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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

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Whistleblower Program Rules

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting several amendments to the Commission's rules implementing its congressionally mandated whistleblower program. Section 21F of the Securities Exchange Act of 1934 ("Exchange Act") provides, among other things, that the Commission shall pay—under regulations prescribed by the Commission and subject to certain limitations—to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the federal securities laws that leads to the successful enforcement of a covered judicial or administrative action, or a related action, an aggregate amount, determined in the Commission's discretion, that is equal to not less than 10 percent, and not more than 30 percent, of monetary sanctions that have been collected in the covered or related actions. The Commission is adopting various amendments that are intended to provide greater transparency, efficiency and clarity to whistleblowers, to ensure whistleblowers are properly incentivized, and to continue to properly award whistleblowers to the maximum extent appropriate and with maximum efficiency. The Commission is also making several technical amendments, and adopting interpretive guidance concerning the term "independent analysis."

DATES: The final rules are effective December 7, 2020. For application dates for each amendment, see the table in Section III.

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SUPPLEMENTARY INFORMATION: The Commission is amending the following rules and adopting a new rule.

Amendments	
Commission Reference	CFR Citation (17 CFR)
Rule 21F-2	§ 240.21F-2
Rule 21F-3	§ 240.21F-3
Rule 21F-4	§ 240.21F-4
Rule 21F-6	§ 240.21F-6
Rule 21F-7	§ 240.21F-7
Rule 21F-8	§ 240.21F-8
Rule 21F-9	§ 240.21F-9
Rule 21F-10	§ 240.21F-10
Rule 21F-11	§ 240.21F-11
Rule 21F-12	§ 240.21F-12
Rule 21F-13	§ 240.21F-13
New Rule	
Rule 21F-18	§ 240.21F-18

I. Background and Summary

The Commission's whistleblower program has made important contributions to the agency's efforts to enforce the federal securities laws. Original information provided by whistleblowers has led to enforcement actions in which the Commission has obtained more than $2.5 billion in financial remedies, including more than $1.4 billion in disgorgement of ill-gotten gains and interest, of which almost $750 million has been or is scheduled to be returned to

harmed investors. In recognition of the important contributions of whistleblowers, the Commission has ordered over $523 million to 97 individuals in 80 enforcement actions whose original information led to the success of Commission actions and, in some instances, related actions brought by other enforcement authorities against wrongdoers.

A. The Whistleblower Award Program

Congress established the Commission's whistleblower program in July 2010 by adding Section 21F to the Exchange Act. Among other things, Section 21F directs that the Commission pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about a violation of the securities laws that leads to the successful enforcement of a covered judicial or administrative action.[1] Section 21F also directs that the awards must be an aggregate amount (the "Award Amount"), determined in the Commission's discretion, that is equal to not less than 10 percent, and not more than 30 percent, of what has been collected in the monetary sanctions imposed in the covered action and certain related actions.[2] Further, Section 21F provides that monetary awards to whistleblowers shall be paid from a special fund that Congress established called the Investor Protection Fund ("IPF").[3]

In May 2011, the Commission adopted a set of rules to implement the whistleblower program. Those rules, which are codified at 17 CFR 240.21F-1 through 17, provide the operative definitions, requirements, and processes related to the whistleblower program. Among

[1] 15 U.S.C. 78u-6(a)(1).

[2] 15 U.S.C. 78u-6(a)(5).

[3] The IPF, which was established as part of the whistleblower program, is a statutorily established fund overseen by the U.S. Department of the Treasury that serves primarily as the funding source for the Commission's whistleblower awards. Additionally, as detailed in Exchange Act Section 21F(g)(3), 15 U.S.C. 78u-6, the IPF has a statutorily created self-replenishing process and is not contingent on annual appropriations from Congress

other things, these rules define key terms and phrases in Section 21F, specify the form and manner through which an individual must submit information to qualify for an award, and establish the procedures for determining the Award Amounts.

B. Procedural Background and Summary of the Amendments Being Adopted

On June 28, 2018, the Commission proposed for public comment a package of rule amendments to the Commission's existing whistleblower rules (*see* Exchange Act Rules 21F-1 through 21F-17). These amendments were designed to enhance claim processing efficiency, clarify and bring greater transparency to the framework the Commission utilizes to exercise its discretion in determining Award Amounts, and otherwise address specific issues that have developed during the ten-year history of the whistleblower program.

For example, the amendments are intended to provide additional efficiency and transparency to the extent possible regarding the application of the existing award factors specified in Rule 21F-6(a) and (b) (the "Award Factors"), individually and collectively, particularly for awards where the statutory maximum award of 30 percent is $5 million or less, which represent the vast majority (in number) of all awards.[4] Additionally, because whistleblowers entitled to receive awards pursuant to the Commission's rules should receive their awards as quickly as reasonably practicable, the Commission is implementing mechanisms to increase the effectiveness and efficiency of its award determination process.

[4] While the Commission has made a number of larger awards, the substantial majority of all awards were $5 million or less. The specific data regarding the Commission's whistleblower awards is detailed in the "Economic Analysis" section below. This information has informed our efforts to enhance the performance of the program.

The Commission received over 150 substantively distinct comment letters from approximately 100 commenters.[5] In addition, the Commission received three form letters from over 9,300 commenters.[6]

The Commission has carefully considered the comments received. As a threshold matter, we note that the Commission's discretion in determining Award Amounts, and the manner in which the Commission exercises that discretion, was a focus for many commenters. The Commission recognizes that its articulation of the manner in which the Commission exercises its authority to determine Award Amounts should be clarified. Accordingly, the Commission is adopting a provision that clarifies the Commission's broad discretion when applying the Award Factors and determining the Award Amount, including the discretion to consider and apply the Award Factors in percentage terms, dollar terms or some combination of percentage terms and dollar terms when determining the Award Amount. Aside from clarifying the Commission's broad discretion, the Commission is adopting the rules substantially as proposed with one exception. Specifically, the Commission is not adopting proposed Rule 21F-6(d)(2), which would have provided a specific process for the Commission to exercise its discretion to review certain larger awards (exceeding $30 million to an individual whistleblower) under certain circumstances.

Although the Commission did not intend to create a new restriction on, or affect the size of, Award Amounts, this proposed rule was misperceived by some as a potential new restriction on Award Amounts. The proposed rule was one component of the Commission's effort to

[5] A number of commenters submitted multiple letters.

[6] The Commission did not investigate the circumstances under which each of these approximately 9,300 commenters submitted a form letter, including whether they submitted the letter of their own accord, were solicited to submit the letter, or provided informed consent to submit the letter.

provide greater transparency, efficiency and certainty to the Award Amount determination process. Based on the comments received, the Commission's further analysis of the operation of the whistleblower program to date and the more comprehensive clarifying amendments being adopted, the Commission does not believe that proposed Rule 21F-6(d)(2) is necessary. Further, as discussed below in Section II(E), based on these same factors and with a focus on increased transparency, efficiency and clarity, we are adding a specific provision to Rule 21F-6 that will create a presumption that, when (1) the statutory maximum authorized Award Amount is $5 million or less and (2) the negative Award Factors are not present, the Award Amount will be set at the statutory maximum, subject to the Commission's discretion to apply certain exclusions. Aside from this presumption, the process for recommendations by the Claims Review Staff ("CRS") and the Office of the Whistleblower is not changing. Awards of this type—where the maximum statutory award of 30 percent is $5 million or less—make up the vast majority (in number) of all whistleblower awards to date. Consistent with the Commission's view that encouraging whistleblowers to come forward is important, the Commission believes any potential whistleblower should understand that where the aggregate maximum award for the actions resulting from that whistleblower's original information is likely to be $5 million or less (and where the negative Award Factors are not present), Rule 21F-6(c) will generally result in an Award Amount that is the statutory maximum.[7] In addition to providing potential whistleblowers with greater transparency and certainty, this presumption should increase efficiency in the award review process.

[7] Of the total 74 awards by enforcement action as of July 31, 2020, including awards above and below $5 million, 31 awards were at the statutory maximum and an additional 16 received close to the maximum amount (in the top quarter of the range, *i.e.* 25% to 29%).

Below is a summary of the principal amendments to the Commission's whistleblower rules that are being adopted:

- Allowing awards based on deferred prosecution agreements ("DPAs") and non-prosecution agreements ("NPAs") entered into by the U.S. Department of Justice ("DOJ") or a settlement agreement entered into by the Commission outside of a judicial or administrative proceeding to address violations of the securities laws;
- Consistent with the Commission's practice in award determinations to date, clarifying the current definition of related action to make clear that recovery from the Commission for the related action is not available where the Commission determines that a separate whistleblower award program more appropriately applies to the non-Commission action;
- Providing a specific process presumptively setting Award Amounts at the top end of the range when the statutory maximum award of 30 percent is $5 million or less and the negative Award Factors are not present, subject to the discretion of the Commission to apply certain exclusions;
- Clarifying the Commission's broad discretion when applying the Award Factors in Rule 21F-6(a) and (b) and setting Award Amounts, including the discretion to consider the Award Factors in percentage terms, dollar terms or some combination thereof; and
- Revising the Commission's definition of "whistleblower" in light of the Supreme Court's decision in *Digital Realty Trust, Inc. v. Somers*,[8] and making certain related clarifications to Rule 21F-2 to address various other interpretive questions that have arisen in connection with the Court's holding.

[8] *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018).

In addition to the foregoing amendments, the Commission is adopting several other amendments to our whistleblower rules that are intended to clarify and enhance certain policies, practices, and procedures in implementing the program. The Commission is revising Exchange Act Rule 21F-4(e) to clarify the definition of "monetary sanctions." Further, the Commission is revising Exchange Act Rule 21F-9 to provide the agency with additional flexibility to modify the manner in which individuals may submit Form TCR (Tip, Complaint or Referral) and to provide a new mechanism for individuals who failed to timely comply with the requirements of subparagraphs (a) and (b) of Rule 21F-9 to obtain an award if the Commission can readily determine that they clearly qualify for an award. Additionally, the Commission is adopting revisions to Exchange Act Rule 21F-8 to provide the agency with additional flexibility regarding the forms used in connection with the whistleblower program,[9] revisions to Exchange Act Rule 21F-12 to clarify the list of materials that the Commission may rely upon in making an award determination, and revisions to Rule 21F-13 to clarify the materials that may be part of the administrative record for purposes of judicial review.

Two further changes are designed to help increase the Commission's efficiency in processing whistleblower award applications. The Commission is adding a new paragraph (e) to Exchange Act Rule 21F-8 to clarify the agency's ability to bar individuals from submitting whistleblower award applications when they are found to have submitted false information in violation of Exchange Act Section 21F(i) and Rule 8(c)(7) thereunder, as well as to afford the Commission the ability to bar individuals who repeatedly make frivolous award claims in Commission actions. The Commission is also adding new Exchange Act Rule 21F-18 to create a summary disposition procedure for certain types of common denials, such as untimely award

[9] 17 CFR 249.1800-1801.

applications and applications involving a tip that was not provided to the Commission in the form and manner that the Commission's rules require. Under this new summary disposition process, the Office of the Whistleblower may issue the preliminary award denial in a limited class of relatively straightforward matters; for all other award applications our current award-processing procedures as specified in Rule 21F-10 will continue to apply, which, among other things, means that the preliminary award determination will be issued by the CRS and not the Office of the Whistleblower.[10]

Also, the Commission is adopting interpretive guidance to help clarify the meaning of "independent analysis" as that term is defined in Exchange Act Rule 21F-4(b)(3) and used in the definition of "original information."[11] Further, the Commission is specifying the applicability dates for each rule amendment that we are adopting.

Finally, the Commission received a number of comments in response to the proposing release requesting additional transparency related to the administration of the whistleblower program. The Commission has considered these concerns and the following actions are in response to them.[12] The Commission is directing that the Office of the Whistleblower will

[10] Exchange Act Rule 21F-10(d) and Rule 21F-11(d) authorize the CRS to make a preliminary determination on an award application for a covered action and related action, respectively. Further, in accordance with Section 4A(b) of the Exchange Act, both rules now clarify that Commission will be provided the opportunity to review any preliminary determination before it is provided to a claimant. *See id.* (providing that "the Commission shall retain a discretionary right to review" actions taken "[w]ith respect to the delegation of any of [the Commission's] functions").

[11] In addition to the amendments and other modifications described above, we are adopting a technical correction to Exchange Act Rule 21F-4(c)(2), to modify an erroneous internal cross-reference, as well as several technical modifications to Exchange Act Rules 21F-9, 10, 11, and 12, to accommodate certain of the substantive and procedural changes described above.

[12] None of the measures discussed in this paragraph are intended to create any enforceable rights. The measures discussed have no legal force or effect; they do not alter or amend applicable law, and create no new or additional obligations for any person.

include in its annual reports to Congress (beginning with the fiscal year 2020 report), in an aggregated manner, an overview discussion of the factors that were present in the awards throughout the year, including (to the extent practicable) a qualitative discussion of how these factors affected the Commission's determination of Award Amounts. The Office of the Whistleblower will continue to make available on its webpage, and will review and update as necessary on not less than an annual basis, information regarding its approach to processing whistleblower award claims, including the initial review and prioritization of award claims.[13]

I. Description of Final Rule Amendments

A. Rule 21F-4(d) — Definition of "action"

1. Proposed Rule

Section 21F of the Exchange Act requires the Commission to pay whistleblower awards, with certain limitations and subject to certain conditions, in relation to the "successful enforcement" of "any covered judicial or administrative action" brought by the Commission and certain "related [judicial or administrative] actions" of other governmental entities, most notably DOJ.[14] The Commission proposed to add a new paragraph (3) to existing Rule 21F-4(d) (defining an "action") to provide that the term "administrative action" includes a deferred prosecution agreement ("DPA") or a non-prosecution agreement ("NPA") entered into by DOJ or a state attorney general in a criminal case as well as a settlement agreement entered into by the

[13] This information is available at https://www.sec.gov/files/OWB%20Approach%20to%20Processing%20Award%20Claims.pdf.

[14] 15 U.S.C. 78u-6(b)(1). A "covered judicial or administrative action" is any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1 million. *Id.* 78u-6(a)(1). A "related action" is a judicial or administrative action brought by any of several governmental entities designated in the statute that is based upon the original information provided by a whistleblower that led to successful enforcement of a Commission covered action. *Id.* 78u-6(a)(5). Awards range between 10 percent and 30 percent "of what has been collected of the monetary sanctions imposed" in the action. *Id.* 78u-6(b)(1)(A), 78u-6(b)(1)(B).

Commission outside of the context of a judicial or administrative proceeding to address violations of the securities laws; and further that any money required to be paid in such actions will be deemed a "monetary sanction" within the meaning of Rule 21F-4(e). This proposed addition to Rule 21F-4 sought to make awards available to meritorious whistleblowers in cases where these alternative vehicles are used to address violations of law. Its premise was the same as that underlying current Rule 21F-4(d)(1): our view that Congress did not intend for meritorious whistleblowers to be denied awards simply because of the procedural vehicle that the Commission (or another governmental entity) has selected to resolve an enforcement matter.

2. Comments Received

Most of the commenters who addressed proposed Rule 21F-4(d)(3) supported it.[15] Commenters generally agreed that the rule would reduce uncertainty for potential whistleblowers and supported the rationale stated in the proposed rule of assuring that the availability of a whistleblower award not depend on the procedural vehicle that the Government may use to resolve an enforcement matter.[16]

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[15] *See* letters from Anat R. Admati, Faculty Director, and Graham Scott Steele, Director, Corporations and Society Initiative, Stanford University Graduate School of Business (Sept. 18, 2018) ("Admati and Steele Letter"); Americans for Financial Reform Education Fund (Sept. 18, 2018) ("AFREF Letter"); Better Markets (Sept. 18, 2018) ("Better Markets Letter"); Securities Industry and Financial Markets Association (Sept. 18, 2018) ("SIFMA Letter"); Cohen Milstein Sellers & Toll PLLC (Sept. 17, 2018) ("Cohen Milstein Letter"); Richard Jansson (June 5, 2019) ("Jansson Letter"); Eileen Morrell (Sept. 17, 2018) ("Morrell Letter"); Harry Markopolos (Sept. 14, 2018) ("Markopolos Letter"); Joe Fischer (Aug. 9, 2018) ("Fischer Letter"); Peter Sivere dated July 13, 2018, Aug. 14, 2018, Aug. 16, 2018, Aug. 20, 2018 (two letters submitted on this date), Aug. 21, 2018, Aug. 27, 2018 (two letters submitted on this date), Sept. 2, 2018 (two letters submitted on this date), Sept. 10, 2018, and Sept. 14, 2018 (collectively "Sivere" unless specified by date); Think Computer Foundation (July 17, 2018) ("Think Computer Letter"); Taxpayers Against Fraud (Sept. 18, 2018) ("TAF Letter"); G. Johnson (July 29, 2018) ("Johnson Letter"); Anonymous-88 (July 28, 2018), ("Anonymous-88 Letter").

[16] *See* Admati and Steele Letter; AFREF Letter; Cohen Milstein Letter; Jansson Letter; Fischer Letter; TAF Letter; Johnson Letter.

One commenter emphasized the important role that DPAs and NPAs play in fostering corporate compliance, cooperation, and remediation.[17] This commenter offered that it would be contrary to the public interest if, in encouraging vigorous compliance programs and extraordinary cooperation in investigations, DOJ or the Commission decided not to offer a company a DPA or an NPA for fear that, as a result, a meritorious whistleblower would not receive an award. Similarly, this commenter stated that it would be unfair to whistleblowers to be deprived of an award simply because of "positive conduct" by the entities about which whistleblowers provided information. For these reasons, this commenter believed that permitting awards based on DPAs and NPAs would fairly balance the important goals of rewarding whistleblowers and encouraging companies to adopt effective compliance programs and to cooperate fully during investigations in the hope of obtaining a DPA or an NPA.

Several commenters advocated that we pay awards in other circumstances beyond the DPAs, NPAs, and settlement agreements addressed in the proposed rule. One commenter urged that awards should be available in cases where, even if the Commission does not bring a covered action, the whistleblower's tip led DOJ to take action (including cases where DOJ issues a declination letter).[18] Another commenter stated that we should pay awards in cases where we refer a whistleblower complaint to a self-regulatory organization that subsequently takes enforcement action relating to the complaint.[19] One commenter asserted that an award should be available, irrespective of the mechanism by which a matter is resolved, any time a whistleblower's information assists the Commission or other governmental entities in obtaining

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[17] *See* SIFMA Letter.

[18] *See* Sivere Letters dated Aug. 14 and 10, 2018.

[19] *See* letter from Anonymous-46 (Sept. 9, 2018).

money.[20] Another commenter opined that "any monetary payment to the SEC by an entity accused of wrongdoing, after and because of the commencement of an SEC inquiry, could be fairly classified as the result of an administrative action, even if the matter does not proceed to be heard by an administrative judge."[21] Another commenter suggested that we pay awards in cases with less than $1 million in monetary sanctions.[22]

Two commenters did not support the proposal to pay whistleblower awards on the basis of DPAs and NPAs entered into by criminal authorities and Commission settlement agreements outside of the context of a judicial or administrative proceeding.[23] One of these commenters stated that these types of agreements are not always filed in court or subject to judicial oversight, which is an important "check and balance" on the process.[24] This commenter further stated that the Commission does not have any particular expertise in the myriad state laws that may come into play with respect to a settlement with a particular state attorney general, and that the standards of culpability under state law may differ considerably from those under the federal securities laws. This commenter thus urged that paying whistleblower awards on the basis of state DPAs and NPAs would lead to "inconsistency in the eligibility standards under the Commission's rules, and could create an imbalance among the states."

This same commenter also stated that interpreting the term "administrative action" to include DPAs, NPAs, and Commission settlement agreements outside of the context of a judicial

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[20] *See* TAF Letter.

[21] *See* Think Computer Letter.

[22] *See* Anonymous-88 Letter.

[23] *See* letter from U.S. Chamber of Commerce Center for Capital Markets Competitiveness (Sept. 18, 2018) ("CCMC Letter"); letter from Carrie Devorah (July 30, 2018) ("Devorah Letter").

[24] *See* CCMC Letter.

or administrative proceeding would be contrary to the plain meaning of the term "action," inconsistent with current usage of the term and judicial precedent, and would lack any basis in the Dodd-Frank Act itself. Instead, this commenter asserted, DPAs, NPAs, and Commission settlement agreements encompassed by the proposed rule are not "actions" because they are contracts among regulators and third parties, are entered into voluntarily by those third parties, and cannot be unilaterally implemented by any individual regulator.

3. Final Rule

After considering the comments, we have decided to adopt Rule 21F-4(d)(3) with three changes. *First*, we have decided not to extend the rule to DPAs and NPAs entered into by state attorneys general in criminal cases. *Second*, we have added the modifier "similar" in paragraph (d)(3)(ii), which describes the Commission settlement agreements to which the rule will apply, in order to clarify the features of these agreements that merit treating them as administrative actions that impose monetary sanctions. *Third*, we have decided to apply the rule to any DPA, NPA, or Commission settlement agreement that would otherwise fall within the terms of the rule (provided that the agreement was entered into after July 21, 2010, which is the date after which the Dodd-Frank Wall Street Reform and Consumer Protection Act took effect).[25]

For the reasons described in the Proposing Release, we disagree with the commenter who asserted that we lack authority to interpret the term "administrative action" to also encompass

[25] We have effectuated this change by revising the language in Rule 21F-10(b) and Rule 21F-11(b). Specifically, we have added language to those rules so that the effective date of the amended rules will serve as the trigger date that begins a 90-day period for a whistleblower to submit an application for a DPA, NPA, or Commission settlement agreement entered after July 21, 2010 but prior to the effective date of the amended rules (although any award application that as of the effective date of these rule amendments is already pending for an DPA, NPA, or Commission settlement agreement covered by this rule need not be resubmitted). We believe that applying the revised definition of "action" to these prior DPAs, NPAs, and Commission settlement agreements is consistent with the purposes of the program to compensate meritorious whistleblowers when their information also leads the authorities identified in the statute to successfully resolve a related matter while, at the same time, not creating an undue additional burden on the Office of the Whistleblower in processing what we anticipate should be a relatively small number of applications.

DPAs and NPAs entered into by DOJ and settlement agreements entered into by the Commission outside of the context of a judicial or administrative proceeding. Rather, we conclude that the term "administrative action" is sufficiently broad to encompass these alternative vehicles for resolving investigations into violations of law. In particular, as noted previously, Congress's use of the term "administrative action"—rather than administrative *proceeding*—does not limit award consideration to cases where investigations are resolved through formal adjudicatory administrative proceedings, and our rulemaking authority under Section 21F and other provisions of the Exchange Act therefore permits us to bring the agreements described in the proposed rule within the definition of an "administrative action."[26]

Several circumstances inform our decision to treat DPAs and NPAs entered into by DOJ as forms of "administrative action" for purposes of Section 21F.[27] *First*, DOJ itself recognizes the importance of DPAs and NPAs in the hierarchy of tools that are available for addressing criminal misconduct on the part of companies, their officers, and their employees.[28] DOJ has explained that DPAs and NPAs provide a "middle ground" for resolution of a criminal matter in circumstances where a declination is determined to be inappropriate, but a conviction of a

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[26] Section 21F(j) of the Exchange Act, 15 U.S.C. 78u-6(j), grants us "the authority to issue such rules and regulations as may be necessary or appropriate to implement" the whistleblower award program. Similarly, Section 23(a)(1) of the Exchange Act, 15 U.S.C. 78w(a)(1), expressly provides the Commission the "power to make such rules and regulations as may be necessary or appropriate to implement the provisions" of the Exchange Act. In addition, we have broad definitional authority pursuant to Section 3(b) of the Exchange Act, 15 U.S.C. 78c(b), which provides us with the "power by rules and regulations to define … terms used in [the Exchange Act]."

[27] We note that, because criminal charges are filed in connection with a DPA (and later dismissed if all the terms of the agreement are satisfied), a DPA in our view also satisfies the alternative requirement of being a "judicial action."

[28] *See* US DEP'T OF JUSTICE, JUSTICE MANUAL, § 9-28.200, 9-28.1100 (2018) (*available at* https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.200) ("Justice Manual"); *see also* Memorandum from Brian A. Benczkowski, Assistant Attorney General, re: Selection of Monitors in Criminal Division Matters (Oct. 11, 2018) (*available at* https://www.justice.gov/criminal-fraud/file/1100366/download) (describing DPAs, NPAs, and plea agreements as forms of corporate criminal resolution).

company may have significant collateral consequences for innocent third parties.[29] *Second*, DPAs and NPAs entered into by DOJ ordinarily impose significant continuing obligations and conditions on subject companies, coupled with clear and substantial consequences for default—including the continuation or initiation of criminal prosecution.[30] Thus, on its face, the terms of a DPA or an NPA reflect a substantive resolution of a criminal matter by DOJ—in other words, an *action*—and not simply the closing of the investigation.

For similar reasons, it is reasonable to view payments made under DOJ DPAs and NPAs as "monetary sanctions" on which a whistleblower award can be based. Section 21F(a)(4) defines "monetary sanctions," in relevant part, as "monies, including penalties, disgorgement, and interest, ordered to be paid…as a result of such action or any settlement of such action."[31] The payments required under a DPA or an NPA with DOJ are enforceable as a result of the company's admissions of facts and liability, which would support the government's criminal charges, coupled with the company's agreement to toll applicable statutes of limitations in the event DOJ determines (in its sole discretion) that prosecution is warranted because the company has breached the agreement. Given these provisions, the practical effect of a DPA or an NPA is to compel the subject company to make the monetary payments to which it has agreed or face the

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[29] *See* Justice Manual § 9-28.1100.

[30] For example, DPAs and NPAs entered by DOJ have stated terms (usually two to three years). At the end of the term, if the company has fulfilled all of its obligations—including making any required monetary payments—the government will typically dismiss the charges (in connection with DPAs) or not file charges (in the case of an NPA). Typically, in both DPAs and NPAs the company is required to admit responsibility for the conduct of its officers and employees and to admit to a detailed statement of facts that supports the government's case. The company is also typically required during the term of the agreement to self-report any new evidence of violations. The government, acting in its sole discretion, determines whether the company has fulfilled all of its obligations under the agreement. If the company fails to do so, then the government may proceed with the prosecution (in the case of a DPA) or file charges against the company (in the case of an NPA). Applicable statutes of limitation are typically tolled during the term of the agreement, and the statement of facts to which the company admitted is admissible into evidence in any prosecution resulting from failure to comply with the agreement.

[31] 15 U.S.C. 78u-6(a)(4), 78u-6 (b)(1).

possibility of criminal prosecution on the basis of its previous admissions. Under these circumstances, payments made under a DPA or an NPA with DOJ are reasonably viewed as "ordered" within the meaning of Section 21F.[32]

In the implementation of our whistleblower program to date we have not had occasion to consider a DPA or an NPA entered into by a state attorney general in a criminal case. We proposed to include such agreements in Rule 21F-4(d)(3)(i) in the expectation that they should generally be similar in nature to DPAs and NPAs entered into by DOJ. However, we are persuaded by the concern expressed by one commenter that including state DPAs and NPAs in the rule risks introducing inconsistency in the eligibility standards for related action awards as a result of the application of varying culpability and other standards under state law.[33] DPAs and NPAs are long-established in DOJ practice, and their terms, conditions, and use have been subject to a great deal of transparency.[34] But the Commission has limited insight into the practices of 50 state attorneys general (plus the District of Columbia's) in entering into DPAs and NPAs, and we believe it would be administratively infeasible to establish consistent award standards if required, on a case-by-case basis, to determine whether any particular state DPA or NPA includes terms sufficiently similar to those that typify DOJ DPAs and NPAs such that the

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[32] 15 U.S.C. 78u-6(a)(4); s*ee Order*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining an "Order" as "A command, direction, or instruction"); U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-110*,* DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 11 (2009) (characterizing payments under DPAs and NPAs as "monetary penalties imposed by DOJ …."). We have also carefully considered whether to include declination letters within the ambit of Rule 21F-4(d)(3), and we have determined not to do so. We recognize that, in some instances, recent declination letters recite considerations similar in certain respects to provisions found in DPAs and NPAs, such as a company's agreement to cooperate, make monetary payments, and undertake remedial measures. *See, e.g.,* JUSTICE MANUAL § 9-47.120 (2018) (*available at* https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977) (FCPA Corporate Enforcement Policy). However, declination letters as a class do not appear to reflect many of the key attributes of DPAs and NPAs described above (*e.g*., admissions and tolling of applicable statutes of limitations) that have been important to our decision to make whistleblower awards available for DPAs and NPAs.

[33] *See* CCMC Letter.

[34] *See* notes 28 to 30, *supra*.

state instrument should also be deemed an "administrative action" that imposes "monetary sanctions." For this reason, new Rule 21F-4(d)(3) does not extend to DPAs or NPAs entered into by state attorneys general in criminal cases.

The rule we are adopting today includes settlement agreements similar to DOJ DPAs and NPAs entered into by the Commission outside of the context of a judicial or administrative proceeding. In our practice, these agreements have included key provisions typically analogous to those found in DOJ DPAs and NPAs that warrant also treating them as "administrative actions," with the payments required under these agreements constituting "monetary sanctions." Among the provisions that we deem important to our analysis are: (1) substantial continuing obligations on the part of the respondent (*e.g.*, detailed and specific cooperation requirements and a requirement that any successors to the respondent be bound by the agreement); (2) specificity as to conduct that constitutes a violation of the agreement (*e.g.*, further violations of the federal securities laws, provision of false information, and failure to make payments on the schedule and in the amounts due); (3) tolling of applicable statutes of limitations; and (4) clear and substantial consequences for default, including the respondent's agreement not to contest or challenge the admissibility in a future enforcement action of factual statements supporting the Commission's case that are recited as part of the agreement, as well as the respondent's consent to the use of any documents, testimony, or other evidence previously provided by it in a future enforcement action resulting from its violations.

However, extending awards to the other circumstances suggested by some of the commenters would exceed our statutory authority. As Section 21F defines a "covered judicial or administrative action" to require "monetary sanctions exceeding $1 million,"[35] we are unable to

[35] 15 U.S.C. 78u-6(a)(1).

pay awards in Commission actions where we obtain any smaller amount of monetary sanctions. For similar reasons, the suggestion of some commenters that an award be available any time a whistleblower's information helps secure a payment of money to the Commission sweeps too broadly; our ability to pay a whistleblower award turns in each case on whether a payment can reasonably be viewed as a "monetary sanction," defined in relevant part as "monies, including penalties, disgorgement, and interest, ordered to be paid … as a result of such action or any settlement of such action."[36] In addition, because a "related action" is defined in the statute to require that the same original information provided by the whistleblower also led to the successful enforcement of the Commission action,[37] we cannot grant an award for an action by DOJ or a self-regulatory organization absent a predicate Commission covered action as to which the whistleblower also merits an award.[38]

B. Rule 21F-4(e) — Definition of "monetary sanctions"

[36] 15 U.S.C. 78u-6(a)(4), 78u-6 (b)(1). As the Proposing Release explained, in our view, a payment of money is reasonably treated as "ordered" when the governmental entity has some mechanism to compel the payment either directly or indirectly. This could include, but does not necessarily require, the ability to obtain a court order requiring the payment. As is further discussed above, the requisite indicia of compulsion are present in the agreements described in proposed Rule 21F-4(d)(3) because of the significant consequences that may result from a breach of the payment obligation under the agreement.

[37] 15 U.S.C. 78u-6(a)(5).

[38] *See* In the Matter of the Claim for an Award in Connection with a Notice of Covered Action, Exchange Act Release No.34-84506, 2018 WL 5619386 n.5 (Oct, 30, 2018) ("The Commission may make an award to a whistleblower in connection with a related action *only if* the Commission has determined that the whistleblower is entitled to an award for a Commission covered action.") (emphasis in original). As with other related actions, we do not believe it is necessary to require the Office of the Whistleblower to post notices of DPAs or NPAs entered into by DOJ. In the great majority of cases, claimants should be able to learn about DPAs and NPAs through public announcements. Some claimants also may know of a DPA or NPA as a result of having communicated with the authority bringing the action. In the rare instance where a claimant can demonstrate that compliance with Rule 21F-11(b) was not practicable because a DPA or an NPA was non-public and the claimant did not obtain actual knowledge of the agreement prior to the deadline for filing an award claim, the Commission could consider exercising its authority to waive compliance with the rule. *See* Section 36(a) of the Exchange Act, 15 U.S.C. 78mm(a), and Rule 21F-8(a). Commission settlement agreements subject to the rule are publicly announced on our website.

1. Proposed Rule

Rule 21F-4(e) currently defines the term "monetary sanctions" to mean "any money, including penalties, disgorgement, and interest, ordered to be paid and any money deposited into a disgorgement fund or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)) as a result of a Commission action or a related action." This definition substantially tracks the definition set forth in Section 21F of the Exchange Act.[39] The Commission proposed to amend Rule 21F-4(e) to provide that the term "monetary sanctions" means: (1) a required payment that results from a Commission action or related action and which is either (i) expressly designated by the Commission in an administrative proceeding or a court of competent jurisdiction in a judicial proceeding as disgorgement, a penalty, or interest thereon, or (ii) otherwise required as relief for the violations that are the subject of the covered action or related action; or (2) any money deposited into a disgorgement fund or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.

Paragraph (e)(1)(ii) of the proposed amended rule was intended to clarify—consistent with our existing practice—that a required payment not expressly designated as disgorgement, penalty, or interest, must be in the nature of relief for the violations charged in order to be considered a "monetary sanction" for purposes of the whistleblower award program. Thus, we explained, if, for example, a court orders an asset freeze and appoints a receiver in a Commission enforcement action, and, without separately entering a disgorgement order, the court subsequently issues an order approving the receiver's plan to distribute money to injured

[39] According to section 21F(a)(4), the term "monetary sanctions," when used with respect to any judicial or administrative action, means any monies, including penalties, disgorgement, and interest, ordered to be paid; and any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action. 15 U.S.C. 78u-6(a)(4).

investors, the amended rule would treat that second order as a monetary sanction under paragraph (e)(1)(ii) of the proposed rule. However, if the receiver requests approval to use frozen funds to pay creditors, taxes to a governmental entity, attorney's fees, or other costs of the receivership, such payments would not constitute monetary sanctions under paragraph (e)(1)(ii) because they are not in the nature of relief for the violations charged.

2. Comments Received

Some commenters supported the proposed amendment to the definition of "monetary sanctions."[40] However, one of these commenters expressed concern that if the Commission were to obtain a court order for defendants to pay "$1 million in restitution payments and $1 million in punitive damages," the order for punitive damages might not be viewed "as relief" for the securities violations.[41] This commenter recommended use of "broader terminology, without substantially changing the way [the Commission] calculates qualifying payments from the way it does now."

Several other commenters objected to the proposed amendment.[42] Some commenters argued that the proposed changes would introduce ambiguity or confusion into the rule.[43] In particular, one of these commenters observed that our use of the word "required" in the proposed

[40] *See* CCMC Letter; Think Computer Letter; letter from Anonymous-135 (Oct. 22, 2019).

[41] *See* Think Computer Letter.

[42] *See* TAF Letter; letter from Whistleblower Law Collaborative, LLC (Sept. 18, 2018) ("Whistleblower Law Collaborative Letter"); Markopolos Letter; letter from Anonymous-12 (Sept. 18, 2018) ("Anonymous-12 Letter"); and letter from Mac Vineyard (Sept. 29, 2018) ("Vineyard Letter").

[43] *See* TAF Letter; Whistleblower Law Collaborative Letter; Markopolos Letter.

rule would lead to "confusion and uncertainty" and suggested that we revert to the statutory term "ordered."[44]

The principal concern of objectors appeared to be that the definition of "monetary sanctions" should be flexible enough to support whistleblower awards in a variety of circumstances that did not appear to be covered by the proposed amendment. For example, several commenters urged that the definition of "monetary sanctions" should permit payments to a whistleblower based on recoveries by a bankruptcy trustee to the same degree as a receiver appointed in a Commission enforcement action.[45] One of these commenters asserted: "While Ponzi cases often go into receivership, public company accounting frauds … often end up in federal bankruptcy court. It is important for corporate whistleblowers to know they will be rewarded for turning in their company even if exposing the fraud ends up bankrupting the company."[46] Another of these commenters similarly supported awards in connection with bankruptcy proceedings, making the point that "[t]he 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."[47]

In addition to including bankruptcy cases, one commenter argued that the definition of "monetary sanctions" should be broad enough to permit awards in other forms of proceedings "where sanctions or settlements result because of the Commission's work and/or the whistleblower's tip…."[48] This commenter urged that "the definition of 'monetary sanctions'

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[44] *See* Whistleblower Law Collaborative Letter.

[45] *See* TAF Letter; Whistleblower Law Collaborative Letter; Markopolos Letter; Anonymous-12 Letter.

[46] *See* Markopolos Letter.

[47] *See* TAF Letter.

[48] *See* Whistleblower Law Collaborative Letter.

should be sufficiently flexible … to allow the Commission to consider sanctions obtained in any proceeding which results from the Commission's action (or a 'related action'), where there is a strong nexus (*e.g.*, a common nucleus of operating facts) between the matter in question and the whistleblower's tip and the ensuing investigation, and results in monetary relief for injured parties such as investors. In other words, the Commission's definition of 'monetary sanction' should be sufficiently flexible to accurately reflect what the whistleblower's tip accomplished in the form of relief to defrauded investors."[49]

This same commenter also asserted that there are many cases where the cost of recovery and administration of claims "cannibalizes" a substantial portion of the funds available for distribution to injured investors.[50] The commenter gave as an example a $100 million fraud case where a receiver successfully recovers $10 million but bills $7.5 million in professional expenses and fees. In such a case, the commenter opined, it would seem unduly harsh to calculate the award on $2.5 million; an award should be based on the gross amount recovered, and not reduced because of "billings from attorneys, accountants, or other professionals."[51]

3. Final Rule

After considering the comments, we have decided to adopt Rule 21F-4(e) substantially as proposed. However, in response to concerns raised by some commenters about potential confusion, and to more closely track the statutory language, we have determined to use the word "ordered," rather than "required," so that Rule 21F-4(e) as adopted, in relevant part, now reads, "(e) *Monetary sanctions* means: (1) An order to pay money that results from a Commission

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[49] *Id.*

[50] *Id.*

[51] *Id.*

action or related action and which is either: (i) Expressly designated as penalty, disgorgement, or interest; or (ii) Otherwise ordered as relief for the violations that are the subject of the covered action or related action …."[52]

With respect to comments relating to bankruptcy proceedings, our statutory authority does not extend to paying whistleblower awards for recoveries in bankruptcy proceedings or other proceedings that may in some way "result from" the Commission's enforcement action and the activities of the whistleblower. Under Section 21F, we are authorized to pay whistleblower awards only on the basis of monetary sanctions that are imposed "in" a covered judicial or administrative action or related action.[53] A "covered judicial or administrative action" is an action "brought by the Commission under the securities laws that results in monetary sanctions exceeding $1 million,"[54] while a "related action" must be brought by one of the enforcement and regulatory authorities specified in the statute.[55] Bankruptcy proceedings are not brought by either the Commission acting under the securities laws or by one of the designated related-action authorities, and orders to pay money that result from bankruptcy proceedings are not imposed "in" Commission covered actions or related actions. The same is true of monetary payments that

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[52] The proposed rule substituted the term "required" to reflect the recognition in proposed Rule 21F-4(d)(3) that monetary obligations under DPAs, NPAs, and Commission settlement agreements outside of the context of a judicial or administrative proceeding are not reflected in formal adjudicative orders. However, we have now included in the discussion of Rule 21F-4(d)(3), as adopted, additional explanation of these agreements and why the payments under them are reasonably viewed as "ordered" for purposes of the definition of monetary sanctions, rendering it unnecessary to substitute "required" for "ordered" in Rule 21F-4(e). We have also revised paragraph (e)(1)(i) to refer to "a penalty, disgorgement, or interest" rather than "disgorgement, a penalty, or interest thereon," as was used in the proposed rule, in order to more closely track the statutory language and eliminate any potential confusion regarding this phraseology.

[53] 15 U.S.C. 78u-6(b)(1)(A) through (B).

[54] 15 U.S.C. 78u-6(a)(1).

[55] 15 U.S.C. 78u-6(a)(5). These authorities are the Attorney General of the United States, an appropriate regulatory authority (a term which is further defined in Exchange Act Rule 21F-4(g)), a self-regulatory organization, or a State Attorney General in connection with a criminal investigation. 15 U.S.C. 78u-6(h)(2)(D)(i).

may result from other forms of proceedings that are not Commission covered actions or related actions.[56]

Defining "monetary sanctions" to include payments that are ordered "as relief for the violations that are the subject of the … action" is most consistent with our statutory authority. As noted, Section 21F(a)(4) of the Exchange Act defines "monetary sanctions," in relevant part, as "any monies, including penalties, disgorgement, and interest, ordered to be paid;…as a result of [any judicial or administrative] action or the settlement of such action."[57] Under accepted principles of statutory construction, the words that follow "including"—penalties, disgorgement, and interest—although not an exhaustive list, are illustrative of the general principle to be applied. [58] Accordingly, as the D.C. Circuit has held, we think it is reasonable to "expand on the remedies explicitly included in the statute only with remedies similar in nature to those enumerated."[59] Because "penalties, disgorgement, and interest" describe forms of monetary relief for the violations that are the subject of an action, this provision reflects a congressional expectation that we would pay whistleblower awards only with respect to other orders to pay money that also constitute relief for the violations. For example, although restitution is not one of the sanctions set forth after the word "including," restitution ordered in a criminal proceeding

[56] With respect to the commenter who sought to ensure that punitive damages would be covered by the rule, we note that punitive damages are not obtainable in Commission covered actions. However, the Commission may order (in an administrative proceeding) or seek (in a federal court action) civil money penalties, which are covered by the statute and the rule and therefore are a basis for posting a Notice of Covered Action and paying a whistleblower award.

[57] 15 U.S.C. 78u-6(a)(4).

[58] *See Samantar v. Yousuf*, 560 U.S. 305, 317 (2010); *United States v. Philip Morris USA, Inc.,* 396 F.3d 1190, 1200 (D.C. Cir. 2004).

[59] *United States v. Philip Morris USA, Inc.*, 396 F.3d at 1200.

is a form of relief for the violations that are the subject of the action, and therefore is a "monetary sanction" that will support a related-action whistleblower award.

For these reasons, we are not persuaded by the commenter who urged that we define "monetary sanctions" to include a court's orders to pay a receiver's fees or billings from attorneys, accountants, or other professionals. Treating a court order to pay such fees as a "monetary sanction" would not comport with the statutory language (as just discussed).[60]

Additionally, as the Proposing Release stated, this conclusion is buttressed by Congress's use of the phrase "monetary sanctions *imposed in* the action" in further describing the sanctions that would support a whistleblower award.[61] While in normal parlance a person might say that disgorgement or civil penalties were "imposed" as a result of a securities-law violation, we do not believe that one would typically say that a court order approving fees and expenses of a court-appointed receiver or other professionals hired by the receiver "impos[ed]" a monetary sanction. Rather, this language indicates that the congressional focus was on monetary obligations that are in the nature of relief for the violations that are the subject of the action.

Finally, the Proposing Release stated generally that a court order approving a receiver's plan to distribute money to injured investors would be treated as a monetary sanction. We further clarify here, in line with Commission practice, the types of distributions to injured investors that will be treated as monetary sanctions. Although the Commission may seek the appointment of a receiver in an enforcement action filed in federal court, a receiver does not

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[60] As more fully discussed in the Proposing Release, we also view the requirement in Section 21F(a)(1), 15 U.S.C. 78u-6(a)(1), that a Commission action must "*result*[] *in* monetary sanctions exceeding $1,000,000" (emphasis added), and the requirement in Section 21F(a)(4), 15 U.S.C. 78u-6(a)(4), that a monetary sanction must be a "result of" an action, as supporting our interpretation. The phrase "results in" suggests to us that Congress was addressing those monetary obligations that the action secures "as relief" for the violations that are the subject of the action.

[61] 15 U.S.C. 78u-6(b)(1)(A) through (B) (emphasis added).

work for the Commission, represent the interests of the Commission, or even represent the interests of investors. Rather, a receiver is an officer of the court, appointed by the court to take custody of assets over which the court asserts jurisdiction (the receivership estate), for the benefit of all persons whom the court may later adjudge to have rights in the property.[62] Depending on the violations charged and the attendant facts and circumstances of the case, a court order directing a receiver appointed in a Commission enforcement action to make a distribution to investors may reflect recompense to the investors of money lost as a result of the securities violations, or it instead may simply reflect a return of assets that the receiver has obtained in his custodial capacity, which is greater than the amount of money lost as a result of the violations.

For example, in a simple hypothetical case where an investment adviser is charged with violating the securities laws for misappropriating $1 million from a fund that holds $100 million, investors lost $1 million as a result of the violations. If, for some reason, a receiver were appointed in the case and the receiver were ordered to unwind the funds and return all fund assets to the investors, any amounts paid in excess of the $1 million lost as a result of the violations would be a return of custodial assets held by the receiver, and not relief for the violations.

Under Rule 21F-4(e) as amended, we first look to whether an order to pay money is expressly designated as penalty, disgorgement, or interest. If so, then that order establishes the amount of monetary sanctions in the case as to that defendant. Absent an order to pay money expressly designated as a penalty, disgorgement, or interest, we will consider whether an order to

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[62] *See Atlantic Trust Co. v. Chapman*, 208 U.S. 360, 370-71 (1908). Indeed, viewing a court order to pay a receiver's fees as a "monetary sanction" cannot be squared with the legal status of a receiver as an officer of the court and the receiver's fees as costs incurred by the court in administering the receivership property. RALPH EWING CLARK, A TREATISE ON THE LAW AND PRACTICE OF RECEIVERS §§ 11, 637 (3d ed. 1992).

pay money to investors is in the nature of relief for the violations that were the subject of the action. In the context of a Commission covered action where a receiver is appointed and the court orders a distribution of money in the receivership estate to investors, we will begin our assessment of the amount of the applicable monetary sanctions with an amount that does not exceed the higher of (i) the ill-gotten gains received by the defendants over which the receiver has been appointed, or (ii) investors' losses as a result of the violations. In determining the investor losses, we will consider losses that flowed from the violative conduct alleged in the covered action, to the extent such losses approximate the monetary sanctions the Commission could obtain in the covered action. In addition, we will not treat as a "monetary sanction" amounts that merely reflect a return of custodial assets to investors and not relief for the violations.[63]

C. Amendments to Exchange Act Rule 21F-3(b) defining "related action"

1. Proposed Amendments

Under Exchange Act Section 21F(b), any whistleblower who obtains an award based on a Commission enforcement action may be eligible for an award based on monetary sanctions that

[63] Under Section 21F(b)(1), the Award Amount must be between 10 percent and 30 percent "of what has been collected" of the monetary sanctions imposed in a Commission covered action or a related action. When, pursuant to the analysis above, a receiver's distribution to investors is the basis for the amount of a monetary sanction under paragraph (e)(1)(ii) of Rule 21F-4, that amount is deemed "collected" at the time the court orders the distribution. However, in a case involving a receiver in which the court has ordered penalties, disgorgement, or interest under paragraph (e)(1)(i), as noted above, that order—not the amounts distributed by the receiver—establishes the amount of the monetary sanction as to that defendant. In this circumstance, payment of an award based on the amount "collected" turns on the Commission's ability to conclude that some portion of funds or other assets over which the receiver assumes control should be treated as satisfying the court's monetary judgment in favor of the Commission. In applying this principle we have and will continue to generally expect—absent particular facts and circumstances supporting a different approach—to look to the amount distributed to investors as the amount collected for award purposes. If the amount distributed to investors includes monies paid to the receiver by other defendants to satisfy their own respective monetary orders, then we would generally expect to net these monies. For example, if two defendants are each separately ordered to pay disgorgement of $1 million, each contribute $500,000 to the receivership estate, and the receiver distributes $1 million to investors, then only $500,000 is "collected" as to each defendant's disgorgement order.

are collected in a related action. Exchange Act Rule 21F-3(b) implements this statutory directive.

Rule 21F-3(b)(1) defines "related action." The Commission proposed to amend the existing definition to clarify that a whistleblower would qualify for a potential related-action award if either (i) the whistleblower provided to the other governmental entity that pursued the purported related action the same information that the whistleblower provided to the Commission and the provision of that information led to the successful enforcement of the Commission covered action or (ii) the Commission itself provided that information to the other governmental entity and the provision of that information led to the successful enforcement of the related action.[64]

Additionally, the Commission proposed a new paragraph (4) to Rule 21F-3(b) that would apply to situations where the Commission's whistleblower program and one or more separate whistleblower award programs might potentially apply to the same action. The proposed new paragraph (4)—the "multiple-recovery rule"—is based on the Commission's experience and past practice and is intended to clarify various issues relating to the application of the Commission's whistleblower program when another award program would potentially apply to the same action. It would provide that, notwithstanding the definition of related action in Rule 21F-3(b)(1), "if a judicial or administrative action is subject to a separate monetary award program established by the Federal Government, a state government, or a self-regulatory organization, the Commission will deem the action a related action only if the Commission finds (based on the unique facts and

[64] We also indicated that we are making a technical modification to the definition in Rule 21F-3(b)(1) to conform the existing rule language with the statutory definition as provided in Section 21F(a)(6) of the Exchange Act. This technical amendment clarifies that with respect to any related action the action must be "based on" the same original information that the whistleblower voluntarily provided to the Commission and that "led to the Commission to obtain monetary sanctions totaling more than $1,000,000." As currently drafted, the rule reads as though this requirement applies only to criminal actions brought by a state attorney general.

circumstances of the action) that its whistleblower program has the more direct or relevant connection to the action." Proposed paragraph (4) would also provide that even "[i]f the Commission does determine to deem the action a related action, the Commission will not make an award to you for the related action if you have already been granted an award by the governmental entity responsible for administering the other whistleblower award program. Further, if you were denied an award by the other award program, you will not be permitted to readjudicate any issues before the Commission that the governmental entity responsible for administering the other whistleblower award program resolved against you as part of the award denial." Lastly, proposed paragraph (4) provided that, if the Commission makes an award before an award determination is finalized by the governmental entity responsible for administering the other award program, the Commission would condition its award on the meritorious whistleblower making a prompt, irrevocable waiver of any claim to an award from the other award program.

Beyond these proposed amendments, the Commission also stated that as part of this rulemaking it is considering whether to repeal Exchange Act Rule 21F-3(b)(3)—which provides a somewhat different mechanism to determine that recovery from the Commission is not available where the whistleblower program administered by the Commodity Futures Trading Commission (CFTC) is involved—so that the provisions of proposed paragraph (4) would apply to all instances where a potential multiple recovery might occur.

2. Comments Received

With respect to the proposed revision of paragraph (1) of Rule 21F-3(b), the Commission received two comments.[65] One of the comment letters opposed the proposal and the other raised concerns.[66]

Both commenters expressed the view that the Commission cannot require whistleblowers to provide directly any information to any federal or state agency (or other governmental entity that can bring a related action) that does not have rules protecting whistleblower confidentiality and allowing anonymous whistleblower submissions. The commenter who opposed the proposed change also asserted that the confidentiality concern is not ameliorated by the alternative that allows the Commission to share the whistleblower's information directly with the other governmental entity because the whistleblower may never be informed that the information has been provided.[67] Finally, the opposing commenter asserted that the revised language in proposed paragraph (1) would not cover situations where one sister agency (*e.g.*, DOJ) provided a whistleblower's information to another sister agency (*e.g.*, the Federal Deposit Insurance Corporation), but neither the Commission nor the whistleblower had directly provided the information to the second sister agency.[68]

With respect to the proposed multiple-recovery rule, two commenters supported the proposal. One commenter stated that the proposal would improve the Commission's stewardship

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[65] *See* letters from Kohn, Kohn & Colapinto, LLP (July 24, 2018) ("Kohn, Kohn & Colapinto July 24 Letter") and Sen. Charles E. Grassley (Sept. 18, 2018) ("Sen. Grassley Letter").

[66] Neither of these comments expressed any concern with the technical revision to conform paragraph (1) to the statutory definition of related action in Section 21F(a) of the Exchange Act.

[67] *See* Kohn, Kohn & Colapinto July 24 Letter.

[68] *Id.*

of the disbursement of public funds,[69] while another agreed with the Commission's preliminary view that a whistleblower should neither have multiple recoveries on the same action nor multiple bites at the adjudicatory apple.[70] One commenter recommended that the Commission go further by categorically excluding from the related-action definition any judicial or administrative action that may be subject to an alternative award program.[71]

Several commenters opposed the proposed multiple-recovery rule. The principal concerns raised were that: (i) the proposed amendment would increase the uncertainty and delay concerning any potential award and that this might discourage a whistleblower from coming forward;[72] (ii) the proposal is unnecessary because the Commission has never encountered a situation where a second whistleblower program potentially applied;[73] (iii) the proposal places an unreasonable burden on potential whistleblowers and could undermine the confidentiality protections in Section 21F(h)(2) by forcing whistleblowers to submit their information to other entities that may have a competing whistleblower program;[74] (iv) the Commission should not read Section 21F's language to impose a cross-agency cumulative 30 percent award ceiling;[75]

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[69] *See* CCMC Letter.

[70] *See* Center for Workplace Compliance Letter.

[71] *See* CCMC Letter.

[72] *See* TAF Letter; Cornell Securities Law Clinic (Sept. 17, 2018) ("Cornell Law Clinic Letter"); Anonymous-9 (Sept. 18, 2018) ("Anonymous-9 Letter"); Think Computer Letter; AFREF Letter.

[73] *See* TAF Letter.

[74] *See* Sen. Grassley Letter; Anonymous-9 Letter.

[75] *See* AFREF Letter; Think Computer Letter.

and (v) the proposal ignores the fact that other whistleblower programs may have different award criteria and eligibility considerations, including significantly reduced payout potentials.[76]

Some commenters offered alternatives to the proposed multiple-recovery rule. One alternative would be to allow a whistleblower to decide whether to receive an award from the Commission's whistleblower award program or the other award program after the whistleblower has been informed by both programs about their respective award determinations.[77] A second alternative would authorize a Commission award on an action as a supplement to the award authorized by the other whistleblower program up to an aggregate maximum based on the application of the statutory maximum percentage under the Commission's program (*i.e.*, 30 percent) to a combination of the multiple recoveries.[78]

Finally, two commenters supported the existing paragraph (3) of Rule 21F-3(b) and its framework for preventing multiple-recoveries or issue re-adjudication where both the Commission's and the CFTC's whistleblower programs might apply. In supporting the framework of paragraph (3), one of the commenters observed that the SEC and the CFTC regulate very similar and at times overlapping markets and the commenter believed that this counseled for retention of the existing paragraph (3).[79] Another commenter suggested that the existing framework of paragraph (3) should actually be expanded to cover all situations where the Commission might encounter a potentially applicable alternative whistleblower program that relates to another governmental entity's action.[80]

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[76] *See* Anonymous-9 Letter.

[77] *See* AFREF Letter; Think Computer Letter.

[78] *See* AFREF Letter.

[79] *See* Think Computer Letter.

[80] *See* Anonymous-9 Letter.

3. Final Rule

After reviewing the comments, we are (i) adopting revised paragraph (1) of Rule 21F-3(b) as proposed with one further clarification; (ii) removing existing paragraph (3) concerning potential multiple recovery under the SEC and CFTC whistleblower programs for the same action; and (iii) adopting proposed paragraph (4) as new paragraph (3) of Rule 21F-3(b).[81]

Revised paragraph (1) of Rule 21F-3(b) provides that a related action is: (i) a judicial or administrative action yielding monetary sanctions; (ii) that is brought by one of the entities listed in Rule 21F-3(b)(1)(i)-(iv); and (iii) that is based upon information that either the whistleblower provided directly to the governmental entity or the Commission itself passed along to the other governmental entity pursuant to the Commission's procedures for sharing information, and which is the same original information that the whistleblower voluntarily provided to the Commission and that led the Commission to obtain monetary sanctions totaling more than $1 million.[82] The modification that we are making to the proposed rule text would include a clarification that a related action must yield monetary sanctions because the statute requires that any Award Amount must be tied directly to the monetary sanctions imposed.[83]

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[81] We are making one further clarifying change. The proposed rule text stated that in assessing whether an action brought by another entity qualifies as a related action under the Commission's whistleblower program, the Commission will consider the "unique facts and circumstances" of the case. We are concerned that the use of the word "unique" may suggest that something highly unusual or special about the case will be relevant to the analysis, but that was not the intention of the proposal. Accordingly, to clarify that each case will be assessed on its own particular facts and circumstances, the final rule text does not include the word "unique."

[82] Experience with the program has shown that other types of actions, including actions under antitrust law, are not likely to qualify as related actions where they do not have a clear, explicit, and direct connection to the conduct governed by the securities law.

[83] 15 U.S.C. 78u-6(b)(1).

For the reasons stated in the Proposing Release, it is appropriate that for an action to qualify as a potential related action a whistleblower must have submitted information directly to the governmental entity that brought the action, or the Commission must have provided the whistleblower's information directly to the governmental entity. This requirement is already provided for in Rule 21F-11(c), and it reflects our interpretation of the requirement in Section 21F(a)(5) of the Exchange Act that a related action must be "based upon the original information provided by a whistleblower" to the Commission. In addition, our experience with the whistleblower program to date leads us to conclude that these requirements regarding the provision of information are appropriate and beneficial to allow us to work with the governmental entity that has brought the purported related action to assess the role a whistleblower's information actually played in contributing to the success of the action. These two alternative requirements have allowed our staff to work with the other governmental entity in a way that is not unduly burdensome to our staff or the other governmental entity to reasonably trace the role of the information from the other governmental entity's receipt of it (including whether it was duplicative of information the other governmental entity already had and what role the information played in advancing the governmental entity's investigation) through to the success of the purported related action.

We acknowledge the commenters' concerns that a whistleblower may decline to provide information directly to a governmental entity that lacks any confidentiality or anonymity protections because of a potential heightened risk of disclosure. But thus far in our experience administering the program, we have routinely observed that many whistleblowers have been directly sharing information with entities that can bring potential related actions. That said, to the extent some subset of whistleblowers may have concerns about submitting their potential

original information to one of these entities, they can take steps to remove any information that may disclose their identity before providing it to the other governmental entity and, when submitting their tip to that governmental entity, explain that information that may identify the whistleblower has been excluded but that it can potentially be obtained by the governmental entity from the Commission.[84] In this way, if the authority seeks and obtains information from the Commission that might reasonably disclose the whistleblower's identity, the other governmental entity will be subject to the same heightened confidentiality obligations that Section 21F(h)(2) imposes on the Commission.[85]

While we appreciate that this may take additional effort by a whistleblower who is seeking to ensure that his or her information is received by the other governmental entity without losing the statutory confidentiality guarantees, we do not believe that this should impose an undue burden. Moreover, in the context of anonymous submissions made to the Commission, a whistleblower could similarly provide that same submission to one of the related-action entities even if the governmental entity does not expressly provide for anonymous disclosures. Under

[84] If the whistleblower includes the Commission's TCR number in his or her submission to the other governmental entity, this should make it possible for the Commission to locate the information and provide it to the other governmental entity subject to the procedures and requirements for sharing such information. Further, if the other governmental entity for some reason is unwilling to accept an anonymous whistleblower tip submitted by an individual, the whistleblower could request, in writing, that the Commission staff provide the tip to the governmental entity and Commission staff will assess whether doing so would be appropriate given the nature of the tip, among other relevant considerations. Generally, before providing a whistleblower's tip to another governmental entity , the other authority must agree to maintain all whistleblower identifying information as confidential in accordance with the requirements established under Section 21F(h)(2)(A). In determining whether to provide information to another governmental entity or authority based on a whistleblower's request, we anticipate that the staff will consider the same mix of factors that the staff already looks to in deciding whether to share information.

[85] *See* 15 U.S.C. 78u-6(h)(2)(D)(ii)(I) (directing that DOJ, various federal regulatory agencies, self-regulatory organizations, state attorney generals and regulatory authorities, and the Public Company Accounting Oversight Board "shall maintain" any whistleblower identifying information provided to them from the Commission "as confidential in accordance with" the same heightened confidentiality obligations that Section 21F(h)(2)(A) of the Exchange Act imposes on the Commission).

the Commission's rules, an anonymous whistleblower seeking to be eligible for an award must have an attorney, so the attorney should be well positioned to make the anonymous submission to the other governmental entity and to serve as the whistleblower's point of contact in dealing with that governmental entity.

We also determined not to revise the new rule to permit awards when another governmental entity that can pursue a potential related action shares information with a third governmental entity. In our view, the difficulties that could arise in trying to accurately and consistently assess the award criteria as a result of such an indirect chain of information transfer could pose undue burdens on our ability to reasonably make reliable award determinations.[86] In light of this, it is appropriate to anticipate that a whistleblower who may want a related-action award from any governmental entity should either provide that information directly to the governmental entity or otherwise rely on the Commission in its sole discretion to determine whether to share the information with another governmental entity.

Turning to the multiple-recovery rule that we are adopting as new paragraph (3) of Rule 21F-3(b), this rule is appropriate for all of the reasons specified in the Proposing Release. As we explained, those considerations are: (i) permitting potential multiple recoveries on a single action could allow a total award in excess of the 30 percent ceiling that Congress has historically imposed in establishing federal whistleblower award programs in the modern era; (ii) in our view, the related-action-award component of the Commission's whistleblower program is intended to allow meritorious whistleblowers the opportunity to obtain a financial award for the ancillary recoveries that otherwise might not be covered by a whistleblower program even

[86] We note that if a whistleblower can identify (or staff is aware of) an instance where this type of sharing of information clearly occurred, and provided that the claimant would be entitled to an award had the individual shared the information directly, the Commission would not be foreclosed from making a related-action award. *See* 15 U.S.C. 78mm(a) (Exchange Act provision affording the Commission discretionary waiver authority).

though the action resulted from the same original information the whistleblower provided to the Commission; and (iii) permitting whistleblowers to recover under both our award program and a separate award program for the same action would produce the irrational result of encouraging multiple "bites at the apple" in adjudicating claims for the same action and potentially allowing multiple recoveries. This rule codifies the approach the Commission has previously taken where another award program is available in connection with an action for which a related-action award is sought.[87]

In deciding to adopt the rule as proposed, we are unpersuaded by the concerns raised by those commenters who opposed the proposed rule. Although one commenter opposed the rule on the theory that it was unnecessary as the Commission had not encountered a matter involving a potential multiple recovery, as noted, the Commission has, in fact, issued a final order in connection with an award that involved a potential multiple recovery.[88] Further, we do not believe that our multiple-recovery rule will disincentivize (because of uncertainty about receiving an award or otherwise) whistleblowers from coming to the Commission. Potential whistleblowers still stand to receive an award both for any Commission covered action[89] and any ancillary action that may produce an award under the alternative whistleblower program. We do not agree that our rule should result in any appreciable additional delay for whistleblowers in receiving an award determination; in assessing this threshold question, the Commission and the

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[87] *See In the Matter of the Claims for Award in Connection with a Notice of Covered Action*, Exchange Act Release No. 34-84046, 2018 WL 4488273 at *6 (Sept. 6, 2018).

[88] *Id.*

[89] And as discussed below in connection with new Rule 21F-6(c), the incentive to come forward to potentially receive an award on a Commission action should be increased as a result of that rule amendment. This is because (subject to certain conditions) Rule 21F-6(c) will establish a presumption where the aggregate maximum award for actions resulting from a whistleblower's original information is $5 million or less (and the negative Award Factors are not present), that the Award Amount be set at the statutory maximum.

CRS should be able to rely on publicly available information to determine the relative relationship of the other governmental entity's action to our whistleblower program and to the other potentially applicable award program.[90]

We do not believe that our rule should impact a whistleblower's confidentiality protections under Section 21F(h)(2) of the Exchange Act because those protections—to the extent that they apply in any given context—are not contingent on the recovery of an award in connection with another governmental entity's action. We are also unpersuaded that our rule will impose an undue burden on a whistleblower by forcing a whistleblower to submit information to another governmental entity that may have its own whistleblower award program; in our view, if Congress or some other governmental entity has established a whistleblower program, it is not unreasonable to expect that a whistleblower should comply with that program's requirements for submitting information in order to be eligible for an award under it.

As we explained at the time that we proposed this rule, in determining whether a potential related action has a more direct or relevant connection to the Commission's whistleblower program than another award program, the Commission has and will continue to consider the nature, scope, and impact of the misconduct charged in the purported related action, and its relationship to the federal securities laws. This inquiry will include consideration of, among other things: (i) the relative extent to which the misconduct charged in the potential related action implicates the public policy interests underlying the federal securities laws (*e.g.*, investor protection) versus other law enforcement or regulatory interests (*e.g.*, tax collection or fraud

[90] We use the term "governmental entity" in the Description of Final Rule Amendments to refer to self-regulatory organizations, state governments and their various agencies, and federal government agencies and departments. The terminology is intended to capture not just governmental entities that may currently have a whistleblower program, but governmental entities that in the future may adopt or oversee a whistleblower program.

against the Federal Government); (ii) the degree to which the monetary sanctions imposed in the potential related action are attributable to conduct that also underlies the federal securities law violations that were the subject of the Commission's enforcement action; and (iii) whether the potential related action involves state-law claims and the extent to which the state may have a whistleblower award program that potentially applies to that type of law-enforcement action.[91] To take an example, we would not expect that our program would apply under the new rule to a DOJ action that charges a scheme to avoid tax obligations and imposes monetary sanctions; the IRS's award program would have a more direct and relevant connection to the case than the Commission's whistleblower program.[92] In addition, we would not expect the IRS's award program to apply to a Commission securities fraud action.

We considered the alternatives advanced by commenters but believe that our approach continues to be appropriate. We disagree that another governmental entity's action should be excluded from our program in all instances when another whistleblower award program might apply; it is preferable to continue to review each such case to determine whether based on the particular facts and circumstances it has a closer relationship to our whistleblower program or the alternative program. We are also unpersuaded that a whistleblower should be able either to collect a supplemental award from us up to a 30 percent total recovery from the various programs (*e.g.*, the Commission would have the discretion to add an additional amount to "cap

[91] To the extent that a state adopts a whistleblower award program relating directly to state securities law violations, we generally anticipate the Commission will find that the state award program should be the operative whistleblower program to determine whether to reward the whistleblower for that state action rather than the Commission's award program. The state program would likely be the more direct or relevant program and thus the appropriate avenue for the whistleblower to seek an award.

[92] By contrast, to the extent that a DOJ enforcement action centers on insider-trading violations that are based on the same misconduct that was the subject of the Commission's covered action, and that most of the monetary sanctions arise from the insider-trading violations, the Commission will likely treat the matter as a related action notwithstanding any potential restitution ordered due to any tax violations included within the case.

off" up to 30 percent any award another governmental entity made that was below our statutory cap). Nor are we persuaded that a whistleblower should be allowed to choose which award (*e.g.*, the Commission's award for a related action versus another governmental entity's award for that same related action) to accept after learning the award determination from each of the potentially applicable award programs. These proposals are in our view needlessly inefficient, as both proposals would have both agencies conduct independent assessments of a whistleblower's contribution to the same action; further, as we explained above, including by the example referencing the IRS award program, we do not believe that Congress ever intended for multiple governmental award programs to yield awards on the same action.[93] Further, we are not persuaded that the potential existence of different eligibility requirements cuts against our rule. If we determine that another award program has a more direct or relevant connection to a particular action brought by another governmental entity, in our view it is fair and reasonable to require the whistleblower to meet all the same criteria and to be subject to the same award considerations that would be applied to any other applicant seeking a recovery under that other program.

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[93] One commenter argued that the new rule is inconsistent with the definition of related action in Exchange Act Section 21F(a)(5) because, according to the commenter, the "plain meaning" of that provision states that the Commission "shall pay" an award for an action or proceeding brought by another authority without any qualification or limitation based on the existence of an alternative whistleblower award program. *See* letters from Kohn, Kohn & Colapinto, LLP (Sept. 10, 2020) ("Kohn, Kohn & Colapinto Sept. 10, 2020 Letter"). The Commission has previously noted that, "on its face, Exchange Act Section 21F does not exclude from the definition of related action those judicial or administrative actions . . . that have a less direct or relevant connection to our whistleblower program than another whistleblower scheme." *In the Matter of the Claims for Award in Connection with a Notice of Covered Action*, Exchange Act Release No. 34-84046, 2018 WL 4488273 at *6 (Sept. 6, 2018). Nonetheless, as the Commission has previously explained, we "perceive ambiguity when considering this language in the context of the overall statutory scheme. We believe that an understanding focused exclusively on the statutory definition of related action would produce a result that Congress neither contemplated nor intended." *Id.* The commenter further noted that "the whistleblower advocacy community has never supported a 'double recovery' concept" and suggested we extend the CFTC "double recovery" rule that the Commission adopted in 2011 so that it bars recoveries from other comparable programs. For the reasons discussed above and in the proposing release, we decline to do so because we believe that the new rule provides the Commission with appropriate flexibility in addressing situations that implicate possible multiple recoveries and should foster a more coherent approach for the resolution of award matters that potentially implicate multiple whistleblower award programs.

Lastly, we have determined to repeal existing Rule 21F-3(b)(3) relating to the CFTC's award program and to allow our new multiple-recovery rule to apply to all actions brought by another governmental entity where one or more alternative whistleblower award programs might apply. A uniform rule to apply in these situations—including where the CFTC's whistleblower award program is implicated—is administratively preferable. This is because the Commission will have the authority under the new rule (based on the specific facts and circumstances of the underlying action) to assess which award program should more logically apply to an action brought by another authority. Under the rule we are repealing, the Commission has no such authority and instead the determination as to which whistleblower program applies is largely controlled (as the existing rule provides for) by the happenstance of which agency (*i.e.*, the SEC or the CFTC) first adjudicates an award application in connection with that action.

D. Rule 21F-6 — Clarification of Commission's discretion

Rule 21F-6 establishes the analytical framework that the Commission follows in exercising its discretion in both setting the appropriate amount of an award in connection with a particular Commission or related action and in determining an individual award for each whistleblower where the Commission makes awards to more than one whistleblower in connection with the same action.

In comments received in response to proposed new paragraphs (c) and (d) of Rule 21F-6 (discussed further below), there appeared to be some confusion regarding the Commission's discretion to consider the dollar amount of monetary sanctions collected, as opposed to focusing exclusively on a percentage amount (*i.e.*, between 10% and 30%) in the statutory range when applying the Award Factors and setting the Award Amount. Certain commenters appeared to assert that nothing in the statute suggests that the Commission, in setting the Award Amount,

may consider the actual dollar value of the sanctions collected.[94] In addition, a hypothetical in the 2018 Proposing Release may have added to this confusion.[95] As the discussion below demonstrates, 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.

The Commission has had and continues to have broad discretion in applying the Award Factors and setting the Award Amount, including the discretion to consider and apply the Award Factors in percentage terms, dollar terms or some combination thereof.

The statutory language in Section 21F demonstrates that Congress gave the Commission the ability—and the discretion—to consider the application of the award criteria provided for in Rule 21F-6(a) and (b) in dollar terms. For example, the language in Section 21F(c)(1) repeatedly refers to the Commission setting the "amount of the award," which indicates that Congress afforded the Commission discretion to consider the application of the Award Factors, and make an award to a meritorious whistleblower, in dollar terms.[96] Nothing in the text of Section 21F indicates any intent on the part of Congress to limit the Commission's discretion in this regard.[97] Indeed, the only reference to percentages in the award provisions of the statute is for purposes of setting the upper and lower bounds in dollar terms for the Award Amount.[98]

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[94] *See* TAF Letter.

[95] *See* Whistleblower Program Rules, 83 Fed. Reg. at 34,713-714, nn. 99 &105 (July 20, 2018).

[96] 15 U.S.C. 78u-6(c)(1)(B)(i)(IV).

[97] *See also* Whistleblower Program Rules, 83 Fed. Reg. at 34,713-34,713, nn. 99 &105 (July 20, 2018).

[98] 15 U.S.C. 78u-6(b)(1)(A) and (B).

To implement Section 21F(c)(1) of the Exchange Act, the Commission adopted Exchange Act Rule 21F-5 (titled "Amount of award") and 21F-6 (titled "Criteria for determining amount of award"). Rule 21F-5(a) reiterates the statutory direction that the "determination of the amount of an award is in the discretion of the Commission." Rule 21F-5(b) states that, if all the conditions for a whistleblower award are satisfied, "the Commission will then decide the percentage amount of the award applying the criteria set forth in" Rule 21F-6.

We further observe that the Commission's long-standing interpretation of Rule 21F-6(a)(3)—law enforcement interest—already specifically references the Commission's discretion to consider the monetary sanctions and the potential Award Amount when assessing that factor, and, as described below, we are adding language to clarify (as contemplated by the statutory language) that the Commission has the same discretion with respect to the other existing Award Factors.

We also note that, as a practical matter, award determinations have historically been recommended to the Commission by the CRS as both a dollar amount and the corresponding percentage of monetary sanctions collected. In considering the application of the Award Factors and the Award Amount, it therefore would have been difficult as a practicable matter to require that the relevant dollar amounts not be considered by the Commission in applying the Award Factors. Moreover, it has been the Commission's long-standing general practice in the public whistleblower award orders (and notices announcing awards) to describe those awards in actual dollar amounts, not percentages (which are generally redacted). This practice has been followed for the common-sense reason that actual dollar figures—not abstract percentages—are most likely to advance the whistleblower award program's goal of incentivizing potential whistleblowers.

To clarify the Commission's discretionary authority, we are modifying Rule 21F-6 to state that the Commission may consider the factors, and only the factors set forth in in Rule 21F-6, in relation to the facts and circumstances of each case in setting the dollar or percentage amount of the award.[99] This new language, by expressly referring to setting the dollar or percentage amount of the award, makes clear that the Commission and the CRS may, in applying the Award Factors specified in Rule 21F-6(a) and (b) and setting the Award Amount, consider the potential dollar amount that corresponds to the application of any of the factors.[100]

The discretion that we are clarifying is the Commission's discretion in applying the Award Factors—in percentage terms, dollar terms, or some combination thereof—and setting the Award Amount. This is not a separate (post application of the Award Factors) assessment of whether Award Amounts are too small or too large. We also are affirming that Award Amounts should be based exclusively on the application of the Award Factors.[101]

We believe the clarity and transparency provided by this amendment will not affect the determination of Award Amounts. The process for recommendations from the CRS is not changing except for some increases due to the presumption described above for awards of less than $5 million. The Commission has had and continues to have the discretion to apply the

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[99] We are also making two other modifications to the first sentence of Rule 21F-6. *First*, we are replacing the words "award percentage" with just "award." We are making this technical modification because we announce awards to the public primarily in dollar terms. *Second*, for the same reasons discussed above in footnote 81, we are removing the word "unique."

[100] As is the case with every aspect of any award determination under Rule 21F-6, the Commission shall not consider the balance of the IPF when exercising this express discretionary authority or the discretionary authority afforded by new Rule 21F-6(c). Section 21F(c)(1)(B)(ii) prohibits the Commission from adjusting an individual award based on the availability of money in the IPF; specifically, it provides that ''[i]n determining the amount of an award,'' the Commission ''shall not take into consideration the balance of the [IPF].''

[101] In deciding to clarify that the Commission may consider the dollar amount as it assesses the Award Factors, the Commission has determined that it is not necessary or appropriate to amend the Award Factors themselves. In the future, the Commission could amend the Award Factors through appropriate notice and comment.

Award Factors to determine the Award Amount within the statutory range. We also believe that the clarity and transparency provided by this and the other amendments the Commission is adopting, will further incentivize whistleblowers to come forward and to do so as promptly as practicable.[102]

The amendment we are adopting was the subject of a question posed to commenters in the proposing release. While the proposing release included proposed rule text that embodied the Commission's general discretion to consider the dollar amount of any increase or decrease under paragraphs (a) and (b) for large awards (along with the proposed specific mechanism for increasing small awards under $2 million), the proposing release asked commenters whether this approach should "cover all awards considered under Exchange Act Rule 21F-6[.]" The proposing release explained that this approach might "allow [the Commission] to better assess each enhancement or reduction in dollar terms" to permit the Commission to "more realistically and concretely assess the impact of each award factor on the overall award to ensure that [the Commission is] appropriately rewarding the whistleblower and incentivizing future whistleblowers[.]"[103]

E. Rule 21F-6(c)—Establishment of a presumption of the maximum statutory amount for certain awards

1. Proposed Rule

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[102] To add further transparency, we are also modifying Rule 21F-10 and Rule 21F-11 to make clear that, in applying the award factors specified in Rule 21F-6 and determining the award dollar and percentage amounts set forth in the preliminary determination, the award factors may be considered by the SEC staff and the Commission in dollar terms, percentage terms or some combination thereof. We further clarify that, should a claimant choose to contest a preliminary determination, the claimant may set forth the reasons for the objection to the proposed amount of an award, including the grounds therefore, in dollar terms, percentage terms or some combination thereof.

[103] The proposing release noted that "to the extent that individuals are motivated to come forward based on a potential award, it is the total dollar payout that" is generally relevant to them.

The Commission proposed paragraph (c) to Rule 21F-6, which would add to Rule 21F-6's existing framework by providing a specific mechanism for the Commission to exercise its discretion to increase any awards to a single whistleblower that would likely be below $2 million.

Specifically, proposed paragraph (c) would provide that, "[i]f the resulting award after applying the award factors specified in paragraphs (a) and (b) would yield a potential payout to a single whistleblower below $2 million (or any such greater amount that the Commission may periodically establish through publication of an order in the Federal Register), the Commission may increase the award so that the likely total payout to the whistleblower reflects a dollar amount that the Commission determines is appropriate to achieve the program's objectives of rewarding meritorious whistleblowers and sufficiently incentivizing future whistleblowers who might otherwise be concerned about the low dollar amount of a potential award; provided that in no event shall the provision be utilized to raise a potential award payout (as assessed by the Commission at the time it makes the award determination) above $2 million (or by such other amount as the Commission may designate by order) nor will the total amount awarded to all whistleblowers in the aggregate be greater than 30 percent."

The proposed rule further provided that an increase to an Award Amount would not be available in the event that the award either involved any of the negative award criteria specified in Rule 21F-6(b)—*i.e.*, culpability, unreasonable reporting delay, or interference with a company's internal compliance processes or reporting program—or triggered the culpability provision of Rule 21F-16. The Commission explained that it believed proposed paragraph (c) could provide an important additional incentive for potential whistleblowers to come forward.

2. Comments Received

The Commission received several comments on the proposed rule. Each of the commenters who supported the proposed rule suggested that it could help incentivize more whistleblowers to come forward.[104] By contrast, commenters who opposed the rule suggested: the proposed rule would not encourage whistleblowers to come forward because it would introduce additional uncertainty into the award process;[105] there is no justification for an enhancement to an award if the existing Award Factors do not justify a higher award;[106] the Commission already has the authority to enhance an award up to the maximum possible amount so the proposed rule change is unnecessary;[107] and Congress did not authorize the Commission to apply any dollar amount considerations in setting an Award Amount.[108]

3. Final Rule

After considering the various views expressed in the comments, and consistent with the Commission's determination that increased transparency, efficiency, and clarity will enhance the overall effectiveness of the program, we have determined to adopt the proposed rule with several modifications.[109]

First, the reach of the rule will be expanded to include a greater number of potential award matters. Specifically, the rule will now be presumptively available, subject to the

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[104] AFREF Letter; SIFMA Letter; Public Citizen Letter; Cohen Milstein Letter; Markopolos Letter.

[105] Cornell Law Clinic Letter; Think Computer Letter.

[106] CCMC Letter.

[107] Morrell Letter.

[108] Better Markets Letter.

[109] In addition to these modifications to the rule text, we are making one further change from the proposing release. The Commission intends new Rule 21F-6(c) to be applicable to all claims pending as of the effective date of these amendments so that those pending claims may receive the benefits of this amendment.

exclusions set forth below, if the statutory maximum award of 30 percent of the monetary sanctions collected in any covered and related action(s), in the aggregate, is $5 million or less, and the Commission determines there is no reasonable anticipation that future collections would cause the statutory maximum award to be paid to any whistleblower to exceed $5 million in the aggregate, and the negative Award Factors are not present.

In selecting $5 million as the ceiling for the new rule's application, we considered the fact that a majority of awards should, based on historical experience, be subject to this new rule. We believe there will be gains in efficiency from streamlining the award determination process for awards where the whistleblower did not trigger any of the negative award factors in Exchange Act Rule 6(b). In this category of cases, experience with the program demonstrates that there is no significant programmatic value in expending time and effort weighing minor increases or reductions to the Award Amount. Further, we believe application of this rule will save the majority of meritorious whistleblowers time and effort in explaining what they believe is the appropriate Award Amount in their award applications and in any subsequent response the whistleblower might file in response to a preliminary determination. Moreover, providing increased transparency, efficiency and clarity for this wide range of awards should help to further incentivize individuals to come forward because they can have more comfort, provided the criteria for the rule's application are met, that they may receive an award that is at the statutory maximum.

Second, we have revised the criteria for eligibility of the rule to allow more claimants to potentially receive the maximum statutory award. Consistent with the proposed rule, to be eligible for application of the new rule a claimant must *not* have acted in such a manner that he or she triggered the negative award factors specified in either Rule 21F-6(b)(1) (culpability in

connection with the securities law violation) or Rule 21F-6(b)(3) (malfeasance in connection with an internal compliance program) with respect to the claimant's award application, and the claimant must *not* have acted in a manner that triggers Rule 21F-16 (concerning awards to whistleblowers who engage in highly culpable misconduct). In a change from the proposed rule, a claimant's unreasonable delay under Rule 21F-6(b)(2) will not automatically disqualify the individual from receiving the enhancement under the new rule. Rather, the Commission in certain cases may exercise its discretion to allow a claimant to receive the benefit of the statutory maximum authorized by this rule notwithstanding his or her unreasonable delay, where the Commission determines that it is consistent with the public interest, the promotion of investor protection, and the objectives of the whistleblower program. Although we anticipate that this discretionary authority will not be routinely used where unreasonable delay has occurred, it will be available to the Commission where the public interest, investor protection and programmatic considerations counsel in favor of allowing the claimant to receive the statutory maximum.[110]

Third, subject to the below exceptions, the new rule embodies a presumption that the Commission will pay a meritorious claimant the statutory maximum amount where none of the negative award criteria specified in Rule 21F-6(b)—*i.e.*, culpability, unreasonable reporting delay, or interference with a company's internal compliance processes or reporting program—are implicated and the award claim does not trigger Rule 21F-16 (concerning awards to whistleblowers who engage in culpable conduct).

[110] In determining whether compelling circumstances exist to use this authority, the Commission may consider (among other relevant facts and circumstances presented by a particular award application) the following: whether the period of delay that is determined to be unreasonable was on balance minimal; whether investors experienced additional harm during the period of unreasonable delay; and whether the Commission's ability to pursue an enforcement action was appreciably jeopardized as a result of the period of unreasonable delay.

Fourth, consistent with the presumption of the rule's applicability, an otherwise eligible claimant will not receive the statutory maximum if the Commission determines in its discretion that either: (1) the claimant's assistance as assessed by the Commission under Rule 21F-6(a) was, under the relevant facts and circumstances, limited; or (2) the Commission determines that providing the statutory maximum in the particular matter would be inconsistent with the public interest, investor protection or the objectives of the whistleblower program (the "Exclusions"). These two Exclusions—which are the only means by which the presumption discussed above may be overcome—are intended to preserve the Commission's discretion to deny a statutory-maximum enhancement in situations where doing so is consistent with the program's overall goals.

The first Exclusion, for example, will allow the Commission discretion to deny a statutory-maximum enhancement where it determines that the assistance provided by the whistleblower was limited, with the degree of assistance provided by the whistleblower to be assessed in accordance with Rule 21F-6(a). This exclusion is consistent with prior past Commission practice in the case of limited assistance. Based on experience with the program, the Commission does not expect the presumption to be overcome by this Exclusion in the vast majority of circumstances.

The second discretionary Exclusion will preserve the Commission's discretion to deny a statutory-maximum enhancement where relevant circumstances counsel against an enhancement. As an example, if the claimant has engaged in securities-law violations that were unrelated to the conduct that formed the basis for the covered action, the Commission could (in its discretion) exclude the claimant from receiving a statutory-maximum enhancement.

Fifth, although we anticipate that the Commission should have little difficulty applying the presumptive enhancement afforded by Rule 21F-6(c) in cases involving a single meritorious whistleblower, the new rule recognizes that there are cases that will involve multiple meritorious whistleblowers. Where at least one of the multiple meritorious whistleblowers would qualify for the presumption if that individual were the sole meritorious whistleblower, the new rule will operate to ensure that the total aggregate award paid to all meritorious whistleblowers is the statutory maximum. But because these cases could involve any number of meritorious whistleblowers and because these cases could reflect any number of whistleblowers that might qualify for the enhancement rule were they the only whistleblower in the matter, the new rule provides flexibility in how the Commission should allocate the statutory maximum Award Amount in these instances. Nonetheless, the rule requires that in allocating that amount among the meritorious claimants, the Commission will consider all relevant facts.[111]

In adopting this rule, we concur with those commenters who expressed the view that this new provision could help to further incentivize whistleblowers to come forward to the Commission. Contrary to what some commenters suggested, we believe that we are significantly increasing certainty. When there are no negative award factors present and the statutory maximum award of 30 percent is $5 million or less, there will be a presumption in favor of an Award Amount at the statutory maximum, subject to the Exclusions.[112] Thus, we believe that

[111] We have decided not to adopt the proposed mechanism that would authorize the Commission to increase the $5 million figure through the publication of an order in the Federal Register. Such a mechanism is no longer necessary given our decision to expand the scope of the rule and the fact that (based on historical experience) the vast majority of awards will now be covered by this rule given its expanded scope.

[112] For awards where the statutory maximum award of 30 percent is greater than $5 million, the Commission will continue to analyze the Award Factors identified in Rule 21F-6 in determining the Award Amount. Based on the historical application of the award factors, if none of the negative Award Factors specified in Rule 21F-6(b) are present, the award amount would be expected to be in the top third of the award range.

this new rule will likely increase—not decrease—a reasonable individual's willingness to report potential securities-law violations.[113]

Lastly, we agree with the commenter that suggested that the Commission already possesses discretionary authority to increase any award to the statutory maximum. But expressly setting forth the specific terms and eligibility criteria in the new rule should help increase the public's confidence that the Commission will presumptively set the Award Amount at the statutory maximum in those cases where none of the negative award criteria specified in Rule 21F-6(b)(2) are present, the statutory maximum award of 30 percent is $5 million or less, and the Exclusions are not applicable.[114]

F. Rule 21F-6(d) — Enhanced review of certain awards

1. Proposed Rule

The Commission proposed a new paragraph (d) that would add to Rule 21F-6's existing analytical framework by providing a mechanism for the Commission in its discretion to conduct an enhanced review of awards in situations where a whistleblower has provided information that led to the success of one or more covered or related actions that, collectively, result in at least $100 million in collected monetary sanctions.

This proposed provision would have formalized the exercise of the Commission's discretion in setting Award Amounts in two respects where the potential Award Amount might involve a large payout. *First*, proposed paragraph (d)(1) would have expressly stated that the

[113] Morrell Letter.

[114] For the reasons already discussed above, we do not agree with the commenter that stated that Congress did not authorize the Commission to utilize dollar-amount considerations in setting awards. 15 U.S.C. 78u-6(c)(1). *See also id.* 78u-6(f).

Commission has the discretion to consider the potential dollar amount when applying each of the existing award criteria.

Second, proposed paragraph (d)(2) would have provided an express mechanism for the Commission to adjust the award if, after consideration of the existing Award Factors in paragraphs (a) and (b) of Rule 21F-6, the Commission finds that the potential award (from any Commission actions and related actions, collectively) exceeds what is reasonably necessary to reward the whistleblower and to incentivize similarly situated whistleblowers. Further, proposed paragraph (d)(2) would have made clear that any increases or decreases to a whistleblower's Award Amount under that paragraph shall not yield a potential award payout (as assessed by the Commission at the time that it makes the award determination) below $30 million, nor may any reduction result in the total amount awarded to all meritorious whistleblowers, collectively, for each covered or related action constituting less than 10 percent of the monetary sanctions collected in that action.

2. Comments Received

This proposed rule received a substantial number of public comments. Many of these letters were one of two different form letters that opposed proposed paragraph (d), as described in the letters. The first set of these form letters incorrectly stated that proposed paragraph (d) would "cap[] rewards in the largest cases to the lowest percentage rate."[115] The second set of form letters—contrary to the explanations offered in the Proposing Release—claimed that paragraph (d) would "plac[e] an arbitrary limit" on rewards and "authorize … drastic reductions in the amount of rewards in major fraud cases."[116] The proposed rule would not have imposed a

[115] Form Letter A.

[116] Form Letter C.

"cap" or an "arbitrary limit," nor would it have resulted in a "drastic reduction" in Award Amounts. Aside from the form-letter comments, the Commission received approximately 30 unique comment letters from persons expressing views on proposed paragraph (d).

A minority of the unique comments supported the proposal.[117] One such commenter stated that there is a public policy interest in allowing the Commission to make discretionary increases or decreases to Award Amounts with extremely large payouts because, according to the commenter, there is not necessarily a correlation between the size of a judgment and the seriousness of the violation; as a result, it could be perceived as unfair if an uncomplicated whistleblower submission could earn a whistleblower a significant windfall.[118] Relatedly, another commenter asserted that awards substantially over $30 million create a potential public perception of "jackpot justice" that may harm the overall credibility of the Commission's enforcement program.[119] Additionally, two commenters asserted that awards over $30 million provide little marginal incentive for a whistleblower to come forward because individuals who receive awards over that amount should be financially secure for the rest of their lives.[120] Another commenter who supported proposed paragraph (d) stated that the Commission should have the flexibility to adjust awards downward as it deems appropriate provided that the Commission explains its reasoning in the award order.[121]

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[117] The Commission also received a draft paper that supported proposed Rule 21F-6(d), asserting (among other things) that relying strictly on award percentages (without consideration of the corresponding dollar amount) "does not ensure that awards will not vastly exceed what is *necessary* to incentivize whistleblowers to come forward[.]" Amanda M. Rose, *Calculating SEC Whistleblower Awards: A Theoretical Approach* (May 28, 2019 Draft).

[118] *See* Anonymous-9 Letter.

[119] *See* SIFMA Letter.

[120] *See* SIFMA Letter; CWC Letter.

[121] *See* letter from Anonymous-123 (Oct. 31, 2018).

With respect to the unique comment letters opposing the proposed provision, the principal arguments against it generally related to the mechanism in paragraph (d)(2) that would formalize the use of Commission discretion to reduce large awards downward—but never below $30 million—under certain circumstances.[122] The principal arguments against paragraph (d)(2) are listed below.

- By permitting a reduction to or a capping of awards, the provision could disincentivize whistleblowers who may have information about massive frauds or other securities law violations.[123]
- Large awards are important to the program's success because these awards generate public awareness of the program.[124]
- The proposal to reduce awards could contravene the statutory language that prohibits the Commission from taking the IPF's balance into account when making whistleblower award determinations.[125]
- In considering whether to adopt a mechanism to reduce large awards, the Commission should focus exclusively on motivating people who know of

[122] Several commenters noted that the proposed rule may be unnecessary because the Commission has not made any awards above the $30 million threshold. *See, e.g.*, TAF Letter. But in fact the Commission had issued two awards exceeding $30 million to a single whistleblower. *See In the Matter of the Claims for an Award in Connection with a Notice of Covered Action*, Exchange Act Release No. 34-82987, 2018 WL 1378788 (Mar. 19, 2018); *In the Matter of the Claims for an Award in Connection with a Notice of Covered Action*, Exchange Act Release No. 34-73174, 2014 WL 4678597 (Sept. 22, 2014). Moreover, since the comments in question were received, the Commission has made additional awards to individual whistleblowers above $30 million. *See, e.g.*, *In the Matter of the Claims for an Award in Connection with a Notice of Covered Action,* Exchange Act Release No. 34- 89002, 2020 WL 3030497 (June 4, 2020); *In the Matter of the Claims for an Award in Connection with a Notice of Covered Action*, Exchange Act Release No. 34-85412, 2019 WL 1353776 (Mar. 26, 2019).

[123] *See, e.g.*, TAF Letter; Cohen Milstein Letter; Markopolos Letter; Public Citizen Letter.

[124] *See, e.g.*, TAF Letter; National Whistleblower Center Letter (Sept. 18, 2018) ("NWC Sept. 18 Letter").

[125] *See, e.g.*, TAF Letter; AFREF Letter; NWC Sept. 18 Letter; Sen. Grassley Letter.

potential securities law violations to report the violation and not on whether the monies could be used for other important public purposes.[126]

- The proposal would establish a 10 percent cap for awards above $30 million and the statute does not permit such a cap.[127]
- By operating as a 10 percent cap on whistleblower awards, the rule could decrease the amount of overseas violations of the securities laws that are detected because large awards incentivize foreigners who may lack employment anti-retaliation protections under U.S. law.[128]
- A 10 percent cap on awards could discourage companies from maintaining adequate internal compliance programs if companies are aware that whistleblowers are less likely to report potential violations to the Commission.[129]
- Large awards are needed to help mitigate the cost of professional and social sanctions that whistleblowers might experience.[130]
- The proposed rule would introduce an additional layer of uncertainty for potential whistleblowers and thus could reduce their willingness to assume the risks associated with reporting.[131]

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[126] *See* Admati & Steele Letter; NWC Sept. 18 Letter; Sen. Grassley Letter.

[127] *See* TAF Letter; letter from Taylor S. Amarel (Aug. 16, 2018).

[128] *See* NWC Sept. 18 Letter.

[129] *See* NWC Sept. 18 Letter; *see also* Sen. Grassley Letter.

[130] *See, e.g.*, letter from Wampler Buchanan Walker Chabrow Banciella & Stanley, P.A. (Sept. 14, 2018) ("Wampler Letter"); Sen. Grassley Letter.

[131] *See, e.g.*, TAF Letter; NWC Sept. 18 Letter; Better Markets Letter.

- A "cap" would be unfair to individuals who disclose industry-wide frauds because they might no longer be able to work in their chosen field.[132]
- Proposed paragraph (d)(2)'s terms such as "reasonably necessary" are "fuzzy" and may result in downward-award adjustments based on political considerations.[133]
- The $30 million threshold in proposed paragraph (d)(2) is not based on the value of the particular whistleblower's information or behavior.[134]
- "By simultaneously increasing the smallest awards and decreasing the largest awards," the Commission "risks encouraging more low-level employees to report minor fraud while potentially deterring high-level executives from reporting major fraud."[135]

3. Final Rule

After considering the comments on this proposed rule and further analysis of the operation of the whistleblower program to date, we have concluded that it is not necessary to adopt the formalized mechanism for the Commission to exercise its discretion to apply the Award Factors and set Award Amounts, and thus we have determined not to adopt it. We note that many of the comments received demonstrated a misperception of Proposed Rule 21F-6(d)(2) that would have applied to exceedingly large potential awards. A significant number of commenters asserted that this proposed rule would effectively result in Award Amounts being

[132] *See* Markopolos Letter.

[133] *See* Think Computer Letter.

[134] *See* Sen. Grassley Letter; *see also* Wampler Letter; letter from Anonymous-43 (Sept. 9, 2018).

[135] *See* Admati & Steele Letter; *see also* Better Markets Letter; Jansson Letter.

capped or set at the statutory minimum. We think it is important to correct this misunderstanding for potential whistleblowers and the public generally: Proposed Rule 21F-6(d)(2) did not introduce a cap nor was it intended to function in any way as an award cap.[136]

G. Rule 21F-6(b) — Interpretive guidance regarding the meaning of "unreasonable delay"

1. Proposed guidance

Rule 21F-6(b)(2) provides that the Commission will reduce an award if it finds that the whistleblower engaged in "unreasonable delay" in reporting a potential securities-law violation to the Commission. Further, new Rule 21F-6(c)—as discussed above—provides that the presumption under that rule will generally not be available if a whistleblower engaged in unreasonable delay. In the Proposing Release, we explained that any delay in reporting to the Commission beyond 180 days would be deemed presumptively unreasonable.

In proposing this interpretive guidance, we explained that the presumption could be overcome depending on potential highly unusual facts and circumstances of a particular award application connected to the delay. We also cautioned that shorter periods of delay (*i.e.*, less than 180 days) may also qualify as unreasonable depending on the particular facts and circumstances at issue, including, for example, whether the violations were ongoing, whether investors continued to experience harm or the whistleblower continued to profit from the wrongdoing during the period of the whistleblower's delay, or whether the delay had a discernable impact on the monetary sanctions that were ordered in the enforcement action.

2. Comments Received

[136] Our determination not to adopt proposed paragraph (d)(2) or any other downward-departure mechanism is not intended to imply that we agree with the arguments advanced by the comments opposing it.

We received only a few comments on the proposed unreasonable-delay guidance.[137] One commenter voiced support, asserting that the guidance would bring clarity and establish a general bright-line standard that could be adjusted on a case-by-case basis.[138]

Two commenters expressed concerns about the guidance. One asserted that a whistleblower who is genuinely continuing to pursue internal compliance procedures past the 180-day period should not be presumptively deemed to have unreasonably delayed reporting.[139] The other commenter who opposed the guidance expressed the view that the Commission should continue to evaluate unreasonable delay on a case-by-case basis.[140]

3. Final Rule

After considering the comments on this proposed rule and as a result of further analysis of the operation of the whistleblower program, we have determined not to adopt a specific time-based presumption of unreasonable delay as interpretive guidance. We continue to believe that a 180-day time period may be consistent with unreasonable delay in many circumstances. But we are persuaded that the idiosyncratic nature of the various claims the Commission is often presented with counsels in favor of continuing to assess the facts and circumstances of each case. Among other relevant considerations in assessing whether a delay was in part or in whole unreasonable (and whether any reduction is warranted if the delay was unreasonable) include

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[137] *See* TAF Letter; Wampler Buchanan Letter; Think Computer Letter.

[138] *See* TAF Letter.

[139] *See* Wampler Letter.

[140] Think Computer Letter. This commenter noted as an illustration supporting the continuation of a case-by-case basis that it may sometimes be reasonable for a whistleblower to delay beyond 180 days to avoid burdening the Commission with confusing and potentially peripheral information. But once a potential whistleblower knows the relevant facts that comprise a potential securities law violation the potential whistleblower should take appropriate steps to report those facts without delay irrespective of any concern by the whistleblower that certain of the facts may turn out to be peripheral or otherwise not relevant to the potential violation.

whether the delay was a result of circumstances beyond the whistleblower's control and whether reasonable actions were taken by the whistleblower during the period of delay.

For example, we agree with the commenter who expressed the view that delay by a whistleblower who is genuinely following internal compliance procedures or otherwise genuinely attempting to address the misconduct internally may be reasonable. Specifically, if the whistleblower provides evidence for the administrative record that the whistleblower was continuing to pursue the matter internally and the company's responses to the whistleblower indicated that the company was taking investigatory or remedial action in a diligent and timely fashion, delay of up to or more than a 180-day period may be deemed reasonable under the facts and circumstances. The Commission will also continue to consider, for example, whether a whistleblower's delay was in whole or in part reasonably attributable to illness or other personal or family circumstances or to a reasonable amount of time spent attempting to ascertain relevant facts or obtain an attorney in order to remain anonymous.

The Commission will continue to evaluate whether the violations were continuing during the delay and whether investors were being harmed during that time. Another relevant consideration that the Commission may consider is whether the delay threatened the Commission's ability to pursue the violations either because of the statute of limitations,[141] or the loss or destruction of evidence during the period of delay. The Commission will also continue to consider whether the whistleblower might ultimately profit from the delay by obtaining a larger Award Amount because the failure to report permitted the misconduct to continue, which can affect the calculation of the monetary sanctions, including, for example,

[141] The Supreme Court has held that the Commission may not seek disgorgement or penalties in any enforcement action that is brought after five years of the date the violation occurred. *See Kokesh v. SEC*, 137 S. Ct. 1635 (2017); *Gabelli v. SEC*, 568 U.S. 442 (2013).

increased disgorgement of ill-gotten gains and penalties. The Commission will continue to set awards at amounts that appropriately reflect these considerations.

We continue to encourage whistleblowers to report as early as possible, to ensure the Commission is able to timely address misconduct and, whenever possible, return those funds to harmed investors.

H. Amendment to Exchange Act Rule 21F-2—Whistleblower status, award eligibility, confidentiality, and retaliation protection

1. Proposed Rule

As explained in the Proposing Release, proposed Rule 21F-2 sought to conform whistleblower status, award eligibility, confidentiality, and retaliation protection in light of the Supreme Court's holding regarding Section 21F in *Digital Realty Trust, Inc. v. Somers*.[142] In *Digital Realty*, the Court held that Dodd-Frank's definition of "whistleblower," codified in Section 21F(a)(6),[143] requires a report to the Commission as a prerequisite for retaliation protection, and that the Commission's broader interpretation of that term in connection with retaliation protection under Section 21F was therefore not entitled to deference.[144]

In response to *Digital Realty*, proposed Rule 21F-2(a) provided a uniform definition of whistleblower status to apply for all purposes under Section 21F—award eligibility, confidentiality, and retaliation protection—while tracking the "whistleblower" definition in Section 21F(a)(6). Accordingly, proposed Rule 21F-2(a) conferred whistleblower status only on (i) an individual; (ii) who provides the Commission with information "in writing"; and only if (iii) "the information relates to a possible violation of the federal securities laws (including any

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[142] 138 S. Ct. 767 (2018).

[143] 15 U.S.C. 78u-6(a)(6).

[144] *Digital Realty Trust*, 138 S. Ct. at 781-82.

law, rule, or regulation subject to the jurisdiction of the Commission) that has occurred, is ongoing, or is about to occur."

Proposed Rules 21F-2(b), (c), and (d) specified how the whistleblower status conferred by paragraph (a) operates across the various contexts of award eligibility, confidentiality, and retaliation protection. Thus, proposed Rule 21F-2(b) specified that, to be eligible for an award in a Commission action based on information provided to the Commission, a person "must comply with the procedures and the conditions described in" Rules 21F-4, 21F-8, and 21F-9. Likewise, proposed Rule 21F-2(c) specified that, to qualify for confidentiality protections afforded by Section 21F(h)(2)[145] based on information provided to the Commission, a person "must comply with the procedures and the conditions described in" Rule 21F-9(a)—that is, must submit information using the Commission's online portal or Form TCR.

Proposed Rule 21F-2(d) sought to define the scope of retaliation protection under Section 21F consistent with the Supreme Court's holding in *Digital Realty*, by specifying both who is eligible for protection as a whistleblower and also what conduct is protected from employment retaliation.[146] In explaining who is eligible for retaliation protection, proposed Rule 21F-2(d)(1)(i) and (ii) required that a person must "qualify as a whistleblower under section (a) before experiencing the retaliation" for which redress is sought and also must "reasonably believe" that the information provided to the Commission relates to a possible securities law violation. In explaining what conduct is protected from retaliation, proposed Rule 21F-2(d)(iii) required that a person must perform a "lawful act" that both is done in connection with any of the

[145] 15 U.S.C. 78u-6(h)(2).

[146] *See Digital Realty Trust*, 138 S. Ct. at 777.

activities described in Section 21F(h)(1)(A)(i)-(iii)[147] and also "relate[s] to the subject matter of" the person's submission to the Commission under proposed Rule 21F-2(a).

Proposed Rule 21F-2(d)(2) resolved a timing issue not addressed by either the statute or the *Digital Realty* decision, by clarifying that a person does not need to qualify as a whistleblower under Rule 21F-2(a) at the time she or he performed the lawful act described in Rule 21F-2(d)(1)(iii), in order to be eligible for retaliation protection; rather, a person eligible for retaliation protection is protected from retaliation for prior lawful acts when the alleged retaliatory conduct occurs after the person qualifies as a whistleblower. Moreover, proposed Rule 21F-2(d)(3) and (4) carried forward provisions of the existing Rule 21F-2 without a substantive change. Paragraph (d)(3) stated that retaliation protection applies regardless of whether a person satisfies all the procedures and conditions to qualify for an award. Paragraph (d)(4) stated that the retaliation prohibition in Section 21F(h)(1) and the rules thereunder shall be enforceable in an action or proceeding brought by the Commission.

2. Comments Received

We received several comments addressing proposed Rule 21F-2's definition of whistleblower status and the scope of retaliation protection.[148] Commenters generally

[147] 15 U.S.C. 78u-6(h)(1)(A)(i)-(iii).

[148] We did not receive any comments addressing the following aspects of proposed Rule 21F-2: limiting whistleblower status to individuals, under proposed Rule 21F-2(a)(2); the clarification of the phrase "securities laws" in Section 21F(a)(6), under proposed Rule 21F-2(a)(1); defining award eligibility and confidentiality, under proposed Rule 21F-2(b) and (c); extending retaliation protection to a lawful act performed in connection with any of the activities described in Section 21F(h)(1)(A)(i)-(iii), under proposed Rule 21F-2(d)(1)(iii)(A); and providing that Section 21F(h)(1) and the rules thereunder shall be enforceable by the Commission, under proposed Rule 21F-2(d)(4).

acknowledged the need to revise these aspects of the existing rule to conform to the *Digital Realty* decision.[149]

Commenters were divided on the proposal to require that a person provide information "in writing" to the Commission in order to qualify for whistleblower status under Rule 21F-2(a)(1). Two commenters supported the "in writing" proposal. One suggested further requiring that information be provided consistent with Rule 21F-9(a)—that is, either on Form TCR or through the online portal—not only for award eligibility and confidentiality, but also for retaliation protection.[150] The other recommended that the Commission make it a practice to physically or electronically date-stamp every written submission.[151] One commenter opposed the "in writing" requirement as too restrictive, since people may make oral reports out of a sense of urgency or fear of retaliation, and since oral reports in the form of interviews or testimony can still provide substantial assistance to the Commission.[152] Three joint commenters opposed the "in writing" requirement as not required by the text of Section 21F and as inconsistent with the statute's remedial purpose, while observing that Section 806 of Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley")[153] and the Fair Labor Standards Act ("FLSA")[154] have been construed as

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[149] *See, e.g.*, CWC Letter; SIFMA Letter. *But see* joint letter from National Employment Lawyers Association, Government Accountability Project, and Public Citizen (Sept. 18, 2018) ("NELA Letter") (opposing proposed rule to the extent it went further than required by *Digital Realty*); TAF Letter (endorsing comments from NELA); letter from Anonymous-52 (Sept. 7, 2018) (arguing that the Commission should challenge *Digital Realty* as wrongly decided).

[150] *See* CCMC Letter.

[151] *See* CWC Letter.

[152] *See* TAF Letter.

[153] 18 U.S.C. 1514A.

[154] 29 U.S.C. 215(a)(3).

affording protection to oral reports.[155] These joint commenters also asserted that, contrary to the justifications for this requirement in the Proposing Release, committing oral reports to writing would not pose a burden to the Commission's staff and there was no evidence that past protections for oral reports under Sarbanes-Oxley Section 806 and Exchange Act Section 21F had enmeshed the Commission's staff in disputes in private retaliation lawsuits.[156]

Similarly, commenters were divided on the specific request for comment whether the new rule should enumerate any additional "manner" of providing information to the Commission. One commenter argued against enumerating any of the manners described in clause (ii) of Section 21F(h)(1)(A), such as testimony, since this commenter agreed with the analysis in the Proposing Release that clause (ii) is best read as extending employment retaliation protection to acts of continued cooperation by a person who has already provided information to the Commission.[157] But other commenters supported enumerating the manners described in clause (ii) precisely because Section 21F lists them and because of the Commission's interest in ensuring that persons can testify or otherwise assist the Commission without reprisal.[158]

Commenters offered further feedback on the definition of whistleblower status under proposed Rule 21F-2(a)(1). Some commenters supported the extension of whistleblower status to persons who provide information concerning "possible" violations of the federal securities

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[155] *See* NELA Letter.

[156] *See id.*

[157] *See* CWC Letter (citing Whistleblower Program Rules, 83 Fed. Reg. 34,702, 34,718 n.144 (July 20, 2018)).

[158] *See* NELA Letter.

laws.[159] Another commenter suggested excluding from whistleblower status any individual who participated in wrongdoing, on a theory of unclean hands.[160]

Commenters took opposing views on whether an individual should be required to report to the Commission before receiving retaliation protection under proposed Rule 21F-2(d)(1). One commenter supported this requirement as dictated by the *Digital Realty* decision and observed the logical impossibility of "commit[ting] retaliation *because of* a protected activity that has not yet occurred."[161] Three joint commenters believed, to the contrary, that this approach, in combination with the proposed protection for "lawful acts" done before the Commission report, would create a loophole by not protecting those who report internally before approaching the Commission, thereby incentivizing prompt firings for internal reports.[162] These commenters further believed this approach would encourage an employer to argue that the employee was fired in retaliation for the internal report rather than the report to the Commission. [163] As an alternative, these commenters proposed that the internal disclosure be deemed an initial step in disclosing to the Commission, and that the employer be required to forward the internal disclosure and its response to the Commission.[164]

Three joint commenters supported the proposal to afford retaliation protection, just as the current rule does, to persons who "reasonably believe" that the information provided to the

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[159] *See id.*

[160] *See* CCMC Letter.

[161] *See* CWC Letter (emphasis in original).

[162] *See* NELA Letter.

[163] *See id.*

[164] *See id.*

Commission concerns a possible violation of the federal securities laws under proposed Rule 21F-2(d)(1)(ii).[165]

Commenters disagreed with one another on the limitation under proposed Rule 21F-2(d)(1)(iii)(B) that retaliation protection will attach to a lawful act only if that act "relate[s] to the subject matter of your submission to the Commission under" Rule 21F-2(a). One commenter supported this "subject matter" limitation as embodying the principle that the submission to the Commission establishes the parameters of retaliation protection.[166] Three joint commenters opposed this limitation as not required by either the text of Section 21F or the *Digital Realty* decision and as injecting uncertainty as to how close a nexus would be required between the lawful act and the subject matter of the submission.[167]

One commenter urged against the proposal to afford retaliation protection, just as the current rule does, regardless of whether the individual also satisfies the procedures and conditions for award eligibility, under proposed Rule 21F-2(d)(3).[168] This commenter instead advocated for expressly treating the procedures and conditions for award eligibility under Rules 21F-4, 21F-8, and 21F-9 as prerequisites for retaliation protection.[169]

Commenters were divided in responding to the request for comment whether participation in internal compliance systems should continue to be considered in determining the amount of an award, given the change in retaliation protection resulting from the *Digital Realty*

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[165] *See* NELA Letter.

[166] *See* CWC Letter.

[167] *See* NELA Letter.

[168] *See* CCMC Letter.

[169] *See id.*

decision. Two commenters[170] as well as three joint commenters[171] supported retaining this factor in the award analysis. One commenter believed that doing so would maintain the incentives for robust internal compliance programs, which the commenter described as the first and best line of defense against violations of the federal securities laws.[172] This commenter also suggested that the Commission consider an explicit program that, in appropriate cases where an individual bypasses internal compliance and goes directly to the Commission, would allow the company to run its own internal investigation and report the results before the Commission staff takes substantial investigative steps.[173] A second commenter similarly cited the benefits of internal compliance programs for both employers and employees,[174] while three joint commenters suggested that the Commission should retain this award factor while actively warning individuals about the limitations on retaliation protection for internal disclosures.[175]

Five commenters opposed keeping participation in internal compliance systems as a consideration in determining the amount of an award, reasoning that the *Digital Realty* decision leaves such reports unprotected from retaliation.[176] One commenter stated that it is simply not practical to assume that individuals will always be able to submit reports simultaneously to the

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[170] *See* CWC Letter; SIFMA Letter.

[171] *See* NELA Letter.

[172] *See* SIFMA Letter.

[173] *See id.*

[174] *See* CWC Letter.

[175] *See* NELA Letter.

[176] *See* letter from Anonymous-64 (Aug. 21, 2018) ("Anonymous-64 Letter"); Sen. Grassley Letter; Kohn, Kohn & Colapinto July 24 Letter; Morrell Letter; TAF Letter.

Commission and to an internal compliance program.[177] Three commenters argued that any provisions to encourage internal reports would be illegal in light of the Supreme Court's recognition in *Digital Realty* that Congress designed Section 21F not to encourage internal reports but to encourage reports to the Commission.[178] These same three commenters further suggested that the Commission clarify that the internal compliance programs addressed in proposed Rule 21F-2 do not include internal investigations led by company counsel and that the Commission eliminate existing Rule 21F-4(b)(4)(iii), which generally requires certain employees in managerial, compliance, and other positions as well as auditors to wait 120 days before reporting to the Commission.[179] On the elimination of Rule 21F-4(b)(4)(iii), these three commenters were joined by a fourth.[180]

Commenters also took opposing views on whether proposed Rule 21F-2 should enumerate additional forms of retaliation as falling within the prohibition in Section 21F(h)(1)(A). One commenter endorsed enumerating "downstream" conduct such as preventing a whistleblower from obtaining future employment,[181] while another commenter opposed doing so based on its assertion that the law is less clear as to retaliation protection for future employment.[182] Three joint commenters supported broadly construing the retaliation prohibition

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[177] *See* Sen. Grassley Letter.

[178] *See* Anonymous-64 Letter; Kohn, Kohn & Colapinto July 24 Letter; Morrell Letter.

[179] *See id.*

[180] *See* Sen. Grassley Letter.

[181] *See* TAF Letter.

[182] *See* CWC Letter (citing *Dellinger v. Science Applications Int'l Corp.*, 649 F.3d 226 (4th Cir. 2011)).

to encompass any employment action that is reasonably likely to deter employees from engaging in protected activity.[183]

3. Final Rule

After considering the comments, we are adopting Rule 21F-2 as proposed, with the addition of interpretive guidance defining the scope of retaliatory conduct prohibited by Section 21F(h)(1)(A). In addition, in the Proposing Release we observed that proposed Rule 21F-2 would render inapplicable the formal interpretation that the Commission issued in 2015 regarding the meaning of Exchange Act Rule 21F-9. *See* 83 Fed. Reg. at 34,718 n.193 (citing Interpretation of the SEC's Whistleblower Rules under Section 21F of the Securities Exchange Act of 1934, 80 Fed. Reg. 47,829 (Aug. 10, 2015)). That formal interpretation explained that compliance with Exchange Act Rule 21F-9 was not required to qualify as a whistleblower for purposes of Section 21F's employment retaliation protections. *See* 80 Fed. Reg. at 47,830. Because the *Digital Realty* decision has since adopted a narrower reading of what is required to qualify as a whistleblower for Section 21F's employment retaliation protections, we now repeal that interpretive guidance as obsolete.

4. Whistleblower status under Rule 21F-2(a)

Requiring information to be provided to the Commission "in writing" as a condition of whistleblower status under Rule 21F-2(a) appropriately addresses the interests of affording flexibility to persons who report to the Commission and promoting reasonable certainty and efficiency for the Commission, including for the Commission staff who receive and process such reports. Were the rule to require that such reports also comply with Rule 21F-9(a)—that is, that

[183] *See* NELA Letter (citing *Burlington N. & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006)).

they be made either on Form TCR or through the online portal—for retaliation protection, as one commenter suggested,[184] the burden to persons making such reports would increase without any corresponding benefit. As the Proposing Release explained, compliance with Rule 21F-9(a) is required in other contexts because it allows precise and reliable tracking of information for determining award eligibility as well as for helping clarify which submitters should receive heightened confidential treatment. There would be no similar benefit in the retaliation context, however, where the key issue following *Digital Realty* is not how the information was handled by the Commission's staff but whether the information was provided to the Commission at all.[185]

Nor are we persuaded that the "in writing" requirement is too onerous, as other commenters suggested.[186] Our experience to date in the awards context suggests that this requirement presents, at most, a minimal burden to individuals who want to report potential securities law violations to the Commission while facilitating the staff's use of the information. To the degree that some individuals may face urgent circumstances,[187] the "in writing" requirement affords ample flexibility in the means of transmission—for example, online submission, email, facsimile, or U.S. Mail—to meet that urgency. Moreover, given that *Digital Realty* has altered the legal landscape by strictly limiting retaliation protection to persons who have reported to the Commission, as distinct from persons who report internally, we anticipate that direct reports to the Commission may increase, and so protecting oral reports to the

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[184] *See* CCMC Letter.

[185] As for the suggestion that the staff make it a practice to date-stamp every written submission, *see* CWC Letter, we observe that it is already the staff's practice to upload to the TCR System, upon receipt, every written report of a possible securities law violation. That system automatically generates an electronic record of the date and time the corresponding TCR is created within the system.

[186] *See, e.g.*, TAF Letter.

[187] *See id.*

Commission could result in litigation disputes about what information was orally provided and on what dates. We decline the invitation of three joint commenters[188] to investigate how many such disputes arose in the past, since the *Digital Realty* decision is likely to encourage more direct reports to the Commission and thus any earlier data would likely have limited predictive value under the post-*Digital Realty* regime.

Nor is a contrary result required by judicial decisions finding oral reports protected under Sarbanes-Oxley Section 806 and the FLSA, since those decisions typically addressed oral reports made internally to an employer who necessarily had a pre-existing employment relationship with the complainant.[189] Our rule, by contrast, must preserve administrative efficiency and reliability while addressing external reports to the Commission from members of the public throughout the country and, indeed, across the globe.[190] Exchange Act Section 21F(a)(6) allows us discretion to determine the required "manner" of providing information, and we conclude that limiting whistleblower status to reports made "in writing" is the better programmatic approach for the reasons above.

In addition to keeping the "in writing" requirement, we have decided to adopt proposed Rule 21F-2(a) without specifying any other "manners" of providing information to the Commission. Although some commenters suggested that we specify the additional conduct enumerated in clause (ii) of Section 21F(h)(1)(A), such as testimony in an action brought by the

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[188] *See* NELA Letter.

[189] *See id.* (collecting cases). Indeed, the cited Supreme Court decision addressing the FLSA did not extend retaliation protection to all oral reports, but only to those oral reports sufficient to give the employer fair notice that the employee was making a complaint. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11-14.

[190] *See* OFFICE OF THE WHISTLEBLOWER, 2018 ANNUAL REPORT TO CONGRESS 22-23 (2018) (documenting geographic dispersal of whistleblowers throughout the United States and from 72 other countries during fiscal year 2018).

Commission, we adhere to our analysis of clause (ii) in the Proposing Release. In particular, because clause (ii) refers to "such information" provided under the preceding clause (i), we continue to believe that clause (ii) is more reasonably understood as extending employment retaliation protection to acts of continued cooperation by a person who has already provided information to the Commission. And, as a practical matter, providing information to the Commission in writing presents a minimal burden for any individual who wants to receive retaliation protection under Section 21F for such acts of continued cooperation.

We have also declined the invitation of one commenter[191] to modify proposed Rule 21F-2(a) to exclude from whistleblower status any individual who participated in wrongdoing. Nothing in the *Digital Realty* decision, which is the impetus for the present revisions to Rule 21F-2, requires such an exclusion. Even were we writing on a blank slate, we find it significant that Congress chose not to adopt such a broad limitation on whistleblower status under Section 21F(a)(6), but instead chose the more narrow option of denying award eligibility under Section 21F(c)(2)(B)[192] to "any whistleblower who is convicted of a criminal violation related to the [covered action] for which the whistleblower otherwise could receive an award under this section." Based on our experience to date, moreover, existing Rule 21F-6(b)(1) provides appropriate flexibility on a case-by-case basis for decreasing an award based on a whistleblower's culpability.[193]

5. Retaliation protection under Rule 21F-2(d)

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[191] *See* CCMC Letter.

[192] 15 U.S.C. 78u-6(c)(2)(B).

[193] Indeed, the Commission followed a similar analysis when it declined suggestions to implement a *per se* exclusion for culpable whistleblowers in our 2011 rulemaking. *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,350-51 (June 13, 2011).

We are adopting Rule 21F-2(d)(1) as proposed to limit retaliation protection to persons who qualify as whistleblowers by providing information to the Commission before experiencing retaliation, as expressly required by the *Digital Realty* decision.[194] At the same time, we are also adopting Rule 21F-2(d)(2) as proposed to extend retaliation protection to lawful acts described in Exchange Act Section 21F(h)(1)(A) even if done before reporting to the Commission when the retaliation takes place after a person qualifies as a "whistleblower" by providing information directly "to the Commission" consistent with Section 21F(a)(6). We believe this interpretation is consistent with the language of Section 21F(h)(1)(A).[195] Although the net result is to limit retaliation protection for persons who report internally before reporting to the Commission,[196] this outcome is driven by the Supreme Court's holding that Section 21F distinguishes between "who" is protected as a whistleblower under Section 21F(a)(6) and "what" conduct is protected under Section 21F(h)(1)(A).[197]

The Supreme Court's holding forecloses the alternative suggested by certain commenters[198] that we require employers to forward all internal reports to the Commission and that we therefore afford retaliation protection to an employee's internal report as an "initial step" in reporting to the Commission. Even under that suggested regime, retaliation protection under Section 21F would not attach to a person who reported only indirectly—by making an internal

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[194] *See Digital Realty Trust*, 138 S. Ct. at 778 ("Somers did not provide information 'to the Commission' before his termination, § 78u-6(a)(6), so he did not qualify as a 'whistleblower' at the time of the alleged retaliation. He is therefore ineligible to seek relief under § 78u-6(h).").

[195] *See* Whistleblower Program Rules, 83 Fed. Reg. 34,720 (July 20, 2018) (observing that the statute is silent on this timing issue).

[196] *Cf.* NELA Letter.

[197] *See Digital Realty Trust*, 138 S. Ct. at 777.

[198] *See* NELA Letter.

report that was then forwarded by the employer to the Commission—until that same person also qualified as a "whistleblower" by providing information directly "to the Commission" consistent with Section 21F(a)(6).[199]

We are adopting Rule 21F-2(d)(1)(iii)(B) as proposed to state that retaliation protection will attach to a lawful act performed by a whistleblower only if the act "relate[s] to the subject matter of" the whistleblower's report to the Commission. Given Section 21F's silence and the Supreme Court's decision not to address whether any such connection should be required,[200] "we believe this clarification helps avoid the incongruous result that a person could qualify just once as a whistleblower and then receive lifetime protection for any non-Commission reports . . . with respect to distinct securities law violations that occur years later."[201] This provision thus helps effectuate what the Supreme Court recognized as Congress's core objective of encouraging reports to the Commission.[202] Although some commenters expressed reservations about the uncertainty this provision might generate for whistleblowers,[203] we anticipate that this provision will be applied in a flexible manner to accommodate whistleblowers who make a good-faith effort to comply with our rules in seeking retaliation protection.

We are declining the invitation of one commenter[204] to limit retaliation protection strictly to persons who satisfy the procedures and conditions for award eligibility under Rules 21F-4,

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[199] Even where retaliation protection under Section 21F does not attach, Sarbanes-Oxley Section 806 may still provide retaliation protection for certain internal reports. *See* 18 U.S.C. 1514A.

[200] *See Digital Realty Trust*, 138 S. Ct. at 780-81.

[201] *See* Whistleblower Program Rules, 83 Fed. Reg. 34,720 n.168 (July 20, 2018).

[202] *See Digital Realty Trust*, 138 S. Ct. at 777.

[203] *See* NELA Letter.

[204] *See* CCMC Letter.

21F-8, and 21F-9. Such a limitation would create significant and arbitrary hazards for whistleblowers who typically would be unable to assess at the time they report to the Commission, for example, whether their information is "original" under Rule 21F-4(b)(1)(ii) in the sense that it is not already known to the Commission from any other source. The text, history, and purposes of Section 21F do not indicate that such an approach would be appropriate. To the contrary, that approach would severely undermine the incentives for individuals to report potential securities law violations to the Commission as intended by Congress.

On the scope of the retaliatory conduct prohibited by Section 21F(h)(1)(A), we agree with the commenter who asserted that the decisional law is too uncertain to warrant revising Rule 21F-2 to prohibit discrimination by an employer against a whistleblower who is not currently employed, but rather seeking prospective employment.[205] Accordingly, Rule 21F-2 as adopted remains silent on that question. At the same time, we have determined to provide guidance, following the Supreme Court's decision in *Burlington Northern and Santa Fe Railway Company v. White*, that we interpret Section 21F(h)(1)(A) as prohibiting any retaliatory activity by an employer against a whistleblower that "a reasonable employee [would find] materially adverse," which means "it well might have dissuade[d] a reasonable worker" from engaging in any lawful act encompassed by Section 21F(h)(1)(A).[206] In particular, we conclude that such a

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[205] *See* CWC Letter (citing *Dellinger v. Science Applications Int'l Corp.* 649 F.3d 226 (4th Cir. 2011)). Much like the FLSA retaliation provision at issue in *Dellinger*, *see* 649 F.3d at 228-30, the language of Section 21F(h)(1)(A) focuses on employment relationships without expressly encompassing prospective employers.

[206] 548 U.S. 53, 67-68 (2006) (internal quotation marks omitted). In *Burlington*, the Supreme Court construed the phrase "discriminate against" in the retaliation provision of Title VII of the Civil Rights Act of 1964. *Id.* at 57. That statute stated, in relevant part, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment" because of their protected conduct. *Id.* at 62 (quoting 42 U.S.C. 2000e-3(a)) (internal quotation marks omitted). Here, Section 21F(h)(1)(A) reads at least as broadly, "No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, *or in any other manner discriminate* against a whistleblower" because of the whistleblower's protected conduct. 15 U.S.C. 78u-6(h)(1)(A)

broad standard will promote greater ease of administration than revising Rule 21F-2 to include a list of prohibited forms of retaliation,[207] which might inadvertently omit certain retaliatory activities that otherwise would meet the *Burlington* standard.

6. Other rules addressing internal compliance

In the Proposing Release, we solicited comment on whether, given the change in retaliation protection following *Digital Realty*, it would be appropriate to change the Commission's use of award criteria that consider participation in internal compliance systems. As discussed above, a number of commenters suggested it would be inappropriate or even unlawful to retain such award criteria and Rule 21F-4(b)(4)(iii) in light of the Supreme Court's interpretation of Section 21F as conditioning retaliation protection on reporting to the Commission rather than simply reporting internally.[208] This interpretation is inconsistent with both *Digital Realty* and Section 21F. As the Supreme Court explained, Congress's enactment of Section 21F in the Dodd-Frank Act in 2010 built upon its earlier enactment of Sarbanes-Oxley Section 806, which already afforded retaliation protection for certain internal reports.[209] Section 21F repealed neither Sarbanes-Oxley Section 806 nor any of the other provisions of the federal securities laws that require or encourage the maintenance and use of internal compliance systems for responding to possible violations of the federal securities laws. Accordingly, we have implemented Section 21F in a way that does not frustrate the design of these other statutes that Congress has chosen to retain. To that end, it is appropriate to retain the provisions in our

(emphasis supplied). Given that both statutes use the same phrase "discriminate against," we expect that courts will follow *Burlington* in construing the scope of retaliatory conduct covered by Section 21F(h)(1)(A).

[207] *Cf.* NELA Letter.

[208] *See* Anonymous-64 Letter; Sen. Grassley Letter; Kohn, Kohn & Colapinto July 24 Letter; Morrell Letter.

[209] *See* 138 S. Ct. at 773.

whistleblower rules that help preserve the internal compliance systems adopted under those other statutes.

Based on our review of the comments received, and in light of our experience to date, we are retaining the award criteria, particularly Rule 21F-6(a)(4) and (b)(3), that consider the whistleblower's participation in or frustration of internal compliance systems when determining the amount of an award. In particular, we are persuaded that the possibility of an increased award under Rule 21F-6(a)(4) remains an appropriate incentive for whistleblowers to use internal compliance systems where available, while the possibility of a decreased award under Rule 21F-6(b)(3) remains an appropriate deterrent against acts to undermine such a system. Nothing in either of these provisions will change the award analysis for a whistleblower who, out of fear of reprisal or for any other reason, reports directly to the Commission in order to secure retaliation protection under Section 21F. In other words, we will not construe a direct report to the Commission, made to secure retaliation protection under Section 21F, to constitute an act that undermines an internal compliance system under Rule 21F-6(b)(3).

Based on these same considerations, we are retaining Rule 21F-4(b)(4)(iii), which generally requires certain employees in managerial, compliance, and other positions as well as auditors to wait 120 days before reporting to the Commission, if they want their information to be considered "original" for purposes of award eligibility. As we explained in adopting this rule, "we believe there are good policy reasons to exclude information from consideration . . . where its use in a whistleblower submission might undermine the proper operation of internal compliance systems."[210] In other words, repeal of this rule could create incentives for such employees and auditors to report potentially unlawful conduct to the Commission in hopes of an

[210] Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,317 (June 13, 2011).

award instead of fulfilling their professional responsibilities within those internal compliance systems by internally reporting information and allowing a reasonable response time.[211] While these personnel will lack retaliation protection under Section 21F until they report to the Commission, this compromise is appropriate in light of the narrow categories of personnel covered by Rule 21F-4(b)(4)(iii) and the need to preserve the proper operation of internal compliance systems.

We are declining the suggestion of one commenter[212] to adopt an explicit program that, in appropriate cases where an individual bypasses internal compliance and goes directly to the Commission, would allow the company to run its own internal investigation and report the results before the Commission staff takes substantial investigative steps. The better approach in our view is to maintain the discretion of the Division of Enforcement to decide how best to evaluate and investigate potential violations, including the potential role of internal investigations. We see no need in light of *Digital Realty* to adopt a one-size-fits-all policy for all enforcement matters.[213]

To illustrate how Rule 21F-2 will operate in practice, consider the following hypothetical scenario: An employee at a publicly traded issuer overhears a conversation by colleagues discussing a scheme to create an artificial boost for reported sales. The employee investigates and discovers that sales invoices are being generated without any corresponding movement of inventory, and then reports the possible misconduct to the issuer's chief compliance officer. But

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[211] *See id.* at 34,315-19.

[212] *See* SIFMA Letter.

[213] We also decline the suggestion of certain commenters to clarify that the internal compliance programs addressed in proposed Rule 21F-2 do not include internal investigations led by company counsel. *See* Anonymous-64 Letter; Kohn, Kohn & Colapinto July 24 Letter; Morrell Letter. Rule 21F-2 itself does not refer to internal compliance systems *per se*, and the suggested revision has nothing to do with *Digital Realty*.

a week passes without any action being taken on the report. If the Commission then receives an email from that employee in which the employee reports the same possible misconduct, and in sending the email the employee reasonably believed that the report relates to a possible securities laws violation, then the employee would qualify as a whistleblower under Rule 21F-2(a) and would be eligible for anti-retaliation protections under Rule 21F-2(d)(1)(i)-(ii) as of the time the employee provides the information to the Commission. Assuming that the employee's internal report was within the scope of Section 806(a) of Sarbanes-Oxley, that internal report itself would be a protected "lawful act" under Rule 21F-2(d)(1)(iii). The fact that the employee made the internal report before the Commission report would not make a difference for anti-retaliation protections under Rule 21F-2(d)(2). That said, if the employee wanted to be eligible for an award under Rule 21F-2(b) and to qualify for confidentiality protections under Rule 21F-2(c), he or she would need to make his or her first report of that information to the Commission using Form TCR or through the online portal at www.sec.gov, as required by Rule 21F-9(a), and not through an email to the Commission. To qualify for an award, the employee would additionally need to satisfy the relevant procedural requirements, eligibility criteria, and other conditions described in Rules 21F-3 through 21F-18.

I. Rule 21F-8(d) — Forms used for Whistleblower Program

1. Proposed Rule

Rule 21F-8 describes certain requirements that a whistleblower must satisfy to be eligible for an award, including the form and manner in which information is submitted to the Commission. The Commission proposed to add a new paragraph (d) to provide the Commission with additional flexibility to change the forms it uses to administer the program. The new subparagraph (d)(1) would allow the Commission to periodically designate on its web page a revised Form TCR for individuals seeking to submit original information to the Commission.

Similarly, subparagraph (d)(2) would allow the Commission to periodically designate a revised Form WB-APP for individuals making a claim for an award.

2. Comments Received

We received few comments on proposed Rule 21F-8(d). Two commenters supported the proposed amendment,[214] while others offered suggested modifications.[215] Two commenters suggested a thirty (30) day grace period to allow a potential whistleblower to use the prior version of each form before a revised version is posted to the Commission website.[216] One commenter suggested that forms be amended at most once per year,[217] while another commenter recommended that the Commission add a section to address the seven factors affecting an award determination.[218]

3. Final Rule

After considering the comments, we are adopting Rule 21F-8(d) as proposed with a slight modification. We agree that it is reasonable to allow a whistleblower to continue to use the superseded versions of the Form TCR and Form WB-APP for a 30-day period following the public release of each revised form. This modification would be reflected in a new sentence added to Proposed Rule 21F-8(a).

While we considered the remaining suggested modifications, they are not reflected in the final rule. One of the goals of the proposal is to ensure that the information the Commission requests in the Form TCR conforms to the information that the Commission requests through the

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[214] *See* Think Computer Letter; TAF Letter.

[215] *See* CCMC Letter; TAF Letter.

[216] *Id.*

[217] *See* Think Computer Letter.

[218] *See* letter from Anonymous-24 (Sept. 15, 2018).

online portal. Permitting the Form TCR to be changed only once a year would run the risk of soliciting asymmetrical information through the two submission methods which would undermine the purpose of the proposed Rule 21F-8(d).

Finally, we are not persuaded that Form TCR should be amended to include a section for the seven factors for determining the amount of an award as described in Rule 21F-6(a) and 21F-6(b). The Form WB-APP asks an individual to explain the basis for the Award Amount that the individual is seeking. To that end, an applicant is permitted to include supporting documents and to attach additional pages to the Form WB-APP. In our experience implementing the program, most claimants already use this opportunity to supplement their award application.

J. Rule 21F-8(e) and a clarifying amendment to Rule 21F-8(c)(7) — Abuse of Award Application Process or Submission of False Information in Connection with the Whistleblower Program and Certain Other Dealings with the Commission

1. Proposed Rule

Proposed Rule 21F-8(e)(1) would authorize the Commission to permanently bar an individual who submits three or more award applications that are frivolous or lack a colorable connection between the tip and the action. The proposed rule would also authorize the Commission to bar an individual who has been deemed ineligible for an award pursuant to paragraph (c)(7) of Rule 21F-8 for knowingly and willfully making false statements to the Commission or another governmental entity.

Further, paragraph (e)(2) would require the Office of the Whistleblower to notify the claimant of its assessment that the award application is frivolous or lacks a colorable connection to the action, and give the claimant the opportunity to withdraw the application before a Preliminary Determination or Preliminary Disposition recommending a bar is issued. If a bar is

recommended, the applicant would have an opportunity to submit a response in accordance with the award processing procedures specified in Rule 21F-10(e)(2) and Rule 21F-18(b)(3).

2. Comments Received

Nearly all commenters supported the proposed rule.[219] Many shared our concern that frivolous award applications divert the Commission's limited resources and threaten the effective and efficient operation of the program.[220] Some commenters suggested imposing a permanent bar after an individual has submitted one[221] or two[222] frivolous applications. However, one commenter suggested that the bar should apply only to claimants who filed three frivolous award applications in one year. [223]

Some commenters—while supporting the proposed rule—raised concerns about the timing and frequency of the process for withdrawing a frivolous application. One commenter stated that the time period between when the Office of the Whistleblower advises a claimant that a claim is considered frivolous and when the claimant actually withdraws the claim should take no more than fifteen days.[224] Another commenter recommended that claimants not be given unlimited opportunities to withdraw an application that has initially been deemed frivolous. Instead, the

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[219] *See* SIFMA Letter; CWC Letter; Cohen Milstein Letter; Markopolos Letter; Think Computer Letter; TAF Letter; Anonymous-9 Letter; Sen. Grassley Letter; letter from Anonymous-33 (Sept. 14, 2018); CCMC Letter.

[220] *See* CCMC Letter; SIFMA Letter; Cohen Milstein Letter.

[221] See Markopolos Letter.

[222] *See* TAF Letter.

[223] *See* Think Computer Letter.

[224] *See* Think Computer Letter.

claimant should be able to withdraw only the first frivolous claim, after which any other frivolous claim would count toward the three without an opportunity to withdraw it.[225]

3. Final Rules

After considering the comments, we are adopting Rule 21F-8(e) substantially as proposed with three modifications.

First, the notice provision and opportunity to withdraw applications that are frivolous or lack a colorable connection to the matter will apply only to the initial three such applications reviewed by the Office of the Whistleblower.[226] We agree with the commenter who suggested that claimants should not be provided an unlimited opportunity to withdraw award applications that might be subject to a bar and believe that limiting this opportunity to three such applications after the claimant receives a preliminary notification from the Office of the Whistleblower about the application's frivolous nature is the appropriate approach.

Second, the final rule includes a new paragraph (e)(4) that addresses pending award applications.[227] The rule codifies the Commission's existing practice of barring applicants who submit materially false, fictitious, or fraudulent statements in their dealings with the Commission[228] and provides an important new tool for the Commission in processing frivolous

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[225] *See* Anonymous-9 Letter.

[226] We have also clarified that a claimant will have only 30 days from the date of the notification by the Office of the Whistleblower to provide that Office with notice that the application has been withdrawn. Failure to provide timely notice will result in the application being considered for purposes of a potential bar. For purposes of determining whether a bar should be imposed under this rule, claimants will not be permitted to withdraw their application (1) after the 30-day period to withdraw has run following notice from the Office of the Whistleblower with respect to the initial three applications assessed by that Office to be frivolous, or (2) after a Preliminary Determination or Preliminary Disposition has issued in connection with any other frivolous application.

[227] Additionally, proposed paragraph (e)(2) has been broken into separate paragraphs (e)(2) and (e)(3) with minor modifications in phrasing.

[228] *See* May 12, 2014 and August 5, 2015 Commission Final Orders finding two serial filers ineligible for awards pursuant to Rule 21F-8(c)(7) of the Exchange Act because of a materially false, fictitious, and fraudulent statements made in their respective dealings with the Commission.

award applications.[229] As the Proposing Release explained, these applications consume a disproportionate amount of staff resources that could otherwise be dedicated to analyzing potentially meritorious award applications.[230]

Third, we are adding clarifying language to Rule 21F-8(c)(7) to address the circumstances under which Rule 21F-8(c)(7), and by extension the bar, will apply. As adopted, the rule provides that individuals who have violated Rule 21F-8(c)(7) may be permanently barred from making future whistleblower award applications or otherwise participating in the program.[231] To clarify the standard to be applied, the additional language will provide that 21F-8(c)(7) will apply, in the context of the eligibility of a whistleblower and by extension in the context of the new authority to bar an applicant, only where there has been a finding by the Commission or a court of competent jurisdiction that the individual provided materially false, fictitious, or fraudulent representations, statements, or documents. After considering the programmatic interests underlying the rule, we are also clarifying that the disqualification from eligibility in Rule 21F-8(c)(7), and by extension the permanent bar in Rule 21F-8(e), will *not* apply where the Commission, in its discretion, determines that refraining from finding a violation of Rule 21F-8(c)(7) is consistent with the public interest, the promotion of investor protection, and the objectives of the whistleblower program.

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[229] Frivolous claims are those that lack any reasonable or plausible connection to the covered or related action.

[230] As an example of the delays and inefficiencies that a frivolous award claim may introduce, *see generally Final Order of the Commission* (May 12, 2014) (*available at* https://www.sec.gov/about/offices/owb/orders/owb-multiple-final-051214.pdf) (explaining that, in barring a frivolous award claimant, the claimant had consumed considerable staff effort with "frivolous claims and caused a delay in the Commission's ability to make a final determination to the three legitimate whistleblowers" in the particular matter and also noting the "time and effort OWB staff expended to prepare the administrative record and other materials for an additional 51 claims").

[231] If such a bar is issued, it will apply to any other award applications from the claimant without any assessment by the Commission of the merits of those other award applications.

In addition, we are adding clarifying language to address which dealings with the Commission will be considered when applying the rule. While we expect that the Commission will impose a bar based upon a violation of 21F-8(c)(7) primarily in situations where there is a finding that an individual has provided materially false information in some way connected to the whistleblower program, the Proposing Release stated that the proposed rule would also apply to "false, fictitious, or fraudulent representations, statements, or documents beyond those made in connection with an award determination." We continue to believe this is appropriate grounds on which to impose a bar and we are adding clarifying language to Rule 21F-8(c)(7) to provide that the dealings include "dealings beyond the whistleblower program and covered action."

For example, there may be situations where an individual's untruthful conduct in connection with the Commission (albeit outside a context associated with the whistleblower program or the covered action) may be sufficiently egregious or harmful, such that the Commission should have the ability to deem the individual's actions a violation of Rule 21F-8(c)(7) and deny a monetary award to such an individual under Section 21F and potentially bar the individual from future whistleblower applications or from otherwise participating in the program.[232] In light of the clarifying language noted further above, however, we expect there to be certain situations in which the Commission finds it in the public interest not to apply a

[232] The Commission does not intend that in assessing a whistleblower's eligibility, and by extension the potential application of the bar, there will be an inquiry into the whistleblower's prior dealings with the Commission to ensure that the individual did not engage in any misconduct covered by the exclusion provided for in Rule 21F-8(c)(7). Rather, the Commission anticipates that it will only utilize this rule to determine that a whistleblower is ineligible for the individual's "other dealings with the Commission" if the Commission has previously made (or otherwise learns of) a prior finding of material misconduct. Further, to the extent that the misconduct covered by this rule may occur in a judicial or administrative enforcement proceeding, the Commission in applying this rule will as a general matter deem a whistleblower ineligible only if there was an express finding during the course of that judicial or administrative enforcement proceeding, or in a related proceeding, that the individual willfully made the sort of materially false, fictitious, or fraudulent statement covered by the rule.

disqualification or bar. The clarifying provisos to Rule 21F-8(c)(7) reflect this balanced approach.

We believe that focusing our authority to impose a bar in the limited the situations described above will discourage individuals from, in an effort to mislead or hinder the Commission or other governmental entity, (i) knowingly or willfully making materially false, fictitious, or fraudulent statements or representations, or (ii) using any false writing or document knowing the writings or documents contain materially false, fictitious, or fraudulent statements or information.

Turning to the procedural aspects of the new rule, Rule 21F-8(e) provides in paragraph (e)(2) that the Preliminary Determination or Preliminary Summary Disposition generally must inform the claimant that a permanent bar is being considered, in order to afford the claimant an opportunity to submit a response in accordance with the claims review procedures in Rules 21F-10(e)(2) and 21F-18(b)(3). We have added a sentence to paragraph (e)(2) to clarify that, if the basis for a bar arises or is discovered after the issuance of the Preliminary Determination or Preliminary Summary Disposition, then the Office of the Whistleblower must notify the claimant and afford the claimant an opportunity to submit a response before the Commission determines whether to issue a bar. This procedure will give the claimant notice and an opportunity to be heard before the issuance of a permanent bar where, for example, the claimant makes a false statement or submits a fictitious document in response to the Preliminary Determination or Preliminary Summary Disposition.

Finally, the new paragraph (e)(4) explains that Rule 21F-8(e) applies to all award applications pending as of the effective date of these rules, but the Office of the Whistleblower must advise claimants, prior to a Preliminary Determination or Preliminary Summary

Disposition, of any assessment by that Office that the conditions for issuing a bar are satisfied because of a frivolous claim or a false or fictitious statement or document submitted prior to the effective date. If the claimant withdraws the relevant award application(s) within 30 days of receiving notice from the Office of the Whistleblower, then the Commission will not consider the withdrawn award application(s) in determining whether to impose a permanent bar. This approach strikes an appropriate balance between the need to process pending award applications efficiently and the need to provide fair notice to claimants of the possible consequences should they refuse to withdraw an award application made prior to the effective date of these rules.

K. Rule 21F-9 — Procedures for submitting original information

1. Proposed Rule

Current Rule 21F-9 describes the procedures for submitting original information to the Commission. The Commission proposed to amend Rule 21F-9(a) to clarify that an individual must use certain prescribed submission methods to qualify for an award and/or confidentiality protections under Rule 21F-2(b) and (c). As proposed, an individual would have to submit information to the Commission by one of three methods: (1) online, through the Commission's electronic TCR portal; (2) by mailing or faxing a Form TCR to the Office of the Whistleblower at the mailing address or fax number identified on the SEC's webpage for making such submissions; or (3) by any such method that the Commission may expressly designate on its website.

We also proposed new paragraph 9(e), which would clarify that the first time an individual provides information to the Commission that the individual will rely upon as a basis for a claim, the individual must have provided the information in accordance with Rule 21F-9(a)

and (b).[233] Currently our rules do not provide any established mechanism to permit individuals who fail to comply with the TCR requirement (including the requirement to provide a signed declaration) to qualify for an award with respect to information they provide to the Commission prior to filing a TCR (and signed declaration). However, proposed paragraph 9(e) provided the Commission with new authority to waive compliance with paragraphs (a) and (b) when the Commission determines that the administrative record "clearly and convincingly" demonstrates that the individual would otherwise qualify for an award *and* the individual shows that he or she complied with paragraphs (a) and (b) within 30 days of communicating with the staff.

2. Comments Received

We received several comments that addressed proposed amendments to paragraph (a) of Rule 21F-9. Two commenters supported the proposal.[234] One of those commenters supported proposed paragraph 21F-9(a) as long as the SEC has a process in place to address technical security issues with the TCR portal that the public may identify.[235] Another commenter, while

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[233] Many of the comments that the Commission received on this portion of the rule seem to have believed that this rule would impose a new obligation on potential whistleblowers. It did not. Rather, this portion of the proposed rule merely codified the Commission's existing interpretation of its current rules; indeed, this portion of the proposed rule was fully consistent with how the Commission has interpreted and applied its current whistleblower rules since those rules were promulgated in 2011. *See, e.g., In the Matter of the Claims for Award in Connection with a Notice of Covered Action,* Exchange Act Release No. 34-83689, 2018 WL 3546251 (July 23, 2018); *In the Matter of the Claims for Award in Connection with a Notice of Covered Action,* Exchange Act Release No. 34-82181, 2017 WL 5969236 (Nov. 30, 2017). Further, the proposal was consistent with Section 21F in which Congress directed that individuals may obtain an award *only* if they follow the form and manner prescribed by the Commission for submitting information; failure to do so under the statute means that an individual will be ineligible for an award. *See* 15 U.S.C. 78u-6(a)(6) (requiring that to qualify as a whistleblower information must be "provide[d] … in a manner established" by the Commission's rules); *id.* 78u-6(c)(2)(D) (directing that "[n]o award … shall be made … to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require"). The important change that was reflected in this proposed rule was the 30-day period in which the Commission could waive an untimely failure to comply with the rule; thus, the changes proposed by this rule were intended to benefit potential whistleblowers by potentially granting relief to them in certain circumstances where they have failed to adhere to the procedural requirements for submitting information and this proposed rule in no way reflected any new obligation on individuals receiving an award.

[234] *See* Think Computer Letter; CCMC Letter.

[235] *See* Think Computer Letter.

not clearly supporting or opposing the proposal, suggested permitting filing of the Form TCR by email.[236]

With respect to proposed paragraph (e), the Commission received numerous copies of a form letter that stated the proposed rule language "would create unrealistic reporting procedures that would disqualify a vast number of whistleblowers, simply because they reported their concerns to the wrong office at the SEC, rather than filling out a specific form and filing it according to specific reporting procedures."[237] Beyond these form letters, the Commission received a number of unique comments from the public. One commenter generally supported the proposal, asserting that it would bring greater clarity to the parameters for obtaining an award, but this commenter opposed the exception granting the Commission discretion to waive some criteria on the ground that it could open the agency to endless waiver requests from "bad actors."[238]

Several other commenters raised broader concerns with proposed paragraph (e).[239] One commenter stated that proposed paragraph 9(e) would render a whistleblower who "contacts *anyone* at the SEC without first having a filed a TCR…automatically ineligible for an award."[240] Another commenter stated that proposed Rule 21F-9(e) thwarted congressional intent by limiting the types of information for which an individual can claim whistleblower credit.[241] This

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[236] *See* letter from Liam Foster (Sept. 18, 2018).

[237] Form Letter C.

[238] *See* CCMC Letter.

[239] *See* Anonymous-9 Letter; letter from Kohn, Kohn & Colapinto (May 6, 2019) ("Kohn, Kohn & Colapinto May 6 Letter").

[240] *See* Kohn, Kohn, & Colapinto May 6 Letter.

[241] *See* TAF Letter.

commenter also asserted that the Commission may use a whistleblower's information well before the whistleblower knows the information was helpful and recommended that any restriction on the time for filing a compliant TCR be tied to the latest date on which the individual could reasonably be aware that (1) the individual's information assisted the Commission, and (2) the individual may therefore be eligible for an award.[242]

Some commenters thought the proposal did not reflect the day-to-day practice in which potential whistleblowers directly contact Commission staff with information about suspected securities law violations. One commenter asserted that SEC staff has welcomed direct contact with the public and that when a matter is time sensitive these interactions can allow the SEC employees to act quickly without waiting for the TCR system to review any pertinent information.[243] The commenter suggested that excluding such communications from consideration in an award determination would discourage individuals from providing information through the most expedient channels.[244]

One commenter expressed concern that the paragraph 9(e) exception for noncompliance with paragraphs 9(a) and 9(b) placed "strict limits" on the Commission's ability to grant waivers because "the whistleblower must meet a high standard that the information they provided resulted in the enforcement action…" and must do so by "clear and convincing evidence."[245] The same commenter suggested that the proposed exception actually limited the Commission's

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[242] *Id.*

[243] *See* Anonymous-9 Letter.

[244] *Id.*

[245] *See* Kohn, Kohn, & Colapinto May 6 Letter.

ability to use its general exemptive authority.[246] The commenter also suggested that the Commission could use its discretionary authority under Rule 9(e) to reduce a whistleblower's award to 10 percent and the whistleblower "would have no recourse or appeal."[247] And that commenter suggested that because the Commission's webpage provides "numerous methods" to contact the agency about potential securities-law violations or related issues, this may result in individuals initially reporting information to the Commission in a manner that results in an eventual disqualification from receiving an award.[248] Finally, several commenters suggested that the Commission should establish a "good cause" exception that would excuse an individual's non-compliance with the TCR and declaration requirements of Rule 21F-9 in any situation where the individual would otherwise qualify as a meritorious whistleblower.[249]

3. Final Rule

After considering the comments, we are adopting the final rule as proposed with several important substantive modifications to paragraph (e). *First*, we are clarifying that an individual need not in the first instance provide original information to the Commission in accordance with the procedures in Rule 21F-9(a) and (b), but may instead provide original information in a different manner, provided that the individual complies with Rule 21F-9(a) and (b) within 30 days of first providing that original information. *Second*, we are permitting an individual who fails to satisfy these procedural requirements to qualify for a waiver if the individual can demonstrate that he or she complied with Rule 21F-9(a) and (b) within 30 days of first learning

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[246] *Id.*

[247] *Id.*

[248] *See* letter from Kohn, Kohn, & Colapinto (Oct. 16, 2019) ("Kohn, Kohn & Colapinto Oct. 16 Letter").

[249] *See* letter from Kohn, Kohn, & Colapinto (Oct. 21, 2019) ("Kohn, Kohn & Colapinto Oct. 21 Letter"); letter from Phillips & Cohen LLP (Oct. 25, 2019) ("Phillips & Cohen Letter).

about the requirements. *Third*, we are making this waiver automatic when the criteria specified in the rule are satisfied. *Fourth*, we have revised the language of the proposed rule to require that the Commission must be able to "readily" determine that the administrative record "unambiguously"—rather than "clearly and convincingly"—demonstrates that the claimant would otherwise qualify for an award in order for us to grant a waiver of noncompliance.[250]

Since the whistleblower rules were implemented in 2011, the Commission has required any individual seeking an award and/or the confidentiality protections of the program to submit a tip through the Commission's online portal or by submitting a Form-TCR by mail or fax.[251] The requirement to file a TCR has been a necessary initial step for an individual to obtain treatment as a "whistleblower" under our rules[252] and, in our experience, has proved beneficial to the effective administration of our whistleblower program. Accordingly, the Commission has treated the failure to file a properly executed TCR as grounds for denial of a claim for award.[253] Thus, paragraph 9(e) as proposed would not have created a new obligation for potential whistleblowers; rather, it was intended to clarify the Commission's existing approach when making award determinations—when an individual provides information to the Commission that he or she will rely upon as a basis for claiming an award, the information should be

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[250] We are also making the discretionary safe harbor provided by Rule 21F-9(e) effective as to all award claims still pending on the effective date of the rules. We believe that doing so is appropriate as we think that all claimants—not just future whistleblowers—should be able to benefit from this new mechanism.

[251] Rule 21F-9(a), (b).

[252] Under Rule 21F-2, as amended, a TCR filing remains necessary to obtain whistleblower confidentiality protections and award eligibility.

[253] *See, e.g., In the Matter of the Claims for Award in Connection with a Notice of Covered Action,* Exchange Act Release No. 34-82181, 2017 WL 5969236 (Nov. 30, 2017) (denying two claimants, in part, on the ground that they had failed to submit their original information to the Commission in the form and manner required to qualify as a whistleblower).

provided initially in accordance with Rule 21F-9(a) and (b). We view this clarification of the importance of the Commission's TCR-filing requirement as merely a codification of current practice—*i.e.*, whistleblowers must comply with the procedures for submitting their information in order to later be eligible for a potential award. Moreover, the Commission's experience with the program to date demonstrates in our view that the procedures for submitting information to the Commission to qualify for an award—including those specified in Rule 21F-9(e)—do not create unrealistic or onerous reporting procedures for potential whistleblowers and that any burdens on the public are outweighed by the administrative efficiencies to the program and the agency.

That said, we have not applied these procedural requirements rigidly and have through our practice permitted whistleblowers to "perfect" their submissions of original information by complying with the requirements of Rule 21F-9(a) and (b) for a brief period of time from the date they first provide the information to the Commission. This practice of permitting individuals to perfect their submission has grown out of our recognition of the practical realities of how whistleblowers or their counsel may first relay information to the Commission. Based on our historical practice, and our consideration of the comments that we have received on proposed paragraph (e), we have modified the rule to expressly provide that an individual's first contact with the Commission need not be in the form of a TCR with an accompanying declaration. Rather, to qualify for a potential award under the rule we are adopting, an individual need only submit the TCR and declaration within 30 days of first providing that information to the Commission. As modified from the proposed rule, paragraph (e) now fully captures the current practice that we have found both beneficial to the agency's administration

of the program and practicable for individuals to follow without imposing unnecessary burdens on them.

We view the new express waiver authority as an important mechanism to protect the ability of these individuals to obtain an award notwithstanding their untimely compliance with Rule 21F-9(a) and (b). Specifically, the new express waiver authority will permit an otherwise clearly meritorious whistleblower who failed to comply with Rule 21F-9(a) and (b) within 30 days of first providing original information to the Commission to nonetheless obtain an award provided that the individual complied with those requirements within 30 days of first learning of them and the Commission can readily develop an administrative record that unambiguously demonstrates that the individual would otherwise merit an award, without a significant expenditure of staff time and resources to do so. Significantly, our rules currently do not provide any established mechanism to permit individuals who fail to comply with the TCR requirement (including the requirement to provide a signed declaration) to qualify for an award with respect to information they provide to the Commission prior to filing a TCR (and signed declaration). New Rule 21F-9(e) now provides that mechanism. In determining whether the new waiver authority applies, the Commission will consider that any whistleblower represented by counsel has constructive notice[254] of the requirements of Rule 21F-9(a) and (b) as of the date counsel was retained.

Although we recognize that some commenters have challenged the long-standing requirement that whistleblowers should file their original information on a TCR in order to obtain an award based on that information, the policy grounds for this requirement are sound.

[254] Constructive notice is generally defined as "[n]otice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of." BLACK'S LAW DICTIONARY (10th ed. 2014).

The Commission has strived to ensure that (1) all TCRs are collected in one central place; (2) the TCR data is combined with other public and confidential information on the persons and entities identified in the TCRs, and (3) investigative resources are dedicated to the TCRs presenting the greatest threat of investor harm. We understand that some whistleblowers may choose to contact staff directly to share information about a suspected violation of the securities laws. However, we do not view such outreach as satisfying or obviating the requirement to file a TCR. Indeed, there are important reasons for requiring the timely submission of a TCR (and an accompanying declaration) which benefit *both* the whistleblower and the Commission's programmatic interests.

First, these requirements ensure that the agency has an accurate record of the information a potential whistleblower deems important to the Commission's enforcement efforts instead of relying on Commission staff to file a TCR summarizing the individual's information. Without this safeguard, disputes may arise as to what information an individual actually provided in the initial contact with Commission staff and when the information was submitted to the TCR system. *Second*, the requirement to file a TCR at the outset of the information-sharing process provides a clear indication to staff that the submitter is seeking the heightened confidentiality protections that are afforded by Section 21F(h)(2) of the Exchange Act;[255] it is important that submitters make this clear up front in this manner because it alerts the staff about the extent to which it may (or may not) reveal the submitter's information to third parties, including other government agencies, and it also determines whether other government agencies are themselves subject to the heightened confidentiality requirements of Section 21F(h)(2).[256] *Third*, the TCR

[255] 15 U.S.C. 78u-6(h)(2).

[256] For example, if a submitter fails to provide information on a TCR and the staff shares it with the another government agency before the TCR is submitted, that agency will not be subject to the confidentiality requirements of Section 21F(h)(2) and this may lead to the disclosure of the submitter's identity. Filing the TCR as part of the

requirement memorializes the timing of a whistleblower's provision of information, which is especially important if a subsequent whistleblower provides similar information or if the whistleblower seeks the program's confidentiality and/or retaliation protections. *Fourth*, the TCR requirement allows the Commission to manage and track "the thousands of tips that it receives annually and to connect tips to each other so as to make better use of the information provided…"[257] The accompanying declaration requirement helps deter individuals from submitting false tips that result in the inefficient use of the Commission's resources.[258] We find it significant that Section 21F provides that an individual "shall" be denied an award if he or she fails to submit information to the Commission in the form and manner required—a strong signal of congressional intent that individuals seeking an award must follow the procedures that the Commission establishes for submitting information.[259]

Notwithstanding the foregoing, the changes that we have expressly incorporated into paragraph (e) will afford an opportunity for individuals who first come to the Commission with original information without complying with Rule 21F-9(a) and (b) to perfect their submissions and thus potentially qualify for an award. Specifically, in those instances when an individual first provides information to the Commission without complying with Rule 21F-9(a) and 9(b), the following mechanisms will now be available: (1) the individual can perfect his or her submission by complying with those rules within 30 days of first providing original information

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initial information-sharing means that the legal protections of Section 21F(h)(2) will apply if the Commission shares the submitter's information with the other agency.

[257] *See* Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70,502 (November 17, 2010).

[258] *Id.*

[259] See 15 U.S.C. 78u-6(c)(2)(D).

to the Commission;[260] (2) after 30 days of first providing original information to the Commission, the individual may still qualify for a waiver from having failed to timely comply with Rule 21F-9(a) and (b) if the individual can demonstrate that he or she complied with these procedural requirements within 30 days of first learning about them[261] and the Commission can readily develop an administrative record that unambiguously demonstrates that the individual would otherwise merit an award, without a significant expenditure of staff time and resources to do so. As compared with the proposed rule, we have determined to make the waiver of non-compliance with Rule 21F-9(a) and (b) automatic, rather than discretionary, when the Commission finds that the whistleblower has established that the conditions for the waiver are satisfied. Further, we have determined to provide for such a waiver opportunity from the time when the individual first learns of the Rule 21F-9(a) and (b) requirements rather than establishing a fixed deadline calculated from when the original information is first submitted.

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[260] As noted in the Proposing Release, even if the individual does not satisfy the procedural requirements within the 30-day safe harbor, he or she may remain award-eligible for any new information that is submitted later in accordance with the Rule 21F-9 procedures. *See* Proposing Release note 195. For example, in our experience, whistleblowers frequently share information and insights with the Enforcement staff in a series of communications over time. Such contacts may range from formal interviews, meetings, or even sworn testimony to more informal contacts such as email exchanges. To date, the Commission has employed a flexible approach in whistleblower awards to treat individuals as award-eligible for any new information submitted after the individual has complied with the TCR-filing requirement, and we expect to continue that practice under new Rule 21F-9(e). *See In the Matter of the Claim for Award*, Exchange Act Release No. 34-78025, 2016 WL 3194294 (June 9, 2016).

[261] Such a demonstration will require a sworn declaration or other supporting materials satisfactory to the Commission. We note that the Office of the Whistleblower makes clear on its webpage that, to qualify for an award, an individual must submit information regarding possible law violations to the Commission in one of two ways: (1) submitting a tip electronically through the SEC's Tips, Complaints and Referrals Portal, or (2) mailing or faxing a Form TCR to the SEC. *See* https://www.sec.gov/whistleblower/submit-a-tip . In determining whether the new waiver authority applies, the Commission will consider that any whistleblower represented by counsel has constructive notice of the requirements of Rule 21F-9(a) and (b) as of the date counsel was retained. Further, if staff advises an individual to review the whistleblower website or to otherwise obtain information about the whistleblower program, the Commission may under the particular facts and circumstances consider the individual to have received constructive notice as of the date the staff communicated this information to the individual.

Based on the suggestion of a commenter, we have eliminated the phrase "clearly and convincingly" and replaced it with the terms "readily" and "unambiguously" in order to avoid confusion and any suggestion that we intended to incorporate into our practice under paragraph 9(e) other areas of law that may require proof by "clear and convincing" evidence. That said, it would be harmful to the effective and efficient administration of our whistleblower program to broadly waive non-compliance with the TCR-filing requirement for non-meritorious claimants or claimants whose entitlement to an award is not clearly established by the administrative record, and we also believe that doing so would be inconsistent with the congressional directive that individuals "shall" comply with the Commission's procedures for submitting information.[262] In adopting this provision for situations where the record "unambiguously" demonstrates that an individual would otherwise qualify for an award (and the record can "readily" be developed to confirm this without a significant expenditure of staff time and resources to do so), we intend the exception to be available only where a clear case exists that the claimant otherwise merits an award, and the claimant submitted his or her TCR and declaration as required by Rule 21F-9(a) and 9(b) within 30 days of first learning about those requirements.[263] That said, the Commission continues to retain its separate discretionary exemptive authorities under Rule 21F-8(a) and Exchange Act Section 36(a) for circumstances that may warrant exemptive relief.[264]

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[262] The standard being adopted is in some respects akin to the plain-error standard of review under which some appellate courts require that, if a litigant argues that an error occurred in the trial court but the litigant failed to raise the issue with the trial court in a timely manner, the error must be "obvious" and "clear-cut" for the appellate court to grant relief. *See, e.g.*, *United States v. Wahid*, 614 F.3d 1009, 1015 (9th Cir. 2010). For a claimant to qualify for discretionary relief under Rule 21F-9(e), the claimant's status as a meritorious whistleblower must be clear-cut, obvious, and readily ascertainable.

[263] The heightened confidentiality protections afforded by Section 21F(h)(2) of the Exchange Act will not attach until an individual has submitted a TCR in compliance with Rule 21F-9.

[264] The Commission's discretionary exemptive authorities will continue to include circumstances where a whistleblower is represented by counsel, but the facts and circumstances nevertheless warrant relief from the requirements under Rule 21F-9(a) and (b). And in pending cases, the staff will continue to assess the facts and

Finally, we have determined not to adopt the recommendation discussed above from several commenters that the Commission afford an unlimited opportunity for any individual that might otherwise qualify as a meritorious whistleblower to comply with the procedural requirements of Rule 21F-9(a) and (b). That standard would generate additional inefficiencies in the program by requiring the Commission in all cases to develop a comprehensive record detailing whether a claimant was in fact meritorious before deciding whether the claimant should be excused from the filing obligation. This would be particularly burdensome because there may be no clear documentation as to when and with whom on the staff a claimant spoke—or what was conveyed—before filing a TCR and officially becoming a whistleblower potentially eligible for an award. For this reason, we believe that it is appropriate to limit the exception for untimely compliance with Rule 21F-9(a) and (b) to those claimants whom the Commission can readily determine would otherwise clearly qualify as meritorious whistleblowers without a significant expenditure of staff time and resources to do so. In our view, this approach strikes an appropriate balance—ensuring that individuals who would clearly obtain an award but for their untimely compliance will in fact receive an award (provided they comply with the 30-day period in paragraph (e)), while not imposing new and undue burdens on the program to develop comprehensive records in cases involving claimants who would not be clearly entitled to an award (thereby preventing the diversion of staff time and resources from cases involving meritorious whistleblowers who did in fact adhere to the filing requirements of Rule 21F-9).

L. Amendments to Exchange Act Rule 21F-12—Materials that may form the basis of the Commission's award determination

1. Proposed Rule

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circumstances of each case to determine whether to recommend to the Commission that application of the exemptive authority is appropriate.

As explained in the Proposing Release, the Commission proposed two revisions to Exchange Act Rule 21F-12, which specifies the materials that may form the basis of the Commission's award determination. *First*, proposed Rule 21F-12(a)(3) would clarify that the Commission and the CRS (and the Office of the Whistleblower when processing a claim pursuant to proposed Rule 21F-18) may rely upon materials *timely* submitted by the whistleblower in response to the Notice of Covered Action, a request from the Office of the Whistleblower or the Commission, or the Preliminary Determination.[265] Materials submitted after the respective deadlines for these submissions would not be considered absent extraordinary circumstances excusing the delay.[266] *Second*, proposed Rule 21F-12(a)(6) would clarify that it applies only to materials submitted by third parties, not to materials submitted by claimants themselves.

2. Comments Received

We received three comments supporting the proposed revisions to Rule 21F-12 and none in opposition.[267] One of these supporting commenters also expressed concern, however, that the timeliness requirement under proposed Rule 21F-12(a)(2) would prevent claimants from alerting the Commission to developments arising after a deadline, such as changes in the law, additional hardships suffered, and the collection of additional funds on behalf of affected investors.[268] To

[265] The deadline for filing a claim for a whistleblower award is ninety (90) days after the relevant Notice of Covered Action under Rule 21F-10(a) & (b) and Rule 21F-11(a) & (b). Consistent with Rule 21F-8(b), the Commission may specify a deadline when it requests additional information from the whistleblower in support of an award application. 17 CFR 240.21F-8(b). The time frame for responding to the Preliminary Determination is expressly established by Rule 21F-10(e) and Rule 21F-11(e). 17 CFR 240.21F-10(e), 21F-11(e).

[266] 17 CFR 240.21F-8(a).

[267] CCMC Letter; TAF Letter; Think Computer Letter.

[268] *See* TAF Letter.

accommodate this concern, this commenter suggested that Rule 21F-12 be revised to allow the supplemental filing, after a deadline, of "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."[269]

3. Final Rule

After considering the comments, we are adopting the revisions to Rule 21F-12 as proposed. We have decided not to make further revision to accommodate submissions concerning subsequent developments[270] because our existing rules already meet that concern in two ways. *First*, existing Rule 21F-8(b) already permits the Commission to request additional information from a whistleblower in support of an award application, regardless of whether the application deadline (or any other relevant deadline) has already passed. *Second*, existing Rule 21F-8(a) already permits the Commission, in its sole discretion, to waive a deadline in the whistleblower rules based upon a showing of extraordinary circumstances.[271] Thus, the Commission already possesses ample discretion to allow a post-deadline submission concerning subsequent developments such as changes in the law precisely because, by definition, that information was not available to the claimant before the deadline.

M. Amendment to Exchange Act Rule 21F-13—The administrative record on appeal

1. Proposed Rule

As explained in the Proposing Release, the Commission proposed revisions to Exchange Act Rule 21F-13 (which governs the administrative record on appeal) to eliminate the

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[269] *Id.*

[270] *Id.*

[271] *Id.* 21F-8(a).

designation of items for inclusion in the record on appeal and instead to define the record on appeal in a manner that conforms more closely to Rule 16 of the Federal Rules of Appellate Procedure. Proposed Rule 21F-13(b) would exclude from the record on appeal any pre-decisional or internal deliberative process materials that are prepared exclusively to assist either the Commission or the CRS, and also would exclude any materials that exclusively concern any claimant other than the claimant who brought the appeal, in matters where multiple claimants applied for an award under a single Notice of Covered Action.

2. Comments Received

We received two comments supporting the proposed revisions to Rule 21F-13 and none in opposition.[272] One of these commenters also suggested that internal deliberative process materials should be made available so that whistleblowers can more easily identify errors in the analysis of the CRS and the Commission.[273]

3. Final Rule

After considering the comments, we are adopting the revisions to Rule 21F-13 as proposed. We have decided not to make internal deliberative process materials available to whistleblowers as part of the record on appeal. As noted when we adopted our whistleblower rules in 2011, "[t]hese materials are by their nature pre-decisional work product that may often contain the staff's 'frank discussion of legal and policy making materials,' and the disclosure of these materials would have a chilling effect on our decision-making process."[274]

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[272] CCMC Letter; Think Computer Letter.

[273] Think Computer Letter. This commenter asserted, "The Commission has no stated basis for excluding these materials from the record, and the justification of avoiding potential future embarrassment is insufficient as a legal rationale." *Id.*

[274] Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,347 (June 13, 2011) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)).

N. Adoption of Exchange Act Rule 21F-18 — Summary disposition process

1. Proposed Rule

As explained in the Proposing Release, proposed Rule 21F-18 would authorize the Office of the Whistleblower to follow a summary disposition process for certain categories of denials of award applications that are relatively straightforward, as a more streamlined alternative to the existing processes specified in Rules 21F-10 and 21F-11. Thus, proposed Rule 21F-18 would apply to five categories of denials: (1) untimely award applications; (2) failure to submit a tip in compliance with Rule 21F-9; (3) where the staff handling the covered action or the underlying investigation (or examination) never received or used the claimant's information and otherwise had no contact with the claimant; (4) failure to comply with Rule 21F-8(b), which encompasses Commission requests for supplemental information and for signed confidentiality agreements; and (5) failure to specify the tip on which the award claim is based. For these categories of denials, the Office of the Whistleblower rather than the CRS would assume responsibility for reviewing the record, issuing a Preliminary Determination (here, a "Preliminary Summary Disposition"), considering any written response filed by the claimant, and issuing any Proposed Final Determination (here, a "Proposed Final Summary Disposition"). Additionally, a claimant seeking to challenge a Preliminary Summary Disposition would have 30 days rather than 60 days in which to file a written response and would receive a staff declaration containing the pertinent facts rather than the full administrative record supporting the Preliminary Summary Disposition.

2. Comments Received

Five commenters supported proposed Rule 21F-18,[275] of which three believed that the new summary disposition process would promote staff efficiency in processing likely meritorious whistleblower award claims.[276] Eight commenters opposed the proposed rule,[277] of which six argued that the Commission should provide a quantitative analysis of the anticipated effect of the proposal on the existing queue of whistleblower award claims.[278] Those who opposed the proposed rule also contended that its effect on the existing queue of claims is unclear because likely frivolous claims are already placed at the back of the queue[279] and that the proposal would not address the time required to gather the information necessary to decide a claim.[280]

Two commenters addressed whether proposed Rule 21F-18 would afford claimants due process.[281] In this context, one commenter asserted that the new rule would reduce "potential whistleblowers' certainty that their information would ever be taken seriously" and suggested as an alternative that the Office of the Whistleblower

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[275] Anonymous-9 Letter; Anonymous-33 Letter; CCMC Letter; CWC Letter; TAF Letter.

[276] CCMC Letter; CWC Letter; TAF Letter.

[277] Letters from Anonymous-26 (Sept. 15, 2018) ("Anonymous-26 Letter"); Anonymous-28 (Sept. 15, 2018) ("Anonymous-28 Letter"); Anonymous-29 (Sept. 15, 2018) ("Anonymous-29 Letter"); Anonymous-35 ("Anonymous-35 Letter") (Sept. 14, 2018); Anonymous-65 ("Anonymous-65 Letter") (Aug. 21, 2018); Anonymous-73 ("Anonymous-73 Letter") (Aug. 17, 2018); Devorah Letter; Think Computer Letter.

[278] Anonymous-26 Letter; Anonymous-28 Letter; Anonymous-29 Letter; Anonymous-35 Letter; Anonymous-65 Letter; Anonymous-73 Letter.

[279] Anonymous-35 Letter.

[280] Anonymous-73 Letter.

[281] *Compare* TAF Letter (stating that proposed Rule 21F-18 would "ensure the provision of due process" to claimants) *with* Think Computer Letter (stating that proposed Rule 21F-18 is likely to be challenged on due process grounds).

engage in "more transparent communication with whistleblowers (and other types of stakeholders)."[282]

Two commenters expressed concern that 30 days would be too narrow a window for claimants to prepare and file a written response to a Preliminary Summary Disposition.[283] One of these asserted that a 30-day window would be too narrow absent a permanent tracking mechanism to give claimants immediate notification of a Preliminary Summary Disposition.[284] The other suggested that claimants should be granted an automatic 30-day extension (for 60 days total) upon written request.[285]

3. Final Rule

After considering the comments, we are adopting Rule 21F-18 as proposed.[286] In our experience to date, the five categories of relatively straightforward denials encompassed by this rule have consumed a disproportionate share of staff time and resources, with little or no corresponding benefit from utilizing the more robust procedures under Rules 21F-10 and 21F-11. We anticipate that the new summary disposition process will conserve time in preparing the administrative record,[287] since all

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[282] *See* Think Computer Letter.

[283] *See* Anonymous-33 Letter; Devorah Letter.

[284] *See* Devorah Letter.

[285] *See* Anonymous-33 Letter.

[286] The final rule text has been modified to conform to the text of the discussion in the Proposing Release. The final rule text also clarifies in section (a)(1)(2) that the summary disposition process will apply to the denial of claims for failure to comply with Rule 21F-9 only if the claimant is not eligible for a waiver under either Rule 21F-9(e) or the Commission's other waiver authorities because the Commission cannot readily develop an administrative record that unambiguously demonstrates that the claimant would otherwise qualify for an award. This language thus ensures that the summary disposition process in Rule 21F-18 will be applied in a manner consistent with the claimant's eligibility for a waiver or lack thereof under either Rule 21F-9(e) or the Commission's other waiver authorities.

[287] *Cf.* letter from Anonymous-73 (Aug. 17, 2018).

pertinent facts will be gathered in a single staff declaration at the Preliminary Summary Disposition stage rather than in multiple declarations as has been common in the past. We anticipate that the new process will permit the more efficient disposition of all claims at all points in the queue.[288]

In our view, the summary disposition process under new Rule 21F-18 will afford claimants due process in the disposition of their claims. Courts have emphasized that "[i]n informal adjudications like these, agencies must satisfy only minimal procedural requirements."[289] Thus, the Due Process Clause[290] imposes no blanket obligation to allow the submission of rebuttal evidence by a claimant[291] or to disclose the agency's own evidence in order to facilitate such a rebuttal.[292] New Rule 21F-18 affords claimants appropriate procedural protection; they have an opportunity to submit a rebuttal statement after having received the Preliminary Summary Disposition and the supporting staff declaration. Moreover, both the Preliminary Summary Disposition and the Commission's final order will provide a brief statement of the grounds for denial of the award application,[293] and a claimant may seek judicial review of the latter as specified in Exchange Act Section 21F(f).[294] Accordingly, the summary disposition process will be

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[288] *Cf.* letter from Anonymous-35 (Sept. 14, 2018).

[289] *Sw. Airlines Co. v. Transp. Sec. Admin.*, 650 F.3d 752, 757 (D.C. Cir. 2011) (internal quotation marks and alterations omitted).

[290] U.S. Const. amend. V.

[291] *See Butte Cty., Calif. v. Chaudhuri*, 887 F.3d 501, 506 (D.C. Cir. 2018).

[292] *See Sw. Airlines*, 650 F.3d at 757.

[293] *See Butte Cty., Calif. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010).

[294] *See* 15 U.S.C. 78u-6(f).

fair and transparent, with an abbreviated record and a streamlined process commensurate with the straightforward nature of the issues relevant to these subsets of award claims.

For similar reasons, we are adopting the 30-day window to respond to a Preliminary Summary Disposition, as proposed. [295] Courts have sustained even shorter response periods in the absence of any blanket obligation to accept rebuttal evidence,[296] and we likewise find it instructive that Congress established a 30-day window for claimants to petition for judicial review of our final award determinations.[297] We also anticipate that the Office of the Whistleblower will continue its current practice of providing claimants with prompt notice of such preliminary decisions using the most efficient means of delivery in light of the contact information provided by the claimant. Moreover, any claimant who demonstrates that extraordinary circumstances will prevent a timely written response may argue that the Commission should exercise its discretion under Rule 21F-8(a) to extend this 30-day deadline.

O. Technical Amendment to Rule 21F-4(c)(2)

In the Proposing Release, the Commission proposed to make a technical amendment to Rule 21F-4(c)(2) to correct an existing error in the text of that rule. We did not receive any comments on this proposed modification. Thus, for the reasons explained in the Proposing Release, we are adopting the proposed technical amendment to this rule.

P. Interpretive guidance regarding the meaning and application of "independent analysis"

1. Proposed Interpretive Guidance

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[295] Whistleblower Program Rules, 83 Fed. Reg. 34,726 (July 20, 2018) ("Given the relatively straightforward nature of the matters that would generally be eligible for summary disposition, this 30-day window will afford any claimant a sufficient opportunity to provide a meaningful reply" to a Preliminary Summary Disposition.).

[296] *See Butte Cty.*, 887 F.3d at 506 (sustaining 20-day response period).

[297] 15 U.S.C. 78u-6(f).

Section 21F of the Exchange Act limits whistleblower awards to individuals who, among other requirements, submit "original information" about possible securities violations. The statute defines "original information" as information that:

> (A) is derived from the independent knowledge or analysis of a whistleblower;
> (B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and
> (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.[298]

Further, before we can grant an award, we must determine that the whistleblower's "original information … led to the successful enforcement" of a Commission covered action or a related action.[299]

In promulgating our whistleblower rules, we further defined the terms "independent knowledge" and "independent analysis," as used in Section 21F(a)(3)(A) of the definition of "original information":

> (2) Independent knowledge means factual information in your possession that is not derived from publicly available sources. You may gain independent knowledge from your experiences, communications, and observations in your business or social interactions.
> (3) Independent analysis means your own analysis, whether done alone or in combination with others. *Analysis means your examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public*.

The Commission proposed interpretive guidance to address the potential availability of a whistleblower award in cases where information provided by a whistleblower is not based on the whistleblower's "independent knowledge" but, instead, is premised on information derived from

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[298] 15 U.S.C. 78u-6(a)(3). Our rules add the requirement that "original information" must have been submitted for the first time after the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Rule 21F-4(b)(1)(iv).

[299] 15 U.S.C. 78u-6(b)(1).

the whistleblower's "independent analysis" of publicly available information. In formulating our views, we considered Congress's and the Commission's determinations to substantially restrict any role for publicly available information in potential whistleblower awards. Further, with reference to the requirement of Rule 21F-4(b)(3) that "independent analysis" must "reveal[] information that is not generally known or available to the public," we considered the framework that the D.C. Circuit and other federal courts of appeal have developed for determining when fraudulent transactions are deemed to have been publicly disclosed for purposes of the so-called "public disclosure bar" under the False Claims Act.[300] Based on our review, we concluded:

> In order 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. In assessing whether this requirement is met, the Commission would determine based on its own review of the relevant facts during the award adjudication process whether the violations could have been inferred from the facts available in public sources.

In further clarifying our approach, we stated:

> A whistleblower's examination and evaluation of publicly available information does not constitute "analysis" if the facts disclosed in the public materials on which the whistleblower relies and in other publicly available information are sufficient to raise an inference of the possible violations alleged in the whistleblower's tip. This is because, where the violations that the whistleblower alleges can be inferred by the Commission from the face of public materials, those violations are not "reveal[ed]" to the Commission by the whistleblower's tip or any purported analysis that the whistleblower has submitted. Rather, in order for a whistleblower to be credited with providing "independent analysis," the whistleblower's examination and evaluation should contribute "significant independent information" that "bridges the gap" between the publicly available information and the possible securities violations.

We explained that "significant independent information" that "bridges the gap" in revealing violations may be found in the application of technical expertise, and we gave as a

[300] 31 U.S.C. 3730(e)(4)(A).

specific example of qualifying "analysis" the type of highly probative submissions to the Commission made by Harry Markopolos in his efforts to expose the Bernard Madoff fraud. However, we also stated that technical expertise is not required. For example, non-experts may configure publicly available information in a non-obvious way that reveals patterns indicating possible violations that would not be otherwise inferable from the public information or may engage in highly probative calculations or some other meaningful exercise with the information that may demonstrate the possibility of securities violations.

However, we contrasted analysis of this type with cases where the whistleblower directs the staff to publicly available information and states that the information itself suggests a fraud or other violations. The latter cases would not qualify as "independent analysis." We offered as examples tips where the whistleblower points to common hallmarks of fraud on the face of the public materials (*e.g.*, impossibly high, guaranteed investment returns or extravagant claims in press releases) or to public discourse (*e.g.*, discussions on a public message board) in which investors or others are alleging a fraudulent scheme. We also stated that the result would be the same whether the individual relied on only one source (*e.g.*, a single website) to collect the publicly available information that demonstrates the hallmarks of the fraud or the individual relied on a multitude of different publicly available sources. We stated that, in each case, the touchstone is whether the whistleblower's submission is revelatory in utilizing publicly available information in a way that goes beyond the information itself and affords the Commission with important insights or information about possible violations.

Finally, we explained that, even when this standard is met, a whistleblower's independent analysis must still have "led to" a successful covered enforcement action. This standard requires an assessment of whether the whistleblower's analysis—as distinct from the publicly available

information on which the analysis was based—either (1) was a principal motivating factor in the staff's decision to open its investigation, or (2) made a substantial and important contribution to the success of an existing investigation.[301]

2. Comments Received

We received 28 comments on our proposed interpretive guidance regarding "independent analysis." Twenty-four of these were critical of the guidance.[302] The predominant objection of these commenters was that the proposed interpretive guidance would permit the Commission to deny awards based on a "retroactive" or "hindsight" determination of whether violations were "reasonably apparent" and "could have" been determined from information that was publicly available.[303] Some commenters expressed a further concern that this determination would be made by an individual Enforcement staff member responsible for the investigation, who might be predisposed to say that she could have inferred the violation herself from the publicly available

[301] Although the interpretive guidance set forth in this release is comprehensive and need not be read in conjunction with the Proposing Release, we incorporate the Proposing Release herein by reference to the extent that it reflects additional supporting analysis and citations.

[302] *See* Think Computer Letter; letter from Anonymous-92 (July 18, 2018) ("Anonymous-92 Letter"); Kohn, Kohn & Colapinto July 24 Letter; letter from Anonymous-89 (July 25, 2018) ("Anonymous-89 Letter"); letters from Chris DiIorio dated July 2, 2018 and Aug. 2, 2018 (collectively "DiIorio Letters"); letters from Dom Laviola dated June 28, 2018 and Aug. 9, 2018 (collectively "Laviola Letters"); Anonymous-73 Letter; letter from Anonymous-72 (Aug. 17, 2018) ("Anonymous-72 Letter"); letter from Anonymous-71 (Aug. 20, 2018) ("Anonymous-71 Letter"); letter from Terry Smith (Aug. 22, 2018) ("Smith Letter"); Markopolos Letter; letter from National Whistleblower Center (Sept. 17, 2018) ("NWC Sept. 17 Letter"); Jansson letter; letter from Arthur "Two Sheds" Jackson (Sept. 17, 2018) ("Jackson Letter"); Cohen Milstein Letter; letter from Annie Bell (Sept. 18, 2018) ("Bell Letter"); Better Markets Letter; Anonymous-9 Letter; AFREF Letter; TAF Letter; letter from Anonymous-121 (Oct. 17, 2018); ("Anonymous-121 Letter"); letter from Anonymous-122 (Oct. 29, 2018) ("Anonymous-122 Letter"); letter from Phillips & Cohen LLP (Oct. 25, 2019) ("Phillips & Cohen Letter); letter from Anonymous-136 (Nov. 18, 2019) ("Anonymous-136 Letter").

[303] *See* Think Computer Letter; Anonymous-89 Letter; DiIorio Letters; Laviola Letters; Anonymous-73 Letter; Anonymous-71 Letter; Smith Letter; Markopolos Letter; NWC Sept. 17 Letter; Jansson Letter; Jackson Letter; Cohen Milstein Letter; Better Markets Letter; Anonymous-9 Letter; AFREF Letter; TAF Letter; Anonymous-121 Letter.

information supplied by the whistleblower.[304] A number of commenters pointed critically to past violations such as the Bernard Madoff fraud that the Commission failed to identify on its own.[305] Those commenters urged that an award should be available under the "independent analysis" prong of "original information" any time a member of the public directs the staff to publicly available information of which the staff was not aware and the staff acts upon the tip by pursuing an investigation (and ultimately an enforcement action); an award should be denied only if the staff, in fact, found the information and acted on its own.[306] One commenter argued that the whistleblower's conclusion that violations exist should itself be viewed as non-public information that the Commission did not previously possess.[307]

Commenters also urged that the proposed interpretation of "independent analysis" would discourage potential whistleblowers because it would introduce ambiguity and uncertainty into the process (*e.g.,* as to the meaning of "reasonably apparent");[308] that whistleblowers should not be denied awards since they take significant personal and professional risks in coming

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[304] *See* TAF Letter; Phillips & Cohen Letter.

[305] *See* Think Computer Letter; Anonymous-89 Letter; Dilorio Letters; Anonymous-73 Letter; Anonymous -71 Letter; NWC Sept. 17 Letter; Jackson Letter; Better Markets Letter.

[306] *See* Anonymous-92 Letter; Anonymous-73 Letter; Anonymous-71 Letter; Markopolos Letter; NWC Sept. 17 Letter; Better Markets Letter; Anonymous-9 Letter; AFREF Letter; TAF Letter; Anonymous-121 Letter; Anonymous-122 Letter.

[307] See Cohen Milstein Letter.

[308] *See* Think Computer Letter; Anonymous-73 Letter; Jansson Letter; Better Markets Letter; Anonymous-9 Letter; AFREF Letter; TAF Letter.

forward;[309] and that the proposed interpretive guidance runs counter to Congress's express intent to make whistleblower awards available based on "analysis" of publicly available information.[310]

Some commenters acknowledged that merely pointing the Commission to a newspaper article or other publicly available information should not qualify for an award; but, these and other commenters emphasized the importance of contributions made by financial services professionals, market analysts, and others who apply specialized training or expertise to the review of publicly available information, as well as the contributions of individuals who devote a "substantial application of time and resources" in "exhaustive research" sifting through and assembling disparate pieces of public information to identify possible violations.[311] Two of these commenters also pointed out that information may be technically available to the public but obscure, costly, difficult to obtain, or largely inaccessible to most people (*e.g.*, documents produced in response to a FOIA request).[312]

Three commenters argued that False Claims Act precedent involving the public disclosure bar should not be applied to interpreting the Commission's rule on independent analysis.[313] One of these commenters argued that Commission actions differ from *qui tam* actions to the extent that Commission actions involve entities for which there is a large amount

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[309] *See* Laviola Letters; Anonymous-73 Letter; Better Markets Letter; TAF Letter: Bell Letter.

[310] *See* Anonymous-92 Letter; Anonymous-73 Letter; Anonymous-71 Letter; NWC Sept. 17 Letter; Better Markets Letter; Laviola Letters.

[311] *See* Anonymous-92 Letters; Markopolos Letter; TAF Letter; Cohen Milstein Letter; Anonymous-9 Letter; Phillips & Cohen Letter; Anonymous-136 letter.

[312] *See* Markopolos Letter; Anonymous-9 Letter.

[313] *See* Think Computer Letter; Anonymous-92 Letter; Cohen Milstein Letter.

of publicly available information (*e.g.*, periodic reports or regulatory filings).[314] Thus, this commenter argued, "there will *almost always* be publicly available information involved in whistleblower submissions, leaving the quality of the whistleblower's analysis as the key variable in most cases except the most brazen frauds."[315] Another commenter argued that Congress specifically included the term "analysis" in Section 21F in recognition of the fact that "in the financial services industry … participants have specialized knowledge and /or experience reviewing financial statements, contracts, and filings and might be able to identify fraud …."[316] According to this commenter, this fact distinguishes Section 21F from the public disclosure bar because "Congress specifically wanted industry professionals to add their analysis with regards to the SEC program to help root out fraud." A third commenter argued that the False Claims Act expressly permits the government to allow relators to pursue actions notwithstanding the public disclosure bar and also permits courts to grant awards even where the action is based primarily on public information.[317]

One commenter supported the proposed interpretive guidance, including the approach of grounding the "independent analysis" framework in federal case law under the False Claims Act.[318] This commenter argued that the Commission's resources should not be diverted from

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[314] A *qui tam* action allows a private party to bring an action on the government's behalf, and, if the government action is successful, then the private party can share in the award.

[315] *See* Think Computer Letter (emphasis in original).

[316] *See* Anonymous-92 Letter.

[317] *See* Cohen Milstein Letter.

[318] *See* CCMC Letter. However, this commenter also argued that the "inference" standard is too low and that "the tip should provide concrete, actionable information to the Commission." The proposed guidance does not indicate, as the commenter may have believed, that a tip would qualify for an award if the whistleblower raised an inference of the violations, but rather that the whistleblower would *not* merit an award if the facts in publicly available information were sufficient to raise such an inference.

"genuine enforcement cases," into "separating wheat from chaff when bounty seekers submit information that is already in the public record and contains no original analysis." Another commenter echoed this sentiment, specifically voicing concern that claims by company outsiders who appear to use certain methods of analysis from publicly available information to formulate claims of fraud "distract[] SEC resources from investigating whistleblower claims by individuals who have been or are subject to retaliation and loss of employment from raising concerns of malfeasance to their employer."[319] This commenter, who identified herself as a former company insider with "inside knowledge of the Company," urged that the award program should be focused on individuals who are at personal risk of retaliation and who provide the Commission with "specific facts, documents, and relevant analysis to support their allegations."[320]

3. Final Interpretive Guidance

After considering the comments, we have decided to adopt the interpretive guidance as proposed with one additional interpretation. Subject to Section 21F(a)(3)(C) of the Exchange Act,[321] in the exercise of our discretion the Commission may determine that a whistleblower's examination and evaluation of publicly available information reveals information that is "not generally known or available to the public"—and therefore is "analysis" within the meaning of

[319] *See* letter from Eileen Morrell (Aug. 29, 2019).

[320] *Id.* Two other commenters did not indicate disapproval of the proposed guidance, but asked only that it not be applied to tips that have been received before the effective date of the amended rules. *See* letter from Anonymous-124 (Nov. 4, 2018); letter from Taylor S. Amarel (Nov. 9, 2018) ("Amarel Letter"). These commenters stated that they had previously submitted TCRs under the existing rule, which, as noted, requires that "analysis" must "reveal[] information that is not generally known or available to the public," and further stated that "'bridging the gap' is different than 'not generally known.'" The interpretive guidance does not change any existing rules or the standards applied thereunder, but merely clarifies the standards under the existing rules that define and apply the term "independent analysis." Further, as discussed below, the interpretation reflected in the guidance is consistent with statutory requirements. For these reasons, we believe that it is appropriate to apply the guidance to previously submitted TCRs.

[321] Section 21F(a)(3)(C) requires that "original information not be exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information." 15 U.S.C. 78u-6(a)(3)(C).

Rule 21F-4(b)(3)—where: (1) the whistleblower's conclusion of possible securities violations derives from multiple sources, including sources that, although publicly available, are not readily identified and accessed by a member of the public without specialized knowledge, unusual effort, or substantial cost; and (2) these sources collectively raise a strong inference of a potential securities law violation that is not reasonably inferable by the Commission from any of the sources individually.

Our experience in administering the whistleblower program, and our review of the comments submitted, confirm the existence of uncertainty regarding the requirement of Rule 21F-4(b)(3) that independent analysis must "reveal[] information that is not generally known or available to the public." By clarifying our application of the rule, we expect to encourage more high-quality submissions that may result in successful enforcement actions, promote transparency, reduce the volume of non-meritorious claims, and increase the efficiency of the whistleblower program.

The interpretive guidance is not intended to discourage tips from financial services professionals and others who develop key insights and illuminate possible violations through the application of expertise to the review and evaluation of publicly available information. Moreover, as we explained, technical expertise is not a requirement under the guidance. We expect to treat as "independent analysis" highly-probative submissions in which the whistleblower's insights and evaluation provide significant independent information that "bridges the gap" between the publicly available information itself and the possibility of securities violations. The additional guidance we are adopting adds further clarification by describing a specific path available to experts and non-experts alike who devote substantial time

and effort and develop unique insights from bringing together information from multiple specialized or difficult-to-obtain sources.

Conversely, our experience has shown that some claimants seek awards based on submissions that do little more than highlight information that is reasonably evident from the public sources. We gave as examples cases where the whistleblower points to common hallmarks of fraud on the face of the public materials (*e.g.*, impossibly high, guaranteed investment returns or extravagant claims in press releases) or to public discourse (*e.g.*, discussions on a public message board) in which investors or others are alleging a fraudulent scheme. Submissions of this type do not constitute "independent analysis." We emphasize, however, that there is no bright-line test and whether any particular submission contains sufficient independent insights to rise to the level of analysis –and, hence, "original information"—will depend on all of the facts and circumstances of the case.

In addition to promoting transparency and efficiency in the operation of our whistleblower program, we continue to believe that Congress did not intend that we should pay whistleblower awards merely for alerting the Commission staff to publicly-available information. The model for "independent analysis" that Congress had before it at the time was the detailed and sophisticated work performed by Harry Markopolos to expose the Madoff fraud, which consisted of more than simply providing the Commission with already-public information.

In conformance with this limitation, our interpretive guidance adapts to the Section 21F context the framework that has found widespread acceptance among federal courts of appeals for determining when fraudulent transactions are deemed to already be publicly disclosed under

analogous provisions of the federal False Claims Act.[322] Although commenters criticized this approach as permitting the Commission to make a "retroactive" determination of whether the violations were "reasonably apparent," we view the framework as an important analytical tool to help inform our judgment on a dispositive question under Section 21F: whether a whistleblower's submission is *original*, and not merely a recitation of publicly available information. We observe further that, to the extent that our evaluation under the guidance is backward-looking, it is reasonably based only on information that was publicly available at the time of the whistleblower's tip; it does not evaluate the whistleblower's submission in light of any information that subsequently became public or in light of the investigative record.[323]

We are conscious of the concern expressed by some commenters that individual Enforcement staff assigned to the investigation will be responsible for determining whether the publicly available information was sufficient to raise an inference of the violations. This is not

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[322] We are not persuaded by the view that we should not follow False Claims Act precedent because of contextual differences between the False Claims Act and Section 21F. *First*, the fact that a large amount of publicly available information is filed with the Commission does not suggest a reason for granting awards based merely on publicly available information; as one commenter observed, the key variable remains "the quality of the whistleblower's analysis" of such information. *See* Think Computer Letter. *Second*, nothing in the interpretive guidance is inconsistent with Congress's expectation that the term "analysis" in Section 21F should support awards when financial services professionals develop original insights about possible violations through application of their specialized knowledge or experience to the review of publicly available information. *Third*, Section 21F does not have provisions similar to those found in the False Claims Act that permit the government to allow a relator to pursue an action notwithstanding the public disclosure bar (31 U.S.C. 3730(e)(4)(A)) or that permit a discretionary award of up to 10% when an action is based primarily on certain publicly available information (31 U.S.C. 3730(d)(1)).

[323] Moreover, our rules already require that we make a range of determinations about the nature, sources, and impact of the information provided by a whistleblower before we can credit it as "original information." For example, in assessing whether a whistleblower possessed "independent knowledge" under Rule 21F-4(b)(2), we must exclude information that is "derived from publicly available sources." Under Rule 21F-4(b)(4), we consider whether the information was obtained by an excluded person or under excluded circumstances, and, if so, whether an exception permitting use of the information applies. Under Rule 21F-4(b)(6), we consider how the information provided by a whistleblower related to other information already in our possession at the time and whether the whistleblower's submission "materially add[ed]" to our base of knowledge about the matter. Viewed in the context of the many individual determinations that we already must make in our evaluation of whether a whistleblower provided "original information," it is reasonable that we should also consider whether the whistleblower provided "significant independent information" that "bridge[d] the gap" between the publicly available information and the possible securities violations.

the case. In our award process, all determinations relevant to award entitlement—including whether the claimant provided "original information"—are made in the first instance by the CRS, which currently is comprised of the Director and Deputy Director of the Enforcement Division and five other Enforcement senior officers. Further, all preliminary award denials that are contested are adjudicated by the Commission. As a result, the role of the individual Enforcement staff member is merely to relay to the CRS the facts relative to the investigation that are pertinent to the CRS's deliberations. It is the job of the CRS (and ultimately the Commission) to determine whether the claimant's submission constitutes "independent analysis" through the application of an objective, rather than a subjective, standard of reasonableness to the record. The interpretive guidance we are adopting provides a framework, consistent with existing legal standards, for making this judgment.

The commenters who urged that the test for "independent analysis" turn on whether the whistleblower provided information of which the staff was not aware and that, in fact, caused the staff to take action would read the "analysis" requirement out of the statute. Under the second prong of "original information" (Section 21F(a)(3)(B)), we are required to determine that information provided by a whistleblower was "not known to the Commission from any other source"; and under Section 21F(b)(1) we must determine that original information provided by a whistleblower "led to" the successful enforcement of a Commission covered action or a related action.[324] We are obliged to interpret "analysis" in the first prong of "original information" (Section 21F(a)(3)(A)) in a manner that gives independent meaning to this term and is not

[324] 15 U.S.C.78u-6(a)(3)(B), 78u-6 (b)(1).

redundant of the requirements that a whistleblower's information be unknown to the Commission and lead to a successful enforcement action.[325]

Put another way, in order to merit an award a whistleblower, among other things, must provide information that is not known to the Commission from any other source, that leads to successful enforcement, *and that also* comprises "independent analysis" (or "independent knowledge"). Importantly, no commenters suggested any alternative interpretations that would distinguish submissions that provide "analysis" of publicly available information from those that fail to do so.

Our conclusion is buttressed by our reading of Section 21F(a)(6)[326] in conjunction with Section 21F(b)(1).[327] Section 21F(a)(6) defines a "whistleblower," in relevant part, as an individual (or two or more individuals acting jointly) who provide "information" relating to a violation of the securities laws to the Commission. However, Section 21F(b)(1) authorizes us to pay awards only to whistleblowers who provide "original information" to the Commission. We read these provisions as reflecting Congress's understanding that "information" and "original information" are distinct concepts, and that some number of individuals who are "whistleblowers" by virtue of the "information" they provide to the Commission may not also qualify as having provided "original information." We cannot interpret "independent analysis" in a way that erases these distinctions and provide awards for any "information" that results in a successful enforcement action.

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[325] *See Moskal v. United States*, 498 U.S. 103, 109 (1990) (noting "the established principle" that "every clause or word of a statute" should be "give[n] effect, if possible"); *Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985) (similar).

[326] 15 U.S.C. 78u-6(a)(6).

[327] 15 U.S.C. 78u-6(b)(1).

Further, we observe that Section 21F(a)(3)(C) requires that "original information" not be "exclusively derived … from the news media."[328] However, the "news media" is not limited to conventional news sources. The Supreme Court has indicated that the identical term in the False Claims Act's public disclosure bar has "broad sweep,"[329] and lower courts interpreting that provision have held that "news media" include publicly available websites that promote a company's services and products.[330] Thus, in many cases, fulfilling our statutory duty not to grant awards for information that is "exclusively derived … from the news media" will require that we find in the whistleblower's purported "analysis" a degree of substance that goes beyond the information available on the face of a public website.[331]

Finally, in response to those commenters who expressed concern that the proposed interpretive guidance would discourage individuals from taking the significant personal and professional risks of becoming whistleblowers, we note that our rules provide whistleblowers with the ability to submit tips anonymously.[332] Further, the interpretive guidance as proposed, as well as the additional interpretation adopted today, will enable such professionals to be treated as having provided "original information" in appropriate cases.

III. Effective Date and Applicability Dates

[328] 15 U.S.C. 78u-6(a)(3)(C).

[329] *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 408 (2011).

[330] *See United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 813 (11th Cir. 2015); *United States ex rel. Cherwenka v. Fastenal Co.*, 2018 U.S. Dist. LEXIS 75108, *20 (D. Minn. 2018); *United Stated ex rel. Green v. Service Contract Education and Training Trust Fund*, 843 F. Supp. 2d 20, 32-33 (D.D.C. 2012)

[331] S*ee generally Schindler Elevator*, 563 U.S. at 408 ("[T]o determine the meaning of one word in the public disclosure bar, we must consider the provision's 'entire text,' read as an 'integrated whole.'").

[332] *See* Rule 21F-9(c).

The amended rules will become effective 30 days after publication in the Federal Register. Although we proposed that the amended rules would take effect 60 days after publication, we believe that it would benefit the program to have the amended rules take effect sooner given that these rules: (i) largely codify existing agency interpretations and practice; (ii) involve a necessary change to conform Exchange Act Rule 21F-2 to a decision of the U.S. Supreme Court; and (iii) otherwise are procedural in nature and intended to achieve efficiencies in the Commission's processing of whistleblower award applications.

The table below explains whether and how the amended rules will apply:

Rule 21F-2 addressing whether whistleblower status and certain threshold criteria related to award eligibility, heightened confidentiality from identity disclosure, and employment anti-retaliation protection	The amendments to Rule 21F-2 shall apply as follows: with respect to employment retaliation claims, the amended rule applies only to employment-retaliation violations occurring after the effective date of the rules; with respect to award eligibility and confidentiality protections, the amended rule applies only to information about a potential securities law violation that is submitted for the first time by an individual after the effective date of the rules.
Rule 21F-3(b)(1) and (b)(3) defining "related action"	The amendments to Rule 21F-3(b) shall apply only to covered-action and related-action award applications that are connected to a Notice of Covered Action (see Exchange Act Rule 21F-10(a)) posted on or after effective date of the rules. *Note:* Although this rule will not apply to pending award applications, the Commission may use its adjudicatory authority to apply the same principles to pending award applications.
Rule 21F-4(c)(2) technical amendment	Rule 21F-4(c)(2) shall apply to all new whistleblower award applications filed after the effective date of the rules, as well as all whistleblower award applications that are pending and have not yet been the subject of a

	final order of the Commission by the effective date.
Rule 21F-4(d) defining "action"	Rule 21F-4(d) as amended shall apply to any DPA, NPA, or Commission settlement agreement that has a date of entry after July 21, 2010.
Rule 21F-4(e) defining "monetary sanctions"	Rule 21F-4(e) as amended shall be utilized by the Commission after the effective date of the final rules in determining whether an action qualifies as a "covered action" and in calculating any outstanding payments to be made to meritorious whistleblowers.
Rule 21F-6 concerning the Commission's discretion to consider the dollar amount of monetary sanctions collected when applying the award factors and concerning award calculations for certain awards of $5 million or less	All aspects of this rule shall apply to all award claims still pending as of the effective date of the rules.
Rule 21F-8(d) concerning flexibility regarding the forms used in connection with the whistleblower program and related rule modifications	Rule 21F-8(d)(1) shall apply only in connection with submissions of information that are made by an individual after the effective date of the proposed rules. Further, Rule 21F-8(d)(2) shall apply only to covered-action and related-action award applications that are connected to a Notice of Covered Action (see Exchange Act Rule 21F-10(a)) posted on or after the effective date of the rules.
Rule 21F-8(e) concerning false statements or frivolous submissions, and revised Rule 21F-8(c)	Rule 21F-8(e) shall apply to all award claims still pending as of the effective date of the rules, but as provided in Rule 21F-8(e)(4), claimants will be given notice and an opportunity to withdraw the relevant award application(s) submitted prior to the effective date. Further, revised Rule 21F-8(c)(7) shall apply to all award claims still pending as of the effective date of the rules.
Rule 21F-9 regarding Form TCR	Rule 21F-9 as amended shall apply only in connection with submissions of information that are made by an individual to qualify as a

	whistleblower after the effective date of the rules, except Rule 21F-9(e) shall apply to all award claims still pending as of the effective date of the rules.
Rule 21F-12 regarding materials that may form the basis of the Commission's award determination	Rule 21F-12 as amended shall apply only to covered-action and related-action award applications that are connected to a Notice of Covered Action (see Exchange Act Rule 21F-10(a)) posted on or after the effective date of the rules.
Rule 21F-13 regarding the administrative record on appeal	Rule 21F-13 as amended shall apply only to covered-action and related-action award applications that are connected to a Notice of Covered Action (see Exchange Act Rule 21F-10(a)) posted on or after the effective date of the rules.
Rule 21F-18 establishing a summary disposition process	Rule 21F-18 shall apply to any whistleblower award application for which the Commission has not yet issued a Preliminary Determination as of the effective date of the rules, as well as to any future award applications that might be filed.
Interpretive guidance regarding the meaning and application of the term "independent analysis" in Rule 21F-4	As we noted in the Proposing Release, although the Commission proposed the interpretive guidance for public comment, the Commission intends to rely on the principles articulated in the guidance for any whistleblower claims that are still pending at any stage because this guidance clarifies the existing rules that define and apply the term "independent analysis." *Note:* As discussed *supra* note 320, the Commission received two comment letters concerning the application of the independent-analysis interpretive guidance to tips received before the effective date of the rules. For the reasons discussed in note 320, we have declined to follow that suggestion.

IV. Other Matters

If any of the provisions of these amendments, or the application of these provisions to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act,[333] the Office of Information and Regulatory Affairs has designated these amendments as not a "major rule," as defined by 5 U.S.C. § 804(2).

V. Paperwork Reduction Act

A. Background

Certain provisions of the whistleblower rule amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[334] To qualify as a whistleblower, individuals seeking to submit information of a possible securities law violation to the Commission must do so by providing information through the Commission's online portal or by submitting the paper Form TCR. Individuals seeking an award must make their award request using a paper Form WB-APP. The hours and costs associated with preparing and submitting information through the online portal and affected forms constitute reporting and cost burdens imposed by each collection of information. An agency may not sponsor, conduct, or require a response to an information collection unless a currently valid Office of Management and Budget ("OMB") control number is displayed. The Commission submitted a proposed reorganization of the affected collections of information to OMB for review in accordance with the PRA.[335] The titles for the affected collections of

[333] 5 U.S.C. 801 *et seq*.

[334] 44 U.S.C. 3501 *et seq*.

[335] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

information were: (1) "Electronic Data Base Collection System -TCR" (OMB Control No. 3235-0672); and (2) "Form TCR" and "Form WB-APP" (OMB Control No. 3235-0686).

B. Estimated Costs and Burdens

As described in more detail above, to provide the Commission with the ability to make timely corresponding adjustments to the paper Form TCR when it determines to modify the online portal, the Commission is modifying Exchange Act Rule 21F-8 by adding a new section (d)(1) that reads as follows: "The Commission will periodically designate a Form TCR (Tip, Complaint, or Referral) that individuals seeking be eligible for an award through the process identified in § 240.21F-9(a)(2) shall use." In addition, to provide the Commission with greater administrative flexibility to modify Form WB-APP, the Commission is modifying Exchange Act Rule 21F-8 by adding a new section (d)(2) that reads as follows: "The Commission will also periodically designate a Form WB-APP for use by individuals seeking to apply for an award under either § 240.21F-10 or § 240.21F-11."

In connection with these amendments, the Commission proposed that the OMB control numbers for the associated collections of information be reorganized, so that both the online portal and Form TCR would fall under the same OMB control number (No. 3235-0672), and Form WB-APP would have its own OMB control number (No. 3235-0686). The collections of information would be re-titled, and the associated burden estimates adjusted accordingly.

In the Proposing Release, the Commission stated that it did not anticipate that the amendments would increase the burden or cost to individuals preparing and submitting the required information through the online portal and affected forms. Although certain modifications would be made to Form TCR so that the information elicited by the form is consistent with the information collected through the online portal, the Commission stated that

these conforming modifications would not increase appreciably the burden for individuals completing the form.

The table below summarizes the burden and cost estimates associated with the online portal and affected forms after the proposed reorganization of the relevant control numbers:

Table 1 of Section V.B.: Revised Burden Estimates under the Proposed Reorganization

Title	OMB Control Number	Burden Hours	Costs
"Tips, Complaints and Referrals (TCR)"	3235-0672	9,050	$42,000
"Form WB-APP"	3235-0686	110	$4,800

The Commission did not receive any comments that directly addressed its Paperwork Reduction Act analysis or the reorganized burden estimates, and we do not believe any changes in the final rules will affect these burden estimates.

C. Mandatory Collection of Information

A whistleblower is required to complete either a hardcopy Form TCR or submit his or her information electronically through the online portal and to complete Form WB-APP to qualify for a whistleblower award.

D. Confidentiality

As explained above, the statute provides that the Commission must maintain the confidentiality of the identity of each whistleblower, subject to certain exceptions. Section 21F(h)(2) states that, except as expressly provided:

> [T]he Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, United States Code, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission [or certain specific entities listed in paragraph (C) of Section 21F(h)(2)].

Further, as discussed above, Rule 21F-2(c) requires that an individual who is seeking this heightened confidentiality protection must submit his or her information to the Commission using the online portal or by completing a hardcopy Form TCR. If an individual fails to do so, then under our amended rule he or she will be ineligible for the heightened confidentiality protections.

Section 21F(h)(2) also permits the Commission to share information received from whistleblowers with certain domestic and foreign regulatory and law enforcement agencies. However, the statute requires the domestic entities to maintain such information as confidential, and requires foreign entities to maintain such information in accordance with such assurances of confidentiality as the Commission deems appropriate.

In addition, Section 21F(d)(2) provides that a whistleblower may submit information to the Commission anonymously and still be eligible for an award, so long as the whistleblower is represented by counsel. However, the statute provides that a whistleblower must disclose his or her identity prior to receiving payment of an award.

VI. Economic Analysis

The Whistleblower Program helps the Commission better enforce the federal securities laws. Unlike some of our rulemakings, we are not addressing a market failure or market risk

here. Rather, based on our decade of experience administering the program, we have identified aspects of the program that could be improved to enhance its efficiency. Accordingly, the amendments to the whistleblower rules are designed to be thoughtful improvements that should help enhance the overall functioning of the program in ways that continue to encourage individuals to come forward to report securities-law violations. The specific changes we are adopting are designed to improve the efficiency of claims processing and provide additional transparency that may strengthen whistleblower incentives.[336] By improving the Whistleblower Program, these amendments should contribute to an improvement in the Commission's law enforcement efforts.

The Commission is sensitive to the economic consequences of its rules, including the benefits, costs, and effects on efficiency, competition, and capital formation. Section 23(a)(2)[337] of the Securities Exchange Act of 1934 requires the Commission, in promulgating rules under the Exchange Act, to consider the impact that any rule may have on competition and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Further, Section 3(f) of the Exchange Act[338] requires the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

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[336] See section I.B.

[337] 15 U.S.C. 78w(a)(2).

[338] 15 U.S.C. 78c(f).

The economic analysis focuses on the amendments to Rule 21F-2, Rule 21F-3(b)(3), Rule 21F-4(d)(3), Rule 21F-6, Rule 21F-8(e), newly adopted Exchange Act Rule 21F-18, and the adopted interpretive guidance concerning the term "independent analysis." As discussed above:

- The amendments to Rule 21F-2 are in response to the Supreme Court's recent decision in *Digital Realty Trust, Inc. v. Somers*;[339]
- Amended Rule 21F-3(b)(3) makes it clear that recovery from the Commission is not possible where the Commission determines that a separate whistleblower program more appropriately applies to a non-Commission action;
- Amended Rule 21F-4(d)(3) would allow awards based on DPAs or NPAs entered into by DOJ and settlement agreements entered into by the Commission;
- Amended Rule 21F-6(c) provides additional clarity regarding the potential award assessment;
- The newly added language to the opening paragraph of Rule 21F-6 clarifies the Commission's discretion to consider the dollar amount of monetary sanctions collected when considering the existing Award Factors and setting the Award Amount;
- Amended Rule 21F-8(e) would provide authority to bar applicants from future award applications in certain limited situations;
- New Rule 21F-18 would provide a streamlined award consideration process for certain limited categories of non-meritorious applications; and

[339] 138 S. Ct. 767 (2018).

- The adopted interpretive guidance would help clarify the meaning of "independent analysis" as that term is defined in Exchange Act Rule 21F-4 and utilized in the definition of "original information."

The other amendments adopted in this release are either procedural, technical in nature, or codify existing practice, and therefore we do not expect them to have significant benefits, costs, and economic effects, or significantly impact efficiency, competition, and capital formation.

Many of the benefits and costs discussed below are difficult to quantify. For example, although the analysis that follows details the specific ways in which we expect the adopted rules to affect whistleblower incentives, we lack the data necessary to estimate the magnitudes of these effects separately or in the aggregate. Similarly, we cannot precisely estimate the additional awards paid out of the IPF due to the inclusion of DPAs and NPAs entered into by DOJ or settlement agreements entered into by the Commission in the definition of an "administrative action."[340] Therefore, while we have attempted to quantify economic effects where possible, much of the discussion of economic effects is qualitative in nature.

A. Economic Baseline

To examine the potential economic effects of the amendments, we employ as a baseline the rules that the Commission adopted in May 2011 to implement the whistleblower program as currently administered, and the Supreme Court's recent decision in *Digital Realty Trust, Inc. v. Somers*. Further, we provide summary statistics that describe the distribution of awards paid by the whistleblower program under the 2011 rules, and estimates of wages and salaries obtained from a number of surveys.

[340] For an explanation of the IPF, *see supra* footnote 3.

1. Supreme Court Decision in *Digital Realty Trust, Inc. v. Somers*

As described above, the Supreme Court held in *Digital Realty Trust, Inc. v. Somers*[341] that Section 21F(h)(1) of the Exchange Act unambiguously requires that a person report a possible securities law violation to the Commission in order to qualify for employment retaliation protection.[342]

2. Awards Issued by the SEC Whistleblower Program

From August 2012 through July 2020, the Commission's whistleblower program issued 81 whistleblower awards to 88 individuals (including, as explained above, individuals who acted as joint whistleblowers).[343] Table 1 of Section VI.A.3 reports the frequency distribution of these awards by award size. Sixty (74%) of these awards were less than $5 million, of which 45 (56%) awards were less than $2 million. The dollar amount of these 60 awards makes up 16 percent of the dollar amount of all awards. Of the remaining 21 awards, 15 were at least $5 million but less than $30 million and six exceeded $30 million. The dollar amount of the 15 awards that were at least $5 million but less than $30 million makes up 39 percent of the dollar amount of all awards. The dollar amount of the six awards that exceeded $30 million makes up 45 percent of the dollar amount of all awards. According to the Office of the Whistleblower, of the 88 individuals who have received awards, approximately 7 percent are high-ranking corporate executives at

[341] 138 S. Ct. 767 (2018).

[342] *Id*. at 781-82.

[343] These totals treat as single awards several cases where whistleblowers' original information led to multiple covered actions that were processed together in one award order recognizing the total contributions of the whistleblower. Similarly, consistent with the approach above governing cases where we grant an award for both a Commission enforcement action and a related action by another governmental entity based on the same information provided by the whistleblower (*see* Rule 21F-3(b)), we consider covered-action awards together with their corresponding related-action awards as single whistleblower awards.

companies of varying sizes and a majority of these executives received awards that were under $5 million.

Table 1 of Section VI.A.3: Frequency distribution of whistleblower awards. We use awards issued to whistleblowers by the SEC Whistleblower Program from August 2012 through July 2020. "Number" is the number of awards that fall within an award size category. "Percent" is the number of awards in an award size category as a fraction of the total number of awards. "Percent of Total Dollars Awarded" is the dollars awarded in an award size category as a fraction of the total dollars awarded.

Award size category	Number	Percent	Percent of Total Dollars Awarded
Less than $2 million	45	56%	6%
At least $2 million but less than $5 million	15	19%	10%
At least $5 million but less than $10 million	6	7%	8%
At least $10 million but less than $15 million	2	2%	5%
At least $15 million but less than $20 million	4	5%	13%
At least $20 million but less than $30 million	3	4%	13%
At least $30 million	6	7%	45%
Total	81	100%	100%

In addition to summarizing the distribution of awards to whistleblowers, we also summarize the distribution of awards by enforcement action. For each enforcement action, we identify all whistleblowers who receive an award for that enforcement action and sum their awards to arrive at the aggregate award for that enforcement action. Table 2 of Section VI.A.3 indicates that between August 2012 and July 2020, there were 74 enforcement actions for which the Commission issued whistleblower awards.[344] Fifty-six enforcement actions had awards of less than $5 million, of which 43 awards were less than $2 million. The dollar amount of awards associated with these 56 actions makes up 15 percent of the dollar amount of all awards. Of the remaining 18 actions, 13 had aggregate awards of at least $5 million but less than $30 million

[344] As noted, we aggregate related actions with their corresponding Commission actions for purposes of this analysis.

and only five had an aggregate award that exceeded $30 million. The dollar amount of awards associated with the 13 actions makes up 34 percent of the dollar amount of all awards. The dollar amount of the awards associated with the five largest actions makes up 51 percent of the dollar amount of all awards.

Table 2 of Section VI.A.3: Frequency distribution of awards by enforcement action. We use awards issued to whistleblowers by the SEC Whistleblower Program from August 2012 through July 2020. For each enforcement action, we identify all whistleblowers who received an award for that enforcement action and sum their awards to arrive at the aggregate award for that enforcement action. "Number" is the number of aggregate awards that fall within an award size category. "Percent" is the number of aggregate awards in an award size category as a fraction of the total number of awards. "Percent of Total Dollars Awarded" is the dollars awarded in an award size category as a fraction of the total dollars awarded.

Award size category	Number	Percent*	Percent of Total Dollars Awarded
Less than $2 million	43	58%	6%
At least $2 million but less than $5 million	13	18%	9%
At least $5 million but less than $10 million	5	7%	6%
At least $10 million but less than $15 million	2	3%	5%
At least $15 million but less than $20 million	3	4%	10%
At least $20 million but less than $30 million	3	4%	13%
At least $30 million	5	7%	51%
Total	74	100%	100%

*Figures do not sum to 100% due to rounding.

3. Estimates of Current Annual Wages

Prospective whistleblowers' annual wages are potentially relevant to various aspects of the adopted rules. In particular, summary statistics of annual wages could inform an assessment of the potential impact of Rule 21F-6(c) on whistleblowing incentives. Table 3 of Section VI.A.3 presents, by industry, the pre-tax annual wages per employee ("average wages")

estimated by the Bureau of Labor Statistics for 2018.[345] Average wages vary from a low of $24,087 in the leisure and hospitality industry to a high of $113,781 in the information industry.

These averages do not reflect the substantial degree of within-industry wage variation. For example, more senior employees involved in financial activities likely earn higher wages than their more junior counterparts; likewise, staff who supply significant expertise may earn more than those who do not. A 2017 report documenting survey responses from 377 financial professionals included average base salaries for senior-level financial executives between $133,859 and $342,154, depending on title and whether companies are public or private.[346]

Table 3 of Section VI.A.3: 2018 average annual wages per employee by industry. This table presents the pre-tax annual wages per employee at privately owned establishments aggregated by industry as reported by the Bureau of Labor Statistics.

Industry	Annual wages per employee ($)
Natural resources and mining	59,628
Construction	62,727
Manufacturing	68,525
Trade, transportation, and utilities	47,607
Information	113,781
Financial activities	95,561
Professional and business services	75,169
Education and health services	50,444
Leisure and hospitality	24,087
Other services	38,464
Unclassified	57,227

B. Analysis of Benefits, Costs, and Economic Effects of the Adopted Rules

[345] Wage data used for calculating the annual wages per employee are derived from the quarterly tax reports submitted to state government workforce agencies by employers, subject to state unemployment insurance laws, and from Federal agencies subject to the Unemployment Compensation for Federal Employees program. Further information is available at https://www.bls.gov/cew/cewbultncur.htm#Tables.

[346] *See* "Financial Executive Compensation Report 2017," Grant Thornton LLP and Financial Executives Foundation, Inc., 2017 (*available at* https://www.grantthornton.com/~/media/content-page-files/tax/pdfs/FEI-financial-exec-comp-survey-2017/FEI-survey-results-2017.ashx).

In this section, we discuss the potential benefits, costs, and economic effects of the adopted rules. We also respond to comments that relate to the benefits, costs, and economic effects of these rules.

1. Amendments to Rule 21F-2

Most of the amendments to Rule 21F-2 are either in response to the Supreme Court's decision in *Digital Realty Trust, Inc. v. Somers*[347] or conform the rule substantively with current practice. Two amendments, however, do represent changes relative to the economic baseline, and their potential benefits, costs, and economic effects are discussed here. Final Rule 21F-2(a)(1) extends employment retaliation protection only to an individual who provides the Commission with information "in writing." Final Rule 21F-2(d)(1)(iii), among other things, limits employment retaliation protection to lawful acts that "relate to the subject matter" of the person's submission to the Commission under final Rule 21F-2(a).

a. Final Rule 21F-2(a)(1)

Final Rule 21F-2(a)(1) could potentially impose a burden on those individuals who want to report potential violations to the Commission and wish to qualify as a "whistleblower" solely for employment retaliation protection. Such individuals might decide not to report to the Commission if the reporting burden is perceived to outweigh the benefits associated with retaliation protection. Our experience to date with individuals who have sought to qualify for a whistleblower award suggests that requiring that information be provided in writing presents, at most, a minimal burden to individuals who want to report violations to the Commission while facilitating the staff's use of the information. To the extent that this experience is informative

[347] 138 S. Ct. 767 (2018).

about the reporting burden for individuals who will seek employment retaliation protection, such a burden would also be, at most, minimal.[348] Accordingly, the final rule would likely not have an adverse impact on the whistleblowing incentives of those individuals who wish to qualify as a "whistleblower" solely for employment retaliation protection.

We considered two alternatives to the approach we are adopting in Rule 21F-2(a): 1) requiring information to be provided to the Commission consistent with Rule 21F-9(a)—that is, either through the online portal at http://www.sec.gov or by mailing or faxing a Form TCR to the Office of the Whistleblower;[349] and 2) permitting additional manners of reporting for anti-retaliation purposes (such as placing a telephone call or making an oral report more generally).[350]

We declined to adopt the first alternative because it would, in our view, unnecessarily limit the means of reporting to the Commission by individuals who are merely seeking employment retaliation protection. Limiting whistleblower status to those individuals who follow the first alternative could unnecessarily exclude individuals from the benefits of Section 21F(h)(2)'s employment retaliation protections without providing any accompanying benefit to the Commission, whistleblowers, or the public generally. Further, requiring that individuals report information simply "in writing" allows individuals to choose the least burdensome manner to report violations to the Commission, potentially lowering costs including, for example, time spent providing the information.

A second alternative to the final rule would have permitted reporting violations other than "in writing" that would, nonetheless, preserve a whistleblower's retaliation protection. While the

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[348] *See* also Section II.G.3.

[349] A commenter also suggested this alternative. *See* CCMC Letter.

[350] *See* letters from TAF and NELA.

Digital Realty decision requires a report as a prerequisite for retaliation protection, it is the final rule that requires the report to the Commission to be "in writing." Some commenters supported the "in writing" requirement because it provided clarity and certainty as to when the whistleblower provided information and what information was provided,[351] while other commenters opposed the "in writing" requirement, noting that reporting can take many other forms and the purpose of the retaliation protection statute is to encourage reporting, whether in writing or not.[352] One commenter noted that reporting not made in writing (*e.g.*, oral disclosure) could readily be put into writing at the time of disclosure or any time after disclosure.[353] However, such an approach could raise a number of concerns. There may be a loss of information or the introduction of ambiguity if the whistleblower fails to provide a sufficiently detailed and clear oral disclosure, especially if the whistleblower fears retaliation or is otherwise distracted. Second, there is likely to be a delay between receiving an oral disclosure and memorializing it. Third, to address the two foregoing concerns, repeated contacts with the whistleblower may be necessary, which could further delay getting the whistleblower's information to the appropriate staff. While the drafting of a written report takes time, a written report likely would mitigate the aforementioned concerns related to oral disclosure. Finally, a commenter noted that an urgent need to make an oral report, particularly if the whistleblower feared retaliation and was therefore unwilling to make a written report, could leave a whistleblower who provides valuable information to the Commission without retaliation

[351] *See* letters from CPMC and CWC.

[352] *See* Kohn, Kohn & Colapinto (May 6 Letter); NELA Letter; TAF Letter.

[353] *See* NELA Letter.

protection.[354] However, the act of providing a written report ensures that a whistleblower has the option to anonymously and confidentially report a violation and, more to the point, that the whistleblower will be provided with retaliation protection. We decline to adopt the second alternative due to the concerns discussed above and to avoid potential costs that could arise if the Commission became involved in disputes in private anti-retaliation lawsuits over what information was provided to whom on what dates. Requiring that any reporting be done in writing obviates these concerns and potential costs.

b. Rule 21F-2(d)(1)(iii)

Rule 21F-2(d)(1)(iii) helps avoid the result that an individual who, having qualified as a whistleblower under the Commission's rules could, as a result, receive subsequent employment retaliation protection for making a required disclosure within the meaning of clause (iii) of Section 21F(h)(1)(A) that does not relate to the subject matter of the report the whistleblower made to the Commission. For individuals who want to make non-Commission reports about potential violations to their employers and desire employment retaliation protection for such lawful acts, the final rule could increase the incentives of these individuals to also report directly to the Commission. While final Rule 21F-2(a)'s "in writing" requirement could potentially impose a burden on these individuals, for the reasons discussed in the analysis of final Rule 21F-2(a)(1), *supra*, we believe that such a reporting burden would, at most, be minimal and would likely not limit the reporting incentives afforded by final Rule 21F-2(d)(1)(iii).

As discussed above, although some commenters expressed reservations about the uncertainty this provision might generate for whistleblowers,[355] we anticipate that this provision

[354] *See* TAF Letter.

[355] *See* NELA Letter.

will be applied in a flexible manner to accommodate whistleblowers who make a good-faith effort to comply with our rules in seeking retaliation protection. To the extent that the Commission's application is flexible, this provision should not discourage potential whistleblowers due to uncertainty about what conduct is protected.

2. Rule 21F-3(b)(3)[356]

As adopted, Rule 21F-3(b)(3) makes clear that a law-enforcement action will not qualify as a related action if the Commission determines that there is a separate whistleblower award program that more appropriately applies to the enforcement action. Further, Rule 21F-3(b)(3) makes clear that the Commission will not make an award to the whistleblower for a potential related action if the whistleblower has already been granted an award by the governmental entity responsible for administering another whistleblower award program. Further, under final Rule 21F-3(b)(3), if the whistleblower was denied an award by another award program, the whistleblower would not be permitted to readjudicate any issues before the Commission that the governmental entity responsible for administering the other whistleblower award program resolved as part of the award denial.

The final rule clarifies that a whistleblower may not adjudicate his or her contributions in separate forums and potentially obtain two separate awards based on the same whistleblower report. While the rules that were adopted in May 2011 precluded this result when an action is applicable to both the Commission's whistleblower program and the CFTC's whistleblower program,[357] those rules do not expressly preclude this result when the non-SEC whistleblower program is administered by a governmental entity other than the CFTC. Thus, the Commission

[356] This rule was proposed as new paragraph (4) to Exchange Act Rule 21F-3(b). *See* 83 FR at 34738.

[357] *See* Rule 21F-3(b)(3).

is amending its rules to reflect its current practice, thus clarifying that its position with respect to the CFTC applies to all other governmental entities,[358] because we believe clarity in this area will improve decision making by whistleblowers and their counsel.

The final rule would likely not have an adverse impact on the incentives of individuals who may report violations that result in enforcement actions potentially implicating both the Commission's whistleblower program and the whistleblower program of another governmental entity. Such an individual likely has the ability to determine (*e.g.,* using web searches, advice from legal counsel), whether her report could potentially be eligible for an award under the whistleblower program of another governmental entity if presented to that governmental entity , whether or not her report is ultimately eligible for an award under the Commission's whistleblower program. The existence of an alternative whistleblower program potentially improves the individual's overall likelihood of receiving an award from reporting a violation and would likely not adversely impact the individual's reporting incentives. In addition, potential whistleblowers with legal counsel likely would have taken into account the Commission's current practice, which the final rule codifies. As discussed in Section II(C) of the proposing release,[359] to date, the Commission has never paid an award on a matter where a second whistleblower program also applied to the same matter, nor has the Commission ever indicated that it would do so. As such, the final rule is unlikely to present a potential whistleblower with a disincentive to report a possible securities law violation.

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[358] In addition to the CFTC, there are various Federal and state whistleblower programs that are currently administered by other agencies or governmental entities, including a program administered by the IRS, whistleblower award programs related to the False Claims Act and the Financial Institution Reform, Recovery, and Enforcement Act (FIRREA), and state whistleblower award programs established in Utah and Indiana. *See* also Proposing Release 83 FR at 34735.

[359] *See* 83 FR at 34709-34711.

One commenter was concerned that the proposed rule could disincentivize whistleblowing if the more applicable program has an award cap that is lower than the whistleblower's desired compensation (*e.g.*, FIRREA's $1.6 million limit).[360] In response to this concern, we note that whistleblowing is an individual decision that is generally guided by a complex mix of pecuniary elements and non-pecuniary elements.[361] While it is possible that a more applicable award program with a lower award cap could, under the final rule, reduce a whistleblower's monetary incentives to report potential violations to the Commission, we believe that this possibility is so remote relative to other factors that it is unlikely to serve as a meaningful disincentive for a potential whistleblower. For example, when considering whether to report a potential violation to the Commission, that potential whistleblower still stands to receive an award from us for any Commission covered action; if a covered action does not occur, any ancillary action may produce an award for that whistleblower under the more applicable program. Even if the more applicable program has an award cap, individuals may still decide to report potential violations if they are sufficiently motivated by non-pecuniary elements, or the award amount available under the other program, or both. Because the amendment codifies current practice, we believe the final rule would likely not have an adverse impact on reporting incentives.

3. Rule 21F-4(d)(3)

Rule 21F-4(d)(3) provides that, for purposes of making a whistleblower award, an NPA or DPA entered into by DOJ in a criminal case, or a settlement agreement entered into by the Commission outside of the context of a judicial or administrative proceeding to address

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[360] *See* Cornell Law Clinic Letter.

[361] *See* Securities Whistleblower Incentives and Protections Adopting Release, 76 FR at 34355, note 433.

violations of the securities laws, will be deemed to be an "administrative action" and any money required to be paid thereunder will be deemed a "monetary sanction."[362] The rule will likely result in more awards because awards would be paid for DPAs and NPAs entered into by DOJ as well as settlement agreements entered into by the Commission in addition to judicial or administrative proceedings covered by the existing rules. The rule should enhance the incentives for whistleblowers to come forward in a timely manner to the extent that it signals to prospective whistleblowers that a wider array of enforcement resolutions may result in awards.

4. Rule 21F-6(c)

Rule 21F-6(c) provides a specific presumption that, subject to Commission discretion and certain other conditions, where the statutory maximum award of 30 percent of the monetary sanctions collected would total $5 million or less for all actions involving the whistleblower's same original information, the Award Amount presumptively will be set at the statutory maximum amount. However, this presumption would not apply under certain circumstances. For example, the Commission will not presume the award to be the statutory maximum amount if any of the negative Award Factors that are identified in Exchange Act Rule 21F-6(b) are found to be present with respect to the whistleblower's award claim or if the award claim triggers Exchange Act Rule 21F-16 (concerning awards to whistleblowers who engage in culpable conduct). In the case of multiple whistleblowers, the award could be set at the statutory maximum, but the allocation of the award could be altered if any of the negative Award Factors applied to one or more whistleblower. Additionally, where, under Rule 21F-6(a), the assistance

[362] *See* Section II.A.3 regarding the clarifications related to the requirement that agreements be "similar" in order to qualify as "administrative actions" imposing "monetary sanctions."

provided by the whistleblower is limited, the Commission may exercise its discretion to set the Award Amount lower than the statutory maximum.

The final rule could enhance the incentives of potential whistleblowers who anticipate receiving awards below $5 million and do not expect to be subject to any of the above conditions that would preclude an application of the presumption. The prospect of a larger award could further incentivize these potential whistleblowers to report violations in a timely manner to the Commission, including before any of the negative Award Factors are present. Further, we anticipate that the final rule will increase incentives to report wrongdoing more broadly. At the time of deciding whether to submit a tip, it would be very unlikely that a whistleblower could estimate accurately the amount that might be awarded. The final rule gives whistleblowers some assurance that if monetary sanctions were to be insufficient to support an award of over $5 million, then the award-setting process will, in the vast majority of cases, start from the presumption of the maximum statutory award of 30% of monetary sanctions.

From a cost perspective, the final rule could potentially result in larger awards being paid because an award that would yield a potential payout below $5 million may be increased. As indicated in Table 1 of Section VI.A.3, as of July 31, 2020, the Commission has granted 60 whistleblower awards (*i.e.*, 74 percent of awards and 16 percent of total dollars awarded) that were below $5 million. To the extent that the distribution of past awards provides a reasonable estimate of the distribution of likely future awards to whistleblowers, the majority of future awards are likely to be subject to the final rule.

An alternative that we considered was using the $2 million threshold described in the proposal. In particular, the proposed rule would have increased incentives for potential whistleblowers who expected awards of less than $2 million, but with a potential increase to a

maximum of $2 million. Like the final rule, the proposed rule would have included the limitations mentioned above to specify which whistleblowers could be considered for the presumption. The alternative would have provided increased incentives relative to current practice. Similarly, relative to current practice, the final rule's presumptive increase of small awards that are $5 million or less provides greater incentives and clarity regarding the application of increased awards for whistleblowers whose awards otherwise might have been smaller (and could have engendered concern in potential whistleblowers that they would have been smaller).

Compared to the proposed rule, the final rule likely would result in increases to the amount of the award for more whistleblowers, as suggested by the number of awards that fell between $2 million and $5 million, as shown in Table 1 of Section VI.A.3.

5. Proposed Rule 21F-6(d) and Amendments to Rule 21F-6

a. Consideration of Rule

The amendments to Rule 21F-6 that we are adopting today clarify that the Commission has the authority to consider the dollar amount when applying the award criteria. Because these amendments only clarify the Commission's existing authority, we do not believe they will have significant benefits, costs, and economic effects, or will significantly impact efficiency, competition, and capital formation.

As noted above, we are not adopting Proposed Rule 21F-6(d). As such, awards exceeding $30 million will not be subject to a specific mechanism for review. This alternative, as described in the proposal, would have provided a specific mechanism to guide the Commission's existing discretion to determine awards, specifically in the context of large awards. This mechanism would have provided a rubric within which the Commission could

determine whether an award exceeded an amount necessary to sufficiently incentivize whistleblowers, which is a goal of the whistleblower award program.

In the Proposing Release, we stated our belief that Proposed Rule 21F-6(d) could reduce the likelihood of awards that are excessive in light of the whistleblower program's goals and the interests of investors and the public, and thus could foster more efficient use of the IPF.[363] In light of some commenters' perception that any downward-departure mechanism for exceedingly large potential awards would serve to hold awards at the 10 percent statutory minimum, the Commission at this time has determined not to adopt this alternative, thereby avoiding any detrimental chilling effect on potential whistleblowers coming forward as a result of misperceiving the purpose and function of the proposed provision.

6. Rule 21F-8(e)

As discussed above,[364] we are adopting Rule 21F-8(e) substantially as proposed. The final rule could increase the speed and efficiency of the award determination process.[365] By permanently barring applicants that make three or more frivolous award applications the final rule could help free up staff resources that could then be devoted to processing potentially meritorious award applications and other work related to the whistleblower program.[366] Based

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[363] Whistleblower Program Rules, 83 Fed. Reg. 34,739 (July 20, 2018)

[364] *See* Section II.I.

[365] We acknowledge that this potential benefit rests, in large part, on the premise that the applicants currently submitting multiple frivolous applications are unlikely to change their behavior.

[366] Other work includes, for example, serving as subject matter experts to investigative staff regarding whistleblower issues in investigations, intake of hard copy tips, posting of Notices of Covered Actions, and manning the whistleblower hotline. To help promote the SEC's whistleblower program and establish a line of communication with the public, the Office of the Whistleblower operates a hotline where whistleblowers, their attorneys, or other members of the public with questions about the program may call to speak to the Office of the Whistleblower's staff. During Fiscal Year 2019, the Office of the Whistleblower returned over 2,600 calls from members of the public. Since May 2011 when the hotline was established, the Office of the Whistleblower has returned nearly 24,000 calls from the public. *See* SEC Whistleblower Program 2019 Annual Report to Congress (Nov. 15, 2019) (*available at* https://www.sec.gov/files/sec-2019-annual-report-whistleblower-program.pdf).

on the Commission's historical experience, the Commission believes the rule would have a meaningful impact in terms of freeing up staff resources. Likewise, to the extent that potentially being barred from awards discourages submitting frivolous applications, the rule may also create a deterrent effect that further limits the number of frivolous award applications that staff have to address. To the extent that the final rule fosters faster award determination and payment and to the extent that this motivates whistleblowing, individuals are more likely to come forward and report potential violations as a result of the final rule.

The rule might dissuade individuals who are permanently barred from providing information in the future about possible securities law violations. We believe that this potential cost of the final rule could be mitigated by a number of factors.

First, the number of individuals who may be permanently barred by the final rule for submitting three or more frivolous applications and who might subsequently have information about possible securities law violations that could be provided to the Commission is likely to be a small fraction of the population of meritorious award applicants, limiting the potential cost of the final rule. Through July 24, 2020, we have found that individuals that submitted three or more award applications make up approximately nine percent of the population of covered action award applicants. This estimate constitutes an upper bound of the actual fraction of applicants who submitted three or more *frivolous* applications and subsequently had information about possible securities law violations that could be provided to the Commission.[367]

Second, as discussed in the proposal, the Commission has issued two final orders that have permanently barred the applicants from submitting any further whistleblower award

[367] To date, approximately 11 applicants submitted three or more applications who were determined to be potentially meritorious and not frivolous with respect to at least one of their applications.

applications based on violations of Rule 21F-8(c)(7). Given that the final rule codifies the Commission's current practice, we believe that individuals who have been barred on the basis of Rule 21F-8(c)(7) could have already taken such current practice into account when deliberating on whether to report, even in the absence of the final rule.

Finally, as discussed in the adopting release that accompanied the original whistleblower rules, whistleblowing is an individual decision that is generally guided by a complex mix of pecuniary elements and non-pecuniary elements.[368] Individuals that are permanently barred from applying for whistleblower awards might still come forward and provide information about possible violations if they are sufficiently motivated by non-pecuniary elements.[369]

We also acknowledge the possibility that individuals who have made fewer than three frivolous award applications might be discouraged from reporting possible securities law violations because their next award application could be determined to be frivolous, which would increase the likelihood of a permanent bar from making any future award applications. We believe that this potential cost of the final rule could be mitigated by a number of factors.

First, claimants may withdraw an application that the Office of the Whistleblower has assessed to be frivolous for up to three such applications. *Second*, the claims adjudication processes should help ensure that potentially meritorious claims will be considered as such by the Commission. *Third*, as discussed above, whistleblowing is an individual decision that is generally guided by a complex mix of pecuniary elements and non-pecuniary elements.[370] Any

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[368] *See* Securities Whistleblower Incentives and Protections Adopting Release, 76 FR at 34355, note 433.

[369] *Id*. An example of a non-pecuniary element is a sense of "doing the right thing."

[370] *See* Securities Whistleblower Incentives and Protections Adopting Release, 76 FR at 34355, note 433.

individual may come forward and provide information about possible violations if she is sufficiently motivated by non-pecuniary elements.[371]

The final rule could further help protect investors and the public from potential harm that may flow from the provision of a materially false, fictitious, or fraudulent statement or representation, or false writing or document with the intent of misleading or otherwise hindering the Commission or another governmental entity. This benefit could arise from the permanent bar as well as the deterrent effect that discourages conduct prohibited by Rule 21F-8(c)(7), each of which is mentioned above.

As noted above, nearly all commenters supported the proposed rule. One commenter recommended not allowing unlimited opportunities to withdraw applications deemed frivolous.[372] The Commission shares the commenter's view that the opportunities to withdraw frivolous applications should be limited. Granting unlimited opportunities to withdraw frivolous applications would not curtail the submission of frivolous claims and by lowering the cost of withdrawing, could give rise to more frivolous claims. Such an outcome likely would consume staff resources without generating commensurate benefits in terms of detecting securities violations and protecting investors. Thus, final Rule 21F-8(e) provides that an individual may withdraw the initial three applications that are deemed frivolous. The final rule balances efficiency of awards processing, providing fair notice to claimants of consequences of filing frivolous claims, and allowing a claimant—once informed that a claim has been determined frivolous—subsequently to submit a meritorious claim. In this regard, the process seeks to

[371] *Id*. and note 409.

[372] *See* Anonymous-9 Letter.

efficiently reject frivolous claims without unilaterally foreclosing the opportunity to submit information and potentially submit a meritorious claim.

7. Rule 21F-18

Rule 21F-18(a) provides that the Office of the Whistleblower may use a summary disposition process to deny any award application that falls within any of the following categories: (1) untimely award application[373]; (2) noncompliance with the requirements of Rule 21F-9, which concerns the manner for submitting a tip to qualify as a whistleblower and to be eligible for an award; (3) claimant's information was never provided to or used by the staff handling the covered action or the underlying investigation (or examination), and those staff members otherwise had no contact with the claimant; (4) noncompliance with Rule 21F-8(b), which requires an applicant to submit supplemental information that the Commission may require[374] and to enter into a confidentiality agreement; or (5) failure to specify in the award application the submission that the claimant made pursuant to Rule 21F-9(a) upon which the claim to an award is based. Rule 21F-18(b) specifies the procedures that shall apply to any award application designated for summary disposition.

The final rule could reduce the diversion of staff resources and time that it might otherwise take to process claims that may be rejected on straightforward grounds. An award application that is processed by the final summary disposition process would not require the CRS to review the record, issue a Preliminary Determination, consider any written response filed by the claimant, or issue the Proposed Final Determination; these functions would be assumed by the Office of the Whistleblower. The summary disposition process incorporates two other

[373] The time periods for submitting an award application are specified in Rule 21F-10(b) and Rule 21F-11(b).

[374] The authority to require additional information of an applicant is delegated to the Office of the Whistleblower. *See* Rule 21F-10(d).

modifications. *First*, the 30-day period for replying to a Preliminary Summary Disposition is shorter than the time period for replying to a Preliminary Determination provided for in Rules 21F-10(e)(2) and 21F-11(e)(2). This shorter period should be sufficient for a claimant to reply and is appropriate given that the matters subject to summary disposition should be relatively straightforward. *Second*, a claimant would not have the opportunity to receive the full administrative record upon which the Preliminary Summary Disposition was based. Instead, the Office of the Whistleblower would (to the extent appropriate given the nature of the denial) provide the claimant with a staff declaration that contains the pertinent facts upon which the Preliminary Summary Disposition is based. This modification from the record-review process specified in Rules 21F-10 and 21F-11 should still afford any claimant a sufficient opportunity to provide a meaningful reply to a Preliminary Summary Disposition. This should eliminate the delay that can arise when a claimant does not expeditiously request the record (which, in turn, delays the start of the 60-day period for a claimant to submit a response to a preliminary determination); elimination of these delays should help further expedite the summary adjudication process that we are adopting.

As with Rule 21F-8(e), staff resources that are freed up as a result of the final rule could be devoted to processing potentially meritorious award applications or with other work related to the whistleblower program. This, in turn, could expedite the processing of potentially meritorious award applications. To the extent that faster processing of potentially meritorious award applications motivates whistleblowing, individuals may be more likely to come forward and report potential violations as a result of the final rule.

We acknowledge the potential that certain aspects of the final rule might make it marginally more difficult for whistleblowers to respond to the denial of award applications

(specifically the shorter time period to respond to the Preliminary Summary Disposition). Thus, it could be possible that the final rule might reduce the whistleblowing incentives of those individuals who consider the ease of responding to award application denials when deciding whether to come forward and report potential violations.

However, certain factors substantially limit this potential for increased difficulties for whistleblowers. *First*, given that the matters subject to summary disposition should be relatively straightforward, we believe that the 30-day period for replying to a Preliminary Summary Disposition and the provision of a staff declaration (where applicable) should afford any claimant a sufficient opportunity to provide a meaningful reply to a Preliminary Summary Disposition. *Second*, as discussed above, the final rule may only be used to deny award applications that fall under certain restricted categories. *Third*, as discussed in the adopting release that accompanied the original whistleblower rules, whistleblowing is an individual decision that is generally guided by a complex mix of pecuniary elements and non-pecuniary elements.[375] Individuals who may be concerned with the ease of responding to award application denials may still come forward and provide information about possible violations if they are sufficiently motivated by non-pecuniary elements.

As noted above, commenters were mixed in their reception of the rule. Commenters who supported it underscored the possibility that the process would promote efficiency of resources, while some commenters opposed it due to the unclear effect it would have on the existing queue of claims. We note that staff from the Office of the Whistleblower have found that the categories encompassed by this rule have consumed a disproportionate amount of time and staff resources without a corresponding benefit. Based on this input, we believe this rule should allow staff to

[375] *See* Securities Whistleblower Incentives and Protections Adopting Release, 76 FR at 34355, note 433.

more efficiently process claims and deal with the existing queue of claims while continuing to provide appropriate due process to claimants.

8. Interpretive Guidance Regarding the Meaning and Application of "Independent Analysis" as Defined in Exchange Act Rule 21F-4(b)(3)

The interpretive guidance adopted in the final rule does not change the existing rules, but merely clarifies the meaning of "independent analysis" as that term is defined in Exchange Act Rule 21F-4 and utilized in the definition of "original information." As discussed earlier, a whistleblower's examination and evaluation of publicly available information does not constitute "analysis" if the facts disclosed in the public materials on which the whistleblower relies and in other publicly available information are sufficient to raise an inference of the possible violations alleged in the whistleblower's tip. In order for a whistleblower to be credited with "analysis," the whistleblower's examination and evaluation should contribute "significant independent information" that "bridges the gap" between the publicly available information and the possible securities violations. Assuming that a whistleblower's submission meets the threshold requirement that it constitutes "independent analysis," for the whistleblower to be eligible for an award the "information that … is derived from the … [whistleblower's] analysis" must also be of such high quality that it leads to a successful enforcement action.

The interpretive guidance could potentially reduce the whistleblowing incentives of those individuals who wish to satisfy the "independent analysis" prong of the "original information" requirement by examining publicly available information and providing observations that do not go beyond the information itself and reasonable inferences to be drawn therefrom. In light of the interpretive guidance, these individuals may decide not to provide such public information knowing that such information would not be credited as "independent analysis" and therefore not be eligible for a whistleblower award. While not qualifying as "independent analysis," to the

extent that the provision of reasonable inferences or observations that do not go beyond public information itself improves Commission enforcement or otherwise provides a benefit, any potential reduction in such provision could be a cost associated with the interpretive guidance. Nevertheless, individuals who are aware that public information would not be credited with "independent analysis" may still come forward and provide reasonable inferences or observations that do not go beyond public information itself to the Commission if they are sufficiently motivated by non-pecuniary elements.

The interpretive guidance could increase the whistleblowing incentives of those individuals who possess "significant independent information" that "bridges the gap" between publicly available information (and reasonable inferences therefrom) and the conclusion that possible securities violations are indicated, but, in the absence of the guidance, may have decided against reporting to the Commission because of the perceived ambiguity in the meaning of "independent analysis." To the extent that these individuals come forward and report such significant independent information to the Commission in light of the interpretive guidance, the quantity and quality of reported information might increase, which in turn might improve the Commission's ability to enforce the Federal securities laws, detect violations, and deter potential future violations. Further, the clarification afforded by the interpretive guidance might also reduce the number of award applications that are made solely on the basis of the provision of public information and do not meet the "independent analysis" threshold.

We are adopting an additional interpretation regarding information from sources that are technically public, but may be largely inaccessible to individuals without specialized knowledge. This additional guidance should benefit submitters of this type of information and others who devote substantial time and effort and develop unique insights from bringing together

information from multiple specialized or difficult-to-obtain sources. To the extent that the number of claims that fail to meet the "independent analysis" threshold declines as a result of the interpretive guidance, staff resources could be freed up and devoted to processing potentially meritorious award applications and other work related to the whistleblower program as discussed earlier.

C. Effects of the Rules on Efficiency, Competition, and Capital Formation

The Commission believes that the amendments make incremental changes to its whistleblower program. Thus, the Commission does not anticipate the effects on efficiency, competition, and capital formation to be significant. The Commission did not receive comments that address the discussion of efficiency, competition, and capital formation in the proposal.

The final rules could have a positive indirect impact on investment efficiency and capital formation by increasing the incentives of potential whistleblowers to provide information on possible violations.[376] Providing such information could increase the effectiveness of the Commission's enforcement activities. More effective enforcement could lead to earlier detection of violations and increased deterrence of potential future violations, which should assist in a more efficient allocation of investment funds.

Serious securities frauds, for example, can cause inefficiencies in the economy by diverting investment funds from more legitimate, productive uses. If investors fear theft, fraud, manipulation, insider trading, or conflicted investment advice, their trust in the markets will be low, in both the primary market for issuance and the secondary market for trading.[377] This

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[376] *See supra* Section VI.B. for a discussion of how final Rules 21F-2(d)(1)(iii), 21F-4(d)(3), 21F-6(c), 21F-8(e), 21F-18, and the interpretive guidance could increase whistleblowing incentives.

[377] Giannetti and Wang (2016) show that, after the revelation of corporate fraud in a state, household stock market participation in that state decreases. Households decrease holdings in fraudulent as well as nonfraudulent firms, even if they do not hold stocks in fraudulent firms. This finding is consistent with the revelation of corporate fraud

would prompt investors to demand a higher risk premium for holding securities, increasing the cost of raising capital and impairing capital formation (relative to the case where rules against such abuses were in effect and properly enforced and obeyed). To the extent that the final rules increase deterrence of potential future violations, investors' trust in the securities markets would also increase. This increased investor trust will promote lower capital costs as more investors enter the market, and as investors generally demand a lower risk premium due to a reduced likelihood of securities fraud.[378] This, too, should promote the efficient allocation of capital formation.

At the same time, some of the final rules could reduce whistleblowing incentives in certain cases, although any such reduction in whistleblowing incentives—to the extent that it occurs—is justified in light of the potential for positive indirect impact on investment efficiency and capital formation discussed above. Rule 21F-8(e) might reduce the whistleblowing incentives of (i) those individuals who are permanently barred under the final rule from submitting award applications and (ii) to a lesser extent, those individuals who have made fewer than three frivolous award applications. Additionally, Rule 21F-18 might reduce the whistleblowing incentives of those individuals who consider the ease of responding to award application denials when deciding whether to come forward and report potential violations. Further, the interpretive guidance might reduce the whistleblowing incentives of those individuals who wish to rely on the provision of solely public information to satisfy the "independent analysis" prong of the "original information" requirement for a whistleblower

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reducing investors' trust and participation in the stock market. *See* Mariassunta Giannetti and Tracy Yue Wang, Corporate scandals and household stock market participation, 71 J. Fin. 2591 (2016) (*available at* https://onlinelibrary.wiley.com/doi/full/10.1111/jofi.12399).

[378] *See* Ko, K. Jeremy, "Economics Note: Investor Confidence," October 2017 (*available at* https://www.sec.gov/files/investor_confidence_noteOct2017.pdf).

award. Yet these potential reductions in whistleblowing incentives may be limited for reasons discussed earlier.

We believe that Rule 21F-6(c) should enhance the whistleblowing incentives of those individuals who anticipate receiving awards that do not exceed $5 million by increasing their anticipated award to an amount of up to $5 million, and this in turn may have positive (albeit indirect) impacts on efficiency and capital formation.

The final rules could also improve other forms of efficiency. By permanently barring applicants that make frivolous or fraudulent award applications, final Rule 21F-8(e) could help free up staff resources that could be used to expedite the processing of potentially meritorious award applications as well as the payment of awards. As discussed previously, to the extent that faster award application processing and award payment motivate whistleblowing, individuals are more likely to come forward and report potential violations as a result of final Rule 21F-8(e) and final Rule 21F-18. To the extent that the final rules promote the timely reporting of possible violations by increasing whistleblowing incentives and prevent the provision of a materially false, fictitious, or fraudulent statement or representation, or a false writing or document with intent of misleading or otherwise hindering the Commission or another governmental entity, the efficiency and speed in detecting violations would be enhanced, which could reduce losses associated with the misuse of resources and hasten public disclosure of such violations to securities markets. To the extent that the final rule enables earlier public disclosure of violations, which, in turn, allow rapid incorporation of such news and information into prices and investors' information sets, price and allocative efficiency of capital markets could be improved.

Similar to the effects on capital formation, the effects of the final rules on competition would be indirect, and would flow from their effects on whistleblowing incentives. To the extent

that the final rules increase the likelihood of detecting misconduct by increasing whistleblowing incentives, the final rules could reduce the unfair competitive advantages that some companies can achieve by engaging in undetected violations.[379] Conversely, to the extent that the final rules decrease the likelihood of detecting misconduct by reducing whistleblowing incentives, the final rules could increase the unfair competitive advantages that some companies can achieve by engaging in undetected violations.

VII. Regulatory Flexibility Act

Section 603(a) of the Regulatory Flexibility Act[380] requires the Commission to undertake a regulatory flexibility analysis of rules it is adopting unless the Commission certifies that the rules would not have a significant economic impact on a substantial number of small entities.[381] In the Proposing Release the Commission requested public comment on its preliminary regulatory-flexibility analysis but received none.

Small authority is defined in 5 U.S.C. 601(6) to mean "small business," "small organization," and "small governmental jurisdiction" as defined in 5 U.S.C. 601(3) through (5). The definition of "small authority" does not include individuals. As explained in the Proposing Release, the rules apply only to an individual, or individuals acting jointly, who provide information to the Commission relating to the violation of the securities laws. Companies and other entities are not eligible to participate in the whistleblower program as whistleblowers. Consequently, the persons that will be subject to the amended rules are not "small entities" for purposes of the Regulatory Flexibility Act.

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[379] *See* 76 FR at 34362.

[380] 5 U.S.C. 603(a).

[381] 5 U.S.C. 605(b).

For the reasons stated above, the Commission certifies, pursuant to 5 U.S.C. 605(b) of the Regulatory Flexibility Act, that the rules would not have a significant economic impact on a substantial number of small entities.

VIII. Statutory Basis

The Commission is adopting rule amendments, as well as the removal of references to various forms, contained in this document under the authority set forth in Sections 3(b), 21F, and 23(a) of the Exchange Act.

List of Subjects

17 CFR Part 240

Administrative practice and procedure; Brokers; Confidential business information; Fraud Reporting and recordkeeping requirements; Securities; Swaps

17 CFR Part 249

Administrative practice and procedure; Brokers; Reporting and recordkeeping requirements; Securities

Text of the Amendments

For the reasons set out in the preamble, title 17, chapter II of the Code of Federal Regulations is amended to read as follows:

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq*., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C.

5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

Section 240.21F is also issued under Pub. L. 111-203, § 922(a), 124 Stat. 1841 (2010).

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2. Section 240.21F-2 is revised to read as follows:

§ 240.21F-2 Whistleblower status, award eligibility, confidentiality, and retaliation protections.

(a) *Whistleblower status*. (1) You are a whistleblower for purposes of Section 21F of the Exchange Act (15 U.S.C. 78u-6) as of the time that, alone or jointly with others, you provide the Commission with information in writing that relates to a possible violation of the federal securities laws (including any law, rule, or regulation subject to the jurisdiction of the Commission) that has occurred, is ongoing, or is about to occur.

(2) A whistleblower must be an individual. A company or other entity is not eligible to be a whistleblower.

(b) *Award eligibility*. To be eligible for an award under Section 21F(b) of the Exchange Act (15 U.S.C. 78u-6(b)) based on any information you provide that relates to a possible violation of the federal securities laws, you must comply with the procedures and the conditions described in §§ 240.21F-4, 240.21F-8, and 240.21F-9. You should carefully review those rules before you submit any information that you may later wish to rely upon to claim an award.

(c) *Confidentiality protections*. To qualify for the confidentiality protections afforded by Section 21F(h)(2) of the Exchange Act (15 U.S.C. 78u-6(h)(2)) based on any information you provide that relates to a possible violation of the federal securities laws, you must comply with the procedures and the conditions described in Rule 21F-9(a) (§ 240.21F-9(a)).

(d) *Retaliation protections*. (1) To qualify for the retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you must satisfy all of the following criteria:

(i) You must qualify as a whistleblower under paragraph (a) of this section before experiencing the retaliation for which you seek redress;

(ii) You must reasonably believe that the information you provide to the Commission under paragraph (a) of this section relates to a possible violation of the federal securities laws; and

(iii) You must perform a lawful act that meets the following two criteria:

(A) First, the lawful act must be performed in connection with any of the activities described in Section 21F(h)(1)(A)(i) through (iii) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)(i) through (iii)); and

(B) Second, the lawful act must relate to the subject matter of your submission to the Commission under paragraph (a) of this section.

(2) To receive retaliation protection for a lawful act described in paragraph (d)(1)(iii) of this section, you do not need to qualify as a whistleblower under paragraph (a) of this section before performing the lawful act, but you must qualify as a whistleblower under paragraph (a) of this section before experiencing retaliation for the lawful act.

(3) To qualify for retaliation protection, you do not need to satisfy the procedures and conditions for award eligibility in §§ 240.21F-4, 240.21F-8, and 240.21F-9.

(4) Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), including any rules promulgated thereunder, shall be enforceable in an action or proceeding brought by the Commission.

3. Amend § 240.21F-3 by revising paragraphs (b)(1) and (3) to read as follows:

§ 240.21F-3 Payment of awards.

* * * * *

(b) * * *

(1) A *related action* is a judicial or administrative action that is brought by one of the governmental entities listed in paragraphs (b)(1)(i) through (iii) of this section or a self-regulatory organization as specified in paragraph (b)(1)(iv) of this section (collectively "governmental/SRO authority"), that yields monetary sanctions, and that is based upon information that either the whistleblower provided directly to a governmental/SRO entity or the Commission itself passed along to the governmental/SRO entity pursuant to the Commission's procedures for sharing information, and which is the same original information that the whistleblower voluntarily provided to the Commission and that led the Commission to obtain monetary sanctions totaling more than $1,000,000.

(i) The Attorney General of the United States;

(ii) An appropriate regulatory authority (as defined in § 240.21F-4); or

(iii) A state Attorney General in a criminal case; or

(iv) A self-regulatory organization (as defined in § 240.21F-4).

* * * * *

(3) The following provision shall apply where a claimant's application for a potential related action may also involve a potential recovery from another whistleblower award program for that same action.

(i) Notwithstanding paragraph (b)(1) of this section, if a judicial or administrative action is subject to a separate monetary award program established by the Federal Government, a state

government, or a self-regulatory organization, the Commission will deem the action a related action only if the Commission finds (based on the facts and circumstances of the action) that its whistleblower program has the more direct or relevant connection to the action.

(ii) In determining whether a potential related action has a more direct or relevant connection to the Commission's whistleblower program than another award program, the Commission will consider the nature, scope, and impact of the misconduct charged in the potential related action, and its relationship to the Federal securities laws. This inquiry may include consideration of, among other things:

(A) The relative extent to which the misconduct charged in the potential related action implicates the public policy interests underlying the Federal securities laws (such as investor protection) rather than other law-enforcement or regulatory interests (such as tax collection or fraud against the Federal Government);

(B) The degree to which the monetary sanctions imposed in the potential related action are attributable to conduct that also underlies the Federal securities law violations that were the subject of the Commission's enforcement action; and

(C) Whether the potential related action involves state-law claims and the extent to which the state may have a whistleblower award program that potentially applies to that type of law-enforcement action.

(iii) If the Commission determines to deem the action a related action, the Commission will not make an award to you for the related action if you have already been granted an award by the governmental/SRO entity responsible for administering the other whistleblower award program. Further, if you were denied an award by the other award program, you will not be permitted to readjudicate any issues before the Commission that the governmental/SRO entity

responsible for administering the other whistleblower award program resolved against you as part of the award denial. Additionally, if the Commission makes an award before an award determination is finalized by the governmental/SRO entity responsible for administering the other award program, the Commission shall condition its award on the meritorious whistleblower making a prompt, irrevocable waiver of any claim to an award from the other award program.

4. Amend § 240.21F-4 by:

a. Revising paragraph (c)(2);

b. Adding paragraph (d)(3); and

c. Revising paragraph (e).

The revisions and addition read as follows:

§ 240.21F-4 Other definitions.

* * * * *

(c) * * *

* * * * *

(2) You gave the Commission original information about conduct that was already under examination or investigation by the Commission, the Congress, any other authority of the federal government, a state Attorney General or securities regulatory authority, any self-regulatory organization, or the PCAOB (except in cases where you were an original source of this information as defined in paragraph (b)(5) of this section), and your submission significantly contributed to the success of the action.

* * * * *

(d) * * *

* * * * *

(3) For purposes of making an award under §§ 240.21F-10 and 240.21F-11, the following will be deemed to be an administrative action and any money required to be paid thereunder will be deemed a monetary sanction under § 240.21F-4(e):

(i) A non-prosecution agreement or deferred prosecution agreement entered into by the U.S. Department of Justice; or

(ii) A similar settlement agreement entered into by the Commission outside of the context of a judicial or administrative proceeding to address violations of the securities laws.

(e) *Monetary sanctions* means:

(1) An order to pay money that results from a Commission action or related action and which is either:

(i) Expressly designated as a penalty, disgorgement, or interest; or

(ii) Otherwise ordered as relief for the violations that are the subject of the covered action or related action; or

(2) Any money deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.

* * * * *

5. Amend § 240.21F-6 by:

a. Revising the first sentence of the introductory text; and

b. Adding paragraph (c).

The revision and addition read as follows:

§ 240.21F-6 Criteria for determining amount of award.

In exercising its discretion to determine the appropriate award, the Commission may consider the following factors (and only the following factors) in relation to the facts and circumstances of each case in setting the dollar or percentage amount of the award. * * * * * * * * *

(c) *Additional considerations in connection with certain awards of $5 million or less*. (1) This subpart applies when the Commission is considering any meritorious award application where:

(i) The statutory maximum award of 30 percent of the monetary sanctions collected in any covered and related action(s), in the aggregate, is $5 million or less, and the Commission determines that it does not reasonably anticipate that future collections would cause the statutory maximum award to be paid to any whistleblower to exceed $5 million in the aggregate;

(ii) None of the negative award factors specified in paragraphs §§ 240.21F-6(b)(1) or 240.21F-6(b)(3) were found present with respect to the claimant's award application, and the award claim does not trigger § 240.21F-16 (concerning awards to whistleblowers who engage in culpable conduct);

(iii) The claimant did not engage in unreasonable reporting delay under § 240.21F-(6)(b)(2) (although the Commission, in its sole discretion, may in certain limited circumstances determine to waive this criterion if the claimant can demonstrate that doing so based on the facts and circumstances of the matter is consistent with the public interest, the promotion of investor protection, and the objectives of the whistleblower program); and

(iv) The Commission does not otherwise determine in its sole discretion that application of the enhancement afforded by this subpart would be inappropriate because either:

(A) The whistleblower's assistance in the covered action or related action (as assessed under § 240.21F-6(a) of this section) was, under the relevant facts and circumstances, limited; or

(B) Providing the enhancement would be inconsistent with the public interest, the promotion of investor protection, or the objectives of the whistleblower program.

(2) If the Commission determines that the criteria in § 240.21F-6(c)(1) are satisfied, the resulting payout to a claimant for the original information that the claimant provided that led to one or more successful covered or related action(s), collectively, will be the maximum allowed under the statute.

(3) Notwithstanding § 240.21F-6(c)(2), if two or more claimants qualify for an award in connection with any covered action or related action and at least one of those claimant's award applications qualifies under § 240.21F-6(c)(1), the aggregate amount awarded to all meritorious claimants will be the statutory maximum. In allocating that amount among the meritorious claimants, the Commission will consider whether an individual claimant's award application satisfies §§ 240.21F-6(c)(1)(ii) and 240.21F-6(c)(1)(iii).

6. Amend § Section 240.21F-7 by revising the introductory text of paragraph (a) to read as follows:

§ 240.21F-7 Confidentiality of submissions

(a) Pursuant to Section 21F(h)(2) of the Exchange Act (15 U.S.C. 78u-6(h)(2)) and § 240.21F-2(c), the Commission will not disclose information that could reasonably be expected to reveal the identity of a whistleblower provided that the whistleblower has submitted information utilizing the processes specified in § 240.21F-9(a), except that the Commission may disclose such information in the following circumstances:

* * * * *

7. Amend § 240.21F-8 by:

a. Revising the section heading;

b. Revising paragraph (c)(7); and

c. Adding paragraphs (d) and (e).

The revisions and additions read as follows:

§ 240.21F-8 Eligibility and forms.

* * * * *

(c) * * *

(7) The Commission or a court of competent jurisdiction finds that, in your whistleblower submission, your other dealings with the Commission (including your dealings beyond the whistleblower program and covered action), or your dealings with another governmental/SRO entity (as specified in § 240.21F-3(b)(1)) in connection with a related action, you knowingly and willfully made any materially false, fictitious, or fraudulent statement or representation, or used any false writing or document knowing that it contains any materially false, fictitious, or fraudulent statement or entry with intent to mislead or otherwise hinder the Commission or another governmental/SRO entity, provided that this provision should not apply if the Commission, in its discretion, finds it consistent with the public interest, the promotion of investor protection, and the objectives of the whistleblower program.

(d) The Commission may modify or revise Form TCR and Form WB-APP as provided below.

(1) The Commission will periodically designate on the Commission's web page a Form TCR (Tip, Complaint, or Referral) that individuals seeking to be eligible for an award through the process identified in § 240.21F-9(a)(2) shall use.

(2) The Commission will also periodically designate on the Commission's web page a Form WB-APP for use by individuals seeking to apply for an award in connection with a Commission-covered judicial or administrative action (15 U.S.C. 21F(a)(1)), or a related action (§ 240.21F-3(b)(1)).

(e) The Commission shall have the authority to impose a permanent bar on a claimant as provided below.

(1) *Grounds for a permanent bar.* Submissions or applications that are frivolous or fraudulent, or that would otherwise hinder the effective and efficient operation of the Whistleblower Program may result in the Commission issuing a permanent bar as part of a final order in the course of considering a whistleblower award application from you. If such a bar is issued, the Office of the Whistleblower will not accept or act on any other applications from you. A permanent bar may be issued in the following circumstances:

(i) If you make three or more award applications for Commission actions that the Commission finds to be frivolous or lacking a colorable connection between the tip (or tips) and the Commission actions for which you are seeking awards; or

(ii) If the Commission finds that you have violated paragraph (c)(7) of this section.

(2) *General procedures for issuance of a permanent bar.* The Commission will consider whether to issue a permanent bar in connection with an award application from you. In general, the Preliminary Determination or Preliminary Summary Disposition must state that a bar is being recommended, and you will then have an opportunity to respond in writing in accordance with the award processing procedures specified in §§ 240.21F-10(e)(2) and 240.21F-18(b)(3). If the basis for a bar arises or is discovered after the issuance of a Preliminary Determination or Preliminary Summary Disposition, the Office of the Whistleblower shall notify you and afford

you an opportunity to submit a response before the Commission determines whether to issue a bar.

(3) *Notice and opportunity to withdraw frivolous applications.* (i) Except as provided in paragraph (e)(3)(ii) of this section, before any Preliminary Determination or Preliminary Summary Disposition is issued that may recommend a bar, the Office of the Whistleblower shall advise you of any assessment by that Office that your award application is frivolous ("frivolous application") or based on a tip that lacks a colorable connection to the action for which you have sought an award ("noncolorable application"). If you withdraw your award application within 30 days of the notification from the Office of the Whistleblower, it will not be considered by the Commission in determining whether to exercise its authority under this paragraph (e).

(ii) The notification and opportunity to withdraw provided for by paragraph (e)(3)(i) are limited to the first three applications submitted by you that are reviewed by the Office of the Whistleblower and preliminarily deemed by that Office to be either a frivolous application or a noncolorable application. After these first three award applications, you will not be provided notice or an opportunity to withdraw any other frivolous or noncolorable applications.

(iii) For purposes of determining whether a bar should be imposed under section (e) of this rule, you will not be permitted to withdraw your application:

(A) After the 30-day period to withdraw has run following notice from the Office of the Whistleblower with respect to the initial three applications assessed by that Office to be frivolous or lacking a colorable connection to the action; or

(B) After a Preliminary Determination or Preliminary Summary Disposition has issued in connection with any other such application.

(4) *Award applications pending before December 7, 2020.*. (i) Paragraph (e) of this section shall apply to all award applications pending as of December 7, 2020, which is the effective date of paragraph (e) of this section. But with respect to any such pending award applications, the Office of the Whistleblower shall advise you, before any Preliminary Determination or Preliminary Summary Disposition is issued that may recommend a bar, of any assessment by that Office that the conditions for issuing a bar are satisfied because either:

(A) You submitted an award application prior to the effective date of this section (e) and that application is frivolous or lacking a colorable connection between the tip and the action for which you have sought an award; or

(B) You made a materially false, fictitious, or fraudulent statement or representation or used a false writing or document in violation of paragraph (c)(7) of this section prior to the effective date of this section (e).

(ii) If, within 30 days of the Office of the Whistleblower providing the foregoing notification, you withdraw the relevant award application(s), the withdrawn award application(s) will not be considered by the Commission in determining whether to exercise its authority under paragraph (e). Further, the procedures specified in paragraph (e)(3)(i) through (iii) of this section shall apply to any award application that is pending as of December 7, 2020 (which is the effective date of this rule) that is determined to be a frivolous or noncolorable application.

8. Amend § 240.21F-9 by:

a. Revising paragraphs (a) and (b); and

b. Removing the parenthetical phrase "(referenced in § 249.1800 of this chapter)" wherever it appears in paragraphs (c) introductory text, (c)(2), (c)(3), (c)(4), and (d); and

c. Adding paragraph (e).

The revisions read as follows:

§ 240.21F-9 Procedures for submitting original information.

(a) To submit information in a manner that satisfies § 240.21F-2(b) and § 240.21F-2(c) of this chapter you must submit your information to the Commission by any of these methods:

(1) Online, through the Commission's website located at www.sec.gov, using the Commission's electronic TCR portal (Tip, Complaint, or Referral);

(2) Mailing or faxing a Form TCR to the SEC Office of the Whistleblower at the mailing address or fax number designated on the SEC's webpage for making such submissions; or

(3) By any other such method that the Commission may expressly designate on its website as a mechanism that satisfies §§ 240.21F-2(b) and 240.21F-2(c) of this chapter. For a 30-day period following the Commission's designation of any new forms by placing them on the Commission's website, the Commission shall also continue to accept submissions made using the prior version of the forms.

(b) Further, to be eligible for an award, you must declare under penalty of perjury at the time you submit your information pursuant to paragraph (a)(1), (a)(2), or (a)(3) of this section that your information is true and correct to the best of your knowledge and belief.

* * * * *

(e) You must follow the procedures specified in paragraphs (a) and (b) of this section within 30 days of when you first provide the Commission with original information that you rely upon as a basis for claiming an award. If you fail to do so, then you will be deemed ineligible for an award in connection with that information (even if you later resubmit that information in accordance with paragraphs (a) and (b) of this section). Notwithstanding the foregoing, the Commission shall waive your noncompliance with paragraphs (a) and (b) of this section if:

(1) You demonstrate to the satisfaction of the Commission that you complied with the requirements of paragraphs (a) and (b) of this section within 30 days of first obtaining actual or constructive notice about those requirements (or 30 days from the date you retain counsel to represent you in connection with your submission of original information, whichever occurs first); and

(2) The Commission can readily develop an administrative record that unambiguously demonstrates that you would otherwise qualify for an award.

9. Amend § 240.21F-10 by revising paragraphs (b), (c), (d), and (e) to read as follows:

§ 240.21F-10 Procedures for making a claim for a whistleblower award in SEC actions that result in monetary sanctions in excess of $1,000,000.

* * * * *

(b) To file a claim for a whistleblower award, you must file Form WB-APP (as specified in § 240.21F-8(d)(2). You must sign this form as the claimant and submit it to the Office of the Whistleblower by mail, email (as a PDF attachment), or fax (or any other manner that the Office permits).

(1) All claim forms, including any attachments, must be received by the Office of the Whistleblower within ninety (90) calendar days of the date of the Notice of Covered Action in order to be considered for an award.

(2) Notwithstanding paragraphs (a) and (b)(1) of this section, the time period to file an application for an award based on a Commission settlement agreement covered by § 240.21F-4(d) of this chapter shall be governed exclusively by § 240.21F-11(b)(1) of this chapter if the settlement agreement was entered into after July 21, 2010 but before December 7, 2020 (which is the effective date of this section as amended in 2020).

(c) If you provided your original information to the Commission anonymously, you must disclose your identity on the Form WB-APP, and your identity must be verified in a form and manner that is acceptable to the Office of the Whistleblower prior to the payment of any award.

(d) Once the time for filing any appeals of the Commission's judicial or administrative action has expired, or where an appeal has been filed, after all appeals in the action have been concluded, one or more staff members designated by the Director of the Division of Enforcement ("Claims Review Staff") will evaluate all timely whistleblower award claims submitted on Form WB-APP in accordance with the criteria set forth in these rules. In connection with this process, the Office of the Whistleblower may require that you provide additional information relating to your eligibility for an award or satisfaction of any of the conditions for an award, as set forth in § 240.21F-8(b) of this chapter. Following a determination by the Claims Review Staff (and an opportunity for the Commission to review that determination), the Office of the Whistleblower will send you a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award dollar and percentage amount, and the grounds therefore.

(e) You may contest the Preliminary Determination made by the Claims Review Staff by submitting a written response to the Office of the Whistleblower setting forth the grounds for your objection to either the denial of an award or the proposed amount of an award. The response must be in the form and manner that the Office of the Whistleblower shall require. You may also include documentation or other evidentiary support for the grounds advanced in your response. In applying the award factors specified in § 240.21F-6 of this chapter and determining the award dollar and percentage amounts set forth in the Preliminary Determination, the award factors may be considered by the SEC staff and the Commission in dollar terms, percentage terms or some

combination thereof. Should you choose to contest a Preliminary Determination, you may set forth the reasons for your objection to the proposed amount of an award, including the grounds therefore, in dollar terms, percentage terms or some combination thereof.

(1) Before determining whether to contest a Preliminary Determination, you may:

(i) Within thirty (30) days of the date of the Preliminary Determination, request that the Office of the Whistleblower make available for your review the materials from among those set forth in § 240.21F-12(a) of this chapter that formed the basis of the Claims Review Staff's Preliminary Determination.

(ii) Within thirty (30) calendar days of the date of the Preliminary Determination, request a meeting with the Office of the Whistleblower; however, such meetings are not required and the office may in its sole discretion decline the request.

(2) If you decide to contest the Preliminary Determination, you must submit your written response and supporting materials within sixty (60) calendar days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (e)(1) of this section, then within sixty (60) calendar days of the Office of the Whistleblower making those materials available for your review.

* * * * *

10. Amend § 240.21F-11 by revising paragraphs (b), (c), (d), and (e) to read as follows:

§ 240.21F-11 Procedures for determining awards based upon a related action.

* * * * *

(b) You must also use Form WB-APP (as specified in § 240.21F-8(d)(2)) to submit a claim for an award in a potential related action. You must sign this form as the claimant and

submit it to the Office of the Whistleblower by mail, email (as a PDF attachment), or fax (or any other manner that the Office permits) as follows:

(1) If a final order imposing monetary sanctions has been entered in a potential related action at the time you submit your claim for an award in connection with a Commission action, you must submit your claim for an award in that related action on the same Form WB-APP that you use for the Commission action. For purposes of this paragraph and paragraph (b)(2) of this section, a final order imposing monetary sanctions is entered on the date of a court or administrative order imposing the monetary sanctions; however, with respect to any agreement covered by § 240.21F-4(d) of this chapter (such as a deferred prosecution agreement or a nonprosecution agreement entered by the Department of Justice), the Commission will deem the date of the entry of the final order to be the later of either:

(i) December 7, 2020, which is the effective date of this section as amended in 2020; or

(ii) The date of the earliest public availability of the instrument reflecting the arrangement if evidenced by a press release or similar dated publication notice (or otherwise, the date of the last signature necessary for the agreement).

(2) If a final order imposing monetary sanctions in a potential related action has not been entered at the time you submit your claim for an award in connection with a Commission action, you must submit your claim on Form WB-APP within ninety (90) days of the issuance of a final order imposing sanctions in the potential related action.

(c) The Office of the Whistleblower may request additional information from you in connection with your claim for an award in a related action to demonstrate that you directly (or through the Commission) voluntarily provided the governmental/SRO entity (as specified in § 240.21F-3(b)(1) of this chapter) the same original information that led to the Commission's

successful covered action, and that this information led to the successful enforcement of the related action. Further, the Office of the Whistleblower, in its discretion, may seek assistance and confirmation from the governmental/SRO entity in making an award determination.

(d) Once the time for filing any appeals of the final judgment or order in a potential related action has expired, or if an appeal has been filed, after all appeals in the action have been concluded, the Claims Review Staff (as specified in § 240.21F-10(d) of this chapter) will evaluate all timely whistleblower award claims submitted on Form WB-APP in connection with the related action. The evaluation will be undertaken pursuant to the criteria set forth in these rules. In connection with this process, the Office of the Whistleblower may require that you provide additional information relating to your eligibility for an award or satisfaction of any of the conditions for an award, as set forth in § 240.21F-(8)(b) of this chapter. Following a determination by the Claims Review Staff (and an opportunity for the Commission to review that determination), the Office of the Whistleblower will send you a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award percentage amount.

(e) You may contest the Preliminary Determination made by the Claims Review Staff by submitting a written response to the Office of the Whistleblower setting forth the grounds for your objection to either the denial of an award or the proposed amount of an award. The response must be in the form and manner that the Office of the Whistleblower shall require. You may also include documentation or other evidentiary support for the grounds advanced in your response. In applying the award factors specified in § 240.21F-6 of this chapter and determining the award dollar and percentage amounts set forth in the Preliminary Determination, the award factors may be considered by the SEC staff and the Commission in dollar terms, percentage terms or some

combination thereof. Should you choose to contest a Preliminary Determination, you may set forth the reasons for your objection to the proposed amount of an award, including the grounds therefore, in dollar terms, percentage terms or some combination thereof.

(1) Before determining whether to contest a Preliminary Determination, you may:

(i) Within thirty (30) days of the date of the Preliminary Determination, request that the Office of the Whistleblower make available for your review the materials from among those set forth in § 240.21F-12(a) of this chapter that formed the basis of the Claims Review Staff's Preliminary Determination.

(ii) Within thirty (30) days of the date of the Preliminary Determination, request a meeting with the Office of the Whistleblower; however, such meetings are not required and the office may in its sole discretion decline the request.

(2) If you decide to contest the Preliminary Determination, you must submit your written response and supporting materials within sixty (60) calendar days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (e)(1)(i) of this section, then within sixty (60) calendar days of the Office of the Whistleblower making those materials available for your review.

* * * * *

11. Amend § 240.21F-12 by:

a. Revising the introductory text of paragraph (a);

b. Amending paragraph (a)(2) by removing the parenthetical phrase "(referenced in § 249.1800 of this chapter)"; and

c. Revising paragraphs (a)(3) and (6).

The revisions read as follows:

§ 240.21F-12 Materials that may form the basis of an award determination and that may be included in the record on appeal.

(a) The following items constitute the materials that the Commission, the Claims Review Staff (as specified in § 240.21F-10(d) of this chapter), and the Office of the Whistleblower may rely upon to make an award determination pursuant to §§ 240.21F-21F-10, 240.21F-11, and 240.21F-18 of this chapter:

* * * * *

(3) The whistleblower's Form WB-APP, including attachments, any supplemental materials submitted by the whistleblower before the deadline to file a claim for a whistleblower award for the relevant Notice of Covered Action, and any other materials timely submitted by the whistleblower in response either

(i) To a request from the Office of the Whistleblower or the Commission; or

(ii) To the Preliminary Determination or Preliminary Summary Disposition that was provided to the claimant;

* * * * *

(6) Any other documents or materials from third parties (including sworn declarations) that are received or obtained by the Office of the Whistleblower to resolve the claimant's award application, including information related to the claimant's eligibility. (The Commission, the Claims Review Staff, and the Office of the Whistleblower may not rely upon information that the third party has not authorized the Commission to share with the claimant.)

* * * * *

12. Amend § 240.21F-13 by revising paragraph (b) to read as follows:

§ 240.21F-13 Appeals.

* * * * *

(b) The record on appeal shall consist of the Final Order, any materials that were considered by the Commission in issuing the Final Order, and any materials that were part of the claims process leading from the Notice of Covered Action to the Final Order (including, but not limited to, the Notice of Covered Action, whistleblower award applications filed by the claimant, the Preliminary Determination or Preliminary Summary Disposition, materials that were considered by the Claims Review Staff in issuing the Preliminary Determination or that were provided to the claimant by the Office of the Whistleblower in connection with a Preliminary Summary Disposition, and materials that were timely submitted by the claimant in response to the Preliminary Determination or Preliminary Summary Disposition). The record on appeal shall not include any pre-decisional or internal deliberative process materials that are prepared exclusively to assist the Commission and the Claims Review Staff (as specified in § 240.21F-10(d) of this chapter) in deciding the claim (including the staff's Proposed Final Determination or the Office of the Whistleblower's Proposed Final Summary Disposition, or any Draft Preliminary Determination or Draft Summary Disposition that were provided to the Commission for review). When more than one claimant has sought an award based on a single Notice of Covered Action, the Commission may exclude from the record on appeal any materials that do not relate directly to the claimant who is seeking judicial review.

13. Add § 240.21F-18 to read as follows:

§ 240.21F-18 Summary disposition.

(a) Notwithstanding the procedures specified in § 240.21F-10(d) through (g) and in § 240.21F-11(d) through (g) of this chapter, the Office of the Whistleblower may determine that an award application that meets any of the following conditions for denial shall be resolved through the summary disposition process described further in paragraph (b) of this section:

(1) You submitted an untimely award application;

(2) You did not comply with the requirements of § 240.21F-9 of this chapter when submitting the tip upon which your award claim is based, and you otherwise are not eligible for a waiver under either § 240.21F-9(e) or the Commission's other waiver authorities;

(3) The information that you submitted was never provided to or used by the staff handling the covered action or the underlying investigation (or examination), and those staff members otherwise had no contact with you;

(4) You did not comply with § 240.21F-8(b) of this chapter;

(5) You failed to specify in the award application the submission pursuant to § 240.21F-9(a) of this chapter upon which your claim to an award is based;

(6) Your application does not raise any novel or important legal or policy questions.

(b) The following procedures shall apply to any award application designated for summary disposition:

(1) The Office of the Whistleblower shall issue a Preliminary Summary Disposition that notifies you that your award application has been designated for resolution through the summary disposition process. The Preliminary Summary Disposition shall also state that the Office has preliminarily determined to recommend that the Commission deny the award application and identify the basis for the denial.

(2) Prior to issuing the Preliminary Summary Disposition, the Office of the Whistleblower shall prepare a staff declaration that sets forth any pertinent facts regarding the Office's recommendation to deny your application. At the same time that it provides you with the Preliminary Summary Disposition, the Office of the Whistleblower shall, in its sole discretion, either

(i) Provide you with the staff declaration; or

(ii) Notify you that a staff declaration has been prepared and advise you that you may obtain the declaration only if within fifteen (15) calendar days you sign and complete a confidentiality agreement in a form and manner acceptable to the Office of the Whistleblower pursuant to § 240.21F-8(b)(4) of this chapter. If you fail to return the signed confidentiality agreement within fifteen (15) calendar days, you will be deemed to have waived your ability to receive the staff declaration.

(3) You may reply to the Preliminary Summary Disposition by submitting a response to the Office of the Whistleblower within thirty (30) calendar days of the later of:

(i) The date of the Preliminary Summary Disposition, or

(ii) The date that the Office of the Whistleblower sends the staff declaration to you following your timely return of a signed confidentiality agreement. The response must identify the grounds for your objection to the denial (or in the case of item (a)(5) of this section, correct the defect). The response must be in the form and manner that the Office of the Whistleblower shall require. You may include documentation or other evidentiary support for the grounds advanced in your response.

(4) If you fail to submit a timely response pursuant to paragraph (b)(3) of this section, the Preliminary Summary Disposition will become the Final Order of the Commission. Your failure to submit a timely written response will constitute a failure to exhaust administrative remedies.

(5) If you submit a timely response pursuant to paragraph (b)(3) of this section, the Office of the Whistleblower will consider the issues and grounds advanced in your response, along with any supporting documentation that you provided, and will prepare a Proposed Final Summary Disposition. The Office of the Whistleblower may supplement the administrative record as

appropriate. (This provision does not prevent the Office of the Whistleblower from determining that, based on your written response, the award claim is no longer appropriate for summary disposition and that it should be resolved through the claims adjudication procedures specified in either §§ 240.21F-10 or 240.21F-11 of this chapter).

(6) The Office of the Whistleblower will then notify the Commission of the Proposed Final Summary Disposition. Within thirty (30) calendar days thereafter, any Commissioner may request that the Proposed Final Summary Disposition be reviewed by the Commission. If no Commissioner requests such a review within the 30-day period, then the Proposed Final Summary Disposition will become the Final Order of the Commission. In the event a Commissioner requests a review, the Commission will consider the award application and issue a Final Order.

(7) The Office of the Whistleblower will provide you with the Final Order of the Commission.

(c) In considering an award determination pursuant to this rule, the Office of the Whistleblower and the Commission may rely upon the items specified in § 240.21F-12(a) of this chapter. Further, § 240.21F-12(b) of this chapter shall apply to summary dispositions.

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

14. The general authority citation for part 249 continues to read as follows, and sectional authorities for 249.1800 and 249.1801 are removed:

Authority: 15 U.S.C. 78a *et seq*. and 7201 *et seq*.; 12 U.S.C. 5461 *et seq*.; 18 U.S.C. 1350; Sec. 953(b), Pub. L. 111-203, 124 Stat. 1904; Sec. 102(a)(3), Pub. L. 112-106, 126 Stat. 309 (2012); Sec. 107, Pub. L. 112-106, 126 Stat. 313 (2012), and Sec. 72001, Pub. L. 114-94, 129 Stat. 1312 (2015), unless otherwise noted.

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Subpart S—[Removed and Reserved]

15. Remove and reserve Subpart S, consisting of §§249.1800 through 249.1801.

By the Commission.

Dated: September 23, 2020.

Vanessa A. Countryman,

Secretary.