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The SEC's Whistleblower Program in 2021 and Beyond

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After Nearly a Decade, SEC Amends Whistleblower Rules

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History of the Whistleblower Program

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On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

Section 922 of the Dodd-Frank Act added Section 21F to the Securities Exchange Act of 1934, entitled "Securities Whistleblower Incentives and Protection."

This includes whistleblower provisions that apply to all public companies and their subsidiaries and affiliates.

History of the Whistleblower Program

On August 12, 2011, the SEC's Final Dodd-Frank Rules became effective and the SEC created the Office of the Whistleblower.

History of the Whistleblower Program

The Whistleblower Program is embodied in Section 21F of the Securities Exchange Act of 1934 in Section 922 of the Dodd-Frank Act entitled "Securities Whistleblower Incentives and Protection." § 240.21F-1 General.

The Program was created by Congress in 2010 to assist the SEC in discovering and prosecuting securities law violations.

The Program seeks to accomplish this goal by:

- (1) providing potentially significant monetary awards in exchange for information regarding securities violations; and
- (2) providing protection to whistleblowers from adverse employment action for providing such information.

History of the Whistleblower Program

Success of the Program:

The success of the Program can be measured by its awards to whistleblowers.

Since the Program's inception, the SEC has awarded more than $700 million to whistleblowers.

The SEC reports the top 10 awards:

- $114 million - October 22, 2020
- $50 million - March 19, 2018
- $50 million - June 4, 2020
- $39 million - September 6, 2018
- $37 million - March 26, 2019
- $33 million - March 19, 2018
- $30 million - September 22, 2014
- $28 million - November 3, 2020
- $27 million - April 16, 2020
- $22 million - September 30, 2020

Amendments to the Rules

Amendments to the Rules

On September 23, 2020, after almost 10 years, the SEC announced that it has voted to amend the rules governing the Whistleblower Program.

The Amended Rules went into effect on December 7, 2020.

Purpose of the Amendments

The Amendments:

- Are “intended to provide greater transparency, efficiency, and clarity, and to strengthen and bolster the program.”
- Aim to “increase efficiencies around the review and processing of whistleblower award claims, and provide the Commission with additional tools to appropriately reward meritorious whistleblowers.”
- Are “intended to clarify and enhance certain policies, practices, and procedures in implementing the program.”

Changes – Award Structure

Some major changes to the whistleblower rules include the way awards are calculated.

Key Amended Provisions:

- Rule 21F-6(c)—Establishment of a presumption of the maximum statutory amount for certain awards
- Rule 21F-6—Consideration of dollar or percentage amounts in applying the award factors

Changes – Award Structure
Historical Monetary Incentives

Under Rule 21F-6, whistleblowers are entitled to awards between 10% and 30% of monetary sanctions of more than $1 million collected by the SEC in actions based on the whistleblowers' information.

The whistleblower award shall be:

- not less than 10%
- but not more than 30%
- of the total monetary sanctions imposed in the action or related actions.

Changes – Award Structure
Historical Monetary Incentives

Within the 10%-30% framework, awards may be increased or reduced based on a number of factors.

Rule 21F-6(a)- Factors that could increase awards:

- (1) significance of information to the success of proceeding;
- (2) extent of assistance, including timeliness, resources conserved, the whistleblower's efforts to mitigate harm, and any undue hardship experienced by the whistleblower;
- (3) the interest in deterring the reported violation;
- (4) whether the violation was reported internally, before, or at the same time it was reported to the SEC.

Changes – Award Structure
Historical Monetary Incentives

Rule 21F-6(b) - Awards may be reduced if the whistleblower:

- (1) participated in the violation;
- (2) unreasonably delayed reporting; and
- (3) interfered with company's internal compliance and reporting systems.

Changes – Award Structure

Rule 21F-6(c)—Presumption of the maximum statutory amount

The percentage range for awards and factors to increase or decrease the awards has not changed, but as amended, the rule provides for a presumption that for awards of $5 million or less, the whistleblower will receive the statutory maximum—30%—absent the existence of any negative factors.

This change is embodied in the added provision 21F-6(c)(2):

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

Changes – Award Structure

Rule 21F-6—Consideration of dollar or percentage amounts in applying the award factors

The amendments clarify the SEC's discretion to determine the amount of the award based on the criteria set forth in Rule 21F-6(a) and (b), and that the amount may be based on percentage, dollar amount, or some combination.

Notably, the SEC rejected a proposed amendment that would have allowed the SEC to essentially cap awards where the SEC recovery was at least $100 million. The SEC declined to impose such a cap, but instead reiterated its broad discretion to adjust awards under Rule 21F-6.

Definitions – Expanding Whistleblower Eligibility

The amended rules also re-define and clarify various definitions, which, in some instances, will have the effect of expanding award opportunities.

The expanded definitions provide more opportunities for whistleblowers to receive awards and thus may encourage whistleblowers to come forward with information without the fear of being denied an award because of the type of enforcement action the SEC ultimately pursues.

Key Amended Definitions:

- Rule 21F-4(d)—Definition of “action”
- Rule 21F-4(e)—Definition of “monetary sanctions”

Definitions – Expanding Whistleblower Eligibility

Rule 21F-4(d) – "Action"

The definition of "action" has been amended to include awards based on deferred prosecution agreement (DPA) or non-prosecution agreement (NPA), or settlement agreements with the SEC.

- **Then:** The former rule did not address whether awards are available for information that leads to DPA or NPA
- **Now:** Expressly includes deferred prosecution agreements, non-prosecution agreements, and settlement agreements

The premise behind some of these amendments is that "Congress did not intend for meritorious whistleblowers to be denied awards simply because of the procedural vehicle that the [SEC] has selected to resolve an enforcement matter."

Definitions – Expanding Whistleblower Eligibility

Rule 21F-4(e) – "Monetary Sanctions"

The rule was amended to include payments ordered as relief for covered violations.

Then: The rule defined "monetary sanctions" as "any money, including penalties, disgorgement, and interest, ordered to be paid and any money deposited into a disgorgement fund or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)) as a result of a Commission action or a related action."

Now: Monetary sanctions is defined as "An order to pay money that results from a Commission action or related action and which is either: (i) Expressly designated as penalty, disgorgement, or interest; or (ii) Otherwise ordered as relief for the violations that are the subject of the covered action or related action . . . ."

Limiting Whistleblower Eligibility

On the other hand, some amended provisions emphasize limitations on whistleblower applications and awards.

Key Amended Provisions:

- Rule 21F-3(b)—Definition of “related action”
- Rule 21F-2—Whistleblower status, award eligibility, and confidentiality and retaliation protection

Limiting Whistleblower Eligibility

Rule 21F-3(b) – “Related Action”

Any whistleblower who obtains an award based on a Commission enforcement action may be eligible for an award based on monetary sanctions that are collected in a related action. The excludes recovery from the SEC if a separate whistleblower award program more appropriately applies.

- **Then:** Did not contain a rule that expressly limits recovery of an award if a whistleblower had already been granted an award under another whistleblower award program
- **Now:** Excludes separate actions if it is determined that a separate award scheme is available and more appropriate

Limiting Whistleblower Eligibility

Rule 21F-2—Whistleblower status, award eligibility, and confidentiality and retaliation protection

The SEC revised its definition of "whistleblower" in Rule 21F-2 to require an individual, in order to be protected from retaliation, to report securities violations to the SEC in writing prior to any retaliation.

- **Then:** Individuals were considered whistleblowers for purposes of the anti-retaliation provisions for reporting internally and to the SEC
- **Now:** Individuals must report information directly in writing to the SEC

This revision was made in response to the Supreme Court's decision in *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018).

- A person must report the securities violation to the SEC—as opposed to just internally to their employer—in order to be subject to the SEC's anti-retaliation protections.

Effect on Employer

While this narrows the definition of a protected whistleblower, it is detrimental to companies as it encourages whistleblowers to report to the SEC rather than just internally to the employer.

Increased Efficiency

With the adoption of the amendments, the SEC added new rules "designed to help increase the Commission's efficiency in processing whistleblower award application."

Key Provisions:

- Rule 21F-8(e)—Claimants who submit False Information or Abuse Award Application Process
- Rule 21F-9—Procedures for submitting original information
- Rule 21F-18 —Summary disposition process

Increased Efficiency

Rule 21F-8(e) – Abuse of Award Application Process

The amended rule allows the SEC to permanently bar any applicant who submits three frivolous award applications.

This intended to increase efficiency by allowing staff to focus on processing meritorious applications.

It also may deter the submission of frivolous applications.

Increased Efficiency

Rule 21F-9- Forms used for Whistleblower Program

Provides flexibility in the procedure for submitting information to the SEC.

- **Then:** Formerly, whistleblowers were required to submit original information to the SEC through the SEC's website or by mailing or faxing a Form TCR. If an individual failed to comply, the rules did not provide a mechanism for such individuals to qualify for an award for information already provided to the SEC.
- **Now:** Under the new rule, whistleblowers may initially submit original information to the SEC in other ways, providing that the whistleblower otherwise complies with the rules within 30 days of that initial submission.

Rule 21F-18 – Summary Disposition Procedure

The SEC added a rule that allows the SEC to deny applications that are untimely, applications containing information not used in the SEC's enforcement action or investigation, or applications otherwise not in compliance with the Program's requirements.

For such categories of denials, "the Office of the Whistleblower rather than the CRS would assume responsibility for reviewing the record, issuing a Preliminary Determination (here, a 'Preliminary Summary Disposition'), considering any written response filed by the claimant, and issuing any Proposed Final Determination (here, a 'Proposed Final Summary Disposition')."

Additional Guidance

The SEC adopted guidance to clarify the meaning of "independent analysis" in the rules in order to qualify as a whistleblower under the Program. Specifically, the guidance provides that to be considered an "independent analysis," the whistleblower must present information to the SEC that is not publicly available.

Significant Post-Amendment Awards

Dec. 7 – SEC Issues Multiple Whistleblower Awards Totaling Nearly $3 Million

- $1.8 million to a company insider who "provided information that would have been difficult to detect in the absence of the tip and provided extraordinary assistance to SEC staff resulting in the return of money to investors."
- $750,000 to two whistleblowers, one that provided information prompting the opening of an investigation, and the other that provided new information for inclusion in that investigation. For the whistleblower who provided information to open the investigation, the SEC waived the TCR filing requirement.
- $500,000 to two individuals prompting the investigation and providing substantial and continued assistance.

Dec. 18, 2020 – SEC Issues Multiple Whistleblower Awards Totaling Over $3.6 Million

- $1.8 million to a whistleblower reporting information about a fraudulent scheme, "who took immediate steps to mitigate the harm to investors, and provided substantial assistance to the staff, including providing testimony, key documents, and other information that saved SEC time and resources and contributed to an enforcement action that resulted in the return of millions of dollars to harmed investors."
- $1.2 million to an individual who provided information, but reduced the award based on the negative culpability and unreasonable delay factors.
- $500,000 to a whistleblower who provided significant information and ongoing assistance. The SEC waived the TCR filing requirement.

Significant Post-Amendment Awards Cases

Dec. 22, 2020 – SEC Awards Over $1.6 Million to Whistleblower

- Awarded to a single whistleblower "that produced critical information about an ongoing fraudulent scheme and provided extensive assistance to the investigative staff, including by participating in meetings and furnishing high-quality evidence."

Jan. 7, 2021 – SEC Issues Over $1.1 Million to Multiple Whistleblowers

- $500,000 to two whistleblowers, one that provided information to prompt the opening of the investigation, and the other that contributed assistance.
- $600,000 to a whistleblower that contributed to the opening of an investigation, and "continued to provide helpful assistance by meeting with investigative staff in-person, providing documents, and identifying witnesses. The whistleblower also repeatedly reported the concerns internally in an effort to remedy the violations."
- $100,000 to an individual who "used information from various publicly available documents to calculate an estimate of an important metric for the Company. Claimant then compared the calculation with information Claimant found in Claimant's own research and showed that the Company's disclosures regarding that metric were implausible." The SEC reports that this is the fifth to receive an award based on independent analysis in FY21.

Challenges to Amendments

Jordan A. Thomas v. SEC, D.D.C., No. 1:21-cv-108

- A former SEC attorney who helped develop the Whistleblower Program is challenging the amended rules in a lawsuit filed on January 13, 2021 in the United States District Court for the District of Columbia.
- The Complaint, filed on January 13, 2021 challenges:
  - Rule 21F-6 allowing the SEC to consider the size of the monetary sanctions and potential dollar amount of award
  - Rule 21F-3 allowing the SEC to deny an award for a related action if another whistleblower program "has 'the more direct or relevant connection to the action'" because it "disincentivizes individuals from becoming whistleblowers by imposing numerous roadblocks on whistleblowers' eligibility to recover awards for 'related actions.'"

Retaliation

Retaliation

The Amendments to the Rules do not lessen the protections afforded to whistleblowers from adverse employment action.

Section 21F also protects whistleblowers by:

- Prohibiting retaliation by employers for the reporting of possible securities violations.
- Authorizing legal action against employers for retaliation against whistleblowers.
- Providing that an employer may not "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against" a whistleblower in the "terms and conditions of employment."

Rule 21F-17: "(a) No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications."

Retaliation

Retaliation includes:

- Discharge
- Demotion
- Suspension
- Direct or indirect threats
- Harassment or discrimination in any other manner in the terms and conditions of employment

Retaliation

While the amendments do not lessen protections, the amended definition of "whistleblower" for retaliation purposes requires an individual to report securities violations to the SEC in writing prior to any retaliation.

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

- The plaintiff reported suspected securities law violations internally to senior management, but did not report the violations to the SEC.
- The court held that the "anti-retaliation provision does not extend to an individual . . . who has not reported a violation of the securities laws to the SEC" and that the "reporting requirement in whistleblower definition applied to [Dodd Frank] Act's anti-retaliation provision, not just to Act's award program."
- Because the plaintiff only reported internally to his employer before being terminated, and not to the SEC, he was not considered a whistleblower entitled to anti-retaliation protection.

Post-Amendment Retaliation Cases

Rodriguez v. Stanley, CV 19-9104 (CCC), 2020 WL 7338221, at *8 (D.N.J. Dec. 14, 2020) - Dismissing claims against the Plaintiff for failure "to state a claim under the anti-retaliation provision of the Dodd-Frank Act because Plaintiff does not allege that she ever reported a violation of securities law to the Securities and Exchange Commission."

Corrent v. Cooper Standard Auto., Inc., 20-11070, 2020 WL 7389040, at *1 (E.D. Mich. Dec. 16, 2020) – "Because plaintiff fails to allege that she complained to the SEC, she cannot establish that she was a whistleblower under Section 78u-6(a)(6) of Dodd-Frank."

Avoiding and Handling Retaliation Claims

Inform all people in the individual's supervisory chain, human resources, and/or compliance that the individual has reported a possible violation of company policy and/or the law and reiterate:

- the company anti-retaliation policy
- that the complaint will be investigated in accordance with the established company policy
- that the matter is not to be discussed orally or in writing with the complainant or anyone else except in the course of the company investigation
- that no employment action (transfers, change in assignment, employment or compensation evaluations, etc.) are undertaken without consulting the appropriate personnel (e.g., HR, the individual's supervisor, legal)

Mitigating Risks

Proactively Manage and Mitigate Risks from Whistleblowers

Strong compliance program – need to establish and maintain effective program

- Review existing program
- Revise or adopt new, if needed
- The right one for your company
- Monitor compliance
- Provide for anonymous communications of allegations
- Consider employee certification on quarterly basis that they are not aware of any actual or potential violations of law

Proactively Manage and Mitigate Risks from Whistleblowers

- Should strongly encourage employees to report actual or potential violations of law to company
- Hopefully, can prevent or reduce violations before conduct results in significant or any penalties

Proactively Manage and Mitigate Risks from Whistleblowers

Companies can take steps to avoid triggering the exceptions

- Mitigate and cease any conduct that could cause substantial injury
- Create environment that any investigation of the misconduct will not be impeded
- Conduct investigations quickly to be able to complete prior to 120 days when possible

Moving Forward

Moving Forward?

Companies must:

- Create multiple channels through which employees can report suspected wrongdoing.
- Encourage internal reporting and reward employees who report potentially unlawful conduct internally.

Such rewards might range from

- praise and recognition
- to career advancement
- to direct financial rewards.

Moving Forward?

Companies must:

- State in writing that employees will not be subject to retaliation for reporting potential violations.
- Investigate complaints promptly when employees do report problems internally.
- Retain independent investigators to investigate significant alleged misconduct.

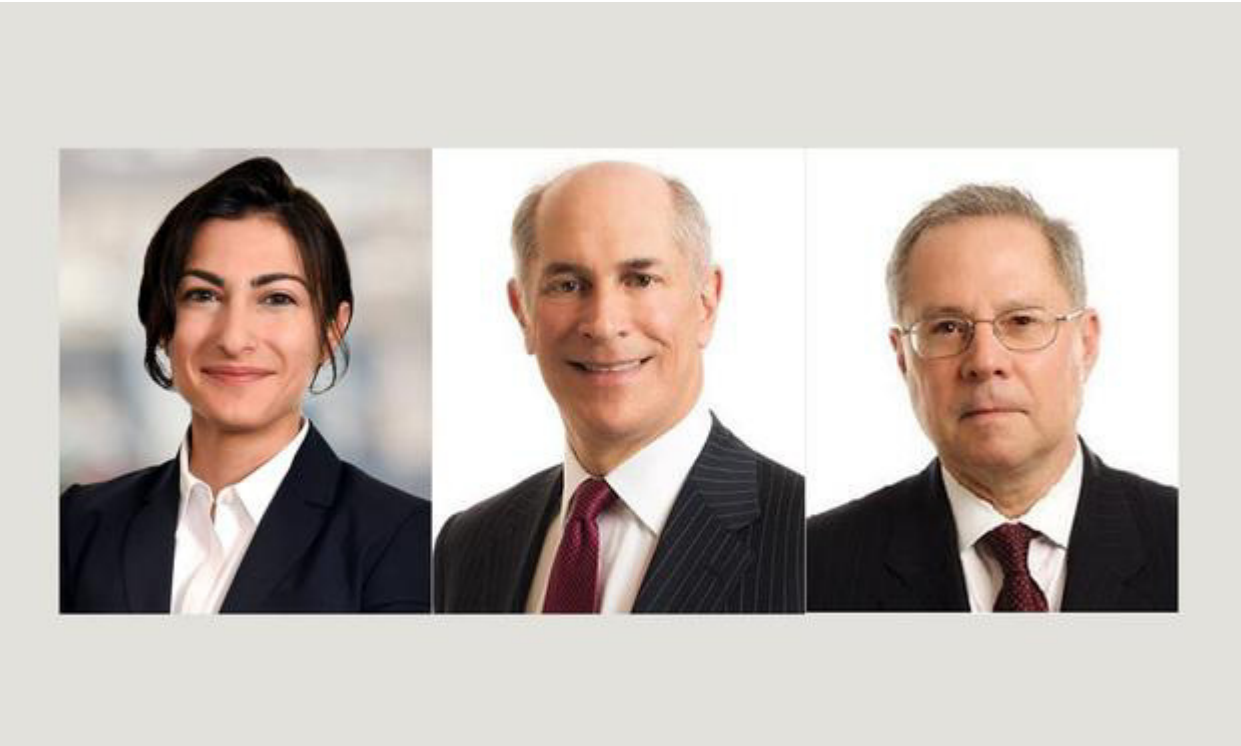
Thank You

The Legal Intelligencer

After Nearly a Decade, SEC Amends Whistleblower Rules

After nearly a decade in operation, the U.S. Securities and Exchange Commission (SEC or commission) voted to amend the rules governing its whistleblower program, which Congress created in 2010 to assist the SEC in discovering and prosecuting securities law violations by providing "monetary incentives for individuals to come forward and report possible violations of the federal securities laws to the SEC."

By **Robert L. Hickok, Jay A. Dubow and Kaitlin Meola** | December 01, 2020



L-R Kaitlin Meola, Jay Dubow and Robert Hickok, Troutman Pepper. Courtesy Photos

After nearly a decade in operation, the U.S. Securities and Exchange Commission (SEC or commission) voted to amend the rules governing its whistleblower program, which Congress created in 2010 to assist the SEC in discovering and prosecuting securities law violations by providing "monetary incentives for individuals to come forward and report possible violations of the federal securities laws to the SEC." The program seeks to

accomplish this goal by providing potentially significant monetary awards in exchange for information regarding securities violations and offering protection to whistleblowers from adverse employment action for providing such information.

The impact and success of the program is clear. Since the program's inception, the SEC has awarded more than $700 million to whistleblowers. The awards can be significant—the top-10 awards range from $22 million to $114 million, with the largest to date awarded in October 2020. The amendments to the program's awards structure, as discussed below, will likely provide for even greater awards.

In addition to the significant awards, provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act also protect whistleblowers by prohibiting employer retaliation for reporting possible securities violations. The SEC, as part of the whistleblower program, implemented rules enabling it to take legal action against retaliating employers, and the whistleblowers themselves have a private right of action. Additionally, SEC Rule 21F-17(a) also prohibits anyone—not just employers—from preventing another person from reporting violations.

Changes to the Rules

On Sept. 23, the SEC announced that it voted to amend the rules governing the whistleblower program. The amendments are "intended to provide greater transparency, efficiency, and clarity, and to strengthen and bolster the program." Specifically, the amendments aim to "increase efficiencies around the review and processing of whistleblower award claims, and provide the commission with additional tools to appropriately reward meritorious whistleblowers."

The major changes to the rules range from substantive rules that affect the way whistleblower awards are made, to rules "intended to clarify and enhance certain policies, practices, and procedures in implementing the program."

Awards. One major change to the whistleblower rules is the way awards are calculated. Historically under the program, whistleblowers were entitled to awards between 10% and 30% of monetary sanctions over $1 million collected by the SEC in actions it brought based on the whistleblowers' information. The award percentages could increase or decrease based on several positive or negative factors set forth in Rule 21F-6. The positive factors include: the significance of information to the success of proceeding; the extent of assistance; the interest in deterring the reported violation; and whether the violation was reported internally before or at the same time it was reported to the SEC. The negative factors include whether the whistleblower: participated in the violation; unreasonably delayed reporting; and interfered with the company's internal compliance and reporting systems.

As amended, for awards of $5 million or less, the whistleblower automatically receives the statutory maximum—30%—absent the existence of any negative factors. Under the amended rule, whistleblowers face the prospect of receiving an award three times higher than they might otherwise have received under the former rules.

For awards over $5 million, the amendments clarify the SEC's discretion to determine the amount of the award based on the criteria set forth in Rule 21F-6(a) and (b), and that the amount may be based on percentage, dollar amount, or some combination. Notably, the SEC rejected a proposed amendment that would have allowed it to essentially cap awards where SEC recovery totaled at least $100 million. The SEC declined to impose such a cap, but instead reiterated its broad discretion to adjust awards under Rule 21F-6.

Definitions—Expanding/Limiting Whistleblower Eligibility. The amended rules also redefine and clarify various definitions, which, in some instances, will effectively expand award opportunities. In particular, the amendments expand the definition of "action" in Rule 21F-4(d) to include deferred prosecution agreements,

non-prosecution agreements, and settlement agreements. Similarly, the amendments clarify the term "monetary sanctions" in Rule 21F-4(e) to include an order to pay money designated as penalty, disgorgement, or interest, or otherwise ordered as relief for covered violations.

The premise behind some of these amendments is that "Congress did not intend for meritorious whistleblowers to be denied awards simply because of the procedural vehicle that the [SEC] has selected to resolve an enforcement matter." The expanded definitions may encourage whistleblowers to come forward with information without the fear of being denied an award because of the type of enforcement action the SEC ultimately pursues.

On the other hand, some amended definitions emphasize some limits on whistleblower applications. For example, the SEC clarified the term "related action" in Rule 21F-3(b) to exclude separate actions if it is determined that a separate award scheme is available and more appropriate.

The SEC also revised its definition of "whistleblower" in Rule 21F-2 to require an individual, in order to be protected from retaliation, to report securities violations to the SEC in writing prior to any retaliation. This revision arose in response to the Supreme Court's decision in *Digital Realty Trust v. Somers*, 138 S. Ct. 767 (2018), which held that the definition of whistleblower requires a person to report the securities violation to the SEC—as opposed to just internally to their employer—in order to be subject to the SEC's anti-retaliation protections. While this narrows the definition of a protected whistleblower, it is detrimental to companies since it encourages whistleblowers to report to the SEC rather than just internally to the employer.

Other Changes. With the adoption of the amendments, the SEC added new rules "designed to help increase the commission's efficiency in processing whistleblower award applications." To that end, the SEC created a summary disposition procedure under Rule 21F-18 that allows it to deny untimely applications, applications containing information not used in the SEC's enforcement action or investigation, or applications otherwise not in compliance with the Program's requirements. It also created a provision under Rule 21F-8, which allows the SEC to permanently bar any applicant who submits three frivolous award applications.

Additionally, the new rules waive Form TCR (tip, complaint or referral), which formerly was essential to obtaining whistleblower status and required whistleblowers to submit the original information to the SEC through the SEC's website or by mailing or faxing a Form TCR. Under the new rule, whistleblowers may initially submit original information to the SEC in other ways, providing that the whistleblower otherwise complies with the rules within 30 days of that initial submission.

Finally, the SEC adopted guidance to clarify the meaning of "independent analysis" in the rules in order to qualify as a whistleblower under the program. Specifically, the guidance provides that to be considered an "independent analysis," the whistleblower must present information to the SEC that is not publicly available.

Going Forward

With over $700 million in whistleblower awards since the program's inception—$175 million awarded in FY 2020 alone—the whistleblower program is fulfilling its purpose of incentivizing people to come forward and report securities violations. The publicity attendant with these awards has encouraged others to come forward as well. The changes to the program's rules, which favor whistleblowers in several ways, will likely increase this number. While some amendments are geared toward reducing the number of non-meritorious applications—such as the summary disposition procedure and bar on frivolous applications—other amendments will likely increase the number of whistleblower applications. For example, given the automatic, statutory maximum award of 30% for recoveries of $5 million or less—which comprise most whistleblower awards—the amendments may further incentivize individuals to come forward and report potential SEC violations. Additionally, the whistleblower program affords whistleblowers protection from adverse employment actions for doing so, and the amendments do nothing to lessen those protections.

Accordingly, companies are well-advised to take the whistleblower complaints seriously. This alone may reduce the number of complaints sent to the SEC. Conducting a serious internal investigation may ultimately reduce exposure and contain potential harm since thorough internal investigations may be favorably received by investors and the SEC if and when the SEC conducts an investigation and considers sanctions. As such, companies should review their internal policies to ensure that they are up to date and in compliance with the amendments, afford adequate protections for potential whistleblowers, and have a robust internal whistleblower reporting and investigation process.

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Securities Whistleblower Incentives and Protections

§240.21F-1 General.
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Section 21F of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78u-6), entitled "Securities Whistleblower Incentives and Protection," requires the Securities and Exchange Commission ("Commission") to pay awards, subject to certain limitations and conditions, to whistleblowers who provide the Commission with original information about violations of the Federal securities laws. These rules describe the whistleblower program that the Commission has established to implement the provisions of Section 21F, and explain the procedures you will need to follow in order to be eligible for an award. You should read these procedures carefully because the failure to take certain required steps within the time frames described in these rules may disqualify you from receiving an award for which you otherwise may be eligible. Unless expressly provided for in these rules, no person is authorized to make any offer or promise, or otherwise to bind the Commission with respect to the payment of any award or the amount thereof. The Securities and Exchange Commission's Office of the Whistleblower administers our whistleblower program. Questions about the program or these rules should be directed to the SEC Office of the Whistleblower, 100 F Street, NE., Washington, DC 20549-5631.

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

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

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

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

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

(d) Retaliation protections.

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

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

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

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

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

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

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

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

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

§240.21F-3 Payment of awards.
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(a) Commission actions: Subject to the eligibility requirements described in §§240.21F-2, 240.21F-8, and 240.21F-16 of this chapter, the Commission will pay an award or awards to one or more whistleblowers who:

(1) Voluntarily provide the Commission

(2) With original information

(3) That leads to the successful enforcement by the Commission of a Federal court or administrative action

(4) In which the Commission obtains monetary sanctions totaling more than $1,000,000.

Note to paragraph (a): The terms voluntarily, original information, leads to successful enforcement, action, and monetary sanctions are defined in §240.21F-4 of this chapter.

(b) Related actions: The Commission will also pay an award based on amounts collected in certain related actions.

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

(i) The Attorney General of the United States;

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

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

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

(2) In order for the Commission to make an award in connection with a related action, the Commission must determine that the same original

information that the whistleblower gave to the Commission also led to the successful enforcement of the related action under the same criteria described in these rules for awards made in connection with Commission actions. The Commission may seek assistance and confirmation from the authority bringing the related action in making this determination. The Commission will deny an award in connection with the related action if:

(i) The Commission determines that the criteria for an award are not satisfied; or

(ii) The Commission is unable to make a determination because the Office of the Whistleblower could not obtain sufficient and reliable information that could be used as the basis for an award determination pursuant to §240.21F-12(a) of this chapter. Additional procedures apply to the payment of awards in related actions. These procedures are described in §§240.21F-11 and 240.21F-14 of this chapter.

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

(i) Notwithstanding paragraph (b)(1) of this section, if a judicial or administrative action is subject to a separate monetary award program established by the Federal Government, a state government, or a self-regulatory organization, the Commission will deem the action a related action only if the Commission finds (based on the facts and circumstances of the action) that its whistleblower program has the more direct or relevant connection to the action.

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

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

interests (such as tax collection or fraud against the Federal Government);

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

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

(iii) If the Commission determines to deem the action a related action, the Commission will not make an award to you for the related action if you have already been granted an award by the governmental/SRO entity responsible for administering the other whistleblower award program. Further, if you were denied an award by the other award program, you will not be permitted to readjudicate any issues before the Commission that the governmental/SRO entity responsible for administering the other whistleblower award program resolved against you as part of the award denial. Additionally, if the Commission makes an award before an award determination is finalized by the governmental/SRO entity responsible for administering the other award program, the Commission shall condition its award on the meritorious whistleblower making a prompt, irrevocable waiver of any claim to an award from the other award program.

§240.21F-4 Other definitions.
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(a) Voluntary submission of information.

(1) Your submission of information is made voluntarily within the meaning of §§240.21F-1 through 240.21F-17 of this chapter if you provide your submission before a request, inquiry, or demand that relates to the subject matter of your submission is directed to you or anyone representing you (such as an attorney):

(i) By the Commission;

(ii) In connection with an investigation, inspection, or examination by the Public Company Accounting Oversight Board, or any self-regulatory organization; or

(iii) In connection with an investigation by Congress, any other authority of the Federal government, or a state Attorney General or securities regulatory authority.

(2) If the Commission or any of these other authorities direct a request, inquiry, or demand as described in paragraph (a)(1) of this section to you or your representative first, your submission will not be considered voluntary, and you will not be eligible for an award, even if your response is not compelled by subpoena or other applicable law. However, your submission of information to the Commission will be considered voluntary if you voluntarily provided the same information to one of the other authorities identified above prior to receiving a request, inquiry, or demand from the Commission.

(3) In addition, your submission will not be considered voluntary if you are required to report your original information to the Commission as a result of a pre-existing legal duty, a contractual duty that is owed to the Commission or to one of the other authorities set forth in paragraph (a)(1) of this section, or a duty that arises out of a judicial or administrative order.

(b) Original information.

(1) In order for your whistleblower submission to be considered original information, it must be:

(i) Derived from your independent knowledge or independent analysis;

(ii) Not already known to the Commission from any other source, unless you are the original source of the information;

(iii) Not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless you are a source of the information; and

(iv) Provided to the Commission for the first time after July 21, 2010 (the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act).

(2) Independent knowledge means factual information in your possession that is not derived from publicly available sources. You may gain independent knowledge from your experiences, communications and observations in your business or social interactions.

(3) Independent analysis means your own analysis, whether done alone or in combination with others. Analysis means your examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public.

(4) The Commission will not consider information to be derived from your independent knowledge or independent analysis in any of the following circumstances:

(i) If you obtained the information through a communication that was subject to the attorney-client privilege, unless disclosure of that information would otherwise be permitted by an attorney pursuant to §205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise;

(ii) If you obtained the information in connection with the legal representation of a client on whose behalf you or your employer or firm are providing services, and you seek to use the information to make a whistleblower submission for your own benefit, unless disclosure would otherwise be permitted by an attorney pursuant to §205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise; or

(iii) In circumstances not covered by paragraphs (b)(4)(i) or (b)(4)(ii) of this section, if you obtained the information because you were:

(A) An officer, director, trustee, or partner of an entity and another person informed you of allegations of misconduct, or you learned the information in connection with the entity's processes for identifying, reporting, and addressing possible violations of law;

(B) An employee whose principal duties involve compliance or internal audit responsibilities, or you were employed by or otherwise associated with a firm retained to perform compliance or internal audit functions for an entity;

(C) Employed by or otherwise associated with a firm retained to conduct an inquiry or investigation into possible violations of law; or

(D) An employee of, or other person associated with, a public accounting firm, if you obtained the information through the performance of an engagement required of an independent public accountant under the Federal securities laws (other than an audit subject to §240.21F-8(c)(4) of this chapter), and that information related to a violation by the engagement client or the client's directors, officers or other employees.

(iv) If you obtained the information by a means or in a manner that is determined by a United States court to violate applicable Federal or state criminal law; or

(v) Exceptions. Paragraph (b)(4)(iii) of this section shall not apply if:

(A) You have a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the relevant entity from engaging in conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors;

(B) You have a reasonable basis to believe that the relevant entity is engaging in conduct that will impede an investigation of the misconduct; or

(C) At least 120 days have elapsed since you provided the information to the relevant entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or your supervisor, or since you received the information, if you

received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or your supervisor was already aware of the information.

(vi) If you obtained the information from a person who is subject to this section, unless the information is not excluded from that person's use pursuant to this section, or you are providing the Commission with information about possible violations involving that person.

(5) The Commission will consider you to be an original source of the same information that we obtain from another source if the information satisfies the definition of original information and the other source obtained the information from you or your representative. In order to be considered an original source of information that the Commission receives from Congress, any other authority of the Federal government, a state Attorney General or securities regulatory authority, any self-regulatory organization, or the Public Company Accounting Oversight Board, you must have voluntarily given such authorities the information within the meaning of these rules. You must establish your status as the original source of information to the Commission's satisfaction. In determining whether you are the original source of information, the Commission may seek assistance and confirmation from one of the other authorities described above, or from another entity (including your employer), in the event that you claim to be the original source of information that an authority or another entity provided to the Commission.

(6) If the Commission already knows some information about a matter from other sources at the time you make your submission, and you are not an original source of that information under paragraph (b)(5) of this section, the Commission will consider you an original source of any information you provide that is derived from your independent knowledge or analysis and that materially adds to the information that the Commission already possesses.

(7) If you provide information to the Congress, any other authority of the Federal government, a state Attorney General or securities regulatory authority, any self-regulatory organization, or the Public Company Accounting Oversight Board, or to an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law, and you, within 120 days, submit the same information to the Commission

pursuant to §240.21F-9 of this chapter, as you must do in order for you to be eligible to be considered for an award, then, for purposes of evaluating your claim to an award under §§240.21F-10 and 240.21F-11 of this chapter, the Commission will consider that you provided information as of the date of your original disclosure, report or submission to one of these other authorities or persons. You must establish the effective date of any prior disclosure, report, or submission, to the Commission's satisfaction. The Commission may seek assistance and confirmation from the other authority or person in making this determination.

(c) Information that leads to successful enforcement. The Commission will consider that you provided original information that led to the successful enforcement of a judicial or administrative action in any of the following circumstances:

(1) You gave the Commission original information that was sufficiently specific, credible, and timely to cause the staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning different conduct as part of a current examination or investigation, and the Commission brought a successful judicial or administrative action based in whole or in part on conduct that was the subject of your original information; or

(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.

(3) You reported original information through an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law before or at the same time you reported them to the Commission; the entity later provided your information to the Commission, or provided results of an audit or investigation initiated in whole or in part in response to information you reported to the entity; and the information the entity provided to the Commission satisfies either paragraph (c)(1) or (c)(2) of this section. Under this paragraph (c)(3), you must also submit the same information to the Commission in accordance with the procedures set forth in §240.21F-9 within 120 days of providing it to the entity.

(d) An action generally means a single captioned judicial or administrative proceeding brought by the Commission. Notwithstanding the foregoing:

(1) For purposes of making an award under §240.21F-10 of this chapter, the Commission will treat as a Commission action two or more administrative or judicial proceedings brought by the Commission if these proceedings arise out of the same nucleus of operative facts; or

(2) For purposes of determining the payment on an award under §240.21F-14 of this chapter, the Commission will deem as part of the Commission action upon which the award was based any subsequent Commission proceeding that, individually, results in a monetary sanction of $1,000,000 or less, and that arises out of the same nucleus of operative facts.

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

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

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

(e) Monetary sanctions means:

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

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

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

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

(f) Appropriate regulatory agency means the Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and any other

agencies that may be defined as appropriate regulatory agencies under Section 3(a)(34) of the Exchange Act (15 U.S.C. 78c(a)(34)).

(g) Appropriate regulatory authority means an appropriate regulatory agency other than the Commission.

(h) Self-regulatory organization means any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board, and any other organizations that may be defined as self-regulatory organizations under Section 3(a)(26) of the Exchange Act (15 U.S.C. 78c(a)(26)).

§240.21F-5 Amount of award.
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(a) The determination of the amount of an award is in the discretion of the Commission.

(b) If all of the conditions are met for a whistleblower award in connection with a Commission action or a related action, the Commission will then decide the percentage amount of the award applying the criteria set forth in §240.21F-6 of this chapter and pursuant to the procedures set forth in §§240.21F-10 and 240.21F-11 of this chapter. The amount will be at least 10 percent and no more than 30 percent of the monetary sanctions that the Commission and the other authorities are able to collect. The percentage awarded in connection with a Commission action may differ from the percentage awarded in connection with a related action.

(c) If the Commission makes awards to more than one whistleblower in connection with the same action or related action, the Commission will determine an individual percentage award for each whistleblower, but in no event will the total amount awarded to all whistleblowers in the aggregate be less than 10 percent or greater than 30 percent of the amount the Commission or the other authorities collect.

§240.21F-6 Criteria for determining amount of award.
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In exercising its discretion to determine the appropriate award, the Commission may consider the following factors (and only the following factors) in relation to the facts and circumstances of each case in setting the dollar or percentage amount of the award. In the event that awards are determined for multiple whistleblowers in connection an action, these factors will be used to determine the relative allocation of awards among the whistleblowers.

(a) Factors that may increase the amount of a whistleblower's award. In determining whether to increase the amount of an award, the Commission will consider the following factors, which are not listed in order of importance.

(1) Significance of the information provided by the whistleblower. The Commission will assess the significance of the information provided by a whistleblower to the success of the Commission action or related action. In considering this factor, the Commission may take into account, among other things:

(i) The nature of the information provided by the whistleblower and how it related to the successful enforcement action, including whether the reliability and completeness of the information provided to the Commission by the whistleblower resulted in the conservation of Commission resources;

(ii) The degree to which the information provided by the whistleblower supported one or more successful claims brought in the Commission or related action.

(2) Assistance provided by the whistleblower. The Commission will assess the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action. In considering this factor, the Commission may take into account, among other things:

(i) Whether the whistleblower provided ongoing, extensive, and timely cooperation and assistance by, for example, helping to explain complex transactions, interpreting key evidence, or identifying new and productive lines of inquiry;

(ii) The timeliness of the whistleblower's initial report to the Commission or to an internal compliance or reporting system of

business organizations committing, or impacted by, the securities violations, where appropriate;

(iii) The resources conserved as a result of the whistleblower's assistance;

(iv) Whether the whistleblower appropriately encouraged or authorized others to assist the staff of the Commission who might otherwise not have participated in the investigation or related action;

(v) The efforts undertaken by the whistleblower to remediate the harm caused by the violations, including assisting the authorities in the recovery of the fruits and instrumentalities of the violations; and

(vi) Any unique hardships experienced by the whistleblower as a result of his or her reporting and assisting in the enforcement action.

(3) Law enforcement interest. The Commission will assess its programmatic interest in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws. In considering this factor, the Commission may take into account, among other things:

(i) The degree to which an award enhances the Commission's ability to enforce the Federal securities laws and protect investors; and

(ii) The degree to which an award encourages the submission of high quality information from whistleblowers by appropriately rewarding whistleblowers' submission of significant information and assistance, even in cases where the monetary sanctions available for collection are limited or potential monetary sanctions were reduced or eliminated by the Commission because an entity self-reported a securities violation following the whistleblower's related internal disclosure, report, or submission.

(iii) Whether the subject matter of the action is a Commission priority, whether the reported misconduct involves regulated entities or fiduciaries, whether the whistleblower exposed an industry-wide practice, the type and severity of the securities violations, the age and duration of misconduct, the number of violations, and the isolated, repetitive, or ongoing nature of the violations; and

(iv) The dangers to investors or others presented by the underlying violations involved in the enforcement action, including the amount of harm or potential harm caused by the underlying violations, the type of harm resulting from or threatened by the underlying violations, and the number of individuals or entities harmed.

(4) Participation in internal compliance systems. The Commission will assess whether, and the extent to which, the whistleblower and any legal representative of the whistleblower participated in internal compliance systems. In considering this factor, the Commission may take into account, among other things:

(i) Whether, and the extent to which, a whistleblower reported the possible securities violations through internal whistleblower, legal or compliance procedures before, or at the same time as, reporting them to the Commission; and

(ii) Whether, and the extent to which, a whistleblower assisted any internal investigation or inquiry concerning the reported securities violations.

(b) Factors that may decrease the amount of a whistleblower's award. In determining whether to decrease the amount of an award, the Commission will consider the following factors, which are not listed in order of importance.

(1) Culpability. The Commission will assess the culpability or involvement of the whistleblower in matters associated with the Commission's action or related actions. In considering this factor, the Commission may take into account, among other things:

(i) The whistleblower's role in the securities violations;

(ii) The whistleblower's education, training, experience, and position of responsibility at the time the violations occurred;

(iii) Whether the whistleblower acted with scienter, both generally and in relation to others who participated in the violations;

(iv) Whether the whistleblower financially benefitted from the violations;

(v) Whether the whistleblower is a recidivist;

(vi) The egregiousness of the underlying fraud committed by the whistleblower; and

(vii) Whether the whistleblower knowingly interfered with the Commission's investigation of the violations or related enforcement actions.

(2) Unreasonable reporting delay. The Commission will assess whether the whistleblower unreasonably delayed reporting the securities violations. In considering this factor, the Commission may take into account, among other things:

(i) Whether the whistleblower was aware of the relevant facts but failed to take reasonable steps to report or prevent the violations from occurring or continuing;

(ii) Whether the whistleblower was aware of the relevant facts but only reported them after learning about a related inquiry, investigation, or enforcement action; and

(iii) Whether there was a legitimate reason for the whistleblower to delay reporting the violations.

(3) Interference with internal compliance and reporting systems. The Commission will assess, in cases where the whistleblower interacted with his or her entity's internal compliance or reporting system, whether the whistleblower undermined the integrity of such system. In considering this factor, the Commission will take into account whether there is evidence provided to the Commission that the whistleblower knowingly:

(i) Interfered with an entity's established legal, compliance, or audit procedures to prevent or delay detection of the reported securities violation;

(ii) Made any material false, fictitious, or fraudulent statements or representations that hindered an entity's efforts to detect, investigate, or remediate the reported securities violations; and

(iii) Provided any false writing or document knowing the writing or document contained any false, fictitious or fraudulent statements or entries that hindered an entity's efforts to detect, investigate, or remediate the reported securities violations.

(c) Additional considerations in connection with certain awards of $5 million or less.

(1) This subpart applies when the Commission is considering any meritorious award application where:

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

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

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

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

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

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

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

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

§240.21F-7 Confidentiality of submissions.
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(a) Pursuant to Section 21F(h)(2) of the Exchange Act (15 U.S.C. 78u-6(h)(2)) and §240.21F-2(c), the Commission will not disclose information that could reasonably be expected to reveal the identity of a whistleblower provided that the whistleblower has submitted information utilizing the processes specified in §240.21F-9(a), except that the Commission may disclose such information in the following circumstances:

(1) When disclosure is required to a defendant or respondent in connection with a Federal court or administrative action that the Commission files or in another public action or proceeding that is filed by an authority to which we provide the information, as described below;

(2) When the Commission determines that it is necessary to accomplish the purposes of the Exchange Act (15 U.S.C. 78a) and to protect investors, it may provide your information to the Department of Justice, an appropriate regulatory authority, a self regulatory organization, a state attorney general in connection with a criminal investigation, any appropriate state regulatory authority, the Public Company Accounting Oversight Board, or foreign securities and law enforcement authorities. Each of these entities other than foreign securities and law enforcement authorities is subject to the confidentiality requirements set forth in Section 21F(h) of the Exchange Act (15 U.S.C. 78u-6(h)). The Commission will determine what assurances of confidentiality it deems appropriate in providing such information to foreign securities and law enforcement authorities.

(3) The Commission may make disclosures in accordance with the Privacy Act of 1974 (5 U.S.C. 552a).

(b) You may submit information to the Commission anonymously. If you do so, however, you must also do the following:

(1) You must have an attorney represent you in connection with both your submission of information and your claim for an award, and your attorney's name and contact information must be provided to the Commission at the time you submit your information;

(2) You and your attorney must follow the procedures set forth in §240.21F-9 of this chapter for submitting original information anonymously; and

(3) Before the Commission will pay any award to you, you must disclose your identity to the Commission and your identity must be verified by the Commission as set forth in §240.21F-10 of this chapter.

§240.21F-8 Eligibility and forms.
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(a) To be eligible for a whistleblower award, you must give the Commission information in the form and manner that the Commission requires. The procedures for submitting information and making a claim for an award are described in §240.21F-9 through §240.21F-11 of this chapter. You should read these procedures carefully because you need to follow them in order to be eligible for an award, except that the Commission may, in its sole discretion, waive any of these procedures based upon a showing of extraordinary circumstances.

(b) In addition to any forms required by these rules, the Commission may also require that you provide certain additional information. You may be required to:

(1) Provide explanations and other assistance in order that the staff may evaluate and use the information that you submitted;

(2) Provide all additional information in your possession that is related to the subject matter of your submission in a complete and truthful manner, through follow-up meetings, or in other forms that our staff may agree to;

(3) Provide testimony or other evidence acceptable to the staff relating to whether you are eligible, or otherwise satisfy any of the conditions, for an award; and

(4) Enter into a confidentiality agreement in a form acceptable to the Office of the Whistleblower, covering any non-public information that the Commission provides to you, and including a provision that a violation of the agreement may lead to your ineligibility to receive an award.

(c) You are not eligible to be considered for an award if you do not satisfy the requirements of paragraphs (a) and (b) of this section. In addition, you are not eligible if:

(1) You are, or were at the time you acquired the original information provided to the Commission, a member, officer, or employee of the Commission, the Department of Justice, an appropriate regulatory agency, a self-regulatory organization, the Public Company Accounting Oversight Board, or any law enforcement organization;

(2) You are, or were at the time you acquired the original information provided to the Commission, a member, officer, or employee of a foreign government, any political subdivision, department, agency, or

instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Exchange Act (15 U.S.C. 78c(a)(52));

(3) You are convicted of a criminal violation that is related to the Commission action or to a related action (as defined in §240.21F-4 of this chapter) for which you otherwise could receive an award;

(4) You obtained the original information that you gave the Commission through an audit of a company's financial statements, and making a whistleblower submission would be contrary to requirements of Section 10A of the Exchange Act (15 U.S.C. 78j-a).

(5) You are the spouse, parent, child, or sibling of a member or employee of the Commission, or you reside in the same household as a member or employee of the Commission;

(6) You acquired the original information you gave the Commission from a person:

(i) Who is subject to paragraph (c)(4) of this section, unless the information is not excluded from that person's use, or you are providing the Commission with information about possible violations involving that person; or

(ii) With the intent to evade any provision of these rules; or

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

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

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

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

(e) The Commission shall have the authority to impose a permanent bar on a claimant as provided below.

(1) Grounds for a permanent bar. Submissions or applications that are frivolous or fraudulent, or that would otherwise hinder the effective and efficient operation of the Whistleblower Program may result in the Commission issuing a permanent bar as part of a final order in the course of considering a whistleblower award application from you. If such a bar is issued, the Office of the Whistleblower will not accept or act on any other applications from you. A permanent bar may be issued in the following circumstances:

(i) If you make three or more award applications for Commission actions that the Commission finds to be frivolous or lacking a colorable connection between the tip (or tips) and the Commission actions for which you are seeking awards; or

(ii) If the Commission finds that you have violated paragraph (c)(7) of this section.

(2) General procedures for issuance of a permanent bar. The Commission will consider whether to issue a permanent bar in connection with an award application from you. In general, the Preliminary Determination or Preliminary Summary Disposition must state that a bar is being recommended, and you will then have an opportunity to respond in writing in accordance with the award processing procedures specified in §§240.21F-10(e)(2) and 240.21F-18(b)(3). If the basis for a bar arises or is discovered after the issuance of a Preliminary Determination or Preliminary Summary Disposition, the Office of the Whistleblower shall notify you and afford you an opportunity to submit a response before the Commission determines whether to issue a bar.

(3) Notice and opportunity to withdraw frivolous applications.

(i) Except as provided in paragraph (e)(3)(ii) of this section, before any Preliminary Determination or Preliminary Summary Disposition is issued that may recommend a bar, the Office of the Whistleblower shall advise you of any assessment by that Office that your award application is frivolous ("frivolous application") or based on a tip that lacks a colorable connection to the action for which you have sought an award ("noncolorable application"). If you withdraw your award application within 30 days of the notification from the Office of the Whistleblower, it will not be considered by the Commission in determining whether to exercise its authority under this paragraph (e).

(ii) The notification and opportunity to withdraw provided for by paragraph (e)(3)(i) are limited to the first three applications submitted by you that are reviewed by the Office of the Whistleblower and preliminarily deemed by that Office to be either a frivolous application or a noncolorable application. After these first three award applications, you will not be provided notice or an opportunity to withdraw any other frivolous or noncolorable applications.

(iii) For purposes of determining whether a bar should be imposed under section (e) of this rule, you will not be permitted to withdraw your application:

(A) After the 30-day period to withdraw has run following notice from the Office of the Whistleblower with respect to the initial three applications assessed by that Office to be frivolous or lacking a colorable connection to the action; or

(B) After a Preliminary Determination or Preliminary Summary Disposition has issued in connection with any other such application.

(4) Award applications pending before the effective date of paragraph (e).

(i) Paragraph (e) of this section shall apply to all award applications pending as of the effective date of paragraph (e) of this section. But with respect to any such pending award applications, the Office of the Whistleblower shall advise you, before any Preliminary Determination or Preliminary Summary Disposition is issued that

may recommend a bar, of any assessment by that Office that the conditions for issuing a bar are satisfied because either:

(A) You submitted an award application prior to the effective date of this section (e) and that application is frivolous or lacking a colorable connection between the tip and the action for which you have sought an award; or

(B) You made a materially false, fictitious, or fraudulent statement or representation or used a false writing or document in violation of paragraph (c)(7) of this section prior to the effective date of this section (e).

(ii) If, within 30 days of the Office of the Whistleblower providing the foregoing notification, you withdraw the relevant award application(s), the withdrawn award application(s) will not be considered by the Commission in determining whether to exercise its authority under paragraph (e). Further, the procedures specified in paragraph (e)(3)(i) through (iii) of this section shall apply to any award application that is pending as of the effective date of this rule that is determined to be a frivolous or noncolorable application.

§240.21F-9 Procedures for submitting original information.
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(a) To submit information in a manner that satisfies §240.21F-2(b) and §240.21F-2(c) of this chapter you must submit your information to the Commission by any of these methods:

(1) Online, through the Commission's website located at www.sec.gov, using the Commission's electronic TCR portal (Tip, Complaint, or Referral);

(2) Mailing or faxing a Form TCR to the SEC Office of the Whistleblower at the mailing address or fax number designated on the SEC's web page for making such submissions; or

(3) By any other such method that the Commission may expressly designate on its website as a mechanism that satisfies §§240.21F-2(b) and 240.21F-2(c) of this chapter. For a 30-day period following the Commission's designation of any new forms by placing them on the Commission's website, the Commission shall also continue to accept submissions made using the prior version of the forms.

(b) Further, to be eligible for an award, you must declare under penalty of perjury at the time you submit your information pursuant to paragraph (a)(1), (a)(2), or (a)(3) of this section that your information is true and correct to the best of your knowledge and belief.

(c) Notwithstanding paragraphs (a) and (b) of this section, if you are providing your original information to the Commission anonymously, then your attorney must submit your information on your behalf pursuant to the procedures specified in paragraph (a) of this section. Prior to your attorney's submission, you must provide your attorney with a completed Form TCR that you have signed under penalty of perjury. When your attorney makes her submission on your behalf, your attorney will be required to certify that he or she:

(1) Has verified your identity;

(2) Has reviewed your completed and signed Form TCR for completeness and accuracy and that the information contained therein is true, correct and complete to the best of the attorney's knowledge, information and belief;

(3) Has obtained your non-waivable consent to provide the Commission with your original completed and signed Form TCR in the event that the Commission requests it due to concerns that you may have knowingly and

willfully made false, fictitious, or fraudulent statements or representations, or used any false writing or document knowing that the writing or document contains any false fictitious or fraudulent statement or entry; and

(4) Consents to be legally obligated to provide the signed Form TCR within seven (7) calendar days of receiving such request from the Commission.

(d) If you submitted original information in writing to the Commission after July 21, 2010 (the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act) but before the effective date of these rules, your submission will be deemed to satisfy the requirements set forth in paragraphs (a) and (b) of this section. If you were an anonymous whistleblower, however, you must provide your attorney with a completed and signed copy of Form TCR within 60 days of the effective date of these rules, your attorney must retain the signed form in his or her records, and you must provide of copy of the signed form to the Commission staff upon request by Commission staff prior to any payment of an award to you in connection with your submission. Notwithstanding the foregoing, you must follow the procedures and conditions for making a claim for a whistleblower award described in §§240.21F-10 and 240.21F-11 of this chapter.

(e) You must follow the procedures specified in paragraphs (a) and (b) of this section within 30 days of when you first provide the Commission with original information that you rely upon as a basis for claiming an award. If you fail to do so, then you will be deemed ineligible for an award in connection with that information (even if you later resubmit that information in accordance with paragraphs (a) and (b) of this section). Notwithstanding the foregoing, the Commission shall waive your noncompliance with paragraphs (a) and (b) of this section if:

(1) You demonstrate to the satisfaction of the Commission that you complied with the requirements of paragraphs (a) and (b) of this section within 30 days of first obtaining actual or constructive notice about those requirements (or 30 days from the date you retain counsel to represent you in connection with your submission of original information, whichever occurs first); and

(2) The Commission can readily develop an administrative record that unambiguously demonstrates that you would otherwise qualify for an award.

§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.
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(a) Whenever a Commission action results in monetary sanctions totaling more than $1,000,000, the Office of the Whistleblower will cause to be published on the Commission's Web site a "Notice of Covered Action." Such Notice will be published subsequent to the entry of a final judgment or order that alone, or collectively with other judgments or orders previously entered in the Commission action, exceeds $1,000,000; or, in the absence of such judgment or order subsequent to the deposit of monetary sanctions exceeding $1,000,000 into a disgorgement or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002. A claimant will have ninety (90) days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred.

(b) To file a claim for a whistleblower award, you must file Form WB-APP (as specified in §240.21F-8(d)(2). You must sign this form as the claimant and submit it to the Office of the Whistleblower by mail, email (as a PDF attachment), or fax (or any other manner that the Office permits).

(1) All claim forms, including any attachments, must be received by the Office of the Whistleblower within ninety (90) calendar days of the date of the Notice of Covered Action in order to be considered for an award.

(2) Notwithstanding paragraphs (a) and (b)(1) of this section, the time period to file an application for an award based on a Commission settlement agreement covered by §240.21F-4(d) of this chapter shall be governed exclusively by §240.21F-11(b)(1) of this chapter if the settlement agreement was entered into after July 21, 2010 but before the effective date of this section as amended in 2020.

(c) If you provided your original information to the Commission anonymously, you must disclose your identity on the Form WB-APP, and your identity must be verified in a form and manner that is acceptable to the Office of the Whistleblower prior to the payment of any award.

(d) Once the time for filing any appeals of the Commission's judicial or administrative action has expired, or where an appeal has been filed, after all appeals in the action have been concluded, one or more staff members designated by the Director of the Division of Enforcement ("Claims Review Staff") will evaluate all timely whistleblower award claims submitted on Form WB-APP in accordance with the criteria set forth in these rules. In connection with this process, the Office of

the Whistleblower may require that you provide additional information relating to your eligibility for an award or satisfaction of any of the conditions for an award, as set forth in §240.21F-8(b) of this chapter. Following a determination by the Claims Review Staff (and an opportunity for the Commission to review that determination), the Office of the Whistleblower will send you a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award dollar and percentage amount, and the grounds therefore.

(e) You may contest the Preliminary Determination made by the Claims Review Staff by submitting a written response to the Office of the Whistleblower setting forth the grounds for your objection to either the denial of an award or the proposed amount of an award. The response must be in the form and manner that the Office of the Whistleblower shall require. You may also include documentation or other evidentiary support for the grounds advanced in your response. In applying the award factors specified in §240.21F-6 of this chapter and determining the award dollar and percentage amounts set forth in the Preliminary Determination, the award factors may be considered by the SEC staff and the Commission in dollar terms, percentage terms or some combination thereof. Should you choose to contest a Preliminary Determination, you may set forth the reasons for your objection to the proposed amount of an award, including the grounds therefore, in dollar terms, percentage terms or some combination thereof.

(1) Before determining whether to contest a Preliminary Determination, you may:

(i) Within thirty (30) days of the date of the Preliminary Determination, request that the Office of the Whistleblower make available for your review the materials from among those set forth in §240.21F-12(a) of this chapter that formed the basis of the Claims Review Staff's Preliminary Determination.

(ii) Within thirty (30) calendar days of the date of the Preliminary Determination, request a meeting with the Office of the Whistleblower; however, such meetings are not required and the office may in its sole discretion decline the request.

(2) If you decide to contest the Preliminary Determination, you must submit your written response and supporting materials within sixty (60) calendar days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (e)(1) of this section, then within

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

(f) If you fail to submit a timely response pursuant to paragraph (e) of this section, then the Preliminary Determination will become the Final Order of the Commission (except where the Preliminary Determination recommended an award, in which case the Preliminary Determination will be deemed a Proposed Final Determination for purposes of paragraph (h) of this section). Your failure to submit a timely response contesting a Preliminary Determination will constitute a failure to exhaust administrative remedies, and you will be prohibited from pursuing an appeal pursuant to §240.21F-13 of this chapter.

(g) If you submit a timely response pursuant to paragraph (e) of this section, then the Claims Review Staff will consider the issues and grounds advanced in your response, along with any supporting documentation you provided, and will make its Proposed Final Determination.

(h) The Office of the Whistleblower will then notify the Commission of each Proposed Final Determination. Within thirty 30 days thereafter, any Commissioner may request that the Proposed Final Determination be reviewed by the Commission. If no Commissioner requests such a review within the 30-day period, then the Proposed Final Determination will become the Final Order of the Commission. In the event a Commissioner requests a review, the Commission will review the record that the staff relied upon in making its determinations, including your previous submissions to the Office of the Whistleblower, and issue its Final Order.

(i) The Office of the Whistleblower will provide you with the Final Order of the Commission.

§240.21F-11 Procedures for determining awards based upon a related action. (Back to Top)

(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 based on the monetary sanctions that are collected from a related action (as defined in §240.21F-3 of this chapter).

(b) You must also use Form WB-APP (as specified in §240.21F-8(d)(2)) to submit a claim for an award in a potential related action. You must sign this form as the claimant and submit it to the Office of the Whistleblower by mail, email (as a PDF attachment), or fax (or any other manner that the Office permits) as follows:

(1) If a final order imposing monetary sanctions has been entered in a potential related action at the time you submit your claim for an award in connection with a Commission action, you must submit your claim for an award in that related action on the same Form WB-APP that you use for the Commission action. For purposes of this paragraph and paragraph (b)(2) of this section, a final order imposing monetary sanctions is entered on the date of a court or administrative order imposing the monetary sanctions; however, with respect to any agreement covered by §240.21F-4(d) of this chapter (such as a deferred prosecution agreement or a non-prosecution agreement entered by the Department of Justice), the Commission will deem the date of the entry of the final order to be the later of either:

(i) The effective date of this section as amended in 2020; or

(ii) The date of the earliest public availability of the instrument reflecting the arrangement if evidenced by a press release or similar dated publication notice (or otherwise, the date of the last signature necessary for the agreement).

(2) If a final order imposing monetary sanctions in a potential related action has not been entered at the time you submit your claim for an award in connection with a Commission action, you must submit your claim on Form WB-APP within ninety (90) days of the issuance of a final order imposing sanctions in the potential related action.

(c) The Office of the Whistleblower may request additional information from you in connection with your claim for an award in a related action to demonstrate that you directly (or through the Commission) voluntarily provided the governmental/SRO entity (as specified in §240.21F-3(b)(1) of this chapter) the same original

information that led to the Commission's successful covered action, and that this information led to the successful enforcement of the related action. Further, the Office of the Whistleblower, in its discretion, may seek assistance and confirmation from the governmental/SRO entity in making an award determination.

(d) Once the time for filing any appeals of the final judgment or order in a potential related action has expired, or if an appeal has been filed, after all appeals in the action have been concluded, the Claims Review Staff (as specified in §240.21F-10(d) of this chapter) will evaluate all timely whistleblower award claims submitted on Form WB-APP in connection with the related action. The evaluation will be undertaken pursuant to the criteria set forth in these rules. In connection with this process, the Office of the Whistleblower may require that you provide additional information relating to your eligibility for an award or satisfaction of any of the conditions for an award, as set forth in §240.21F-(8)(b) of this chapter. Following a determination by the Claims Review Staff (and an opportunity for the Commission to review that determination), the Office of the Whistleblower will send you a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award percentage amount.

(e) You may contest the Preliminary Determination made by the Claims Review Staff by submitting a written response to the Office of the Whistleblower setting forth the grounds for your objection to either the denial of an award or the proposed amount of an award. The response must be in the form and manner that the Office of the Whistleblower shall require. You may also include documentation or other evidentiary support for the grounds advanced in your response. In applying the award factors specified in §240.21F-6 of this chapter and determining the award dollar and percentage amounts set forth in the Preliminary Determination, the award factors may be considered by the SEC staff and the Commission in dollar terms, percentage terms or some combination thereof. Should you choose to contest a Preliminary Determination, you may set forth the reasons for your objection to the proposed amount of an award, including the grounds therefore, in dollar terms, percentage terms or some combination thereof.

(1) Before determining whether to contest a Preliminary Determination, you may:

(i) Within thirty (30) days of the date of the Preliminary Determination, request that the Office of the Whistleblower make available for your review the materials from among those set forth in

§240.21F-12(a) of this chapter that formed the basis of the Claims Review Staff's Preliminary Determination.

(ii) Within thirty (30) days of the date of the Preliminary Determination, request a meeting with the Office of the Whistleblower; however, such meetings are not required and the office may in its sole discretion decline the request.

(2) If you decide to contest the Preliminary Determination, you must submit your written response and supporting materials within sixty (60) calendar days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (e)(1)(i) of this section, then within sixty (60) calendar days of the Office of the Whistleblower making those materials available for your review.

(f) If you fail to submit a timely response pursuant to paragraph (e) of this section, then the Preliminary Determination will become the Final Order of the Commission (except where the Preliminary Determination recommended an award, in which case the Preliminary Determination will be deemed a Proposed Final Determination for purposes of paragraph (h) of this section). Your failure to submit a timely response contesting a Preliminary Determination will constitute a failure to exhaust administrative remedies, and you will be prohibited from pursuing an appeal pursuant to §240.21F-13 of this chapter.

(g) If you submit a timely response pursuant to paragraph (e) of this section, then the Claims Review Staff will consider the issues and grounds that you advanced in your response, along with any supporting documentation you provided, and will make its Proposed Final Determination.

(h) The Office of the Whistleblower will notify the Commission of each Proposed Final Determination. Within thirty 30 days thereafter, any Commissioner may request that the Proposed Final Determination be reviewed by the Commission. If no Commissioner requests such a review within the 30-day period, then the Proposed Final Determination will become the Final Order of the Commission. In the event a Commissioner requests a review, the Commission will review the record that the staff relied upon in making its determinations, including your previous submissions to the Office of the Whistleblower, and issue its Final Order.

(i) The Office of the Whistleblower will provide you with the Final Order of the Commission.

§240.21F-12 Materials that may form the basis of an award determination and that may comprise the record on appeal.
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(a) The following items constitute the materials that the Commission, the Claims Review Staff (as specified in §240.21F-10(d) of this chapter), and the Office of the Whistleblower may rely upon to make an award determination pursuant to §§240.21F-10, 240.21F-11, and 240.21F-18 of this chapter:

(1) Any publicly available materials from the covered action or related action, including:

(i) The complaint, notice of hearing, answers and any amendments thereto;

(ii) The final judgment, consent order, or final administrative order;

(iii) Any transcripts of the proceedings, including any exhibits;

(iv) Any items that appear on the docket; and

(v) Any appellate decisions or orders.

(2) The whistleblower's Form TCR, including attachments, and other related materials provided by the whistleblower to assist the Commission with the investigation or examination;

(3) The whistleblower's Form WB-APP, including attachments, any supplemental materials submitted by the whistleblower before the deadline to file a claim for a whistleblower award for the relevant Notice of Covered Action, and any other materials timely submitted by the whistleblower in response either

(i) To a request from the Office of the Whistleblower or the Commission; or

(ii) To the Preliminary Determination or Preliminary Summary Disposition that was provided to the claimant;

(4) Sworn declarations (including attachments) from the Commission staff regarding any matters relevant to the award determination;

(5) With respect to an award claim involving a related action, any statements or other information that the entity provides or identifies in connection with an award determination, provided the entity has authorized the Commission

to share the information with the claimant. (Neither the Commission nor the Claims Review Staff may rely upon information that the entity has not authorized the Commission to share with the claimant); and

(6) Any other documents or materials from third parties (including sworn declarations) that are received or obtained by the Office of the Whistleblower to resolve the claimant's award application, including information related to the claimant's eligibility. (The Commission, the Claims Review Staff, and the Office of the Whistleblower may not rely upon information that the third party has not authorized the Commission to share with the claimant.)

(b) These rules do not entitle claimants to obtain from the Commission any materials (including any pre-decisional or internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim) other than those listed in paragraph (a) of this section. Moreover, the Office of the Whistleblower may make redactions as necessary to comply with any statutory restrictions, to protect the Commission's law enforcement and regulatory functions, and to comply with requests for confidential treatment from other law enforcement and regulatory authorities. The Office of the Whistleblower may also require you to sign a confidentiality agreement, as set forth in §240.21F-(8)(b)(4) of this chapter, before providing these materials.

§240.21F-13 Appeals.
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(a) Section 21F of the Exchange Act (15 U.S.C. 78u-6) commits determinations of whether, to whom, and in what amount to make awards to the Commission's discretion. A determination of whether or to whom to make an award may be appealed within 30 days after the Commission issues its final decision to the United States Court of Appeals for the District of Columbia Circuit, or to the circuit where the aggrieved person resides or has his principal place of business. Where the Commission makes an award based on the factors set forth in §240.21F-6 of this chapter of not less than 10 percent and not more than 30 percent of the monetary sanctions collected in the Commission or related action, the Commission's determination regarding the amount of an award (including the allocation of an award as between multiple whistleblowers, and any factual findings, legal conclusions, policy judgments, or discretionary assessments involving the Commission's consideration of the factors in §240.21F-6 of this chapter) is not appealable.

(b) The record on appeal shall consist of the Final Order, any materials that were considered by the Commission in issuing the Final Order, and any materials that were part of the claims process leading from the Notice of Covered Action to the Final Order (including, but not limited to, the Notice of Covered Action, whistleblower award applications filed by the claimant, the Preliminary Determination or Preliminary Summary Disposition, materials that were considered by the Claims Review Staff in issuing the Preliminary Determination or that were provided to the claimant by the Office of the Whistleblower in connection with a Preliminary Summary Disposition, and materials that were timely submitted by the claimant in response to the Preliminary Determination or Preliminary Summary Disposition). The record on appeal shall not include any pre-decisional or internal deliberative process materials that are prepared exclusively to assist the Commission and the Claims Review Staff (as specified in §240.21F-10(d) of this chapter) in deciding the claim (including the staff's Proposed Final Determination or the Office of the Whistleblower's Proposed Final Summary Disposition, or any Draft Preliminary Determination or Draft Summary Disposition that were provided to the Commission for review). When more than one claimant has sought an award based on a single Notice of Covered Action, the Commission may exclude from the record on appeal any materials that do not relate directly to the claimant who is seeking judicial review.

§240.21F-14 Procedures applicable to the payment of awards.
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(a) Any award made pursuant to these rules will be paid from the Securities and Exchange Commission Investor Protection Fund (the "Fund").

(b) A recipient of a whistleblower award is entitled to payment on the award only to the extent that a monetary sanction is collected in the Commission action or in a related action upon which the award is based.

(c) Payment of a whistleblower award for a monetary sanction collected in a Commission action or related action shall be made following the later of:

(1) The date on which the monetary sanction is collected; or

(2) The completion of the appeals process for all whistleblower award claims arising from:

(i) The Notice of Covered Action, in the case of any payment of an award for a monetary sanction collected in a Commission action; or

(ii) The related action, in the case of any payment of an award for a monetary sanction collected in a related action.

(d) If there are insufficient amounts available in the Fund to pay the entire amount of an award payment within a reasonable period of time from the time for payment specified by paragraph (c) of this section, then subject to the following terms, the balance of the payment shall be paid when amounts become available in the Fund, as follows:

(1) Where multiple whistleblowers are owed payments from the Fund based on awards that do not arise from the same Notice of Covered Action (or related action), priority in making these payments will be determined based upon the date that the collections for which the whistleblowers are owed payments occurred. If two or more of these collections occur on the same date, those whistleblowers owed payments based on these collections will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

(2) Where multiple whistleblowers are owed payments from the Fund based on awards that arise from the same Notice of Covered Action (or related action), they will share the same payment priority and will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

§240.21F-15 No amnesty.
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The Securities Whistleblower Incentives and Protection provisions do not provide amnesty to individuals who provide information to the Commission. The fact that you may become a whistleblower and assist in Commission investigations and enforcement actions does not preclude the Commission from bringing an action against you based upon your own conduct in connection with violations of the Federal securities laws. If such an action is determined to be appropriate, however, the Commission will take your cooperation into consideration in accordance with its Policy Statement Concerning Cooperation by Individuals in Investigations and Related Enforcement Actions (17 CFR 202.12).

§240.21F-16 Awards to whistleblowers who engage in culpable conduct.
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In determining whether the required $1,000,000 threshold has been satisfied (this threshold is further explained in §240.21F-10 of this chapter) for purposes of making any award, the Commission will not take into account any monetary sanctions that the whistleblower is ordered to pay, or that are ordered against any entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated. Similarly, if the Commission determines that a whistleblower is eligible for an award, any amounts that the whistleblower or such an entity pay in sanctions as a result of the action or related actions will not be included within the calculation of the amounts collected for purposes of making payments.

§240.21F-17 Staff communications with individuals reporting possible securities law violations.

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(a) No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by §240.21F-4(b)(4)(i) and §240.21F-4(b)(4)(ii) of this chapter related to the legal representation of a client) with respect to such communications.

(b) If you are a director, officer, member, agent, or employee of an entity that has counsel, and you have initiated communication with the Commission relating to a possible securities law violation, the staff is authorized to communicate directly with you regarding the possible securities law violation without seeking the consent of the entity's counsel.

§240.21F-18 Summary disposition.
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(a) Notwithstanding the procedures specified in §240.21F-10(d) through (g) and in §240.21F-11(d) through (g) of this chapter, the Office of the Whistleblower may determine that an award application that meets any of the following conditions for denial shall be resolved through the summary disposition process described further in paragraph (b) of this section:

(1) You submitted an untimely award application;

(2) You did not comply with the requirements of §240.21F-9 of this chapter when submitting the tip upon which your award claim is based, and you otherwise are not eligible for a waiver under either §240.21F-9(e) or the Commission's other waiver authorities;

(3) The information that you submitted was never provided to or used by the staff handling the covered action or the underlying investigation (or examination), and those staff members otherwise had no contact with you;

(4) You did not comply with §240.21F-8(b) of this chapter;

(5) You failed to specify in the award application the submission pursuant to §240.21F-9(a) of this chapter upon which your claim to an award is based;

(6) Your application does not raise any novel or important legal or policy questions.

(b) The following procedures shall apply to any award application designated for summary disposition:

(1) The Office of the Whistleblower shall issue a Preliminary Summary Disposition that notifies you that your award application has been designated for resolution through the summary disposition process. The Preliminary Summary Disposition shall also state that the Office has preliminarily determined to recommend that the Commission deny the award application and identify the basis for the denial.

(2) Prior to issuing the Preliminary Summary Disposition, the Office of the Whistleblower shall prepare a staff declaration that sets forth any pertinent facts regarding the Office's recommendation to deny your application. At the same time that it provides you with the Preliminary Summary Disposition, the Office of the Whistleblower shall, in its sole discretion, either

(i) Provide you with the staff declaration; or

(ii) Notify you that a staff declaration has been prepared and advise you that you may obtain the declaration only if within fifteen (15) calendar days you sign and complete a confidentiality agreement in a form and manner acceptable to the Office of the Whistleblower pursuant to §240.21F-8(b)(4) of this chapter. If you fail to return the signed confidentiality agreement within fifteen (15) calendar days, you will be deemed to have waived your ability to receive the staff declaration.

(3) You may reply to the Preliminary Summary Disposition by submitting a response to the Office of the Whistleblower within thirty (30) calendar days of the later of:

(i) The date of the Preliminary Summary Disposition, or

(ii) The date that the Office of the Whistleblower sends the staff declaration to you following your timely return of a signed confidentiality agreement. The response must identify the grounds for your objection to the denial (or in the case of item (a)(5) of this section, correct the defect). The response must be in the form and manner that the Office of the Whistleblower shall require. You may include documentation or other evidentiary support for the grounds advanced in your response.

(4) If you fail to submit a timely response pursuant to paragraph (b)(3) of this section, the Preliminary Summary Disposition will become the Final Order of the Commission. Your failure to submit a timely written response will constitute a failure to exhaust administrative remedies.

(5) If you submit a timely response pursuant to paragraph (b)(3) of this section, the Office of the Whistleblower will consider the issues and grounds advanced in your response, along with any supporting documentation that you provided, and will prepare a Proposed Final Summary Disposition. The Office of the Whistleblower may supplement the administrative record as appropriate. (This provision does not prevent the Office of the Whistleblower from determining that, based on your written response, the award claim is no longer appropriate for summary disposition and that it should be resolved through the claims adjudication procedures specified in either §§240.21F-10 or 240.21F-11 of this chapter).

(6) The Office of the Whistleblower will then notify the Commission of the Proposed Final Summary Disposition. Within thirty (30) calendar days thereafter, any Commissioner may request that the Proposed Final Summary Disposition be reviewed by the Commission. If no Commissioner requests such a review within the 30-day period, then the Proposed Final Summary Disposition will become the Final Order of the Commission. In the event a Commissioner requests a review, the Commission will consider the award application and issue a Final Order.

(7) The Office of the Whistleblower will provide you with the Final Order of the Commission.

(c) In considering an award determination pursuant to this rule, the Office of the Whistleblower and the Commission may rely upon the items specified in §240.21F-12(a) of this chapter. Further, §240.21F-12(b) of this chapter shall apply to summary dispositions.

Press Release

SEC Issues Multiple Whistleblower Awards Totaling Nearly $3 Million

FOR IMMEDIATE RELEASE
2020-307

Washington D.C., Dec. 7, 2020 — The Securities and Exchange Commission today announced whistleblower awards to five individuals for information provided in three different enforcement actions for combined payments of nearly $3 million.

In the first order, the SEC awarded the whistleblower nearly $1.8 million. The whistleblower, a company insider, provided information that would have been difficult to detect in the absence of the tip and provided extraordinary assistance to SEC staff resulting in the return of money to investors.

In the second order, the SEC awarded a total of approximately $750,000 to two whistleblowers. The first whistleblower provided a detailed tip that prompted the opening of the investigation and received an award of more than $500,000. In awarding this whistleblower, the SEC exercised its discretion to waive the TCR filing requirement. The second whistleblower, who received more than $250,000, provided new information that resulted in the inclusion of additional allegations in the covered action. Both whistleblowers provided substantial assistance, including participating in interviews and providing subject matter expertise.

In the third order, the SEC jointly awarded nearly $400,000 to two individuals whose analysis prompted the opening of an investigation that led to the SEC's enforcement action. They also provided substantial and continuing assistance during the course of the investigation.

"Today the Commission issued awards to multiple whistleblowers whose information and assistance proved critical to several enforcement matters," said Jane Norberg, Chief of the SEC's Office of the Whistleblower. "In the first quarter of FY2021, the SEC has made whistleblower awards of almost $170 million to 17 individuals, which is already near the record dollar amount reached last fiscal year."

The SEC has awarded approximately $731 million to 123 individuals since issuing its first award in 2012. All payments are made out of an investor protection fund established by Congress that is financed entirely through monetary sanctions paid to the SEC by securities law violators. No money has been taken or withheld from harmed investors to pay whistleblower awards. Whistleblowers may be eligible for an award when they voluntarily provide the SEC with original, timely, and credible information that leads to a successful enforcement action. Whistleblower awards can range from 10-30% of the money collected when the monetary sanctions exceed $1 million.

As set forth in the Dodd-Frank Act, the SEC protects the confidentiality of whistleblowers and does not disclose information that could reveal a whistleblower's identity.

For more information about the whistleblower program and how to report a tip, visit www.sec.gov/whistleblower.

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Related Materials

- SEC Order 1
- SEC Order 2
- SEC Order 3

Press Release

SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program

FOR IMMEDIATE RELEASE
2020-219

Washington D.C., Sept. 23, 2020 — The Securities and Exchange Commission today voted to adopt amendments to the rules governing its whistleblower program that are designed to provide greater clarity to whistleblowers and increase the program's efficiency and transparency. Concurrently, to provide additional efficiencies, as well as clarity and transparency in the award determination process, the SEC's Office of the Whistleblower published guidance regarding the process for determining award amounts for eligible whistleblowers.

The SEC's whistleblower program was created to incentivize individuals to report high-quality tips to the Commission and assist the agency in its efforts to combat wrongdoing and, as a result, better protect investors and the marketplace. Since the program's inception ten years ago, whistleblowers have made a significant impact on the Commission's enforcement efforts and protection of investors. Original information provided by whistleblowers has led to enforcement actions in which the Commission has obtained over $2.5 billion in financial remedies, most of which has been, or is scheduled to be, returned to harmed investors.

The SEC has awarded approximately $523 million to 97 individuals since the program began, and it has worked over the years to improve the program's efficiency and increase incentives for whistleblowers. In the past three and a half years, the agency has made the five top largest awards in the program's history – two at $50 million, and one each at $39 million, $37 million, and $33 million. It has also increased the pace at which it has been processing claims and making awards. This year so far, even with the challenges presented by COVID-19, the Commission has processed more claims than in any previous year.

"The Commission's enforcement efforts, and most importantly, American investors and markets, have greatly benefitted from the credible information and assistance that whistleblowers have provided," said SEC Chairman Jay Clayton. "Whistleblowers often take professional and reputational risks in reporting their information to the SEC and we are committed to rewarding them for taking those risks and contributing to our enforcement efforts. Today's rule amendments will help us get more money into the hands of whistleblowers, and at a faster pace. Experience demonstrates this added clarity, efficiency and transparency will further incentivize whistleblowers, enhance the whistleblower award program and benefit investors and our markets."

The amendments to the whistleblower rules are intended to provide greater transparency, efficiency and clarity, and to strengthen and bolster the program in several ways. The rule amendments increase efficiencies around the review and processing of whistleblower award claims, and provide the Commission with additional tools to appropriately reward meritorious whistleblowers for their efforts and contributions to a successful matter.

Among other enhancements, the amendments provide a mechanism for whistleblowers with potential awards of less than $5 million (which historically have represented nearly 75% of all whistleblower awards), subject to certain criteria, to qualify for a presumption that they will receive the maximum statutory award amount. Other awards will continue to be evaluated consistent with past practice.

The amendments also affirm that award amounts—which the Commission, in its discretion, can determine in percentage terms, dollar terms or some combination—are to be determined exclusively based on the application of the award factors set forth in the Commission's whistleblower rules. In other words, there is not a separate (post application of the award factors) assessment of whether award amounts are too small or too large. The amendments further clarify that the Commission may waive compliance with the TCR filing requirements if a whistleblower complies with the requirements within 30 days of first providing the information or of first obtaining actual or constructive notice of the TCR filing requirements.

The whistleblower rule amendments will become effective 30 days after publication in the Federal Register.

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FACT SHEET

SEC Open Meeting

September 23, 2020

Background

Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act added Section 21F to the Securities Exchange Act of 1934 (the "Exchange Act"), establishing the Commission's whistleblower program. Among other things, Section 21F authorizes the SEC to make monetary awards to eligible individuals who voluntarily provide original information that leads to successful SEC enforcement actions resulting in monetary sanctions over $1 million.

Awards must be made in an amount equal to not less than 10 percent, and not more than 30 percent, of the monetary sanctions collected in the covered SEC action and certain related actions. The amendments clarify that the form of an action—e.g., settlement agreements, deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs)—will not affect whether the action is a covered action or a related action. The amendments also codify the Commission's historic approach to determining whether an action is a related action, including clarifying that a law-enforcement or separate regulatory action does not qualify as a "related action" if the Commission determines that there is a separate award scheme that more appropriately applies to such law-enforcement or separate regularly action.

Congress established a separate fund at the Treasury Department, called the Investor Protection Fund (IPF), from which whistleblower awards are paid. No money has been taken or withheld from harmed investors to pay whistleblower awards.

The whistleblower rule amendments make certain modifications and clarifications to the existing rules, as well as several technical amendments.

Highlights

Additional Tools in Award Determinations

- *Presumption of the statutory maximum award amount for certain awards of $5 million and less*: Historically, approximately 75% of the awards given out in the whistleblower program have been $5 million or less.
    - For awards where the statutory maximum award amount for the covered action and any related actions is in the aggregate $5 million or less, the Commission is adding Exchange Act Rule 21F-6(c) to provide a presumption that the Commission will pay a meritorious claimant the statutory maximum amount where none of the negative award criteria specified in Rule 21F-6(b) are present, subject to certain limited exceptions.
    - For awards over $5 million, the Commission will continue to analyze the award factors identified in Rule 21F-6 and issue awards based on the application of those factors. Based on the historical

application of the award factors, if none of the negative criteria specified in Rule 21F-6(b) are present, the award amount would be expected to be in the top third of the award range.

- After carefully considering the comments received, the Commission has determined not to adopt proposed Exchange Act Rule 21F-6(d)(2), which would have provided a formalized process for the Commission to conduct an enhanced review of certain awards.

- *Allowing awards based on deferred prosecution agreements ("DPAs") and non-prosecution agreements ("NPAs") entered into by the U.S. Department of Justice ("DOJ"), or a settlement agreement entered into by the Commission outside of the context of a judicial or administrative proceeding to address violations of the securities laws:* This amendment will ensure that whistleblowers are not disadvantaged because of the particular form of an action that the Commission or DOJ may elect to pursue. Under the amendment, the Commission would be able to make award payments to whistleblowers based on money collected as a result of such DPAs and NPAs, as well as under settlement agreements entered into by the Commission outside of the context of a judicial or administrative proceeding to address violations of the securities laws.
    - The amendment to the definition of "action" to include NPAs, DPAs, and similar Commission settlement agreements will apply to any such agreement that was entered into after July 21, 2010 (the date the Dodd-Frank Act became effective). Individuals will have 90 days from the effective date of the amendments to apply for an award in connection with any such agreement that was entered between the July 2010 date and the effective date of the amendments.

- *Clarifying the current definition of "related action":* This amendment codifies the Commission's approach to determining whether an action is a related action, including clarifying that a law-enforcement or separate regulatory action does not qualify as a "related action" if the Commission determines that there is a separate award scheme that more appropriately applies to such law-enforcement or separate regulatory action. The presence of such a separate award scheme would not affect the Commission's determination of the award based on the monetary sanctions collected by the Commission in the covered SEC action and any related action where such an award scheme was not present.

Uniform Definition of "Whistleblower"

In response to the Supreme Court's decision in Digital Realty Trust, Inc. v. Somers, the Commission is modifying Rule 21F-2 to establish a uniform definition of "whistleblower" that will apply to all aspects of Exchange Act Section 21F—i.e., the award program, the heightened confidentiality requirements, and the employment anti-retaliation protections.

- For purposes of retaliation protection, an individual is required to report information about possible securities laws violations to the Commission "in writing." As required by the Supreme Court's decision, to qualify for the retaliation protection under Section 21F, the individual must report to the Commission before experiencing the retaliation.

- To be eligible for an award or to obtain heightened confidentiality protection, the additional existing requirement that a whistleblower submit information on Form TCR or through the Commission's online tips portal remains in place, subject to the additional discretion of the Commission to grant waivers described below.

- Additionally, the Commission is issuing interpretive guidance defining the scope of retaliatory conduct prohibited by Section 21F(h)(1)(A), which includes any retaliatory activity by an employer against a whistleblower that a reasonable employee would find materially adverse.

Increased Efficiency in Claims Review Process

The new presumption for certain awards of $5 million or less, described above, should result in gains in efficiency from streamlining the award determination process for those awards. Two further amendments are designed to help increase the Commission's efficiency in processing whistleblower award applications.

- New subparagraph (e) to Exchange Act Rule 21F-8 codifies the Commission's practice of barring applicants who submit materially false, fictitious, or fraudulent statements in their whistleblower submission, in their other dealings with the Commission, or in related actions, and provides an important new tool for the Commission in processing frivolous award applications.
    - To prevent repeat submitters from abusing the award application process, the rule permits the Commission to permanently bar any applicant from seeking an award after the Commission determines that the applicant has abused the process by submitting three frivolous award applications.
    - For the first three applications determined to be frivolous, the Office of the Whistleblower will notify a claimant of its assessment and give the claimant the opportunity to withdraw the application.

- New Exchange Act Rule 21F-18 affords the Commission with a summary disposition procedure for certain types of common denials, such as untimely award applications, applications that involve a tip that was not provided to the Commission in the form and manner that the rules require, and applications where the claimant's information was never provided to or used by staff responsible for the investigation.
    - The more streamlined process is designed to help facilitate a more timely resolution of such relatively straightforward denials, while freeing up staff resources to focus on processing potentially meritorious award claims. Claimants will still have an opportunity to contest a preliminary denial of their claim before the Commission makes its final determination.

Clarification and Enhancement of Certain Policies and Procedures

The rule amendments also clarify and enhance certain policies, practices, and procedures in implementing the program. These amendments include the items listed below.

- Exchange Act Rule 21F-4(e) is amended to clarify the definition of "monetary sanctions," codifying the Commission's current understanding and application of that term.

- Section 21F of the Exchange Act provides that the determination of the amount of an award is in the discretion of the Commission. Exchange Act Rule 21F-6 is amended to clarify the Commission's discretion in applying the award factors and setting the award amount, including the discretion to apply the award factors in percentage terms, dollar terms or some combination thereof. The amendments also confirm that the Commission will consider only the enumerated award factors set forth in the rule when determining the award amount.

- Exchange Act Rule 21F-9 is amended to provide the Commission with additional flexibility to modify the manner in which individuals may submit Form TCR (Tip, Complaint or Referral).
    - Further, the amendment clarifies that the Commission may waive compliance with Rule 21F-9(a) and (b) for a meritorious whistleblower who provided a Form TCR:
        - within 30 days of first providing the information that he or she relies upon as a basis for a claim, or
        - within 30 days of first obtaining actual or constructive notice about those requirements (or 30 days from the date the whistleblower retains counsel to represent him or her in connection with the submission of original information, whichever occurs first).

- The waiver of non-compliance with Rule 21F-9(a) and (b) is automatic, rather than discretionary, when the Commission finds that the whistleblower has established that the specified conditions are satisfied.
- The Commission continues to retain its separate discretionary exemptive authorities under Rule 21F-8(a) and Exchange Act Section 36(a) for circumstances that may warrant exemptive relief.

- Exchange Act Rule 21F-8 is amended to provide the Commission with additional flexibility regarding the forms used in connection with the whistleblower program.

- Exchange Act Rule 21F-12 is amended to clarify the list of materials that the Commission may rely upon in making an award determination.

- Exchange Act Rule 21F-13 is amended to clarify the materials that may comprise the administrative record for purposes of judicial review.

Commission Interpretive Guidance

In addition to the foregoing rule amendments, the Commission is publishing interpretive guidance to help clarify the meaning of "independent analysis" as that term is defined in Exchange Act Rule 21F-4 and utilized in award applications.

- Under the guidance, in order to qualify as "independent analysis," a whistleblower's submission must provide evaluation, assessment, or insight beyond what would be reasonably apparent to the Commission from publicly available information.

- In making that determination, the Commission will consider whether the whistleblower's conclusion of possible securities violations derives from multiple sources, including sources that are not readily identified and accessed by a member of the public without specialized knowledge, unusual effort, or substantial cost, and the sources collectively raise a strong inference of a potential securities law violation that is not readily inferable by the Commission from any of the sources individually.

Finally, the Commission has decided not to adopt a specific time-based presumption of "unreasonable delay" as interpretive guidance. The Commission will continue to assess the facts and circumstances of each case to determine whether any delay was reasonably attributable to actions taken by or circumstances out of the control of the whistleblower or to unreasonable actions by the whistleblower.

Guidance from the Office of the Whistleblower

Over the past several years, the Office of the Whistleblower and the Division of Enforcement have worked to streamline and substantially accelerate the evaluation of claims for whistleblower awards and there has been substantial improvement in this regard. To provide additional efficiencies, as well as clarity and transparency in the award determination process, the Office of the Whistleblower has contemporaneously issued staff guidance regarding the process for determining award amounts for eligible whistleblowers. This guidance is publicly available on the SEC's web page for the Office of the Whistleblower.

The guidance reflects the Office of the Whistleblower's experience with the program as well as the implementation of the amendments adopted today, and it sets forth the process for the Office of the Whistleblower to propose award amounts to the Claims Review Staff, which issues a preliminary determination that is subject to Commission review. The discretion to apply the award factors and set the award amount remains with the Commission.

The guidance sets forth that, for awards where the statutory maximum award amount for the covered action and any related actions is in the aggregate $5 million or less, the proposed amount will be the statutory maximum

where none of the negative award criteria specified in Rule 21F-6(b) are present, subject to certain limited exceptions as set forth in the rule.

For awards over $5 million, the Office of the Whistleblower will continue to analyze the factors identified in Rule 21F-6 and propose award amounts based on the application of the award factors. Historically, if none of the negative criteria specified in Rule 21F-6(b) were present, the majority of awards have been in the top third of the award range.

The Office of the Whistleblower will continue to make available on its webpage (www.sec.gov/whistleblower) information regarding its approach to processing whistleblower award claims.

Additional Information to Congress

The Commission also directed the Office of the Whistleblower to include in its annual reports to Congress (beginning with the upcoming FY 2020 report), in an aggregated manner, an overview discussion of the factors that were present in the awards throughout the year, including (to the extent practicable) a qualitative discussion of how these factors affected the Commission's determination of award amounts.

What's Next?

The amendments to the whistleblower rules become effective 30 days after publication in the Federal Register.

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Related Materials

- Final Rule

Press Release

SEC Awards Over $1.6 Million to Whistleblower

FOR IMMEDIATE RELEASE
2020-333

Washington D.C., Dec. 22, 2020 — The Securities and Exchange Commission today announced an award of more than $1.6 million to a whistleblower whose tip significantly contributed to the success of an enforcement action. The whistleblower produced critical information about an ongoing fraudulent scheme and provided extensive assistance to the investigative staff, including by participating in meetings and furnishing high-quality evidence.

“Today’s award demonstrates the value of whistleblowers to the SEC’s enforcement efforts,” said Jane Norberg, Chief of the SEC’s Office of the Whistleblower. “We hope that this award encourages others with information regarding possible securities laws violations to report to the Commission.”

The SEC has awarded approximately $736 million to 128 individuals since issuing its first award in 2012. All payments are made out of an investor protection fund established by Congress that is financed entirely through monetary sanctions paid to the SEC by securities law violators. No money has been taken or withheld from harmed investors to pay whistleblower awards. Whistleblowers may be eligible for an award when they voluntarily provide the SEC with original, timely, and credible information that leads to a successful enforcement action. Whistleblower awards can range from 10-30% of the money collected when the monetary sanctions exceed $1 million.

As set forth in the Dodd-Frank Act, the SEC protects the confidentiality of whistleblowers and does not disclose information that could reveal a whistleblower's identity.

For more information about the whistleblower program and how to report a tip, visit www.sec.gov/whistleblower.

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More About This Topic

- Whistleblower Award Process and Statistics

Related Materials

- SEC Order

Press Release

SEC Issues Multiple Whistleblower Awards Totaling Over $3.6 Million

FOR IMMEDIATE RELEASE
2020-325

Washington D.C., Dec. 18, 2020 — The Securities and Exchange Commission today announced whistleblower awards in connection with three separate enforcement actions totaling over $3.6 million.

In the first order, the SEC awarded a whistleblower over $1.8 million for providing significant information about a fraudulent scheme. The whistleblower took immediate steps to mitigate the harm to investors, and provided substantial assistance to the staff, including providing testimony, key documents, and other information that saved SEC time and resources and contributed to an enforcement action that resulted in the return of millions of dollars to harmed investors.

In the second order, the SEC awarded a whistleblower more than $1.2 million for providing information that led to a successful enforcement action. In making the award, the SEC determined that the whistleblower's culpability and unreasonable delay impacted the award amount.

In the third order, the SEC awarded more than $500,000 to a whistleblower who provided significant information and ongoing assistance that led to the success of an enforcement action. In issuing the award, the SEC waived the TCR filing requirement based on the unique facts and circumstances of the case.

"Today's three awards demonstrate the SEC's continuing commitment to making awards to individuals who provide high-quality information that assists the agency in bringing successful enforcement actions," said Jane Norberg, Chief of the SEC's Office of the Whistleblower. "These awards also show that the Commission will take into account the unique facts and circumstances of each matter, in accordance with the whistleblower rules, when determining eligibility and the amount of the award."

The SEC has awarded approximately $735 million to 127 individuals since issuing its first award in 2012. All payments are made out of an investor protection fund established by Congress that is financed entirely through monetary sanctions paid to the SEC by securities law violators. No money has been taken or withheld from harmed investors to pay whistleblower awards. Whistleblowers may be eligible for an award when they voluntarily provide the SEC with original, timely, and credible information that leads to a successful enforcement action. Whistleblower awards can range from 10-30% of the money collected when the monetary sanctions exceed $1 million.

As set forth in the Dodd-Frank Act, the SEC protects the confidentiality of whistleblowers and does not disclose information that could reveal a whistleblower's identity.

For more information about the whistleblower program and how to report a tip, visit www.sec.gov/whistleblower.

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Related Materials

- SEC Order 1
- SEC Order 2
- SEC Order 3

Press Release

SEC Issues Over $1.1 Million to Multiple Whistleblowers

FOR IMMEDIATE RELEASE
2021-2

Washington D.C., Jan. 7, 2021 — The Securities and Exchange Commission today announced awards totaling more than $1.1 million to five whistleblowers who provided high-quality information that led to successful enforcement actions.

In the first order, the SEC awarded three whistleblowers almost $500,000 in connection with two related enforcement actions. The first whistleblower provided information that prompted the opening of an investigation. The second and third whistleblowers provided information that significantly contributed to the success of the actions, and contributed additional, helpful assistance to the investigative staff.

In the second order, the SEC awarded nearly $600,000 to a whistleblower whose information caused the opening of an investigation. The whistleblower continued to provide helpful assistance by meeting with investigative staff in-person, providing documents, and identifying witnesses. The whistleblower also repeatedly reported the concerns internally in an effort to remedy the violations.

In the third order, the SEC awarded more than $100,000 to a whistleblower whose independent analysis led to a successful enforcement action. Among other things, the whistleblower conducted an analysis using information from publicly available documents to calculate an estimate of an important metric for a company, and then showed that the company's disclosures regarding that metric were implausible. This is the fifth individual in FY21 who received an award based on independent analysis.

"These awards underscore the breadth of ways that company insiders, as well as whistleblowers not affiliated with a company, can positively impact SEC investigations," said Jane Norberg, Chief of the SEC's Office of the Whistleblower. "Whistleblowers who provide high-quality information or analysis may be eligible for an award where their information causes staff to open an investigation or meaningfully advances an existing investigation."

The SEC has awarded approximately $737 million to 133 individuals since issuing its first award in 2012. All payments are made out of an investor protection fund established by Congress that is financed entirely through monetary sanctions paid to the SEC by securities law violators. No money has been taken or withheld from harmed investors to pay whistleblower awards. Whistleblowers may be eligible for an award when they voluntarily provide the SEC with original, timely, and credible information that leads to a successful enforcement action. Whistleblower awards can range from 10-30% of the money collected when the monetary sanctions exceed $1 million.

As set forth in the Dodd-Frank Act, the SEC protects the confidentiality of whistleblowers and does not disclose information that could reveal a whistleblower's identity.

For more information about the whistleblower program and how to report a tip, visit www.sec.gov/whistleblower.

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Related Materials

- SEC Order 1
- SEC Order 2
- SEC Order 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JORDAN A. THOMAS, 40 Fairfield Beach Road Fairfield, CT 06824, PLAINTIFF, v. SECURITIES AND EXCHANGE COMMISSION and ELAD L. ROISMAN, in his official capacity as Acting Chairman of the Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549 DEFENDANTS.	CIVIL ACTION NO. 1:21-cv-108

COMPLAINT

Plaintiff Jordan A. Thomas brings this civil action against Defendants U.S. Securities and Exchange Commission ("Commission" or "SEC") and Elad L. Roisman, in his official capacity as Acting Chairman of the SEC (collectively "Defendants"), for declaratory and injunctive relief, and alleges as follows:

INTRODUCTION

1. Following the global financial crisis of 2008, Congress recognized that the Commission was in need of additional power, assistance, and money at its disposal to regulate securities markets. To assist the Commission in identifying securities law violations, Congress passed the Dodd-Frank Act, which created a new, robust whistleblower program designed to motivate people who know of securities law violations to come forward.

2. Since its creation, the SEC's whistleblower program has been an unparalleled success. To date, the agency has received more than 40,000 reports, launched more than 1,000 investigations, returned more than $850 million to injured investors, and sanctioned wrongdoers more than $3 billion.

The American securities markets are unequivocally better as a result of this innovative investor protection program.

3. Despite this incredible success, the Commission recently amended its whistleblower rules for the express purpose of decreasing the size and number of whistleblower awards it issues. *See Whistleblower Program Rules*, Rel. No. 34-89963, File No. S7-16-18, 2020 WL 5763381 (Sept. 23, 2020) ("Final Rule").

4. Plaintiff Jordan Thomas, one of the most prominent whistleblower attorneys in the country, brings this action in order to vacate and set aside the Commission's unlawful new rules.

5. Under the Dodd-Frank Act, the Commission "shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement" of a covered action or "related action" in an amount equal to "not less than 10 percent . . . [and] not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions." 15 U.S.C. §78u-6(b)(1).

6. Under the Commission's prior rules, the agency calculated whistleblower awards by assigning an "award percentage" based on certain positive factors (*e.g.*, the significance of the information provided) and negative factors (*e.g.*, the culpability of the whistleblower). The Commission then issued an award by multiplying the "award percentage" by the total monetary sanctions collected by the SEC. The Commission did not take the size of the monetary sanctions into account when deciding the proper amount of the whistleblower award.

7. These rules encouraged whistleblowers to come forward by guaranteeing that those individuals who acted properly would be awarded accordingly and would not have their awards unfairly and arbitrarily diminished.

8. In 2018, however, the Commission changed course. In a proposal to amend its whistleblower rules, the Commission stated that its prior rules were leading to whistleblower awards

that were too large in situations where the SEC collected significant monetary sanctions. Accordingly, the Commission proposed to adopt a new rule that would allow the agency to consider the amount of the monetary sanctions collected (and the potential dollar amount of the whistleblower award) when calculating the whistleblower award and to lower whistleblower awards when they were based on high-dollar monetary sanctions. In doing so, the Commission explained that it needed to adopt a new rule because it had *no authority* under its current rules to lower whistleblower awards on the basis that the award was "unnecessarily large."

9. After receiving fierce criticism, the Commission in September 2020 reversed course. According to the Commission, it had no need to adopt its proposed rule because the agency *already had discretion* to consider the potential dollar amount of the whistleblower award when calculating the award and to give lower whistleblower awards on this basis. Disregarding its rules and its prior public statements, the Commission adopted new language to "clarify" that the agency already had authority to give lower whistleblower awards based on the size of the monetary penalties collected.

10. In reliance on the prior rules, courageous whistleblowers have put their careers and lives on the line to assist the Commission—including wearing FBI wires, testifying in high-profile trials, and smuggling key documents out of foreign countries. Now, in the middle of the proverbial football game, the Commission has moved the goal posts on literally hundreds of SEC whistleblowers.

11. In the Final Rule, the Commission also amended its rules governing whistleblower awards for "related actions." Even though the Exchange Act mandates that the Commission "*shall* pay an award" in the successful enforcement of a "related action, in an aggregate amount" of 10% to 30%, the Commission imposed new barriers to whistleblowers recovering awards for "related actions." For example, the Commission now will not issue an award for a "related action" if, in the Commission's view, another whistleblower program has "the more direct or relevant connection to the action"—an additional limitation that is found nowhere in the statute.

12. The Final Rule will have devastating effects on the Commission's whistleblower program because it will disincentivize knowledgeable individuals from coming forward and blowing the whistle.

13. More important, the Final Rule's amendments to Rule 21F-6 are unlawful for at least five reasons: (1) the Final Rule was not a "logical outgrowth" of the proposed rule; (2) the Commission enacted the rule without ever acknowledging that it was changing its position; (3) the Commission failed to weigh the costs and benefits of the Final Rule because it (wrongly) believed that it had made no change at all; (4) the Commission adopted the rule without providing a reasoned explanation and despite the enormous harms it will cause the whistleblower program; and (5) the Commission had no statutory authority to enact the rule.

14. In addition, the Final Rule's amendments to Rule 21F-3 are unlawful because, among other things, (1) the Commission had no statutory authority to enact the changes; and (2) the Commission adopted the rule without providing a reasoned explanation and despite the enormous harms it will cause the whistleblower program.

15. The Final Rule's amendments to Rule 21F-6 and Rule 21F-3 are unlawful and must be enjoined, vacated, and set aside.

PARTIES

I. The Plaintiff

16. Plaintiff Jordan A. Thomas is an attorney in New York City, New York. Plaintiff is the Chair of the Whistleblower Representation Practice at Labaton Sucharow LLP ("Labaton"). In July 2011, Plaintiff founded Labaton's whistleblower practice, making Labaton the first national practice to exclusively focus on representing whistleblowers with information about possible violations of the federal securities laws.

17. According to the New York Times, Plaintiff's whistleblower practice is "one of the top . . . in the country."[1] The Wall Street Journal has described him as "one of the most prominent attorneys representing whistleblowers before the government."[2] And NPR Planet Money has referred to him as "one of the top whistleblower lawyers in the country."[3]

18. Plaintiff's first-of-its-kind whistleblower practice has experienced unprecedented success. He has successfully represented, among other clients, the first officer of a public company to win a whistleblower award, the first whistleblower to receive criminal immunity, and the first whistleblower to receive an award because his company retaliated against him. His clients have received some of the largest whistleblower awards in history, with three of his clients' cases involving monetary sanctions in excess of $100 million.

19. Before joining Labaton, Plaintiff served as Assistant Chief Litigation Counsel and as Assistant Director in the U.S. Securities and Exchange Commission's Division of Enforcement. In these roles, he successfully investigated, litigated, and supervised a wide variety of high-profile enforcement matters. For his work on these cases, he received one Chairman's award, four Division Director Awards, and a Letter of Commendation from the U.S. Attorney for the District of Columbia.

20. While serving at the Commission, he also had a leadership role in the development of the Commission's whistleblower program, including conducting fact-finding visits to other federal agencies with whistleblower programs, drafting the proposed legislation and implementing rules, and briefing Congressional staffs on the proposed legislation. In recognition of his contributions to the establishment of the program he received the Chairman's Law and Policy Award, as well as the

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[1] Randall Smith, *Once an S.E.C. Regulator, Now Thriving as a Lawyer for Whistle-Blowers*, (Mar. 20, 2018), nyti.ms/2KTHA57.

[2] Gregory Zuckerman & Dave Michaels, *Bernie Madoff's Legacy: Whistleblower Inc.*, The Wall Street Journal (Dec. 8, 2018), on.wsj.com/33Behe9.

[3] Planet Money, *The Whistleblower Whisperer*, National Public Radio (May 29, 2019), n.pr/3mvcBdt.

Commission's Arthur Mathews Award, which recognized his "sustained demonstrated creativity in applying the federal securities laws for the benefit of investors."

21. Plaintiff brings this extensive knowledge and experience of SEC enforcement and the whistleblower program into his whistleblower practice at Labaton. As a private whistleblower attorney, his mission is to level the playing field for his clients so that they can successfully report possible securities violations without personal and professional regrets.

22. Plaintiff's clients are diverse, have come from numerous industries, and have reported a wide variety of significant securities violations. His clients are often senior executives and other knowledgeable individuals within companies. About 75% of them are insiders who work within the organization engaging in the reported securities violations. Almost two thirds of them work in the financial services industry.

23. Plaintiff's practice is ultra-selective. Every year his team screens more than 300 potential cases, but he typically accepts fewer than 12 as clients.

24. Plaintiff's representation of a whistleblower has typically been a seven-step process.

25. First, he interviews potential clients about the possible securities violations that they wish to report. During this phase, he accepts the representations made by these clients and focuses on whether they appear credible and their allegations constitute securities violations.

26. Second, he conducts due diligence on the potential clients and their allegations. During this phase, he and his team conduct background checks on the clients, perform legal research on the violations, and attempt to independently corroborate some of the facts alleged by the clients.

27. Third, he helps potential clients make the difficult decision whether to blow the whistle or not. During this phase, he educates his clients about the SEC Whistleblower Program, shares his initial legal and factual findings, and advises them regarding the realities of being a whistleblower in light of their goals and fears.

28. Fourth, he assists clients in reporting possible securities violations to the Commission. During this phase, he and his team conduct additional legal research and attempt to strengthen the evidentiary record by, among other things, working with investigators, financial analysts, forensic accountants, and industry experts. Ultimately, Plaintiff develops a lengthy whistleblower submission that summarizes his legal and factual findings, identifies knowledgeable individuals, and produces potentially relevant evidence. Then, he files their whistleblower submissions with the Commission and later briefs the Staff.

29. Fifth, Plaintiff and his clients assist the Staff with their investigations and any related prosecutions. During this phase, among many other things, he and his clients respond to factual and legal inquiries, review and comment on potentially relevant documents, and participate in related investigations and prosecutions—all at the request of the Staff. Throughout this period, Plaintiff also provides 24/7 legal and emotional support to his clients as they navigate difficult professional and personal terrain.

30. Sixth, if the Commission collects a monetary sanction in which his client is eligible, Plaintiff prepares an application for an award from the Commission (called a Form WP-APP). During this phase, Plaintiff conducts legal research, reviews his clients' contributions over many years, and memorializes his findings in a lengthy legal memorandum with numerous exhibits.

31. Finally, Plaintiff provides post-award counseling to his clients. During this phase, he provides a wide-variety of legal and other support services to help his clients manage potentially life-changing whistleblower awards.

32. Plaintiff takes on whistleblower clients on a contingency fee basis. As a partner at Labaton, he receives a fixed percentage of whatever his client recovers in a whistleblower case as incentive compensation, less any case-related expenses.

33. Since joining Labaton, Plaintiff has filed Form WP-APPs—applications for an award from the Commission—and his clients have recovered more than $125 million in whistleblower awards. For each of these awards, Plaintiff's firm received a contingency fee and Plaintiff received incentive compensation for recovering the award on behalf of his client.

34. Plaintiff currently has nine whistleblower clients who have reported information to the Commission and are awaiting a final determination of whether they are entitled to an award under the Dodd-Frank Act. The monetary sanctions in these cases exceed $1 billion, and his clients collectively are eligible for awards of more than $300 million. On each of these potential awards, Plaintiff's firm will receive a contingency fee and Plaintiff will receive incentive compensation for recovering the award on behalf of his client.

35. Plaintiff's clients are responsible for the Commission and other federal authorities collecting almost $2 billion in monetary sanctions, with violators going to jail and countless investors being protected from wrongdoing.

II. The Defendants

36. Defendant U.S. Securities and Exchange Commission is an agency of the United States government within the meaning of 5 U.S.C. §551(1). The Commission promulgated and now enforces the Final Rule.

37. Defendant Elad L. Roisman is the Acting Chairman of the Commission and is sued in his official capacity.

JURISDICTION & VENUE

38. This Court has subject-matter jurisdiction over this case because it arises under the laws of the United States. *See* 5 U.S.C. §§701, *et seq.*; 28 U.S.C. §§1331, 2201-2202.

39. Venue is proper because the Commission resides in this District and a substantial part of the events or omissions giving rise to the claims occurred here. 28 U.S.C. §1391(b)(1)-(2).

BACKGROUND

I. The Dodd-Frank Act's Whistleblower Program

40. "[F]ollowing the global financial crisis of 2008, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act." *Reyher v. Grant Thornton, LLP*, 262 F. Supp. 3d 209, 215 (E.D. Pa. 2017). "Dodd-Frank responded to numerous perceived shortcomings in financial regulation." *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 773 (2018). "Among them was the SEC's need for additional 'power, assistance and money at its disposal' to regulate securities markets." *Id.* (quoting S. Rep. No. 111–176, pp. 36-37 (2010)). "To assist the Commission 'in identifying securities law violations,' the Act established 'a new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC.'" *Id.* (quoting S. Rep. No. 111–176, at 38).

41. To accomplish this "core objective" of motivating people to report violations, the Act gives "substantial monetary rewards" to whistleblowers. *Id.* at 777 (citation omitted). Congress did this because it recognized that "whistleblowers often face the difficult choice between telling the truth and . . . committing 'career suicide.'" *Id.* at 773-74 (quoting S. Rep. No. 111–176, at 111-12).

42. The Dodd-Frank Act states:

> In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—
>
> > (A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and
> >
> > (B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

15 U.S.C. §78u-6(b)(1).

43. In Section 78u-6(c)(1)(B), Congress laid out the criteria the Commission must follow when determining the percentage amount of a whistleblower award:

> In determining the amount of an award made under subsection (b), the Commission—
>
> (i) shall take into consideration—
>
> (I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;
>
> (II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;
>
> (III) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and
>
> (IV) such additional relevant factors as the Commission may establish by rule or regulation; and
>
> (ii) shall not take into consideration the balance of the Fund.

15 U.S.C. §78u-6(c)(1)(B).

44. This award "shall be paid from" the Investor Protection Fund ("IPF" or "Fund"). *Id.* §78u-6(b)(2). The IPF is a separate fund "established in the Treasury of the United States," *id.* §78u-6(g)(1), and it is funded by monetary sanctions obtained in certain Commission enforcement actions, *id.* §78u-6(g)(3)-(4). If the amount of money in the IPF is "not sufficient to satisfy" a whistleblower award, the Commission will pay the rest of the whistleblower award with the monetary sanctions that it collects through the litigation generated by the whistleblower's information. *Id.* §78u-6(g)(3)(B). This ensures that the whistleblower is always paid in full.

II. The Prior Whistleblower Rules (2011)

45. After Congress enacted the Dodd-Frank Act, the Commission promulgated rules to implement the new whistleblower program. *See Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34300 (June 13, 2011) ("Prior Rule").

46. The Prior Rule created Rule 21F-6, which determined whistleblower awards by calculating an "award percentage" based on certain positive and negative factors. The Prior Rule did

not consider the monetary sanctions collected (or the potential size of the whistleblower award) when calculating whistleblower awards.

47. The Prior Rule stated:

> In exercising its discretion to determine the appropriate award percentage, the Commission may consider the following factors in relation to the unique facts and circumstances of each case, and may increase or decrease the award percentage based on its analysis of these factors. . . .
>
> > (a) Factors that may increase the amount of a whistleblower's award. In determining whether to increase the amount of an award, the Commission will consider the following factors. . . .
> >
> > > (1) Significance of the information provided by the whistleblower. . . .
> > >
> > > (2) Assistance provided by the whistleblower. . . .
> > >
> > > (3) Law enforcement interest. The Commission will assess its programmatic interest in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws. . . .
> > >
> > > (4) Participation in internal compliance systems. . . .
> >
> > (b) Factors that may decrease the amount of a whistleblower's award. In determining whether to decrease the amount of an award, the Commission will consider the following factors . . .
> >
> > > (1) Culpability [of the whistleblower]. . . .
> > >
> > > (2) Unreasonable reporting delay. . . .
> > >
> > > (3) Interference with internal compliance and reporting systems. . . .

17 C.F.R. §240.21F-6 (2011); *see* Prior Rule, 76 Fed. Reg. at 34366-67.

48. The Commission also proposed and finalized Rule 21F-3, which defined "related action." This Rule provided that the Commission would pay an award based on amounts collected in related actions. The Rule defined a "related action" as a "judicial or administrative action that is brought by [specified agencies or self-regulatory organizations ('SROs')], and is based on the same original information that the whistleblower voluntarily provided to the Commission, and that led the Commission to obtain monetary sanctions totaling more than $1,000,000." 17 C.F.R. §240.21F-3 (2011); *see* Prior Rule, 76 Fed. Reg. at 34363-64.

III. The Successful Whistleblower Program

49. Because of the SEC's whistleblower program, individuals from all walks of life began to break their silence and blow the whistle on a wide-variety of possible securities violations related to, for example, corporate disclosures and financials, offering fraud, manipulation, crypto-currency, insider trading, trading and pricing, the Foreign Corrupt Practices Act, unregistered offerings, market events, municipal securities, and public pensions.

50. Since the beginning of the program, the Commission has received tens of thousands of tips, coming from every state and territory in the United States and approximately 130 foreign countries. Over 1,000 tips have led to formal investigations.

51. Enforcement actions from tips have generated more than $2.7 billion in monetary sanctions, including more than $1.5 billion in disgorgement of ill-gotten gains and interest, of which $850 million has been, or is scheduled to be, returned to harmed investors.

52. At the end of fiscal year 2020, the Commission had awarded almost $562 million to 106 whistleblowers.

IV. Proposed Amendments to the Commission's Whistleblower Rules (2018)

53. Despite the enormous success of the Commission's whistleblower program, the Commission in 2018 sought to amend its rules to decrease the number and size of the awards it issued.

54. On June 28, 2018, the Commission proposed to adopt a new rule that would, among other things, amend the whistleblower award criteria in Rule 21F-6 and amend the definition of "related action" in Rule 21F-3. *See Amendments to the Commission's Whistleblower Program Rules*, Rel. No. 34-83557, File No. S7-16-18, 2018 WL 3238771 (June 28, 2018) ("Proposed Rule").

55. According to the Commission, Rule 21F-6 had caused some whistleblowers to receive awards that were too large. "[A]s the dollar value of an award amount grows exceedingly large, there is a significant potential for a diminishing marginal benefit to the program in terms of compensating

the whistleblower and incentivizing future whistleblowers." *Id.* at *21. The Commission believed it was "in the public interest that [the Commission] scrutinize the dollar impact of these awards more carefully" by "assess[ing] the award factors . . . in terms of dollar amounts, not merely in terms of award percentages," and "where appropriate, adjust an award downward so that the dollar amount of the payout is more in line with the program's goals of rewarding whistleblowers and incentivizing future whistleblowers from a cost-benefit perspective." *Id.* at *20-21 & n.99. The Commission also expressed concern that large awards would "cause the funds in the IPF to be diminished" and thus would cause the IPF to not be used "efficiently and effectively to achieve the program's objectives." *Id.* at *24.

56. The Commission recognized that it needed to amend Rule 21F-6 to achieve these goals. It explained that, "under the existing framework of Rule 21F-6[,] . . . the Commission in setting the appropriate amount of an award [is] unable to consider . . . extraordinarily large dollar amounts that [are] associated with any assessments and adjustments made when applying the existing award factors of Rule 21F-6." *Id.* at *21. And it explained that it "also lack[ed] the authority to adjust [an] award amount downward if it [finds] that amount unnecessarily large for purposes of achieving the whistleblower program's goals." *Id.*

57. The Proposed Rule thus proposed to add the following paragraph to Rule 21F-6:

> *(d) Additional considerations in connection with certain large awards where the monetary sanctions collected would equal or exceed $100 million.* When considering any meritorious whistleblower award application where the whistleblower's original information led to one or more successful covered or related action(s), collectively, that resulted in the collection of $100 million or more in monetary sanctions or will likely result in such collections . . . , the Commission shall determine the award amount as specified in paragraphs (d)(1) through (4) of this section. . . .
>
> (1) When applying the award factors in paragraphs (a) and (b) of this section, the Commission shall make any upward or downward adjustments by considering the impact of the adjustments on both the award percentage and the approximate corresponding dollar amount of the award. If the resulting payout would be below $30 million . . . , then the downward adjustment provided for in paragraph (d)(2) of this section shall not be applicable.

> (2) After completing the award analysis required by paragraph (d)(1) of this section and determining the total dollar amount of the potential award for any action(s) based upon the whistleblower's original information, the Commission shall consider whether that amount exceeds what is reasonably necessary to reward the whistleblower and to incentivize similarly situated whistleblowers. If the Commission finds that the total payout for any action(s) based upon the whistleblower's original information would exceed an amount that is reasonably necessary, it may adjust the total payout for the action(s) downward to an amount that it finds is sufficient to achieve those goals. As is the case with every aspect of any award determination under this section, the Commission shall not consider the balance of the Investor Protection Fund ("IPF") when determining whether to make an adjustment to an award under this paragraph (c).
>
> (3) Any downward adjustment to a whistleblower's award for any actions based upon the whistleblower's original information under paragraph (d)(2) of this section shall under no circumstances yield a potential total payout on all the actions, collectively . . . of less than either $30 million . . . .
>
> (4) Further, any adjustments under paragraph (d)(2) of this section shall in no event result in the total amount awarded to all meritorious whistleblowers, collectively, for each covered or related action constituting less than 10 percent of the monetary sanctions collected in that action.

Proposed Rule, 2018 WL 3238771, at *82-83.

58. The Commission gave an example of why it believed the Proposed Rule was necessary:

> [C]onsider the settlements that the Commission and DOJ entered with Siemens AG in 2008. The total monetary sanctions collected in these two actions was $800 million . . . Suppose that these two actions occurred today and that these actions were based on original information voluntarily provided to the Commission by an eligible whistleblower. In such a situation, the Commission would be required to pay an award to that whistleblower of between $80 million (a 10 percent award) and $240 million (a 30 percent award) for the two actions. . . . [I]f the hypothetical meritorious whistleblower were an individual who did everything right in connection with his or her whistleblowing (that is, he or she were the model whistleblower), the Commission would almost certainly be obligated to pay this individual an award at or near the maximum $240 million level under the existing rules. What paragraph (d) would do . . . is to afford the Commission the discretion to determine whether such an extraordinarily large payout is actually necessary to further the whistleblower program's goals of rewarding whistleblowers and incentivizing future whistleblowers, and if not, proposed paragraph (d) would afford the Commission the ability to adjust the actual payout to an award amount that is closer to the $80 million minimum that would be required to be paid pursuant to Section 21F(b). We believe that adopting paragraph (d) to afford us a discretionary mechanism to make such common-sense adjustments to extraordinarily large awards to ensure that they do not exceed an amount that is appropriate to achieve the goals and interests of the program is, to put it simply, good public policy.

Id. at *21.

59. Importantly, the Commission stated that the proposed rule change would apply only to *future* whistleblower applications. *See* Proposed Rule, 2018 WL 3238771, at *18 n.96 ("The Commission anticipates this proposed rule change, if adopted, would apply only to covered-action and related-action award applications that are connected to a Notice of Covered Action . . . posted on or after [the] effective date of the final rules.").

60. In addition to these changes, the Commission also proposed significant changes to the definition of "related action" in Rule 21F-3. The Commission proposed to redefine "related action" to pay an award for another agency's enforcement action "*only if* the Commission finds . . . that its whistleblower program has the more direct or relevant connection to the action." Proposed Rule, 2018 WL 3238771, at *14-18, *80-81 (emphasis added).

61. The Commission also proposed additional limits on when a whistleblower could recover for a "related action." Under the Proposed Rule:

> [T]he Commission will not make an award to you for the related action if you have already been granted an award by the authority responsible for administering the other whistleblower award program. Further, if you were denied an award by the other award program, you will not be permitted to readjudicate any issues before the Commission that the authority responsible for administering the other whistleblower award program resolved against you as part of the award denial. Additionally, if the Commission makes an award before an award determination is finalized by the authority responsible for administering the other award scheme, the Commission shall condition its award on the meritorious whistleblower making a prompt, irrevocable waiver of any claim to an award from the other award scheme.

See id. at *81.

62. Two Commissioners, Robert Jackson and Kara Stein, dissented from the proposed rule. Commissioner Jackson warned that the proposed rule would insert "uncertainty and politics" into the whistleblower program—uncertainty for potential whistleblowers over the amount of the eventual award, and politics for Commissioners in the award-setting process, since future Commissioners may face political pressure or motivation to lower whistleblower awards. *See* Comm'r

Robert J. Jackson, Jr., *Statement on Proposed Rules Regarding SEC Whistleblower Program* (June 28, 2018), bit.ly/3fQeKOw. Commissioner Jackson lamented this change, explaining that "the purpose of the whistleblower program is not to maximize the utility of whistleblowers, but instead to maximize deterrence." *Id.* at n.7.

63. Commissioner Stein, in dissent, explained that by empowering the Commission "to consider not just the enumerated factors, but also the overall dollar amount of the award," the Proposed Rule would allow the Commission to "reduce the award if, in its sole discretion, it thinks the award is 'too large.'" Comm'r Kara M. Stein, *Statement on Proposed Amendments to the Commission's Whistleblower Program Rules* (June 28, 2018), bit.ly/3odvPoH. This would effectively empower the Commission to "take into consideration the balance of the Fund," which was "inconsistent with [Congress's] explicit instructions." *Id.* Commissioner Stein also worried that "that this subjective determination will be used as a means to weaken the Whistleblower Program." *Id.*

64. The Commission received fierce criticism of the Proposed Rule. Commenters argued that the proposed amendment to Rule 21F-6, among other things, conflicted with the plain language of the Exchange Act and contradicted the Congressional goal to increase whistleblower awards and incentivize cooperation with law-enforcement officials.

65. Commenters also argued that the proposed amendments to Rule 21F-3, among other things, violated the Exchange Act's command that the Commission "shall pay" all related action awards and would disincentivize whistleblowers from coming forward to report securities violations.

V. The Final Rule (2020)

66. On September 23, 2020, the Commission adopted amendments to its whistleblower rules. *See Whistleblower Program Rules*, Rel. No. 34-89963, File No. S7-16-18, 2020 WL 5763381 (Sept. 23, 2020) ("Final Rule").

67. In the Final Rule, the Commission abruptly changed course from its initial proposal to amend Rule 21F-6. According to the Commission, an amendment to Rule 21F-6 was unnecessary because, in fact, the Commission *already* had "discretion to consider the dollar amount of monetary sanctions collected when considering the existing Award Factors and setting the Award Amount." Final Rule, 2020 WL 5763381, at *64. Thus, rather than creating the discretion to consider dollar amount, the Proposed Rule would have simply "expressly stated" that the Commission always had this discretion and "provided a specific mechanism to guide the Commission's existing discretion to determine awards, specifically in the context of large awards." *Id.* at *27, *72. The Commission decided that it was "not necessary to adopt the formalized mechanism for the Commission to exercise its discretion to apply the Award Factors and set Award Amounts." *Id.* at *29.

68. Under the Prior Rule, whistleblower awards were calculated as percentages:

> In exercising its discretion to determine the appropriate award *percentage*, the Commission may consider the following factors in relation to the unique facts and circumstances of each case, and may increase or decrease the award *percentage* based on its analysis of these factors.

Prior Rule, 76 Fed. Reg. at 34366 (emphasis added).

69. The Final Rule amended this language to "clarify" that the Commission already had the authority to consider the potential dollar amount of the whistleblower award when calculating a whistleblower award. *See* Final Rule, 2020 WL 5763381, at *22. This "clarification"—which was not proposed in the Proposed Rule—amended the first sentence of Section 240.21F-6 to state:

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

Id. at *84 (emphasis added).

70. Importantly, because the Commission claimed that it had always had this discretion, the agency now claimed the authority to give lower whistleblower awards based on the size of the

dollar amount for applications that had already been filed. *Id.* This change directly contradicted the Proposed Rule's statement that its actions would apply only to future applications.

71. Because the Commission believed that its amendments to Rule 21F-6 merely "clarif[ied]" that the Commission "has the authority to consider the dollar amount when applying the award criteria," the Commission found that its rule would have no "significant benefits, costs, and economic effects" or "significantly impact efficiency, competition, and capital formation." *Id.* at *73.

72. The Final Rule also finalized its proposals to amend the definition of "related action" in Rule 21F-3. The Final Rule states that "if a judicial or administrative action is subject to a separate monetary award program established by the Federal Government, a state government, or a self-regulatory organization, the Commission will deem the action a related action only if the Commission finds (based on the facts and circumstances of the action) that its whistleblower program has the more direct or relevant connection to the action." Final Rule, 2020 WL 5763381, at *82.

73. In determining whether a potential related action has a "more direct or relevant connection to the Commission's whistleblower program than another award program," the Commission will consider "the nature, scope, and impact of the misconduct charged in the potential related action, and its relationship to the Federal securities laws." *Id.*

74. In addition, the Final Rule contains a number of provisions allowing the Commission to avoid paying whistleblowers awards for related actions:

> If the Commission determines to deem the action a related action, the Commission will not make an award to you for the related action if you have already been granted an award by the governmental/SRO entity responsible for administering the other whistleblower award program. Further, if you were denied an award by the other award program, you will not be permitted to readjudicate any issues before the Commission that the governmental/SRO entity responsible for administering the other whistleblower award program resolved against you as part of the award denial. Additionally, if the Commission makes an award before an award determination is finalized by the governmental/SRO entity responsible for administering the other award program, the Commission shall condition its award on the meritorious whistleblower making a prompt, irrevocable waiver of any claim to an award from the other award program.

Final Rule, 2020 WL 5763381, at *83.

75. Two Commissioners, Allison Lee and Caroline Crenshaw, dissented from the Final Rule. Commissioner Lee's dissent recognized the multiple contradictions between the proposal to amend Rule 21F-6 and the Final Rule. In the proposal to amend Rule 21F-6, the Commission claimed that "we needed a rule that would allow us the discretion to consider dollar amounts, but that our proposed rule would limit the use of that discretion to only cases in which the money collected totaled at least $100 million." Comm'r Allison Herren Lee, *June Bug vs. Hurricane: Whistleblowers Fight Tremendous Odds and Deserve Better* (Sep. 23, 2020), bit.ly/2TNOWZe ("Lee Dissent"). But the Commission's Final Rule now "claim[s] that we do not need a new rule at all, that we've had this discretion all along." *Id.* And, at the same time, the Commission still amended its rules to "claim the authority to use that discretion, labeling it a 'clarification.'" *Id.* (citation omitted).

76. Commissioner Lee explained the effect of the Final Rule's amendment of Rule 21F-6 through a hypothetical she had posed to her fellow Commissioners during their deliberations:

> Under the rule we adopt today, assume two cases: in both cases, we are presented with the exact same whistleblower and exactly the same facts in every way. The only difference is that in Case A, the monetary sanctions collected total $10 million, while in Case B, the monetary sanctions collected total $500 million. Under this new interpretation of our authority, I asked, can the Commission reach a different award *percentage* between these two cases? Again, not one single fact is different except the dollar size of the potential award. The answer I was given was an unequivocal "yes."
>
> That tells me everything I need to know about what can or cannot be considered under this new rule. If we were going to be confined to the existing original factors under the new rule, there should be no difference in the outcome—in terms of the percentage of the award—between Case A and Case B.

Id.

77. As Commissioner Lee explained, the Commission now "claim[s] a new discretion to consider dollar amount in the setting of award amounts that is broader than the discretion we proposed . . . [and] applicable to all awards no matter their size." *Id.* Moreover, "the rule will not

require the Commission to tell whistleblowers if or when we have exercised this discretion," and it "provides whistleblowers no way to contest its application." *Id.* There is thus "no transparency[] and no accountability" in the award process. *Id.*

78. At the public meeting, before the Commissioners voted on the new whistleblower rules, Commissioner Lee asked the Commission's General Counsel, Robert Stebbins, about her hypothetical and whether she had accurately summarized the Commission's asserted discretion to make award determinations. On the record, he confirmed that she had accurately summarized the Commission's legal position. At no time did any other Commissioner challenge Commissioner Lee's description of their deliberations or legal position.

79. Commissioner Lee also objected to the Commission's amendment to the definition of "related action" in Rule 21F-3. She explained that, although "the statutory text dictating that we 'shall pay' awards in related actions is unambiguous, we are today adopting a rule that decreases certainty by introducing a new, subjective standard, which is whether another agency's whistleblower program has a 'more direct or relevant connection to the action.'" *Id.* If the Commission "determine[s] that it does, the whistleblower must recover separately from that agency's program." *Id.* This change would thus undermine the ability of the Commission to "promote[] efficiency and certainty for whistleblowers by ensuring that they will get an award when other parts of the government act on a whistleblower's tip," and frustrate the Commission's efforts to "encourage[] whistleblowers to choose to bring information to us, knowing they will still receive an award if the information is directed to a different agency." *Id.*

VI. The Impact of the Final Rule on the Plaintiff

80. The Final Rule's amendments to Rules 21F-6 and 21F-3 have harmed and will continue to harm Plaintiff.

A. The Final Rule's Amendment to Rule 21F-6

81. The Final Rule's amendments to Rule 21F-6 harm Plaintiff in at least six ways.

82. *First*, the Final Rule will reduce the amount of the awards that Plaintiff's current clients will recover which will, in turn, lower his law firm's contingency fee and his incentive compensation.

83. As of January 11, 2021, Plaintiff has nine clients whose applications for award are pending with the SEC Whistleblower Office, 28 clients whose cases are being actively investigated by the Commission Staff, and two clients whose whistleblower submissions he is currently preparing to file with the Commission. When the Commission exercises its new discretion to reduce their awards, Plaintiff's law firm's contingency fee and Plaintiff's incentive compensation will be reduced as well.

84. Plaintiff knows of at least five of his cases, in particular, where the size of the monetary sanctions are or will likely be so large that the Commission will exercise its new discretion to lower the award his clients receive.

85. Many of these clients have put their careers and lives on the line to assist the Commission. One client risked being imprisoned to smuggle key evidence of a large-scale securities fraud out of China. Some have worn FBI wires and agreed to publicly testify against wrongdoers. And a few have lost their jobs, been blacklisted, and endured substantial financial hardships that have required them to take loans from family members and litigation funders. All of them relied on the governing statute and the whistleblower program's implementing rules when they decided to blow the whistle. The Commission is breaking faith with these courageous whistleblowers.

86. *Second*, the Final Rule increases Plaintiff's marketing costs and related expenses by requiring him to change his business model for locating potential clients.

87. Since 2011, in reliance upon the Prior Rule, Plaintiff has led a low-volume, ultra-selective whistleblower practice that has depended on a handful of large whistleblower awards to be successful.

88. Historically, the vast majority of Plaintiff's clients were referred to him by other attorneys. Plaintiff consistently found that attorney referrals were much more likely to become actual clients (and lead to high-dollar awards) than all other potential clients.

89. Because of the Final Rule, however, Plaintiff can no longer rely on referrals and large whistleblower awards to sustain his whistleblower practice. That is because Plaintiff knows that the Commission is likely to lower the awards that his clients recover on the basis that they are "too large." Plaintiff therefore must make costly changes to the business model and practices he developed in reliance on the Prior Rule in order to expand his pool of potential clients.

90. Following the publication of the Final Rule, for the first time ever, Plaintiff retained an advertising agency to directly market to potential SEC whistleblowers. In January 2021, the agency launched an initial $150,000 marketing campaign for his practice. Plaintiff must pay for this campaign out of the fixed operating budget for his whistleblower practice. As a consequence, Plaintiff now has less money in his budget to pay the attorneys assigned to his practice and other expenses necessary to build his practice. In addition, if Plaintiff exceeds his fixed operating budget before the end of the year, then he must pay for any additional costs himself.

91. Plaintiff's costs will not end with this advertising campaign. Unlike his traditional attorney referrals, the individuals who come to him through this marketing campaign will be less likely to have valid claims and become future clients. Plaintiff will need to spend numerous hours reviewing and evaluating claims that are less likely to yield whistleblower awards.

92. *Third*, the Final Rule requires Plaintiff to spend numerous attorney hours doing additional research and analysis before accepting a case.

93. As the Chair of the Whistleblower Representation Practice at Labaton, Plaintiff is responsible for selecting the whistleblower clients he represents. Two important factors he considers

in deciding whether to represent a client are (1) the likely monetary sanctions the SEC will collect and (2) the likely client award.

94. Plaintiff must be highly selective because representing a whistleblower is not easy or cheap. Representing whistleblowers is an expensive and time-consuming process, especially because Plaintiff is unique in offering high-touch round-the-clock services to his clients, many of whom are enduring one of the most stressful situations of their lives.

95. Before the Final Rule, Plaintiff could assess the economic potential of a case fairly predictably. Based on historical data, along with case-specific information provided by the client, Plaintiff could estimate the likely monetary sanctions that the SEC will collect. Similarly, based on historical data, coupled with his and his team's experience representing other whistleblowers, Plaintiff could review the positive and negative factors in Rule 21F-6 and estimate the likely award percentage for each case.

96. Now, however, the Final Rule requires Plaintiff to speculate when and how the Commission will exercise its discretion to lower the client award based on the size of the monetary sanctions the Commission will collect.

97. The Commission has indicated that "[f]acts that would be relevant to determining whether [a] large payout is necessary and appropriate" include, among others, "whether the whistleblower made an extraordinary and highly unusual sacrifice by coming forward (such as placing himself or herself in legal jeopardy to bring the Commission information that it would otherwise not have been able to obtain or demonstrably suffering career-ending consequences commensurate with the potential large award), . . . the industry in which knowledgeable whistleblowers might work, the type of position held by that whistleblower, and the compensation levels within that industry, and the compensation levels within that industry, and whether potential whistleblowers may be located

overseas and the likely compensation levels in those countries." Proposed Rule, 2018 WL 3238771, at *25 (footnotes omitted).

98. As a result, in larger cases, Plaintiff now must interview the potential clients to determine whether any of these facts apply to them. Then, based upon the extended interview, Plaintiff must evaluate whether the Commission is likely to lower the potential client's award and, if so, by how much. These are hours of Plaintiff's time—time that most attorneys bill by the hour for—that Plaintiff can no longer devote to other matters. This new work also increases Plaintiff's operating expenses, including attorney time, and thus depletes Plaintiff's limited operating budget for his whistleblower practice.

99. *Fourth*, the Final Rule will cause fewer of Plaintiff's clients to ultimately report possible securities violations to the Commission, thereby reducing Plaintiff's practice's revenue and his incentive compensation.

100. Being a whistleblower is not always easy, glamourous, or even lucrative. Sophisticated potential whistleblowers, like Plaintiff's typical clients, know this. While a large percentage of employees are aware of misconduct in the workplace, only a fraction of them ever report it. The Commission's whistleblower program is designed to combat this significant law enforcement problem.

101. When deciding whether to report possible violations, potential whistleblowers must reconcile conflicting societal values and engage in a cost-benefit analysis. Like the analyses they conduct in their jobs in corporate America or on Wall Street, these potential whistleblowers evaluate the benefits associated with reporting possible securities violations to the Commission against the costs of doing so.

102. In Plaintiff's experience, the potential for large monetary awards is the primary motivation for individuals to blow the whistle to law enforcement and regulatory authorities.

Sophisticated whistleblowers evaluate this benefit by closely assessing the probability of success, the size of the potential award, and the time it will take to achieve it.

103. Plaintiff has consistently found that the more senior, salaried, and tenured the potential whistleblower is, the less risk or uncertainty he or she is willing to accept.

104. The Final Rule adds extreme uncertainty into Plaintiff's clients' cost-benefit analysis. Effectively, it turns the Commission into a kind of casino that aggressively courts high-rollers with the promise of large jackpots but reserves the right to lower their winnings if those winnings get "too large."

105. In addition, when evaluating whether to report possible securities violations to the Commission, potential SEC whistleblowers often do not trust the government. Plaintiff knows this from personal experience, and this distrust is supported by academic research. This skepticism of the government will be heightened when potential whistleblowers learn that the government has the discretion to lower their awards based on the size of the monetary sanctions collected.

106. Under the Final Rule, Plaintiff now must advise clients of the risk that the Commission may lower their whistleblower awards if it thinks that the award is "too large." When informed of the risk, some potential clients will weigh the costs and benefits and choose not to report possible violations to the SEC.

107. Indeed, after the Final Rule was adopted, Plaintiff spoke with 12 of his current Wall Street clients. All of them were concerned about whether and how the Commission would exercise this discretion in their cases. All of them shared with him that the original decision to become a whistleblower was a very difficult one and the new risk that the Commission could lower their whistleblower award would have made them less likely to report. One executive, who annually earns more than $10 million a year, stated unequivocally that he never would have reported if he knew the Commission would adopt the Final Rule.

108. Based on Plaintiff's work with SEC whistleblowers over the last decade, and his recent interviews with current clients, Plaintiff has no doubt that the Final Rule will reduce the number of individuals who will become SEC whistleblowers. This is particularly true for the most senior, salaried, and tenured executives on Wall Street, who make up about two-thirds of Plaintiff's clients.

109. *Fifth*, the Final Rule will increase Plaintiff's costs and expenses associated with filing applications for awards for his current and future clients.

110. Based on prior years and his current pipeline of cases, Plaintiff anticipates filing at least 3-5 applications for award in 2021.

111. For future applications for award, where the Commission may exercise discretion to lower the whistleblower award, the Final Rule forces Plaintiff to explain to the Commission why it should not apply its new discretion to lower his clients' whistleblower awards. Plaintiff must now address numerous factors to convince the Commission that the award is not "too large" and does not need to be reduced based on its size.

112. Since the Commission lacks the necessary knowledge, experience, and data to independently make such a determination, Plaintiff will have the burden of proof. To satisfy this burden, Plaintiff will have to hire an industry expert to draft a report addressing, among other things, the realities of being a known or suspected whistleblower in each client's industry and geographic region, including the likelihood of his client being blacklisted. To supplement this opinion, Plaintiff will have to hire an economist to conduct a comprehensive study of each client's work history, industry, and geographic region, so that the economist can draft a report for the Commission regarding the net present value of that client's likely future earnings. Hiring qualified experts and working with them will be complex, time consuming, and expensive—especially since his clients will have only 90 days from the Commission's Notice of Eligibility to the deadline for filing their applications for

award. In cases like these, as a result of the Final Rule, Plaintiff anticipates spending $30,000 to $50,000 on expert consulting services.

113. These expenses will directly lower Plaintiff's incentive compensation. Under Plaintiff's arrangement with his law firm, the firm calculates his incentive compensation by (1) deducting case-related expenses from the contingency fee paid by his clients and then (2) paying him a fixed percentage of this new amount.

114. In addition, when the Commission issues its preliminary award determinations for Plaintiff's clients that are less than 30% and may have been the result of the Commission exercising its new discretion, Plaintiff will now need to (1) "request that the Office of the Whistleblower make available for [his] review the materials . . . that formed the basis of the Claims Review Staff's Preliminary Determination"; (2) "request a meeting with the Office of the Whistleblower," to determine whether and by how much the Commission reduced by clients' awards because of their size; and (3) "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 [his] objection to . . . the proposed amount of an award," arguing that the Commission should not have reduced the award amount because of its size. 17 C.F.R. §§240.21F-10(e)(1), 240.21F-11(e)(1).

115. Prior to the Final Rule, since 2011, Plaintiff had only requested the record that formed the basis of the Staff's Preliminary Determination four times. Plaintiff had never requested a meeting with the Office of the Whistleblower. And Plaintiff has requested that the Commission reconsider a client's Preliminary Determination on only one occasion. When Plaintiff did seek reconsideration, he hired an appellate firm to assist his client and paid the firm more than $50,000. The Final Rule will now require Plaintiff to review the record, meet with the Office of Whistleblower staff, and challenge the Staff's Preliminary Determinations more frequently, which will further increase his practice's costs and expenses.

116. *Finally*, for future potential clients who are still willing to be SEC whistleblowers after being properly advised, the Final Rule will reduce the size of their eventual award which will, in turn, lower Plaintiff's firm's contingency fee and his incentive compensation.

B. The Final Rule's Amendment to Rule 21F-3(b)

117. The Final Rule's amendment to Rule 21F-3 harms Plaintiff's practice in at least nine ways.

118. *First*, the Final Rule requires Plaintiff to file additional applications for award for clients, which has increased his operating expenses and costs.

119. Under the prior rules, Plaintiff needed to file his client's whistleblower tip only with the Commission. If the Commission shared his client's tip with another agency or SRO, his client would still be eligible to receive a "related action" award from the Commission, even if the agency or SRO that received his client's tip had its own whistleblower program.

120. The Final Rule eliminates this certainty. In cases where the Commission and other law enforcement or regulatory authorities bring related enforcement actions, the new rule empowers the Commission to decline to pay a whistleblower award for the monetary sanctions associated with the related action if it concludes that another agency's whistleblower program has a "more direct or relevant connection to the action." As a result, Plaintiff now must file applications for award with these other programs to ensure that his clients receive an award from at least one of the programs.

121. Drafting and filing applications for awards is time consuming and expensive. To illustrate, on September 23, 2020, the Commission adopted the Final Rule. Six days later, the agency announced a $35 million settled enforcement action against JPMorgan Securities LLC. Simultaneously, in parallel related actions, the CFTC and DOJ announced joint settled enforcement actions against JPMorgan Chase & Co., JPMorgan Chase Bank N.A., and JPMorgan Securities. Collectively, JPMorgan was required to pay $920.2 million.

122. Plaintiff currently represents an individual who is seeking to recover an award based on the whistleblower tips he provided. Under the prior rules, Plaintiff could have filed just one application for award that covered both the sanctions collected by the Commission and those associated with the related DOJ settlement. Now, however, Plaintiff was required to file separate applications with the Commission and the CFTC, each seeking an award for the monetary sanctions associated with DOJ's settlement. Plaintiff was forced to spend approximately 40 hours researching, drafting, and filing this additional CFTC application. Overall, the additional (unnecessary) CFTC application required more than 175 attorney hours and had a total lodestar in excess of $150,000.

123. *Second*, the Final Rule introduces timing issues that will reduce the amount of award Plaintiff's clients will recover, which will, in turn, lower his law firm's contingency fee and his incentive compensation.

124. The Commission and other potential whistleblower programs have different whistleblower-award procedures and processing times. For instance, the SEC typically takes two to three years to process applications for award, while the CFTC takes one to two years to process applications.

125. Under the Final Rule, these timing differences between the Commission and other whistleblower programs pose significant issues for Plaintiff's clients. If the Commission determines that an award for a "related action" is appropriate, his client is now required to make "a prompt, irrevocable waiver of any claim to an award from the other award program," even if the other program has not made a determination regarding the client's eligibility and award amount.

126. Similarly, if another whistleblower program determines that an award is appropriate, Plaintiff's client may not receive a related action award from the Commission if he had "already been granted an award by the other governmental [or SRO] entity."

127. In practice, these timing differences mean that Plaintiff's clients will be forced to blindly accept the first award offered to them, regardless of its size, rather than risk getting nothing. Since the Final Rule prevents them from selecting the largest award to which they were (formerly) eligible, his clients will receive smaller whistleblower awards. These lower awards will, in turn, lower Plaintiff's incentive compensation.

128. *Third*, the Final Rule will increase the possibility that Plaintiff's client will be denied a whistleblower award by the Commission on the basis that another agency or SRO already denied his client an award.

129. Under the Final Rule, Plaintiff's clients have been placed between a rock and a hard place. On the one hand, if the Commission determines that another whistleblower program "has the more direct or relevant connection to the action," Plaintiff's clients will be denied an award for a related action, so they are strongly incentivized to apply to any and all programs that they may be eligible for. On the other hand, if any of these other whistleblower programs deny their award applications, for any reason, Plaintiff's clients will be barred from receiving an award from the Commission. This prohibition is mandated by the Final Rule, even though award proceedings are not litigation, the proceedings are not governed by the same rules, and the proceedings don't involve the same parties.

130. Notwithstanding these material facts, Plaintiff's clients will be forced to choose, and some will lose. In fact, award programs regularly deny whistleblowers' applications for awards. For example, from 2011 through 2020, more than 66% of all Commission whistleblower program orders have been denials.

131. When the Commission denies "related action" awards based on these grounds, Plaintiff's clients will receive smaller whistleblower awards. This, in turn, will lower Plaintiff's incentive compensation.

132. *Fourth*, the Final Rule requires Plaintiff to do additional research and analysis about his clients' eligibility for other potential whistleblower programs before accepting a case, which has increased his operating expenses.

133. As explained, under the Final Rule, if the Commission determines that another whistleblower program "has the more direct or relevant connection to the action" Plaintiff's clients will be denied an award for a "related action," so they are strongly incentivized to apply to other whistleblower programs. Accordingly, before accepting a new case, Plaintiff now must identify other potential whistleblower programs, evaluate the probability of a related action, and estimate the size of any related action and whistleblower award.

134. Depending upon the case, and the relevant programs, this review process can be time consuming. Plaintiff first must learn the various programs' fundamentals: procedures for submitting a tip, eligibility requirements, opportunity to report anonymously, available employment protections, award criteria, minimum and maximum awards, extent of discretion, source of award payment, procedures for applying for an award, process for appealing award determinations, and how awards are taxed. Next, Plaintiff must research the relevant agency's enforcement history, including current leadership priorities, past enforcement actions, and whether whistleblowers have been outed during the agency's cases. Finally, Plaintiff must investigate the awards the programs have granted. Under the prior rules, this type of inquiry was not required. These new inquiries cost Plaintiff time and money to conduct.

135. *Fifth*, the Final Rule will reduce the number of future cases Plaintiff accepts if the clients' information could result in a "related action," which will, in turn, reduce client recoveries and Plaintiff's incentive compensation.

136. As the Chair of the Whistleblower Representation Practice at Labaton, Plaintiff is required to select the clients he represents. The stakes are high because Plaintiff works on a

contingency basis and his cases demand a substantial investment of time and resources, often between five and seven years. Accordingly, Plaintiff's success in selecting cases depends upon conducting a detailed qualitative and quantitative analysis of potential cases using proprietary SEC enforcement and award databases.

137. Unfortunately, for many of the other whistleblower programs that the Commission may deem to have "the more direct or relevant connection to the action," there is limited available information about the organization's enforcement history and track record of paying whistleblower awards. And what is known about these programs' fundamentals is discouraging because virtually all of their award determinations are discretionary, the awards are paid for out of the agency's annual operating budget (which biases the organization to making smaller awards), and the maximum potential awards are much smaller than the SEC Whistleblower Program.

138. For example, the award provision of the Major Frauds Act, which is administered by the Attorney General, authorizes payment of an award to a person who has furnished information relating to a possible fraud against the United States. But payment is within the sole discretion of the Attorney General, the amount of the award is limited to $250,000, a decision by the Attorney General not to pay an award is nonreviewable, and there are no mechanisms for anonymous reporting. *See* 18 U.S.C. §1031.

139. Accordingly, under the Final Rule, the greater the probability of a related action, the lower the probability that Plaintiff will accept the case. This reduced likelihood ultimately decreases his incentive compensation.

140. *Sixth*, the Final Rule will require Plaintiff to do greater engagement with other law enforcement and regulatory organizations, which will increase his operating expenses.

141. Before the Final Rule, Plaintiff assisted his whistleblower clients in reporting their tips to the Commission and supported the Commission Staff in their investigations and related

prosecutions. If it was appropriate to refer certain matters or coordinate certain activities with other law enforcement and regulatory organizations, the Commission would be responsible for doing so.

142. Under the Final Rule, however, the burden for engaging with other potential law enforcement and regulatory organizations has shifted to Plaintiff's clients. That is because if the Commission determines that another whistleblower program "has the more direct or relevant connection to the action," Plaintiff's clients will be denied an award for a related action. They therefore are strongly incentivized to apply to all programs that they may be eligible for. Furthermore, denials or prior awards from these other programs can prohibit them from receiving an award from the Commission. Accordingly, to ensure that they are deemed eligible and receive the maximum possible award from these programs, Plaintiff and his clients are now required to engage early and often with these other law enforcement and regulatory organizations. This is time consuming.

143. *Seventh*, the Final Rule requires Plaintiff to do new monitoring while representing clients, which increases Plaintiff's operating expenses.

144. Historically, Plaintiff's clients directly reported and assisted the Commission, and his clients didn't need to worry about related actions that may have resulted from or benefited from such engagement. Now, under the new rules, Plaintiff's clients are strongly incentivized to apply to other award programs and are penalized if they are denied an award or receive a small award from these other programs.

145. Because the Final Rule doesn't limit its application to other award programs in existence at the time his clients file their tips, Plaintiff now has to continually monitor the award program landscape for new programs that his clients may be eligible for. Plaintiff also has to attempt to monitor the Commission's investigation to learn if the scope of wrongdoing has grown into another program's jurisdiction and/or the agency is now coordinating its efforts with other law enforcement and regulatory organizations. The monitoring required by the new rule will be time consuming.

146. *Eighth*, the Final Rule will result in fewer potential clients choosing to report possible securities violations to the Commission because of the new risks the Final Rule introduces, thereby reducing Plaintiff's practice's revenue and his incentive compensation.

147. Over the years, in virtually every consultation, potential whistleblowers have expressed concern to Plaintiff about retaliation and blacklisting within their industry. The more senior, salaried, and tenured the individuals have been, the greater this fear seems to be. Not surprisingly, the ability to report anonymously with employment protections has proven to be a critical factor in his clients' decision to participate in the SEC Whistleblower Program. In fact, approximately half of Plaintiff's current clients have elected to report anonymously. Unfortunately, most of the other whistleblower programs do not offer anonymous reporting and many of the programs don't offer employment protections. Accordingly, fewer of Plaintiff's potential clients will ultimately choose to blow the whistle. This, in turn, will lower Plaintiff's incentive compensation.

148. *Finally*, the Final Rule will result in fewer potential clients choosing to report possible securities violations to the Commission because of the greater uncertainty it introduces, thereby reducing Plaintiff's practice's revenue and personal incentive compensation.

149. As Commissioner Lee explained, the Final Rule "decreases certainty" for whistleblowers "by introducing a new, subjective standard, which is whether another agency's whistleblower program has a 'more direct or relevant connection to the action.'" Comm'r Allison Herren Lee, *June Bug vs. Hurricane: Whistleblowers Fight Tremendous Odds and Deserve Better* (Sep. 23, 2020), bit.ly/2TNOWZe. Compounding this problem, even if Plaintiff's clients are willing to assume the additional risk of participating in other award programs, these programs offer extraordinarily small whistleblower awards compared to the SEC Whistleblower Program.

150. Accordingly, since the potential for large monetary awards is the primary motivator for external reporting, fewer of Plaintiff's potential clients will ultimately choose to report possible securities violations to the Commission. This, in turn, will decrease Plaintiff's incentive compensation.

CLAIMS FOR RELIEF

COUNT I
Administrative Procedure Act, 5 U.S.C. §706
Amendments to Rule 21F-6
(Notice and Comment)

151. Plaintiff incorporates all of its prior allegations.

152. The APA requires this Court to hold unlawful and set aside any agency action taken "without observance of procedure required by law." 5 U.S.C. §706(2)(D).

153. The APA requires agencies to publish in a notice of proposed rulemaking "'either the terms or substance of the proposed rule or a description of the subjects and issues involved.'" *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (quoting 5 U.S.C. §553(b)(3)). This means that the final rule must be "a logical outgrowth of the rule proposed." *Id.* (citation omitted).

154. The purpose of this "logical outgrowth" rule "is one of fair notice." *Id.* It exists to prohibit agencies from "us[ing] the rulemaking process to pull a surprise switcheroo on regulated entities." *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

155. "Notice of agency action is crucial to ensure that agency regulations are tested via exposure to diverse public comment, to ensure fairness to affected parties, and to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Daimler Trucks N.A. LLC v. EPA*, 737 F.3d 95, 100 (D.C. Cir. 2013) (cleaned up).

156. "A final rule is a logical outgrowth of the proposed rule 'only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their

comments on the subject during the notice-and-comment period.'" *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94-95 (D.C. Cir. 2010).

157. The Final Rule violates the APA because it was not a "logical outgrowth" of the Commission's proposed rule. *Long Island Care at Home*, 551 U.S. at 174.

158. Interested parties could not have anticipated that the Commission would claim that it already had the authority to base awards based on the dollar amount of monetary sanctions collected.

159. Under its prior rules, the Commission had no authority to consider the amount of the monetary sanctions collected or the potential dollar amount of the award when calculating the whistleblower award.

160. In the Proposed Rule, moreover, the Commission repeatedly and expressly acknowledged that it lacked this authority and therefore needed a new rule to grant the Commission this authority. In the Final Rule, however, the Commission flipped its position, concluding that it *already had* this authority. *See, e.g.*, *Ctr. for Biological Diversity v. Everson*, 435 F. Supp. 3d 69, 97 (D.D.C. 2020) (finding that a final rule that is a "180 degree course change" from the proposal is not a logical outgrowth of the proposal).

161. In addition, interested parties should not have anticipated that the Commission would draft a rule giving it total discretion to give lower awards based on the dollar amount. The Proposed Rule would have considered whether an award is too large only when the monetary sanctions collected exceeded $100 million, and it never would have applied a downward adjustment to provide an award less than $30 million. In the Final Rule, however, the Commission claimed the authority to base awards on dollar amounts collected with no limits whatsoever. This is far *worse* than the Proposed Rule.

162. Finally, in the Proposed Rule, the Commission stated that its changes would apply only to *future* whistleblower applications. *See* Proposed Rule, 2018 WL 3238771, at *18 n.96 ("The Commission anticipates this proposed rule change, if adopted, would apply only to covered-action

and related-action award applications that are connected to a Notice of Covered Action . . . posted on or after [the] effective date of the final rules."). In the Final Rule, however, the Commission claimed that it had *always* had the authority to consider the size of the monetary sanctions collected and thus that it could give lower awards on this basis for whistleblower applications that were filed before the Final Rule was adopted.

163. The Commission therefore "use[d] the rulemaking process to pull a surprise switcheroo," depriving commenters of notice and the opportunity to comment on this significant change to the formula for calculating whistleblower awards. *Envtl. Integrity Project*, 425 F.3d at 996.

164. Because the Final Rule is a legislative rule that was promulgated without observance of the required notice-and-comment rulemaking procedures under the APA, it must be held unlawful and set aside. *See* 5 U.S.C. §706(2)(D).

COUNT II
Administrative Procedure Act, 5 U.S.C. §706
Amendments to Rule 21F-6
(Arbitrary and Capricious – Failure to Acknowledge Change)

165. Plaintiff incorporates all of its prior allegations.

166. The APA requires a reviewing court to hold unlawful and set aside any agency action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. §706(2)(A).

167. "One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Id.* An agency "need not demonstrate . . . that the reasons for the new policy are better than the reasons for the old one." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis omitted). But "the agency must at least 'display awareness that it is changing position.'" *Encino*, 136 S. Ct. at 2126 (quoting *Fox*, 556 U.S. at 515).

168. In explaining its changed position, an agency must also be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." *Encino*, 136 S. Ct. at 2126. "[A]n 'unexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Id.* (cleaned up) (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.,* 140 S. Ct. 1891, 1913-15 (2020).

169. The Final Rule is arbitrary and capricious because it never acknowledges that it is reversing the Commission's previous rule and interpretations holding that the Commission could not, and thus would not, give a lower whistleblower award based on the size of the award's dollar amount.

170. Under its prior rules, the Commission had no authority to consider the amount of the monetary sanctions collected (or the potential dollar amount of the whistleblower award) when calculating a whistleblower award.

171. In the Proposed Rule, moreover, the Commission acknowledged that it lacked this authority. *See, e.g.*, Proposed Rule, 2018 WL 3238771, at *21 ("[U]nder the existing framework of Rule 21F-6 . . . the Commission in setting the appropriate amount of an award [is] unable to consider [any] extraordinarily large dollar amounts that [is] associated with any assessments and adjustments made when applying the existing award factors of Rule 21F-6; the Commission . . . also lack[s] the authority to adjust the award amount downward if it [finds] that amount unnecessarily large for purposes of achieving the whistleblower program's goals.").

172. The Final Rule, however, asserted—for the first time—that the Commission *always* had the authority to consider the amount of the monetary sanctions collected (or the potential dollar amount of the whistleblower award) when calculating a whistleblower award. *See* Final Rule, 2020 WL 5763381, at *21-22, *72. The Final Rule purported to simply "clarify" the Commission's "existing

discretion" with an amendment to Rule 21F-6. *Id.* This change was transparently designed to reverse the Commission's old position and create new discretion. *See id.*

173. In addition, by failing to acknowledge its change in policy, the Commission also ignored how whistleblowers have relied on the promise of the Dodd-Frank Act, and the Commission's prior rules, that an award would not be arbitrarily reduced simply because the Commission deemed its dollar amount to be "too large."

174. Indeed, the Commission in the Final Rule claimed the discretion to lower whistleblower awards based on the size of the monetary sanctions for whistleblower applications that were filed *before* the Final Rule was adopted. Those individuals who blew the whistle and applied for an award under the old regime are now being deprived of their rights retroactively and without prior notice.

175. Because the Commission did not "provide a reasoned explanation for the change" it made to Rule 21F-6, *Encino Motorcars*, 136 S. Ct. at 2125, the Final Rule's amendment to Rule 21F-6 must be held unlawful and set aside. *See* 5 U.S.C. §706(2)(A).

COUNT III
Administrative Procedure Act, 5 U.S.C. §706
Exchange Act, 15 U.S.C. §78c(f)
Amendments to Rule 21F-6
(Arbitrary and Capricious – Failure to Weigh Costs and Benefits)

176. Plaintiff incorporates all of its prior allegations.

177. The APA requires a reviewing court to hold unlawful and set aside any agency action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. §706(2)(A).

178. The Exchange Act provides that when the SEC is "engaged in rulemaking" the SEC "shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. §78c(f).

179. The APA has a similar requirement. Under the APA, "[f]ederal administrative agencies are required to engage in 'reasoned decisionmaking.'" *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)).

180. In light of these requirements, the Commission acts "arbitrarily and capriciously . . . [when] it neglect[s] its statutory responsibility to determine the likely economic consequences of [a rule] and to connect those consequences to efficiency, competition, and capital formation." *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011); *see also Chamber of Com. of U.S. v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) (the SEC must "apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation"). Moreover, the Commission may not substitute for cost benefit analysis mere "ipse dixit, without any evidentiary support and unresponsive to [] contrary claim[s]." *Bus. Roundtable*, 647 F.3d at 1155. And the Commission must "provide[] substantial detail on the benefits of the rule" or "the reasons why quantification was not possible." *Cigar Ass'n of Am. v. U.S. Food & Drug Admin.*, No. 1:16-CV-01460 (APM), 2020 WL 4816459, at *13 (D.D.C. Aug. 19, 2020) (citation omitted).

181. The Final Rule's amendment to Rule 21F-6 is arbitrary and capricious because it does not "apprise itself—and hence the public and the Congress—of the economic consequences of [its] proposed regulation." *Chamber of Com.*, 412 F.3d at 144.

182. The Final Rule does not engage in any cost-benefit analysis of its amendment to Rule 21F-6. According to the Commission, "[b]ecause these amendments only clarify the Commission's existing authority, . . . they will [not] have significant benefits, costs, and economic effects, . . . [and] will [not] significantly impact efficiency, competition, and capital formation." Final Rule, 2020 WL 5763381, at *72.

183. That is wrong. The Final Rule reversed the Commission's previous rule and interpretations holding that the Commission could not, and thus would not, consider the amount of

the monetary sanctions collected when calculating a whistleblower award or provide a lower award based on the size of the potential dollar amount.

184. Because the Final Rule failed to perform the required cost-benefit analysis, its amendment to Rule 21F-6 must be held unlawful and set aside. *See* 5 U.S.C. §706(2)(A).

COUNT IV
Administrative Procedure Act, 5 U.S.C. §706
Amendments to Rule 21F-6
(Arbitrary and Capricious – Failure to Engage in Reasoned Decisionmaking)

185. Plaintiff incorporates all of its prior allegations.

186. The APA requires a reviewing court to hold unlawful and set aside any agency action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. §706(2)(A).

187. Under the APA, the agency must engage in "reasoned decisionmaking." *Michigan*, 576 U.S. at 750 (citation omitted). The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). An agency rule is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

188. The Final Rule fails this test for multiple reasons.

189. The Commission asserted that it was simply "clarifying" that it always had the discretion to consider the potential size of the whistleblower award when calculating the award. Final Rule, 2020 WL 5763381, at *21-22. But this rationale contradicts a plain reading of the Commission's prior rules and the Commission's prior statements.

190. In addition, the Final Rule gave the Commission discretion to reduce awards based on dollar amounts, creating a nebulous and arbitrary standard without any accountability. The Final Rule

empowers the Commission to effectively ignore the statutory award factors and reduce awards without telling whistleblowers or giving them an opportunity to challenge the reduction.

191. Because the Final Rule is arbitrary and capricious, its amendments to Rule 21F-6 must be held unlawful and set aside. *See* 5 U.S.C. §706(2)(A).

COUNT V
Administrative Procedure Act, 5 U.S.C. §706
Amendments to Rule 21F-6
(Contrary to Law)

192. Plaintiff incorporates all of its prior allegations.

193. Under the APA, a reviewing court must hold unlawful and set aside agency action that is "not in accordance with law" or is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §706(2)(A), (C).

194. "It is axiomatic that administrative agencies may act only pursuant to authority delegated to them by Congress." *Air All. Houston v. EPA*, 906 F.3d 1049, 1060 (D.C. Cir. 2018) (cleaned up). Therefore, if a provision of the Exchange Act is "clear," the Commission's regulations interpreting or implementing that provision "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Moreover, if a provision of the Exchange Act is either silent or ambiguous, the Commission's interpretation or implementation of it must be "based on a permissible construction of the statute." *Id.* at 843.

195. Through the Final Rule, the Commission gave itself the discretion to reduce the "dollar amount" of a whistleblower award if it deems the award to be too large. Final Rule, 2020 WL 5763381, at *21-22, *72. This contradicts the plain language of the Exchange Act's whistleblower provisions and is an otherwise unreasonable construction of the statute.

196. In Section 78u-6(c)(1)(B), Congress made clear that the Commission "shall not take into consideration the balance of the Fund" when "determining the amount of an award." 15 U.S.C. § 78u-6(c)(1)(B).

197. Congress imposed this requirement because it wanted the whistleblower program "to be used actively with *ample rewards* to promote the integrity of the financial markets." S. Rep. No. 111–176 (2010) at 112 (emphasis added); *see also Digital Realty Tr.*, 138 S. Ct. at 777 ("The 'core objective' of Dodd-Frank's robust whistleblower program . . . is 'to motivate people who know of securities law violations to *tell the SEC*.'" (quoting S. Rep. No. 111–176, at 38) (citation omitted) (emphasis in original)).

198. The Final Rule violates this text and statutory purpose. The Final Rule is designed to give the Commission power to give lower awards in order to preserve the balance of the Fund. Indeed, the Commission admitted in the Final Rule that it wanted to consider the dollar amount of the award in order to "foster more efficient use of the [Fund]." Final Rule, 2020 WL 5763381, at *72.

199. Because the Final Rule's amendment to Rule 21F-6 contradicts the plain text of the Exchange Act and is otherwise an unreasonable construction of the statute, it must be held unlawful and set aside. *See* 5 U.S.C. §706(2)(A), (C).

COUNT VI
Administrative Procedure Act, 5 U.S.C. §706
Amendments to Rule 21F-3
(Contrary to Law)

200. Plaintiff incorporates all of its prior allegations.

201. Under the APA, a reviewing court must hold unlawful and set aside agency action that is "not in accordance with law" or is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §706(2)(A), (C).

202. "It is axiomatic that administrative agencies may act only pursuant to authority delegated to them by Congress." *Air All. Houston*, 906 F.3d at 1060 (cleaned up). Therefore, if a provision of the Exchange Act is "clear," the Commission's regulations interpreting or implementing that provision "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Moreover, if a provision of the Exchange Act is either silent or ambiguous, the

Commission's interpretation or implementation of it must be "based on a permissible construction of the statute." *Id.* at 843.

203. The Exchange Act defines "related action" as "*any* judicial or administrative action brought by [specified entities] . . . that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action." 15 U.S.C. §78u-6(a)(5) (emphasis added). The word "any" is all inclusive and not amenable to any limiting construction.

204. The Exchange Act, in turn, requires that the Commission "*shall pay* an award . . . [in] the successful enforcement of . . . [the] related action, in an aggregate amount [of 10% to 30%]." 15 U.S.C. §78u-6(b)(1) (emphasis added).

205. The Final Rule, however, amends Rule 21F-3 to give the Commission the discretion to deny a whistleblower award for "related actions" under certain circumstances, including if the Commission finds that another whistleblower program has "the more direct or relevant connection to the action." Final Rule, 2020 WL 5763381, at *82. The Commission has no statutory authority to impose this requirement.

206. Rule 21F-3 is also an unreasonable interpretation of the statute. Rule 21F-3 disincentivizes individuals from becoming whistleblowers by, among other things, imposing numerous roadblocks on whistleblowers' eligibility to recover awards for "related actions."

207. For example, if the Commission determines that an award for a "related action" is appropriate, the whistleblower now must make "a prompt, irrevocable waiver of any claim to an award from the other award program," even if the other program has not made a determination regarding the client's eligibility and award amount. This forces whistleblowers to blindly accept the first award offered to them, regardless of its size, rather than risk getting nothing.

208. Similarly, the Final Rule places whistleblowers in a lose-lose situation. The Final Rule forces individuals to apply for as many whistleblower programs as possible to avoid the Commission determining that another whistleblower program "has the more direct or relevant connection to the action." At the same time, however, if another whistleblower program denies the individual's whistleblower application, for any reason, the Final Rule bars that individual from receiving an award from the Commission. This prohibition is mandated even though proceedings are not litigation, the proceedings are not governed by the same rules, and the proceedings don't involve the same parties. This punishment of whistleblowers is irrational.

209. The Commission's rule contradicts the purpose of the statute, which is to create a whistleblower program that will "be used actively with ample rewards to promote the integrity of the financial markets." S. Rep. No. 111–176 (2010) at 112; *see also Digital Realty Tr.*, 138 S. Ct. at 777 ("The 'core objective' of Dodd-Frank's robust whistleblower program . . . is 'to motivate people who know of securities law violations to *tell the SEC*.'" (quoting S. Rep. No. 111–176, at 38) (citation omitted) (emphasis in original)).

210. Because the Final Rule's amendment to Rule 21F-3 contradicts the plain text of the Exchange Act and is otherwise an unreasonable construction of the statute, it must be held unlawful and set aside. *See* 5 U.S.C. §706(2)(A), (C).

COUNT VII
Administrative Procedure Act, 5 U.S.C. §706
Amendments to Rule 21F-3
(Arbitrary and Capricious)

211. Plaintiff incorporates all of its prior allegations.

212. The APA requires a reviewing court to hold unlawful and set aside any agency action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. §706(2)(A).

213. Under the APA, the agency must engage in "reasoned decisionmaking." *Michigan*, 576 U.S. at 750 (citation omitted). The agency "must examine the relevant data and articulate a satisfactory

explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citation omitted). An agency rule is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

214. The Final Rule fails this test. Rule 21F-3 disincentivizes individuals from becoming whistleblowers by imposing numerous roadblocks on whistleblowers' eligibility to recover awards for "related actions."

215. For example, if the Commission determines that an award for a "related action" is appropriate, the whistleblower now must make "a prompt, irrevocable waiver of any claim to an award from the other award program," even if the other program has not made a determination regarding the client's eligibility and award amount. This forces whistleblowers to blindly accept the first award offered to them, regardless of its size, rather than risk getting nothing.

216. Similarly, the Final Rule places whistleblowers in a lose-lose situation. The Final Rule forces individuals to apply for as many whistleblower programs as possible to avoid the Commission determining that another whistleblower program "has the more direct or relevant connection to the action." At the same time, however, if another whistleblower program denies the individual's whistleblower application, for any reason, the Final Rule bars that individual from receiving an award from the Commission. This prohibition is mandated even though proceedings are not litigation, the proceedings are not governed by the same rules, and the proceedings don't involve the same parties. This punishment of whistleblowers is irrational.

217. These prohibitions are arbitrary and capricious because they harm potential whistleblowers and contravene Congress's purpose of encouraging whistleblowers to come forward to report securities violations.

218. Because the Final Rule is arbitrary and capricious, its amendments to Rule 21F-3 must be held unlawful and set aside. *See* 5 U.S.C. §706(2)(A).

WHEREFORE, Plaintiff asks this Court to enter judgment in his favor and to provide him with the following relief:

a. A declaratory judgment finding that the Final Rule's amendments to Rule 21F-6 are unlawful under the APA and the Exchange Act because the Commission failed to promulgate them through the proper notice-and-comment rulemaking procedures;

b. A declaratory judgment finding that the Final Rule's amendments to Rule 21F-6 and Rule 21F-3 are arbitrary and capricious under the APA and the Exchange Act because the Commission failed to acknowledge its changes in policy, did not consider its costs and benefits, did not articulate a rational explanation for its changes, did not explain why it created a new arbitrary standard lacking accountability and transparency, disregarded reliance interests, and otherwise failed to engage in reasoned decisionmaking;

c. A declaratory judgment holding that the Final Rule's amendments to Rule 21F-6 and Rule 21F-3 are contrary to law because they contradict the plain text of the Exchange Act and are otherwise an unreasonable construction of the statutory text;

d. A declaratory judgment finding that the Final Rule's amendments to Rule 21F-6 and Rule 21F-3 are invalid;

e. A declaratory judgment that the Commission had no authority under its prior rules to consider the amount of the monetary sanctions collected or the potential size of the whistleblower award when calculating a whistleblower award;

f. A permanent injunction prohibiting Defendants from enforcing or implementing the Final Rule's amendments to Rule 21F-6 and Rule 21F-3;

g. An order vacating and setting aside the Final Rule's amendments to Rule 21F-6 and Rule 21F-3;

h. All other relief to which Plaintiff is entitled, including but not limited to Plaintiff's attorneys' fees and costs.

i. All other relief that this Court deems just and proper.

Respectfully submitted,

Dated: January 13, 2021

/s/ J. Michael Connolly

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