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

Re: Release No. 34-94212; File No. S7-07-22
Related Action: Initial Comment on Proposed Rule 21F-3(b)(3)

Dear Secretary Countryman:

We are writing to strongly support the proposed amendments to the whistleblower program published by the U.S. Securities and Exchange Commission's ("SEC") or ("Commission") proposed amendments to the whistleblower program.[1] Below is our initial comment regarding the proposed changes to the Commission's Related Action rule.

We completely endorse the reasons set forth in the Commission's February 22, 2022 release setting forth the justification for the proposed changes. We believe that the current rule violates the plain meaning of the Dodd-Frank Act and violates the Administrative Procedure Act. The current rule is also inconsistent with the holding of the U.S. Supreme Court in *Digital Realty v. Somers,* 583 U.S. ___ , 138 S. Ct. 767 (2018).

The Commission's February 22, 2022 proposed rule sets forth two options for fixing the current regulation. We endorse the second option, as it is less confusing and simpler to implement. We have also made suggested changes to Option #2, which are set forth below.[2]

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[1] *See* Whistleblower Program Rules, 87 Fed. Reg. 9280 (February 18, 2022).

[2] In its initial 2010-11 whistleblower rulemaking proceedings the Commission recognized the potential for a double recovery and took constructive steps to prevent such an occurrences. However, as the Commission explained, these steps all recognized that related action rewards still had to be consistent with Dodd-Frank's requirement that awards needed to be paid within the mandatory range established by Congress. It's discussion on how it resolved this issue is consistent with the approach the Commission is now considering. The rule initially proposed and ultimately approved prevented a "double recovery on the same related action" but also ensure that related action awards would always "embody" the "*clear Congressional determination that a whistleblower award on a successful action should lie within the 10 percent to 30 percent range*." SEC Proposed Rule for Implementing Whistleblower Provisions, 75 *Federal Register* 70488, 70490 (November 17, 2010)(emphasis added). The SEC's 2010 proposed rule on double-recoveries was not opposed by any industry group and was approved by the Commission without objection raised by any Commissioner over its provisions.

I. The Current 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. The current rule violates this requirement. In regard to the plain meaning of the Dodd-Frank Act's "related action" provision, Congress clearly defined the meaning of a "related action" claim. The current rule violates that definition, but the proposed rule would correct this obvious violation of law.

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 information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.
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> ***
>
> (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 regulations impacting the payment of related action awards must start and end with deference to these statutory mandates. The statute sets forth a clear definition of precisely what constitutes a related action, and it clearly and unambiguously requires the payment of rewards in these cases within the 10-30% range. The current regulation created procedures that authorize the Commission to violate these statutory requirements. The proposed rule would fix these violations of law.

The current rule also conflicts with the Supreme Court's unanimous decision in *Digital Realty v. Somers,* 583 U.S. ___ (2018) which held that Dodd-Frank's whistleblower law must 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 the 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 to exclude other laws that may also have a whistleblower-reward component. The proposed rule accomplishes these required objectives.

II. The Current Rule Violates the Plain Language of Dodd-Frank

As clearly explained in Part I of this letter, the related action requirements under Dodd-Frank are clearly unambiguously 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 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 Dodd-Frank the wording of the statute trumped logical policy goals.

The Court held that the definitions set forth in the Dodd-Frank 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, "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.

This holding is fully applicable to the current rulemaking proceeding. Just as Dodd-Frank defined the term "whistleblower," in the very same section it also defined the term "related action."

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

[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.

> whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

15 U.S.C. §78u–6(a)(5).

Thus, the Commission must ensure that a reward between 10-30% is paid in every case where a "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." The entities explicitly referenced by Congress are requiring related action payments are:

> (I) the Attorney General of the United States;
> (II) an appropriate regulatory authority;
> (III) a self-regulatory organization;
> (IV) a State attorney general in connection with any criminal investigation.

15 U.S.C. §78u–6(h)(2)(D)(i)(I)-(IV).

This was a carefully formulated list, and excluded other agencies referenced in the same provision of the law. Thus, a related action payment was required if sanctions were obtained as a result of a state *criminal* investigation, but state regulatory actions were excluded from the definition. 15 U.S.C. §78u–6(h)(2)(D)(i)(V).

In *Digital* the Court also noted that the statutory definition of "whistleblower" was binding on the Commission because the Dodd-Frank statute 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," Congress also explicitly stated that its definition of "related action" "shall apply" to the Dodd-Frank Act. *Digital,* Slip Op. at 9 ("Leaving no doubt as to the definition's reach, the statute instructs that the 'definitio[n] shall apply.'").

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

- First, the current 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 exclude this class of related actions.

- Second, the current rule creates an exception to the Congressionally mandated related action provision that contradicts Congress' language and has absolutely no basis in law or the legislative history. The current 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 criminal agency falls within the Dodd-Frank definition of a "related action," the monies obtained by the sister agency fall within Dodd-Frank's related action rule, period.

- Third, the current rule permits 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 obtains an award in another program, regardless of amount. Again, this proposal 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.

- 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 (which is referenced in the Senate Report on the Dodd-Frank Act, and was used as a model for the Commission's whistleblower program), yet Congress did not modify its definition of related action to exclude actions taken related to tax or actions that could also be covered under the IRS law. The Commission cannot do what Congress clearly would not do.

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

III. The Current Rule Has a Chilling Effect on Whistleblowers and Creates Hardship by Penalizing Whistleblowers Congress Wanted to Incentivize and Reward

The current rule creates substantial risks for whistleblowers whose related action cases implicate older reward laws that are purely discretionary and/or have very low mandatory reward caps. Significantly, during the 2018-20 rulemaking proceeding no organization supported a rule that would permit a whistleblower to "double-dip." Instead, all of the opposition focused on the chilling effect of undermining Congress' clearly established (and reasonable) related action requirements, and raised other policy issues that demonstrated the harmful nature of implementing a rule that failed to follow the plain meaning of Dodd-Frank.[4]

There are a number of existing reward laws that can be used under the Commission's current rule to block a whistleblower from obtaining a meaningful reward. This is true even when the sister-agency's reward law is radically deficient and would result in a radically lower reward than required under Dodd-Frank. These deficient reward laws are discretionary, and some of which have mandatory caps as low as $2500. Significantly, the SEC had such an older law prior to the enactment of Dodd-Frank. That law was harshly criticized by the SEC's Inspector General and

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[4] *See, e.g.* Americans for Financial Reform Education Fund, https://www.sec.gov/comments/s7-16-18/s71618-4373288-175491.pdf; Cohen|Milstein, https://www.sec.gov/comments/s7-16-18/s71618-4363691-174418.pdf; William A. Jacobson, Esq. Director, Cornell University Securities Law Clinic. https://www.sec.gov/comments/s7-16-18/s71618-4366409-174879.pdf; Kohn, Kohn and Colapinto, https://www.sec.gov/comments/s7-16-18/s71618-7753450-223170.pdf; Taxpayers Against Fraud https://www.sec.gov/comments/s7-16-18/s71618-4373287-175492.pdf.

thereafter repealed when Dodd-Frank was passed. *See* Inspector General Report, *https://g7x5y3i9.rocketcdn.me/wp-content/uploads/2020/03/SEC-Report-OlderRewardProgram-474.pdf*.

The current rule must be amended as proposed by the Commission. It causes confusion as to reward eligibility, discourages whistleblowers from stepping forward, interferes with a whistleblower's willingness to fully cooperate with other federal or state law enforcement agencies, and causes significant hardship on a small class of whistleblowers covered under the deficient reward laws.

Here is a summary of some of these highly defective laws:

A. *Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA)*

Under the current 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 Dodd-Frank, 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 could be barred from obtaining a reward under the Dodd-Frank, and implicitly coerced into filing a FIRREA case, and forgoing his or her right to confidentiality available under Dodd-Frank.

Second, the decision of the Justice Department to grant an award under FIRREA 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 Dodd-Frank 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 a 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, even if the whistleblower met the statutory requirements for a related action award under Dodd-Frank.

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. Because of this cap even 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, than Attorney General Eric Holder explained some of the problems with FIRREA and endorsed legislation fixing the law. The current SEC rule exasperates and reinforces these problems:

> 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.
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> 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. https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law

B. *Other Deficient Reward Laws*

Numerous other 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). The money laundering whistleblower law is also purely discretionary, has no fund capable of paying any awards whatsoever, and is riddled with other defective provisions. *See* "Congress Must Protect Anti-Money Laundering Whistleblowers, *National Law Review* (January 26, 2021).

Other older laws cover illegal fishing, illegal logging, and wildlife trafficking. *See* 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. Even under the laws that could potentially pay a larger reward, the Government Accountability Office criticized these laws due to the failure of the responsible agencies to properly implement their discretionary programs. For example, in a case where the government recovered approximately $2.5 million in fines, the Fish and Wildlife Service gave a discretionary award of only $25,000. This was after the whistleblower worked for two years undercover, helping to obtain 20 successful prosecutions.

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 current rule any one of these numerous defective reward laws could block a whistleblower from obtaining a reward guaranteed under the DFA. There are other discretionary or defective reward laws tucked away in other statutes, most of which are never used. But under the current rule their very existence causes great mischief. In short, the current rule permits the SEC to dust-off highly defective laws that are rarely (or never) used, to undermine the requirements of Dodd-Frank, and cause great personal hardship on otherwise fully qualified whistleblowers.

IV. The Definition of a "Related Action" is not Ambiguous

In order to ignore the plain meaning of Dodd-Frank's definition of "related action," the Commission had to determine that the term "related action" was ambiguous. " However, a cursory look at the definition of "related action" unquestionably demonstrates that this term is not ambiguous.

The definition states: "The term 'related action' . . . **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 . . . ." §78u–6(a)(5). In accordance with the Supreme Court's unanimous decision in *Digital* the use of the term "means" within this definition resolves the issue. The term, as a matter of law, is not ambiguous. However, a review of the entire statute further reinforces this holding.

First, Congress carefully and precisely defined which federal or state agencies were covered under the definition of a "related action" proceeding. This definition explicitly included the Department of Justice (which has jurisdiction over FIRREA, the False Claims Act and the Major Frauds Act). The definition also covers the IRS, which Congress knew included a whistleblower reward law at the time they defined that term within Dodd-Frank. There is no ambiguity as to the agencies covered under the provision, and the requirement that related action awards *must* be paid when these agencies collect sanctions in circumstances covered under Dodd-Frank.

Second, it is clear that Congress wanted to reward whistleblowers who provided information directly to federal agencies referenced in the definition of related action. Congress explicitly defined the term "original information" to information initially provided to other federal agencies, even if those agencies commenced investigations before the SEC even learned of the violation. 15 U.S.C. §78u–6(a)(3). Congress envisioned that whistleblowers who initially provided information to the government agencies covered under the related action provision and would thereafter be fully credited with having provided "original information" to the SEC. Congress understood that the information provided to the government could implicate violations of numerous laws, not just the Securities and Exchange Act.

Congress wanted to pay rewards based on those non-SEC enforcement actions, and made that requirement crystal clear.[5]

Third, Congress was extremely focused on the importance of paying "related action" awards. The term was not only carefully defined in the statute, it was clearly inserted into the rewards provision of the statute. In fact, in the provision of the law that made rewards mandatory Congress referenced "related actions" and the strict requirement to pay the mandatory rewards of between 10-30 percent on *four different occasions.* §78u–6(b)(1). The meaning of the term, and the requirement to pay related action rewards is not ambiguous.

Finally, the only legal precedent cited to by the Commission for narrowing the scope of related action awards when it approved the amendments in September 2020 was a Commission case decided in 2018, *In the Matter of the Claims for Award in Connection with a Notice of Covered Action*, Exchange Act Release No. 34-84046, 2018 WL 4488273 at *6 (Sept. 6, 2018). However, in that case the whistleblower voluntarily waived his/her entitlement to a double-recovery. Thus, the legal analysis on related action payments in that decision was dicta. No double-recovery was approved or denied. Instead, the issue was avoided by a waiver similar to the waivers now being supported in the proposed rule.

V. Specific Comments on the Proposed "Related Action" Rule Changes

The Commission's proposed rule changes address numerous problems caused by the current "related action" rule. The Commission set forth two options for correcting the problems However, Option 1 raises a number of issues, is confusing, and would be difficult to administer. The better choice is Option 2, which sets forth clear standards and procedures.
In regard to Option 2, we suggest the following changes to clarify the scope of the rule and avoid confusion over its application.

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[5] This policy position was explained by the Think Computer Foundation in its July 17, 2018 comment on the proposed rule that was ultimately approved in September 2020:

> "Our federal government is deliberately structured such that absolute authority is never vested in one single office or location, but fraudulent activity rarely respects the boundaries of statutory slicing and dicing. Disincentivizing whistleblowers from addressing various parts of the federal government simultaneously if and when large, complex frauds arise would harm the public. Reward should be commensurate with risk, and exposing extremely large and complex frauds might reasonably involve extreme risks, as more money is at stake. The government should enthusiastically welcome cases where multiple awards from different agencies might be merited. We do believe that the SEC's exception for dual SEC and CFTC claims is sensible given that the SEC and CFTC regulate very similar and at times overlapping markets."

https://www.sec.gov/comments/s7-16-18/s71618-4058984-169087.pdf.

The new language we are proposing for Option 2 is set forth in **bold**:

<u>Proposed Changes to Proposed rule § 240.21F-3(b)(3)(i):</u>

> *"If the Commission determines that the claimant qualifies for an award for the related action, any payment of that award ~~shall~~* ***may*** *be conditioned on the claimant making an irrevocable waiver of any award or potential award from the other award program,* ***if the potential award that could be issued by the other program is based on the same notice of violation/settlement/deferred prosecution agreement (or other sanction) as the Commission's related action award****."*

This change is recommended to insure that the provisions of this regulation strictly apply to a related action, and do not apply to rewards obtained from another agency for other violations that do not meet the criteria of a Commission "related action" under Dodd-Frank.

<u>Proposed Changes to Proposed rule § 240.21F-3(b)(3)(iii):</u>

> *"The Commission shall not make a related-action award to a claimant (or any payment on an award if the Commission has already made an award determination) if the claimant has received at any point prior to the Commission making any payment on a related-action award any payment from the other program for that action* ***of 10% or greater of the sanction****."*

The Dodd-Frank Act requires a minimum payment of 10% in any related action case. Congress' requirement that mandatory related action payments be made by the Commission is required to effectuate the goal of having a whistleblower cooperate with as many law enforcement agencies as necessary to hold a fraudster accountable. The wording of this proposal could potentially result in the denial of the mandatory 10% award, even if the award obtained by the sister agency was de minims, and even if the whistleblower was not aware that accepting a small award would result in a mandatory disqualification of a related action award. Thus, the proposal should be amended as set forth above.

<u>Proposed Changes to Proposed rule § 240.21F-3(b)(3)(v):</u>

> *"A claimant seeking a related-action award has an affirmative obligation to promptly notify the Office of the Whistleblower in writing if the claimant applies for an award on the same action from another award program."*

This provision is reasonable, but a whistleblower must clearly be made aware of this requirement in order to avoid an inadvertent mistake. Notice of this requirement can be given both as part of the TCR form and as part of the WB-APP application. These two forms can be amended to include a box to be checked that simply asks the whistleblower whether or not he or she has applied for a reward based on the same information provided to the Commission. If so, the whistleblower should be asked to identify the agency or entity for which the reward was or is being sought. In this way the Commission is provided with the information it needs to properly consider a related action award.

Conclusion

The SEC's current related action rule violates the law, undermines statutory intent of the DFA, and disincentivizes whistleblowers – ultimately it harms investors and the willingness of whistleblowers to work with other federal agencies when filing Dodd-Frank claims. The proposed rule corrects these problems and should be quickly approved.

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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