



CENTER FOR CAPITAL MARKETS
C O M P E T I T I V E N E S S

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September 18, 2018

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: **Amendments to the Commission’s Whistleblower Program Rules;
17 CFR Parts 240 and 249; Release No. 34-83557; File No. S7-16-18;
RIN 3235-AM11**

Dear Mr. Fields:

The U.S. Chamber of Commerce (the “Chamber”) created the Center for Capital Markets Competitiveness (“CCMC”) to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century global economy.¹ The CCMC welcomes the opportunity to comment on the proposed rules issued by the Securities and Exchange Commission (the “SEC” or “Commission”), entitled Amendments to the Commission’s Whistleblower Program Rules (the “Proposing Release”).²

The Chamber views a strong and fair SEC as an essential element of maintaining efficient capital markets by providing investors and businesses with the certainty needed to transfer capital for its best use. A rigorous enforcement regime ensures efficient markets by rooting out fraudsters and other bad actors, but if not properly calibrated, could discourage public capital market activities. This issue is especially acute in light of the declining number of public companies—in the past twenty years, the number of US public companies has been cut in half.

¹ The U.S. Chamber of Commerce is the world’s largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region.

While the Chamber has some continuing concerns about the Whistleblower program as mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and believe that other reforms should be undertaken, we are encouraged that elements of the Proposing Release seek to rationalize discrete elements of the Section 21F rules. This effort helps to provide proper balance to the program and allow Whistleblowers to report wrongdoing. In brief the Chamber:

- Believes that a person who knowingly participates in wrongdoing that harms investors should not profit from having unclean hands by being eligible for a bounty award of any kind. Rule 21F-2(a) should therefore be revised to make this point abundantly clear;
- Does not support the proposed redefinition of the term “action” to include deferred prosecution agreements (“DPAs”), non-prosecution agreements (NPAs (each defined below) or other kinds of settlement agreements;
- Supports the narrow definition of “monetary sanctions” proposed by the Commission;
- Generally supports the proposed amendments that would eliminate the potential for double recovery under the current definition of “related action” by preventing a bounty seeker from receiving multiple recoveries for the same information from different whistleblower programs;
- Does not support granting the Commission broad discretion to vary the conditions of payment in the case of smaller and extraordinarily large bounties;
- Supports the Commission in its desire to conform its whistleblower definition to the criteria laid out by the Supreme Court, but urge the Commission to amend its rules to eliminate the possibility of making payments to bounty seekers with unclean hands;
- Supports conforming the forms used by SEC whistleblowers to those that are already referenced in the code of Federal Regulations;

- We are supportive of the Commission’s efforts to root out fraud and abuse associated with bounty seekers who submit false information or otherwise abuse the bounty application process;
- Supports proposed amendments that provide greater clarity regarding the criteria required to obtain a large bounty, however the Commission should not retain the right to waive this criteria as it would likely open the SEC to endless waiver requests from bad actors;
- Supports limiting abuse of the program by unscrupulous bounty seekers, we support the proposed amendments to limit the administrative record on appeal;
- Agrees that the Commission and its staff should not devote the agency’s limited resources to a prolonged process concerning non-meritorious claims and support the proposed amendments to the summary disposition mechanism;
- Generally supports the Commission’s proposed guidance concerning “independent analysis”, but believe a bounty seeker must, in conducting that analysis, provide concrete, actionable information to the Commission rather than the mere “inference” of wrongdoing; and
- Does not support creating an additional discretionary award mechanism for matters outside those contemplated by Congress under Section 21F.

These points are discussed in more detail below.

DISCUSSION

The bounty program established by the Dodd-Frank Act and administered by the SEC has operated on a broad set of nebulous and subjective criteria. While a certain degree of confidentiality is required under Section 21F of the Exchange Act the paucity of details in the orders granting (and denying) bounty awards provides little if any decision-useful information to regulated persons as to what conduct they should avoid.

We continue to be concerned about the ongoing impact the Commission's bounty rules have had on the efficacy of internal corporate compliance programs. The bounty program also suffers from a significant structural flaw in that it permits a wrongdoer—one who actually planned, aided, abetted or caused a violation of law—to be eligible to receive a bounty. Rather than undertaking a top to bottom assessment as to how the bounty rules have impacted the marketplace, however, the bulk of the proposed amendments would simply provide the SEC additional leeway in making award determinations.

Definition of an “Action”

As the Proposing Release notes, the SEC's bounty rules currently do not address whether the SEC may pay a related-action award when an eligible whistleblower voluntarily provides original information that leads to a DPA or NPA entered into by the US Department of Justice or a state attorney general in a criminal proceeding. Under the proposed amendments, the SEC would be able to make award payments to whistleblowers based on money collected as a result of such DPAs and NPAs, as well as under settlement agreements entered into by the SEC outside of the context of a judicial or administrative proceeding to address violations of the securities laws.

We do not support the proposed redefinition of the term “action” to include DPAs, NPAs or other kinds of settlement agreements. As the Proposing Release itself concedes, these types of agreements are not always filed in court or subject to judicial oversight, which we believe is an important check and balance on the process. Moreover, the Commission does not have any particular expertise in the myriad of state laws that may come into play with respect to a settlement with a particular state attorney general, and the standards of culpability under state law may differ considerably from those under the federal securities laws. New York's Martin Act,³ for example, contains no scienter requirement and is largely a strict liability regime for securities fraud. Introducing these kinds of awards into the bounty system on a regular basis would lead to inconsistency in the eligibility standards under the Commission's rules, and could create an imbalance among the states.

³ New York General Business Law article 23-A, §§ 352-353.

We also respectfully disagree with the Proposing Release’s assertion that “the statutory term ‘administrative action’ is sufficiently ambiguous and broad enough to permit” the Commission “to include DPAs and NPAs . . . or settlement agreements entered into by the Commission outside of the context of judicial or administrative proceedings” Such a novel interpretation is contrary to the plain meaning of the term “action”, conflicts with the current usage of the term “action” in the Commission’s existing Section 21F rules, lacks any basis in judicial precedent, and also lacks any basis in the Dodd-Frank Act itself—a statute that runs nearly 900 pages in length. Instead, DPAs, NPAs and settlement agreements are bilateral (or multilateral) contracts among regulators and third parties, are entered into voluntarily by those third parties, and cannot be unilaterally implemented by any individual regulator. In sum, to redefine “action” to include DPAs, NPAs and settlement agreements far exceeds the deference arguably afforded to the Commission under *Chevron*.⁴ Indeed, because the text of Section 21F of the Exchange Act is clear on its face, there is no need (or authority) to probe deeper into any hidden meanings under *Chevron* in the first instance.

Definition of “Monetary Sanctions”

We support the narrower definition of “monetary sanctions” proposed by the Commission. We do not, however, support the proposed amendments to the extent they would permit bounty payments in respect of DPAs, NPAs and settlement agreements, as explained in the preceding section of this letter.

Definition of “Related Action”

The proposed amendments would also eliminate the potential for double recovery under the current definition of “related action” by preventing a bounty seeker from receiving multiple recoveries for the same information from different whistleblower programs. We are supportive of this objective and believe it would improve the Commission’s stewardship over the disbursement of public funds. However, unlike the proposed revision that would authorize the Commission to determine on a case-by-case basis whether an action qualifies as a related action, we believe the Commission should categorically exclude any judicial or administrative

⁴ See generally *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

action that may have an alternative award scheme. The CCMC cannot conceive a situation in which a bounty seeker should ever receive a double recovery, which eliminates the need for any discretion to make a duplicative award.

Considerations for Smaller and Extraordinarily Large Bounties

The proposed amendments would provide additional discretion to the Commission when considering for smaller and extraordinarily large bounties. For bounties less than \$2 million, the proposed amendments would authorize the SEC in its discretion to adjust the bounty percentage upward under certain circumstances (subject to the 30% statutory maximum) to an amount up to \$2 million. For bounties of at least \$100 million, the proposed amendments would authorize the SEC in its discretion to adjust the award percentage so that it would yield a bounty payment (subject to the 10% statutory minimum) that “does not exceed an amount that is reasonably necessary to reward the whistleblower and to incentivize other similarly situated whistleblowers.” However, in no event would the bounty be adjusted below \$30 million under the proposed amendments.

The CCMC supports the Commission bringing more discipline to the payment of bounties. We are troubled by the wide, subjective discretion that the Commission has previously granted itself in the payment of bounties, which undermines public confidence in the agency. We also continue to be concerned that the payment of life-altering bounties has had a material adverse impact on the efficacy of internal compliance systems. Due to the Dodd-Frank Act and in pursuit of multi-million-dollar payouts, large numbers of employees with knowledge of potential wrongdoing now go directly to the SEC rather than make use of internal reporting channels, allowing potentially violations of law to continue unabated, undermining internal controls and harming investors in the process.⁵

Internal compliance systems are often more efficient than external reporting in correcting financial misstatements and increasing the accuracy of management’s assessment of internal controls. Because the Commission’s bounty rules provide little countervailing incentive for employees to report internally, employees now choose

⁵ Since the objective of Section 404 of the Sarbanes-Oxley Act is to improve internal controls, it seems odd to us to incentivize behavior that has the opposite effect.

between their own financial benefit and the health of their company, all to the detriment of investors.

For these reasons, we do not support any effort to “round up” bounty payments below \$2 million. If a particular tip does not justify a bounty payment in excess of that amount under the Commission’s already generous criteria, we see no policy reason to provide even more discretion to top off a lower award. Likewise, we see no reason why collecting monetary sanctions above \$100 million (itself an arbitrary number) should alter the criteria for payment to a bounty seeker or otherwise provide any kind of floor. We therefore oppose the proposed amendments to Rule 21F-6 in their totality.

Additionally, in order to incentivize the use of internal compliance systems, the SEC should also consider imposing a significant discount on any award in which a whistleblower does not make a report to the company involved at the same time they report to the SEC. There is nothing in the statute that would preclude such a discount, and a bright line standard would have a motivating influence upon whistleblowers to report to companies as well as the SEC.

Status, Eligibility, Confidentiality, and Anti-Retaliation

In response to the Supreme Court’s ruling in the *Digital Realty* case,⁶ the Proposing Release also proposes a uniform definition of “whistleblower” that would apply to all aspects of Section 21F of the Exchange Act, including the reward program, the heightened confidentiality requirements and the employment anti-retaliation protections. The SEC would confer whistleblower status only on (1) an individual (2) who provides the SEC with information “in writing” and only if (3) “the information relates to a possible violation of the federal securities laws (including any law, rule, or regulation subject to the jurisdiction of the SEC) that has occurred, is ongoing, or is about to occur.”

We support the Commission in its desire to conform its whistleblower definition to the criteria laid out in *Digital Realty*. We agree that clarifying that reports must be made “in writing” is a sensible condition. However, for purposes of anti-

⁶ *Digital Realty Trust, Inc. v. Somers*, 583 US ___, 138 S. Ct. 767 (2018).

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retaliation protection, we believe that protection should only attach at such time as a bounty seeker submits Form TCR to the Commission. The Proposing Release lays out a series of complicated hypotheticals regarding competing email and TCR submissions that make the case for having a bright line test for anti-retaliation protection. Confidentiality only attaches under the Commission's rules when Form TCR is submitted, and a bounty seeker is only eligible for an award when she submits Form TCR. We believe it will be much more straightforward for anti-retaliation protection to attach at the same time and not be subject to a different test.

We firmly believe that a person who knowingly participates in wrongdoing that harms investors should not profit from having unclean hands by being eligible for a bounty award of any kind. Rule 21F-2(a) should therefore be revised to make this point abundantly clear.

Accordingly, Rule 21F-2(a) should be further modified to read as follows:

(a) *Whistleblower status.* (1) You are a whistleblower for purposes of Section 21F of the Exchange Act (15 U.S.C. 78u-6) as of the time that, alone or jointly with others, you provide the Commission with information in writing **on Form TCR** that relates to a possible violation of the federal securities laws (including any law, rule or regulation subject to the jurisdiction of the Commission) **by another person** that has occurred, is ongoing, or is about to occur, **and you did not directly or indirectly participate in, plan, direct, facilitate, control, aid, abet or cause such violation.**

(2) A whistleblower must be an individual. A company or other entity is not eligible to be a whistleblower.

Because a culpable person would no longer be eligible for any bounty award, Rule 21F-6(b)(1)—which at present merely treats culpability as a factor that may or may not decrease a bounty payout—becomes unnecessary and should also be deleted in its entirety.

To clarify eligibility for retaliation protection, we would also revise proposed Rule 21F-2(d) (3) as follows:

(3) To qualify for retaliation protection, you ~~do not need to~~ **must** satisfy the procedures and conditions for award eligibility in Rules 21F-4, 21F-8, and 21F-9 (§§ 240.21F-4, 240.21F-8, and 240.21F-9).

Use of Forms

On the basis of the Commission's assurance that "the forms designated on the Commission's website for use in the whistleblower program would be substantially similar to those currently referenced in the Code of Federal Regulations", we do not object to the proposed amendments described in Part II.F of the Proposing Release. To allow the public sufficient time to become familiar with any revised forms, we agree that any revisions to paper Form TCR or Form WB-APP should not take effect until the expiration of a 30-day period after posting on the Commission website.

False Information and Abuse of Process

Since the SEC's bounty rules were first proposed in 2010, we have repeatedly expressed our deep apprehension that the prospect of lottery-sized payouts would inundate the Commission and its staff with all manner of frivolous complaints by unscrupulous bounty seekers, distracting SEC personnel and diverting the agency's limited resources away from investigating meritorious cases. We are not surprised then that the Proposing Release concedes that some "claimants have imposed an undue burden on the award determination process by submitting dozens and in some cases over a hundred award applications that lack any colorable connection" to information they have provided and completed enforcement actions.

A recent analysis from the *Wall Street Journal*, for example, found that over the life of the bounty program, individuals who received awards waited on average about 210 days for a decision, while those individuals who were rejected got word of their rejection within an average of 730 days.⁷ We suspect that absent significant reforms to the bounty program, these wait periods will only grow, and it will become more difficult for the Commission to separate frivolous cases from those which have merit.

⁷ SEC Whistleblower Payouts Slow Amid Deluge of Reward Seekers. Wall Street Journal August 5, 2018.

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We are supportive of the Commission's efforts to root out fraud and abuse associated with low-quality complaints. We therefore support the proposed amendments to Rule 21F-8 to enhance the Commission's authority over bounty seekers who submit false information or abuse the bounty application process. The apparent abuse of the system provides further support for our objections to several of the proposed amendments detailed elsewhere in this comment letter. We urge the Commission to reconsider how the proposed amendments to the Section 21F rules would have the unintended but entirely predictable effect of further encouraging baseless or exaggerated complaints and further misuse of the bounty program by numerous bad actors.

Form TCR

We support the proposed amendments to Rule 21F-9 to the extent they provide greater clarity about the parameters around the criteria for obtaining a bounty and, consistent with our earlier remarks, would discourage frivolous activity on the part of bounty seekers. We do not support granting the Commission discretion to waive these same criteria in proposed Rule 9(e) because doing so would open the agency to endless waiver requests from the same bad actors that the agency is trying to limit elsewhere in the proposed amendments to the Section 21F rules.

Materials That May Form the Basis of an Award Determination

In further support of the objective of limiting the burden placed on SEC staff associated with processing non-responsive or non-timely submissions, we support the proposed amendment to Rule 21F-12(a)(3) regarding timely submission of information. Likewise, we similarly support the proposed amendments to Rule 21F-12(a) (6).

Administrative Record on Appeal

Again with a view toward limiting abuse of the program by unscrupulous bounty seekers, we support the proposed amendments to Rule 21F-13.

Summary Disposition Process

As noted elsewhere in this comment letter, we wholeheartedly support measures that permit the Commission to deploy its limited resources in pursuit of meritorious actions and away from frivolous or non-serious claims. We agree that agency staff should not waste time unnecessarily in processing non-meritorious claims. Accordingly, we support the proposed amendments to the summary disposition process.

Interpretive Guidance Regarding “Independent Analysis”

The CCMC continues to be concerned that SEC staff who could be pursuing genuine enforcement cases are instead sidelined separating wheat from chaff when bounty seekers submit information that is already in the public record and contains no original analysis. As the Proposing Release suggests, we believe there is merit in grounding the “independent analysis” framework in the federal case law under the False Claims Act and the public disclosure doctrine. The federal courts frequently look to whether essential facts that are sufficient to give rise to an inference of fraud are in the public domain. Therefore, we support the general approach that the Commission’s proposed interpretive guidance that no “analysis” exists if the facts disclosed in public documents are already sufficient to raise an “inference” of the possible violations provided in the bounty seeker’s purported tip.

Although we support this approach in general terms, we believe that the term “inference” does much of the work under the proposed interpretive guidance. We are concerned that it sets too low a standard and may be inconsistent with the False Claims Act jurisprudence and the Commission’s own standard under current Rule 21F-4(b) (3). A mere “inference” is, to us, associated too closely with hearsay and innuendo, not “information that is not generally known or available to the public.” Rather than a standard that supports a simple “inference” of wrongdoing, the tip should provide concrete, actionable information to the Commission.

Potential Discretionary Award Mechanism

Part IV of the Proposing Release seeks comment on a broad discretionary award mechanism that could be created in the future. We do not believe that such a program is a wise use of public funds.

A recurring theme in the Proposing Release—one that we support—is rationalizing the various processes under the Commission’s bounty seeker program to discourage frivolous complaints so that agency resources are deployed to more productive uses. We do not believe it is sensible to tack in the opposite direction and create a program with no criteria. Chaos would follow.

Removing the guardrails established by Congress and the SEC will encourage trivial, non-actionable claims and overwhelm the SEC staff who must process them. Because this broader program goes beyond what Congress intended under Section 21F of the Exchange Act, we also do not believe that the Commission could (or should) redistribute public funds in this way without a specific appropriation from Congress.

For these reasons, we do not support creating a mechanism that goes beyond the limits set by Congress.

Other Issues

Respectfully, we are disappointed that the Proposing Release abruptly warns commenters that the Commission “is not proposing any other changes to the whistleblower program rules . . . , nor is the Commission otherwise reopening any of those rules for comment.” Such a bold statement is an unwelcome departure from Commission practice in virtually every other notice of proposed rulemaking, which typically foster a broad debate of the issues and encourage the public’s input on a wide range of issues. More fundamentally, in limiting itself in this way the Commission is missing the opportunity to probe additional avenues to improve the operation of the Section 21F rules for the benefit of investors.

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Conclusion

We believe the Proposing Release is a small but nonetheless important step towards improving the Commission's bounty rules. The Proposing Release itself concedes that many of the unintended consequences the CCMC warned about when the Section 21F rules were first proposed in 2010 have now come to pass. We are disappointed but not surprised that the Commission has found itself overwhelmed at times by a large number of low-quality complaints advanced by putative bounty seekers more concerned with enriching themselves than truly protecting investors. We encourage the Commission to continue studying ways to improve this well-intentioned but at times unfocused program.

We thank you for your consideration of these comments and are available to discuss them further with the Commissioners or Staff at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read 'TK' followed by a long horizontal flourish.

Tom Quaadman

cc: The Honorable Jay Clayton
The Honorable Kara M. Stein
The Honorable Robert J. Jackson, Jr.
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman