

TAF

TAXPAYERS
AGAINST
FRAUD

THE FALSE CLAIMS ACT LEGAL CENTER

September 18, 2018

Mr. Brent J. Fields
Secretary, United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number S7-16-18
Proposed Amendments to the SEC's Whistleblower Program Rules
Submitted by electronic mail to rule-comments@sec.gov

Dear Secretary Fields:

The Securities and Exchange Commission recently announced a proposal to amend certain aspects of the rules governing the SEC Whistleblower Program. As the leading non-profit organization dedicated to the promotion and protection of the effectiveness of federal whistleblower programs, Taxpayers Against Fraud (TAF) takes this opportunity to comment on the proposed rule changes.

We also commend to the Commission's attention the comments jointly submitted by the National Employment Lawyers Association, the Government Accountability Project and Public Citizen, which focus on the proposed rules implementing the anti-retaliation provision of 15 U.S.C., § 78u-6(h); the comments submitted by Robert M. Thomas, Jr. and Suzanne E. Durrell of the Whistleblower Law Collaborative; and the comments submitted by Harry Markopolos.

TAF is a non-profit organization whose mission is to maintain the integrity and advance the effectiveness of whistleblower reward and private enforcement provisions contained in federal and state laws, including the Securities Exchange Act, the Commodity Exchange Act, the federal and state False Claims Acts, and the Internal Revenue Code. These laws empower and encourage citizens and organizations in the private sector to report incidents of fraud, waste and abuse that improperly divert taxpayer funds from government agencies and programs.

TAF is uniquely situated to comment on the factors necessary to build and sustain a successful whistleblower program. Since 1986, TAF's members, in partnership with the Department of Justice, have represented whistleblowers in federal False Claims Act ("FCA") matters that have generated tens of billions of dollars in civil and criminal recoveries. The FCA's whistleblower provisions are recognized as DOJ's chief civil fraud enforcement tool and are a model for the states and the Internal Revenue Service, which have adopted similar whistleblower statutes. FCA whistleblower enforcement has also yielded serious efforts to improve internal compliance within the business community and is estimated to have saved tens of billions of dollars through deterrent effects.

There are at least five key factors to the FCA's success. First, the statute provides a guaranteed, non-discretionary award if the whistleblower's information leads to the government's recovery or judgment. Second, the statute provides federal court oversight over the whistleblower award determination. Third, the statute creates a structure for whistleblower collaboration in investigation and prosecution, bringing needed private resources to bear. Fourth, there are limited and discrete bases for denying an award under the statute, and it creates no broad disqualifications based on an individual's status. Fifth, the statute does not require that an individual exhaust internal reporting procedures before filing a whistleblower action.

Whistleblowers, therefore, have confidence that if they provide information that leads to an FCA judgment or settlement, they will almost certainly receive a guaranteed award. They are assured that the award can be reviewed by a court, if the Justice Department does not adequately value their contribution. This certainty has encouraged more than 10,000 whistleblowers to report allegations of fraud to the Department of Justice through the False Claims Act, and the payoff to taxpayers has been huge. Altogether, the US Treasury and state governments have recovered well over \$60 billion in civil settlements and criminal fines as a result of *qui tam* cases since Congress strengthened the whistleblower provisions of the FCA in 1986.

Introduction

At the outset, we would like to acknowledge the thoughtfulness of the Commission's staff in drafting the comments and encouraging members of the public to weigh in. In particular, we greatly appreciate the SEC's clear recognition that the Whistleblower Program has been an extraordinary success and has contributed significantly to the Enforcement Division's fight against fraud and other wrongdoing. In our view, any proposed changes to these rules must be viewed through the prism of the general acknowledgment of the program's successful development over the past decade.

We wholeheartedly support the proposed changes that build on the program's successes and address areas in demonstrated need of improvement. These include enhanced efficiency of the intake and award-making processes, which we believe will augment the efficiency and credibility of the program. We also embrace the proposed rules that provide clear answers to questions concerning eligibility to participate in the program, consistent with Congress's intent to encourage concerned individuals to bring meritorious cases to the attention of the Commission's enforcement personnel.

At the same time, we are concerned that the proposed limits to award payouts threaten to undermine this same central element of Congress's clear intent when it enacted the Whistleblower Program in 2010: the creation of incentives for a broad pool of potential whistleblowers to come forward and report wrongdoing. Accordingly, we oppose those proposed rules that would inject unnecessary and unsupportable ambiguity into the operation of the Whistleblower Program. These changes would create uncertainty and drive potential whistleblowers away, causing many who might otherwise have come forward with meritorious cases to decline to participate in the program.

The SEC Whistleblower Program is a revolutionary investor protection initiative that incentivizes individuals to voluntarily provide the Commission with original information about violations of the federal securities laws. The Program was crafted in response to a series of financial frauds that caught the public and the Commission unawares and led to massive financial devastation across global markets and for individual investors. By any objective measure, the Program has been a resounding success, in large part because of its robust incentive structure. Since 2012, the first full year of data on the program, tips have increased more than 50%. Mary Jo White, the 31st Chair of the SEC, applauded the growth in quantity and quality of whistleblower submissions in her 2015 speech "The SEC as the Whistleblower's Advocate." In her remarks, she noted that

. . . the regime does, in fact, create powerful incentives to come to the Commission with real evidence of wrongdoing that harms investors and it meaningfully contributes to the efficiency and effectiveness of our Enforcement program. And whether the whistleblowers are reluctant or eager, motivated by a desire to do what's right or by the prospect of financial reward, or both, they have, and will continue to, come forward.

The Whistleblower Program offers attractive incentives and powerful protections to the public, thereby encouraging individuals to take the enormous risks inherent in reporting significant financial fraud schemes. The SEC deliberately set no ceiling on the amount of an award, focusing on the nature and extent of the substance and assistance offered by

the whistleblower to prevent or stop ongoing wrongdoing rather than the motives of the witness. Consider how large-scale frauds that extended over many years, such as those involving Siemens and Enron, might have been stopped sooner if a whistleblower had been emboldened to come forward. By contrast, the resolution of the Merrill Lynch case in 2016 demonstrates that whistleblowers who are able to rely upon the protections and incentives of the Program can help detect and punish misconduct that puts billions of dollars of customer funds at risk and potentially return millions of dollars to wronged investors.

Comments

Request for Comment #1, p. 22

Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)

We support this proposed amendment. Clarity is critical for participants in the Whistleblower Program, and this proposed change will eliminate uncertainty as to an important consideration for potential whistleblowers (*i.e.*, that they do not run the risk of losing an award depending on the procedural tool the SEC or another regulator uses to impose sanctions on the wrongdoer). This is consistent with Congress's intent to incentivize and reward whistleblowers who assist the government in preventing potential violations or stopping ongoing misconduct, and is also consistent with current SEC practice. We agree with the staff that it would be contrary to congressional intent to deprive a whistleblower of a payout based on the nature of the enforcement proceeding a regulator decided to bring.

Requests for Comment ## 2-3, pp. 22-23

Alternate Proceedings

The intent of Congress was to incentivize and reward Whistleblowers who assist the SEC and related regulators to bring successful actions, regardless of how the actions and related monetary sanctions are documented. The rules should make clear that if the information assists the SEC and related regulators in obtaining monetary sanctions, the whistleblower will be eligible for an award, regardless of the mechanism by which the sanctions were levied.

Monetary sanctions exceeding \$1 million that are ordered and paid in connection with any type of resolution based on whistleblower information that "led to" or significantly contributed to that resolution should be included in the proceeds subject to such an award. For example, this should include sanctions exceeding \$1 million imposed in connection with an Office of Compliance Inspections and Investigations (OCIE) exam

based on whistleblower information that led to or significantly contributed to the exam, regardless of whether the matter was referred to the Division of Enforcement.

We are concerned about a lack of transparency in the proposed approach, which may have negative consequences on an otherwise deserving whistleblower. The rules should include a more clearly defined procedure for the Office of the Whistleblower to notify the public and potential whistleblowers that monetary sanctions exceeding \$1 million have been levied, akin to the Notice of Covered Action process currently followed by the Office. The notice process should be designed to facilitate the provision of awards to meritorious whistleblowers. It is neither just nor efficient to start the 90-day clock for the application process with the issuance of a press release or (even worse) the execution of an agreement by the final signatory, occurrences of which a whistleblower is unlikely to be aware.

Request for Comment ## 5 and 6, p. 28

“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?”

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”?

Far from clarifying the process for determining the appropriate circumstances under which whistleblowers qualify for awards, this proposal inserts unnecessary ambiguity and does not appear to be justified by any actual problem. In our view, and with the single exception noted immediately below, there is no reason to alter a clear definition of monetary sanctions or to eliminate any category of collected funds from the pool.

We do, however, see a need for clarification of one aspect of “monetary sanctions.” In providing relevant examples, the proposed rule unambiguously reflects the Commission’s understanding that “monetary sanctions” includes funds obtained by an SEC-requested receiver. In our view, the Commission should also make clear that funds obtained by a SEC-requested trustee in bankruptcy will receive the same treatment. The primary purpose of the two proceedings is essentially the same: to place control of the company in the hands of a disinterested party in order to properly run, reorganize or liquidate the business and protect investors and creditors. Indeed, while there are procedural differences, “receiverships are the historical progenitor of the modern Chapter 11, and they share many functional analogs. The 1978 Bankruptcy Code incorporated many aspects of the equity receivership and authorized the appointment of a trustee with

powers similar to that of a receiver.” Kevin Moore, *The SEC’s Role in American Corporate Reorganization: A Historical Analysis*, 2011 Ann. Surv. of Bankr. Law 6 (2011).

The Commission itself has stated in the proposed rule that “our view [is] that Congress did not intend for meritorious whistleblowers to be denied awards simply because of the procedural vehicle that the Commission (or the other authority) has selected to pursue an enforcement matter.” Accordingly, we see every reason for the Commission to make explicit that whistleblowers are entitled to an award based on recoveries by an SEC-requested bankruptcy trustee just as they would be entitled to an award based on recoveries by an SEC-requested receiver.

Requests for Comment ## 7-9, pp. 39-40

Proposal to bar a whistleblower’s recovery from the SEC where there is a potential related action that is arguably more closely related to another whistleblower program

We oppose this proposal because it injects ambiguity into what should be (and what Congress intended to be) a straightforward process to reward eligible whistleblowers whose information leads or significantly contributes to a successful SEC action in which sanctions exceed \$1 million. As the SEC release acknowledges, “the Commission never paid an award on a matter where a second whistleblower program also potentially applied to the same matter,” so there is no need for the proposed change.

Consider the likely disincentives this change would create and the adverse outcomes that would result. A potential whistleblower with significant information about a federal securities law violation might well decide not to report to the SEC because s/he is forced to guess which payment program is more closely associated with the wrongdoing. The risk that the Commission might declare after the fact that a state statutory incentive award program is more directly applicable to the allegations raised by the whistleblower would create a powerful disincentive to file with the SEC.

We believe that it is in no way inconsistent with congressional intent to reward a whistleblower under multiple programs in the unique circumstance where s/he possesses information that a company has cheated the IRS out of rightfully owed taxes while at the same time withholding material information from its investors about its actual profits. What if a whistleblower knew that an insider sold shares ahead of the announcement of a restatement of profits due to the payment of back taxes and penalties? Why would the SEC discourage the reporting of such violations by designating them as solely IRS matters?

The efficiency of the SEC Whistleblower Program drives whistleblowers and their counsel to advocate reporting information to the Commission either concurrently or to the exclusion of other potentially affected agencies whose award programs they consider less effective, much to the benefit of the SEC. The Commission risks the loss of this benefit by telling whistleblowers that even if they come to the SEC and help bring a successful action, the Commission may later decide to force them to seek an award elsewhere. The release includes no legal or factual justification for such a fundamental change in the program.

Requests for Comment ## 12-14, pp. 57-58

Proposal to allow the Commission to limit awards in large cases

As the SEC contemplates whether to shoehorn a “reasonableness” standard into the rules governing its consideration of the appropriate size of an award to a whistleblower who helped the Commission bring a substantial successful action, it is important to note that the size of whistleblower awards has no impact on the SEC’s budget or individual taxpayers. To the contrary, awards come from an Investor Protection Fund that is funded solely by monetary sanctions from enforcement actions. The Commission’s release refers to the proposed new guidelines as a means to protect the Investor Protection Fund, but the proposal contravenes the statutory language specifically stating that the balance in the fund must not be taken into account when making whistleblower award amount determinations. The inclusion of the phrase “the potential impact the adjustments might have on the Investor Protection Fund” is specifically at odds with the statute.

Payments to whistleblowers, which have totaled approximately \$265 million to date, have been the direct result of the imposition of \$1.4 billion in sanctions recovered on the basis of the information they provided. The proposal to limit awards is suggested as a mechanism “appropriate to achieve the goals and interests of the program,” but these goals and interests are being achieved as a result of the incentive structure currently in place. With the exception of just three awards, payments to whistleblowers have been well below the \$30 million threshold set forth in the proposal. Indeed, more than 60% of all awards have been in amounts smaller than \$2 million.

In addition, the Commission must take into account the relationship between the magnitude of the awards and a key element of the Whistleblower Program’s success: the public’s awareness of the program specifically and its engagement with the agency generally. For the two week period from March 19, 2018, when the SEC announced its record-setting \$83 million awards in the Merrill Lynch case, traffic to www.sec.gov surged by an estimated 300%, and Google searches for the term “SEC whistleblower” tripled.

Additionally, the proposed rule alters the statutory requirement that the Commission make an award determination of between 10% and 30% of sanctions ordered based upon specific factors. Under the proposal, the Commission would likely apply the mandatory statutory 10-30% consideration only to whistleblowers whose actions resulted in sanctions from \$1 million to \$99,999,999. Actions resulting in \$100 million in sanctions would receive a guaranteed 30% because the proposed rule specifies that the award cannot be less than \$30 million in these circumstances. Cases resulting in sanctions from \$100 million to \$300 million would receive a fixed dollar amount of \$30 million, and whistleblowers providing information for actions with sanctions exceeding \$300 million (assuming a \$30 million “floor”) would inevitably be paid a fixed minimum percentage of 10%.

There is nothing in the statute that indicates that the Commission may consider such a tiered system of payout considerations or variations between percentages and fixed amounts. Likewise, there is no statutory language that suggests that the amount of sanctions collected in connection with a whistleblower-eligible case should be considered when setting the appropriate award percentage. The statute specifies that the Commission has discretion in setting the award amount in the 10%-30% range, but it does not anticipate that the SEC will adopt a rule that removes Commission discretion in larger cases by setting a fixed dollar amount for certain matters, a fixed payout of \$30 million for cases with sanctions from \$100 million to \$300 million and a fixed percentage of 10% in cases with sanctions exceeding \$300 million. Yet this tiered structure – eliminating Commission discretion in all cases with sanctions exceeding \$100 million – is exactly what would result from the proposed rule.

It is counterintuitive for the SEC to propose altering its incentive structure so that only “super-whistleblowers” (those with information about massive frauds resulting in the largest sanctions imposed) are placed in a category for the Commission to consider a downward adjustment to an award percentage, based on a nebulous standard of what is reasonably necessary to award those super-whistleblowers. On the contrary, the Commission should provide greater incentive percentages to those who bring forward information concerning the most serious frauds. The SEC’s own data show that this proposed radical alteration of whistleblower payout considerations is a solution in search of a problem. Only five of 58 whistleblowers who have received awards to date collected in excess of \$15 million, and there is no justification for such a radical change and no data indicating the need to drive down “excessive” payouts. The introduction of an additional layer of uncertainty – that an award may be reduced based upon what the Commission considers “reasonably necessary to achieve the programs goals” – will inevitably reduce the pool of individuals willing to take the extraordinary risks inherent in reporting the kinds of massive frauds that the program was designed to ferret out.

Request for Comment # 19, p. 60

Guidance making a delay beyond 180 days “unreasonable”

We support an improved level of clarity on this issue, as certainty is valuable in incentivizing potential whistleblowers to come forward. We support a “bright line” test of 180 days going in both directions, with delays of less than 180 days presumed reasonable and delays exceeding 180 days presumed unreasonable. Under both circumstances, the Commission could and should have discretion to determine otherwise if the facts and circumstances warrant doing so.

Requests for Comment ## 20-25, pp. 72-73

Reporting and Retaliation Provisions

We believe strongly that the imposition of an “in writing” requirement for a whistleblower to be entitled to anti-retaliation protections is too restrictive. A whistleblower who reports information concerning a potential securities law violation should be protected from retaliation in all circumstances. Situations may arise in which a whistleblower has an urgent need to make an oral report of wrongdoing, particularly if s/he fears retaliation and is unwilling to communicate in writing. An individual who declines to submit information in writing may nevertheless provide the SEC with substantial assistance, such as submitting to a voluntary interview or providing trial testimony, and should benefit from the program’s protection from retaliation under such circumstances.

The SEC should also be expansive in its interpretation of what constitutes retaliation, to include “downstream” conduct through which a former employer prevents a whistleblower from securing future employment or causes her/him to be blackballed. The rules should also limit language that can be read as incentivizing internal reporting to avoid causing potential whistleblowers to lose protection from retaliation by failing to report to the Commission concurrently with internal reports (or earlier). In addition, because the Supreme Court has determined that a whistleblower must report to the SEC to avail her/himself of anti-retaliation protections, the Commission should no longer consider internal reporting – or the failure to report internally – as a factor in determining the appropriate whistleblower award percentage.

Requests for Comment ## 26, 30, 31, pp. 76 and 85

Updating Forms

We support the SEC’s proposal to allow for flexibility in making adjustments to the online form and suggest that there should be a 30-day grace period for anyone who

submitted under the “old form” after the Commission issues a new one. We also urge the SEC to consider allowing the submission of forms to the Office of the Whistleblower by electronic mail in addition to current permissible methods (the online form and facsimile).

Requests for Comment ## 27-29, p. 80

Barring frivolous claimants

We strongly support the Commission’s careful exercise of the authority to ban frivolous claimants from the program for life. The Commission has imposed lifetime bans from the program on two individuals, but was required to expend an inordinate amount of time and resources in order to do so. The credibility and efficiency of the program are enhanced when the resources of the Office of the Whistleblower can be focused on providing timely Preliminary Determinations and Final Orders on good faith, non-frivolous claims. Clearing out the few repeat offenders who create nuisance work for program staff and the Commission is a well-founded idea whose time has come. In keeping with the principle that every claimant is given at least a second chance, the number of frivolous claims justifying exclusion should be reduced to two, and we see no benefit in extending a third chance to a claimant who clearly is acting in bad faith. At the same time, we support the idea of providing a one-time opportunity to reconsider and withdraw frivolous applications as a means of conserving resources.

Requests for Comment ## 30-31, p. 85

Requiring the submission of TCR forms no later than 30 days after initially contacting SEC

We have concerns that this proposal conflicts with other Whistleblower Program rules and may usurp Congressional intent by unilaterally and arbitrarily limiting the types of information for which an individual can claim whistleblower credit. Whistleblowers can receive credit under the Rules for providing the Commission with original information and analysis even if the Commission previously received that information *entirely* from another source, such as Congress or the media. *See* § 240.21F-4(b)(2)(ii)-(iii). The whistleblower need only demonstrate later that s/he is the original source of the information the Commission obtained from an alternative source. *Id.* Congress thus contemplated that the Commission would make use of some whistleblower information and analysis well before the whistleblower even knows s/he has assisted an enforcement action. Under the proposed rule, however, individuals in such situations would not be eligible for an award because their TCR filing would necessarily be made long after the Commission received and used their work.

This is not a hypothetical concern. Our members have reported circumstances where whistleblowers had no idea their work assisted a Commission enforcement action until

some aspect of the matter became public, *e.g.*, through the disclosure of a subpoena or the filing of a complaint. Indeed, we understand that in more than one enforcement action the Commission indicated that the underlying investigation originated due to certain public disclosures when, in fact, the original source of that publicly available information was a whistleblower. Individuals who find themselves in such situations should have a reasonable window of time thereafter to file a TCR to formalize the assistance that their original information and analysis has already provided to the Commission.

There are also circumstances in which whistleblowers have brought information to the Commission's attention but are unaware that their information may qualify for a whistleblower award. As strange as that may sound to the Commission, the reality is that while the Whistleblower Program has grown in stature and become more visible over the years, there are still many potential whistleblowers who are unaware of its benefits.

We are not convinced that a "deficiency letter," which we understand to be discretionary, would allay whistleblower concerns. The unfortunate reality is that the letters may not even reach whistleblowers in time to permit them to seek representation or advice and meet the submission deadline. Moreover, deficiency letters will have no impact on those whose original information and analysis, unbeknownst to them, was used by the Commission to initiate an enforcement action. Accordingly, to the extent that the Commission enacts any time restriction on the filing of a TCR, we propose in the alternative that the deadline be tethered to the latest date on which the individual could reasonably be aware that (1) her/his original source information assisted the Commission in opening, advancing or re-opening an enforcement action; and (2) s/he is eligible for a whistleblower award.

Requests for Comment ## 32-33, pp. 87-88

Limiting the CRS record to timely submissions and/or submissions made in response to requests by the Office of the Whistleblower

We do not support the proposal to establish the WB-APP deadline as the date after which the Office of the Whistleblower will no longer consider information received by a whistleblower relevant to her/his award application. Our understanding is that many whistleblowers wait three years or more to receive a preliminary determination on their award applications, and a great deal can happen in that span of time that will have significant impact on the Commission's calculus. A primary example is the domino effect that a whistleblower's case against a single company can have on other companies if the fraud turns out to be industry-wide – a plus factor that the Commission must consider in reaching its preliminary determination. What happens if those dominos do

not begin to fall until after a whistleblower's deadline for filing a WB-APP? Among the many other relevant developments that could occur after the filing of a WB-APP are changes in law, additional hardships suffered by the whistleblower or the collection of additional funds on behalf of affected investors, such as monies returned to investors in related bankruptcy proceedings. A whistleblower must be permitted to notify the Commission that the information exists, since there is simply no other procedural mechanism available to assure that such information will become part of the appellate record.

We understand and appreciate the Commission's attempt through this proposed rule change to increase efficiency in the award determination process. In our view, however, a more reasonable approach that sufficiently protects whistleblower interests would be to limit the size and scope of any supplemental submission related to a whistleblower application to a reasonably short presentation of: (1) information requested by the Commission; and/or (2) information that could not reasonably have been known to the whistleblower at the WB-APP deadline. Such a change would strike the appropriate balance between increased efficiency and whistleblower advocacy.

Request for Comment # 35, p. 95

Summary disposition process

We support this proposed enhancement to the program, and agree that the proposed criteria for the exercise of summary disposition power by the Office of the Whistleblower are appropriate (no evidence that a TCR was filed, no evidence that staff bringing the action ever saw the TCR, etc.). We appreciate the proposal to ensure the provision of due process by allowing for an accelerated appeal process following a summary disposition notice, and we believe this approach will promote efficiency while helping to ensure that meritorious cases do not fall through the cracks.

Requests for Comment numbered 30 and 31, pp. 109-110

Proposed guidance on "Independent Analysis"

Absent some evidence of a problem in need of fixing, we do not support affirmative changes to a program that is working well. The proposing release provides no evidence of occasions where the current definition of and approach to "independent analysis" has caused any identifiable problems. Indeed, the release introduces the issue with an extensive discussion of the efforts of Harry Markopolos, the model outsider who blew the whistle on Bernie Madoff's historic Ponzi scheme years before the Office of the Whistleblower was established. Markopolos provided the SEC with extensive original analysis of the Madoff scheme more than eight years before Madoff's children turned

their father in to the authorities, and he clearly would have qualified for a whistleblower award had the program existed when he came forward.

There is no question that a person who simply submits public information like a news article is not providing original analysis, while a submission containing detailed analysis and reflecting significant expertise and a great deal of hard work (a “Markopolos submission”) clearly meets the standard. The difficulty lies between these two extremes, and the proposed rule does not provide helpful interpretive guidance for cases in this middle ground. The proposed “fix” injects uncertainty into a process that needs to be as unambiguous as possible to maximize the pool of potential whistleblowers. We do not support this proposed guidance and strongly urge that it not be included in the final rules.

The proposal to limit awards based on “original analysis” to submissions that provide insight “beyond what would be reasonably apparent to the Commission from publicly available information” is a step backward if the intention is to provide additional clarity. It raises many questions, including the following:

- Who determines what would be “reasonably apparent to the Commission?”
- At what point in time must that determination be made? As of the time of the submission or after the fact? With the benefit of hindsight virtually anything can be classified as “reasonably apparent,” and the assessment of an applicant’s eligibility for an award based on independent analysis will be made many years after the original submission was made. If the staff who worked on the investigation have moved on and are not available, who can state what was “reasonably apparent” while the investigative work was going on?
- Can the Commission reject an application on the “reasonably apparent” standard even if no one at the Commission had opened an investigation until the whistleblower made her/his submission? Shouldn’t the opening of an investigation based on the submission be dispositive of the question of whether the alleged conduct was “reasonably apparent”?
- When a whistleblower’s award petition is being considered, years after the original submission and following the completion of a complex investigation, isn’t it counterproductive and unfair to investigative staff to ask them to acknowledge that facts now evidently true were not “reasonably apparent” at the time of the submission?

Whistleblowers, including those who are not insiders, assume significant risk when they decide to submit information to the SEC, and this proposed guidance sends them precisely the wrong message. The Commission would be telling them that they are welcome to provide information based on publicly available documentation, but after a long and complex investigation they may not be rewarded and will be at the mercy of a nebulous assessment conducted by unknown persons about what might have been “reasonably apparent” years earlier. The proposed guidance would disincentivize Markopolos-type whistleblowers without resolving any identified problem and should not be adopted.

Request for Comment IV, pp. 110-111

Discretionary Award process

The membership of the TAF Education Fund includes practitioners with significant experience representing clients who have made submissions to the Office of the Whistleblower. Some of their whistleblower clients have received Final Award orders in cases where no funds were collected; others have provided significant assistance in matters where the imposed sanctions did not meet the \$1 million threshold for an award. We appreciate the proposed idea of “spot” awards in such instances and the helpful intention behind it, but we’re not sure there is statutory support for such discretionary payments. We are also concerned that the availability of spot awards might produce a high volume of requests for such awards and require the expenditure of staff time and resources not justified by the proposed benefit.

Conclusion

We thank the Commission for this opportunity to comment on its proposed rulemaking. The success of the Whistleblower Program over the past decade clearly demonstrates the benefits to investors and the public at large when major frauds are detected, deterred and remedied as early as possible, and the Commission is to be commended for its efforts in safeguarding the public trust. We respectfully submit that this trust was most dangerously eroded in the first decade of this century when federal law enforcement did not have early, actionable intelligence to assist it in uncovering and stopping misconduct. The result was that businesses were shuttered, retirement accounts disappeared and Americans lost their homes in shocking numbers. We cannot afford to miss another epidemic of fraud on such a massive scale. The SEC’s Whistleblower Program is developing into one of the most successful public-private partnerships in American history, and the Commission has a great deal to be proud of in this regard.

Taxpayers Against Fraud commends your efforts to strengthen the program, and strongly urges you to avoid making rule changes that would weaken it.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'R. Patten', with a long horizontal line extending to the right from the end of the signature.

Robert Patten
President and Chief Executive Officer
Taxpayers Against Fraud and the TAF Education Fund

Courtesy copies (via First Class Mail) to:

Secretary Brent J. Fields
Chairman Jay Clayton
Commissioner Kara M. Stein
Commissioner Robert J. Jackson, Jr.
Commissioner Hester M. Peirce
Commissioner Elad L. Roisman
Ms. Jane Norberg, Chief, SEC Office of the Whistleblower