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NWC | NATIONAL WHISTLEBLOWER CENTER

August 18, 2021

URGENT MATTER

The Hon. Gary Gensler
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
Chair@sec.gov

Re: Proposed Rule Changes and Release No. 34-92565 on Related Actions

Dear Chair Gensler:

We are writing on behalf of the National Whistleblower Center ("NWC"), a non-profit and non-partisan organization, and the whistleblower law firm of Kohn, Kohn, and Colapinto ("KKC"),[1] concerning the need for the U.S. Securities and Exchange Commission's ("SEC" or "Commission") to undergo a new rulemaking proceeding concerning the Commission's whistleblower program.

As you may be aware, both the NWC and KKC have been actively engaged in promoting protections for corporate whistleblowers going back to our extensive involvement in profiting input into the statutory language incorporated into both Sarbanes-Oxley and Dodd-Frank Act's ("DFA") whistleblower laws. Since than we have been extensively engaged in the two prior SEC DFA-whistleblower rulemaking proceedings, and more recently have provided comments on the ESG disclosure issues.

We are grateful for the opportunity to continue participating in the discussions regarding the SEC whistleblower rules and how to make the overall whistleblower program as effective and efficient as possible. Thank you for being open to public input as we take this opportunity to provide suggestions regarding potential new rules that are under consideration to improve the U.S. Securities and Exchange Commission's ("SEC" or "Commission") extremely important whistleblower program.

We write to express our complete support the concerns expressed in the Chair's August 2nd Statement and the Commission's August 5, 2021 Policy Statement regarding that rule. We provide the below discussion of Rule 21F-3 regarding award determinations for related actions outlined in the Commission's August 5, 2021 Statement in Release No. 34-92565. We hope this letter provides context for why it is so important that the Commission continue to improve its

[1] The senior partners at KKC have represented corporate whistleblowers for over 35 years, and have extensive experience representing clients under the Dodd-Frank Act.

program and continues to pay particular attention to repairing damage to the related action rules that were needlessly and harmfully amended in the 2020 rulemaking process.

I. The September 23rd "Related Action" Amendments were a Solution in Search of a Problem and Should be Officially Withdrawn

The SEC's September 23, 2021, amendment to the "related action" rule purported to place limits on the ability of whistleblowers to obtain a "double recovery" from two separate agencies based on submitting the same original information provided to the SEC. The SEC admitted in its 2018-21 rulemaking proceeding that such a double recovery had never occurred.

Further, during the first rulemaking proceeding (2010-11) or the second rulemaking proceeding (2018-20), no one ever argued that whistleblowers were 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.").

The September 23rd rule did not simply prohibit double recoveries. It undermined the entire "related action" provisions of the DFA and threatened numerous cases where whistleblowers may be covered under more than one whistleblower law and disincentivizing cross agency collaboration. The rule authorized the Commission to grant rewards below the 10% minimum mandated by Congress, and it authorized the Commission to deny mandatory related action awards, almost at-will, and created an illegal discretionary award process whenever a related action could result in compensation from another agency, regardless of the merits of the other agency's program.

A similar issue was raised during the 2010-11 rulemaking proceeding when the SEC addressed the issue of a potential double-award under the Commodity Exchange Act ("CEA") and the Securities and Exchange Act ("SEA"). In resolving this issue 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.*"[2] This determination was the key guarantee that ensured that the SEC rules on potential double recoveries did not violate the plain language and Congressional intent of the DFA, but was not included in the September 23rd revision to the related action rule.

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[2] *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)

Release No. 34-92565 states that:

> New paragraph (c) authorizes the Commission to determine, based on the facts and circumstances of the claims and misconduct at issue in the potential related action (among other factors), whether the Commission's whistleblower program or the other whistleblower program has the more "direct or relevant connection to the [related] action." And responsibility for making an award in connection with the potential related action will then rest with whichever award program is determined to have the more direct or relevant connection to the action.

This new paragraph created the possibility for whistleblowers to be caught in the uncertain position of waiting for the Commission to make a critical decision about their award based on the vague standard of a "more direct or relevant connection". This rule violates the 10-30% mandatory award rule of the Dodd-Frank Act and deters whistleblowers from cooperating with enforcement bodies that may have whistleblower programs for fear of having their award reduced below the 10% mandatory threshold – simply because they helped another agency stop wrongdoing. The rule does not, however, address the hypothetical problem of "double award" determinations. We commend the Commission for making it a priority to revisit this rule and believe it will benefit whistleblowers and renew certainty for it to be repealed. The idea of double awards has been debunked, and uncertainty is a major factor in a potential whistleblowers decision to stay silent.

II. The September 23rd Related Action Rule is Illegal and Violates the Dodd-Frank Act's Statutory Framework

Any rule enacted by the U.S. Securities and Exchange Commission (SEC) must conform to the plain language of the Dodd-Frank Act. The September 23rd related action rule fails this test.

The DFA was absolutely clear on its face. The section of the DFA regarding the Commission's requirement to pay awards explicitly states that the Commission "shall pay" rewards in "related actions" within the mandatory 10-30% range. There are no exceptions. Thus, the Commission lacked the discretion and legal authority to enact the September 23rd related action rule. Because this new rule is patently illegal, it should be immediately withdrawn through an interim rule. The applicable wording in the statute requiring mandatory related action rules within the 10%-30% range is plain, clear and not subject to any reasonable dispute:

> §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).

Given the clear language of the DFA, the current related action rule directly conflicts with the Supreme Court's unanimous ruling in *Digital Realty Trust, Inc. v. Somers*, 583 U.S. ___ (2018). That decision confirmed that the SEC is bound by the statutory definitions in the DFA.

In *Digital,* the Supreme Court narrowed the ability of the Commission to approve rules for its whistleblower program that 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 Securities and Exchange Act'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.[3] The Supreme Court also explained that "the definition section of the statute supplies an unequivocal answer" as to the meaning of specifically 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

[3] 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.

(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 also 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 "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 September 23rd "related action" 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. The September 23rd rule, creates a number of situations that result in violations of the Dodd-Frank Act and the Supreme Court decision as follows:

- **The 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.
- **The 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 rule gives 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.
- **The rule contains another strained interpretation of the law that contradicts the definition of a related action.** According to the 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.
- **The rule would permit the Commission to deny paying rewards in admittedly related action proceedings.** According to the rule, the Commission can simply ignore the language of the statute whenever a whistleblower obtained an award in another program, regardless of the amount. Again, this contradicts the statute. It also contradicts the Commission's 2011 rule, which understood that Congress mandated that

whistleblowers obtain rewards between 10-30% in all proceedings that qualified as related action.

- **The rule would unlawfully subject whistleblowers mandatory caps, some as low as $2500.00, or are purely discretionary.** Other federal whistleblower programs and laws, many of which are older and were in existence when the Dodd-Frank Act was enacted, contain discretionary award provisions or caps as low as $2500.00. This means that under the 2020 related action rule, the Commission could determine that because a whistleblower participated in a successful action, governed by one of these older laws, that person could be either denied an award or be granted an award that falls far below the 10% mandatory threshold set out in the Dodd-Frank Act simply because the Commission decided that these inadequate award programs had a "more direct or relevant connection" to the matter. It is clear, that the current rule defies the law, public policy, and the core goals of the Dodd-Frank Act inasmuch as it gave the Commission the authority to deny rewards simply because they were given $2500.00 award in another program. Nothing in the statutory definition of a related action justifies this draconian response.
- **The Commission requires 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%.

For these reasons, and particularly because alternative reward programs existed at the time the SEC enacted its reward law, it is presumed that Congress intended for the provisions of the related action rule in 21F-3 to be realized without regard to other programs award provisions. 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 accommodate these existing programs. The Commission cannot do what Congress clearly would not do. We commend you for identifying this issue and once again fully support the Commission in your efforts to remedy this unlawful rule.

III. The SEC's Related Action Rule Creates a Chilling Effect on Whistleblowers and Create Hardship by Penalizing Whistleblowers Congress wanted to Award

The current "related action" rule threatens the ability of whistleblowers to obtain rewards based on their original information. Specifically, when approving the September 23rd "related action"

rule the Commission ignored older and ineffective whistleblower reward laws that could or would be used to deny whistleblowers the compensation mandated by Congress. Under the current rule numerous defective whistleblower laws (most of which are discretionary, and some of which have mandatory caps as low as $2500) could be used to undermine the related action requirements. Because there are numerous defective whistleblower laws that can be used under the current regulations to deny a whistleblower a reward under the DFA, the current rules create cause confusion, discourage whistleblowers, interfere with a whistleblower's willingness to fully cooperate with other federal or state law enforcement agencies, and will cause significant hardship on whistleblowers covered under the deficient reward laws.

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

Under the Commission's "related action" 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 a 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 —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 are 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 than-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 than-Attorney General Eric Holder explained some of the problems with FIRREA, problems that the SEC's related action rule exasperates:

> 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.
>
> 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.
>
> 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.
>
> 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). More recently, under the AML whistleblower law, the Secretary of Treasury has the discretion to grant rewards as low as $1.00. Also, without specific Congressional appropriations, the Treasury Department cannot grant any awards whatsoever.

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[4] (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.

Under the current 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.

[4] The Lacey Act is relevant to the Commission's priorities concerning climate change, as that law prohibits trade in illegally harvested plants, including lumber, timber obtained from protected forests, along with potential deforestation concerns. Illegal timbering is a multi-billion dollar business.

IV. The Solution is to Adopt a Rule that Both Considers Related Programs and Complies with the Dodd-Frank Act Award Requirements.

The Commission can amend its current rules in a number of ways that will adequately address any concern about a double-award. We recommend the immediate withdrawal of the amendments to the related action rule approved on September 23, 2020.

We understand that the Commission may be concerned about alternative ways to address the issue of balancing the Commission's duty to pay 10-30% minimums and the reality that whistleblowers may be eligible for awards from multiple sources. Attached is a proposal for amending the pre-September 2021 related action rules that would prevent double-awards but also adhere to the plain meaning of the DFA. The proposed changes to the current rule are emphasized in bold.

Conclusion

The Commission's current rules concerning related action proceedings are illegal, violate Supreme Court precedent, and are inconsistent with the Congressional intent behind the DFA. We commend you for taking action to prevent this rule from harming whistleblowers while the Commission considers how to properly address the issue. The amendments to the related action rule approved on September 23, 2021, should be withdrawn in their entirety.

Finally, we want to express our appreciation for your strong public support for the SEC's whistleblower program, as witnessed by your comments made on National Whistleblower Day and your August 2, 2021, statement. We look forward to working with you and your staff to ensure that the whistleblower program protects investors and the general public to the fullest extent of the law.

We would welcome to the opportunity to meet with you and more fully explain this proposal.

Respectfully submitted,

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encl: Attachment– Proposal for Rule § 240.21F-3(b)(3)
cc: Commissioner Allison Herren, Lee, via e-mail
Commissioner Hester M. Peirce, via e-mail

Commissioner Elad L. Roisman, via e-mail
Commissioner Caroline A. Crenshaw, via e-mail
Emily Pasquinelli, Acting Chief, Office of the Whistleblower, via e-mail

ATTACHMENT

PROPOSAL REGARDING RELATED ACTION PROCEEDINGS

AMENDMENT TO PRIOR RULE § 240.21F-3(b)(3)

We recommend the following changes to the pre-September 2021 SEC rules concerning Related Actions, *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 based on the same original information, 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 based on the same original information.** 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.

***

Amend the pre-September 2021 related action 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 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. 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.