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September 10, 2020

URGENT MATTER

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U.S. Securities and Exchange Commission
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chairmanoffice@sec.gov

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
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Re: **ELEVENTH SUPPLEMENTAL COMMENT**
File Number S7-16-18

Update: **Related Action: Comment on Proposed Rule 21F-3(b)(4).**

Dear Chairman Clayton and Secretary Countryman:

We are writing to further comment on the U.S. Securities and Exchange Commission's ("SEC") or "Commission") proposed amendments to the whistleblower program.[1] After reviewing the comments placed on the record concerning potential double recoveries in related action proceedings we believe that further discussion on this matter is warranted. *See* 21F-3(b)(4). As will be explained below, this issue was previously addressed in the 2011 rulemaking.

In 2011, the Commission considered potential double rewards under the Commodity Exchange Act ("CEA"), the False Claims Act ("FCA") and the Securities Exchange Act ("SEA") while drafting the Dodd-Frank Act.[2] The resolution reached in 2011 is highly instructive as to how this issue should be resolved under the current proposed rules.

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

[2] Although the SEA and CEA whistleblower laws were enacted as part of the Dodd-Frank Act, the narrow legal issue discussed here is equally applicable to other laws.

Further, we would like to take this opportunity to express our full support of the efforts of the Commission to take the appropriate time to fully review the various comments and issues raised by the proposed rules. Given the widespread public debate and interest concerning the proposed rules, we strongly believe that a unanimous ruling by the Commission regarding the proposed rules would serve the public interest and set a strong precedent for reasonable rulemaking. As stated by Chairman Clayton in his testimony before the House Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets (June25, 2020), the Commission's whistleblower program is "extremely successful."[3] We agree with the Chairman's sentiment and have championed this highly successful program from the beginning. Our hope is that the final rule serves to fortify this exemplary program in a manner which we can continue to celebrate. This rulemaking process holds the potential for huge ramifications to the SEC's ability to actualize its mission, and the Commission now has the opportunity to make clear that it will not approve any proposals that would weaken this exceptional program.

Taking the time to thoroughly consider comments and only adopt amendments which fortify this powerful program – as the Commission has done - sends the precise message that whistleblowers, investors, and corporate executives need to hear.

SUMMARY

We agree that the Commission has a legitimate interest in preventing or wanting to render double recoveries unattainable. The whistleblower advocacy community has never supported a "double recovery" concept. No one argued during the first rulemaking proceeding in 2010-11 (or in the current comments) that whistleblowers are entitled to a double recovery in related action proceedings. *See* Taxpayers Against Fraud (comment filed on September 18, 2018)("As the SEC release acknowledges, 'the Commission never paid an award on a matter where a second whistleblower program also potentially applied to the same matter,' so there is no need for the proposed change.").[4]

[3] As the has documented, since the program was initiated over $2.5 billion has been obtained from whistleblower-initiated enforcement actions and $750 million has been (or will be) returned to investors. In a July release the SEC Office of the Whistleblower confirmed the "paramount role the SEC's whistleblower program plays in safeguarding the Main Street investor." The Office further stated that "since the beginning of the program nearly ten years ago, the SEC has ordered more than $2.5 billion in financial remedies based on whistleblower information, including more than $1.4 billion in disgorgement and prejudgment interest, of which almost $750 million has been returned or is scheduled to be returned to harmed investors."

[4] The Americans for Financial Reform Education Fund correctly pointed out numerous problems caused by the proposed rule, but they did not argue that related action awards should require that SEC to pay related action awards if the combined awards from two or more programs was greater than 30%. result in double recoveries above the 30% threshold. The letter filed by the Cornell University law professor opposed the rule on the grounds that it could result in related action awards far below the 10-30% range required under the SEA, but did not endorse paying double awards above the 30% ceiling.

Because there is a consensus that double recoveries are not appropriate, the Commission should be able to resolve this issue in a manner that addresses the concerns raised by the Commission staff and whistleblower advocates alike.

The Commission addressed this issue during its first whistleblower rulemaking proceeding, because potential double recoveries raise programmatic concerns. The resolution reached in 2011 presents an excellent precedent for resolving this issue outside the context of the FCA and CEA. After thorough consideration in 2011, the Commission confirmed that its prohibition on double recoveries under the SEA and CEA would not result in reducing the total whistleblower reward compensation below the *"clear Congressional determination that a whistleblower award on a successful action should lie within the 10 percent to 30 percent range."*[5] It is essential that the Commission clearly reinforce this guarantee of a 10-30% award to alleviate concerns that changes to the current procedures will have a significant prejudicial impact on whistleblowers who assist in investigations conducted by various agencies.

In this regard it is clear, based on the plain meaning of the Dodd-Frank Act, that Congress wanted to encourage whistleblowers to share their information with every federal agency that may have an interest in investigating the whistleblower's allegations. The related action provisions ensure that whistleblowers will be incentivized to cooperate across various agencies, and that those who commit fraud are held accountable under all applicable federal laws and state criminal laws. The final rule approved by the Commission must affirm these goals.

As highlighted above and more fully explained below, the current proposal conflicts with the statutory requirements of the Dodd-Frank Act. Further, this letter will specify alternative tools the Commission has at its disposal which can accomplish the legitimate intent behind the proposed related action rule 21F-3(b)(4).

I. The Proposed Rule Violates the Dodd-Frank Act's Statutory Framework for Related Action Awards

Any rule enacted by the U.S. Securities and Exchange Commission (SEC) must conform to the specific statutory mandates contained in the Dodd-Frank Act's whistleblower provision applicable to the SEC. This is especially true because the wording of the statute states that the definition of "related action" "shall apply" to all actions taken by the Commission under the DFA, and the DFA provides a precise definition of "related action."

Thus, the Commission is without authority to alter this definition by rule.

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[5] *See,* "Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934," 75 Federal Register at 70490 (November 17, 2010), available at https://www.sec.gov/rules/proposed/2010/34-63237fr.pdf (emphasis added).

The portion of the DFA regarding the Commission's requirement to pay awards explicitly states that the Commission "shall pay" all related action awards within the mandatory 10-30% range. Thus, the Commission has no discretion to deny such awards, and cannot approve a regulation inconsistent with these statutory mandates.

The applicable wording in the statute is plain and clear:

> §78u–6. Securities whistleblower incentives and protection
> (a) Definitions
> In this section the following definitions **shall apply**:
>
> ***
>
> (5) The term ''related action'', when used with respect to any judicial or administrative action brought by the Commission under the securities laws, **means** any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the original in- formation provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.
>
> (b) Awards
> (1) In general
> In any covered judicial or administrative action, **or related action**, the Commission, under regulations prescribed by the Commission and subject to subsection (c), **shall pay an award** or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, **or related action**, in an aggregate amount equal to—
> (A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action **or related actions**; and
> (B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action **or related actions**.

§78u–6(a)(5) and (b)(1)(emphasis added).

The review of any proposed regulations impacting the payment of related action awards must start and end with deference to these statutory mandates. The provisions of the proposed rule especially those tied to specific definitions) conflict with the Supreme Court's unanimously ruling in *Digital Realty v. Somers*, 583 U.S. ___ (2018) which states that the DFA should be interpreted within the four corners of the language therein. Thus, in reviewing any proposal impacting the related action requirements the Commission must start with a strict reading of these statutory requirements, ensuring that nothing approved conflicts with the right of otherwise qualified whistleblowers to obtain a reward of 10-30% of each and every "related action" case. Furthermore, the Commission cannot reduce the scope of proceedings covered under the "related action" definition by rule.

A simple comparison of the proposed rule with the mandatory statutory definition unquestionably requires the Commission to reject that proposal. Although conflicts between the statutory requirements and the proposed rule are obvious, some of the specific conflicts are explicated in Part III of this letter.

Based on the conflicts between the statutory requirements and the proposed rule the Commission has two alternatives to correct these problems. The first is to simply abandon the proposed rule. This alternative is very logical, as the Commission admits that the theoretical harm the rule is trying to address has never actually occurred.[6] Thus, there is no need to rush to fix a problem that does not exist and/or which may arise rarely in a highly exceptional case.

The other alternative is to redraft the proposal consistent with the statutory requirements. Our recommendations for redrafting the proposal are set forth in part V of this letter. Both of these options are acceptable.

II. The Potential for Double Recoveries under the Securities Exchange Act's Whistleblower Program was Properly Addressed in the 2011 Rules

The issue of double recoveries under the "related action" provision of the Securities and Exchange Act's ("SEA") whistleblower program was first addressed in the Commission's 2011 rulemaking proceeding. In those proceedings the Commission approved a simple, fair and straightforward rule that prevented double recoveries under two whistleblower reward laws, the SEA and the Commodity Exchange Act ("CEA"). In addition, the Commission also resolved the issue as to whether double rewards were available under the SEA and the *qui tam* provision of the False Claim Act ("FCA").[7]

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[6] As is explained in Part II below, the reason this issue has not come up is easy to ascertain. In the 2011 rulemaking the issues were addressed regarding potential recoveries under the Commodity Exchange Act and Securities Exchange Act. Furthermore, the Commission held that the *qui tam* provisions of the False Claims Act (the part of the law that permits whistleblowers to obtain a reward) fell outside the scope of the "related action" provision. Thus, the issues related to the two laws that had the greatest potential to give rise to a double recovery were fully addressed in 2011. Additionally, because the IRS whistleblower law require a greater mandatory minimum reward than the DFA (i.e. a minimum reward of 15%, and a maximum reward of 30%), whistleblower who have filed claims under both the IRS and the DFA laws apparently have been satisfied with pursuing their rewards under each applicable statute, and not seeking double awards under the DFA.

[7] Without objection, FCA *qui tam* matter was discussed and resolved in the 2011 rulemaking. As explained in Footnote 52: "Several comment letters suggested that a *qui tam* action under the False Claims Act, 31 U.S.C. 3729 *et seq,* could qualify as a ''related action.'' *See, e.g.,* letter from VOICES. This is not correct. A *qui tam* action is not brought by the Attorney General of the United States as is required under the definition of ''related action'' in Section 21F(a)(5) of the Exchange Act. In a *qui tam* action, the relator ''bring[s]'' the action ''in the name of the Government,'' *see Vermont Agency of Natural Resources* v. *United States ex rel. Stevens,* 529 U.S. 765, 769 (2000), and thereafter the Attorney General may ''elect to intervene and proceed with the action,'' 31 U.S.C. 3730(b)(2), 3730(b)(4). Moreover, given that Congress has specifically provided a 15– 30% award for successful *qui tam* plaintiffs, *see* 31 U.S.C. 3730(d)(1)–(2), we do not believe Congress intended Section 21F of the

The commentary on the original proposed rules published in 2010 is instructive of precisely how the SEC could resolve this issue today. The Commission wrote:

> This provision serves two purposes. First, it would ensure that a whistleblower will not obtain a double recovery on the same related action. For example, if the CFTC makes an award of 10 percent to 30 percent on a criminal action brought by the U.S. Department of Justice, the whistleblower would be precluded from obtaining a second recovery of 10 percent to 30 percent from the SEC on the same action. Any other reading of the interplay of the SEC and CFTC whistleblower award provisions—which were both established by Dodd-Frank and which are substantially identical in their substantive terms—would produce the highly anomalous result of allowing the whistleblower to effectively receive a 20 percent minimum to 60 percent maximum recovery on the same related action. **The SEC and CFTC whistleblower provisions, however, embody a clear Congressional determination that a whistleblower award on a successful action should lie within the 10 percent to 30 percent range.**[8]

The reason why there was no opposition to the SEC's final resolution of this issue was because the rule recognized that whistleblowers were entitled to a 10-30% reward regardless of which agency (the CFTC or the SEC) paid the award.[9] In other words, because the rule recognized the "clear Congressional determination" that all related action awards "should lie within the 10 percent to 30 percent range," the issue of improperly reducing the size or scope of related action awards was properly addressed, in a manner consistent with the statutory requirement that all related action award be paid consistent with the statutory range.

However, in the commentary accompanying the current proposed rules the Commission did not explicitly assure whistleblowers that the 10-30% award range would be honored. This apparent oversight has led to some confusion and well-founded opposition.

The Commission must make it clear that any weighing of potential recoveries under one whistleblower reward law can never reduce the overall amount of a "related action" recovery to

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Exchange Act to permit additional recovery for the same action above what it specified in the False Claims Act." https://kkc.com/wp-content/uploads/2020/03/SEC-Final-Rule-Publication.pdf

[8] *See,* "Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934," 75 Federal Register at 70490 (November 17, 2010), available at https://www.sec.gov/rules/proposed/2010/34-63237fr.pdf (emphasis added).

[9] Significantly, in the extensive comments filed regarding the 2011 whistleblower rules no one from the corporate community argued against the Commission's statement that the 10-30% range for rewards was a "clear Congressional determination" and would be fully honored. Specifically, the Society of Corporate Secretaries and Governance Professionals took no issue with this Commission position, but simply wanted to confirm its opposition to "double payments." Likewise, no one explicitly supported double payments for whistleblowers.

less than 10%, nor justify reducing the total amount of compensation paid to a whistleblower under multi-programs to less than 30%, should a whistleblower meet the criteria for a 30% award.

III. The Proposed Rule Violates the Plain Language of the DFA

As clearly explained in Part I of this letter, the related action requirements under the DFA are clearly set forth in the statute. In light of the U.S. Supreme Court's decision in *Digital Realty v. Somers*, 583 U.S. ___ (2018), the Commission is bound by the statutory definition and cannot approve any rule that is inconsistent with that definition.

In *Digital* the Supreme Court narrowed the ability of the Commission to approve rules for its whistleblower program the stray from clear statutory requirements. This was true even when the Commission rule under review by the Court was consistent with public policy and other Congressional goals (i.e. the protection of whistleblowers who raise concerns through an established compliance program). The Supreme Court unanimously held that when interpreting the Dodd-Frank Act the wording of the statute trumped logical policy goals.

The Court held that the definitions set forth in the SEA's whistleblower law were controlling: "*When a statute includes an explicit definition, we must follow that definition," even if it varies from a term's ordinary meaning . . . This principle resolves the question before us."* Slip op. p. 9.[10] The Supreme Court also explained that the, "the definition section of the statute supplies an unequivocal answer" as to the meaning of specific defined terms in the Dodd-Frank Act. *Id.* Thus, the Commission cannot alter the meaning of a "related action" as defined in the Act.

The Dodd-Frank Act's definition of "related action" is precise and clear:

> The term ''related action'', when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

15 U.S.C. §78u–6(a)(5).

Additionally, in *Digital* the Court noted that the statutory definition of "whistleblower" was binding because the DFA stated that this definition "shall apply" to that term. An identical requirement controls the meaning of "related action." Like it did with the definition of

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[10] As the Supreme Court held, when interpreting the meaning of the Dodd-Frank Act the "definition section of the statute supplies an unequivocal answer" as to the scope of the law and limits on the Commission's discretion to alter those meanings.

"whistleblower" in the DFA, Congress also explicitly stated that its definition of "related action" "shall apply" to the DFA. *Digital,* Slip Op. at 9 ("Leaving no doubt as to the definition's reach, the statute instructs that the 'definitio[n] shall apply.'").

The proposed rule radically changes Congress' definition of a related action and violates the clear instruction from the Supreme Court as to how the DFA must be interpreted. Some of the most glaring are:

- First, the proposed rule creates an entirely new category of "related actions," i.e. those covered by another whistleblower reward program. Congress was fully aware that other whistleblower reward programs existed at the time they passed the Dodd-Frank Act, and even modeled the DFA whistleblower law on the existing IRS reward law. Nowhere in the statute or the legislative history is there any support whatsoever for radically altering the Congressional definition of "related action" to include two classes of related actions.
- Second, the proposed rule creates an exception to the Congressionally mandated related action rule that contradicts Congress' language and has absolutely no basis in law or the legislative history. The proposed rule would give the Commission the discretion to determine which "whistleblower program has the more direct or relevant connection to the action." The Commission has no such discretion. If a sanction issued by a sister federal or state agency meets the definition of a "related action" as clearly set forth in the statute, the monies obtained by the sister agency fall within the Dodd-Frank Act's related action rule, period.
- Third, the proposed rule contains another strained interpretation of the law that contradicts the definition of a related action. According to the proposed rule, if the Commission were to determine that a related action had a "more direct or relevant connection" to another agency, the Commission could thereafter deny the related action payment. Again, this new-found authority to deny a related action payment, even if the related action meets the definition of a related action as set forth in the law, simply defies the Congressional requirements, ignores the holding of *Digital,* and makes legal mush of a clear provision in the law.
- Fourth, the proposed rule would require the Commission to deny paying rewards in admittedly related action proceeding. According to the proposed rule the Commission can simply ignore the language of the statute whenever a whistleblower obtained an award in another program, regardless of amount. Again, this proposal contradicts the statute. It also contradicts the Commission's 2011 rule, that understood that Congress mandated that whistleblowers obtain rewards between 10-30% in all proceedings that qualified as related action.

  This part of the proposal also failed to understand that some older federal laws, all of which were on the books when Congress enacted the Dodd-Frank Act, contained mandatory caps, some as low as $2500.00. Other laws were purely discretionary. It would defy the law, public policy, and the core goals of the Dodd-Frank Act, if the Commission approved a rule that would disqualify whistleblowers from the mandatory related action award, simply because they were awarded $2500.00 in another program. Nothing in the statutory definition of a related action justifies this rule.

- Fifth, the Commission proposes to force whistleblowers to waive an entitlement to a reward under a sister program as a condition of obtaining an SEC related action award. This again conflicts with the statutory mandates of the Dodd-Frank Act and is illegal. It also conflicts with public policy. For example, assume that based on the SEC's criteria it awarded a whistleblower a related action award of 10%. However, under the criteria of another reward program, administered by another agency, that whistleblower could be entitled to the highest award permitted under law (assume 30%). It would be outrageous for the Commission to use its rule to undermine a sister agency's award program and coerce a whistleblower to waive his or her right to a reward in another program that Congress determined he or she deserves. When applied, the rule would give the SEC indirect veto power of a sister agency's program whenever it was used to force a whistleblower to waive rights that could have resulted in a total related action award of 30%.

Because alternative reward programs existed at the time the SEC enacted its reward law, it is presumed that Congress knew of them. Congress clearly knew of the IRS law (as it modeled the SEC law on the IRS law), yet Congress did not modify its definition of related action to exclude actions taken, and potential awards granted, by these existing programs. The Commission cannot do what Congress clearly would not do.

The proposed rule violates the law. It violates rules of statutory construction affirmed by the Supreme Court in *Digital* (a cases that directly interpreted the DFA). If enacted it will harm numerous well-deserving whistleblowers. and disincentivize individuals from coming forward with valuable information.

That said, the Commission is not without tools to legally police double payments in cases where a whistleblower may obtain an award of over 30%. The apparent shot-gun approach taken in the proposed rules creates the perception that the Commission did not even attempt to ensure that its proposals conformed to the law – this perception reasonably causes concern and should be corrected by a more reasonable approach to the rule. Should the Commission decide to alter its current regulations to better police potential double awards, any such new rule must clearly follow the legal requirements set forth in the DFA. Part V below outlines a number of lawful mechanisms the Commission could employ to achieve this purpose.

IV. The Proposed Rule will have a Chilling Effect on Whistleblowers and Create Hardship by Penalizing Whistleblowers Congress wanted to Award

The current rule already prevents double recoveries under the CEA, SEA and the False Claims Act (and the IRS whistleblower law contains even more generous reward provisions than does the SEA), and the risk of double-recoveries under the Dodd-Frank Act are extremely small and easily mitigated against.[11] And, if the proposed rules were approved there would be substantial

[11] The proposed rule identified the False Claims Act ("fraud against the government") and the IRS law ("tax") as examples of the programs that would be subject to the related action disqualification. But as explained above these two programs do not raise any major issue.

risks faced by whistleblowers whose related action cases implicate older reward laws that are purely discretionary and/or have very low mandatory reward caps.

There are a number of reward laws that under the proposed rule could block a whistleblower from obtaining an SEC related action award, even when the sister-agency's reward law is radically deficient. Under the proposed rule these laws (all of which are discretionary, and some of which have mandatory caps as low as $2500) could be used to undermine the related action requirements. As drafted, the proposed rule would cause confusion, discourage whistleblowers, interfere with a whistleblower's willingness to fully cooperate with other federal or state law enforcement agencies, and cause significant hardship on a small class of whistleblowers covered under the deficient reward laws.

Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA)

Under the proposed rule, if a whistleblower's information is determined to be "more direct or relevant" in "connection" to a prosecution initiated by the Justice Department under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), that whistleblower would not be entitled to any "related action" award, even if the whistleblower did not file a FIRREA complaint. Likewise, if a whistleblower obtained any compensation whatsoever under FIRREA that whistleblower would be disqualified from the SEC whistleblower program.

The problems with the FIRREA whistleblower law are well documented. The law is not used by whistleblowers, and for good reason.

First, unlike the DFA, whistleblowers are not entitled to confidentiality or anonymity under FIRREA. Instead, it is the whistleblower who is gagged and not permitted to discuss the case. The Justice Department is free to release the whistleblower's identity, at-will. *See* 12 U.S.C. § 4203. Thus, a whistleblower who wanted confidentiality, but whose "related action" case concerned FIRREA violations would be barred from obtaining a reward under the DFA, and implicitly coerced into filing a FIRREA case, and forgoing his or her right to confidentiality available under the DFA.

Second, the decision of the Justice Department to grant an award is discretionary. 12 U.S.C. § 4206(b). A decision by the Justice Department that a whistleblower is not eligible for a reward is not subject to judicial review. 12 U.S.C. § 4208 ("non-reviewability"). Under the DFA a whistleblower can contest a denial of a reward. Thus, the Justice Department could determine that a whistleblower is not eligible for a reward, applying criteria that is not consistent with the SEC's criteria, and this whistleblower would be barred from seeking a related action award from the SEC.

Third, even if a whistleblower was willing to forgo his or her right to confidentiality, and was able to prevail in a FIRREA case, FIRREA contains a hard cap set at $1.6 million. 12 U.S.C. § 4205(d). Thus, regardless of the economic losses suffered by the whistleblower, and regardless of the size of the FIRREA sanction, the whistleblower's level of compensation is capped. Thus, the Department of Justice has recognized that the FIRREA law is *not able* to properly incentivize whistleblowers.

In 2014 the Attorney General explained that FIRREA was "unlikely to induce an employee to risk his or her lucrative career in the financial sector" to become an informant to the government. The Attorney General also confirmed that because of the numerous problems in the FIRREA law it was "rarely used."

The entire purpose of the Dodd-Frank Act's whistleblower provision was designed to avoid these problems and create strong financial incentives not only to have whistleblowers work directly with the SEC, but also to have whistleblowers work with sister law enforcement agencies. The entire purpose of the related action provision was to promote interagency cooperation between whistleblowers and every federal agency that may also have an interest in the whistleblower's information.

In a public speech, the then Attorney General Eric Holder explained some of the problems with FIRREA - problems that the SEC's proposed rule would exasperate and reinforce:

> To pursue these types of fraud cases, the Justice Department has come to rely on a statute known as the Financial Institutions Reform, Recovery, and Enforcement Act – or FIRREA – a little-used law passed after the savings and loan crisis of the 1980s. Over the last few years, the Residential Mortgage-Backed Securities Working Group – a part of the President's Financial Fraud Enforcement Task Force – has been aggressive in using this law to develop the types of cases that have resulted in major settlements with JPMorgan, Citigroup and Bank of America, among many others. Our use of this measure – to accuse financial institutions of committing fraud against themselves – was recently upheld in U.S. District Court here in the Southern District of New York, by Judge Jed Rakoff, among others.
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> Like the False Claims Act, FIRREA includes a whistleblower provision. But *unlike* the FCA, the amount an individual can receive in exchange for coming forward is capped at just $1.6 million – a paltry sum in an industry in which, last year, the collective bonus pool rose above $26 billion, and median executive pay was $15 million and rising.
>
> In this unique environment, what would – by any normal standard – be considered a windfall of $1.6 million is unlikely to induce an employee to risk his or her lucrative career in the financial sector. That's why we should think about modifying the FIRREA whistleblower provision – perhaps to False Claims Act levels – to increase its incentives for individual cooperation. This could significantly improve the Justice Department's ability to gather evidence of wrongdoing while complex financial crimes are still in progress – making it easier to complete investigations and to stop misconduct before it becomes so widespread that it foments the next crisis.
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> The value of conducting investigations in real time cannot be understated. As any U.S. Attorney can tell you, investigating these cases after the fact is incredibly resource-intensive, often requiring large teams of investigators and prosecutors to sift through millions of documents or terabytes of data – sometimes in foreign languages – over multiple years. In some cases, when the institutions being

> investigated are based outside the United States, we are unable to compel the production of certain documents or the testimony of certain witnesses. And most critically – as we saw in 2008 – while backward-looking investigations can rigorously hold people and institutions accountable for their actions, they come too late to prevent harm to consumers, the American public, and the economy at large.
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> https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law

Other Deficient Reward Laws

Numerous other older whistleblower reward laws are also radically deficient. One such law is the Major Frauds Act. This law has significant potential to overlap with SEC cases, but the reward law has a $250,000.00 cap and is also purely discretionary. *See* 18 U.S.C. § 1031(g).

Other older laws cover illegal fishing, illegal logging, and wildlife trafficking. According to World Bank include the African Elephant Conservation Act: 16 U.S.C. § 4225 (25,000 cap); Bald and Golden Eagle Protection Act 16 U.S.C. § 668(a)($2500 cap); Endangered Species Act (discretionary, average award $3700); Fish and Wildlife Improvement Act, 16 U .S .C . §7421(k)(2)(discretionary payments); Lacey Act (discretionary, average award $6600.00); Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § c1861(e)(1)(B)($20,000 cap); Marine Mammal Protection Act: 16 U.S.C. § 1376(c) ($2500 cap). Although these laws do not normally come into mind when considering a securities violation, the World Bank estimates that the annual economic costs of illegal trade in fish, timber and wildlife is between $73-216 Billion annually. *See* World Bank Group, "Illegal Logging, Fishing and Wildlife Trade The Costs and How to Combat It, p. 15 (Oct.2019). Publicly traded companies are implicated in this illegal conduct. *See e.g.* Lumber Liquidators (NYSE: LL) Lacey Act prosecution.

Another defective law is the Act to Prevent Pollution on Ships (APPS). Although this law permits a reward of up to 50% of the APPS penalty, there are usually other violations triggered by the illegal dumping that are directly involved in the violations, but for which a whistleblower gets nothing. For example, in 2017 a publicly traded company was sanctioned $40 million, but the whistleblower only obtained a $1 million award. Under the Dodd-Frank Act a related action award should have been between $4 million and $12 million. Furthermore, the granting of awards under APPS, and the range of such awards, is discretionary.

Under the proposed rules any one of these numerous defective reward laws could block a whistleblower from obtaining a reward guaranteed under the DFA. There are numerous other discretionary or defective reward laws tucked away in other statutes, most of which are never used. But under the proposed rules their existence could cause great mischief.

V. Proposed Resolution

The Commission can amend its current rules in three ways that would address the harm the proposed rule intended to address. Our recommendations are as follows:

Clarify Related Action Rule in Commentary

Just as the Commission did in the 2010-11 proceeding, the Commission can - in its commentary - on the proposed rules confirm that the 10-30% award range for related actions is an undisputed Congressional directive and will be followed in all related action cases where a law does not meet the same standards as does the Dodd-Frank Act (i.e. confidentiality; non-discretionary awards within the10-30% range; juridical review of any denials; no caps below 30% of a sanction).

Amend Rule 17 CFR 240.21F-3(b)(3)

The Commission can amend its current rule prohibiting double awards under the CEA to include other similar whistleblower reward laws. This 2011 rule was vetted during the first rulemaking and has been operational since 2011. There have been no public issues raised with the Commission's resolution of either the potential for double awards under the CEA or the False Claims Act.

Attachment A outlines potential language that could be used to achieve this goal.

Amend Rule 17 CFR 240.21F-6

The Commission should also amend the rules governing how to calculate related action awards. Rule § 240.21F-6 ("Criteria for determining amount of award") should be changed in order to reflect the right of the Commission to reduce a related action award if a whistleblower is obtaining compensation from another agency for the same information that laid the basis for the Commission's related action award.

Attachment B outlines potential language that could be used to achieve this goal.

Amend Rule § 240.21F-11(c)

The current rules for APP applications regarding related actions already require an applicant to fully identify the agency covered under a related action request and provide contact information and other details. Additionally, the current rules require the applicant to consent to the Commission's right to communicate with that sister agency to determine eligibility. These procedures can simply be amended to include the right to communicate with a sister agency concerning potential double awards and create an opportunity to address that issue to prevent abuse.

Attachment C outlines potential language that could be used to achieve this goal.

Conclusion

Proposed Rule 21F-3(b)(3) should not be approved. As drafted, the proposed rule violates the law, the statutory intent of the DFA, and would disincentivize whistleblowers – ultimately undermining the success of the whistleblower program. Instead, the Commission should issue guidance on how it processes related action cases when a whistleblower is potentially eligible for two rewards based on the one related action sanction. This guidance would fortify the program and provide clarity in a manner that would support credible submissions and foster interagency communication. Additionally, the related action rules should be amended as set forth herein.

Attached are draft proposals for amending the current rules to prevent double awards. The proposed changes to the current rule are emphasized in bold.

Thank you for your careful attention to these matters. We would welcome the opportunity to more fully explain this proposal.

Respectfully submitted,

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cc: Commissioner Caroline A. Crenshaw., 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

ATTACHMENT A

TO KKC COMMENT DATED SEPTEMBER 10, 2020

PROPOSAL REGARDING RELATED ACTION PROCEEDINGS

AMENDMENT TO RULE § 240.21F-3(b)(3)

We recommend the following changes to *17 CFR 240.21F-3(b)(3) [the proposed changes are in bold]:*

> (3) The Commission will not make an award to you for a related action if you have already been granted an award by the Commodity Futures Trading Commission ("CFTC") for that same action pursuant to its whistleblower award program under Section 23 of the Commodity Exchange Act (7 U.S.C. 26) **or granted an award of over 10% by another state or federal agency or FINRA for the same action**. **However, should the criteria for paying an award be substantially different between the sister federal or state agency and the SEC, the Commission may apply its criteria to the award and issue a related action award no larger than 30% (combining all awards provided to the whistleblower.** Similarly, if the CFTC **(or another federal or state agency)** has previously denied an award to you in a related action, you will be precluded from relitigating any issues before the Commission that the CFTC (**or the other agency)** resolved against you as part of the award denial.

ATTACHMENT B

TO KKC COMMENT DATED SEPTEMBER 10, 2020

PROPOSAL REGARDING RELATED ACTION PROCEEDINGS

AMENDMENT TO RULE § 240.21F-6

Add the following to the award criteria set forth in Rule § 240.21F-6:

> **In any case in which a whistleblower obtains a reward pursuant to law for making disclosures or providing information that would have qualified under the "related action" award procedures of the Dodd-Frank Act, the Commission may reduce the amount of an award to said whistleblower, provided that the combined award given to the whistleblower from the SEC and the other federal or state agency is not less than 10%. However, nothing in this rule would support reducing a related action award to less than 30%, based on the combined recoveries.**

ATTACHMENT C

TO KKC COMMENT DATED SEPTEMBER 10, 2020

PROPOSAL REGARDING RELATED ACTION PROCEEDINGS

AMENDMENT TO RULE § 240.21F-11(c)

Amend Rule § 240.21F-11(c) in the following manner [Note: the new language is in BOLD]:

(c**)(i)**The Office of the Whistleblower may request additional information from you in connection with your claim for an award in a related action to demonstrate that you directly (or through the Commission) voluntarily provided the governmental agency, regulatory authority or self-regulatory organization the same original information that led to the Commission's successful covered action, and that this information led to the successful enforcement of the related action. **The Office of the Whistleblower may also obtain information and communicate with the other agency in order to ensure that there is no double payment of a related action award.** The Office of the Whistleblower may, in its discretion, seek assistance and confirmation from the other agency in making this determination.

(ii) Should you have a reward application pending with either the CFTC or another state of federal agency (or FINRA) the SEC may, with your consent, dismiss your related action claim, without prejudice, with a right to refile within 60 days of either (a) a determination by the CFTC and/or another state of federal agency or FINRA as to the merits of your reward claim or (b) your waiver of seeking said claim from the CFTC or another federal or state agency or FINRA. The purpose of this provision is to avoid any delay in processing your Commission Action reward application pending the resolution of any related action issues.