TAF
TAXPAYERS AGAINST FRAUD

THE FALSE CLAIMS ACT LEGAL CENTER

September 23, 2019

The Honorable Chuck Grassley
135 Hart Senate Office Building
Washington, DC 20510

The Honorable Tammy Baldwin
709 Hart Senate Office Building
Washington, DC 20510

Re: Whistleblower Programs Improvement Act of 2019

Senator Grassley and Senator Baldwin:

As the leading non-profit organization dedicated to the promotion and protection of the effectiveness of federal and state whistleblower programs, Taxpayers Against Fraud (TAF) takes this opportunity to thank you both, along with Senators Ernst and Durbin, for your sponsorship of the proposed Whistleblower Programs Improvement Act of 2019.

TAF and its sister organization, the TAF Education Fund, are uniquely situated to comment on the government's efforts to maintain the integrity and advance the effectiveness of whistleblower reward and private enforcement provisions in federal and state laws. Since 1986, TAFEF's members, working in partnership with government law enforcement personnel, have represented whistleblowers in cases brought under the federal and state False Claims Acts and the Securities and Exchange Commission, Commodity Futures Trading Commission, Internal Revenue Service, and Motor Vehicle Safety whistleblower programs. These cases have generated tens of billions of dollars in civil and criminal recoveries for federal and state taxpayers. Just as importantly, vigorous enforcement of whistleblower laws through public-private partnerships has resulted in significant efforts to improve internal compliance within various sectors of the U.S. economy and is estimated to have saved additional tens of billions in taxpayer dollars through deterrent effects.

We strongly support passage of the Whistleblower Programs Improvement Act, which would codify several significant improvements to the SEC and CFTC whistleblower programs.

1220 19th Street, NW Suite 501 Washington, DC 20036 phone (202) 296-4826 fax (202) 296-4838
internet: http://www.taf.org or taf-info@taf.org

1. Protection for internal whistleblowers

Section 2 of the proposed bill would correct a drafting oversight in the original legislation by amending the definition of whistleblower to protect individuals who report potential violations of federal commodities and securities trading laws internally to their employers but not to the government. This change would vindicate Congress's intent, clearly evident from the legislative history, to incentivize internal reporting and extend whistleblower protection to persons who report potential wrongdoing to their employers but not to the CFTC or the SEC. *See* 76 Fed. Reg. at 34,300-34,301.

The need for this amendment became clear when the Supreme Court issued its decision in Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018), holding that the definition of "whistleblower" in Section 922 of the Dodd-Frank Act requires that an individual report a possible securities law violation to the SEC to qualify for protection against retaliation, and that a whistleblower who makes only an internal report is not entitled to the protection of the statute.

While providing vital protection to whistleblowers, the proposed amendment benefits companies and their shareholders as well. Indeed, when the SEC was implementing its whistleblower program in 2010, the U.S. Chamber of Commerce submitted a lengthy letter to the Commission detailing the importance of promoting employee reports within the chain of command.[1] Internal reporting incentivizes the development of robust corporate compliance programs and gives companies the opportunity to take corrective action prior to government investigation or intervention. Government enforcers routinely give credit to companies that voluntarily identify and disclose compliance problems and take proactive steps to remedy them. Employees who report internally because they believe in the integrity of their employers should be encouraged to come forward with information about potentially unlawful conduct and must be protected when they do so.

2. Timely processing of claims and prompt payment of awards

The SEC and the CFTC programs impose a variety of time-sensitive procedural requirements on whistleblowers who file claims under their statutes, but at present set no time limits on the agencies themselves for the processing of whistleblower claims. Section 3 of the proposed bill would impose modest time limits on both agencies for the processing of claims and payment of awards in future cases and would require notice to whistleblowers

[1] The text of the Chamber's letter can be found at http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/CCMC-ILR-WB-Comment-Letter-12.17.2010.pdf.

when good cause exists for delayed resolution of their claims. We applaud these provisions as a first step toward streamlining the award process.

In order to remedy the significant backlog of unresolved cases, particularly at the SEC, and the slow pace of the award process at both agencies, we encourage Congress to consider appropriating funds for additional personnel to investigate, administer and approve whistleblower claims. These programs are profit centers for both agencies, and additional appropriations for enforcement would be a wise investment of taxpayer funds.

We have recommended that Congress consider adopting additional improvements to strengthen the incentives of the SEC and CFTC whistleblower programs, and would welcome further discussion of these proposals:

- Harmonize the rights of appeal under the two programs by making SEC appeal rights consistent with those of the CFTC program, which give whistleblowers the ability to appeal both the denial of an award and the amount of an award.

- Streamline agency processes for making final award determinations by giving the Commissions 45 days following a Preliminary Determination to make a Final Determination of Award if no Request for Reconsideration has been filed. If one or more whistleblowers file a Request for Reconsideration, this period would be extended to 180 days.

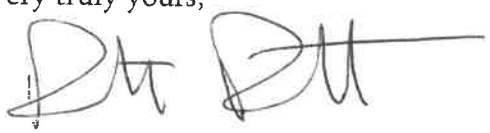
- Provide reasonable disclosure requirements, subject to appropriate safeguards, to permit notification to whistleblowers of the status of investigations for which they have provided information. Disclosures would not be required if the agency's Commissioner determines that disclosure would seriously impair an ongoing investigation.

3. Technical correction – non-enforceability of provisions waiving rights and remedies or requiring arbitration for SEC whistleblowers

The whistleblower protections of the SEC and CFTC programs were developed together and were intended to mirror one another, and Section 4(d)(2) of the proposed bill would rectify what appears to have been an inadvertent omission in the drafting of the original SEC provisions. The CFTC statute clearly provides that conditions of employment and contracts with individual employees, including certain arbitration agreements, will be deemed invalid and unenforceable as against public policy if they conflict or interfere with whistleblower protections created under the law. The proposed amendment would provide the identical protection to SEC whistleblowers, consistent with Congressional intent.

We are grateful for your efforts to improve the effectiveness of the SEC and CFTC whistleblower programs. Thank you for your leadership in bringing this legislation forward, and for considering the views of Taxpayers Against Fraud. Please feel free to contact me at (202) 293-1117 or rpatten@taf.org if you have any questions.

Very truly yours,



Robert Patten
President and Chief Executive Officer
Taxpayers Against Fraud
1220 19th St, NW, Suite 501
Washington, DC 20036
(202) 293-1117
rpatten@taf.org
www.taf.org

cc: The Honorable Joni Ernst
730 Hart Senate Office Building
Washington, DC 20510

The Honorable Dick Durbin
711 Hart Senate Office Building
Washington, DC 20510