

TAF

TAXPAYERS
AGAINST
FRAUD

THE FALSE CLAIMS ACT LEGAL CENTER

April 11, 2022

Ms. Vanessa Countryman

Secretary, United States Securities and Exchange Commission

100 F Street, NE

Washington, DC 20549-1090

Re: File Number S7-07-221

Proposed Amendments to the SEC's Whistleblower Program Rules

Submitted by electronic mail to rule-comments@sec.gov

Dear Secretary Countryman:

The Securities and Exchange Commission recently announced a proposal to amend certain aspects of the rules governing the SEC Whistleblower Program. As the leading non-profit organization dedicated to the promotion and protection of the effectiveness of whistleblower programs, Taxpayers Against Fraud (TAF) takes this opportunity to comment on the proposed rule changes. We also take this opportunity to commend the Commission for continuing to look for ways to improve the program and make it more accessible and understandable to potential whistleblowers.

TAF is a non-profit organization whose mission is to maintain the integrity and advance the effectiveness of whistleblower reward and private enforcement provisions contained in federal and state laws, including the Securities Exchange Act, the Commodity Exchange Act, the federal and state False Claims Acts, and the Internal Revenue Code. These laws empower and encourage citizens and organizations in the private sector to report incidents of fraud, waste and abuse that improperly divert taxpayer funds from government agencies and programs.

TAF is uniquely situated to comment on the factors necessary to build and sustain a successful whistleblower program. Since 1986, TAF's member-attorneys, in partnership with the Department of Justice, have represented whistleblowers in federal False Claims Act matters that have generated tens of billions of dollars in civil and criminal recoveries. Also, since the launch of the SEC Whistleblower

Program, TAF's member-attorneys have represented many, and perhaps a majority, of the successful SEC whistleblowers.

We think it is critical that any rules implementing the program align with Congress' intent and not extend beyond what the statute creating the Program sets forth. In addition, in our experience representing whistleblowers, uncertainty and ambiguity in how the program operates can present potentially significant obstacles to individuals who are considering reporting wrongdoing. As such, our comments are focused on suggestions that are consistent with the statute and that make the process as transparent and efficient as possible so as to maximize the potential pool of individuals emboldened to blow the whistle and assist the SEC in enforcing the securities laws.

Related Actions Proposal

On related actions, we encourage the Commission to adopt a rule that incentivizes reporting to multiple regulators that have jurisdiction over the misconduct at the outset, while imposing an offset mechanism at the award recovery stage to prevent double recoveries in connection with the same proceeding. This proposal is consistent with Congress' intent to encourage the broadest possible pool to be empowered to report wrongdoing and because it minimizes subjectivity by instituting "simple math," providing a level of clarity to potential whistleblowers as to his/her treatment at the award determination phase. It also avoids the inevitable and discouraging delays that compel a whistleblower to await resolution by all potential whistleblower programs before selecting the one from which to receive the deserved payout.

This proposal incentivizes individuals to seek justice in the widest net possible when reporting, without the potential risk of forfeiting an award down the road based on that initial choice. In our experience, the vast majority of our potential clients are motivated initially by a desire to see potential wrongdoing prevented before it happens or stopped if it is ongoing. We think any proposal regarding how related actions are treated should recognize this reality and encourage – not discourage – whistleblowers to report to any and all regulators that might have jurisdiction to address the ongoing conduct. We urge the Commission to adopt a rule envisioning an offset so as to not pre-emptively force an individual to select where to report wrongdoing based on preserving award eligibility as opposed to addressing the misconduct as promptly as possible.

The offset proposal provides a simple framework to explain to potential whistleblowers on the front end and straightforward and equitable implementation at the award stage. On the front end,

whistleblowers are encouraged to report to all relevant regulatory bodies without regard to the implications at the award stage. Assuming a successful action, we endorse the offset approach that would work as follows:

- Whistleblower applies for an award from all regulators offering an award for its successful action;
- If SEC issues Final Order granting an award on its action (and any related actions) before any other regulator, whistleblower agrees to waive any subsequent award issued by any other entity
- If non-SEC whistleblower program issues a final order granting an award, Whistleblower permitted to accept award without forfeiting right to have application for an SEC award be considered and decided;
- If SEC grants an award after whistleblower has already been paid on the same action by another regulator, SEC's payout is reduced by any amounts already received by the whistleblower

The concept and execution are simple – if a whistleblower assists the SEC and other regulators to bring successful actions, he/she is entitled to an award amount equal to (and never exceeding) the amount reflected by the SEC's final award percentage. The only issue relates to timing – if SEC makes its award first, the whistleblower forfeits an award from any other program; if the other regulator pays first, the SEC offsets whatever amount the whistleblower receives with whatever amount he or she received from other programs. This proposal serves three valuable considerations – consistency with the statute, transparency as to process and timeliness of the whistleblowers' receipt of funds (whistleblower can get paid by the first regulator to grant an award without waiting for all regulators to make their determinations).

We urge the Commission not to adopt either the Comparability Approach or the Whistleblower Choice Option outlined in the proposing release. The Comparability Test frankly strains our ability to follow much less explain to potential clients. It also creates huge uncertainty with the injection of amorphous and subjective concepts, including “comparable award program” and “more direct or relevant program].” These concepts are not intuitive and might well give a potential whistleblower pause before reporting given the uncertainty created by such amorphous terms.

The Whistleblower Choice Option, while appealing on its face in that it empowers whistleblowers, should be rejected because it will prejudice whistleblowers by delaying receipt of an award. Under this option, a whistleblower must wait until his/her application for an award across multiple regulatory agencies are finally resolved before selecting which one to accept. The unfortunate but practical reality

is that many whistleblowers find themselves waiting for years for a single regulatory determination before receiving an award; imposing a delay in receipt until all regulators reach a final conclusion could push ultimate receipt of an award to a date so far into the future that no whistleblower will be incentivized to start the process by reporting in the first place.¹

Consideration of Dollar Amounts

While we appreciate the Commission's reconsideration of the topic of whether the Commission may take the size of the collections and award into account and the concept of only doing so to increase an award, we continue to believe that any consideration of the size – to adjust an award up or down – is unsupported by the statute. Congress set forth specific considerations to be considered when arriving at an award percentage, all of which are keyed on the quality of the whistleblower's information and conduct. It conspicuously does not include the size of the award as a consideration and directs that the balance remaining in the Investor Protection Fund specifically not be permitted in this consideration. We recommend that the Commission revert to its practice of considering only the factors set forth in the statute and amplified in the initial rules that focus solely on the whistleblowers' information and actions.² Any other result would be contrary to the statute and Congress' intent. The Commission's release announcing changes to the Rules should make clear that the size of the collections and resulting award is not appropriate under the statute and will not be a factor in its award determinations going forward.³

¹ The Proposing Release also suggests the possibility of simply reverting to the prior rule (adopted in May 2011) with regard to related actions, which simply prohibits collections from both the SEC and CFTC in the same action. We might be inclined to support doing so except for the instances where, under the old rules, the Commission took the position that it need not consider an application for an award under the SEC Program where a whistleblower had previously received an award under another less generous, and perhaps limited, award program. We see no reason to revert to a rule that could lead once again to such an unfortunate outcome for our clients.

² Although in 2018, the Commission initially proposed an amendment to the Rules that would include the size of the award in the factors considered, and despite receiving hundreds of comments about that proposal, it summarily declared upon adoption of the revised rules that it was withdrawing this amendment because the Commission already has the discretion to take the size of the award into account. This was and is not true. We are aware of no Final Order from the Commission where it set the award percentage or dollar amount based on consideration of the size of the collections.

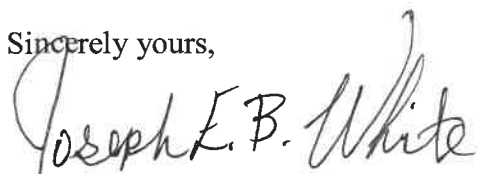
³ To the extent the Commission believes that the equities demand a higher award to a particular whistleblower, it already has the law enforcement interest positive factor in the current rules as an appropriate hook to make that determination. Indeed, the Commission has already cited that factor as the reason for increasing its final award percentage in light of the relatively minimal collections in the underlying case.

Conclusion

We thank the Commission for this opportunity to comment on its proposed rulemaking. The success of the Whistleblower Program over the past decade clearly demonstrates the benefits to investors and the public at large when major frauds are detected, deterred and remedied as early as possible, and the Commission is to be commended for its efforts in safeguarding the public trust. We respectfully submit that this trust was most dangerously eroded in the first decade of this century when federal law enforcement did not have early, actionable intelligence to assist it in uncovering and stopping misconduct. The result was that businesses were shuttered, retirement accounts disappeared and Americans lost their homes in shocking numbers. We cannot afford to miss another epidemic of fraud on such a massive scale. The SEC's Whistleblower Program is developing into one of the most successful public-private partnerships in American history, and the Commission has a great deal to be proud of in this regard.

TAF commends your efforts to strengthen the program, and strongly urges you to avoid making rule changes that would weaken it.

Sincerely yours,



Joseph E. B. "Jeb" White, Esq.

President and Chief Executive Officer

Taxpayers Against Fraud and the TAF Education Fund

Courtesy copies (via First Class Mail) to:

Secretary Vanessa Countryman

Chairman Gary Gensler

Commissioner Hester M. Peirce

Commissioner Allison Herren Lee

Commissioner Caroline A. Crenshaw

Ms. Nicole Creola Kelly, Chief, SEC Office of the Whistleblower