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April 8, 2022

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

Re: **SECOND COMMENT**  
**Release No. 34-94212; File No. S7-07-22**  
**Supplemental Comment on Proposed Rules 21F-3(b)(3) and 21F-6**

Dear Secretary Countryman:

We are writing in further support of all of the proposed amendments to the whistleblower program published by the U.S. Securities and Exchange Commission's ("SEC") or ("Commission") on February 18, 2022.<sup>1</sup> We filed an initial comment on these proposals dated March 22, 2022 (Corrected version submitted on March 28, 2022).<sup>2</sup> This letter provides additional comments on the proposed rule changes.

Consistent with the requirements of Section 3(f) of the Exchange Act, the proposed rules are in the public interest, will protect investors, and will promote efficiency, competition, and capital formation.<sup>3</sup> The SEC's finding that the proposed rule changes met this requirement<sup>4</sup> is strongly supported by the academic literature, by the public comments of numerous government

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<sup>1</sup> See Whistleblower Program Rules, 87 *Fed. Reg.* 9280 (February 18, 2022).

<sup>2</sup> References in this letter to our March 22, 2022 submission includes the corrected version submitted on March 28, 2022.

<sup>3</sup> *Id.*, p. 9292.

<sup>4</sup> Citing to respected academic papers and studies the SEC staff, in its discussion of the proposed rule changes, stated as follows: "Whistleblower programs, and the SEC's whistleblower program in particular, have been studied by economists who report findings consistent with award programs being effective at contributing to the discovery of violations. For example, a recent publication reports that, among other benefits, "[w]histleblower involvement [in the enforcement process] is associated with higher monetary penalties for targeted firms and employees." In addition, current working papers report that the SEC's whistleblower program deters aggressive (*i.e.*, potentially misleading) financial reporting and insider trading." *Id.* (citations omitted).

representatives with first-hand knowledge as to the effectiveness of whistleblower reward programs.<sup>5</sup>

In addition to the academic literature cited above, Congress has held hearings on how effectively administered reward laws serve the public interest. A review of these hearing reports would also demonstrate how implementing changes to the Commission's regulations as is currently proposed would meet the requirements of Section 3(f) of the Exchange Act. Two years before the enactment of Dodd-Frank the Senate Committee on the Judiciary held hearings on the False Claims Act. The Committee report, approved on a bi-partisan basis with no dissent,<sup>6</sup> quoted approvingly from the testimony of Pamela Bucy, the Bainbridge Professor of Law at the University of Alabama School of Law. As quoted in the report:

Complex economic wrongdoing cannot be detected or deterred effectively without the help of those who are intimately familiar with it. Law enforcement will always be outsiders to organizations where fraud is occurring. They will not find out about such fraud until it is too late, if at all. When law enforcement does find out about such fraud, it is very labor intensive to investigate. Fraud is usually buried in mountains of paper or digital documents. It is hidden within an organization. Many different people within an organization, in multiple offices, divisions, and corporate capacities, may have participated in the illegality. Because of the complex nature of economic crime and the diffuse nature of business environments, it may not be apparent, perhaps for years, that malfeasance is afoot. By then, victims will have been hurt, records and witnesses will have disappeared, and memories will have faded. Given these facts, insiders who are willing to blow the whistle are the only effective way to learn that wrongdoing has occurred. Information from insiders is the only way to effectively and efficiently piece together what happened and who is responsible. Insiders can provide invaluable assistance during an investigation by identifying key records and witnesses, interpreting technical or industry information, providing expertise, and explaining the customs and habits of the

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<sup>5</sup> In addition to the sources cited by the SEC staff in the discussion on the proposed rules, *also see, e.g.*, Professor Dennis J. Ventry, *Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States*, 59 VILL. L. REV. 425 (Aug. 2015); Senate Judiciary Committee, Niels Johannesen and Tim Stolper, *The Deterrence Effect of Whistleblowing: Evidence from Offshore Banking* (2017); Jaron H. Wilde, *The Deterrent Effect of Employee Whistleblowing on Firms' Financial Misreporting and Tax Aggressiveness* (2017); Professors Philip Berger and Heemin Lee, *Do Corporate Whistleblower Laws Deter Accounting Fraud?* (2019); Professor Jetson Leder-Luis, *Whistleblowers, The False Claims Act, and the Behavior of Healthcare Providers* (2019); Professor Giancarlo Spagnolo and Theo Nyreröd, *SITE Working Paper, No. 44: Myths and Numbers on Whistleblower Rewards*, STOCKHOLM INST. OF TRANSITION ECON., STOCKHOLM SCH. OF ECON. (2018); Ben Johnson, *Minnesota House Research Department*, "Do Criminal Laws Deter Crime? Deterrence Theory in Criminal Justice Policy: A Primer," available at <https://www.house.leg.state.mn.us/hrd/pubs/deterrence.pdf>.

<sup>6</sup> Senate Committee on the Judiciary, "The False Claims Act Correction Act," Senate Rep. No. 110-507 (Sept. 25, 2008), available online at: [https://g7x5y3i9.rocketcdn.me/wp-content/uploads/2020/03/FCA\\_Senate-Report\\_The-False-Claims-Act-Correction-Act-of-2008-Sep-25-2008.pdf](https://g7x5y3i9.rocketcdn.me/wp-content/uploads/2020/03/FCA_Senate-Report_The-False-Claims-Act-Correction-Act-of-2008-Sep-25-2008.pdf).

business or industry. *Help from an insider can save time and expense for both law enforcement and putative defendants by focusing the investigation on relevant areas. Because of the valuable information brought by insiders, it is no surprise that Government officials state: ‘Whistleblowers are essential to our operation. Without them, we wouldn’t have cases.’*<sup>7</sup>

Testimony from Michael Hertz, the Deputy Assistant Attorney General, DOJ Civil Division, was also quoted approvingly in the report: “[T]he 1986 qui tam amendments to the Act that strengthened whistleblower provisions have allowed us to recover losses to the Federal fisc that we might not have otherwise been able to identify. . . In the wake of well-publicized recoveries attributable to the qui tam cases, those who might otherwise submit false claims to the Federal Government are more aware than ever of the ‘watchdog’ effect of the qui tam statute. *We have no doubt that the Act has had the salutary effect of deterring fraudulent conduct.*”<sup>8</sup>

In addition to the strong public record endorsing the Justice Department’s reward program, at the very time Congress was considering enacting the Dodd-Frank Act the IRS and DOJ were using information obtained from a whistleblower under the IRS whistleblower reward law to tackle illegal offshore banking. This case, the UBS-Birkenfeld matter, is further discussed in this letter.

Finally, when drafting Dodd-Frank Congress was not writing on a blank slate. The SEC’s Inspector General, whose report was instrumental the development of Dodd-Frank. *See* SEC OIG, “Assessment of the SEC’s Bounty Program,” Report No. 474 (March 29, 2010), noted that the SEC desired to follow the “best practices” of the IRS and DOJ’s “well-defined whistleblower programs” into the “legislation” that would become the Dodd-Frank Act’s whistleblower program. *Id.*, p. iii. Incorporating these “best practices” was among one of the specific “recommendations” issued by the OIG: “Incorporate best practices obtained from DOJ and the IRS into the SEC bounty program.” *Id.*, p. v.<sup>9</sup> In fact, OIG “Finding” # 7 was entitled as follows: “Finding 7: SEC Bounty Program Should Incorporate Best Practices from other Agencies with Whistleblower Programs,” and cited only to the DOJ (False Claims Act) and IRS laws. *Id.* p. 20.

Moreover, the OIG was *highly critical* of the SEC’s pre-Dodd-Frank whistleblower reward law. That law placed strict limits on the amount of an award that a whistleblower could obtain, and gave the SEC discretion to decline to pay any meaningful awards whatsoever. The current SEC related action rule contains similar problems, which the Commission is now attempting to correct through this rulemaking. By preventing the Commission from unilaterally reducing rewards based

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<sup>7</sup> *Id.*, pp. 6-7 (emphasis added).

<sup>8</sup> *Id.*, pp. 7, 8 (emphasis added).

<sup>9</sup> The OIG’s endorsement of the DOJ (i.e. False Claims Act) and IRS whistleblower programs was reflected throughout the report: “We identified two government agencies, the Internal Revenue Service (IRS) and Department of Justice (DOJ) that have well-defined whistleblower functions,” p. 1. The SEC acknowledged that it intended to model its new program on these two successful programs. OIG Report, p. 28-29 (SEC’s Division of Enforcement commitment that its “new program” would be “based on the structure and best practices” of the DOJ and IRS programs).

on the size of an enforcement action, and by eliminating the discretion of the Commission to deny rewards (or radically reduce rewards below the 10% minimum requirement), the Commission's proposed rules target the very kinds of problems identified by the Inspector General.<sup>10</sup>

The record is clear. The proposed rules, if adopted with the minor modifications referenced in our March 22, 2022 comment, will not only meet the requirements of Section 3(f) of the Exchange Act, they will significantly enhance the public interest, protect investors, and promote efficiency, competition, and capital formation within the securities markets.

## **I. RESPONSE TO SPECIFIC QUESTIONS RAISED BY THE COMMISSION**

The Commission asked members of the public to respond to specific questions in helping the SEC to approve rules that would best serve the public interest and protect investors. Below are our answers to the relevant questions:

### **A. Questions Concerning Proposed Rule 21F-3(b)(3)**

We strongly endorse the reforms being proposed by the Commission concerning the related action rule (Rule 21F-3(b)(3)). The following are our responses to the Commission's questions:

1. *Do any of the approaches discussed above implicate additional considerations that the Commission has not addressed in this proposing release but that you believe should be factored into the Commission's deliberations relating to potential amendments to Rule 21F-3(b)(3)? For example, should the proposals identify the potential consequences that might result if a claimant fails to comply with the requirements of any amended rule?*

The explanatory notes for the final revised rule should state that the Commission shall ensure that related action awards are given within the mandatory range provided by Congress (10-30%) but that the revised rule is simply to ensure that a whistleblower does not "double-dip." In this manner, whichever option the Commission decides upon, the intent of the new rule to comport with Congressional purpose of granting mandatory awards within the (10-30% statutory range) should be made clear.

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<sup>10</sup> The OIG described some of the deficiencies within the SEC's pre-DFA reward law that the new legislation was targeting to fix: "All bounty determinations, including whether, to whom, or in what amount to make payments, are within the sole discretion of the SEC. However, the total bounty may not currently exceed 10 percent of the amount recovered from a civil penalty." OIG Report, p. ii. The Commission's proposed rule would correct the current problem that improperly returned to the Commission the "sole discretion" to effectively deny meaningful "related action" awards. This type of discretion was highly criticized by the OIG and corrected by Congress. Additionally, the OIG was critical of the 10% cap on awards, which would result in rewards far lower than those required under the DOJ and IRS programs. These highly effective existing programs *required* minimum awards of 15%, and permitted the agencies to grant awards as high as 30%. Congress' decision to significantly increase the amount of awards permitted or required under Dodd-Frank reflects an intent to use increased award amounts to further incentivize whistleblowers in coming forward, and deterring companies from engaging in illegal conduct based on the fear of detection.

2. *The Commission outlines above how it contemplates dealing with instances involving multiple whistleblowers under the Comparability Approach and the Whistleblower's Choice Option. If the Comparability Approach is adopted, is the Commission's proposed approach for addressing awards in the context of related actions involving multiple whistleblowers appropriate? Similarly, if the Whistleblower's Choice Option is adopted, is the Commission's proposed approach for addressing awards in the context of related actions involving multiple whistleblowers appropriate? Please explain. Should the Commission consider alternative approaches for dealing with related actions involving multiple whistleblowers under the Comparability Approach and Whistleblower's Choice Approach? Please explain and identify any alternatives that you believe the Commission should consider.*

The precise wording of the revised regulation should reflect the mandatory nature of a related action award between 10-30%, regardless of which agency pays that award. As long as the intent of Congress is followed to pay awards on related actions within the statutory range of 10-30%, and whistleblowers are fully incentivized to cooperate with multiple agencies in order to ensure full accountability for the crimes/violations they report, there is no “one way” to word this rule. We have stated our preference for Option 2, with some minor revisions.

3. *Is the \$5 million threshold proposed as part of the Comparability Approach the appropriate figure? Should the threshold be higher or lower? Please explain.*

In its 2020 rulemaking the Commission significantly improved its program by creating a rule requiring the Commission to pay rewards at the maximum level if the total amount of an award was \$5 million or less (provided there were no negative factors justifying lowering the award). This rule revision served three purposes: (1) it provided much needed economic relief to whistleblowers who often suffer retaliation; (2) it provided an additional incentive for whistleblowers to report violations, even if they appeared on their face to be small. It is a well-established principle of auditing that large violations are often detected via the initial reporting of a small violation or discrepancy; (3) it reduced the burden on staff by eliminating the requirement to review each case and apply all of the factors, some of which are complex and clearly would exhaust limited staffing resources resulting in further delay in the processing of whistleblower cases.

Thus, having a larger threshold for a mandatory 30% award for Commission actions would serve the public interest and promote the integrity of the markets both by reducing the staff resources allocated to smaller cases and by increasing the collateral benefits of the reward laws (i.e. deterrence and incentivizing disclosures by additional quality informants). We would recommend increasing this threshold to \$20 million for combined Commission Action and Related Action payments.

4. *The initial set of whistleblower program rules adopted in May 2011 included a now-repealed version of Rule 21F-3(b)(3) that dealt only with the potential that a claimant could receive awards for the same related action from the Commission and the Commodity Futures Trading Commission (“CFTC”), whose new whistleblower program, like the SEC's, was authorized by the Dodd-Frank Act and includes a related-action supplemental*

*component. Under that original version of Rule 21F-3(b)(3), the Commission stated that it would not pay an award on a related action if the CFTC had already made an award on that action, nor would the Commission allow the whistleblower to re-adjudicate any factual issues decided against the whistleblower as part of the CFTC's final order denying an award. Should the Commission reconsider this original version of Rule 21F-3(b)(3) instead of adopting one of the alternative options proposed in this release? If so, please explain why and what revisions to the original version might be appropriate.*

We are not aware of any problems being caused by the current CFTC rule on double-payments. Consequently, the Commission staff should make a determination on this issue based on what approach would impose the least administrative burden on staff and remain consistent with the Congressional intent behind Dodd-Frank.

5. *Proposed Rule 21F-3(b)(3)(iii)(A) directs that the Commission shall not make a related-action award to a claimant (or any payment on a related-action award if the Commission has already made an award determination) if the claimant has already received any payment from the other program for that potential related action. Rather than cut off the potential for an award payment from the SEC in this situation, should the Commission consider adopting in this limited situation some form of an offset mechanism similar to the Offset Approach discussed above? Please explain.*

Yes. The clear intent of Congress in was to ensure that all related action payments be within the 10-30% mandatory range. Paying large rewards in both Commission actions and related actions when justified by the criteria for granting whistleblower awards under Dodd-Frank serves the public interest, incentivizes high quality reporting, and deters misconduct at the highest corporate levels. Under certain circumstances, the intent of Congress would not be violated if the Commission deferred to another agency's payment for this mandatory reward in the related action. But the reward must always be within the required statutory range. If another agency paid an award below the 10% threshold the Commission should ensure that the mandatory award payment is made, if the whistleblower is otherwise qualified for a related action award under Dodd-Frank. The Commission needs to make this clear. The only exception to this rule would be if a whistleblower knowingly and *voluntarily* waived his or her right to a Commission-paid award for a related action award. In other words, any waiver provisions in the law cannot establish a guessing game that could prejudice a whistleblower. The whistleblower has a right to the 10-30% related action payment, and any waiver must acknowledge and not violate that right. An "off-set" mechanism appears to be a logical means to accomplish this goal if appropriate safeguards are established.

The off-set process could work as follows: A whistleblower waives his or her right to a Commission related action payment. The alternative program grants an award of 10% or higher. In such circumstances the whistleblower cannot come back to the SEC for an offset, regardless of whether or not the Commission paid the Commission Action award at a rate higher than 10%.

However, if the alternative program paid an award of less than 10%, the whistleblower could request the SEC to "cap off" the award to reach the mandatory minimum of 10%, or the whistleblower could in appropriate circumstances seek an award from the SEC on the related

action in the statutory range of between 10-30%, minus the amount awarded by the alternative program as an off-set. In such circumstances the whistleblower must also demonstrate that he or she is fully qualified for a related action award within the statutory range.

6. *Instead of the current Rule 21F-3(b)(3) and the alternatives discussed above (including the alternative referenced in the prior question and the alternatives discussed in Part II(A)(3)), should the Commission consider a different approach, such as: (i) Leaving the text of Rule 21F-3(b)(3) unchanged; or (ii) adopting a hybrid approach that would implement the Whistleblower's Choice option below a maximum potential award threshold, and above that threshold retain the current Rule 21F-3(b)(3) framework that considers which program has the more direct or relevant connection to the action? Please identify the alternative approach that you support, explain why you believe that approach should be adopted, and explain how the specific approach you support should work.*

Option 2, with the modifications suggested in our March 22<sup>nd</sup> filing, should resolve the problems created by the September 2020 rule revisions. However, regardless of the final approach used by the Commission the intent of Congress to ensure that related action payments are made within the mandatory range (10-30%) must be clearly established. Thus, leaving the current rule unchanged is not a lawful or viable option.

7. *As described above, the Comparability Approach would apply in any situation where another award program (were it to apply) has an award range or an award cap that would yield an award "meaningfully" lower than the amount the Commission's program would likely offer (but above a \$5 million maximum award that might be paid by the Commission). As discussed, the Comparability Approach would also apply where awards under another award program are discretionary rather than mandatory. In assessing whether an award from another award program (greater than the \$5 million threshold) would be "meaningfully lower" than the maximum amount that might be awarded under the Commission's award program, should the Commission establish a fixed dollar or percentage difference as an alternative to the "meaningfulness" standard? If so, please explain why a uniformly applied fixed dollar or percentage amount would be better. If possible, please also identify the dollar or percentage amount of the potential difference that the Commission should use to determine that the other program's award is not meaningfully lower, and please explain why that dollar or percentage amount is appropriate.*

The "Comparability Approach" is complex and could potentially result in related action awards being paid outside of the mandatory range established by Congress (i.e. 10-30%). The "meaningfully lower" standard is vague. We are of the opinion that Congress intended related action awards to be paid at a 10-30% range. So "meaningful" must always mean not less than 10%.

8. *If the Comparability Approach is adopted, should the Commission also incorporate eligibility and award conditions into the definition of “comparable whistleblower program. For example, should comparability include consideration of the absence of robust confidentiality protections or anonymity provisions similar to those under which the Commission's whistleblower program operates? Are there other factors that the Commission should take into account to determine if another whistleblower program is comparable to the Commission's award program? With respect to the foregoing, if you believe that additional factors should be added to assess a program's comparability, please identify those factors and explain why they should be considered in determining whether another award program is comparable.*

The right to confidentiality *must* be part of any “comparable” related action. It would be inconsistent with Congressional intent and the plain meaning of Dodd-Frank to require whistleblowers to waive any of their rights to confidentiality. In this regard, Congress adopted very specific procedures that permit the SEC to forward information to alternative government programs that also protect the identity of the whistleblower and require these alternative government agencies to adhere to the Dodd-Frank confidentiality rules. These provisions demonstrate that confidentiality is a major aspect of any related action program, and they also demonstrate that Congress wanted to use Dodd-Frank to encourage interagency compliance actions.

9. *Both the Comparability Approach and the Whistleblower's Choice Option would require that a claimant irrevocably waive and promptly forgo an award from the other potentially relevant award program. Should the Commission take additional steps to ensure that claimants are put on notice of the potential consequences of falsely representing that they have waived an award from the alternative program? If so, please explain why this is uniquely important in this context and what approach the Commission should take (such as, for example, requiring claimants to explicitly acknowledge that providing false information to the Commission could constitute a violation of Section 1001 of Title 18 of the United States Code (and any other applicable provisions))?*

Any waiver must be knowingly and voluntarily made. The Commission should be very clear in whatever document a whistleblower must sign to waive any “related action” rights as to precisely what is being waived. Included in the waiver could be another waiver that gives the Commission the right to communicate with other agencies that are issuing sanctions that could be covered under the Dodd-Frank related action requirements in order to double-check compliance by the whistleblower and to ensure that there was no double-dipping by collecting a related action award after an irrevocable waiver of the related action award.

10. *Are the time limits imposed by the Comparability Approach and Whistleblower's Choice Option appropriate? Should these time periods be longer or shorter and, if so, what would be appropriate time periods? Please explain.*

We assume that specific time limits contained in the final rule will be the subject of considerable discussion. However, the following framework should be adhered to when developing time-requirements:



- a. No action should be taken on any potential related action award until after the SEC publishes a Notice of Covered Action. Thereafter, a whistleblower should be required to disclose whether he or she has (or intends to) apply for a reward under another program. Thus, the WB-APP form should be amended to include this question, with an opportunity to explain;
- b. No time limit should be imposed until it is clear that the whistleblower fully understands how the SEC will treat his or her potential eligibility for a reward under another program, and the whistleblower has sufficient time to make a knowing and voluntary waiver and/or election of remedies;
- c. All time limits must be sensitive to the right of whistleblowers to obtain a minimum related action award of no less than 10%. Whistleblowers should not be forced into making decisions that could result in an inadvertent waiver of this right.

## **B. Questions Concerning Proposed Rule 21F-6**

We strongly endorse the reforms being proposed by the Commission concerning the related action rule (Rule 21F-6). The following are our responses to the Commission's questions:

*11. Are there additional considerations that the Commission should assess in deciding whether to adopt any changes to Rule 21F-6, including proposed Rule 21F-6(d)?*

Yes. The Commission must consider the significant benefits that the public, taxpayers, and investors will obtain from the approval of the rule. By paying larger rewards the Commission will incentivize high quality reporting from well-placed insiders, and will significantly increase the deterrent effect of the Dodd-Frank Act, as Congress intended. As explained below, these benefits will be extremely large.

*12. Are there other or different revisions to Rule 21F-6 that the Commission should consider to clarify that the Commission will not lower an award based on the potential dollar amount of the award? For example, should the Commission consider removing the reference to "dollar . . . amount of the award" entirely from the introductory paragraph of Rule 21F-6? Please explain why this approach or any other alternative approach should be adopted and explain how the specific approach recommended would work.*

We strongly endorse the proposed Rule 21F-6(d) as written. No changes are needed.

*13. Instead of completely eliminating the Commission's ability to consider the dollar amount of an award when assessing whether to lower a potential award, should the Commission retain this authority for a subset of awards ( e.g., for related-action awards, given that they are an ancillary component of the program, or for awards where the whistleblower engaged in culpable conduct or obstructed the Commission's process in some fashion)? Please identify the approach that you would follow and explain the basis for your recommendation if it differs from the approach the Commission has proposed.*

No changes are needed in the proposed language for Rule 21F-6(d). The Commission already has well designed regulations permitting the SEC to reduce rewards in numerous circumstances, including when the whistleblower engaged in “culpable conduct or obstructed the Commission’s process.” These existing rules can and should be used to lower the percentage of a reward in all appropriate circumstances. The public and investors are well served by the Commission’s existing use of its discretion in applying the current factors to increase or decrease an award. The use of these factors helps to instruct whistleblowers and their counsel as to the best practices they should engage in to maximize a reward. In a similar vein, whistleblowers who report high-quality information that results in major sanctions should not be penalized because their information was to good, or the frauds they reported were to large. The opposite is true. Paying large rewards when justified serves the public interest, incentivizes high quality reporting, and deters misconduct at the highest corporate levels.

### **C. Questions Concerning the Economic Costs and Benefits of the Proposed Rules.**

*14. Are there costs and benefits associated with the proposed amendments that the Commission has not identified? If so, please identify them and, if possible, offer ways of estimating these costs and benefits.*

There are tremendous benefits to be gained from approving the proposed rules. Incentivizing interagency cooperation and the use of whistleblower information to enforce all applicable violations of law serves the public interest and will result in greater recoveries for the taxpayer and investors. The United States is always the greatest beneficiary of cases litigated due to whistleblower disclosures under Dodd-Frank. The United States always obtains a minimum of 70% and a maximum of 90% of all proceeds collected in whistleblower-triggered cases, regardless of whether the case is an SEC case or a related case. Furthermore, rewards are fully taxed as income, and larger rewards are taxed at the highest possible bracket. Thus, the general treasury always gets back approximately 35% of all rewards paid, and the various states also benefit from the taxes paid by the whistleblower.

But the benefits obtained by the public and investors based on the deterrent effect of whistleblower laws are massive, and most likely have rate of return of 20:1 in financial benefits alone. The benefits obtained from greater accountability and more investments into reasonable and ethical compliance programs are also massive. These benefits are described below.

*15. Are there effects on efficiency, competition, and capital formation stemming from the proposed amendments that the Commission has not identified? If so, please identify them and explain how the identified effects result from one or more amendments.*

Yes. Some of these benefits are described below.

## II. Additional Information Concerning the Economic Costs and Benefits of the Proposed Rules.

A primary benefit obtained by investors and the public from whistleblower reward laws is deterrence. Every study that has reviewed the matter, including the three studies cited by the SEC in its rulemaking release, demonstrate that the fear of detection generated by paying significant rewards, and the increase in enforcement actions triggered by whistleblower disclosures increases deters wrongdoing before it happens. Simply stated, large rewards highlight the risk of detection. As explained by a study undertaken by the *Minnesota House Research Department*, “When people believe they will be caught and punished, they are less likely to commit crimes.” The study discussed the Nobel Prize-winning economist Gary Becker’s economic theory that “an increase in the likelihood of apprehension” has a “great() impact” on reducing crime. See Minnesota Research Department, <https://www.house.leg.state.mn.us/hrd/pubs/deterrence.pdf>.

Empirical evidence demonstrating the deterrent effect of paying large rewards and actively prompting whistleblower reward programs was fully explicated in the *National Law Review* article, “Will the SEC’s Proposed Whistleblower Rules Undermine the Deterrent Effect of the Dodd-Frank Act?” (August 19, 2020), that was written in response to the now discredited 2018 proposal of the SEC to establish a rule permitting the reduction of rewards in large cases. <https://www.natlawreview.com/article/will-sec-s-proposed-whistleblower-rules-undermine-deterrent-effect-dodd-frank-act>. These arguments are incorporated into this letter by reference.

This common sense understanding of the relationship between the fear of detection and deterrence was clearly understood by Congress when it enacted various whistleblower reward laws. It was specifically cited by Senator Charles Grassley when, in 1985, he explained the intent behind amending the False Claims Act, eliminating the discretion of the courts and Justice Department to reduce rewards below a newly established mandatory minimum 15% of all collected proceeds: “[R]eform is desperately needed not only in the content area of refining existing law but especially in the context area of rethinking our overall approach to *fraud deterrence*.” See, <https://www.justice.gov/sites/default/files/jmd/legacy/2014/03/30/hear-j-99-52-1985.pdf> (emphasis added). The intended deterrent effect of the modernized reward laws was also reflected in the final Senate Report on the 1986 FCA amendments, explaining that the law was “necessary both for *meaningful fraud deterrence* and for breaking the current ‘conspiracy of silence.’” See [https://g7x5y3i9.rocketcdn.me/wp-content/uploads/2020/03/FCA\\_Senate-Judiciary-Committee-report\\_July-28-1986.compressed.pdf](https://g7x5y3i9.rocketcdn.me/wp-content/uploads/2020/03/FCA_Senate-Judiciary-Committee-report_July-28-1986.compressed.pdf) (emphasis added).

All of the changes proposed by the Commission in its February 18, 2022 release would increase the deterrent effect of the Dodd-Frank Act. As fully explained in the *National Law Review* article (and other supporting materials), large rewards have a major deterrent effect. Furthermore, encouraging whistleblowers to fully cooperate with all federal agencies, Congress, the news media, and state criminal agencies, as envisioned by Congress in its definitions of “original information” and “related action,” will likewise have a multiplier effect on deterring white collar crime. Fraudsters need to understand that whistleblowers incentivized by the Dodd-Frank Act can expose their frauds to multiple government agencies, Congress, and the news media, and still be fully rewarded.

This also explains why Congress carefully broadly defined “original information” that qualifies for a reward, and explicitly permitted that information to be used by multiple agencies pursuant to the “related action” provisions. This broad approach to permissible disclosures and mandatory related action payments was fully explained in our letter dated March 22, 2022, and in the various letters submitted to the Commission in Petition for Rulemaking No. 4-783, <https://www.sec.gov/rules/petitions.htm>.

### **III. Empirical Proof of the Deterrent Effect of Whistleblower Reward Laws Demonstrates that the Proposed Rules will be Highly Beneficial**

The Commission cited to three studies demonstrating the deterrent effect of whistleblower laws in its February 22, 2022 release. These studies are extremely relevant and highly persuasive and comport with our 35-year history of representing whistleblowers and observing the short term and long-term impact of their cases. These studies should be relied upon by the Commission.

In addition there is extremely well documented empirical evidence of the tremendous deterrent effect of whistleblower reward laws in the context of the IRS program. As you are aware, the SEC’s Dodd-Frank Act whistleblower law was modelled on the IRS program, so empirical examples under that law have direct relevance to the Commission’s program. In March 2013 the Governmental Accountability Office published a comprehensive analysis of the IRS’s enforcement actions policing illegal offshore banking. *See* GAO-13-318, <https://www.gao.gov/assets/gao-13-318.pdf>. The report looked at the increase in voluntary tax compliance after the international whistleblower case regarding UBS bank triggered significant enforcement actions against the bank, and forced UBS to release the names of U.S. citizens who had offshore accounts for the first time in history.

What makes this study so significant in understanding the impact on voluntary compliance and deterrence in the face of potential disclosures by whistleblowers, was the reports focus on the success of the IRS’ voluntary disclosure program. The GAO was able to compare two different voluntary compliance programs. One was initiated in 2003, before there was a tax whistleblower law, and before the Birkenfeld-UBS case made national headlines and resulted in a highly successful enforcement action against UBS. The second reviewed a 2009 voluntary compliance program, that was initiated by the IRS to take advantage of the historic whistleblower-triggered enforcement actions against UBS.

Thus, this report provided hard data permitting a comparison between pre-whistleblower and post-whistleblower voluntary compliance in identical circumstances (i.e. offshore tax compliance and a similarly structured voluntary disclosure program permitting tax cheats to voluntarily disclose their wrongdoing in exchange for non-prosecution agreements and reduced penalties).

The results reinforce the accuracy of the studies cited to by the SEC.

In regard to the 2003 and 2009 voluntary compliance programs the following resulted were documented by GAO:

Pre-Whistleblower 2003 Program<sup>11</sup>

Total amount Collected:	\$200 million
Total number of Participants:	1,321

Post-Whistleblower 2009 Program<sup>12</sup>

Total amount Collected:	\$4.1 billion
Total number of Participants:	19,337

Significantly, the 2009 figure for total amounts collected only reflected proceeds obtained from the 10,439 tax cases that were closed-out at the time the report was issued. Thus, proceeds eventually collected from another 8,898 tax evaders who signed up for the voluntary program were not included in this number.<sup>13</sup>

Thus, in looking at the precedent from the UBS-Birkenfeld case, the return on investment in a well-functioning whistleblower program could be at least 20:1, taking into consideration the benefits of voluntary compliance and deterrence alone. This is on top of the 70-90% collections obtained by the United States as a direct result of the sanctions obtained in the whistleblower cases.

In a 2014 article in the [\*Villanova Law Review\*](#), University of California-Davis professor of law and Chairman of the IRS Advisory Council Dr. Dennis J. Ventry fully documented the array of enforcement actions and the massive deterrent effect that flowed from the Birkenfeld-UBS whistleblower triggered tax case and the IRS' ultimate writing out a "check for \$104 million to Bradley Birkenfeld." Professor Ventry explained that the "treasure trove of inside information" that Birkenfeld provided U.S. officials formed "the foundation for the UBS debacle and everything that followed."

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<sup>11</sup> <https://www.gao.gov/assets/gao-13-318.pdf>, p. 10.

<sup>12</sup> *Id.*

<sup>13</sup> In its report GAO explained why collections made (or to be obtained) from the additional 8898 tax evaders were not included in the \$4.1 billion figure: "We identified 19,337 total participants in IRS's 2009 OVDP [i.e. the voluntary compliance program]. Those participants had 10,439 closed cases, as of November 29, 2012, that we could analyze. The 19,337 participants we identified as participating in IRS's 2009 OVDP differs from the number released publicly by IRS, which has been 15,000. The number released publicly by IRS reflects the total applicants accepted into OVDP by CI, while our figure represents the total number of taxpayers reviewed within the 2009 OVDP civil penalty structure, meaning that we added some spouses and other taxpayers that were assessed offshore penalties . . . Of the 19,337 participants that we identified, 200 (or 1 percent) were businesses." *Id.*, p.12, n. 14. Thus, the total amount of collected proceeds obtained as a result of the deterrent impact of the UBS-whistleblower enforcement action could have easily exceeded \$8 billion.

According to Ventry this included:

- \$780 million fine against UBS;
- “UBS turning over the names of 250 high-dollar Americans with secret accounts;”
- UBS providing “another 4,450 names and accounts of U.S. citizens” with secret accounts;
- As of 2014, “120 criminal indictments of U.S. taxpayers and tax advisors;”
- The “closure of prominent Swiss banks—including the oldest private bank;”
- “[M]ore than \$5.5 billion collected from the IRS Offshore Voluntary Disclosure Program (OVDP), with untold tens of billions of dollars still payable due to only a quarter of the 39,000 OVDP cases being closed;”
- “15 banks themselves disclosing the names and accounts of clients who refuse to participate in the program to avoid their own monetary penalties and to defer or avoid criminal prosecution.”

Moreover, as a direct response to the \$104 million reward paid to Birkenfeld, leading Swiss banking experts and officials announced the end of illegal offshore banking for U.S. taxpayers. The risk of detection posed to strong of a deterrent, especially when Swiss bankers could become wealthy by turning in their U.S. clients. *See* contemporaneous reports in *Agence France-Presse* and *Swiss Info*, published online at: <https://dailystar.com.lb/ArticlePrint.aspx?id=188088&mode=print> and [https://www.swissinfo.ch/eng/whistleblower-payoff\\_birkenfeld-reward-may-temptother-bankers/33500198](https://www.swissinfo.ch/eng/whistleblower-payoff_birkenfeld-reward-may-temptother-bankers/33500198).

The voluntary termination of secret offshore Swiss banking for American clients discussed at these post-Birkenfeld award meetings came to fruition. Almost every Swiss bank entered into agreements with the Justice Department to terminate these illegal banking arrangements, and many of these banks paid fines and penalties. *See* <https://www.justice.gov/tax/swiss-bank-program>.

These tremendous “collateral benefits” triggered by Birkenfeld’s tax whistleblowing led Professor Ventry to highlight the deterrent effect of an effective reward-based whistleblower program, willing to pay rewards at significantly high levels:

Whistleblowers can do more than just uncover and report knowing violations of the law. They can also prevent noncompliance from happening in the first place. An effective whistleblower program (run either through a state’s FCA or as a standalone statute) would add significant risk to noncompliance by increasing the probability of detection and the likelihood of potential penalties, the two most important variables in traditional tax deterrence models. In turn, **increased aversion to noncompliance—due to increased fear of detection** and palpable penalties as well as additional variables such as moral, ethical and reputational inputs—would result in increased revenue collection.

Professor Ventry, citing to well-documented examples, explained the importance of paying large rewards to increase to public perception that whistleblowers increase the “odds of capture.” His conclusion on this matter was clear: “[K]eep whistleblower awards sufficiently high,” as “sufficiently high awards” can be used to “induce external reporting of otherwise meritorious claims and provide incentives for whistleblowers to incur the risks and costs associated” with blowing the whistle.

### **Conclusion**

For the reasons set forth above the SEC should amend the rules implementing the Dodd-Frank Act’s whistleblower program in the manner proposed by staff, incorporating the additional recommendations set forth herein and in our March 22, 2022 letter.

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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