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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-95620; File No. S7-07-22]

RIN 3235-AN03

Whistleblower Program Rules

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("SEC" or "Commission") is adopting amendments to the Commission's rules implementing its whistleblower program. Section 21F of the Securities Exchange Act of 1934 ("Exchange Act") and the Commission's implementing rules provide that the Commission shall pay an award 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 non-SEC related action. The amendments: expand the scope of related actions eligible for an award under the Commission's whistleblower program; clarify that the Commission may use its statutory authority under Section 21F to consider the dollar amount of a potential award to increase an award but provide that the Commission will not use any statutory authority it might have to decrease the amount of an award; and make several conforming changes and technical corrections.

DATES: The final rules are effective October 3, 2022. These amendments will apply to any whistleblower award application that is pending with the Commission as of that date, and to all future-filed award applications.

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SUPPLEMENTARY INFORMATION: The Commission is amending the rules listed in the table below.

Amendments	
Commission Reference	CFR Citation (17 CFR)
Rule 21F-3	§ 240.21F-3
Rule 21F-4	§ 240.21F-4
Rule 21F-6	§ 240.21F-6
Rule 21F-8	§ 240.21F-8
Rule 21F-10	§ 240.21F-10
Rule 21F-11	§ 240.21F-11

I. Introduction

The Commission's whistleblower rules, which are codified at 17 CFR 240.21F-1 through 17 CFR 240.21F-18, provide the operative definitions, requirements, standards, and processes implementing the SEC's whistleblower program. The amendments being adopted make several changes to those rules.

First, the Commission is amending 17 CFR 240.21F-3(b)(3) or Rule 21F-3(b)(3)(hereinafter "the Multiple-Recovery Rule") to revise the definition of "related action." A whistleblower may be eligible for an award from the SEC for certain non-SEC actions that meet the definition of a related action under our rules. The Multiple-Recovery Rule currently provides that when both the SEC's award program and another award program might apply to a non-SEC action, that action will be deemed a related action for purposes of an award from the Commission only if the SEC's whistleblower program has the "more direct or relevant connection" to the action. The amended Multiple-Recovery Rule provides additional circumstances in which a non-SEC action may qualify as a related action without regard to whether the Commission's program has the more direct or relevant connection to the action. Specifically, under the amended Multiple-Recovery Rule, a non-SEC action may qualify as a related action:

- When the non-SEC award program has an award range or fixed-dollar award cap that could yield an award that is meaningfully lower than what could be awarded under the Commission's whistleblower program;
- When the decision to grant an award under the non-SEC program is discretionary, even when any specified award criteria and eligibility requirements have been satisfied; and

- When the maximum award the Commission could potentially pay on the non-SEC action does not exceed $5 million ("$5-million provision").

Second, the Commission is amending Rule 21F-6, which concerns the Commission's discretion to apply award factors and set award amounts. A new paragraph 21F-6(d) provides that the Commission may exercise its authority to consider the dollar amount of a potential award when making an award determination only for the purpose of increasing, not decreasing, the award amount.

The Commission is also adopting conforming amendments to Rules 21F-10 and 21F-11, as well as technical revisions to Rules 21F-4(c) and 21F-8 that correct errors in the rule text.

II. Description of Final Rule Amendments

A. Rule 21F-3(b)(3) amendments concerning non-SEC actions that involve at least one other award program

Under Exchange Act Section 21F, a whistleblower who obtains an award based on a Commission covered action also may be eligible for an award based on monetary sanctions that are collected in a related action. Exchange Act Section 21F(a)(5) and Exchange Act Rule 21F-3(b)(1) provide that a non-SEC judicial or administrative action must meet certain conditions to potentially qualify as a related action. First, the action must be brought by the United States Department of Justice ("DOJ"), an appropriate regulatory authority (as defined in Exchange Act Rule 21F-4(g)), a self-regulatory organization (as defined in Exchange Act Rule 21F-4(h)), or a state attorney general in a criminal case. Second, the same original information that the whistleblower gave to the Commission must also have led to the successful enforcement of the non-SEC action.

The Multiple-Recovery Rule imposes additional requirements for a non-SEC action to qualify as a related action where both the SEC's whistleblower program and at least one other, separate whistleblower program could potentially apply to the action. Rule 21F-3(b)(3) authorizes the Commission to pay an award on such an action only if the Commission determines that the SEC's whistleblower program has the more direct or relevant connection to the non-SEC action based on: (i) the relative extent to which the misconduct involved in the non-SEC action implicates the policy considerations underlying the Federal securities laws (such as investor protection) rather than other law-enforcement or regulatory interests; (ii) the degree to which the monetary sanctions imposed in the non-SEC action are attributable to conduct that also underlies the Federal-securities-law violations that were the subject of the SEC's covered action; and (iii) whether the non-SEC action involves state-law claims, as well as the extent to which the state may have a whistleblower award program that applies to that type of law-enforcement action.[1]

1. Proposed Rule

The Commission proposed to revise the Multiple-Recovery Rule to identify a limited number of additional circumstances under which a non-SEC action constitutes a related action for award purposes. The principal proposed revision was referred to as the "Comparability Approach," and was intended to help ensure that the Multiple-Recovery Rule would not reduce

[1] Another provision of the Multiple-Recovery Rule directs that if a related-action claimant has already received an award from another program, that claimant may not receive an award or payment from the Commission. Relatedly, the Multiple-Recovery Rule provides that if a related-action claimant was denied an award from the other program, the claimant will not be able to re-adjudicate any fact decided against the claimant by the other program. And if the Commission decides that its whistleblower program has the more direct or relevant connection to the non-SEC action, the Multiple-Recovery Rule provides that no payment will be made on the award unless the claimant promptly and irrevocably waives any claim to an award from the other program. The amendments will not impact these existing terms of the Multiple-Recovery Rule.

whistleblowers' incentive to come forward, or place an undue burden on whistleblowers as a result of having come forward.[2]

The proposing release explained that the Comparability Approach would allow the Commission to treats a non-SEC action as a related action if the maximum potential monetary award from the alternative award program would be "meaningfully lower" than the maximum potential award from the Commission's program (*i.e.*, 30 percent "in total, of what has been collected of the monetary sanctions imposed"). The meaningfully lower standard could be triggered either because the other program involves a different award range or imposes a fixed-dollar award cap. The proposed Comparability Approach would also authorize the Commission (without regard to which program has the more direct or relevant connection) to treat a non-SEC action as a related action if the decision whether to issue an award under the other program is entirely discretionary.

To incorporate these aspects of the Comparability Approach into the Multiple-Recovery Rule, the Commission proposed to amend the opening sentence of Rule 21F-3(b)(3) to provide that the Multiple-Recovery Rule would not apply unless the other whistleblower program qualifies as a "comparable whistleblower program." A comparable whistleblower program would be defined, in turn, as an award program that: (i) does not have an award range or fixed-dollar award cap that would restrict the maximum potential award to an amount that is meaningfully lower than the maximum or minimum potential award to all eligible claimants (in dollar terms) that the Commission could make on the particular action; or (ii) does not afford the

[2] The Multiple-Recovery Rule is designed to prevent the Commission's award program from displacing the important role that Congress intended for other whistleblower programs and to further the Commission's desire to continue to be a careful steward of the Investor Protection Fund ("IPF"), from which Commission awards are paid. The Comparability Approach is narrowly targeted to preserve the underlying goals of the Multiple-Recovery Rule.

entity administering the other program with discretion to deny an award even if the established eligibility requirements and award criteria have been satisfied.

The Commission further proposed that, under the Comparability Approach, the Multiple-Recovery Rule would be amended so that the Commission would deem a matter eligible for related-action status (without regard to which program has the more direct or relevant connection to the action) if the maximum award the Commission could under any circumstances be required to pay to all whistleblowers in connection with the non-SEC action would not exceed $5 million. As the Commission explained, this would occur when 30 percent of the monetary sanctions imposed in the non-SEC action would be a sum that is $5 million or less.[3]

Although the Comparability Approach was the principal proposal offered for public comment, the Commission identified three other possible alternatives: the "Whistleblower's Choice Option," the "Offset Approach," and the "Topping-Off Approach." Under both the Whistleblower's Choice Option and the Offset Approach, current Rule 21F-3(b)(3) would be repealed in its entirety. The Whistleblower's Choice Option would allow a whistleblower, after having received award determinations from the Commission and the entity administering the other program, to decide which award to accept (but the Commission would condition any payment from its program on the whistleblower first making an irrevocable waiver of any claim to an award from the other program). Under the Offset Approach, the Commission could make an award on a non-SEC action notwithstanding the potential that another program might make

[3] To ensure that a claimant would not receive multiple awards for the same non-SEC action, the proposed amendments would require that a claimant make an irrevocable waiver of any claim to an award from the other program within 60 calendar days of receiving notice of the Commission's award, and would also require the claimant to demonstrate compliance with the irrevocable-waiver requirement. The proposed amendments also provided that failure to comply with any of the terms or conditions of the amended rule could result in the claimant becoming ineligible for an award from the Commission on the non-SEC action (notwithstanding any prior award notice).

and pay an award on that same action, but the Commission would offset its payment by any amount another program pays on the same action. Under the Topping-Off Approach, the current framework of the Multiple-Recovery Rule would be retained but the Commission would have the discretion to increase the award amount on the Commission's own covered action (up to a total award of 30 percent of the monetary sanctions imposed) if the Commission concluded that the other program's award for the non-SEC action was inadequate.

2. Comments Received

Virtually all of the commenters supported modifying the Multiple-Recovery Rule to encompass additional circumstances in which non-SEC actions qualify as related actions, with some offering a view on which of the four proposed alternatives would be the best option.[4]

The commenters generally favored either the Comparability Approach or the Whistleblower's Choice Option,[5] though two commenters supported the Offset Approach, one commenter expressed a preference for the Topping-Off Approach, and several other commenters offered their own proposed approaches.[6]

A number of commenters favored the Comparability Approach. One stated that this approach "strikes the appropriate balance between ensuring that qualified whistleblowers are not subject to a diminished award due to a weaker alternative whistleblower program while also

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4 *See, e.g.*, Anonymous (Apr. 12, 2022) (stating the "four proposed approaches to address related action claims" are a "well thought-out and flexible strategy that seem designed to improve related action award determinations"); Eileen Morrell (Apr. 11, 2022) (expressing general support for the proposed changes but not identifying a preference among the four Rule 21F-3(b)(3) alternatives that were offered for public comment).

5 One commenter made a general observation applicable to both the Comparability Approach and the Whistleblower's Choice Option that a claimant failing to comply with the irrevocable waiver or notice provisions of these proposed approaches "should not be wholly disqualified from [a] reward unless egregious or malicious noncompliance is evidenced." Mark C. (Feb. 19, 2022). The proposed rule text for both options would permit the Commission in its discretion to factor these considerations into any determination relating to a claimant's non-compliance.

6 *See infra* notes 27-34.

limiting the ability of whistleblowers to obtain a double recovery in a related action."[7] Another commenter stated that the Comparability Approach would be "extremely practical" in situations where the award range is different, the other program has a fixed-dollar award cap, or the other program "is discretionary[,] not mandatory[.]"[8] A third commenter expressed a preference for the Comparability Approach because it may impose less of an administrative burden on the staff and agency than the other proposals.[9]

A few commenters raised concerns about the Comparability Approach. One stated that the Comparability Approach is "confusing" and "would be difficult to administer."[10] But a different commenter offered a contrary view, stating that "[t]he Comparability Approach is laid out in a way that is easy to follow and understand how a whistleblower will be awarded by the SEC over another program."[11] And another commenter stated that the Comparability Approach was suboptimal because it "would result in . . . a penalty in situations in which the other whistleblower program was found to be 'comparable' and has the 'more direct or relevant connection'" to the non-SEC action "yet provides for a smaller award than the SEC would provide."[12]

Several commenters addressed specific elements of the Comparability Approach. For example, one commenter suggested that the $5-million provision of the Comparability Approach

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7 NWC (Apr. 7, 2022) ("NWC supports the Comparability Approach proposed by the Commission.").

8 Anonymous-2 (Feb. 19, 2022).

9 Mark C. (Feb. 19, 2022).

10 Kohn, Kohn & Colapinto, LLP (Mar. 22, 2022) ("The better choice is [Whistleblower's Choice] which sets forth clear standards and procedures.").

11 Talia Finamore (Apr. 3, 2022).

12 Cohen, Milstein, Sellers & Toll PLLC (Apr. 8, 2022). This commenter did state, however, that "each of the proposed alternatives represents improvements over the [existing] Multiple-Recovery Rule[.]"

should be replaced with a provision authorizing the Commission to treat *any* non-SEC action that might implicate another award program as a potential related action for which the Commission would agree to pay an award equal to "a minimum of 5% and maximum of 10% of the total amount of monetary sanctions recovered" in that non-SEC action. The commenter stated that refashioning this aspect of the Comparability Approach would be "fair[er]" for larger actions that would otherwise be excluded under the $5-million provision.[13] Similarly, another commenter recommended that, instead of $5 million or some other fixed dollar amount, a percentage-based maximum might be better in case the whistleblower program rules are not regularly updated in the future.[14] One commenter recommended that if the Comparability Approach is adopted, it should authorize an award whenever the total payout for the SEC's action and the non-SEC action would not collectively exceed $20 million.[15]

Several commenters addressed the meaningfully lower standard for determining whether an alternative program is comparable.[16] One such commenter explained that a benefit of the meaningfully lower standard is that it would allow the Commission to "consider[] a whistleblower's financial circumstances when they volunteer information to the Commission."[17] Another commenter recommended that the meaningfully lower standard must always be

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13 *Id.*

14 Mark C. (Feb. 19, 2022). Unlike the prior commenter, this commenter did not offer a suggestion of a particular percentage figure (or range).

15 Kohn, Kohn, and Colapinto (Apr. 11, 2022).

16 No commenter recommended replacing the meaningfully lower standard with a fixed number or percentage.

17 Cornell Securities Law Clinic (Apr. 11, 2022). This commenter also opposed a fixed-dollar or percentage amount in lieu of the meaningfully lower standard "because of the law of diminishing marginal returns." This commenter suggested that the meaningfully lower standard should focus on capturing award differences "that are substantial enough to incentivize whistleblowers to volunteer pertinent information, often at the risk of their careers."

understood to encompass an award from another program that is "less than 10%" of the monetary sanctions collected in the non-SEC action.[18]

One commenter recommended that if another award program lacks the confidentiality protections that the SEC's program affords, then it should not be deemed comparable.[19] As support, the commenter stated that "Congress adopted very specific procedures that permit the SEC to forward information to alternative government programs that also protect the identity of the whistleblower and require these alternative government agencies to adhere to the [Section 21F(h)(2)] confidentiality rules."[20]

Several commenters supported the Whistleblower's Choice Option. One stated that a benefit of that approach is that if "either whistleblower rewards program is proposing to issue an award that the whistleblower feels is inadequate, then he/she has the choice of which program they want to [pay] the award based on their own determination."[21] Similarly, another commenter stated that whistleblowers "should get to decide which [award] they receive."[22] And one commenter stated that the Whistleblower's Choice Option is preferable because it would: (1) have the Commission focus only on "the merits and eligibility of the whistleblower under the requirements of just the SEC program," because "[w]hether or not another program applies

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18 Kohn, Kohn & Colapinto, LLC (Apr. 11, 2022).

19 Kohn, Kohn & Colapinto, LLP (Apr. 11, 2022) ("The right to confidentiality must be part of any 'comparable' related action." (emphasis in original)).

20 *Id.*

21 Anonymous-2 (Feb. 19, 2022). *See also* Cohen, Milstein, Sellers & Toll PLLC (Apr. 8, 2022) (stating that the Whistleblower's Choice Option was the only option under which whistleblowers would under no circumstances be at risk of being "penalized" by being required to take an award from another agency "when their information leads to a related action recovery that implicates both the SEC's and another agency's whistleblower program"); Laura Bonomini (Mar. 21, 2022) (stating that the Whistleblower's Choice Option would "give[] the meritorious whistleblower agency over their own claim").

22 Talia Finamore (Apr. 3, 2022).

should not impact the SEC's ultimate decision" for an award determination; and (2) make "the process more clear, straightforward, and understandable for the average claimant[]" by removing "a step from how the Commission currently processes claims[.]"[23] Finally, a commenter stated that under the Whistleblower's Choice Option "whistleblowers will no longer intentionally withhold certain applications or information out of fear that the eventual awards will be severely limited by another program's restrictions because they will be allowed to choose the most favorable [award] option."[24]

One commenter identified the risk that the Whistleblower's Choice Option could lead to award-processing delays because any payment of an award would depend on both the Commission's program and the alternative award program issuing their award determinations before a claimant could decide which of the awards to accept.[25] Several other commenters identified potential modifications to the Whistleblower's Choice Option, including revising the Whistleblower's Choice Option so that a whistleblower could receive *both* a full award from the Commission and an award from the other agency that is 10 percent or less "of the sanction" collected in the non-SEC action. According to the commenter, this 10-percent exception from the general multiple-recovery prohibition embodied in the Whistleblower's Choice Option is reasonable because it would permit only a relatively *de minimis* separate recovery, and it would

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[23] Laura Bonomini (Mar. 21, 2022). *See also* Cornell Securities Law Clinic (Apr. 11, 2022) (stating that by eliminating the need to assess which program has a more "direct or relevant" connection to a case, or to assess the comparability of another program to the Commission's program in connection with a particular application, the Whistleblower's Choice Option would enhance "administrative efficiency" and "reduc[e] administrative costs"); Kohn, Kohn & Colapinto, LLP (Mar. 22, 2022) (stating that the Whistleblower's Choice Option would be "less confusing and simpler to implement" than the other approaches proposed).

[24] Cornell Securities Law Clinic (Apr. 11, 2022) (explaining that in "cases where the alternative programs provide significantly fewer financial incentives than the Commission's Program (*i.e.*, absolute dollar ceilings for awards), it becomes very plausible that some potential-whistleblowers may make certain application decisions (*i.e.*, withholding certain information) to avoid pitfalls that will severely limit their financial award later on").

[25] Talia Finamore (Apr. 3, 2022).

be appropriate to permit a whistleblower to "accept[] a small award" payment from the other program without being subjected to mandatory disqualification under the SEC's program.[26]

Two commenters supported the Offset Approach. One stated, without explanation, that the Offset Approach could produce more prompt awards and perhaps further incentivize whistleblowers to come forward.[27] The other commenter stated that the Offset Approach is a "good option as it allows the whistleblower to receive money from both programs but not actually double dip."[28] But a commenter opposing the Offset Approach stated that it could violate the principle underlying proposed Rule 21F-6(d) that would prohibit the Commission from considering dollar amounts when adjusting award amounts downward.[29]

One commenter supported the Topping-Off Approach, stating, without explanation, that it could produce prompt awards.[30] Another commenter opposed the Topping-Off Approach, however, stating that "[t]he topping-off approach feels confusing in how it would be implemented[.]"[31]

Beyond the four approaches discussed above, several commenters included recommendations for other approaches. Two commenters stated that whistleblowers should be allowed to receive awards from all programs for which they qualify, even if this could result in

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[26] Kohn, Kohn & Colapinto, LLP (Mar. 22, 2022). *See also* Kohn, Kohn & Colapinto, LLP (Apr. 11, 2022) (stating that the Commission should not bar a whistleblower from receiving a related-action award if the whistleblower received a payment from another agency that is below the 10-percent minimum award authorized by Section 21F of the Exchange Act, unless the whistleblower knowingly and voluntarily waived a right to a Commission related-action award).

[27] John Lao (Feb. 20, 2022).

[28] Talia Finamore (Apr. 3, 2022). This commenter acknowledged, however, that a potential difficulty with the Offset Approach is that it could take more processing time as it requires the other award program to make an award determination before the Commission could complete its award determination.

[29] Andres Rodriquez (Apr. 3, 2022).

[30] John Lao (Feb. 20, 2022).

[31] Talia Finamore (Apr. 3, 2022).

the aggregate payout to whistleblowers for the non-SEC action exceeding 30 percent of the sanctions collected in the action.[32] According to one of these commenters, the Commission should effectuate this by "simply rescinding the Multiple-Recovery Rule."[33] Another commenter recommended that "all whistleblower reports for publicly traded companies should be considered for SEC program awards" irrespective of whether another program might have the more direct or relevant connection to the non-SEC action in question.[34]

3. Final Rule

The Commission is adopting the Comparability Approach as proposed, because it is a practical, targeted modification of the Multiple-Recovery Rule that will provide additional incentives to encourage individuals to report potential violations of the federal securities laws when another program has a statutory cap, significantly lower award range, or discretionary award structure.[35] The Commission agrees with the statement that the Comparability Approach

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[32] Anonymous (Feb. 8, 2022); Better Markets (Apr. 11, 2022). *See also* Andres Rodriquez (Apr. 3, 2022) (suggesting an approach "whereby a whistleblower would receive the full amount of monetary awards by the [C]ommission in instances where whistleblowers also receive awards from other comparable programs").

[33] This commenter asserted that the Commission may lack statutory authority "to deny an award for a related action" merely because another award program might also apply and might make an award too. Better Markets (Apr. 11, 2022) (stating that the "plain language" of Section 21F makes related-action award payments mandatory and that, while the statute "establishe[s] the circumstances under which the SEC must deny an award," none of those involves the potential application of another award program). The commenter goes on to recommend that if the Commission declines to rescind the Multiple-Recovery Rule, the "optimal" alternative is the Whistleblower's Choice Option. The commenter states that "the other proposed approaches leave[] open the possibility that the SEC will not, itself, make an award to an otherwise eligible whistleblower for a related action," which (according to the commenter) "conflicts with the letter and spirit of" Section 21F.

[34] Joshua Moran (Apr. 12, 2022) (stating that it "is unclear what other programs exist that would be more relevant" where a publicly traded company is involved).

[35] The Commission is not persuaded that the Comparability Approach "would result in . . . a penalty in situations where" the other program is comparable and a whistleblower is required to seek an award from that other program. Cohen, Milstein, Sellers & Toll PLLC (Apr. 8, 2022). The commenter states that a penalty would result because the other program "provides for a smaller award than the SEC would provide." But to qualify as a comparable program the alternative program would have to have a structure that could result in awards comparable to those that could be made by the Commission, so any "smaller award" would not be a product of the other award program's award structure. Rather, any risk of a "smaller award" presumably would reflect the potential that the Commission and the other program might reach different conclusions about the appropriate award amount after an assessment of the facts and circumstances underlying a particular award application.

"strikes the appropriate balance between ensuring that qualified whistleblowers are not subject to a diminished award due to a weaker alternative whistleblower program while also limiting the ability of whistleblowers to obtain a double recovery" in a non-SEC action.[36] The Commission also agrees that, as one commenter stated, "[t]he Comparability Approach is laid out in a way that is easy to follow and understand" for whistleblowers to assess when they might be awarded more for a non-SEC action "by the SEC's program instead of another award program, and vice versa."[37]

Although the comments made thoughtful arguments in support of the Whistleblower's Choice Option, the Offset Approach, and the Topping-Off Approach, the Commission on balance finds each of these alternatives less desirable given various competing considerations. As a threshold matter, these three alternatives could add significant delay to the processing of applications and/or payment of awards, because each could require the Commission to defer any award until the other program has made an award determination.[38] Under the whistleblower program that is administered by the Internal Revenue Service ("IRS"), for example, final decisions cannot "be made until proceeds resulting from the action(s) have been collected" and, even then, a final decision may be postponed until the multi-year "statutory period for [a

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And this resulting risk of a smaller award in any particular case is in any event counterbalanced by the potential that the other program might view the particular award application more favorably than the Commission might.

36 NWC (Apr. 7, 2022).

37 Talia Finamore (Apr. 3, 2022).

38 The proposing release briefly posited that the Whistleblower's Choice Option would not result in delay due to another award program's delays in making an award-determination. For the reasons explained above, however, the Commission agrees with a commenter's observation that Whistleblower's Choice would add delays to the processing time for awards. *See* Talia Finamore (Apr. 3, 2022). The proposing release did observe, however, that the Whistleblower's Choice Option could cause delays because of the additional burden it might impose on limited staff resources. *See* 87 FR 9280, 9287 ("[T]he Whistleblower's Choice Option could slow the overall processing of award claims given the limited staff resources and the likelihood that this approach would increase the staff's administrative workload.").

taxpayer's] filing a claim for a refund has expired[.]"[39] Were the Commission to adopt the Whistleblower's Choice Option, the Commission's award process in such a case might be delayed (and thus no payment made) for a period of several additional years awaiting a final award determination from the IRS.[40] And the same could be true with the Offset Approach, because the Commission would be required to withhold any payment to avoid the risk of overpaying for an amount that the IRS might ultimately pay. Importantly, any timing delays resulting from other award programs would potentially impact *all* award matters involving non-SEC actions that implicate a second award program; by contrast, under the Multiple-Recovery Rule (as amended by the Comparability Approach) the Commission will experience no such delays on awards for non-SEC actions because the revised rule does not hinge on the award processes or determinations of the other program.[41] The Topping-Off Approach would also pose a risk of delay because before determining whether and how much to "top off" a covered-action award the Commission would need to await a final determination from the other program on the non-SEC action.[42]

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39 INTERNAL REVENUE SERVICE, SPECIAL TOPICS MANUAL, 25.2.2.6.1(1), *available at* https://www.irs.gov/irm/part25/irm_25-002-002.

40 INTERNAL REVENUE SERVICE, CHIEF COUNSEL DIRECTIVES MANUAL FOR LITIGATION IN DISTRICT COURT, BANKRUPTCY COURT, COURT OF FEDERAL CLAIMS, AND STATE COURT, 34.5.2.4.2.1(1), *available at* https://www.irs.gov/irm/part34/irm_34-005-002#idm140486826695168 ("Generally, the taxpayer must file a claim for refund within three years from the time he files his return or within two years from the time the tax was paid, whichever is later. If no tax return was filed, a claim must be filed within two years from the time the tax was paid." (internal citation omitted)).

41 In the context of the Whistleblower's Choice Option, delays resulting from the other award program could cause meritorious whistleblowers to abandon (preemptively irrevocably waive) their claims before a final award determination is made by that other program so that they can proceed to accept the Commission's award offer. This would result in the IPF (from which SEC whistleblower awards are paid, *see* Exchange Act Section 21F(g)) absorbing costs resulting from delays and inefficiencies tied exclusively to another award program.

42 Beyond the potential for processing and payment delays, the Commission also finds the Topping-Off Approach less desirable because, as explained in the proposing release, "the Commission's ability to enhance or 'top-off' a covered-action award to provide a whistleblower relief from a deficient award issued by another program for a non-SEC action would be limited in many instances." 87 FR 9280, 9288. This would especially be so "when the covered-action award already (*i.e.*, prior to any enhancement to account for a deficient award from the other

An additional consideration that persuades the Commission that the Whistleblower's Choice Option, the Offset Approach, and the Topping-Off Approach are less desirable alternatives is the potential that these alternatives could create unintended friction between the Commission and our partner regulatory and law-enforcement agencies that oversee alternative award programs. Unlike under the Comparability Approach, there is a risk under each of the alternative approaches that the Commission and one of these other authorities would make "conflicting factual determinations" after reviewing the same non-SEC action.[43] And under each of the alternatives there is the additional risk that a whistleblower could receive an award from the SEC's program for a non-SEC action even though the whistleblower failed to satisfy a significant eligibility requirement or award criterion that may be based on important policy considerations and judgments by the other regulatory or law-enforcement authority.[44] The Commission believes that minimizing the potential for situations in which the SEC could be perceived to second-guess or preempt the judgments of our partner regulatory and law-enforcement authorities favors the Comparability Approach over the other alternatives.[45]

Several commenters recommended various modifications to the Comparability Approach, but the Commission is not persuaded that those revisions are warranted or appropriate. The suggestions generally concerned the meaningfully lower standard and the $5-million provision.[46]

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program for the non-SEC action) is at or near the statutory maximum 30 percent award." *Id.* In such instances, "the Commission would not have the ability to grant a significant percentage enhancement." *Id.*

43 *Id.* at 9287.

44 *Id.*

45 Although two commenters recommended that the Commission allow multiple awards to a whistleblower for the same non-SEC action (even where the aggregate award on the action would exceed the 30-percent maximum award that is the general award ceiling under federal whistleblower award programs), such an approach could be inconsistent with congressional intent. 87 FR 9283; 85 FR 70898, 70908-09 & n.93.

46 Although one commenter suggested that the scope of the definition of comparable whistleblower award program should be expanded to require that the other award program include heightened confidentiality measures comparable to those that Section 21F(h)(2) of the Exchange Act imposes on the Commission, the

Turning first to the meaningfully lower standard that is used to assess whether an alternative award program is a comparable program, the Commission is persuaded that this flexible standard is appropriate and that a fixed-dollar cap or percentage amount would not offer any programmatic advantages. For example, under this standard, a whistleblower might argue that the Commission should consider the particular whistleblower's own economic situation at the time that the individual reported the securities-law violation.[47] The Commission does not agree that any time another program could yield an award that is below the Commission's 10-percent minimum award amount an award under the other program should automatically qualify as meaningfully lower.[48] The commenter offered no persuasive justification for this position, and the Commission is unpersuaded to depart from the flexible, case-specific approach that the meaningfully lower standard affords.

With respect to the $5-million provision of the Comparability Approach, the Commission has decided not to adopt the revisions suggested by commenters. In the Commission's view, it is appropriate to allow related-action awards (assuming the other relevant criteria are met) for a non-SEC action without regard to whether another award program has a more direct or relevant connection to the action when the maximum award the Commission could ever potentially be required to pay in the action would not exceed $5 million. As the proposing release explained, "[w]hen the maximum award amount" would not exceed $5 million under any set of

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Commission is not persuaded that this is necessary. As the commenter itself explains, Section 21F(h)(2)'s heightened confidentiality requirements extend to other specified authorities and entities, which includes the authorities and entities that can bring actions that qualify as "related actions." *Compare id.* Section 21F(h)(2)(D) *with id*. Section 21F(a)(5). This appears to address to a substantial degree the underlying concern about confidentiality without modifying the Comparability Approach.

47 *See supra* note 17 and accompanying discussion.

48 *See supra* note 8 and accompanying discussion.

circumstances (*i.e.*, if the entire amount of the monetary sanctions was in fact collected), it is reasonable to permit claimants the option of avoiding the expense and burden of applying to a second award program and instead electing to pursue their related-action claims with the Commission.[49] The Commission does not agree that, in lieu of the $5-million provision, the Commission should authorize payouts of "a minimum of 5% and maximum of 10% of the total monetary sanctions received" for *all* non-SEC actions where another award program applies (without regard to which program has the more direct or relevant connection).[50] The Commission is concerned that this proposed modification could be contrary to Section 21F(b), which provides for a minimum award of "not less than 10 percent" of the collected monetary sanctions in an action. More fundamentally, this proposal (unlike the $5-million provision) fails to align closely with the Commission's core concern of lessening the expenses and other burdens on claimants in those instances where the non-SEC action would involve only a relatively small award amount.

Similarly, the Commission is unpersuaded that the $5-million provision should be replaced with a "percentage-based figure" (presumably a percentage at or above the statutory minimum 10-percent award).[51] Even if only a minimum award amount of just 10 percent were adopted, this could still produce very large payouts in non-SEC actions that involve very large collected monetary sanctions.[52] Given this potential, the Commission is persuaded that a

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49 87 FR 9280, 9285.

50 *See supra* note 13 and accompanying discussion.

51 *See supra* note 14 and accompanying discussion.

52 As an example, were the Commission to provide that it will pay a 10-percent award on any non-SEC action even if another program might have a more direct or relevant connection to the action, then in a $100 million case the Commission would make a $10 million payout.

percentage-based figure would not align as closely with the Commission's underlying policy concerns as the $5-million provision that is being adopted.

Further, the Commission declines to modify the $5-million provision so that a non-SEC action could qualify as a related action (irrespective of which program has the more direct or relevant connection) if the total possible payout on that action *and* the Commission's covered action would be $20 million or less.[53] As with the prior recommendation, the proposed revision would not align as well as the $5-million provision does with the overall objective of alleviating the risk that claimants might have to bear additional costs and burdens of dealing with another award program where the potential maximum payout on a non-SEC action is relatively small. The $5-million provision, by focusing on the potential payout of the related action alone, is better tailored to address the underlying policy concern.

Finally, the following principles will apply where more than one individual provides information to the Commission that leads to the success of the action and the other award program is not comparable. Where two or more individuals are whistleblowers and they did not act jointly to contribute to the success of a related action (and the Commission determines that the other agency's award program was not comparable or that the maximum aggregate award payable would not exceed $5 million), each whistleblower will be able to determine separately whether to proceed under the Commission's program. Additionally, as is the case with all related-action claims involving multiple, independent whistleblowers, each claimant's application will be assessed separately to determine whether the applicant qualifies for an award. And in determining the appropriate award amount for any whistleblower who has elected to

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[53] *See supra* note 15 and accompanying discussion.

proceed under the SEC's program, the award guidelines and considerations specified in Exchange Act Rule 21F-5[54] and Rule 21F-6 will be used in making the award assessment. Relatedly, when setting the award amount for any whistleblower who proceeds under the SEC's program, the Commission may consider the relative contributions of any whistleblower who opted to proceed under the alternative whistleblower program rather than the Commission's program. That said, in no event will the total award paid out on a related action to all the meritorious whistleblowers who proceed under the Commission's program be less than 10 percent or greater than 30 percent of the total monetary sanctions collected in the related action. But individuals who jointly provided the Commission with information will have to determine collectively to proceed under the Commission's program or the other program. This approach is consistent with the Commission's long-standing practice of treating individuals who acted jointly as a single unit for assessing eligibility requirements, applying the award criteria, and determining a specific award amount. See generally Section 21F(a)(6) of the Exchange Act (referring to "2 or more individuals acting jointly" to provide information to the Commission).

For the foregoing reasons, the Commission is adopting the Comparability Approach.

* * *

Below is a decision tree that outlines how the amendments to Rule 21F-3(b)(3) that effectuate the Comparability Approach will generally operate.

Step 1. Is there another whistleblower program that might apply to a potential related (non-SEC) action for which a claimant is seeking an award?

- If yes, continue to step 2.

[54] 17 CFR 240.21F-5.

- If no, the matter would be treated as a potential related action and the Commission would process the claimant's award application against the general award criteria and eligibility requirements of the whistleblower rules.

Step 2. If there is another program that applies to the potential related action, is it a "comparable award program"?

- If the other award program is comparable, proceed to step 3.
- If the other program is not comparable, the matter would be treated as a potential related action and the Commission would process the claimant's award application against the general award criteria and eligibility requirements of the whistleblower rules.

Step 3. If the program is comparable, then determine whether either: (i) the absolute maximum payout the Commission could make on the potential related action is $5 million or less (*i.e.*, 30 percent of the monetary sanctions ordered is $5 million or less); or (ii) the SEC's award program has the more direct or relevant connection to the action (relative to the other program) based on the facts and circumstances of the action.

- If the answer to *both* (i) *and* (ii) above is "no," then the matter is not a related action.
- If the answer to (i) *and*/*or* (ii) in step 3 is "yes," the matter would be treated as a potential related action and the Commission would process the claimant's award application against the general award criteria and eligibility requirements of the whistleblower rules.

B. Rule 21F-6(d) amendment regarding consideration of the potential dollar amount of an award when making an award determination

Rule 21F-6 identifies the general criteria and standards that the Commission considers when determining the amount of an award. Rule 21F-6(a) specifies that in deciding whether to increase an award the Commission will consider: (1) the significance of a whistleblower's information to the action's success; (2) the degree of assistance provided by the whistleblower; (3) any Commission programmatic interests in deterring securities-law violations by making awards to whistleblowers; and (4) the whistleblower's participation in an internal compliance system. Rule 21F-6(b) provides that in determining whether to decrease the amount of an award the Commission will consider: (1) the whistleblower's culpability or involvement in matters associated with the Commission's action or related actions; (2) whether the whistleblower unreasonably delayed reporting the misconduct; and (3) whether the whistleblower undermined the integrity of an entity's internal compliance and reporting system. Finally, Rule 21F-6(c) establishes a presumption that (provided certain specified exclusions are not implicated) a whistleblower should receive the maximum statutorily permissible award amount if, based on the sums that have been collected or that are likely to be collected, the statutory maximum award in the aggregate for any covered and related actions will not exceed $5 million.

1. Proposed Rule

The Commission proposed to add new paragraph (d) to Rule 21F-6 to cabin the Commission's use of its statutory authority to consider the dollar amount of an award when setting the award amount. Proposed paragraph (d) would restrict the Commission from considering the dollar amount of a potential award (when applying the award factors specified in Rule 21F-6, or in any other way) to decrease a potential award. But proposed paragraph (d)

would reaffirm that the Commission may consider the dollar amount of a potential award for the limited purpose of increasing the award amount.

Taken together, the provisions of proposed paragraph (d) would ensure that potentially large awards are not decreased because of their size, thus embodying a regulatory and programmatic determination by the Commission that "large awards directly [advance] the purpose of the whistleblower program (and by extension the interests of the investing public) by incentivizing whistleblowers to report violations [of the securities laws] to the Commission."[55] The Commission further reasoned that, because public information regarding how the Commission applies award factors is necessarily limited to avoid the release of information that could reveal a whistleblower's identity,[56] uncertainty about the authority to lower potential awards based on their dollar amount risked creating the misimpression that the Commission is regularly exercising such authority. The proposing release expressed the concern that this could in turn deter individuals from reporting misconduct.

2. Comments Received

The commenters that specifically addressed the proposed addition of paragraph (d) to Rule 21F-6 supported the proposal. Moreover, the reasons offered in support of the proposed amendment largely tracked the reasons the Commission advanced in the proposing release. For example, several of the commenters stated that the proposed amendment would address the concern that lowering an award based on the dollar size might discourage whistleblowers from

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[55] Nothing about the proposed rule would disturb the Commission's long-standing practice in public whistleblower award orders of describing awards in appropriate dollar amounts, rather than percentages (which are generally redacted). Relatedly, paragraph (d) does "not impact . . . the maximum-award presumption that Rule 21F-6(c) establishes." 87 FR 9280, 9291 n.65.

[56] *See generally* Exchange Act Section 21F(h)(2).

coming forward.[57] Relatedly, one commenter stated that the proposed change would reduce whistleblower uncertainty and increase whistleblower confidence in reporting violations.[58]

3. Final Rule

The Commission has decided to amend Rule 21F-6 by adopting new paragraph (d) as proposed. For the reasons set forth in the proposing release and supported by the comments received on this proposal, this amendment will help strengthen the whistleblower program by encouraging high-quality tips from insiders and others who have original information relating to potential securities law violations.

C. Technical and conforming amendments to Rules 21-4(c), 21F-8(e), 21F-10, and 21F-11

In the proposing release, the Commission identified various technical amendments to Rules 21F-4(c) and 21F-8(c) to correct errors in the rule text. No comments were received on

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[57] *See* Cornell Securities Law Clinic (Apr. 11, 2022) (explaining that removing the authority to reduce awards based on dollar size is appropriate because the risk the Commission might reduce awards in this way "would only instill more hesitation for people that are considering coming forward with pertinent information"); Better Markets (Apr. 11, 2022) (expressing support for limiting the authority of the Commission to lower dollar awards based on their dollar size for the reasons the Commission stated in the proposing release, including that "high dollar awards serve the purpose of the whistleblower program by drawing public attention and thereby incentivizing whistleblowers to come forward"); Cohen, Milstein, Sellers & Toll PLLC (Apr. 8, 2022) (expressing support for the proposed change to Rule 21F-6 because "discretionary authority to consider the dollar amount to reduce the size of awards adds uncertainty and decreases confidence in the award process," while "large awards increase the awareness of, and incentives to participate in, the SEC's whistleblower program"); Lee (Feb. 21, 2022) (stating that the proposed amendment would be "a crucial tool in the form of an incentive to motivate whistleblowers of the highest levels"); Benjamin Ng (Feb. 21, 2022) ("Clarifying that the Commission will never reduce award sums to whistleblowers is an important incentive for motivating whistleblowers of the highest levels."). *See also* Kohn, Kohn & Colapinto, LLC (Apr. 11, 2022) ("strongly endors[ing] the proposed Rule 21F-6(d) as written" and explaining that "[b]y paying larger rewards, the Commission will incentivize high quality reporting from well-placed insiders, and will significantly increase the deterrent effect of the Dodd-Frank Act"); Cornell Securities Law Clinic (Apr. 11, 2022) (supporting the Commission's "discretion to increase award amounts" because "large awards generate more public interest"); NWC (Apr. 7, 2022) (stating the proposed amendment "clarif[ies] that whistleblowers in large cases, who meet the criteria for enhanced awards, will not be prejudiced simply based on the size of a sanction").

[58] *See* Andres Rodriquez (Apr. 3, 2022).

these proposed modifications. For the reasons explained in the proposing release, the Commission is adopting the proposed technical amendments to these rules.

Further, the Commission proposed various amendments to Rules 21F-10 and 21F-11 so that these rules conform to the changes that are being made to the Multiple-Recovery Rule and Rule 21F-6. The Commission did not receive comments specifically addressing these minor modifications and is adopting them for the reasons explained in the proposing release.[59]

III. Effective Date and Other Matters

The Commission received no comments on the proposed effective date. Accordingly, as proposed, the amended rules will become effective 30 days after publication in the Federal Register. Further, the amendments shall apply to any award application pending as of the effective date of the rules, and to all future-filed award applications.

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,[60] 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).

Lastly, the final amendments do not impose any new "collections of information" within the meaning of the Paperwork Reduction Act of 1995,[61] nor do they create any new filing, reporting, recordkeeping, or disclosure requirements.

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59 87 FR 9280, 9284 n.24, 9290 n.57 (explaining conforming edits that are being made to Rules 21F-10 and 21F-11).

60 5 U.S.C. 801 *et seq*.

61 44 U.S.C. 3501 *et seq*.

IV. Economic Analysis

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)[62] of the Exchange Act 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[63] 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.

This economic analysis concerns the final amendments to Exchange Act Rule 21F-3 and Rule 21F-6. As discussed above, the final amendments to Rule 21F-3(b)(3) allow awards for related actions if an alternative whistleblower program has an award range or award cap that would restrict the maximum potential award from that other program to an amount that is meaningfully lower than the maximum potential award that the Commission could make. In addition, the final amendments allow awards for related actions when the alternative program has a discretionary structure, or when the maximum award the Commission could potentially pay on the non-SEC action could not exceed $5 million. The final amendment to Rule 21F-6 eliminates the Commission's discretion to consider the dollar amounts to reduce an award. Although the impact of the final amendments is expected to be small, to the extent that there is an impact, the

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62 15 U.S.C. 78w(a)(2).

63 15 U.S.C. 78c(f).

amendments could increase the size of some whistleblower awards and therefore increase the incentives for whistleblowers to submit tips.

The benefits and costs discussed below are difficult to quantify. For example, we do not have a way of estimating quantitatively the extent to which the final rules could affect our enforcement program by altering whistleblowing incentives. Similarly, we are unable to quantify any costs (or benefit) to the IPF[64] associated with the Comparability Approach or the alternative approaches discussed above for amending Rule 21F-(b)(3). Therefore, the discussion of economic effects of the final amendments is qualitative in nature.

We received several comments in response to the proposed rulemaking that suggest additional alternatives as well as comments that discuss the economic consequences of the rule changes that are being adopted. We respond to those comments below.

A. Economic Baseline

In our examination of the potential economic effects of the final amendments, we have employed as a baseline the set of rules that implement the SEC's whistleblower program as amended in September 2020.[65] Over the past 10 years, the whistleblower program has been an important component of the Commission's efforts to detect wrongdoing and protect investors in the marketplace, particularly where fraud is difficult to uncover. The program has received a high number of submissions from whistleblowers and it has also produced substantial awards.[66]

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64 *See supra* note 41 (discussing the IPF).

65 Earlier this year, the Commission issued a statement identifying procedures that could be used by the whistleblower award program during an Interim Policy-Review Period. Release No. 34-81207 (Aug. 5, 2021), *available at* https://www.sec.gov/rules/policy/2021/34-92565.pdf. These procedures are considered in the economic baseline.

66 In fiscal year (FY) 2021, the Commission awarded approximately $564 million to 108 individuals—both the largest dollar amount and the largest number of individuals awarded in a single fiscal year. The program was also very active in FY 2020, awarding approximately $175 million to 39 individuals.

Both the number of submissions and the number and dollar amount of awards per year have increased considerably since the program was initiated.[67]

SEC Whistleblower Program Annual Award Activity		
Year	**Total Awards**	**Number of Recipients**
2021	$564 million	108
2020	$175 million	39
2019	$60 million	8

Whistleblower programs, including the SEC's whistleblower program, have been studied by economists who report findings consistent with award programs being effective at contributing to the discovery of violations.[68] In addition, a recent publication reports that, among other benefits, "[w]histleblower involvement [in the enforcement process] is associated with higher monetary penalties for targeted firms and employees."[69] Further, published research articles and current working papers report that the SEC's whistleblower program deters

[67] *See* SEC 2020 REPORT ON WHISTLEBLOWER PROGRAM, at 9-16; U.S. SEC. & EXCH. COMM'N, DIV. OF ENF. 2020 ANN. REP., pp. 9-16 (Nov. 2, 2020), *available at* https://www.sec.gov/files/enforcement-annual-report-2020.pdf.

[68] Andrew C. Call, *et al.*, *Whistleblowers and Outcomes of Financial Misrepresentation Enforcement Actions*, 56 J. ACCT. RES. 123, 126 (2018) ("Our collective findings are consistent with whistleblower involvement being associated with more rapid discovery of financial misconduct."). *See also* Alexander Dyck, *et al.*, *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2215 (2010) ("[A] strong monetary incentive to blow the whistle does motivate people with information to come forward.").

[69] Call, *et al.*, *supra* note 68, at 126.

aggressive (*i.e.*, potentially misleading) financial reporting[70] and insider trading.[71] We have received comments that support the conclusion that the SEC's whistleblower program is valuable and effective.[72]

B. Final Rules

1. Final Rule 21F-3(b)(3)

The rule amendments may affect SEC whistleblower awards in cases where there is a potential related action that could be covered by another whistleblower program. As described above, the Commission is adopting the Comparability Approach, which authorizes the Commission to make awards in particular situations where, under the Multiple-Recovery Rule, another award program would otherwise apply if that program has the more direct or relevant relationship to the underlying (non-Commission) related action.[73] The Comparability Approach will do this by authorizing the Commission to make an award irrespective of the related action's

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70 *See* Philip G. Berger & Heemin Lee, *Did the Dodd-Frank Whistleblower Provision Deter Accounting Fraud?*, 60 J. ACCT. RES. 1337, 1359 (2022) available at https://onlinelibrary.wiley.com/doi/10.1111/1475-679X.12421 ("for firms not exposed to a general [state] F[alse] C[laims] A[ct] before the Dodd-Frank whistleblower law, the new law lowers the probability of fraud by 12%-22% relative to firms already exposed."); *see also* Christine Weidman & Chummei Zhu, *Do the SEC Whistleblower Provisions of Dodd Frank Deter Aggressive Financial Reporting* (Feb. 2020) (unpublished manuscript), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3105521; Jaron H. Wilde, *The Deterrent Effect of Employee Whistleblowing on Firms' Financial Misreporting and Tax Aggressiveness*, 92 ACCT. REV. 247 (2017).

71 *See* Jacob Raleigh, *The Deterrent Effect of Whistleblowing on Insider Trading* (Sept. 29, 2021) (unpublished manuscript), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3672026.

72 *See, e.g.*, Taxpayers Against Fraud (Apr. 11, 2022) ("The success of the Whistleblower Program over the past decade clearly demonstrates the benefits to investors and the public at large when major frauds are detected, deterred and remedied as early as possible[.]"); *id.* ("The SEC's Whistleblower Program is developing into one of the most successful public-private partnerships in American history"); Better Markets (Apr. 11, 2022) ("[T]he [SEC's Whistleblower] program has been an enormous success."). One commenter stated that "the benefits obtained by the public and investors based on the deterrent effect of whistleblower laws are massive," and cited additional sources to support this conclusion. Kohn, Kohn, & Colapinto (Apr. 8, 2022).

73 It would be difficult to predict with any degree of certainty how often the Comparability Approach would be relevant, particularly as whistleblower programs change, and new whistleblower programs are implemented. That said, as discussed above, the Commission has seen an increase in the number of award matters that would potentially implicate the Comparability Approach.

relative relationship to the two award programs if the other award program is discretionary, or structured to provide meaningfully smaller awards than the maximum potential award that could be granted by the SEC's program, or if the maximum total award amount that the Commission could pay is less than or equal to $5 million. The Whistleblower's Choice Option, by contrast, would have allowed the Commission to make an award irrespective of the existence of another program and would have allowed the whistleblower to decide whether to accept the Commission's award or the other program's award. While the two approaches are structured differently, both may increase the total dollar award amount for a whistleblower compared to the baseline. Thus both options could increase the incentives for whistleblowers.[74]

The Whistleblower's Choice Option might have had a slightly different incentive effect, since a comparison would have been made between realizable award amounts rather than analysis of award structures.[75] To the extent that a whistleblower prefers to exercise discretion over the selection of awards for the same related action, the whistleblower might have preferred the Whistleblower's Choice Option because the whistleblower would have had an opportunity to make a decision in every instance where another award program might have applied. In contrast, the Comparability Approach does not offer the whistleblower the opportunity to exercise discretion. Feedback from some commenters indicates that whistleblowers may prefer to

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[74] We considered comments that support the conclusion that the Comparability Approach and the Whistleblower's Choice Option would increase incentives for whistleblowers. *See, e.g.*, Andres Rodriguez (Apr. 3, 2022) (stating "With the proposed amendment to rule 21F-3(b)(3), the Securities and Exchange Commission can further the maximization of whistleblower tips by means of providing monetary awards."); Anonymous (Mar. 21, 2022) ("This will Induce [sic] and Incentivize [sic] those with a moral compass to come forward more often.").

[75] In theory, the Whistleblower's Choice Option could have resulted in larger awards than the Comparability Approach. For example, a comparable program, such as the CFTC's program, might potentially determine an award amount at 20 percent. If, in that case, the Commission would have exercised its discretion to determine an award at 30 percent for the related action, the whistleblower would have received a larger amount under the Whistleblower's Choice Option than under the Comparability Approach.

exercise such discretion.[76] As discussed above, however, the Whistleblower's Choice Approach could weaken the incentives for whistleblowers, since it might add significant delay to the processing of applications and/or payment of awards.[77]

To the extent that these amendments increase the willingness of some individuals to come forward with information about potential securities law violations, we expect that they will increase Commission enforcement activity and deter wrongdoing.[78] The effects of the rule changes are expected to be small, due to the limited circumstances under which they will apply, and because there are many factors, including non-pecuniary incentives, that motivate whistleblowers.[79] If this amendment had been operative during the period from July 21, 2010, (when the program was created) to the present, staff review of award data indicates that this amendment would have resulted in an additional total payout from the IPF of less than $10.5 million. Although the rule amendments would not have substantially increased the total payout in prior related-action awards, the economic literature leads us to believe that changes such as these that increase whistleblowing incentives should have a positive effect on the frequency of whistleblowing activity.[80]

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76 *See supra* notes 21-22 and related discussion.

77 *See supra* note 38 and accompanying discussion.

78 We have received letters from commenters that support this expectation, *see, e.g.*, National Whistleblower Center (Apr. 7, 2022) ("High rewards increase the likelihood that more whistleblowers will come forward to the SEC with their information.").

79 The mix of pecuniary and non-pecuniary elements that motivate whistleblowers were described in the economic analysis for the 2020 Adopting Release for Rule 21F-3(b)(3), Section VI.B.2, *see* Adopting Release, 85 FR 70937.

80 *See* Andrew C. Call, et al., *Rank and File Employees and the Discovery of Misreporting: The Role of Stock Options*, 62 J. ACCT. & ECON. 277, 297-99 (2016). *See also* Jonas Heese & Gerardo Perez-Cavazos, *The Effect of Retaliation Costs on Employee Whistleblowing*, 71 J. ACCT. & ECON. 101385 (2021). *See also* Kohn, Kohn, & Colapinto (Apr. 8, 2022) (citing congressional testimony as well as other sources that indicate incentive changes have an effect on whistleblower participation).

Because these amendments may increase the amounts paid to whistleblowers under certain circumstances, there may be costs associated with the final rule amendments. One possibility is that the IPF will be depleted temporarily.[81] For example, assume the DOJ collected $1.5 billion on a related action. If there were a meritorious whistleblower, then even a mid-range 20 percent award would require the Commission to pay the whistleblower $300 million, an amount that could temporarily exhaust the IPF.[82] An award that exhausted the IPF could produce additional effects, depending on the size of the shortfall and the SEC whistleblower awards that would otherwise be eligible for issuance and payment during the shortfall period.[83]

In addition, we expect that these amendments will cause a small increase in the administrative costs for the SEC's whistleblower program. For example, the final adopted amendments will require the Commission to compare whistleblower programs based on the expected award amounts from those programs. But these costs will be small relative to the baseline, and, to the extent that the program structures are stable, the comparisons may not need to be repeated for each case. In contrast, the Whistleblower's Choice Option could have been expected to increase the administrative costs relative to the baseline more than the Comparability Approach because it would have required the Commission to determine whether an award should have been granted in each case where there is a related action and a separate whistleblower

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81 17 CFR 240.21F-14(d) (Exchange Act Section 21F-14(d)), which describes the procedures applicable to the payment of awards, indicates that if there are insufficient amounts available in the IPF to pay the entire amount of an award within a reasonable period of time, then the balance of the payment shall be paid when amounts become available. These procedures specify the relative priority of competing claims.

82 *See generally* Exchange Act Section 21F(g)(3)(A). At the end of FY 2021, the IPF's balance was $144,442,134. To date, the largest amount the IPF has ever had is approximately $453 million. *See* 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM *available at* https://www.sec.gov/files/annual-report-2013.pdf.

83 *See also* Exchange Act Section 21F(c)(1)(B)(ii).

program.[84] As described above, commenters have provided mixed feedback regarding the relative increase in administrative costs for the Whistleblower's Choice Option as compared to the Comparability Approach.[85]

2. Final Rule 21F-6

The change to Rule 21F-6 eliminates the Commission's discretionary authority to consider dollar amounts in reducing awards while retaining the Commission's discretionary authority to consider dollar amounts to increase awards. The 2020 amendments that clarified that the Commission could consider, in its discretion, the dollar amount of an award when making an award determination may have increased whistleblowers' uncertainty relating to the program and thus potentially reduced their willingness to report potential misconduct. To the extent that the 2020 amendments may have diminished a whistleblower's willingness to come forward, eliminating this discretionary authority reduces uncertainty and thus potentially encourages more whistleblowing.[86] But we cannot determine with any reasonable degree of certainty if the revisions to Rule 21F-6 will affect a whistleblower's willingness to report a potential securities law violation.[87] To the extent that the Commission would have exercised the

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84 The award presumption established by Rule 21F-6(c) could help limit the overall administrative costs, however. *See* Adopting Release, 85 FR 70911 (discussing potential "gains in efficiency from streamlining the award determination process" when the $5 million award presumption would apply during the award-calculation phase).

85 As discussed above, one commenter indicated that the administrative burdens associated with the Comparability Approach would be greater than those of the Whistleblower's Choice Option, *supra* note 10, but others indicated that the Comparability Approach would have low administrative burdens, *supra* note 11.

86 *See* Taxpayers Against Fraud (Apr. 11, 2022) (stating that "in our experience representing whistleblowers, uncertainty and ambiguity in how the program operates can present potentially significant obstacles to individuals who are considering reporting wrongdoing").

87 As noted above, commenters have expressed support for the proposed changes to Rule 21F-6. *See supra* notes 57-58 and related discussion, indicating that larger awards generate important incentives.

discretion to lower award amounts, amended Rule 21F-6 will increase program costs to the IPF by any such amounts.[88]

C. Additional Alternatives

As discussed above, the Offset Approach and the Topping-Off Approach are alternatives that could also have increased whistleblower award incentives. For example, under certain circumstances, the Offset Approach could have produced award amounts in related actions that are comparable, if not identical, to the awards produced under the Comparability Approach (and the Whistleblower's Choice Approach). In contrast, the Topping-Off Approach could have resulted in smaller changes in the award amounts.[89]

As also discussed above, both of these alternative approaches would likely have increased the Commission's award-processing time, because the Commission's final award-amount determinations would have been dependent on the completion and resolution of the award process by the entity or authority administering the other award program.[90] Additional delays may adversely affect whistleblower incentives.[91] As a result, despite the generally

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[88] Similar to the amendments to Rule 21F-3(b)(3), to the extent that program costs increase as a result of the amendments to Rule 21F-6, there will be an increase in the possibility that the IPF is temporarily depleted. As described above, an award that exhausted the IPF could produce additional effects that would depend on the size of the shortfall and the SEC whistleblower awards that would otherwise have been eligible for issuance and payment during the shortfall period.

[89] As described above, the Topping-Off Approach would not have allowed the Commission to provide an increase to the covered-action in those instances where the Commission grants an award at the 30 percent statutory cap, which occurs in a substantial portion of cases.

[90] Commenters suggested modifications to the Offset Approach to address this concern. *See* Taxpayers Against Fraud (Apr. 11, 2022) ("The only issue relates to timing—if SEC makes its award first, the whistleblower forfeits an award from any other program; if the other regulator pays first, the SEC offsets whatever amount the whistleblower receives with whatever amount he or she received from other programs."); Kohn, Kohn & Colapinto (Apr. 8, 2022). But as discussed in Section II.A.3, the Commission would be required to withhold any payment to avoid the risk of overpaying.

[91] Some commenters have expressed concerns about award-processing delays. *See, e.g.*, Talia Finamore (Apr. 3, 2022) ("My only worry would be how much more time the Commission would have to put into processing applications.").

positive expected impact on whistleblower incentives from the possibility for increased award amounts, the net impact on whistleblower incentives from the Offset Approach and the Topping-Off Approach would have depended on the relative impacts of potential increased awards and potential increased delays.[92]

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

As discussed earlier, the Commission is sensitive to the economic consequences of its rules, including the effects on efficiency, competition, and capital formation. The Commission believes that the final amendments would 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 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. To the extent that increased whistleblowing incentives stemming from the final rules result in more timely reporting of useful information on possible violations or the reporting of higher quality information on possible violations, the Commission's enforcement activities could become more effective. More effective enforcement could lead to earlier detection of violations and increased deterrence of potential future violations, which could improve price efficiency and assist in a more efficient allocation of investment funds. Securities frauds, for example, can cause inefficiencies in the economy by diverting investment funds from legitimate, productive uses.[93]

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[92] As described above, we have considered several additional alternatives suggested by commenters. For example, one commenter suggested that the $5 million threshold in the Comparability Approach should be raised to $20 million. *See supra* note 15.

[93] *See* Adopting Release, 76 FR 34362.

V. Regulatory Flexibility Act

Section 604(a) of the Regulatory Flexibility Act[94] requires the Commission to undertake a final 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.[95] The proposing release included a request for public comment on the Commission's preliminary regulatory-flexibility analysis but no such comments were received.

Under Section 601(6) of Title 5 of the United States Code, "small authority" means "small business," "small organization," and "small governmental jurisdiction."[96] 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.[97] Consequently, the persons that will be subject to the amended rules are not "small entities" for purposes of the Regulatory Flexibility Act.

For the reasons stated above, the Commission certifies, pursuant to Section 605(b) of Title 5 of the U.S. Code, that the rules would not have a significant economic impact on a substantial number of small entities.[98]

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94 5 U.S.C. 603(a).

95 5 U.S.C. 605(b).

96 *See* 5 U.S.C. 601(3) through(5) (defining "small business," "small organization," and "small governmental jurisdiction").

97 *See generally* Exchange Act Section 21F(a)(6) (defining "whistleblower"); Rule 21F-2(a)(2) (providing that "[a] whistleblower must be an individual" and a "company or other entity is not eligible to be a whistleblower").

98 The final amendments do not impose any new "collections of information" within the meaning of the Paperwork Reduction Act of 1995 [44 U.S.C. 3501 *et seq.*], nor do they create any new filing, reporting, recordkeeping, or disclosure requirements.

VI. Statutory Basis

The Commission is adopting the rule amendments contained in this document under the rulemaking authority provided in Sections 3(b), 21F, and 23(a) of the Exchange Act.

List of Subjects in 17 CFR Part 240

Securities, Whistleblowing.

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, 78*l*, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78*ll*, 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).

* * * * *

2. Amend § 240.21F-3 by:

a. Revising paragraphs (b)(3) introductory text and (b)(3)(i) and (iii); and

b. Adding paragraphs (b)(3)(iv), (v), and (vi).

The revisions and additions read as follows:

§ 240.21F-3 Payment of awards.

* * * * *

(b) * * *

(3) The following provision shall apply where a claimant's application for a potential related action may also involve a potential recovery from a comparable whistleblower award program (as defined in paragraph (b)(3)(iv) of this section) 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 (SRO), the action will be deemed eligible to qualify as a potential related-action only if either:

(A) The Commission finds that the maximum total award that could potentially be paid by the Commission based on the monetary sanctions imposed would not exceed $5 million; or

(B) The Commission finds (based on the facts and circumstances of the action) that the Commission's whistleblower award program has the more direct or relevant connection to that action.

* * * * *

(iii) The conditions in paragraphs (b)(3)(iii)(A) through (C) of this section apply to a determination under paragraph (b)(3)(ii) of this section.

(A) The Commission shall not make a related-action award to a claimant (or any payment on a related-action award if the Commission has already made an award determination) if the claimant receives any payment from the other program for that action.

(B) If a claimant was denied an award by the other award program, the claimant will not be permitted to re-adjudicate any issues before the Commission that the governmental/SRO entity responsible for administering the other whistleblower award program resolved, pursuant to a final order of such government/SRO entity, against the claimant as part of the award denial.

(C) 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 award shall be conditioned on the claimant making an irrevocable waiver of any claim to an award from the other award program. The claimant's irrevocable waiver must be made within 60 calendar days of the claimant receiving notification of the Commission's final order.

(iv) The provisions of paragraphs (b)(3)(iv)(A) through (D) of this section apply to program comparability determinations.

(A) For purposes of paragraph (b)(3) of this section, a comparable whistleblower award program is an award program that satisfies the following criteria:

(*1*) The award program is administered by an authority or entity other than the Commission;

(*2*) The award program does not have an award range that could operate in a particular action to yield an award for a claimant that is meaningfully lower (when assessed against the maximum and minimum potential awards that program would allow) than the award range that the Commission's program could yield (*i.e.*, 10 to 30 percent of collected monetary sanctions);

(*3*) The award program does not have a cap that could operate in a particular action to yield an award for a claimant that is meaningfully lower than the maximum award the Commission could grant for the action (*i.e.*, 30 percent of collected monetary sanctions in the related action); and

(*4*) The authority or entity administering the program may not in its discretion deny an award if a whistleblower satisfies the established eligibility requirements and award criteria.

(B) The Commission shall make a determination on a case-by-case basis whether an alternative award program is a comparable award program for purposes of the particular action on which the claimant is seeking a related-action award with respect to paragraphs (b)(3)(iv)(A)(*2*) through (*3*) of this section.

(C) If the Commission determines that an alternative award program is not comparable, the Commission shall condition its award on the meritorious whistleblower making within 60 calendar days of receiving notification of the Commission's final award an irrevocable waiver of any claim to an award from the other award program.

(D) A whistleblower whose related-action award application is subject to the provisions of paragraph (b)(3) of this section (including a whistleblower whose related-action award application implicates another award program that does not qualify as a comparable program as a result of paragraph (b)(3)(iv)(A) of this section) must demonstrate that the whistleblower has complied with the terms and conditions of this section regarding an irrevocable waiver. This shall include taking all steps necessary to authorize the administrators of the other program to confirm to staff in the Office of the Whistleblower (or in writing to the claimant or the Commission) that an irrevocable waiver has been made.

(v) A claimant seeking a related-action award must promptly inform the Office of the Whistleblower if the claimant applies for an award on the same action from another award program.

(vi) The Commission may deem a claimant ineligible for a related-action award if any of the conditions and requirements of paragraph (b)(3) of this section in connection with that related action are not satisfied.

3. Amend § 240.21F-4 by revising paragraph (c)(2) to 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; or

* * * * *

4. Amend § 240.21F-6 by adding paragraph (d) to read as follows:

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

* * * * *

(d) *Consideration of the dollar amount of an award.* When applying the award factors specified in paragraphs (a) and (b) of this section, the Commission may consider the dollar amount of a potential award for the limited purpose of increasing the award amount. The Commission shall not, however, use the dollar amount of a potential award as a basis to lower a potential award, including when applying the factors specified in paragraphs (a) and (b) of this section.

5. Amend § 240.21F-8 by revising paragraph (e)(4)(ii) to read as follows:

§ 240.21F-8 Eligibility and forms.

* * * * *

(e) * * *

(4) * * *

(ii) If, within 30 calendar 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) of this section.

6. Amend § 240.21F-10 by revising paragraph (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.

* * * * *

(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 and standards specified in § 240.21F-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, subject to the limitations imposed by § 240.21F-6(d). 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 30 calendar 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) that formed the basis of the Claims Review Staff's Preliminary Determination.

(ii) Within 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 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 60 calendar days of the Office of the Whistleblower making those materials available for your review.

* * * * * *

7. Amend § 240.21F-11 by revising paragraphs (a), (c), and (e) to read as follows:

§ 240.21F-11 Procedures for determining awards based upon a related action.

(a) If you are eligible to receive an award following a Commission action that results in monetary sanctions totaling more than $1,000,000, you also may be eligible to receive an award in connection with a related action (as defined in § 240.21F-3(b)).

* * * * *

(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)) 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. Additionally, if your related-action award application might implicate a second whistleblower program, the Office of the Whistleblower is authorized to request information from you or to contact any authority or entity responsible for administering that other program, including disclosing the whistleblower's identity if necessary, to ensure compliance with the terms of § 240.21F-3(b)(3).

* * * * *

(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 and standards specified in § 240.21F-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, subject to the limitations imposed by § 240.21F-6(d). 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 30 calendar 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) that formed the basis of the Claims Review Staff's Preliminary Determination.

(ii) Within 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 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 60 calendar days of the Office of the Whistleblower making those materials available for your review.

* * * * *

By the Commission.

Dated: August 26, 2022.

Vanessa A. Countryman,

Secretary.