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September 21, 2020

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: SUMMARY SUPPLEMENTAL COMMENT
Dodd-Frank Act ("DFA") Proposed Whistleblower Rule
File Number S7-16-18

Dear Chairman Clayton and Secretary Countryman:

We are writing to thank the Chairman, the Commissioners and the staff who carefully reviewed our written comments and took the time to meet with and discuss the important issues raised by the proposed amendments to the SEC's whistleblower program.[1] Although we have not always agreed, we greatly appreciate the opportunity to discuss these issues with you in hope that a consensus could be reached to protect and enhance the current highly effective program.

We would like to take this opportunity to summarize what we believe are the most important issues to be addressed at the Commission's September 23rd meeting:

1. *Proposed Rule 21F-9(e) (the "TCR issue").* The final rule must ensure that whistleblowers are not prejudiced simply because they contact the Commission prior to filing a formal whistleblower complaint, known as a "TCR." Any deadline for filing TCRs after a whistleblower informally contacts the SEC, should start running only after the whistleblower obtains **written notice** from the SEC of the TCR filing deadline. Such a requirement will help promote the TCR process and ensure that whistleblowers do not make honest mistakes that would undermine the core purpose of the DFA. Having a written record of whistleblower

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

notification of the rule would also aide in the administration of award claims and enforcement of this rule.

Additionally, a "good cause" exception should be created if a whistleblower files a TCR after any deadline set out in the rule - but is otherwise fully eligible for a reward. This exception should also apply by default in cases where a whistleblower did not obtain the formal written notice as referenced above.

Fully qualified whistleblowers cannot be prevented from obtaining the mandatory reward simply because they contacted the SEC prior to submitting a form TCR. Without a requirement that whistleblowers received written notice of any TCR filing requirements, including any deadlines, when they communicate in any way with the SEC we strongly and unequivocally urge every Commissioner to vote "no" on the entire package of amendments.[2]

2. *Proposed Rule 21F-6(d) (Limiting Reward in Large Cases).* We understand from public comments made by the Chairman that there will be no "hard cap" on rewards. We take this to mean that the original proposal to presumptively limit rewards in larger cases will no longer be included in the final rule. This is a significant step forward and we greatly appreciate the fact that the Chairman and other Commissioners have been attentive to concerns raised unanimously by whistleblowers and their representatives on this critical issue.[3]

Consistent with this understanding, we expect that the final rule will not permit the lowering of awards simply based on the size of an award. As explained in our various comments, large rewards play a vital public service, in both incentivizing whistleblowers to step forward and deterring future misconduct by the regulated community. Lowering awards simply on the basis of size is inconsistent with the plain meaning of the statute and undermines the existing criteria established by Congress for increasing the percentage of a sanction obtained based on important market behaviors that serve the long-term interest of investors. A rule that permits arbitrary reductions based on the size of an award is counter to the public interest, would discourage whistleblowers from coming forward, and undermine existing incentives for desired behaviors when a whistleblower reveals a large fraud, and for these reasons such a rule should be opposed.

3. *Proposed Rule 21F-3(b)(4) (Related Action Cases).* The specific statutory requirements of the Dodd-Frank Act specifically require the Commission to ensure that whistleblowers obtain a minimum 10% and maximum 30% award based on every case that falls within the definition of a "related action." The Commission lacks the authority to limit related action awards that are mandated by the statute.

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[2] *See* Comment filed by ENRON whistleblower Sherron Watkins on August 15,2019 ("Proposed revisions to Exchange Act Rule 21F-9(e) would create unrealistic reporting procedures that would disqualify a vast number of whistleblowers, simply because they reported their concerns to the wrong office at the SEC, rather than filling out a specific form and filing it according to specific reporting procedures."). Accord., Comment filed by Kohn, Kohn and Colapinto (KKC), Sherron Watkins and the National Whistleblower Center dated October 21, 2019 and Comments filed by KKC dated December 23, 2019, October 16, 2019, October 8,2019, and May 6, 2019.

[3] Comments filed on September 18, 2018 by Senator Charles Grassley, Taxpayers Against Fraud and Better Markets and Comments filed by Kohn, Kohn and Colapinto/National Whistleblower Center dated January 16, 2020.

Furthermore, as a matter of law and policy related action awards must be encouraged, not limited by an unpredictable rule that discourages cooperation with multiple enforcement bodies. It is clear that Congress wanted whistleblowers to share their information with other law enforcement agencies and that the related action provisions in the law effectuate this important public policy. This policy should be embraced by the Commission.

If the final rule permits the Commission not to reward whistleblowers within the 10-30% range in related action cases, this proposed amendment should not be approved.[4]

4. *Proposed Rule 21F-2(d)(4) (Protection of Internal Whistleblowers).* The Commission should use its authority under the Sarbanes-Oxley Act to prohibit regulated companies from retaliating against employees who raise securities related concerns internally (i.e. to a compliance officer, Audit Committee, or corporate counsel, etc.).[5] This proposal would be consistent with the Commission's interests in protecting internal compliance programs. If the Commission does not approve this proposal, whistleblowers need to be warned about the risks of contacting internal compliance programs.

5. *The Definition of an Analyst.* The current rules properly define an "analyst" under the DFA. The Commission is not proposing to change these rules. The proposed "guidance" is inconsistent with both the existing rules and the definition of an "analyst" under the DFA. The proposed guidance should not be approved.[6] However, because this guidance does not alter the existing rule, we believe that analysts improperly denied awards under the "guidance" would be able to successfully appeal these denials in court.

Again, thank you for your careful attention to these matters.

Respectfully submitted,

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[4] Comment filed by KKC on September 10, 2020.
[5] Comment filed by KKC on January 8, 2020.
[6] *See* Comments filed by Harry Markopolos dated September 14, 2018 and by Senator Sherrod Brown, et al., dated March 4, 2020.

cc: Commissioner Caroline 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