June Bug vs. Hurricane:* Whistleblowers Fight Tremendous Odds and Deserve Better

Commissioner Allison Herren Lee

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In recent times, it seems that nearly every day has provided us with an opportunity to appreciate the contributions of whistleblowers.[1] Often, they display extraordinary bravery to expose fraud and wrongdoing, and to shine light in some very dark places.[2] In doing so, they reinforce our fundamental values – that the rule of law matters, and no one is, or should be, above the law. All too often, sometimes very publicly and sometimes in the shadows, those whistleblowers face retaliation from the powerful figures they expose.[3] They help create transparency, and from transparency flows crucial accountability. Unfortunately, today's rules do not serve these individuals well.

Since its inception, the Commission's whistleblower program has enabled us to identify and pursue fraudulent conduct, ongoing regulatory violations, and other wrongdoing that would otherwise have gone undetected. Investors – including some of the most vulnerable – are the real beneficiaries. As a result of the success of our whistleblower program, we have been able to stop schemes in their tracks, and to return millions to victims of fraud.[4]

The value of the program is evident from the staggering volume of tips we receive, and the number of awards claims submitted. Our program today is working well; in this fiscal year we have processed a record number of claims. The volume of claims to be processed continues to grow, as our program attracts more and more tips every day. What is needed is a thoughtful and limited set of amendments to our rules to enhance efficiency and transparency, without detracting from what makes our program such a success. Unfortunately, that is not what this rule offers. Instead of fixing what is broken, we instead run the risk of breaking what works.

DISCRETION TO ADJUST AWARDS BASED ON SIZE

The principal reason that I find myself unable to support this rule is because of the treatment given to the central issue of the Commission's discretion to consider the dollar amount of an award in making award determinations. Let me explain. The proposal would have granted to the Commission new discretion to reduce awards in cases where collections exceeded $100 million if a majority of Commissioners thought simply that the dollar amount of the award was just too high. The proposal contained a very specific hypothetical that posed the following scenario. Assume you have a whistleblower who did everything right. Further assume that this whistleblower is eligible for an award for a matter in which a 10% award would equal an $80 million payout, and a 30% award would equal a $240 million payout. The proposal stated that, absent the proposed 2018 rule change, "the Commission *would lack the authority to adjust the award amount downward* if it found that amount unnecessarily large for purposes of achieving the whistleblower program's goals."[5] The proposal went on to state that "the Commission would almost certainly be obligated to pay this individual an award at or near the maximum $240 million level under the existing rules."[6]

Where did the final rule land on this point? Remarkably, the final rule actually claims that the entire premise of the hypothetical—and the basis for the main proposed rule change in the proposal—was mistaken. Indeed, the final rule states that the hypothetical was incorrect and did not reflect the Commission's prevailing understanding of its discretion or its practice in considering and applying the award factors and setting award amounts.[7] First, it is not entirely accurate to claim that the hypothetical didn't reflect the Commission's prior understanding or practice.[8]

But setting that aside for now, let's look at where the final rule landed on this newly-found discretion. According to the new understanding, the discretion to reduce an award that a majority of the Commission deems too large (or even one that it feels is unnecessarily small), actually existed all along in the statute, despite the Commission's stated view in 2018. And now, with a minor tweak to the rule text, we claim the authority to use that discretion, labeling it a "clarification." [9] So, what is the implication of this surprising reversal? We claim a new discretion to consider dollar amount in the setting of award amounts that is broader than the discretion we proposed to write into the rule at proposal, applicable to all awards no matter their size. There is no transparency in its usage, and it provides whistleblowers no way to contest its application.

Here is how it works. First, the rule text from the proposal that contained the discretion has been removed. Why? Because according to the new interpretation, the discretion existed all along in the statute. But we do have new rule text, so what does it say? It says in making an award, the Commission may consider the same factors, and ***only*** those same factors, that we have always considered (including positive factors such as the significance of the information provided by the whistleblower, and negative factors such as the degree of the whistleblower's culpability) in setting the "dollar or percentage amount of the award."[10] At first blush, it appears this rule text restricts us in exactly the manner in which we said we were restricted in assessing the 2018 hypothetical. That is, we do not have the discretion to reduce an award to a whistleblower who had done everything right under the existing factors.

But here's the rub. As I mentioned, the release now says we were wrong with our 2018 hypothetical – and we in fact ***can*** exercise discretion to change the outcome of that hypothetical case.

How do we square that with the rule text that seems to say otherwise? It appears that we are saying throughout the release that we now have the authority or ability to somehow "think" in terms of dollars when applying the award factors, but the release is at pains to suggest that this is not to say that we can adjust an award based on its size alone. Of course, we don't need a rule to tell us when and how we can "think" or translate percentages into dollars in our heads. Assuming this new discretion we now claim to have had all along means something beyond permitting us to do math in our heads as we consider the original factors, I endeavored to find out exactly *what*.

I posed a new hypothetical: Under the rule we adopt today, assume two cases: in both cases, we are presented with the exact same whistleblower and exactly the same facts in every way. The only difference is that in Case A, the monetary sanctions collected total $10 million, while in Case B, the monetary sanctions collected total $500 million. Under this new interpretation of our authority, I asked, can the Commission reach a different award *percentage* between these two cases? Again, not one single fact is different except the dollar size of the potential award. The answer I was given was an unequivocal "yes."

That tells me everything I need to know about what can or cannot be considered under this new rule. If we were going to be confined to the existing original factors under the new rule, there should be no difference in the outcome—in terms of the percentage of the award—between Case A and Case B.

So, to recap. We said at proposal that we needed a rule that would allow us the discretion to consider dollar amounts, but that our proposed rule would limit the use of that discretion to only cases in which the money collected totaled at least $100 million. Now, we claim that we do not need a new rule at all, that we've had this discretion all along. Yet, we add rule text that appears to limit the discretion in some fashion. In fact, the new rule is even more problematic than the proposal because we are no longer even restricted to the largest awards. We may exercise this newly-claimed discretion to adjust awards up or down, on any case, large or small, so long as we say that we are doing so "in considering and applying the award factors," whatever that may mean.

And importantly, the rule will not require the Commission to tell whistleblowers if or when we have exercised this discretion. Thus, there will be no transparency, and no accountability.

I tried hard to understand how we got here, and I tried hard, as did my colleagues, to find some potential way to get to a consensus. But ultimately, I cannot support a rule that allows two different outcomes where the only difference is the size of the amount collected. By definition, that means that the dollar amount or size of the award is factored into our consideration. The concern with the original 2018 proposal was that it would allow the reduction of awards on the basis of an objection by the Commission solely to the size of an award. [11] Today's rule enshrines that approach.

Why does this matter? Because when this discretion is used, it will most likely be in exactly the circumstances posed by the 2018 hypothetical – to adjust what would otherwise have been a very large award downward (without any notice to the whistleblower or the public). We don't need this discretion to adjust a small award upward, as we have a mechanism in the new rule to do that with the new presumption applying to awards of $5 million or less. The clear concern expressed by the 2018 hypothetical and inherent in the new rule is how to adjust very large awards downward if a majority of Commissioners simply feel an award amount is "too high." This kind of determination, unlike the existing award factors, has absolutely nothing to do with the merits of a whistleblower's conduct or the value of the information she provides. In other words, the existing factors have a rational relationship to the award amount we set. The overall size of the award does not.[12] This injects an arbitrary wildcard into what was a sensible, merits-linked calculus.

Whistleblowers deserve better. They take great risks to help law enforcement, never knowing when they make their decision to speak up what will happen to them. Will they lose their jobs? Will their physical safety be threatened? Will anyone care? Will there be enough proof to bring a case? If an action is brought, will it result in a recovery for victims? Will they ever be compensated in any way for these risks? Each of these questions creates well-grounded fear, uncertainty, and risk. We should not introduce more.

I don't doubt assertions by individual Commissioners about how they intend to use this discretion, nor do I doubt my colleagues' commitment to the program. Unfortunately, such assertions are not relevant to the wisdom of the new rule because future Commissions will not be bound in any way to take a similar approach to the exercise of this newly-asserted discretion.

JUDGING WHISTLEBLOWERS FOR PAST VIOLATIONS

Relatedly, we are adopting new Rule 21F-6(c), which contains a new presumption that the Commission will award the full 30% in matters with maximum awards of up to $5 million. I agree with the stated goal of this provision, to reduce uncertainty for whistleblowers by making award determinations more predictable and more efficient. The presumption, however is subject to an exception which allows the presumption to be discarded in the event the Commission determines that applying it would be "inconsistent. . . with the objectives of the whistleblower program."[13] In explaining how this exception might apply, the release provides, as an example, a whistleblower who has committed securities law violations in a matter *unrelated to the covered action.*[14] Using past, unrelated misconduct to lower an award in this way is profoundly ill-advised. It is inimical to the purpose and structure of our program.[15]

RELATED ACTIONS

Today's rule includes other policy choices that raise concerns, including a new and problematic definition of "independent analysis," an overly restrictive requirement that whistleblowers provide information "in writing" in order to qualify for protection from retaliation,[16] and a TCR filing requirement which, though improved from the proposal, is still too inflexible.[17] I want to address in more detail, however, the change we are making today to the definition of a related action; that is, an action brought by another governmental agency that is based on the information provided to the SEC by a whistleblower, and therefore eligible for an award through the SEC's whistleblower program. Our ability to pay an award on a related action promotes efficiency and certainty for whistleblowers by ensuring that they will get an award when other parts of the government act on a whistleblower's tip. It encourages whistleblowers to choose to bring information to us, knowing they will still receive an award if the information is directed to a different agency. Unfortunately, the rule we are adopting today limits our payment of related action awards.

Though the statutory text dictating that we “shall pay” awards in related actions is unambiguous,[18] we are today adopting a rule that decreases certainty by introducing a new, subjective standard, which is whether another agency’s whistleblower program has a “more direct or relevant connection to the action.”[19] If we determine that it does, the whistleblower must recover separately from that agency’s program. The release frames this as a necessary measure to prevent whistleblowers from recovering from multiple agencies for the same conduct. While I appreciate the concerns about taxing our and our sister agencies’ resources with whistleblowers taking “multiple bites of the apple,” I believe other solutions were available, which would have better balanced the agency’s interests with those of whistleblowers.[20]

Directing whistleblowers to another agency’s whistleblower program can have real impacts. It will increase the administrative burden on whistleblowers, who may already be in difficult circumstances. It may also force them to participate in programs with varying standards for maintaining the confidentiality of their identity, an issue of critical importance to many whistleblowers. Moreover, some whistleblower programs may have materially lower maximum awards, including some with statutory caps at a certain dollar amount.[21]

IMPROVEMENTS TO THE RULE

Before I conclude, I want to be clear that this rule does contain improvements designed to address issues that have arisen in the course of the last 10 years. These improvements were the original impetus revisiting the rules. I am hopeful that they will provide substantial benefits for whistleblowers, and for our administration of the program. In particular, the new summary disposition procedures and the ability to bar individuals who make repeated, frivolous awards claims will allow staff to expend their limited resources on processing meritorious claims. Similarly, codifying the practice of treating Deferred and Non-Prosecution Agreements as covered or related actions is an appropriate and welcome measure to ensure that whistleblowers are not disadvantaged by the Commission’s or the Department of Justice’s choice of resolution mechanism.

I appreciate these efficiency improvements, but they do not outweigh the very real problems in the rule we are adopting today. In sum, at a time when the importance of whistleblowers has never been clearer, I cannot support these new rules that in too many ways increase discretion and restrict access to our program without providing essential clarity, transparency, and accountability.

I must respectfully dissent.

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* Lucinda Williams, 2 Kool 2 Be 4-Gotten, Car Wheels on a Gravel Road (Mercury Records 1998).

[1] *See, e.g.,* Marissa J. Lang, *Federal officials stockpiled munitions, sought ‘heat ray’ device before clearing Lafayette Square, whistleblower says*, Washington Post, Sept. 17, 2020, at https://www.washingtonpost.com/local/dc-protest-lafayette-square/2020/09/16/ca0174e4-f788-11ea-89e3-4b9efa36dc64_story.html**;** Shane Harris, Nick Miroff & Ellen Nakashima, *Senior DHS official alleges in whistleblower complaint that he was told to stop providing intelligence analysis on threat of Russian interference*, Washington Post, Sept. 9, 2020, at https://www.washingtonpost.com/national-security/senior-dhs-official-alleges-in-whistleblower-complaint-that-he-was-told-to-stop-providing-intelligence-analysis-on-threat-of-russian-interference/2020/09/09/9d0661c4-f2b6-11ea-b796-2dd09962649c_story.html; *California Senate Settles Claim by Harassment Whistleblower*, AP, Feb. 6, 2020, at https://apnews.com/article/92f58386d044fc55e9ed9358399e6646; David Welna, *Before Snowden: The Whistleblowers Who Tried to Lift the Veil*, NPR.org, July 22, 2014, at https://www.npr.org/2014/07/22/333741495/before-snowden-the-whistleblowers-who-tried-to-lift-the-veil.

[2] *See, e.g., ICE whistleblower: Nurse alleges 'hysterectomies on immigrant women in US'*, BBC.com, Sept. 15, 2020, at https://www.bbc.com/news/world-us-canada-54160638.

[3] *See, e.g.*, Natasha Bertrand and Lara Seligman, *Alexander Vindman, key impeachment witness, retires from military,* Politico, July 16, 2020, at https://www.politico.com/news/2020/07/08/alex-vindman-retires-from-military-352538; Emily Wax-Thibodeaux, *Isolated. Harassed. Their personal lives investigated. That’s life as a VA whistleblower, employees tell Congress.,* Washington Post, Apr. 14, 2014, at

https://www.washingtonpost.com/news/federal-eye/wp/2015/04/14/isolated-harassed-their-personal-lives-investigated-thats-life-as-a-va-whistleblower-employees-tell-congress/.

[4] To date, our whistleblower program has produced tips that have led to monetary sanctions of billions of dollars, including $750 million that has been or will be returned to investors; in connection with those actions, we have paid awards to at least 97 individuals. *See* Whistleblower Program Rules, Rel. No. 34-89963, 6 (Sept. 23, 2020) [Adopting Release]. Our whistleblower program is administered by the excellent staff in our Office of the Whistleblower, along with a dedicated team in our Office of the General Counsel, which works with the Whistleblower Office to parse difficult legal issues. The partnership works extremely well, and I want to take this opportunity to commend both offices for their tremendous work over the years not only administering the program, but also drafting, and re-drafting, this rule. I am grateful to them for their dedication and commitment to our mission. My position on this rule reflects my view of the top-down policy decisions driving it, not the incredible work of the staff. They have provided thoughtful and steady counsel throughout this process, and I am grateful for their professionalism.

[5] Whistleblower Program Rules, Rel. No. 34-83557, 45 (June 28, 2018) (emphasis added) [Proposing Release].

[6] *Id*.

[7] *See* Adopting Release at 49 (“the statement that the Commission would be unable to consider the dollar amount, and rather only the percentage amount, in the context of the hypothetical was incorrect and did not reflect the Commission’s prevailing understanding of its discretion or its practice in considering and applying the Award Factors and setting Award Amounts.”)

[8] I note that it did reflect the prevailing understanding of the Commission at the time of the proposal in 2018. Four of the Commissioners who voted that day specifically referenced, in their statements, their belief that the Commission did not have discretion to consider dollar amounts in setting awards under the rules at the time.

[9] *See* Adopting Release at 48-53.

[10] *See* Adopting Release at 184.

[11] *See, e.g.,* Comment Letter of Senator Chuck Grassley (Sept. 18, 2018) (“Moreover, by setting minimums and maximums in percentage terms, Congress instructed the Commission to weigh these factors and set the amount of the award specifically in relation to the amounts recovered. None of these factors contemplate the potential dollar number itself as a factor in determining the final warranted award”); Comment Letter of Taxpayers Against Fraud (Sept. 18, 2018) (“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”); Comment Letter of Kohn, Kohn & Colapinto LLP (Sept. 20, 20202) (“Lowering awards simply on the basis of size is inconsistent with the plain meaning of the statute and undermines the existing criteria established by Congress for increasing the percentage of a sanction obtained based on important market behaviors that serve the long-term interest of investors. A rule that permits arbitrary reductions based on the size of an award is counter to the public interest, would discourage whistleblowers from coming forward, and undermine existing incentives for desired behaviors when a whistleblower reveals a large fraud, and for these reasons such a rule should be opposed”); Comment Letter of Sean X. McKessy (Oct. 25, 2019) (“Under the proposed rules, this straightforward discussion gets murky as it must be explained that even if he/she is a ‘model whistleblower,’ the Commission may decide to decrease a possible award based on what it deems to be 'reasonably necessary' to award him/her as well as advance the interests of the program. This explanation will inevitably lead to more difficult-to-answer questions from the potential whistleblower about what ‘reasonably necessary’ means, who will make that determination, what will we have to provide to the Commission to support what is reasonably necessary in his/her particular circumstance. An already reluctant whistleblower may well find this injected level of uncertainty sufficient confirmation to avoid taking the immense and potentially career-ending risk of blowing the whistle.”)

[12] Substantial monetary sanctions collected could, in some circumstances, suggest the vindication of a significant law enforcement interest. On the other hand, lesser monetary sanctions collected could suggest

nothing more than difficulty collecting a judgment due to circumstances wholly unrelated to the substance of the case. In general, award amount does not have the direct relationship to the merits of the whistleblower's conduct or information that the existing factors do.

[13] *See* new Rule 21F-6(c)(iii), Adopting Release at 184-85.

[14] *See* Adopting Release at 58.

[15] The existing rules already permit the Commission to consider, as a negative award factor, a whistleblower's culpability in "matters associated with the Commission's action or related actions. . ." Rule 21F-6(b)(1). But that is very different from reducing a whistleblower's award for past transgressions, totally unrelated to the Commission's action, which may be years in the past. It seems to me that we should encourage whistleblower submissions from those who may have a familiarity with how frauds are perpetrated, not find ways to punish them even further for matters in the past. By way of example, consider someone like Sam E. Antar, who, in his own words, "helped to perpetrate one of the largest securities frauds of the 1980's" (https://www.sec.gov/news/press/4-511/4511-49.pdf), for which he was convicted. Mr. Antar is now a well-known and active forensic accountant who has devoted himself to uncovering and publicizing financial frauds. On his blog, Mr. Antar notes prominently that "Red flags investigated in this blog are often reported to appropriate government agencies as a whistleblower." *See* https://whitecollarfraud.blogspot.com/. I cannot imagine why we would disincentivize someone like him from reporting a tip. That is, in the word most associated with the fraud for which Antar was convicted, "crazy." *See* https://en.wikipedia.org/wiki/Crazy_Eddie.

[16] The amendment to Rule 21F-2 goes beyond what was necessary in response to the Supreme Court's decision in *Digital Realty Trust v. Somers,* 138 S.Ct. 767, 778 (2018), which held that the definition of a "whistleblower" in Exchange Act Section 21F(6)(a) requires that an individual provide a report to the Commission in order to be eligible for protection from retaliation. Rather than simply conforming our rules to that holding, today's amendments add a requirement that the report to the Commission be "in writing." The release refers to the in-writing requirement as a "minimal burden," necessary for the facilitation of tracking information by the staff, but for purposes of protecting whistleblowers from retaliation, the Commission should be willing to shift the burden to itself.

[17] As proposed, new Rule 21F-9(e) would have essentially rendered a whistleblower ineligible for an award if they first reported their information to the staff by any means other than the filing of a Form TCR. This provision was one of the most strongly opposed by commenters because it was both draconian in its implications, and inconsistent with the reality of how information is often brought to the staff. The version we are adopting is vastly improved, allowing a whistleblower to perfect their submission by filing a Form TCR within 30 days of either when they first provided their information, or of when they learned of the requirement to file Form TCR. Nevertheless, I am concerned that the 30 day window may be too short, and hope that the Commission will be willing to revisit it in the future if it proves to be so. In the meantime, I am optimistic that the Commission will exercise its exemptive authority as appropriate to ensure fair outcomes for whistleblowers who provide assistance to the staff but do not satisfy the letter of 21F-9(e).

[18] *See* Exchange Act Section 21F-6(b) (15 U.S.C. § 78u-6(b)(1)) ("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.")

[19] Adopting Release at 180-82.

[20] For example, we could have added language requiring an evaluation of the relevant agency's program to determine whether its contours were similar to our own. Our rules did contain such a provision that foreclosed recovery of multiple awards when the related action involved the Commodity Futures Trading Commission, an agency with a program similar to ours. That provision, however, is repealed by today's amendments. *See* Rule 21F-3(b)(3).

[21] One notable example is the statutory maximum award of $1.6 million available under the Department of Justice's whistleblower program relating to the Financial Institutions Reform, Recovery, and Enforcement Act, or FIRREA), which has been widely cited as ineffective at producing high quality tips for that program.