September 18, 2018

Submitted via the Commission’s internet comment form
(http://www.sec.gov/rules/proposed.shtml)

The Honorable Jay Clayton, Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-16-18, Amendments to the
SEC’s Whistleblower Program Rules

Dear Mr. Chairman:

The Center for Workplace Compliance welcomes the opportunity to submit the following comments on the Securities and Exchange Commission’s (SEC or Commission) proposed revisions to its whistleblower rules. We commend the Commission on its efforts to refine and improve the whistleblower program and look forward to assisting it in that endeavor.

Statement of Interest

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation’s leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes nearly 250 major U.S. corporations, collectively providing employment to millions of workers.

CWC’s directors and officers include many of industry’s leading experts in the fields of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

Nearly all of CWC’s members are publicly traded companies subject to the federal securities laws, and thus will be affected directly by the amendments to the SEC’s whistleblower regulations. In addition, most if not all of CWC’s member companies have established internal complaint procedures designed to encourage employees who wish to report unlawful or otherwise inappropriate conduct to bring their issues forward within the company. These procedures allow the company to investigate and resolve employee concerns quickly and effectively.
Proposed Amendment to Exchange Act Rule 21F–2 Addressing Whistleblower Status and Certain Threshold Criteria Related to Award Eligibility, Heightened Confidentiality From Identity Disclosure, and Employment Anti-Retaliation Protection

Amending the Rule To Conform to the Supreme Court’s Decision in Digital Realty Trust Is Appropriate

CWC agrees with the reasons stated in the Preamble to the Proposed Rule that amending the Rule to conform to the Supreme Court’s decision in Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018), is appropriate. In Digital Realty Trust, the Court ruled unanimously that the plain text of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) explicitly protects from retaliation only those whistleblowers who provide information to the Commission. The proposal properly corrects the Rule to make it consistent with the Court’s interpretation of Dodd-Frank.

Request for Comment

The Commission is seeking public comment on a number of specific questions relating to proposed amendment to Exchange Act Rule 21F-2. CWC’s comments to those questions follow.

1. Is it reasonable to require that an individual provide information to the Commission “in writing” to qualify as a whistleblower? Is this approach either too restrictive or too broad? Are there situations in which only some other form of communication would be possible or preferred? Please explain.

It is quite reasonable, and well within the Commission’s discretion, to require that an individual provide information to the Commission in writing to qualify as a whistleblower. As the Proposed Rule correctly observes, requiring a written submission, while imposing only a minimal burden on the individual, provides certainty as to when the individual provided information to the Commission, as well as what information was provided. And Section 21F(a)(6) specifically authorizes the Commission to establish, by rule or regulation, the “manner” in which qualifying information must be provided. 15 U.S.C. § 78u-6(a)(6).

To facilitate documentation of when the Commission received the information, CWC recommends that, if it does not already do so, the Commission make it a practice to physically or electronically date-stamp each communication when received, regardless of the date that the informant puts on the Form TCR or other writing submitted.

2. Should our whistleblower rules enumerate any other “manner” of providing information to the Commission for purposes of anti-retaliation protection? For example, should our rules enumerate testifying under oath in an investigation or judicial or administrative action of the Commission as an additional “manner” of providing information to the Commission?

In CWC’s view, the Commission is correct not to include any other manner of providing information to the Commission (such as the actions listed in Section F(h)(1)(A)(ii)) for the
purpose of conferring anti-retaliation protection. As the Preamble accurately points out, Section 21F(h)(1)(A)(ii) specifically cross-references the action listed in Section 21F(h)(1)(A)(i), i.e., “providing information to the Commission in accordance with this section.” Thus, Section 21F(h)(1)(A)(ii) indeed “is best read as extending employment retaliation protections to acts of continued cooperation by a person who has already provided information to the Commission.” 83 Fed. Reg. 34702, 34718 n.144 (July 20, 2018) (emphasis added).

3. Does the proposed rule reasonably require that the lawful acts done by the whistleblower must relate to the subject matter of the whistleblower’s submission to the Commission in order for the employment retaliation protections to apply? Should a different standard apply? Why or why not?

In CWC’s view, the proposed rule quite reasonably requires that the lawful acts done by the whistleblower must relate to the subject matter of the whistleblower’s submission to the Commission in order for the employment retaliation protections to apply. Simply put, any other approach would extend anti-retaliation protection well beyond the scope of the statutory language.

The individual’s submission to the Commission essentially establishes the parameters of anti-retaliation protection. Extending that protection to acts that do not relate to the information the individual provided thus would greatly, and improperly, expand coverage to any number of other activities that have nothing whatsoever to do with the matter brought to the Commission’s attention.

4. Does the proposed rule appropriately address the timing of an individual’s report to the Commission relative to the protected conduct and to any retaliation?

The proposed rule appropriately requires that an individual must meet the fundamental requirement for becoming a protected whistleblower, i.e., must provide information to the Commission, before experiencing any alleged retaliation in order to qualify for anti-retaliation protection. The contrary approach would be inconsistent with the Supreme Court’s ruling in Digital Realty Trust that an individual who has not provided information to the Commission is not eligible for anti-retaliation protection under Dodd-Frank. Moreover, it is simply impossible for an employer to commit retaliation because of a protected activity that has not yet occurred.

5. In determining the amount of an award, the Commission considers participation in internal compliance systems. Given the change in anti-retaliation protections, should the Commission still use this criterion in determining the size of whistleblower awards? Why or why not?

As explained above, participation in internal compliance systems produces a number of benefits for both employer and employee, and thus should be encouraged. For that reason, in order to continue to incentivize employees to utilize internal dispute resolution processes, the Commission should continue to use this criterion in determining the size of whistleblower awards.
6. Would it be necessary or appropriate to specify additional types of misconduct that fall within the prohibition against “any other manner [of] discrimination against[] a whistleblower”? For example, should our rules clarify that if an employer rejects a prospective employee, or a past employer attempts to cause such rejection, because that individual had engaged in protected activity, this would be a form of retaliation?

In CWC’s view, it is neither necessary nor appropriate to specify additional types of misconduct that fall within the prohibition against “any other manner [of] discrimination against[] a whistleblower.” Section 21F(h)(1)(A) already makes it unlawful to “discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower ....” That language provides sufficient clarification on its own. In the employment discrimination context, there has been considerable litigation over whether or not a particular action or course of action is sufficient to constitute discrimination.

For example, in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), the Supreme Court announced that actionable “hostile environment” sexual harassment occurs only when conduct is sufficiently severe or pervasive to alter the conditions of an individual’s employment or create an abusive working environment. Since then, courts have wrestled with numerous cases in which the primary issue was whether or not the alleged conduct met the threshold. CWC respectfully submits that the Commission should not attempt to resolve such issues via regulatory action.

Moreover, while the Commission is correct that in Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997), the Supreme Court ruled that the term “employees,” as used in § 704(a) of Title VII of the Civil Rights Act of 1964, includes former employees, the law is far less settled as to whether or not alleged retaliation by an employer against a prospective employee is actionable.

For example, in Dellinger v. Science Applications International Corp., 649 F.3d 226 (4th Cir. 2011), the U.S. Court of Appeals for the Fourth Circuit ruled that job applicants cannot bring a Fair Labor Standards Act (FLSA) claim of retaliation against a prospective employer because the law’s anti-retaliation provisions are intended to cover only current or former employees who have exercised their rights under the law. Accordingly, CWC recommends that the Commission not expand anti-retaliation protection to cover prospective employees.

Proposed Amendment to Exchange Act Rule 21F-3(b)(1) Defining “Related Action”

CWC supports the proposed amendment to Exchange Act Rule 21F-3(b)(1) defining “related action” to avoid multiple recoveries by the same individual in the event there are overlapping award schemes. As the Preamble correctly observes, multiple awards have the potential to exceed the maximum 30% award established by Congress. We agree with the Commission that “a whistleblower should neither have two recoveries on the same action nor multiple bites at the adjudicatory apple.” 83 Fed. Reg. 34702, 34711 (July 20, 2018) (footnote omitted).
Proposed Amendment to Rule 21F–8 To Add New Paragraph (e) To Clarify and Enhance the Commission’s Authority To Address Claimants Who Submit False Information to the Commission or Who Abuse the Award Application Process

CWC supports the Commission’s proposal to add new paragraph (e) to Rule 21F-8 to clarify and enhance the Commission’s authority to permanently ban from the program anyone who has submitted three frivolous award applications, including those lacking a colorable connection between the information submitted to the Commission and the Commission’s action. Similarly, we support the proposal to allow the Commission to permanently ban an applicant who has violated Rule 21F–8(c)(7), which makes an applicant ineligible for an award if he or she, in dealing with the Commission or another authority, “knowingly and willfully make[s] any false, fictitious, or fraudulent statement or representation, or use[s] any false writing or document knowing that it contains any false, fictitious, or fraudulent statement or entry with intent to mislead or otherwise hinder the Commission or another authority.” 83 Fed. Reg. at 34722-23.

As with frivolous – or fraudulent – cases filed in court, award applications meeting this description significantly burden the system, unnecessarily and wastefully taking staff time away from meritorious cases. Codifying the Commission’s current practice into a formal Rule should serve as a warning to individuals who might otherwise be tempted to engage in such behavior.

Proposed Amendment to Exchange Act Rule 21F–6 Regarding Awards in Cases Yielding at Least $100 Million in Collected Monetary Sanctions

CWC supports the Commission’s proposal to add a new paragraph (d) to Rule 21F-6 that would provide a mechanism for the Commission to conduct an advanced review in situations involving at least $100 million in collected monetary sanctions, to determine whether an exceedingly large potential payout may not fulfill the purposes of the program. As the Preamble points out, enormous awards are likely to provide incrementally diminishing return value to the program. Thus, it is indeed in the public interest for the Commission to conduct such a review.

Proposed Rule 21F–18 Establishing a Summary Disposition Process

CWC agrees with the Commission’s proposal that would provide for a summary process to quickly dispose of award applications that are untimely, noncompliant, or can otherwise be denied on relatively straightforward grounds. Such a process would save significant staff time, allowing meritorious claims to be resolved more quickly.

Request for Comment Regarding a Potential Discretionary Award Mechanism for Commission Actions That Do Not Qualify as Covered Actions, Involve Only a De Minimis Collection of Monetary Sanctions, or Are Based on Publicly Available Information

In CWC’s view, the Commission lacks the statutory authority to provide discretionary awards in situations where the Commission action does not qualify as a covered action under Dodd-Frank, involves only a de minimis collection of monetary sanctions, or is based solely on publicly available information. Section 21F(b)(1) specifically limits the Commission’s authority to pay awards in a covered action, to a whistleblower who provided original information that led
to the successful enforcement action, in amounts based on *what has been collected* of the monetary sanctions imposed. Section 21F(a)(1) states expressly that a “covered action” is one that “results in monetary sanctions exceeding $1,000,000.” Section 21F(a)(3) defines “original information” to exclude publicly available information. Thus, the Commission lacks the authority to make discretionary awards absent a legislative change.

**Conclusion**

CWC appreciates the opportunity to submit the foregoing comments.

Very truly yours,

Rae T. Vann

Rae T. Vann
General Counsel