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Submitted via e-mail to rule-comments@sec.gov

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

Re: Comments of the National Whistleblower Center on the SEC's Proposed Rulemaking: Whistleblower Program Rules (File No. S7-16-18)

Dear Commissioners:

Thank you for the opportunity to comment on your proposed regulations on the Whistleblower Program, as articulated in Release No. 34-83557; File No. S7-16-18.

The undersigned are the Managing Members of the Whistleblower Law Collaborative LLC, a Boston-based law firm representing whistleblowers nationwide. We each have over fifteen years' experience successfully representing whistleblowers, and a comparable amount of experience earlier in our careers in the Department of Justice and the Maryland and Massachusetts U.S. Attorney's Office.

First, let us take this opportunity to congratulate and thank you and your colleagues for the initial success of the Commission's whistleblower program. It has made an impressive start and has done much to detect fraud patterns that would not otherwise have come to light. We hope the success of this program will only grow in the years ahead. As we have seen both here and in other areas of the law, incentivizing whistleblowers to report fraud is the single most effective fraud recovery tool in the American legal system. No matter how competent law enforcement investigators may be, without insiders coming forward with relevant information, investigators' hands are largely tied and fraudsters remain two steps ahead.

Second, we echo the comments of our colleagues at Taxpayers Against Fraud ("TAF") in their recent submission in connection with these same proposed rule changes. We will not elaborate further here beyond what TAF has already submitted.

There are, however, two specific areas that TAF did not address or where we offer additional specific comments. These are Request Numbers 5 and 6 (p. 28), with reference to the proposed changes to the definition of “monetary sanctions” under Rule 21F-4(e).

Request for Comment Number 5: “Should ‘monetary sanctions’ be defined as those obligations to pay money that are obtained ‘as relief’ for the violations that are charged in a Commission enforcement action or a related action? Why or why not?”

Response: We do not believe this change is necessary, as many of commenters, including TAF, have stated. In the event, however, that the Commission believes a change is necessary, we respectfully suggest that this change, as currently worded, is confusing, not consistent with the statutory definition, and may well be counter-productive.

This proposed change drops critical language from the statute and the current definition that could have unforeseen adverse effects on the eligibility of whistleblowers for an award under the program and will almost certainly lead to confusion and uncertainty. Specifically, the change from monies “*ordered*” to be paid to monies “*required*” to be paid may in some circumstances lower the number from which the whistleblower award is calculated, and would therefore discourage whistleblowers from taking the risk of coming forward.

We are not sure of the reason for the proposed change, but it appears to come from two sources. *First*, in cases where the monies are paid under a Deferred or Non Prosecution Agreement or Commission settlement agreement, there may not be an “order” and thus the Commission may view the word “require” to be helpful in enabling whistleblowers to recover an award in those situations. *See* discussion of the Proposed Regulations and Request for Comment Numbers 1-2 at pp. 9-10, 16-22 and fns. 32, 38, and 42, frequently using the words “require” or “required” and discussing “monetary sanctions”). *Second*, it appears from the paragraphs preceding Request for Comment Number 5 (specifically pages 26-28), that the Commission’s has some concern about distinguishing between certain kinds of payments that are ordered and how this impacts the gross amount ordered to be repaid to defrauded investors, and the net amount actually paid to defrauded investors. If this is the intent behind the proposed rule change, then a whistleblower’s award may be calculated only on the net amount actually paid.

Such a change could have a chilling effect on whistleblowers. Why? Because there are many cases where the costs of recovery and administration of claims of victims cannibalizes a substantial portion – or all – of the available funds to go back to defrauded investors. In a \$100 million fraud case where a receiver successfully recovers \$10 million but bills \$7.5 million in professional expenses and fees, it would seem unduly harsh to calculate the award on \$2.5 million.

While we appreciate the Commission's expressed interest in making sure that the Investor Protection Fund is not depleted, we believe this proposed change is unnecessary and would discourage potential whistleblowers. The Commission specifically set up the Whistleblower Program in a way that would ensure that whistleblower awards would not be taken or withheld from harmed investors but rather come from the separate Investor Protection Fund. This proposed change is inconsistent with the original intent of the Program, which was designed to encourage whistleblowers to identify and report fraud. We are concerned that this proposed change, would, in fact, punish whistleblowers by reducing their awards because of billings from attorneys, accountants, or other professionals. The award should be based on the full gross amount recovered, which is a truer measure of the tip's value and a more valid measure of the scope of the fraud uncovered.

As written, the proposed rule could act as a "poison pill" that would undercompensate the whistleblower and denigrate the magnitude of what was actually accomplished. A few harsh results under this scenario would chill future whistleblowers from coming forward.

Accordingly, if the Commission nevertheless decides to change the longstanding *statutory and regulatory* language of the current definition of "monetary sanctions," we propose that the wording be as follows to be consistent with the statutory (and current regulatory definition): the words "or ordered" be inserted after the word "required" in both sections 1(i) and (ii). In addition, we propose that the words "restitution, forfeiture, and prejudgment interest" be added to (1)(i) (compare Commission's discussion at fn. 42, p. 20 describing types of monetary relief in DPAs, NPAs, and administrative settlements).

Request for Comment Number 6: Are there additional classes of monetary requirements or payment obligations (beyond those discussed above) that may be ordered in an action covered by the Commission's whistleblower award program that the Commission should specifically consider or address in clarifying the definition of "monetary sanctions"?

Response: Yes. As several other commenters have noted, there are situations where other proceedings are directly connected to the contribution of the whistleblower and where payments are ordered that nonetheless may be deemed to fall outside the proposed definition of "monetary sanctions." *See, e.g.,* Mr. Markopolous' comment submitted on September 14, 2018, in which he points out that proceedings in bankruptcy court may well be the result of a successful whistleblower tip and enforcement action, yet monies collected and distributed pursuant to bankruptcy proceedings would, under the proposed rule, fall outside of the definition and not be counted.

We believe there are other, similar, situations where sanctions or settlements result because of the Commission's work and/or the whistleblower's tip but would potentially be outside the proposed definition and therefore not eligible for an award. As in the bankruptcy scenario, as one example, these situations could result in a technical exclusion unduly harsh to the whistleblower.

If the Commission wants whistleblowers to come forward, as we believe it does and should, the definition of “monetary sanctions” should be sufficiently flexible (as we believe it currently is) to allow the Commission to consider sanctions obtained in any proceeding which results from the Commission’s action (or a “related action”), where there is a strong nexus (e.g., a common nucleus of operating facts) between the matter in question and the whistleblower’s tip and the ensuing investigation, and results in monetary relief for injured parties such as investors. In other words, the Commission’s definition of “monetary sanction” should be sufficiently flexible to accurately reflect what the whistleblower’s tip accomplished in the form of relief to defrauded investors. Otherwise, potential whistleblowers may not receive adequate numeric credit for the full value of their tips, and Congress’ intent in enacting the whistleblower program will be undermined.

Thank you for your consideration.

Respectfully submitted,

/s/

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