



BETTER MARKETS

April 11, 2022
Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Whistleblower Program Rules (File No. S7-07-22, RIN 3235-AN03)

Dear Ms. Countryman:

Better Markets¹ appreciates the opportunity to comment on the above-captioned proposal (“Proposal” or “Release”) amending the rules governing the whistleblower program (the “Whistleblower Program”), issued by the Securities and Exchange Commission (“SEC” or “Commission”).² The Proposal would address two flawed elements in the SEC’s 2020 rule amendments (“2020 Amendments”). Those amendments adopted an overly restrictive approach to related action awards in situations where another whistleblower program potentially also applies. They also asserted the authority of the SEC to reduce awards based upon dollar amounts. The Proposal will help remove these two obstacles to the continued robust success of the whistleblower program. We support them both, subject to the provisos set forth below.

BACKGROUND

The Commission’s Whistleblower Program was established by Section 922 of the Dodd-Frank Act.³ Congress was motivated to establish a whistleblower program at the SEC not only by the rampant misconduct that triggered and fueled the financial crisis but also by specific concerns about the SEC’s failure to follow up on whistleblower reports of wrongdoing. A cardinal example was the Commission’s failure to heed compelling evidence from whistleblowers, including Harry Markopolos, indicating that Bernie Madoff was running the largest Ponzi scheme in history and victimizing countless investors.⁴ Between May 2000 and December 2008—when Madoff confessed and surrendered to the FBI—Madoff’s fraudulent investment fund grew from about \$3

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans’ jobs, savings, retirements, and more.

² Whistleblower Program Rules, 87 Fed. Reg. 34, 9280 (Feb. 18, 2022).

³ The Whistleblower Program provisions in the Dodd-Frank Act were incorporated into the statutory framework of the Securities and Exchange Act of 1934 (the “Exchange Act”) at 15 U.S.C. § 78u-6.

⁴ See U.S. Securities and Exchange Commission, Office of Investigations, *Investigation of Failure of the SEC to Uncover Bernard Madoff’s Ponzi Scheme*, at 62 (Aug. 31, 2009), <https://www.sec.gov/files/oig-509.pdf>.

billion to \$50 billion. During this period, the SEC conducted at least five examination and enforcement investigations but did not detect, let alone stop, Madoff's massive fraud. This was indicative of the SEC's failure to recognize the enormous value of whistleblower information prior to the Dodd-Frank Act.

The SEC's Whistleblower Program establishes monetary awards to any eligible whistleblower who voluntarily provides the Commission with original information that leads to a successful judicial or administrative enforcement action or related action. The Dodd-Frank Act also requires the SEC to make an award for so-called "related actions," defined as "any judicial or administrative action brought by [the U.S. Attorney General, an appropriate regulatory agency, a self-regulatory organization, or a state attorney general in a criminal investigation] that is based upon the original information provided by a whistleblower...that led to the successful enforcement of the Commission action."⁵

The Dodd-Frank Act mandates that the Commission make an award to a whistleblower of between 10% and 30% of the monetary sanctions collected in the SEC's action or in any related action. It also provides that the SEC must consider the following factors in determining an award:

- (1) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;
- (2) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;
- (3) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and
- (4) such additional relevant factors as the Commission may establish by rule or regulation.⁶

Whistleblower Program awards are not made using taxpayer money but are paid from a separate fund created in the Dodd-Frank Act known as the Investor Protection Fund, which is funded by monetary sanctions in enforcement actions that are not distributed to victims.⁷

In May 2011, the Commission adopted a comprehensive set of rules to implement the Whistleblower Program.⁸ Under those rules, which were in place for nearly the entirety of the Whistleblower Program, the program has been an enormous success. According to the SEC's most recent report, the program has awarded more than \$1.2 billion to hundreds of individuals in return for information that has resulted in nearly \$5 billion in monetary sanctions, including \$3.1

⁵ 15 U.S.C. 78u-6(a)(5).

⁶ 15 U.S.C. 78u-6(c)(1)(B).

⁷ 15 U.S.C. 78u-6(b)(2).

⁸ See SEC Proposed Rule for Implementing Whistleblower Provisions, 75 Fed. Reg. 221, 70488 (Nov. 17, 2010).

billion in disgorgement of ill-gotten gains, of which more than \$1.3 billion has been, or is scheduled to be, returned to investors.⁹

Despite the program’s success, in June 2018, the Commission proposed amendments to the rules (“2018 Proposal”), which Better Markets strongly opposed.¹⁰ The rules that were adopted as a result of the 2018 Proposal, among other things, gave the SEC discretion to refuse to make an award for a “related action” where it determined another whistleblower award program had a more “direct and relevant” connection to the action, without regard to whether the whistleblower received an adequate award (or any award at all) under the other program. It also purported to provide the SEC with discretion to reduce an award amount based solely on its determination that the dollar amount of the award would be too large.¹¹ Notwithstanding the vigorous objections of Better Markets and others, the Commission adopted provisions that had the effect of weakening the Whistleblower Program in 2020 (the “2020 Amendments”).¹²

OVERVIEW OF PROPOSAL

The SEC now proposes to revisit two of the Whistleblower Program rules that were affected by the 2020 Amendments. The Proposal would revise the approach to related actions finalized in 2020 Rule 21F-3(b)(3) to allow awards for related actions where an alternative award

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- ⁹ SEC, *Whistleblower Program: 2021 Annual Report to Congress* 24 (2021), https://www.sec.gov/files/2021_OW_AR_508.pdf; see also Better Markets, *SEC’s Whistleblower Program: A \$5 Billion Success Story With A Bright Future*, January 20, 2022, available at <https://bettermarkets.org/analysis/secs-whistleblower-program-a-5-billion-success-story-with-a-bright-future/>.
- ¹⁰ Whistleblower Program Rules, 83 Fed. Reg. 140, 34702 (July 20, 2018); Better Markets Comment Letter to the SEC on Whistleblower Program Rules (September 18, 2018) (“Better Markets 2018 Letter”), <https://bettermarkets.org/wp-content/uploads/2021/07/Better-Markets-CL-to-SEC-on-Whistleblower-Program-9-18-18.pdf>, which is incorporated by reference as if fully set forth herein.
- ¹¹ Better Markets, *SEC’s Whistleblower Program: A \$5 Billion Success Story With A Bright Future* 9-10, (Jan. 20, 2022), <https://bettermarkets.org/analysis/secs-whistleblower-program-a-5-billion-success-story-with-a-bright-future/>. Technically, the 2020 final rule “removed” the provision in the 2018 proposal that would have explicitly given the SEC the authority to reduce an award based solely on dollar amount. In the 2018 proposal, the SEC had argued that the 2011 rules left it without the ability to reduce awards based on dollar amounts that the agency might deem excessive. Accordingly, the SEC proposed to establish a rule that would give it discretion, where an award could involve a sanction of over \$100 million, to reduce the award amount if the Commission determined that the amount exceeded what was “reasonably necessary to reward the whistleblower and to incentivize similarly situated whistleblowers.” The final 2020 amendments removed that offending provision from the rule itself—seemingly an improvement—but the accompanying release then insisted that the SEC always had the authority to reduce awards based on dollar amount. The SEC thus claimed the same problematic, extra-statutory discretion it had proposed in 2018, but without the limitation that the discretion would only be exercised where a sanction could exceed \$100 million, surreptitiously *expanding* a provision it purported to remove from the final rule. SEC Commissioner Allison Herren Lee, *Statement: June Bug vs. Hurricane: Whistleblowers Fight Tremendous Odds and Deserve Better* (Sept. 23, 2020), <https://www.sec.gov/news/public-statement/lee-whistleblower-2020-09-23>.
- ¹² At least one federal lawsuit has been filed challenging the legality of the 2020 Amendments. In *Thomas v. S.E.C.*, No. 1:21-cv-0010 (D.D.C. filed Jan. 31, 2021), currently pending in the District Court for the District of Columbia, the plaintiff, a prominent whistleblower attorney, has sued for declaratory and injunctive relief. The case has been stayed pending the outcome of this rulemaking proceeding.

program that is not comparable to the SEC’s program because of a cap on award amount, a more limited award range, or a discretionary rather than mandatory award feature, regardless of whether the other award program had a more direct or relevant connection to the action (“Comparability Approach”). In the Proposal, the SEC also requests comment on other possible approaches to addressing related actions:

- Pursuant to the “Whistleblower Choice” approach, a meritorious whistleblower could decide whether to receive a related-action award from the Commission or the authority administering the other award program. The whistleblower would be allowed to wait until both programs had determined the award amount they would pay before making an election.
- Pursuant to the “Offset Approach,” the Commission would determine an award percentage it would pay on the related action but offset its whistleblower award dollar-for-dollar from any award received for the related action from the other whistleblower program.
- Pursuant to the “Topping Off Approach,” the Commission would have the discretion to increase an SEC award on a covered action if the Commission concludes that the other whistleblower program’s award for the related action was inadequate for any reason.

The Commission also proposes to revise Rule 21F-6 to explicitly provide that the SEC may adjust an award *upward* based on dollar amount but that it “shall not” lower an award based on dollar amount.

COMMENTS

I. THE SEC SHOULD ADHERE TO THE STATUTORY FRAMEWORK FOR RELATED ACTIONS.

The statutory provisions governing the Whistleblower Program clearly define “related actions” and also specify the award amounts that whistleblowers are entitled to receive for awards collected in SEC enforcement actions as well as related actions i.e., 10 to 30% of the amounts collected, “in total.” There is no distinction in the statute between related actions that involve whistleblower programs established by other agencies and those that do not. Its provisions were directed at, and govern, the SEC’s responsibilities, not those of other agencies.

In the 2020 Amendments, the SEC injected unnecessary and unwarranted complexity into the treatment of related action awards based on a distinction found nowhere in the applicable statutory provision. Moreover, the rule undermined the purposes of the Whistleblower Program by generally reducing the prospects for recovery or the amounts that could be recovered on the basis of related actions. Under the current version of Rule 21F-(3)(b)(3), if the Commission finds that a competing whistleblower award program has a “more direct or relevant connection” to a

related action,¹³ then the Commission will deny the award claim for the related action and the claimant must then pursue an award with the other award program (“Multiple-Recovery Rule”). The Multiple-Recovery Rule, as currently constituted, not only violates the text of the Dodd-Frank Act and the Congressional intent in implementing the Whistleblower Program but also disincentivizes whistleblowers by introducing even more uncertainty and risk into the process, specifically that a whistleblower with meritorious information may receive an inadequate award, or even no award, for a related action where the SEC forces the whistleblower it into a less desirable whistleblower program. This is especially inappropriate in light of the risks whistleblowers already take, including the likelihood that coming forward could functionally end their careers.¹⁴ As the Commission points out in the Release, the Multiple-Recovery Rule creates the real risk that two otherwise similarly situated meritorious whistleblowers whose tips led to comparably successful Commission and related actions would receive meaningfully different awards based solely on the whistleblower award program that the SEC deemed to be more directly related or relevant.¹⁵

The Multiple-Recovery rule also violates the plain language of the Dodd-Frank Act that makes it mandatory for the SEC to pay a whistleblower an award for a related action:

“In any covered judicial or administrative action, **or related action**, the Commission...**shall pay an award or awards** to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, **or related action**.”¹⁶

This clearly mandatory language provides the Commission with no room to deny an award for a related action because it determines that another whistleblower program is more relevant. Further bolstering the point, Congress also established the circumstances under which the SEC must deny an award, and none are framed in terms of whether another whistleblower program is more relevant.¹⁷ The remedy should be to jettison the convoluted and legally unfounded approach to related actions and revert to a simple rule that tracks the statute.

¹³ Exchange Act Section 21F(a)(5) and Exchange Act Rule 21F-3(b)(1) provide that a related action is a judicial or administrative action that is: (i) brought by the Department of Justice, a Rule 21F-4(g) regulatory authority, a Rule 21F-4(h) self-regulatory organization, or a state attorney general; (ii) based on the same original information that the whistleblower voluntarily provided both the Commission and to the authority that brought the related action, and (iii) resolved in favor of the authority that brought the action as a result of the whistleblower’s information. Thus related actions include state criminal prosecutions, but exclude state regulatory actions.

¹⁴ Better Markets 2018 Letter; Release at 9283 n.22.

¹⁵ Release at 9283.

¹⁶ 15 U.S.C. 78u-6(b)(1) (emphasis added).

¹⁷ 15 U.S.C. § 78u-6(c)(2). Indeed, the provision governing denials of awards does not even contain a catch-all provision giving the SEC discretion to deny an award in other, unenumerated circumstances.

II. AMONG THE VARIOUS ALTERNATIVES FOR DEALING WITH RELATED ACTIONS, THE SEC SHOULD ADOPT THE “WHISTLEBLOWER CHOICE” OPTION.

If the SEC insists on adopting a new approach to related actions, instead of the simpler and more legally sound option of simply rescinding the 2020 Amendments, it should elect the Whistleblower’s Choice approach. Each of the alternative approaches to making awards based on related actions set forth in the Proposal would improve on the 2020 Amendments. Each would at least ensure that whistleblowers are no longer in danger of receiving no award whatsoever for a related action for information that leads to successful enforcement by another agency. And each (except for the Whistleblower’s Choice approach) would also require the Commission to at least account for the possibility that an award from another whistleblower program would be inadequate.

However, among the alternatives, the Whistleblower’s Choice approach appears to be optimal. Each of the other approaches, while an improvement on the current rule, would still be inadequate from both a policy and legal perspective. For example, each of the other proposed approaches could still leave whistleblowers in danger of receiving an award that is too low based on the quality of information provided and the other statutory factors. This increased uncertainty could still disincentivize whistleblowers. Moreover, each of the other proposed approaches leaves open the possibility that the SEC will not, itself, make an award to an otherwise eligible whistleblower for a related action. This conflicts with the letter and the spirit of Section 922, which mandates that the SEC make an award to an eligible whistleblower based on a related action, and which does not list as a factor for reducing or denying an award a more directly relevant whistleblower program. In essence, each of these other approaches would result in the SEC improperly substituting its own policy judgment for that of Congress. Only the Whistleblower’s Choice Approach respects the clearly mandatory nature of Section 922, which requires that the SEC make an award to an eligible whistleblower based on a related action; it also functionally eliminates the risk that a whistleblower might unfairly get an award that is too low. Accordingly, if the SEC is going to go beyond simply rescinding the Multiple-Recovery Rule and is going to establish a process for handling situations where another whistleblower program applies, it should adopt the Whistleblower’s Choice approach.

III. LIMITING THE DISCRETION TO ADJUST AWARDS BASED ON DOLLARS AMOUNTS, TO ALLOW ONLY INCREASES, IS APPROPRIATE.

The Proposal would make two related changes in the criteria governing the amount of whistleblower awards. First, it would make clear that the Commission “shall not” use the dollar amount of a potential award to lower an award. Second, it would make clear that the Commission may consider the dollar amount of a potential award for the limited purpose of increasing the award amount.

Setting aside the precise legal status of any claimed authority to adjust awards in any way based on dollar amounts, these changes are appropriate and should be adopted. As the Commission explains in the Release, they find support on several grounds. The authority to decrease awards has proven to be unnecessary, as the Commission has never had occasion to seek a decrease in an

award based on dollar amount. Second, high dollar awards serve the purposes of the whistleblower program by drawing public attention and thereby incentivizing whistleblowers to come forward; decreasing the dollar amount of awards would thus be counterproductive in terms of the SEC's enforcement priorities. Finally, merely preserving the authority to decrease awards would threaten to increase uncertainty regarding the awards program and decrease confidence in the outcome of the award process, all of which could disincentivize whistleblowers from coming forward.

IV. THE SEC MUST RESCIND THE FLAWED 2020 GUIDANCE ON INDEPENDENT ANALYSIS.

One aspect of the 2020 Amendments that is unaddressed in this Proposal is the accompanying interpretive guidance regarding how the SEC will determine whether a tip constitutes “independent analysis” that justifies an award. Section 922 provides that “original information” includes information that is derived from the “independent knowledge **or analysis**” of the whistleblower.¹⁸ The interpretive guidance accompanying the 2020 Amendments imposed extra-statutory and restrictive conditions on when independent analysis qualifies as original information. Under the guidance, to qualify as “independent analysis,” a whistleblower’s submission must provide evaluation, assessment, or insight beyond what would be reasonably apparent to the Commission from publicly available information. Furthermore, in making that determination, the Commission considers whether the whistleblower’s conclusions derive from multiple sources (including sources that are not readily identified and accessed by a member of the public without specialized knowledge, unusual effort, or substantial cost) and whether the sources collectively raise a strong inference of a potential securities law violation that is not readily inferable by the Commission from any of the sources individually.¹⁹

Again, this is contrary to the text and intent of Section 922, which does not impose these restrictions on the nature of the independent analysis that can support an award. More alarmingly, the interpretive guidance, particularly the provision requiring that the sources raise a strong inference of illegal conduct that is not “reasonably inferable” by the SEC from the sources individually, ignores the history of Section 922. Specifically, Section 922 was at least partially motivated by the SEC’s failure to detect Bernie Madoff’s brazen fraud. Yet as detailed by the SEC’s inspector general, that debacle included the SEC’s failure to heed multiple obvious red flags, including those raised in publicly available sources.²⁰ In light of this context, it is highly unlikely that Congress intended the SEC to condition whistleblower awards on whether, in hindsight, it thinks the illegal conduct was “reasonably inferable.” The SEC must rescind this flawed interpretive guidance without unreasonable delay.

CONCLUSION

We hope these comments are helpful as the Commission finalizes the Proposal.

¹⁸ 15 U.S.C. § 78u-6(a)(3).

¹⁹ Whistleblower Program Rules, 85 Fed. Reg. 70,898, 70,929 (2020).

²⁰ SEC Office of Investigations, *Investigation of Failure of the SEC to Uncover Bernie Madoff’s Ponzi Scheme* 80-81 (Aug. 31, 2009), <https://www.sec.gov/files/oig-509.pdf>.

Sincerely,



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