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April 8, 2022

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: **File No. S7-07-22**
Comments on Proposed Whistleblower Program Rules

Dear Ms. Countryman:

We respectfully submit this letter in response to the Securities and Exchange Commission's proposed whistleblower program rules, 87 Fed. Reg. 9280 (Feb. 18, 2022) (the "Proposed Rules").

As attorneys that represent individuals who submit claims under the SEC's whistleblower program, we are well aware of the valuable role that whistleblowers play in facilitating the enforcement of the federal securities laws. We believe that certain of the amendments to the whistleblower program contained in the Proposed Rules will benefit the SEC, whistleblowers, and ultimately all participants in the U.S. capital markets by providing clear incentives to individuals with information regarding securities law violations to provide that information to the SEC and to any other whistleblower program that is implicated by such violations.

Related Actions – Rule 21F-3(b)(3)

We support the SEC's efforts to replace the current "Multiple-Recovery Rule" (Rule 21F-3(b)(3)) with a new approach that strengthens the incentives that the SEC presents to whistleblowers. There is no policy reason why whistleblowers should be penalized merely because the information that they provided to the SEC and that led to a related action recovery may also qualify them for an award under a different whistleblower program. Such a penalty, which may arise under the Multiple-Recovery Rule when the SEC determines that another whistleblower program has a closer relationship to the related action but would provide a lower award than the SEC would provide, creates a disincentive to whistleblowers in precisely those situations in which the government has determined whistleblowers are of particular importance (*i.e.*, situations in which multiple whistleblower programs are implicated).

While each of the proposed alternatives represent improvements over the Multiple-Recovery Rule, we believe the SEC should select the Whistleblower's Choice Option. This is the only "principal" alternative that fully ensures that whistleblowers are not penalized when their information leads to a related action recovery that implicates both the SEC's and another agency's whistleblower program.[1] The Comparability Approach would result in such a penalty in situations in which the other whistleblower program was found to be "comparable" and has the "more direct or relevant connection" to the related action yet provides for a smaller award than the SEC would provide. And the Topping-Off Approach would retain the potential for this penalty in situations where the SEC's covered action award was at or near the 30% statutory maximum.

Under the Whistleblower's Choice Option, the SEC would only consider the existence of the alternative award program at the payment stage.[2] We therefore believe it would be appropriate and efficient to clarify in proposed Rule 21F-3(b)(3)(v) that the whistleblower's obligation to inform the SEC that he or she has applied for an award from an alternative award program arises at the payment stage.[3] We also suggest that the SEC specify the process by which a whistleblower should provide this notice, such as by creating a specific form or online mechanism. We are concerned that the language of proposed Rule 21F-3(b)(3)(v) may cause confusion among whistleblowers and their counsel as to when the obligation to inform the SEC is triggered[4] and how notice should be provided.

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[1] We acknowledge that the SEC "has not designated the Offset Approach as one of the principal approaches under consideration" because of its potential conflict with other aspects of the whistleblower program statutory scheme. (Proposed Rules at n. 48).

[2] Proposed Rules at 87 FR 9287 ("Rather, the Commission would consider the existence of the alternative award program only at the payment stage, when it would be required to determine that the whistleblower had irrevocably waived any and all rights to an award from the other program before making the related-action award payment.").

[3] To best implement the Whistleblower's Choice Option, we suggest that the SEC modify proposed Rule 21F-3(b)(3)(ii) to accommodate the situation in which another whistleblower program makes its award considerably earlier in time than the SEC's related action award, such that the whistleblower retains the ability to choose between the awards regardless of their timing.

[4] As one illustration, the CFTC's whistleblower program (like the SEC's) requires a whistleblower to first submit a Form TCR that contains information regarding potential violations of law and then to submit a Form WB-APP to make an application for an award. In contrast, the IRS whistleblower program requires a whistleblower to submit Form 211 containing information regarding potential violations of law, which form itself constitutes an application for an award. The final rule should provide clarity as to which of these (and other) whistleblower submissions constitutes an "application for an award on the same action from another award program" under Rule 21F-3(b)(3)(v).

Consideration of the Dollar Amount of Awards – Rule 21F-6

We support the addition of proposed paragraph (d) to Rule 21F-6. Our experience representing whistleblowers is consistent with the experience of the SEC that large awards increase the awareness of, and incentives to participate in, the SEC's whistleblower program. We can also confirm that the SEC is wise to be concerned that discretionary authority to consider the dollar amount to reduce the size of awards adds uncertainty and decreases confidence in the award process. Whistleblowers should believe that they will be rewarded, not penalized, for the time and personal risk inherent in presenting information to the SEC concerning those frauds that cause the greatest investor harm and most significantly undermine faith in the U.S. capital markets. The proposed paragraph (d) to Rule 21F-6 would appropriately communicate this important message to whistleblowers.

Thank you in advance for your consideration of the comments expressed in this letter. Should you have any questions regarding these comments or any other issues related to the SEC's whistleblower program, please contact our Whistleblower Practice Group through its co-chairs, Gary L. Azorsky or Jeanne A. Markey, or attorney Raymond M. Sarola, at [redacted]

Sincerely,

Cohen Milstein Sellers & Toll PLLC

/s/ Gary L. Azorsky

Gary L. Azorsky
Jeanne A. Markey
Raymond M. Sarola