

September 18, 2018

Mr. Brent J. Fields
Secretary, Securities and Exchange Commission
Attn: Emily Pasquinelli, Office of the Whistleblower
Attn: Brian A. Ochs, Office of the General Counsel
100 F Street NE
Washington, DC 20549-1090

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

Dear Secretary Fields and Colleagues:

I write today as an interested market participant who has provided the Securities and Exchange Commission ("SEC" and the "Commission") with several voluntary submissions. In my opinion, the SEC's whistleblower program promotes the submission of high-quality information and original analysis detailing apparent violations of federal securities laws. Based upon public disclosures and my personal knowledge, several of my whistleblower submissions have prompted or significantly contributed to investigations and enforcement actions by the Commission.

Many whistleblowers, including myself, provide information to the Commission out of a sense of duty and without necessarily having any expectation of reward. However, to the extent the submissions may be eligible for compensation, whistleblowers should be treated fairly and consistently.

While there are positive aspects to the proposed amendments, I have significant concerns regarding the proposed changes to Rule 21F-9, the interpretative guidance redefining "independent analysis," the failure of the proposed amendments to adequately address the significant backlog of award applications, and other specific proposals. As someone who takes the whistleblower program seriously and wants it to succeed, I hope the Commission will take these comments seriously in turn.

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To date, I have filed one WB-APP after the publication of a Notice of Covered Action. The Commission has not issued a Preliminary Determination more than 18 months after receiving my WB-APP. The relevant Notice of Covered Action concerned a small, expeditiously resolved administrative proceeding. The adjudication of my application should have been a straightforward exercise that is not particularly resource-intensive. Yet, without any explanation from the Claims Review Staff, my application has languished without response for even longer than the apparent duration of the associated investigation, which is both perplexing and frustrating. I understand that many other applicants are similarly situated.¹

While I applaud the Commission's attempt to eliminate frivolous claims and the resulting backlog of WB-APPs, the Commission can begin to address this problem without waiting for the outcome of the rulemaking process. Specifically, the Commission should: i) hire additional attorneys in the Office of the Whistleblower and/or appoint additional individuals to the Claims Review Staff;² ii) prioritize easily

¹ On page 114, the Commission reveals that the Office of the Whistleblower has received approximately 660 properly completed WB-APPs over the past six years, not including repeat submissions from frivolous claimants. During that time, the Commission has issued 128 final orders. Since many orders cover multiple applications and preliminary determinations are not publicly available, the size of the current backlog is unknown.

² According to the 2017 Annual Report of the SEC's Whistleblower Program, the 11 attorneys in the Office of the Whistleblower assess each award application before making a recommendation to the 5 senior Enforcement

processed claims; iii) establish a reasonable deadline for issuing each Preliminary Determination; and iv) provide applicants with periodic updates on the status of pending claims.

Accordingly, I wholeheartedly agree with the comment letter issued by Kohn, Kohn & Colapinto, LLP on July 24, 2018 (the “Kohn Letter”), which stated: “The most significant problem with the SEC’s current whistleblower program is...the prolonged delay in processing reward applications. These delays can drag on for years and based on our direct experience, can be as long as four (4) years and running.”

I was particularly disappointed that the proposed rule changes did not establish a deadline for the initial review of WB-APPs. The Kohn Letter opines, “Moreover, just as whistleblowers must adhere to strict timing requirements for filing TCR and APP applications, the SEC staff should similarly be bound by strict time requirements for approving reward applications.” A formal deadline would help ensure that the Office of the Whistleblower would process claims in a timely fashion. Considering the potential complexity of competing claims and burdens on Claims Review Staff, I would be satisfied with any reasonable deadline, as long as the deadline was explicitly documented. This requirement could be easily included in Section 240.21F-11(d), which as proposed by the Commission states, “Following this evaluation, the Office of the Whistleblower will send you a Preliminary Determination setting forth a preliminary assessment[.]” It would only take a minor edit to establish this much needed deadline. Moreover, such a change follows directly from the stated goal of the amendments to “more efficiently process award applications.”

* * *

The remainder of this letter responds to many of the enumerated and general requests for comment. My responses are based on my familiarity with the SEC’s whistleblower program. Where a question is omitted, I do not have any substantive comment on the amendment as proposed or lack sufficient basis to make a meaningful contribution.

Questions Regarding Proposed Rule 21F-3(b)(4)

The discussion of the proposed rule does not address that collections in a “related action” are only eligible for compensation where the Commission has itself brought a successful enforcement action. If the Commission was concerned about avoiding multiple recoveries, it could simply decline to bring an enforcement action. But, if the Commission receives original information that results in an enforcement action, an award application should not be denied because another body might possibly provide an award of its own. Therefore, I do not believe that the proposed Rule 21F-3(b)(4) should be adopted.

7. Is the proposed “direct or relevant” standard appropriate for assessing whether an action should qualify as a related action? Are there alternative formulations that should be adopted instead?

I believe the SEC’s proposed standard is untenable and imposes an unreasonable burden on potential whistleblowers. The application of this proposed rule would impose an undue burden on whistleblowers by forcing them to submit their original information to several government entities. In addition, this proposed rule change might extend how long it takes for a whistleblower to be compensated as differing governmental agencies determine who is best suited to compensate the meritorious whistleblower. This proposed change ignores the fact that most whistleblower programs have different eligibility considerations and confidentiality protections, which could make some whistleblowers

officers who act as Claims Review Staff. At a rate of 110 WB-APPs each year, each attorney could conceivably be tasked with making a recommendation on one application per month. If this is overly burdensome, I encourage the Commission to consider devoting additional resources to processing award applications.

unwilling or unable to claim compensation through another whistleblower program. Moreover, even without this rule, the Commission is already empowered to deny claims resulting from original information that did not lead to the covered action in question, making the SEC's proposed change largely irrelevant.

Some of the Commission's own examples do not clearly detail how this proposed rule would apply, evidencing the difficulty in applying the SEC's proposed standard. For instance, on page 33, the Commission provides a hypothetical "scheme to avoid tax obligations." In this example, the Department of Justice ("DOJ") charges a scheme to avoid tax obligations and imposes monetary sanctions. The Commission suggests that "such an action would lack a more direct or relevant connection to the Commission's whistleblower program relative to the IRS's award program." If a whistleblower provided information regarding tax evasion to the Commission and the DOJ was the only governmental agency that subsequently took action, there would be no covered action and no additional rulemaking is required for the Commission to deny an award claim. However, if a whistleblower provided the SEC with original information regarding tax evasion by a public company *that involved violations of federal securities laws*, the whistleblower should not be denied recovery under the SEC's whistleblower program because the whistleblower might someday, hypothetically, also be able to recover under the IRS's whistleblower program.

In my personal experience, I submitted a TCR concerning an FDIC-regulated financial institution under investigation by the SEC. I provided original information to both the FDIC and the SEC. If the FDIC imposes civil monetary penalties for related conduct, those penalties could form the basis for a related action claim, assuming that the Commission also brings an enforcement action. One reading of the proposed rule could exclude the value of the civil monetary penalties from the definition of "related action" because other whistleblower award programs exist, even though the other programs have significant limitations. Specifically, FDIC whistleblowers may have eligibility for an award of up to \$1.6 million under FIRREA, which has additional procedural requirements when compared to the SEC whistleblower program that I did not meet. As written, the proposed rule could inappropriately exclude from the definition of "related action" all monies collected by the FDIC, regardless of whether I actually received, or could receive, any compensation from the FDIC.

8. Instead of adopting the proposed rule, which would authorize the Commission on a case-by-case basis to consider whether an action should qualify as a related action, should the Commission adopt a categorical exclusion from the definition of related action for any judicial or administrative action that may have an alternative applicable award scheme?

The Commission should not adopt a categorical exclusion. In fact, that would be an even worse result than the proposed rule, for the same reasons set forth above. If the Commission is concerned about duplicate awards, the SEC could consider reducing a whistleblower award by the amount of compensation a whistleblower actually received from other whistleblower programs. It is unfair that the proposed rule prospectively excludes the potential recovery from other whistleblower programs because of the delays and uncertainty associated with award applications to every whistleblower program.

9. Should we repeal existing Exchange Act Rule 21F-3(b)(3) so that proposed Rule 21F-3(b)(4) would apply instead to afford a uniform treatment for all potential related actions for which multiple whistleblower programs might apply? Please explain.

Rule 21F-3(b)(3) adequately addresses the concerns the new rule attempts to resolve and should not be repealed. In the alternative, Rule 21F-3(b)(3) could be expanded to encompass other regulatory authorities.

Questions Regarding Proposed Rule 21F-6

While I agree with other commenters that the proposed rule sends the wrong message to prospective whistleblowers, and I struggle to understand how such a proposal reflects the program's policy priorities, I believe there are narrow circumstances in which it could be appropriate. There is a public policy interest in allowing the Commission to make discretionary adjustments to awards with otherwise unreasonably large or small absolute values, provided the Commission uses its discretion fairly and judiciously and claimants maintain due process. The proposed discretion to increase awards is particularly appropriate for situations where collections were less than the sanctions awarded. In those limited circumstances, the Commission should also consider applying the proposed rule retroactively.

13. With respect to proposed paragraph (d), are the \$100 million collected sanctions threshold and the \$30 million floor appropriate? Is there another threshold or floor that the Commission should adopt? If so, please explain what should be the appropriate threshold or floor.

I support the proposed thresholds because there is not necessarily a correlation between the size of a judgment and the seriousness of the violation. For numerous reasons, an accounting misstatement by a multi-billion-dollar company may result in a larger sanction than for a fraud committed by a microcap company. The size of the sanction, however, is not always indicative of how much assistance a whistleblower provided on a case. In fact, a whistleblower may spend more time and face greater risks with a smaller case.

There could be situations where an uncomplicated whistleblower submission could earn a whistleblower a significant personal windfall, even if the SEC only awarded 10% of the total recovery. This could be perceived as unjust, especially if the whistleblower did not suffer any retaliation or hardship from providing information to the Commission. It is reasonable, though hardly a priority, for the Commission to consider limiting awards in these rare situations, while still ensuring that whistleblowers are well-compensated given the impact of their information. Given the breadth of discretion proposed, whistleblowers should be allowed to appeal any discretionary reduction applied pursuant to the proposed rule.

15. In the context of two or more individuals acting together as a whistleblower, should the \$30 million floor in proposed paragraph (d) apply where the aggregate award to both individuals exceeds \$30 million or where the award to each individual would potentially exceed \$30 million? Please explain the reasons for your views.

The Commission should apply the floor on an individual basis because many individuals have other agreements that reduce their share of an award, such as cost reimbursements and contingency-fee arrangements with counsel.

Questions Regarding Proposed Rule 21F-8

27. Is it appropriate for OWB to advise a claimant of the Office's assessment that the claimant's award application for a Commission action is frivolous, and to offer the claimant the opportunity to withdrawal his or her award application(s), such that the application(s) would not be considered by the Commission in determining whether to impose a bar?

This proposal would still allow a bad faith actor to make multiple award applications and withdraw the applications, without any negative consequences, after notification from the Commission.

This would still waste Commission resources on frivolous applications. While notification is a good idea in principle, vexatious claimants should not receive an infinite number of warnings, while legitimate claimants await rulings from the Commission. The Commission should allow vexatious claimants to withdraw their first frivolous claim, after which additional frivolous claims would count towards the “three strikes” proposal, ultimately leading to the vexatious claimant’s permanent ban.

28. Is it appropriate for the Commission to adopt a rule that would permanently bar any applicant after he or she has been found by either the Commission to have submitted at least three frivolous award applications? Should the number of frivolous award applications be fewer or greater before a bar would be imposed?

I support this well-considered rule change and hope that this will help resolve the backlog of unanswered award applications.

Questions Regarding Proposed Rule 21F-9

Based on my experience with the Commission’s whistleblower program, this proposed rule appears to be far removed from the actual day-to-day practice of Enforcement Staff. Timely intervention in ongoing, serious securities violations often results from contact with members of the public. Several SEC employees have told me that they welcome direct contact regarding potential violations of the securities laws and that follow-up TCR submissions are acceptable. When a matter is time sensitive, these interactions can allow the SEC employees to act quickly without waiting for the TCR system to triage any pertinent information. By excluding these communications from consideration when granting an award, the Commission would create a procedural roadblock and discourage individuals from providing information through the most expedient channels, thereby contradicting the program’s mission.

The only stated rationales for this amendment are confidentiality protections and the Commission’s previously unannounced approach of excluding from award eligibility any information that a whistleblower submits directly to the SEC’s staff. When whistleblowers reach out to SEC staff beyond the TCR system, they do so to save time and protect the public interest, while potentially compromising their own anonymity. These whistleblowers should not also have to waive their right to a potential award.

In order to draft an effective TCR submission, a whistleblower and their counsel often spend a significant amount of time developing their submission. During this process, whistleblowers and/or their counsel often reach out to SEC employees to discuss the upcoming TCR submission. The proposed rule would illogically preclude a whistleblower from receiving an award for information contained in those communications with the SEC, despite the information’s clear contribution to the SEC’s investigation. The proposed rule’s limited exception – which is discretionary – would be the only protection for these communications.

31. Please comment on [whether] the limited exception provided for in proposed Rule 9(e) [is] appropriate. Should the exception be adopted? If so, should it be narrowed or broadened? Should the 30-day time period be extended or reduced?

The limited exception is insufficient. If the whistleblower’s original information leads to a successful enforcement action and the whistleblower complies with the requirements of Rules 21F-9(a)-(b), the means of the whistleblower’s initial communication with the Commission should not alter the whistleblower’s eligibility for an award. The proposed rule would otherwise significantly chill the communication of time sensitive information from whistleblowers to the Commission. Whistleblowers

would have to routinely file a TCR *before* every email or phone call with SEC employees to maintain award eligibility.

If the proposed rule is adopted, the Commission should expand the exception to encompass any information provided in written or oral communication with SEC employees that is *subsequently* documented in a TCR submission. I strongly encourage the Commission to consult with SEC employees to discuss the nature of their communications with whistleblowers. The proposed rule even appears to prejudice supplemental submissions, which often provide ongoing assistance throughout an investigation.

In my experience, a 30-day time period is insufficient for the preparation of a TCR submission, which often amounts to a substantial legal brief. I have filed TCR submissions the same day as my discussions with SEC staff, but I have also filed TCR submission almost a year after my initial discussions with the SEC. The significant variation depends on the complexity of the allegations, the progress of my research at the time of the initial communication, and the nature of the initial interaction.

Lastly, it is possible that the direct submission of original information outside of the TCR system could prompt an investigation and result in an enforcement action, without a whistleblower knowing the significance of the contribution. In such circumstances, the Commission should allow whistleblowers to remedy any perceived formal defects in a submission.

Questions Regarding Proposed Rule 21F-18

35. We seek comments about the proposed summary disposition process, including whether the categories of award applications that would be eligible for summary disposition are appropriate, whether the proposal would afford claimants sufficient process, and whether there are any specific modifications that we should consider making to the proposed process.

I support this proposed rule subject to my comments on Rule 21F-9 presented above.

Questions Regarding the Interpretative Guidance on the Meaning of Independent Analysis

The proposed Interpretative Guidance muddies the waters, introducing additional subjective standards for assessing the originality of independent analysis. This subjective standard could prejudice award applicants and discourage submissions from incorporating useful public information along with other analysis. Moreover, I am concerned that this subjective standard could not be applied uniformly.

The proposed *ex post* determination by the Commission, potentially many years later, of “whether the violations could have been inferred from the facts available in public sources” is vague and hypothetical. Unlike this proposal, a workable standard would assess whether the Commission actually inferred the violations from available public information. If this threshold was satisfied, it would establish a rebuttable presumption that a whistleblower did not submit original information. Conversely, if the Commission did not infer violations from the public record, the violations were clearly not “reasonably apparent.” I believe that the presumption against the originality of a whistleblower’s information should not be based on a hypothetical inference of what the Commission could have recognized at the time of the whistleblower’s submission.

As noted in the guidance, original information must still “lead to” a successful enforcement action to establish award eligibility. It is highly unlikely that unsophisticated public information (*e.g.*, share prices, news articles, press releases, or SEC filings) without further analysis would slip past the SEC. Therefore, it seems implausible that less substantive tips simply providing this basic information could “lead to” a successful enforcement action.

The examples provided in the interpretative guidance would benefit from threshold analysis. The proposal cites the information provided by Harry Markopolos against Bernie Madoff as an example of qualifying original information, but it is unclear whether the example is meant to represent the minimum threshold for independent analysis, an exemplary contribution, or something in between. The SEC could clarify its position by providing the public with several detailed examples that apply to the new subjective standard.

Additionally, the SEC's guidance dismissively describes some types of data as public information, ignoring the expertise required to obtain and understand the information. For example, information obtained from a FOIA request may be public, but it can be costly and time consuming to obtain. Providing the Commission with independently sourced FOIA materials as part of a submission detailing a fraud appears to be highly probative analysis, although the documents were technically publicly available. The Markopolos example relied on open interest data, which is public, but its significance may not be. I am concerned that the Commission's examples raise significant questions, while trivializing the difficulty of assembling and analyzing information from disparate public sources. The Commission risks seriously undermining the incentives for the type of rigorous and long-term investigatory work many whistleblowers conduct in order to expose pernicious frauds. If this incentive is taken away, many of the best independent analysis provided to the Commission may begin to dry up.

36. [captioned 30. on p.109]. We seek comment on the interpretation of "independent analysis" in light of the background set forth above. Are there additional considerations that the Commission should factor into the interpretation? For example, should the interpretation address more explicitly cases in which an individual selects, compiles, and presents publicly available information in a new way for the staff? If so, how?

As stated above, to the extent that almost all non-insider submissions rely at least in part on public information, it would be helpful to have clear examples that detail the Commission's proposed standards for independent analysis.

37. [captioned 31. on p.109]. Should any aspect of the interpretation be codified in rule text? For example, should the Commission adopt rule text that would make clear that for a whistleblower to be credited with providing "original information" through "independent analysis," the whistleblower's examination and evaluation should contribute "significant independent information" that "bridges the gap" between the publicly available information and the possible securities violations?

No, this is an inherently subjective determination. Interpretative guidance is the better mechanism for presenting this information. Without a robust definition of "bridging the gap," it is not clear that a rule change would accomplish anything.

Comment on the Discretionary Mechanism

Beyond the specific rule proposals and interpretations expressly advanced above, we invite public comment on whether the Commission could at a future point propose a rule that would permit the Commission on a discretionary basis to pay awards to whistleblowers in Commission enforcement actions that do not result in an order for monetary sanctions that exceeds \$1,000,000 or enforcement actions where the whistleblower's tip consisted of publicly available information. Similarly, do we have the statutory authority to propose and adopt a rule that would permit the Commission on a discretionary basis to make award payments that are not tied to the monetary payments collected where a meritorious whistleblower has received an award determination in a covered action, but the ordered monetary sanctions cannot be collected or the amount collected would result in a de minimis payment?

Alternatively, would a legislative change be required for the Commission to establish the type of discretionary award mechanisms described in this section? Moreover, whether by rule or legislative change, would such discretion to make awards in these instances be in the public interest? Please explain the grounds for your views.

All of the concerns addressed in this letter would be moot if the Commission consistently rewarded individuals who report violations to the Commission. Any mechanism for doing so, even when the information technically fails to qualify for an award or monetary sanctions, would certainly be welcomed and consistent with the purpose of the whistleblower program. Moreover, this additional discretion could incentivize individuals to provide additional information to the Commission, which would have previously been left unreported.

* * *

I appreciate the opportunity to comment and hope that my opinions and analysis will help the Commission with its proposed rulemaking. If there are any questions, I am available to discuss at your convenience, and can be reached through counsel.