



February 7, 2022

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE Washington, DC 20549
Via E-mail

Re: Petition for Issuance, Amendment or Repeal of Commission Rules Related to Whistleblower Submission of Original Information to the News Media

Urgent Request for Immediate Action to Protect the Public Interest in Accordance with Rule 202.6

Dear Secretary Countryman:

As longtime advocates for whistleblowers, National Whistleblower Center, Whistleblower Network News, and Kohn, Kohn and Colapinto, LLP, are requesting that the U.S. Securities and Exchange Commission (“SEC” or “Commission”) use its authorities under [§ 202.6\(a\)](#) of the SEC’s Rules of Practice to immediately correct two procedural rules: Rules 21F-4(a) and 21F-9. These rules are in direct conflict with the Commission’s extremely important policies incentivizing whistleblowers to report wrongdoing and the Commission’s longstanding policy of promoting First Amendment rights to freedom of speech and freedom of the press.

Consistent with the SEC’s strong and commendable support for whistleblowers, and the Commission’s policy on freedom of the press, we are requesting that the Commission take immediate action to address problems caused by two rules located at 17 C.F.R. §240. These rules are 21F-4(a), excluding the news media from the list of organizations with whom a whistleblower can make “voluntary” disclosures that qualify for a reward; and §240.21F-9, regarding the “form” of communication that must be used to qualify for a reward.¹

Due to the urgent value of media whistleblowers and freedom of the press, we request that the SEC issue guidance to claims determination staff instructing them to treat media whistleblowers who otherwise qualify as original sources under the Dodd-Frank Act as both original and voluntary whistleblowers to be judged by the merit of their contributions to SEC investigations rather than their mode of communication with the Commission. Please consider the language recommended in our petition for Commission action immediately.

¹ See Regulation 21-F from SEC.gov, available at <https://www.sec.gov/about/offices/owb/reg-21f.pdf>.

I. National Whistleblower Center has an Interest in the Requested Action.

[National Whistleblower Center](#) (“NWC”) has worked directly with whistleblowers who have communicated violations of law to the news media since 1988. NWC strongly supported the case of [Sanjour v. EPA](#), which successfully challenged the constitutionality of a federal agency using financial rules to create a chilling effect on the right to free speech.

[Whistleblower Network News](#) (“WNN”) is a media outlet that has a strong interest in working with whistleblowers who desire to directly communicate with the news media.

[Kohn, Kohn and Colapinto](#) has provided legal representation to whistleblowers who have disclosed violations of law to the news media since 1988 and served as the lead attorneys for the plaintiffs in the *Sanjour* case.

KKC provides *pro bono* legal and advisory assistance to both NWC and WNN and currently represents at least one media whistleblower whose claims may be prejudiced by the application of the current SEC rules in a manner that is inconsistent with law and the existing SEC policy on the news media.

II. The SEC’s Support of Whistleblowers is Well Documented and Ongoing.

The SEC strongly supports and benefits from whistleblowers under the Dodd-Frank Act (“DFA”). In [September 2020](#), the [Commission unanimously recognized](#) the value of whistleblowers in enhancing enforcement of laws protecting investors and the public. Each active Commissioner made on-the-record statements reflecting the significant value of the DFA program and approved a number of reforms to enhance that program.² Since his appointment, Chair Gary Gensler has [continued to recognize](#) the important contributions whistleblowers make toward protecting investors and the public, including [publicly recognizing](#) their significant contributions, and taking steps to correct ongoing problems in the current rules governing the whistleblower program. Chair Gensler has strongly endorsed paying qualified whistleblowers who serve the public interest.

There is currently a conflict between the rules governing the SEC program, the Commission’s open support of whistleblowers, and the application of these rules. We request the Commission to issue guidance ensuring that whistleblowers who report through the media are recognized, supported, and rewarded as a matter of public interest.

III. The SEC Must Harmonize the Commission’s Assessment of Whistleblowers with Existing Policy’s Regarding Freedom of The Press.

In a 2006 Policy Statement the SEC codified its support for freedom of the press, recognizing the role news media plays in informing investors of potential violations, informing the Commission staff of these violations, deterring violations and otherwise assisting in protecting investors from fraud.

² Former Chair [Jay Clayton](#), Commissioner [Allison Lee](#), Commissioner [Caroline Crenshaw](#), Commissioner [Hester Peirce](#), former Commissioner Elad [Roisman](#). Also see comments by former Chair [Mary Jo White](#).

The SEC’s policy on freedom of the press states, in relevant part:

Freedom of the press is of vital importance to the mission of the Securities and Exchange Commission. **Effective journalism complements the Commission's efforts to ensure that investors receive the full and fair disclosure** that the law requires, and that they deserve. **Diligent reporting is an essential means of bringing securities law violations to light and ultimately helps to deter illegal conduct.** In this Policy Statement the Commission sets forth guidelines for the agency's professional staff to **ensure that vigorous enforcement** of the federal securities laws is conducted **completely consistently** with the principles of the First Amendment's guarantee of freedom of the press . . .

[17 C.F.R. § 202.10](#) (emphasis added).

Consistent with the SEC’s strong and commendable support for whistleblowers, and the Commission’s policy on freedom of the press, we are requesting that the Commission take immediate action to address problems caused by [two existing rules](#) that undermine both whistleblower protections and freedom of the press.³

IV. The Value of Whistleblowers Who go to the Media is Well Established.

We are particularly concerned because these conflicts are likely to arise in cases that attract national or international media attention. These are cases where there is an overriding interest in alerting the public (and government agencies) about the violations as only a high-profile media report can accomplish. These types of cases are often brought to light by whistleblowers who work as engineers, computer specialists, or anti-corruption activists, and these whistleblowers typically have no expertise in securities law. There are numerous examples of the SEC taking action on such scandals. These include the Volkswagen “dieselgate” scandal,⁴ the arrest of Nissan’s CEO in Japan,⁵ numerous international corruption scandals (e.g. an Italian oil company paying bribes in Algeria)⁶, the Cambridge Analytica and Facebook election and privacy scandal,⁷ the Lumber Liquidators scandal first exposed on *60 Minutes*,⁸ COVID-19 frauds,⁹ and the BP oil spill in the Gulf of Mexico.¹⁰ In each of these examples there is a high likelihood that the original source whistleblower(s) were not familiar with U.S. securities law, but provided “original information” to the news media that would qualify, as a matter of law, for a financial reward under

³ These two rules are located at 17 C.F.R. §240.21F-4(a) (excluding the news media from the list of organizations with whom a whistleblower can make “voluntary” disclosures that qualify for a reward) and §240.21F-9 (the “form” that must be used to qualify for a reward).

⁴ <https://www.sec.gov/news/press-release/2019-34>.

⁵ <https://www.sec.gov/news/press-release/2019-183>.

⁶ <https://www.sec.gov/enforce/34-88679-s>.

⁷ <https://www.sec.gov/news/press-release/2019-140>.

⁸ <https://www.sec.gov/news/press-release/2019-29> (“The charges stem from Lumber Liquidators’ false public statements in response to media allegations that the company was selling laminate flooring that contained levels of formaldehyde exceeding regulatory standards.”)

⁹ <https://www.sec.gov/news/press-release/2020-327>.

¹⁰ <https://www.sec.gov/news/press-release/2012-2012-231htm>.

the Congressionally enacted DFA. In some of these cases the SEC could have used whistleblower-information published in the news media to initiate or expand an investigation, never informing the whistleblower as to his or her rights under the law, or even worse, using the two rules identified in this Petition to deny justice to an otherwise qualified whistleblower.

I. Inconsistency in Rules Prejudice Media Whistleblowers.

These rules create procedural obstacles prejudicing whistleblowers who make initial reports of wrongdoing to the news media. As you are aware, the DFA permits whistleblowers to file “original information”¹¹ directly to the press, and still qualify for a reward. Such disclosures can play a vital role in protecting investors and the public, preventing retaliation, and in deterring wrongdoing.¹² This Petition concerns the rights of “media whistleblowers” and simply requests that the Commission fully implement these rights, as envisioned by Congress. As used in this Petition, that term refers to a whistleblower who initially provides information to the news media, and thereafter the SEC learns about the allegations from the press reports.

All modern whistleblower reward laws, including the False Claims Act and the IRS whistleblower law, authorize rewards to be paid to media whistleblowers. This practice was followed by Congress in the DFA. Within the very definition of “original information” Congress carved out exceptions, permitting whistleblowers to fully qualify for a reward if the SEC learned of their allegations from other government agencies or from the news media. These carve-outs recognized that numerous whistleblowers initially provide their allegations to these two sources but are still

¹¹ “Original information” is a term of art defined in the DFA. It is the type of information a whistleblower must provide in order to qualify for a reward. See 15 U.S.C. § 78u-6(a)(3) (defining “original information”) and § 78u-6(b)(1)(setting forth requirements for a reward). As such, “original information” is the most valuable type of information that can be provided by a whistleblower and the submission of this type of information is a mandatory requirement for obtaining a reward. Under the Supreme Court’s ruling in [Digital Realty Trust v. Somers](#), 138 S.Ct. 767, 776-77 (2018)(a case interpreting the DFA), the Commission is required to strictly follow this definition.

¹² “The ability of the media to expose wrongdoing to public scrutiny is a way to neutralize the inherent advantages organizations hold over their members; the media can serve as vehicles both to achieve redress of wrongdoing and to gain protection against organizational retaliation. The possibility of public exposure may inhibit wrongdoing in the first instance as well. The power of the press to expose and publicize wrongdoing is likely to provide a disincentive to misconduct of comparable weight to the threat of governmental sanction. Indeed, the media can often be more effective report recipients than the government, because the media are uniquely qualified to apply pressure to public officials or agencies that ignore or do not respond aggressively to reports of wrongdoing.” Dworkin & Callahan, *Employee Disclosures to the Media: When Is a Source a Sorcerer*, 15 HASTINGS COMM. & ENT. L.J. 357 (1992) (emphasis added). *And see*, “Recent federal legislation incorporating whistleblower protection is often more specific about appropriate channels, commonly favoring external reports to a government agency. The statute that most clearly protects reporting to the media is the False Claims Act (FCA or Act). First passed in 1863 and significantly revised in 1986, this statute encourages private sector whistleblowing, and generously rewards whistleblowers . . . *The Act specifically allows whistleblowers who first report the wrongdoing to the media to subsequently file suit under the FCA.*” (emphasis added).

fully deserving of a reward if they would otherwise qualify for compensation under the DFA. To accommodate media whistleblowers Congress defined “original information” to include information the SEC learns from the news media *if* “the whistleblower is a source of the information.” [15 U.S.C. § 78u-6\(a\)\(3\)](#).

This Petition addresses the conflict between the right of media whistleblowers to disclose violations of law directly to the news media and two SEC procedural rules approved by the Commission that undermine those rights.

II. Current Rules Could Deter Valuable Insiders from Coming Forward.

In its final rules implementing the DFA’s whistleblower provisions, effective August 12, 2011, the Commission adopted a rule providing that, for a whistleblower submission to be considered “voluntary,” it must be submitted “before a request, inquiry, or demand that relates to the subject matter of [the] submission is directed” to the whistleblower by the Commission or by various other authorities.¹³

However, the Commission recognized that this requirement “could have had the unintended consequence of precluding a submission from being considered as ‘voluntary’ in circumstances where the whistleblower provided the information to another authority, the other authority referred the matter to the Commission, and our staff contacted the whistleblower before he or she had the opportunity to file a whistleblower submission with us.”¹⁴

To address this concern, the Commission created a carve-out that permits whistleblowers to initially disclose their allegations with certain specified authorities prior to notifying the Commission.¹⁵ These whistleblowers would not lose their “voluntary” status even if the Commission were to subpoena them before the whistleblowers are able to file a formal whistleblower submission.¹⁶ The Commission thereby authorized certain third-party disclosure channels with whom a whistleblower may communicate with prior to notifying the Commission—provided that the disclosure was made to a designated entity. These designated entities include: the Public Company Accounting Oversight Board, a self-regulatory organization, Congress, any other authority of the Federal government, or a state Attorney General or securities regulatory authority.¹⁷

However, in a move that is highly prejudicial to a wide swath of potential whistleblowers, *the Commission did not include the news media in the list of authorized third-party disclosure channels*. This means that a whistleblower could lose his or her “voluntary” status if the whistleblower first provides information to the news media and the Commission thereafter contacts the whistleblower based on the initial news media disclosure.

¹³ 17 C.F.R. § 240.21F-4(a)(1).

¹⁴ 76 Fed. Reg. 34300, 31319 (June 13, 2011).

¹⁵ 17 C.F.R. § 240.21F-4(a)(2).

¹⁶ *Id.*

¹⁷ 17 C.F.R. § 240.21F-4(a)(1)(i)-(iii).

Here is how the current rules could operate so as to result in severe prejudice to otherwise highly qualified whistleblowers: Assume a whistleblower was identified in the press as being the source of a scandal that an SEC investigator has an interest in reviewing. If that investigator simply picks up the phone and calls the whistleblower to obtain additional information on the scandal, that whistleblower could be *automatically disqualified* under the current SEC rules from ever obtaining a reward, because that whistleblower would no longer be considered “voluntary” under Rule 21F-4(a). This disqualification could occur within hours of the media disclosure and despite the fact that the whistleblower fully and voluntarily cooperates with the SEC and becomes one of the primary sources of information justifying a large sanction. As absurd as it may sound, this whistleblower could be deemed disqualified simply because he or she was called by the SEC and voluntarily answered the SEC’s questions. Under the current regulations a whistleblower is deemed non-voluntary simply if he or she *voluntarily* responds to an “inquiry” made by an SEC investigator.¹⁸

A second rule that undermines the ability of media whistleblowers to qualify for a reward is the regulation governing the submission of a TCR, which is the formal complaint whistleblowers are required to file. A media whistleblower could also be disqualified if, after speaking with an SEC investigator who learned of the whistleblower’s information through the press, he or she did not submit the technical TCR to the Commission within 30-days of the conversation. This rule would apply even if the SEC learned all of the information from the whistleblower necessary to sanction the wrongdoer from the media disclosures and/or follow-up conversations with the news media source. Rule 21F-9(a)-(b).¹⁹ These disqualifications can occur despite any sacrifices he or she made, the extent the SEC relied on his or her disclosures to sanction the wrongdoer, or the extent of cooperation offered to the SEC to assist in the investigation.

The goal of this petition is to have the Commission harmonize its current whistleblower rules with the statutory requirements of the DFA, the existing SEC policy on the news media, and the regulations regarding voluntary disclosures.²⁰ Given the Congressional intent behind the DFA, the Commission should grant this petition, as a matter of discretion, in order to harmonize the statutory right to file “original information” with the news media with the rules governing the submission of voluntary information. However, the Petitioners also maintain that the adjustments requested

¹⁸ 17 C.F.R. § 240.21F-4(a)(1). Recognizing that this rule could result in disqualification of numerous valid whistleblowers, the Commission exempted numerous whistleblowers who, like media whistleblowers, made initial disclosures to various third-parties. § 240.21F-4(a)(2), but did not include whistleblowers within this exemption. See also, 76 Fed. Reg. 34300, 31319, n. 81 (June 13, 2011), where the Commission warned against the “unintended consequences” of this rule, but once again failed to recognize that media whistleblowers also fell victim to these “unintended consequences.” This Petition seeks to close this loophole.

¹⁹ Like the rule on voluntary submissions, the Commission also recognized that the TCR rule could have unintended consequences by disqualifying otherwise highly qualified whistleblowers. The Commission also created exemptions to this rule that apply to other third-party disclosures, but also failed to include media whistleblowers in the exemption. Vol. 76 Federal Register at 34301 and 34322. This Petition would close this loophole.

²⁰ See *Clark v. Uebersee*, 322 U.S. 480, 488-89 (1947) (the task is to give the most “harmonious and comprehensive meaning” to two provisions); *Citizens to Save Spencer Cty v. U.S. Env’tl. Protec. Agency*, 600 F.2d 844, 877, n. 155 (D.C. Cir. 1979)(when “exercising rulemaking authority” the goal is to “harmonize to the maximum extent possible” different statutory provisions).

herein are required as a matter of law in order to effectuate the plain meaning of the DFA. Additionally, the U.S. Constitution prohibits administrative agencies, such as the SEC, from creating regulations that create a [financial disincentive](#) on individuals from lawfully communicating with the news media.²¹

III. Changes to Existing Rules are needed Immediately to protect whistleblowers and freedom of the press.

The Commission can immediately address this issue on a case-by-case basis by processing media-whistleblower cases pursuant to 17 C.F.R. §§ 240.21F-10 and 11. Unlike other regulations, these rules establish a fair process that lets media whistleblowers compete equally with other applicants for a reward, without being prejudiced by rules that fail to consider the right of whistleblowers to disclose “original information” to the news media.²²

Rules 21F-10 and 11 require *all* whistleblowers to file their applications for a reward within 90-days of the publication of a Notice of Covered Action. All applicants, including media whistleblowers, can thereafter set forth the facts demonstrating that they voluntarily submitted original information that was used by the SEC (or other federal agencies) to sanction a wrongdoer for \$1 million or more. This permits the Commission to adjudicate a media whistleblower case without being prejudiced by the rules that failed to address the statutory right to provide “original information” to the news media.

IV. Changes to Existing Rules Requested in the Petition

Petitioners hereby request that the SEC issue the following directive to staff regarding the processing of claims filed by news media whistleblowers under the Dodd-Frank Act:

Pursuant to the Commission’s authority under Commission Rule § 2.206 and DFA Rule § 240.21F-8(a), and in accordance with the statutory definition of “original information” set forth in 15 U.S.C. § 78u-6(a)(3), the Commission hereby instructs claims determination staff to waive the following rules in any case in which an award applicant can demonstrate that he or she voluntarily provided “original information” to the news media that otherwise meets the qualifications for a reward pursuant to 15 U.S.C. § 78u-6(b) and files a timely application for a reward in accordance with 17 C.F.R. §§ 240.21F-10 or 11:

- (1) Rule 21F-9(a)-(b), the requirement that whistleblowers file a TCR when providing original information to the Commission; and
- (2) Rule 21F-4(a)(1), provided that the whistleblower voluntarily submitted his or her original information to the news media prior to receiving a request or demand to submit that information from the SEC or from another government agency.

²¹ See, *U.S. v. NTEU*, 513 U.S. 454, 468 (1995).

²² See, Rules 21F-4(a); 21F-9(a)-(b).

The Commission should exercise its authority under Rule § 2.206 to immediately implement the following changes applicable to news media whistleblowers: (1) If a media whistleblower otherwise meets the procedural requirements of 17 C.F.R. §§ 240.21F-10 or 11, that they be deemed qualified for compensation under the DFA; (2) that the procedural requirement that whistleblowers file a TCR pursuant to 21F-9(a)-(b) be waived in media-whistleblower cases, as long as the substantive requirements necessary to qualify for a reward are also met; (3) that the rule as to how to voluntarily provide information to the SEC set forth in Rule 21F-4(a)(1) be waived, provided that the whistleblower's original disclosures to the news media was voluntary. The precise relief requested by the Petitioners is attached to this letter as an Appendix.

Thank you in advance for your prompt attention to this matter. We look forward to meeting with you and/or your staff to further explain this critical issue.

Respectfully submitted,

/s/

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