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of Claims for Award by: Redacted WB-APP Redacted ; Redacted WB-APP Redacted ; Redacted WB-APP Redacted ; and Redacted WB-APP Redacted In Connection with Notice of Covered Action Redacted	CFTC Whistleblower Award Determination No. 18-WB-1

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS

The Commodity Futures Trading Commission ("Commission") received whistleblower award applications from Redacted ("Claimant #1"), Redacted ("Claimant #2"), *** Redacted ("Claimant #3"), and Redacted ("Claimant #4") in response to the Commission's Notice of Covered Action Redacted regarding Redacted

The Claims Review Staff has evaluated each of the applications in accordance with the Commission's Whistleblower Rules ("Rules"), 17 C.F.R. pt. 165 (2017) (as amended by 82 Fed. Reg. 24,487, 24,496–521 (May 30, 2017)), promulgated pursuant to Section 23 of the Commodity Exchange Act ("CEA" or "Act"), 7 U.S.C. § 26 (2012). On January 9, 2018, the Claims Review Staff issued a Preliminary Determination recommending that Claimant #4 receive a whistleblower award in the amount of *** % of monetary sanctions collected in *** Redacted because Claimant #4 voluntarily provided original information to the

Commission that led to the successful enforcement of a covered action. The Preliminary Determination also recommended denying the other award claims because the other applicants played no role in Redacted .

I. LEGAL ANALYSIS

Section 23(b)(1) of the CEA requires the Commission to pay an award to an individual who voluntarily provides the Commission with original information that leads to the successful enforcement of a covered or related action. 7 U.S.C. § 26(b)(1) (2012). The Claims Review Staff has determined that Claimant #4 voluntarily provided the Commission with original information that led to the successful enforcement of a covered action. Even though Claimant #4 did not submit a Form TCR (Tip, Complaint or Referral) until after the Commission concluded the enforcement action, Claimant #4 is a whistleblower. As a foreign national, Claimant #4 did not know about the Commission's whistleblower program when he/she initiated contact with the Commission regarding an ongoing litigation matter. Claimant #4 provided significant information and assistance to Commission staff during the litigation, and he/she thereafter submitted a Form TCR to perfect his/her whistleblower status. Accordingly, Claimant #4 is a whistleblower within the meaning of the Rules. Claimant #4 also provided the information voluntarily, as he/she was not under a legal obligation to report to the Commission, and Commission staff did not know about Claimant #4's existence until he/she came forth out of his/her own volition. In addition, Claimant #4's information was original, as it was previously unknown to the Commission and derived from his/her personal experiences and observations. Lastly, Claimant #4 significantly contributed to the Commission's action by helping Commission staff successfully settle the action and thereby avoid a costly trial.

The Claim Review Staff recommended the award amount to be *** % of the amount of monetary sanctions collected in the covered action.[1] We agree with this determination. In arriving at this award amount, the Claims Review Staff applied the factors set forth in Rule 165.9, 17 C.F.R. § 165.9, in relation to the facts and circumstances of Claimant #4's award application. The determination of the appropriate percentage of a whistleblower award involves a highly individualized review of the facts and circumstances. Depending upon the facts and circumstances of each case, some factors may not be applicable or may deserve greater weight than others. The analytical framework in the Rules provides general principles without mandating a particular result. The criteria for determining the amount of an award in Rule 165.9, 17 C.F.R. § 165.9, are not listed in any order of importance and are not assigned relative importance. The Rules do not specify how much any factor in Rule 165.9(b) or (c) should increase or decrease the award percentage. Not satisfying any one of the positive factors does not mean that the award percentage must be less than 30%, and the converse is true. Not having any one of the negative factors does not mean the award percentage must be greater than 10%. These principles serve to prevent a vital whistleblower from being penalized for not satisfying the positive factors. For example, a whistleblower who provides the Commission with significant information and substantial assistance such as testifying at trial and producing smoking gun documents could receive 30% even if the whistleblower did not participate in any internal compliance systems. In contrast, in order to prevent a windfall, a whistleblower who provides some useful but partial information and limited assistance to the Commission may receive 10% even if none of the negative factors were present.

[1] The Commission collected Redacted of sanctions imposed, which means Claimant #4 would receive Redacted in payout. While circumstances may change, the Commission does not anticipate being able to collect the remaining amount.

As applied, Claimant #4 significantly contributed to the Commission's case, but he/she was involved in the CEA violations at issue in the covered action. However, it was unlikely that Claimant #4 acted with scienter, as he/she was a junior-level employee in a foreign nation given instruction by his/her employer Redacted . Further, Claimant #4 did not financially benefit from the violations, and his/her information led the Commission to successfully settle the case and thereby avoid a potentially costly, risky, and cumbersome trial against Redacted . After considering the mitigating factors, we find that the Claims Review Staff's determination of *** % is appropriate.

The remaining Claimants did not contribute to the covered action. Commission staff responsible for the covered action did not know who the remaining Claimants were until the Commission's Whistleblower Office informed staff of these Claimants' award applications.

II. RESPONSE TO PRELIMINARY DETERMINATION

On January 11, 2018, Claimant #1 wrote to the Commission to withdraw his/her award application from this proceeding. Therefore, Claimant #1 is no longer a claimant in this determination. On January 31, 2018, Claimant #4 informed the Commission in writing that he/she would not contest the Preliminary Determination within the 60-day deadline set out in Rule 165.7(g), 17 C.F.R. § 165.7(g). Accordingly, pursuant to Rule 165.7(h), 17 C.F.R. § 165.7(h), the Preliminary Determination became the Proposed Final Determination of the Claims Review Staff with respect to Claimant #4.

Claimant #2 and Claimant #3 did not respond to the Preliminary Determination. Pursuant to Rule 165.7(h), 17 C.F.R. § 165.7(h), the Preliminary Determination became final with respect to Claimant #2 and Claimant #3. Claimant #2's and Claimant #3's failure to submit a timely response contesting the Preliminary Determination constituted a failure to exhaust administrative

remedies. Accordingly, Claimant #2 and Claimant #3 are prohibited from pursuing an appeal under Rule 165.13, 17 C.F.R. § 165.13.

It is hereby ORDERED that Claimant #4 shall receive *** % of monetary sanctions collected in Redacted ; and it is further ORDERED that Claimant #2's and Claimant #3's whistleblower award claims be, and hereby are, denied.

By the Commission.

Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, DC 20581

Dated: July 12, 2018