Cornell University
Law School
Lawyers in the Best Sense

WILLIAM A. JACOBSON
Clinical Professor of Law
Director, Cornell Securities Law Clinic
138 Hughes Hall
Ithaca, NY 14853
[redacted]

April 11, 2022

Via Electronic Filing

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

RE: File Number S7-07-22 (The Commission's Whistleblower Program Rules)

Dear Secretary Countryman,

The Cornell Securities Law Clinic ("the Clinic") welcomes the opportunity to comment on the Securities and Exchange Commission ("the Commission") proposal for amending the Commission's Whistleblower Program, File Number S7-07-22 ("Rule Proposal"). The Clinic is a Cornell Law School curricular offering in which law students provide representation to public investors and public education as to investment fraud in the largely rural "Southern Tier" region of upstate New York. For more information, please see securities.lawschool.cornell.edu.

The Commission's Rule Proposal is being offered for public comment to help ensure that eligible, meritorious whistleblowers are appropriately rewarded for their efforts and that the rules do not inadvertently create disincentives to reporting potential securities-law violations to the Commission. The Clinic addresses two of the proposed approaches: 1) allowing the meritorious whistleblower to decide whether to receive a related-action award from the Commission or the authority administering the other award program, and 2) affirming the Commission's discretion for the sole, limited purpose of increasing award amounts.

The Clinic's Responds to the Rule Proposal

The Dodd-Frank Wall Street Reform and Consumer Protection Act requires the Commission to implement a whistleblower program. It was enacted by Congress on July 21, 2010, in response to the 2007-08 financial crisis. Section 21F of the Exchange Act specifically directs the Commission to pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about a violation of federal securities laws and regulations that leads to the successful enforcement of a covered action and certain related actions brought by other statutorily identified authorities.

Whistleblower awards are paid from the dedicated Investor Protection Fund ("IPF"), which was also created by Congress as part of the Dodd-Frank Act. The IPF is required to maintain a minimum balance to ensure whistleblowers get awarded through the program, and the IPF is replenished with funds collected from SEC enforcement actions.

When the Commission promulgates new regulatory schemes for the whistleblower program, it must balance countervailing interests to ensure that the monetary awards sufficiently incentivize potential whistleblowers to volunteer pertinent information, while also preventing excessive recoveries. The congressional intent to moderate awards is reflected in Section 21F, which explicitly provides that an award be at least ten percent but no more than thirty percent of the amount of the monetary sanctions collected in the action for which the award is granted.

1. **Permitting Whistleblower's Choice Would Resolve Inadvertent Monetary Disincentives For Potential Whistleblowers**

The Commission is offering for public comment several proposals to change Rule 21F-3(b)(3), including the Comparability Approach, Whistleblower's Choice Option, Offset Approach, and the Topping Off Approach proposals. Each alternative proposal has its unique pros and cons. That being said, the Clinic supports the Commission's proposal to repeal the current Rule 21F-3(b)(3) in favor of an approach that would prohibit the Commission from holding exclusive authority to forego processing an otherwise meritorious award claim because another award program has a more direct or relevant connection to the underlying action.

Under the Whistleblower's Choice Option ("WCO"), the Commission would be required to process any related-action award applications just as it does for related applications that do not implicate separate award programs. More importantly, the WCO would allow a meritorious whistleblower to choose which award to ultimately accept if both the Commission and the other program grant an award. The Clinic supports the WCO because it adequately addresses the potential disincentives whistleblowers may face in light of the different award caps that are attached to various award programs.

If whistleblowers are allowed to personally decide between the awards granted, whistleblowers would naturally be incentivized to volunteer all pertinent information that may be eligible for awards. Opportunistic whistleblowers will likely be more forthcoming with pertinent information—even to programs with restrictive award schemes—to increase the likelihood that they will secure any kind of award for their efforts. In other words, the whistleblowers will no longer intentionally withhold certain applications or information out of fear that the eventual award will be severely limited by another program's restrictions because they will be allowed to choose the most favorable option.

Since the adoption of the Multiple-Recovery Rule, the Commission has been working under the assumption that the limitations on financial awards do not appreciably impact a potential whistleblower's financial incentives to volunteer pertinent information. However, this assumption may not be justified under circumstances where an alternative whistleblower program may be implicated. In cases where these alternative programs provide significantly

fewer financial incentives than the Commission's Program (i.e. absolute dollar ceilings for awards), it becomes very plausible that some potential-whistleblowers may make certain application decisions (i.e. withholding certain information) to avoid pitfalls that will severely limit their financial award later on.

The Clinic also supports the Commission's adoption of the WCO on the grounds of administrative efficiency. Under the WCO, the Commission would no longer need to assess and determine which award program has a more "direct or relevant" connection to the related action. Moreover, the Commission would not have to account for the existence of another potentially applicable award program in its assessment of the claimant's award eligibility or award offer. Instead, the Commission would only consider the existence of the alternative awards at the payment stage when it would be required to determine whether the meritorious whistleblower irrevocably waived any rights to other awards.

In practice, the determination of "direct or relevant" connections has been administratively burdensome because it entails difficult assessments that typically increase the overall processing time. The WCO provides distinct advantages for the Commission by avoiding the entire determination process, thereby reducing administrative costs. Moreover, the Clinic supports the WCO proposal because it still prevents whistleblowers from indirectly doing something that they cannot directly do. Under the WCO, the proposal would not frustrate Congress' intent to prevent multiple recoveries in the whistleblower program. As aforementioned, the Commission would still verify that the whistleblower has irrevocably waived any rights to other awards before making the award payment.

2. Affirming The Commission's Discretion To Increase Award Amounts Would Be in The Public's Interest

As demonstrated through the Commission's ongoing experience with the whistleblower program, the Commission's discretionary authority to decrease awards based on the potential dollar size has been proven unnecessary. Since the whistleblower program's inception, the Commission has considered the dollar amount of an award (under the analysis set by Rule 21F-6) generally to increase the amount of an award under the "law enforcement interest" provision. When the Commission attaches an additional law enforcement interest with the information provided by a whistleblower, the Commission does so to increase the dollar amount of the contemplated award.

The Clinic supports affirming the Commission's discretion to increase award amounts precisely because large awards generate more public interest.[1] Generating public interest is a fundamental purpose of the whistleblower program because its efficacy is dependent upon public awareness and cooperation. In other words, the more people that are interested and aware of the whistleblower program, the more insider tips the Commission can expect to receive.

[1] SEC record award of $140 million - https://www.sec.gov/news/press-release/2020-266; see also, SEC Surpasses $1 Billion in Awards to Whistleblowers - https://www.sec.gov/news/press-release/2021-177

In contrast, if the Commission were to begin using its discretion to decrease the dollar amounts of awards, the Commission may inadvertently decrease potential whistleblowers' confidence in the already-uncertain process. When whistleblowers consider the decision to volunteer information about securities violations to the Commission, whistleblowers are staking their future career prospects at their firms.[2] The idea of allowing the Commission to decrease an expected award amount would only instill more hesitation for people that are considering coming forward with pertinent information.

The Clinic Responds to the SEC's Specific Requests for Comment

In addition to the analysis above, the Clinic responds to some of the specific questions raised by the SEC in the Request for Comment.

Question 7: In assessing whether an award from another award program 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?

In light of the Rule Proposal discussed above, the Commission should not establish a fixed dollar or percentage difference as an alternative to the "meaningfulness" standard because of the law of diminishing marginal returns. The rationale driving the Rule Proposal is that the Commission hopes to establish awards that are substantial enough to incentivize whistleblowers to volunteer pertinent information, often at the risk of their careers.

In light of this rationale, the meaningfulness standard should instead involve an individual determination that considers a whistleblower's financial circumstances when they volunteer information to the Commission. For example, a C-suite level whistleblower may not find a $1 million reduction in awards to be meaningfully lower. In contrast, whistleblowers who just began their professional careers may completely regret volunteering information when they later discover a $1 million reduction in their awards.

When determining the meaningfulness standard, the Clinic suggests that the Commission utilize an individualized analysis instead of a fixed dollar or percentage standard. Although a uniform fixed dollar or percentage standard would be administratively easier to implement, it fails to address the heart of the issue.

Question 9: 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?

[2] Blowing the Whistle is Not for the Faint of Heart -https://www fcacounsel.com/blog/whistleblower-retaliation-2/; see also, Caught Between Conscience and Career - https://www.pogo.org/analysis/2019/03/caught-between-conscience-and-career/

If the WCO is adopted, it would be prudent for the Commission to take additional steps that ensure claimants are on notice of the potential consequences of false waiver representations. It is certainly plausible that opportunistic claimants would try and accept multiple awards in spite of the WCO's explicit disallowance. The Clinic suggests that the Commissioner outline significant sanctions against false representations.

Question 10: Are the time limits imposed by the Whistleblower's Choice Option appropriate? Should these time periods be longer or shorter and, if so, what would be appropriate time periods?

The Rule Proposal stipulates that under the WCO, the claimant's irrevocable waivers must be made within 60 calendar days of receiving the Commission's final order. In most cases, the 60 calendar day time limit appears to be a generous and reasonable amount of time for a claimant to determine which award to accept. The Clinic believes that the Commission should adhere to the 60 calendar days allotted as the minimum time limit.

However, the WCO time limit can be adjusted by permitting extensions that are determined by the Commission based on an individual's circumstances. For example, extensions may be reasonably granted for claimants with multiple applications that are yet to be determined. Allowing for individualized extensions would support the WCO's aim of allowing claimants to have discretion when choosing to accept awards.

Conclusion

The Clinic appreciates the opportunity to provide our comments to the Commission.

Respectfully Submitted,

William A. Jacobson

William A. Jacobson, Esq.
Clinical Professor of Law
Director, Cornell Securities Law Clinic

Kevin Cho

Kevin Cho
Cornell Law School, Class of 2023

Joshua Gopaul

Joshua Gopaul
Cornell Law School, Class of 2023