

Eileen Morrell

Senior Corporate Finance Professional

(Contact information is on file with the SEC Office of the Whistleblower)

September 17, 2018

Hon. Jay Clayton, Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: File No. S7-16-18, Amendments to Commission's Whistleblower Program Rules

Dear Mr. Chairman:

Thank you for the opportunity to comment on the proposed amendments to the Commission's Whistleblower Program rules. As a SEC whistleblower currently in the program, I was pleased to read your June 28, 2018 "Statement at Open Meeting on Amendments to the Commission's Whistleblower Program Rules" in which you confirmed the value and continued need for the program.

I am a SEC whistleblower who fought the good fight and lost everything, having been terminated only days after exhausting all internal remedies under the Company's "Code of Ethics for Chief Executive Officer and Chief Financial Officer". The resulting personal financial losses and emotional trauma for protesting unlawful behavior and practices have been devastating and unrelenting with no relief or upside. The SEC Whistleblower Bounty Award Program provides a vestige of hope for financial remedy and justice.

Commissioner Robert J. Jackson, Jr.'s June 28, 2018 "Statement on Proposed Rules Regarding SEC Whistleblower Program" closely describes my whistleblower circumstances (albeit with a smaller public company) when he stated:

Let's start from the perspective of an employee who is witnessing a significant corporate fraud. Especially if she is a high-ranking insider at a large public company—the whistleblowers who are most valuable to us in protecting our markets—there are major risks for the employee if she comes forward. She may lose her job and her salary, but worse, she faces the very real prospect of never working in a senior position in her field again.

Commissioner Jackson urged "commenters to come forward and provide us with their views regarding today's proposals, and in particular data that might help us understand the proposal's effects on whistleblowers' incentives to help us uncover frauds and protect investors".

With this mandate, I've included relevant circumstances of my whistleblower activities to show the brutal consequences of being a single gatekeeper who endeavors to instill strong internal controls, uphold compliant accounting practices and transparent, accurate public disclosures under Exchange law and other regulations. Please oblige my long letter, as I have much to say about SEC whistleblower retaliation. And, I believe much can be learned by sharing my retaliation experience with the Commission and others who may read my comment letter. Moreover, it will shed light on two key areas of debate regarding proposed changes to the SEC Whistleblower program under Dodd-Frank:

- 1) restrictions on who can directly report concerns to the SEC based on the current SEC rule that requires certain employees to exhaust all internal remedies before filing a whistleblower award claim under the Dodd-Frank Act, and
- 2) definition of a whistleblower under the retaliation provisions of the Dodd-Frank Act, to comport with the Supreme Court's recent decision in *Digital Realty Trust, Inc. v. Somers*.

Of note, my retaliation claim is not impacted by the Supreme Court decision, as I timely filed my claim with the Department of Labor/OSHA under provisions of the Sarbanes-Oxley Act of 2002, as amended.

I'm a senior corporate finance, accounting, internal audit, and governance professional with over 35 years' experience in senior roles at large publicly traded commercial and federal government contracting companies. From 2003 to 2005 I worked on the WorldCom/MCI financial restatement and internal controls remediation process, conducted under Federal Bankruptcy Court-ordered monitoring. The 2002 WorldCom bankruptcy resulted from \$11 billion in fraudulent accounting entries and a complete breakdown of internal controls. WorldCom remediation included replacing their entire board of directors, the CEO, and most of the senior management staff. Approximately a half-dozen former employees were sentenced to prison, with the former CEO and CFO receiving the longest terms. There were no "sacred cows".

Hence, I'm keenly aware of an integrated framework of internal control deficiencies, fraudulent accounting, earnings smoothing, misleading and erroneous public reporting, classifying period expense as a depreciating or amortizing asset, unwarranted shifting between expense and cost, misallocations, goodwill impairment from acquisitions, and efforts to deflect or suppress fact-finding. I'm also aware of the strengthened U.S. sentencing guidelines enacted under the Sarbanes-Oxley Act of 2002, as amended. As such, I took my responsibilities regarding Company accounting practices, internal controls, and full and accurate public reporting and disclosures very seriously. And, I expected the same from the CFO, CEO, Chairman of the Board, Audit Committee, and outside legal counsel of the Company for whom I worked. If any one of these leaders ignores or doesn't understand the COSO Framework of Internal Controls and instances of accounting and disclosure fraud, they are not qualified to hold a position practicing before the Securities and Exchange Commission.

During the six years prior to my termination, I held senior finance roles at this smaller reporting public company that provides professional services to government agencies. My responsibilities included, but were not limited to: preparation of consolidated and consolidating financial statements for internal, board, bank loan covenants, and public reporting; preparation and filing of quarterly and annual reports with the SEC including Management Discussion and Analysis and forward looking business trends; preparation of quarterly earnings releases, earnings call scripts, and investor presentations; financial modeling for strategic five-year business plans including potential acquisitions or sale of the business; and compliance on federal government contracts including the composition of overhead rates and allocation processes under the Federal Acquisition Regulations (FAR). Up until the last six months of my employment, I continually received outstanding performance feedback from the CEO and CFO, salary increases, stock option awards, and received among the largest annual bonus awards among my peers.

Problems began when the Company acquired a small private professional services company. Immediately after the acquisition, the major customer cut back on requirements that significantly reduced expected revenue and cash flows generated by the newly acquired business. That is when the Company machinations began, internal controls were thwarted, my public financial reporting responsibilities were diminished and then removed, my internal protests up through the Chairman of the Board and outside legal counsel were ignored, I was abruptly terminated without notice, and asked to sign a separation agreement that waived my rights to due process and remedies, specifically naming the retaliation provisions of the Sarbanes-Oxley Act of 2002. I did not sign the agreement.

During my internal protests that spanned six months until I was abruptly terminated, I provided regulatory guidance, specific examples and detailed independent analysis to support my assertions to the CFO, CEO, Chairman of the Board/Audit Committee Financial Expert, and the Company's outside legal counsel. Because the Company eliminated the position of Chief Compliance Officer in 2014, I was on my own. Neither the Chief Executive Officer nor the Chairman of the Board/Audit Committee Financial Expert acknowledged or responded to my emails, nor contacted me to get clarification or a better understanding of my concerns and allegations. They apparently ignored the advice of Sean McKessy, the Commission's first Chief of the Office of the Whistleblower who warned: Denial Is Not a Strategy (FEI Daily 6/24/14 by Edith Orenstein):

On the heels of the first whistleblower retaliation case filed by the SEC, FEI Daily asked Sean McKessy, Chief of the SEC's Office of the Whistleblower, what the broader message is for the financial reporting community.

"Denial is not a strategy around this program," the SEC's Sean McKessy told FEI Daily in an exclusive interview. "Adjust your mindset if the thought was to pretend there is no whistleblower program or pretend there is no ability for employees to report, or not educate your employees. Part of my job is to spread the word this program exists, and there is a mechanism for people to report wrongdoing when they see it. ..."

If you are determined to never encounter our office, then the best thing you can do is take a fresh look at your compliance program to try and create a culture that if your employees encounter wrongdoing, they feel comfortable reporting it internally so that they see it is stopped, and they won't be punished for reporting it, even if they are wrong about the existence of an underlying violation. ...

The message for senior financial executives and senior officers is: If I don't really want to have a whistleblower go to the SEC, what do I need to do so an employee comes to us, what do I have to do to create an environment where my employees believe that an internal report will result in a credible, transparent investigation."

<https://daily.financialexecutives.org/denial-is-not-a-strategy-whistleblower-watchdog-warns/>

It was shortly after this first SEC whistleblower retaliation case in 2014 that the Company eliminated the position of Chief Compliance Officer.

In order to exhaust all internal remedies before submitting a TCR form to the SEC, I filed a formal internal complaint under the Company Code of Ethics for Chief Executive Officer and Chief Financial Officer. Over a period of six weeks prior to my termination, I sent emails to the Chairman of the Board, who was also the Audit Committee Financial Expert, and the Company outside legal counsel. My emails painstakingly described my allegations of fraud, misleading disclosures, and deficient internal controls and showed the life cycle of a whistleblower: recognition and reward for excellent performance and contributions that evolve into hostility, diminution of responsibilities once protests begin and intensify, and in the worst case, abruptly terminated without notice as I was a few days after the Audit Committee and outside legal counsel completed their investigation into my allegations and concerns with "no findings".

Midway through my formal internal protest, the Chairman of the Board asked the Company outside legal counsel to open an investigation into my concerns. This was met by an immediate increase of egregious hostility and removal of my job responsibilities. My emails sent to the Board Chairman and outside legal counsel describing the intensified retaliation were ignored. If outside legal counsel had found wrongdoing, but the Chairman of the Board and Board Audit Committee did not, the outside legal counsel was required under SOX to report the findings to the SEC. This did not happen. In fact, the same outside legal counsel who conducted the internal investigation also prepared the Company's answer to my OSHA retaliation complaint, in which counsel chastised me for using the internal grievance process under the Company Code of Ethics for CEO and CFO. Three days after the Company's legal counsel advised me that neither he nor the Chairman of the Board/Audit Committee found any wrongdoing, the Company cut off my computer access, terminated my employment without notice, and sent me a request to sign a severance agreement that included, in part:

General Release: "waive any and all claims, causes of action and damages against the Company including, but not limited to, the retaliation provisions of the Sarbanes-Oxley Act of 2002."

Covenant Not To Sue: “waive Your right to any monetary or equitable recovery ... and promise not to seek or accept any award, settlement or other monetary or equitable relief from any source or proceeding brought by any person or governmental entity or agency on Your behalf...”

I did not sign the agreement. Moreover, SEC Rule 21F-17(a) prohibits such waivers in a Separation Agreement, as it constitutes an unlawful impediment to communicate with the agency. <https://www.sec.gov/whistleblower/retaliation#protections> :

Protections Against Actions Taken to Impede Reporting

In addition to protecting whistleblowers who have reported possible securities law violations from retaliation, Commission Rule 21F-17(a) prohibits any person from taking any action to prevent you from contacting the SEC directly to report a possible securities law violation. The Rule states “[n]o person may take action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement...with respect to such communications.”

Unlike the anti-retaliation protections, the protections against actions taken to impede reporting possible securities law violations are not limited to the employee-employer context. Only the SEC, however, may file an enforcement action for a violation of Rule 21F-17(a).

My Comments on the Commission’s proposed changes re File No. S7-16-18 are as follows:

Digital Realty and Internal Disclosures

I was caught in the retaliation crossfire of the SEC rule that certain classes of employees must exhaust all internal remedies before qualifying for a SEC Whistleblower Award under the Dodd-Frank Act. Because I fell into one of those classes of employees, I fully exhausted all internal remedies before reporting to the SEC. My reasons for doing so were:

- 1) ensure that the Company officers and directors fully understood my allegations and the serious consequences of same;
- 2) provide them with an opportunity to remediate the internal controls deficiencies and restate publicly reported financial misstatements; and
- 3) ensure that I fully qualified for the SEC bounty award program and at the highest award percent possible.

After the Company Chairman of the Board, Audit Committee, and outside legal counsel found no wrongdoing, no fraud, and no serious internal control deficiencies under the Code of Ethics for CEO and CFO, I then proceeded to prepare a TCR form to the SEC Office of the Whistleblower. However, three days after the Company notified me that they found no

violations, the Company disconnected my computer access and terminated my employment without notice.

Consequently, I did not have enough time to complete the TCR form required by the SEC before the Company fired me. Had I known that the Supreme Court would narrow the definition of retaliation under the Dodd-Frank Act, as a placeholder I would have submitted my concerns to the SEC months earlier while I was still employed by the Company. While I still would have chosen to file a retaliation claim under SOX/OSHA, I would want to retain the option of filing a personal claim of retaliation under Dodd-Frank which provides a much longer statute of limitations. This is especially beneficial where whistleblowers, for whatever reason, have exceeded the 180-day statute of limitations for filing a retaliation claim with the Department of Labor/OSHA and Dodd-Frank is their only remaining option.

Therefore, I recommend that the Commission amend all Dodd-Frank Act whistleblower rules to conform with the Digital decision. This was well stated in the Kohn, Kohn & Colapinto, LLP, comment letter submitted to the SEC dated July 24, 2018, re File No. S7-16-18, copied here as follows:

“First, existing rule 240.21F-6(a)(4) must be removed. This rule was intended to encourage employees to report concerns first to their internal compliance programs. However, as the Supreme Court has made perfectly clear, the core purpose of the DFA is to encourage employees to report directly to the SEC, and as such the Court held that the Commission was without legal authority to provide any protection to employees who report internally. The current rule not only has no support in law, but badly misleads employees. It encourages employees to file internally with companies, without warning them that if they do, they can lose all of the employment rights under the DFA. The rule flouts the explicit holding of the Supreme Court and undermines the Congressional intent behind the DFA, as explained by the Court. The rules on calculating the amount of an award must conform to the Digital mandate interpreting the “core purpose” of the DFA, and there is simply no place in this calculation for promoting internal reporting.

Second, Rule 240.21F-4(b)(4)(iii) must be deleted. This rule place restrictions on the right of certain employees, otherwise fully qualified as “whistleblowers” under Congress’ definition of that term, to qualify for a reward. Under this rule, company directors, officers, auditors, and compliance officials could not report their concerns directly to the SEC, but instead would have to wait at least 120 days to file such a report.”

Under the Digital decision these restrictions are clearly illegal. The DFA provided an explicit definition of “whistleblower” and set forth an explicit definition of those classes of persons excluded from the reward provisions. Directors, officers, auditors and compliance officials were not excluded from coverage under the DFA, and all are included within the definition of “whistleblower.” These classes of employees often have the most significant evidence of corporate crimes and must be actively encouraged to blow the whistle.

Monetary Awards

1. Proposed change allowing awards based on deferred prosecution agreements (“DPAs”) and non-prosecution agreements (“NPAs”) entered into by the U.S. Department of Justice (“DOJ”) or a state attorney general in a criminal case, or a settlement agreement entered into by the Commission outside of the context of a judicial or administrative proceeding to address violations of the securities laws.

I agree with the SEC’s proposed amendment that would expressly allow for the payment of awards based on money collected under these types of arrangements. It provides a significant and beneficial enhancement for whistleblowers under the Bounty Award Program

2. Elimination of potential double recovery under the current definition of related action: We propose an amendment to our rules to clarify that a law-enforcement action would not qualify as a related action if the Commission determines that there is a separate whistleblower award scheme that more appropriately applies to the enforcement action.

If I’m interpreting the change correctly, I respectfully disagree with the proposed amendment. When the SEC conducts an investigation based on a whistleblower’s tip and supporting information, and the SEC prevails in a successful enforcement, the SEC will collect disgorgement, fines, and penalties from the offending Company. The SEC should honor the award earned by the whistleblower under the Dodd-Frank Act. I will call upon the “but for” rule from my government contract accounting days: The SEC would not have recovered the money, but for the fact that a whistleblower provided the necessary information. The SEC would still retain between 70% and 90% of the collected monies. It’s not easy, quick, or frequent for a whistleblower to receive a bounty award under the Dodd Frank Act, and this recommendation exacerbates an already painful process.

3. Additional considerations for small and exceedingly large awards.

I respectfully disagree with the Commission’s recommendation of limits on exceedingly large awards. The Dodd Frank Act established specific criteria for monetary awards that ranged from 10% to 30%, and the SEC established criteria for increasing or decreasing award percentages. I don’t believe that the SEC should place arbitrary restrictions on the award percentage based on an assumption of “enough”. I will again refer to the government contract accounting “but for” rule: The SEC would not recover an exceedingly large award, but for the fact that a whistleblower provided the necessary information. The SEC would still retain between 70% and 90% of the exceedingly large recovery. There are likely many hands to feed from the award, including large takings from contingency-fee plaintiff attorneys that may dwarf the whistleblowers’ share of the award.

Regarding the SEC’s proposed change allowing a \$2 million minimum award for small awards that meet or exceed the Dodd-Frank requirement of at least \$1 million collected by the SEC, I

believe the SEC already has the authority to award a whistleblower up to the maximum of 30% and that no change is necessary. The Dodd Frank Act established monetary awards that ranged from 10% to 30%, and the SEC established rules for increasing or decreasing award percentages that already provide flexibility.

Regarding proposed changes where the monetary sanctions collected are de minimis; i.e. less than the Dodd-Frank requirement of at least \$1 million collected by the SEC. This is a beneficial and worthwhile change. Whistleblowers are harmed whether they work for a very large or very small company, and must work just as hard to prove their allegations to the SEC. However, it appears that the Dodd-Frank Act would need to be amended to remove the \$1 million minimum collections hurdle.

SEC recommendations to expedite awards to whistleblowers

My faith and trust that the Company's officers, directors, audit committee, and outside legal counsel would uphold Exchange law were groundless. They have since richly rewarded themselves while I've been reduced to living on social security wages and moving in with family to make ends meet, patiently pursuing claims under SOX/OSHA and Dodd-Frank. All valid SEC whistleblowers, especially those who've lost their income from retaliation, need an expedient reward process. Kohn, Kohn & Colapinto, LLP provided a sensible, expedited process in their comment letter to the SEC dated July 24, 2018, re File No. S7-16-18. I totally agree with the KKC LLP recommendations and have copied selected parts of their letter below, with edits:

Under the current process, whistleblowers often wait years to obtain a reward, exacerbating and prolonging financial and emotional harm to whistleblowers. To prevent undue delay, the current rules should be amended in a manner consistent with current practice under the False Claims Act.

As required under Digital Reality to qualify for a reward, whistleblowers must provide their information directly to the SEC. Thus, the Commission's staff knows, well before issuing a sanction, the identity of every whistleblower who provided information to the SEC and for which the SEC relied upon when issuing the sanction. The Commission is in a position to make their reward recommendations simultaneous with the Commission's approval of any sanction. The Commission should consider requiring the staff to make these recommendations immediately after the issuance of a sanction and providing these recommendations to the whistleblower(s) for comment. Once the SEC staff completes their reward recommendation, they can immediately forward their justification to the Claims Review Staff or the Commission for immediate approval.

Moreover, just as whistleblowers must adhere to timing requirements for filing TCR and APP applications, the SEC staff should similarly be bound by time requirements for approving reward applications. One suggestion is that the Commission approve all reward applications within 90 days of the issuance of the sanction for which the

Commission action was based, and that other policies and procedures are amended to accommodate this 90-day requirement.

Finally, the Commission should adopt a rule requiring that all whistleblower rewards be paid in the fiscal year for which the collected proceeds/sanctions are obtained. This will help ensure that the Investor Protection Fund can directly use the sanctions obtained from the whistleblower cases to pay rewards.

Conclusion:

Thank you again Chairman Clayton for your steadfast commitment to the SEC whistleblower award program. I sincerely appreciate the opportunity to provide comments on the Commission's proposed changes. Under signed certifications (SEC Whistleblower's Declaration), I've submitted detailed financial analysis, expansive narratives, supporting documents, and estimated restated earnings from those filed by the Company before and after I was terminated. I stand behind my assertions, evidence, and supporting analysis provided to the SEC Office of the Whistleblower and the Department of Labor/OSHA. I'm confident and ready to defend my allegations under oath before any regulatory entity, court, or member of Congress.

Respectfully submitted,

Eileen Morrell

Eileen Morrell