Monday, October 1, 2012
9:00 AM - 10:30 AM

200 – Strategies for Keeping a Whistleblower Claim In-house

Jay Cohen
SVP & Chief Compliance Officer
Assurant, Inc.

Richard Grime
Partner, White Collar Defense and Corporate Investigations Practice
O'Melveny & Myers, LLP

Susan Markel
Managing Director
AlixPartners, LLP

Sean McKessy
Chief of the SEC's Office of Whistleblower
Securities and Exchange Commission

Brian Sumner
Counsel
Alcoa Inc.

Faculty Biographies

Jay Cohen

Jay Cohen is senior vice president and chief compliance officer, at Assurant, a premiere provider of specialized insurance products and related services in North America and selected other markets.

He began his legal career as an assistant district attorney in Brooklyn, NY, and spent twenty years in New York City and state government. Prior to joining Assurant, he served in compliance leadership positions in the financial services, health-care and information services industries and also had his own compliance consulting practice.

Mr. Cohen earned his BA from The George Washington University and his JD from Yale Law School. He is a member of the editorial board of the Society for Corporate Compliance and Ethics. He is also a member of the Executive Committee, board of directors, of The George Washington University Alumni Association.

Richard Grime

Richard W. Grime is a partner in the white collar defense and investigation's practice in the Washington, D.C. office of O'Melveny & Myers LLP. He represents clients, both corporations and individuals, on a full range of white collar, securities enforcement, regulatory, and compliance matters. His work includes representing audit committees and boards conducting internal investigations with a particular focus on FCPA investigations and frequently advises companies on implementing FCPA compliance programs.

Mr. Grime is ranked as a nationwide "FCPA Expert" by *Chambers USA* 2011 and 2012 and *Chambers Global* 2012.

Before he joined O'Melveny, Mr. Grime spent over nine years in the Division of Enforcement at the U.S. Securities and Exchange Commission in Washington, D.C where he led many FCPA investigations.

Susan Markel

Susan G. Markel is a managing director in the financial advisory services group of AlixPartners, LLP. Her practice focuses on corporate investigations, litigation support and white collar defense. She provides advice on, and has served as an expert on, matters related to accounting, financial reporting and auditors' liability. She has a significant amount of Foreign Corrupt Practices Act experience including conducting reviews and assessments of a company's internal controls and books and records, conducting

investigations, and performing due diligence procedures. She also conducts internal investigations including those, which are prompted by whistleblower complaints.

Prior to joining AlixPartners, she was the chief accountant in the division of enforcement at the SEC. In this position, and in her total 15 year tenure at the SEC, she was responsible for conducting, supervising, and reviewing financial accounting and reporting investigations of the SEC. She was also an auditor for both public and non-public entities and is a frequent speaker nationally and internationally on financial reporting matters.

Ms. Markel received the SEC's Andrew Barr Award in 2000 and the Distinguished Service Award in 2006. In addition to being recognized by the Commission, the Federal Bureau of Investigation also honored her for tireless assistance, expert advice, and keen insights in the Cendant securities fraud case.

Ms. Markel graduated with honors with a BS in accounting from the University of Akron. She is a CPA and a member of the American Institute of Certified Public Accountants.

Sean McKessy
Chief of the SEC's Office of Whistleblower
Securities and Exchange Commission

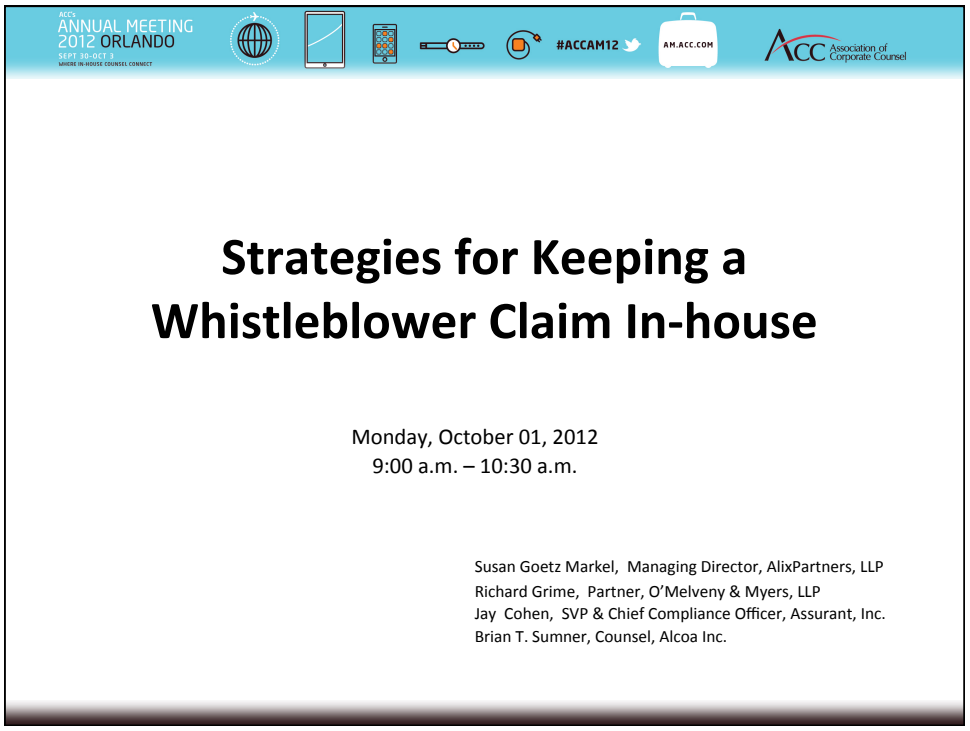
Brian Sumner

Brian T. Sumner is counsel at Alcoa Inc., the world's leading producer of primary aluminum, fabricated aluminum, and alumina. At Alcoa, he has responsibility for compliance matters, government investigations and related civil litigation, and corporate governance issues.

Prior to joining Alcoa, Mr. Sumner was associated with Fried, Frank, Harris, Shriver & Jacobson LLP. At Fried Frank, Mr. Sumner represented financial services companies, accounting firms, and those organizations' leaders in government investigations. Mr. Sumner assisted clients in navigating investigations of alleged insider trading, market manipulation, accounting fraud, professional misconduct, and violations of the FCPA and other federal securities laws and regulations.

Mr. Sumner is actively involved in the American Bar Association. He is a Fellow of the ABA's business law section and previously served as the publications and content director for the White-Collar Crime Committee, the publications director for the Federal Regulation of Securities Committee, and the publications director and newsletter editor for the Professional Responsibility Committee. Mr. Sumner also served on the Drafting Committee for the Federal Regulation of Securities Committee's comment letter to the SEC regarding its proposed whistleblower rules.

Mr. Sumner received his JD, cum laude, and MA from Duke University, and his BA, summa cum laude, from Wake Forest University, where he was elected to Phi Beta Kappa. While at Duke, he served on the editorial board of the *Duke Law Journal*.



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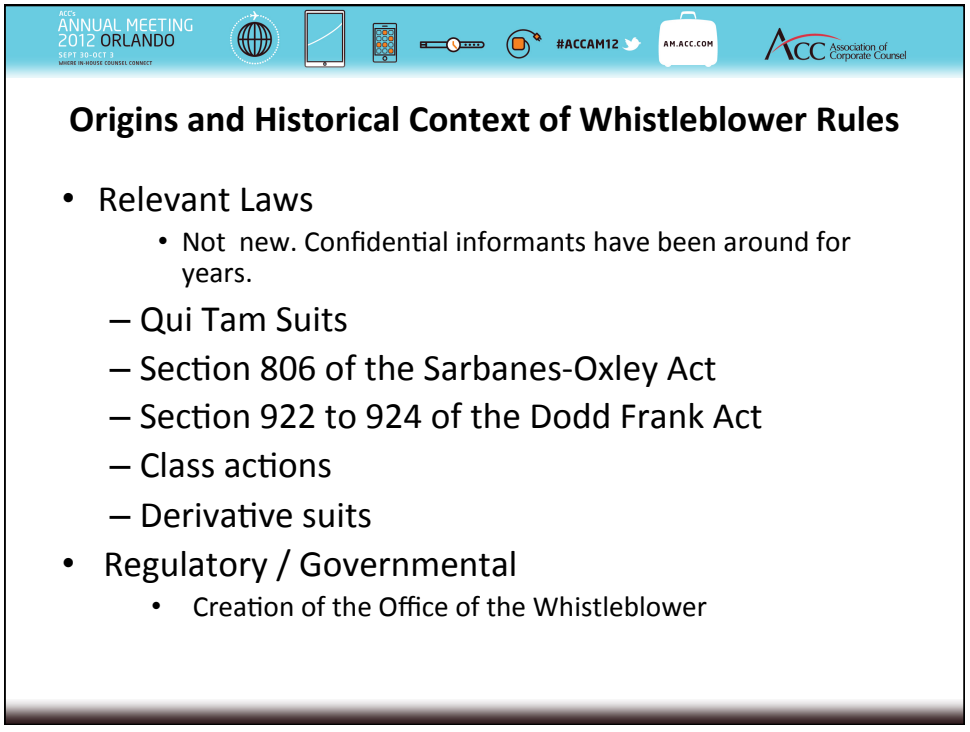
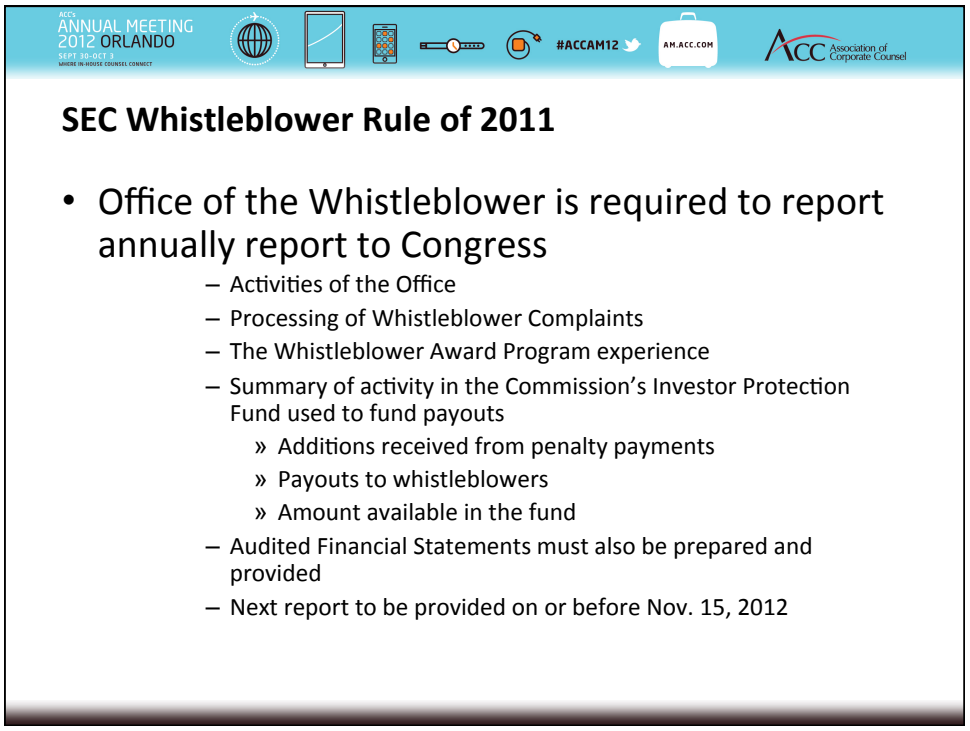
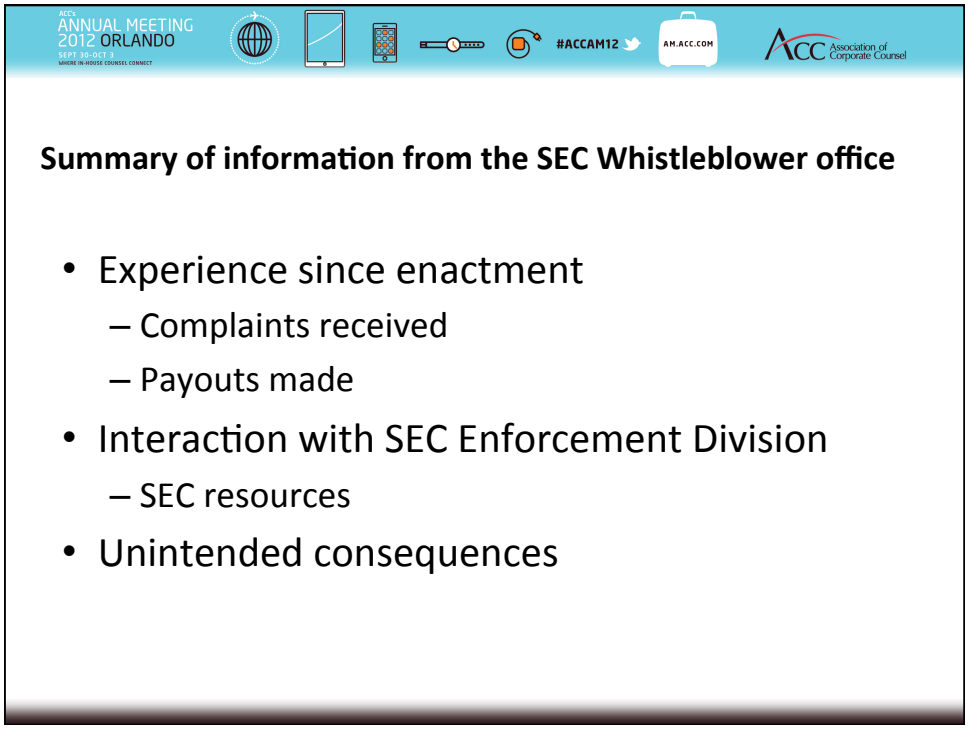
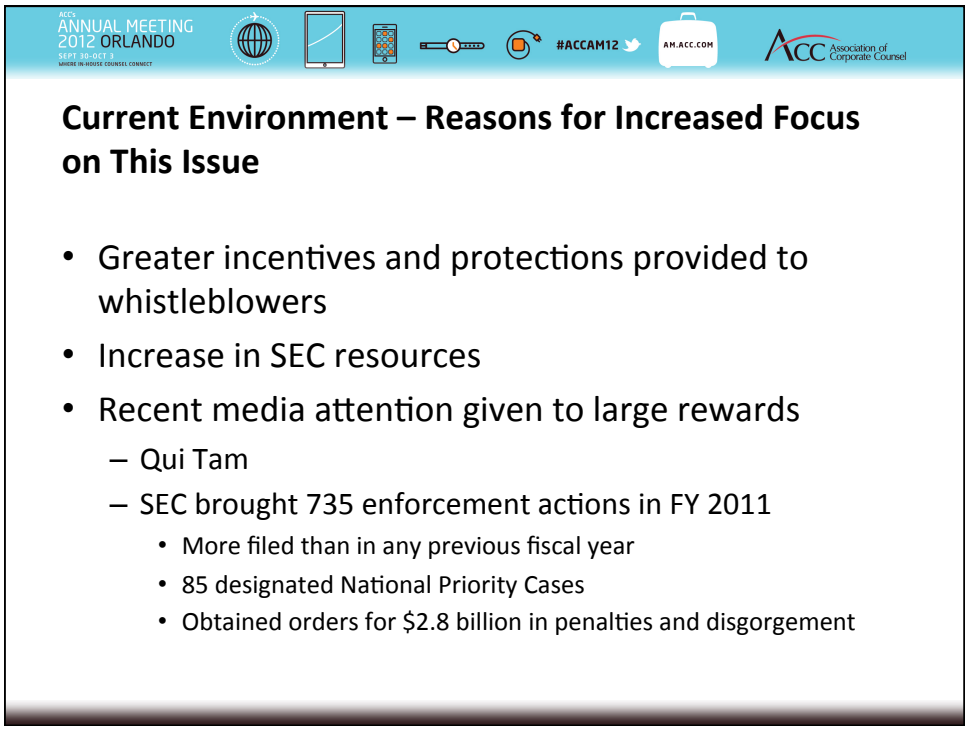
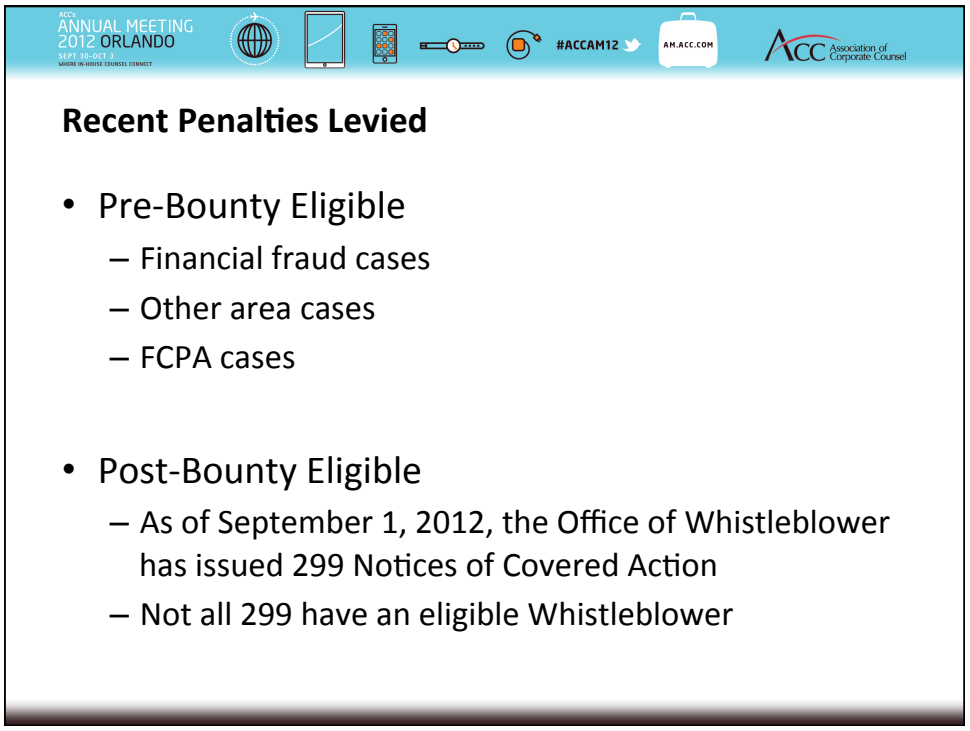
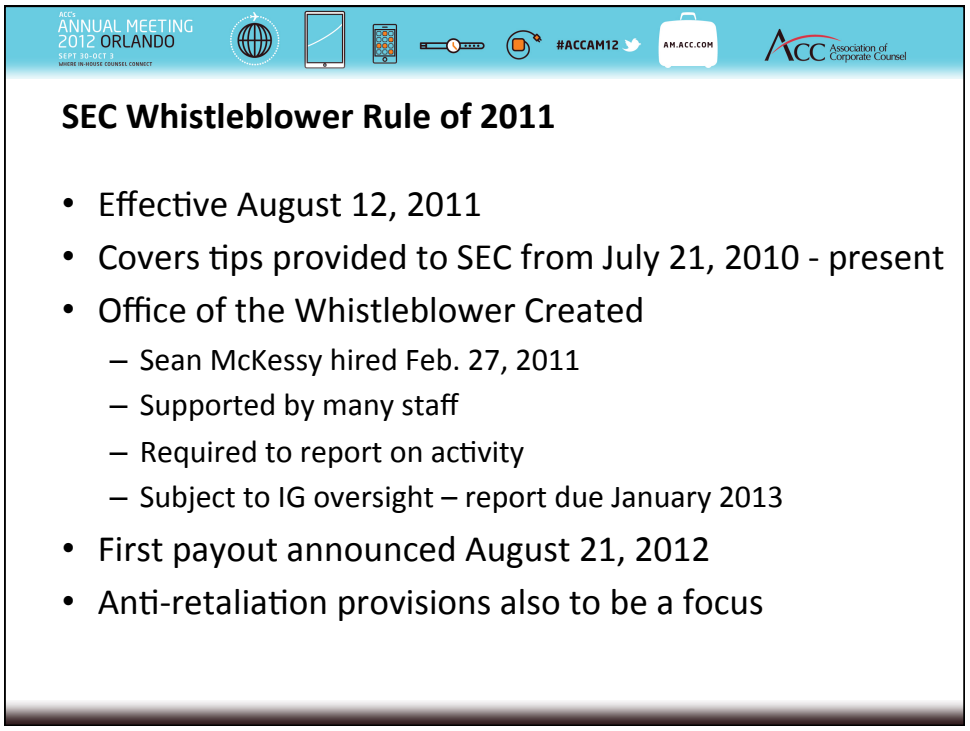


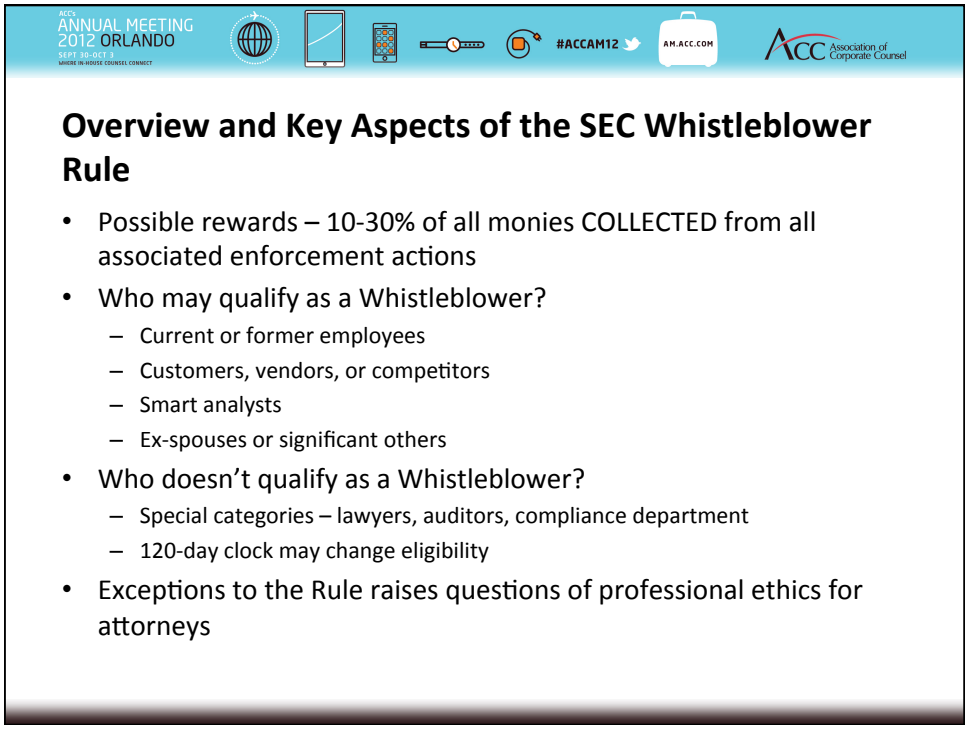


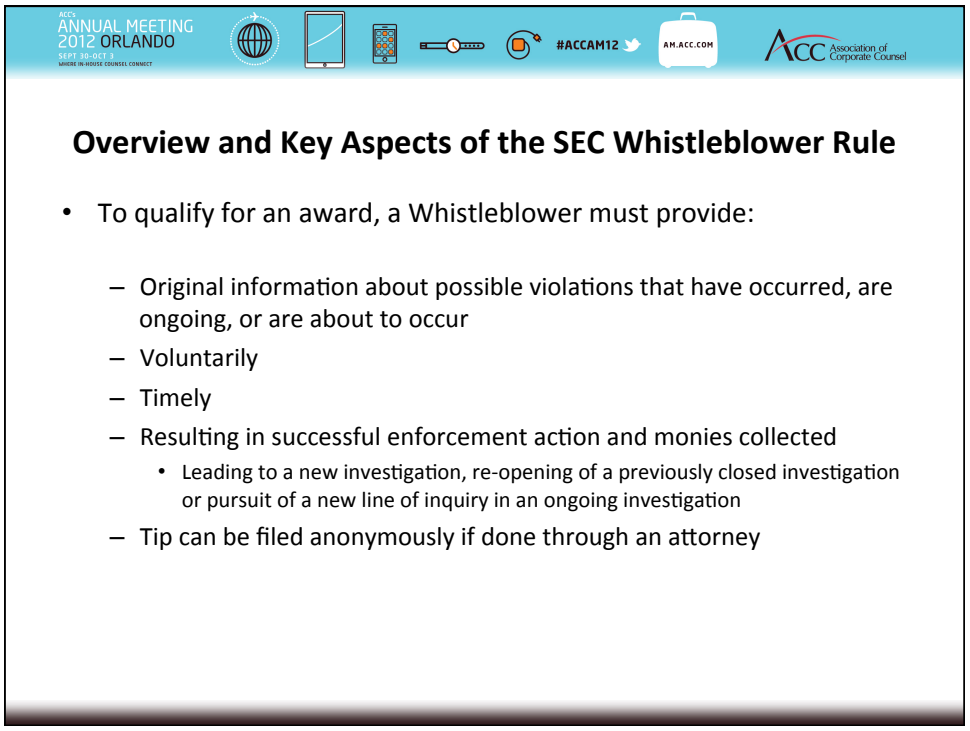


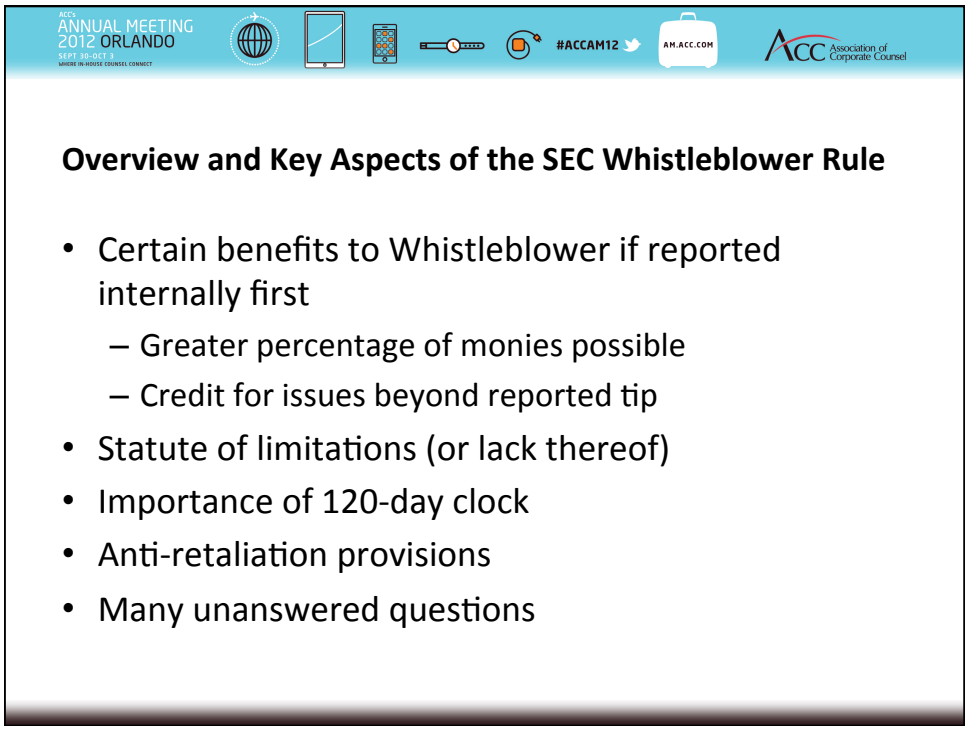


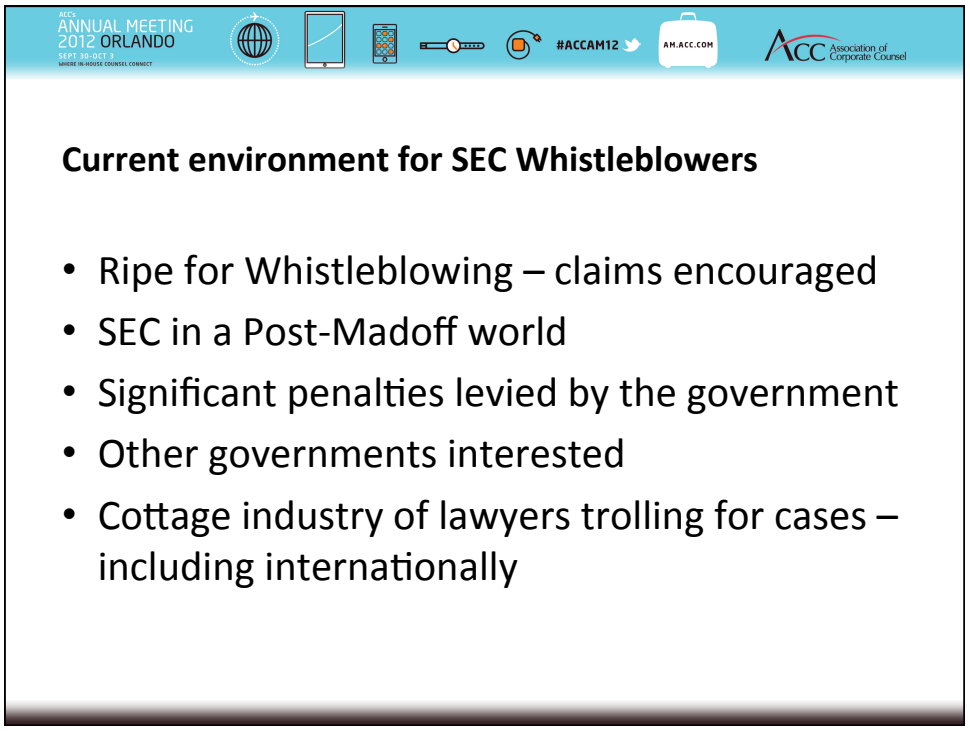


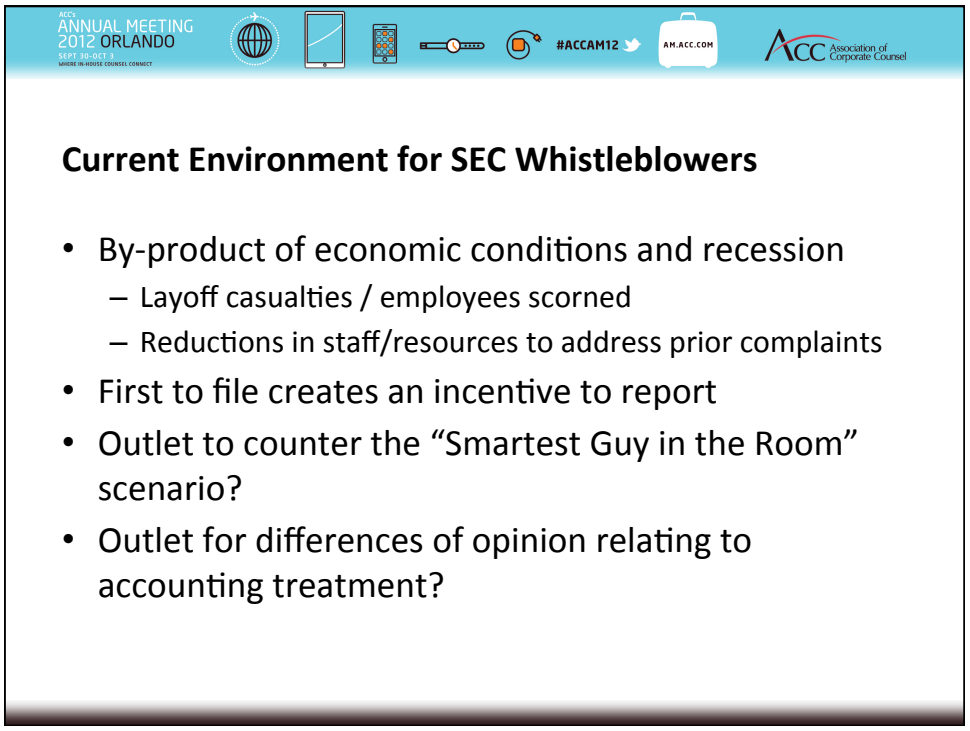


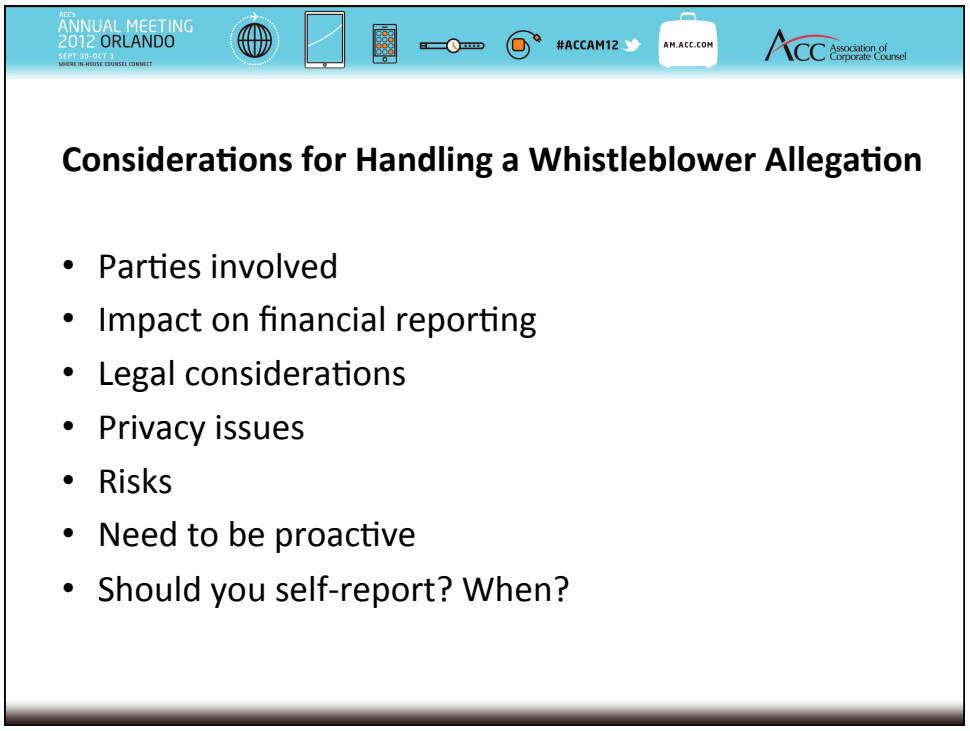


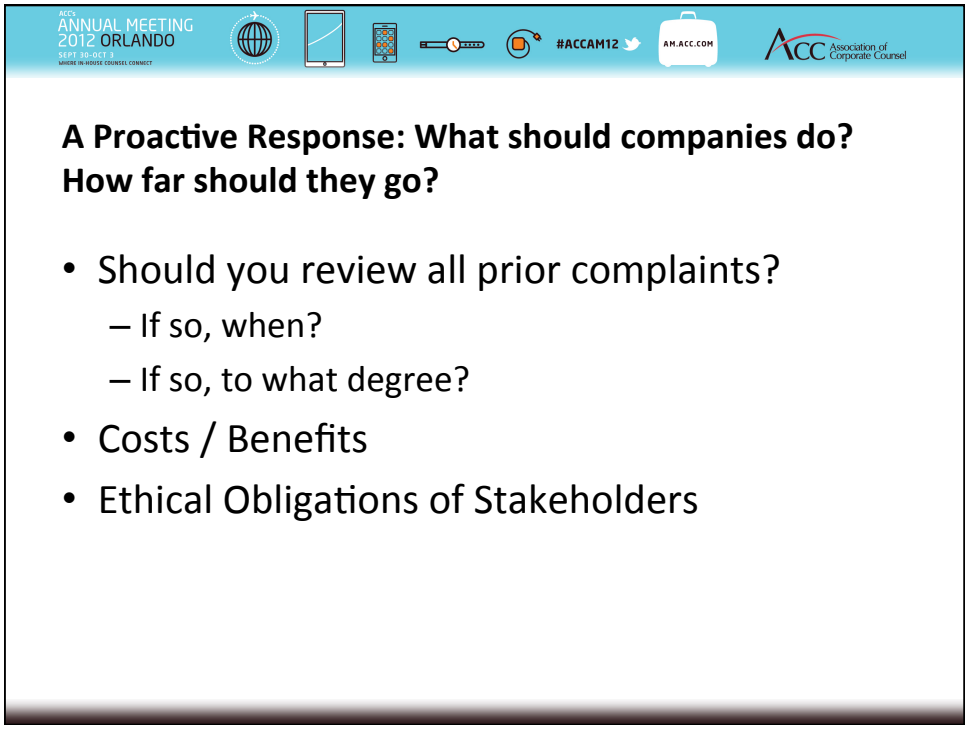


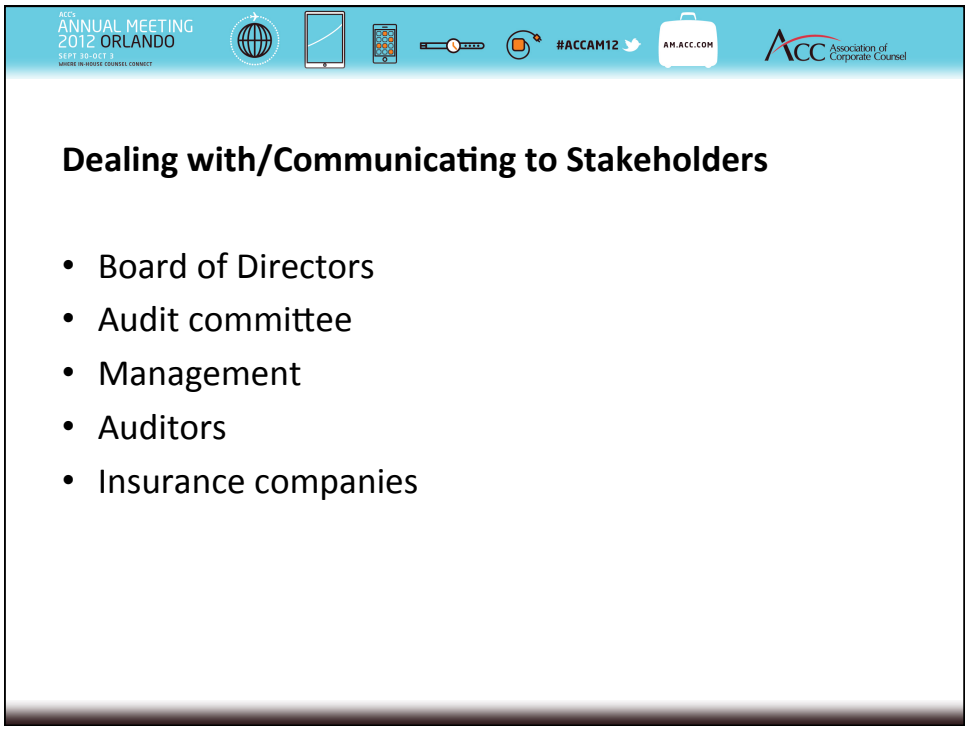


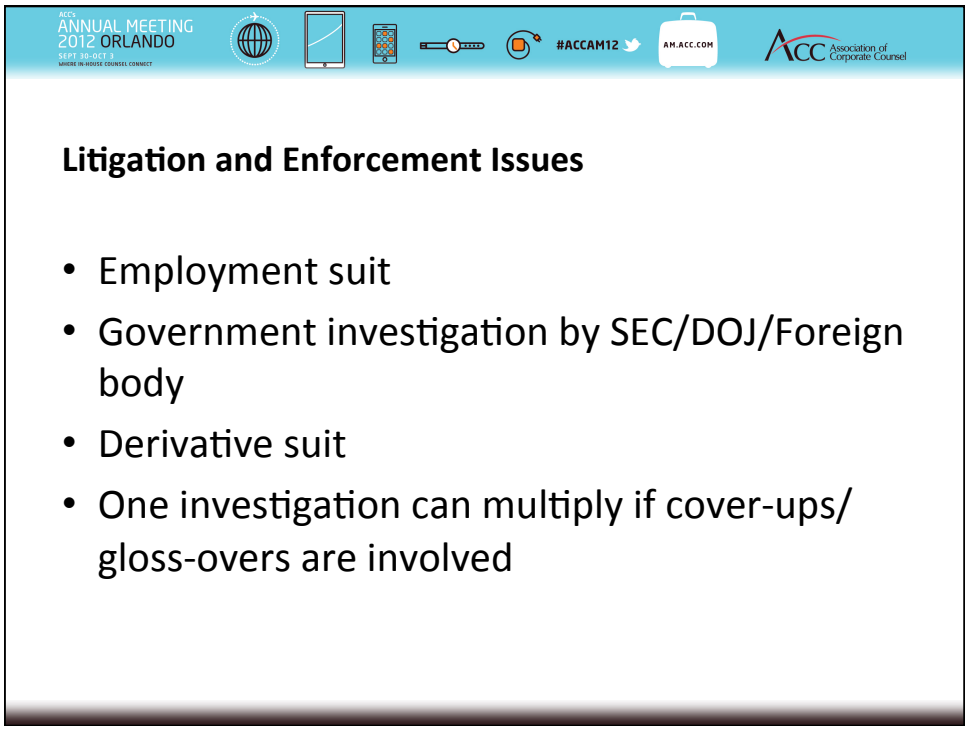


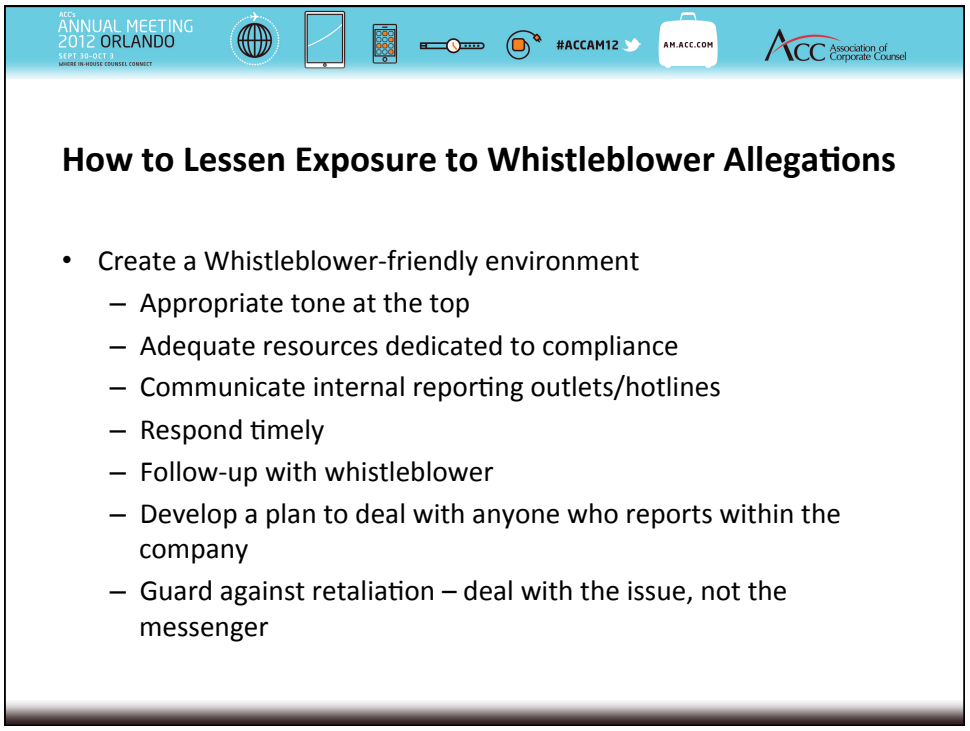


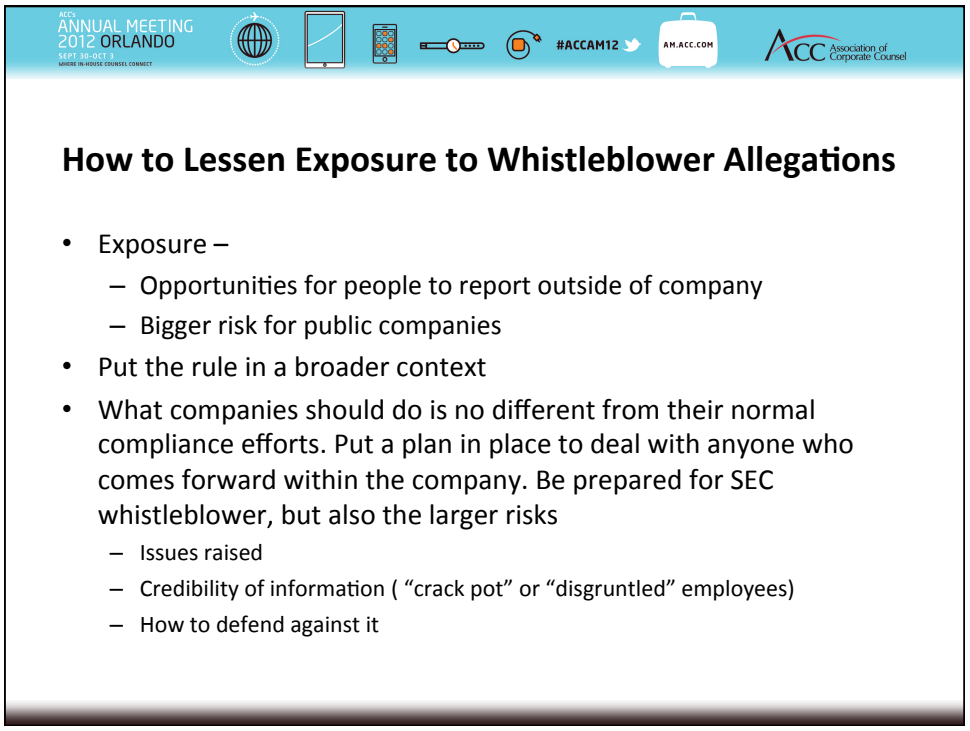


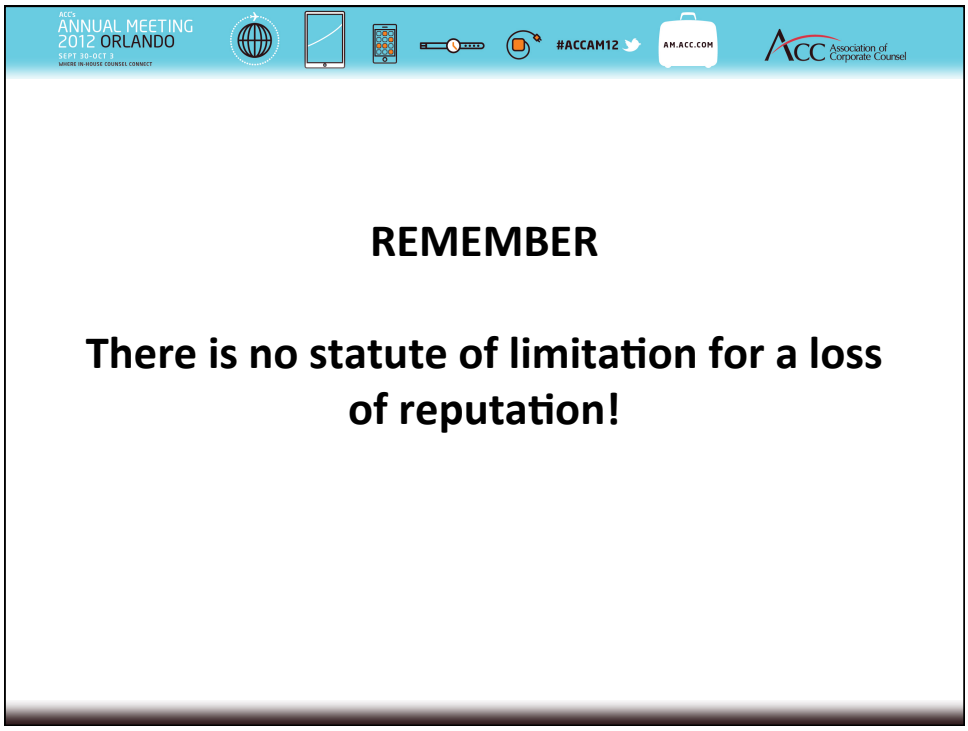












Navigating the Dodd-Frank Whistleblower Rules

Jay Cohen
Chief Compliance Officer, Assurant
June 2012

Agenda

- The Latest News
- The Whistleblower Rules
- Organizational Imperatives
- Our Program at Assurant

The Latest News – The Regulator

- **The SEC**
  - Seven tips a day – "We've been impressed with the quality of the tips we have seen"
  - Most relate to corporate disclosure or market manipulation
  - The "vast majority" of tipsters also reported internally
  - "The first award cannot come soon enough for us"
  - "It is very important to communicate with employees to let them know you are there, you take this seriously, and you are going to protect them from any retaliation"

- Jane Norberg. Deputy Chief
SEC Office of the Whistleblower

The Latest News - Whistleblowers

- **The Ethics Resource Center**
  - Most employees want to report misconduct internally first
  - Supervisors receive the majority of first reports
  - Most second reports are still made internally
  - Only 2% of employees went outside the company without ever reporting the wrongdoing to their employer
  - Employees do not want to harm the company – "External reporting is usually a last resort"

- 2011 National Business Ethics Survey
Supplemental Research Report

The Latest News - Retaliation

- **The EEOC and the Department of Labor(DOL)**
  - The EEOC
    - Retaliation cases represented 37.4% of all charges in FY 2011, up from 22.6% of cases in FY 1997
    - There are more retaliation cases than any other category
    - The number of retaliation cases has doubled in fifteen years
  - DOL – recent cases have:
    - Made it easier for employees to meet the burden of proof
    - Dramatically expanded "adverse employment actions"
    - Found possible retaliation even in the absence of any underlying violations

The Whistleblower "Bounty" is:

- **Designed to prevent another Madoff case but impacts companies even more than regulators**
- **Not a new risk – but it raises the stakes**
- **Limited to securities law violations – but for a public company, that can mean a wide range of issues**
- **Part of a trend to encourage and protect whistleblowers:**
  - In any organization – public or private
  - Involving any issues – securities law violations or not

The law requires that the SEC pay a bounty if these conditions are met

- A whistleblower – including but not limited to an employee – who
- Voluntarily provides "original" information
- About any "possible" securities law violation
- Leading to successful enforcement actions
- In which the SEC and other government agencies impose penalties of $1 million or more

is entitled to a bounty of between10% to 30%

More than $450 million in the fund

The rules encourage whistleblowers in several important respects

- Broad definition of reportable matters
- Easy to make a report
- Relaxed standards for "information that leads to successful enforcement" of a new or existing matter
- Related actions aggregated to increase the award
- Some opportunities for Legal, Compliance and Audit staff to be whistleblowers
- Non-criminal participants still eligible
- Protections against, and remedies for, retaliation

The SEC believes employees will be encouraged to report internally first because:

- Internal reports may increase the amount of an award – explicit but not mandatory factor
- Interference or delay may decrease the award
- The employee gets credit for any company investigation and report that he/she initiates
- "Look back" period of120 days
- The SEC asks if the whistleblower reported internally

But the SEC rejected a requirement that employees report internally first

The rules place a huge premium on the speedy internal detection and resolution of problems

- Encourage internal reports
- Know what is going on anywhere in the company
- Respond well – prepare to be reviewed!
- Prevent retaliation
- Get the message out all across the organization

Companies must assess and prepare to respond quickly and wisely to every report

- **Review in-take practices and procedures**
- **Ensure the right investigations process**
- **Benchmark the volume and types of reports**
- **Assure timely escalation and review**
- **Plan ahead to assess, reach, implement and document decisions about self-reporting**

Managers must tell us about reports to them

- **Most internal reports go to managers, not Compliance**
- **We cannot address what we do not know**
- **We can help managers protect against retaliation and prevent lingering concerns**
- **Are employees comfortable talking to their boss?**
  - Employee surveys provide an answer
  - It is great if they are – but then managers still must tell us

Our program at Assurant includes a broad communications and awareness campaign

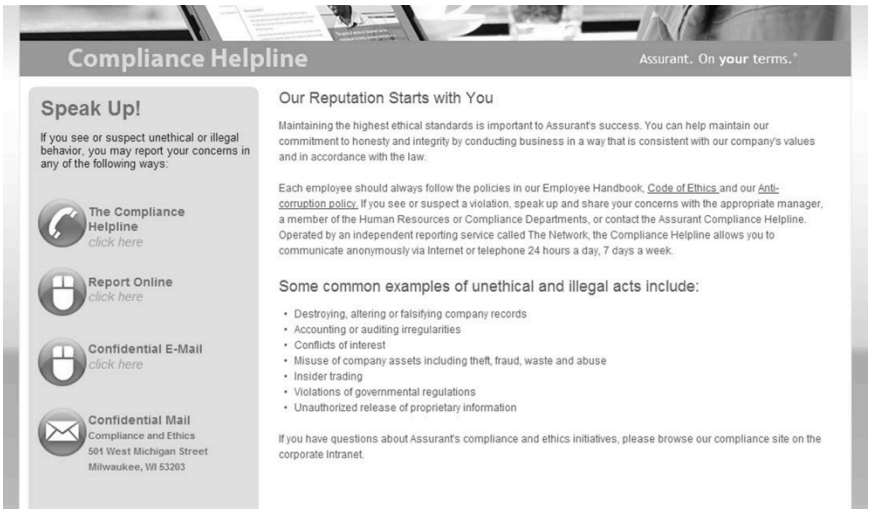
- Tone from the top messages
- Articles, posters and badges
- Meetings with senior leadership teams
- Improved Compliance intranet site
- Quarterly Ethics Feature Stories – retaliation is the subject of the first edition
- Repeated education about the Code of Ethics, the Helpline and other reporting tools

Other elements of our plan include:

- Employee engagement surveys
- Feedback from employees who report concerns
- Comprehensive internal review, investigation and remediation process
- Vigorous enforcement of the anti-corruption program
- Exit interviews – are you aware of any issues?
- Special outreach to HR and middle managers

Compliance Helpline Reporting

Compliance Helpline Reporting



Ethical Leadership – these factors are critical

1. Leading indicator of misconduct – A retaliatory culture in which employees are not comfortable raising concerns
2. Leading indicator of a culture of integrity - Organizational Justice (how well we respond to issues)
3. All Integrity is Local – The tone set by direct managers and attitudes held by immediate colleagues affect the likelihood of misconduct to a great degree

- Preempting Compliance Failures – Identifying Leading Indicators of Misconduct, Compliance and Ethics Leadership Council, The Corporate Executive Board

We expect our managers to set the right tone

- Foster an open, retaliation-free environment
- Encourage employees to speak-up and raise concerns
- If unsure how to respond to an employee's question, refer the question to Human Resources, Legal, or a member of the Compliance team
- Use the resources on the Compliance intranet site
- Communicate about the Compliance Helpline, which is available toll-free, 24 hours a day, 7 days a week

Leadership Compliance Competency Scorecard – part of the performance review

Deliver Compliance Results	**Supports and achieves compliance program objectives:** **1. Provides adequate compliance resources and staff** **2. Involves compliance in strategy and new business planning** **3. Fully implements business segment Compliance Plan**
Tone From The Middle	**Fosters a culture of compliance:** **1. Ensures that middle managers promote compliance with actions and messages, and encourages speaking up** **2. Managers and their staffs complete all required compliance training**
Tone From The Top	**Promotes company commitment to compliance and culture of integrity:** **1. Endorsement of and engagement with compliance initiatives** **2. Leads by example** **3. Includes Compliance messages in management communications**
Performance with Integrity	**Demonstrates Partnership with the Compliance Team:** **1. Invites compliance to address business staffs** **2. Interacts regularly with the Compliance Team** **3. Achieves business goals in a compliant manner**

These themes guide this effort

- **We <u>want</u> to know – we <u>need</u> to know**
- **Thank you for coming forward – your voice matters!**
- **We're from Compliance and we are here to help – that is why we are getting out of the office and visiting you**
- **The Helpline is critical**
- **But it is not all about the Helpline**
- **Retaliation of any kind is unacceptable**
- **An effective whistleblower program must focus on:**
  - Risk
  - Culture
  - Leadership

These issues require advance attention, to enable informed and defensible actions

- Information: what do you know, when do you know it?
- Outreach: where should we look without waiting for the phone to ring?
- Investigation: how, by whom and how quickly?
- Escalation: how high should you go?
- Response: whose help will you need to stop-and-fix?
- Self-reporting: what are the competing considerations and how will you weigh them?

Information: Will you know what has happened – how quickly and by what means?

- Most information is reported to managers, not to your helpline – will they tell you?
- The more distant the office, the less likely the report
- But you are responsible, whether you know or not!
- Tools -
  - Multiple avenues to report
  - Mandatory reporting by managers – consequences for not
  - Element in performance evaluations of leaders
  - Face time – overcome skepticism
  - Communications and training, training, training!

Outreach: Which areas warrant attention before the phone rings? Look inside and outside.

- Post-scandal assessments can tell us where our own risks are greatest. In these post-mortems:
  - Long-standing complaints were ignored or not resolved
  - The speed and size of the business got ahead of controls or the business failed to implement promised controls
  - Sales culture, targets and compensation drove conduct
  - Part of the business stood "above the law"
  - Competitors were doing it
- Tools
  - Past internal audits and regulatory examinations
  - Helpline reports from prior years
  - Employee surveys, leader reviews and "culture" reports
  - Company compensation plans
  - Regulatory matters within your industry

Investigation: Are the resources in place ahead of time to assess and investigate?

- Have you matched resources to categories of cases, evidence, investigations?
- This matching requires an assessment of
  - The volume and types of reports
  - Internal capabilities and external resources
  - Knowledge and expertise
  - Timeliness, cost, privilege, complexity, credibility
- Tools
  - Investigative manual and response plan
  - Training and practice
  - Preparation with Legal, HR, Audit and IT
  - On-call external experts

Escalation: What reports should you make inside the company, to whom and when?

- There are requirements – SOX 302 and 307, industry
- But what if internal self-reporting is NOT required?
- Can it wait for your "regular" report, or do you need to call now? Report all matters or just some?
- Increasingly, the Board is expected – and wants - to know more, not less
- Tools -
  - Work this out now with the Board and senior management
  - Vet examples, categories and scenarios
  - Investigative manual – general outline with flexibility
  - Benchmarks and templates for reports
  - Revisit periodically

Response: Have you stopped and then fixed the problem? What about remediation?

- This is easier said than done – what will it take to:
  - Stop the problem
  - Fix what has already happened
  - Make changes going forward
  - Consider and provide remediation for past conduct
- Tools – individual discipline is only one factor
  - Assessment of the harm – who suffered and how much?
  - Broad review – where else do we have similar issues?
  - Understanding and commitment from the top
  - Money and time

Self-reporting: Do we understand all of the competing considerations and consequences?

- Nature and seriousness of the matter – isolated or not
- Senior leadership knowledge and involvement
- Have I done enough or too little to find out?
- Whistleblowers – the 120-day clock is ticking
- Regulations and external expectations – even if no "duty" to report
- Race to the regulator vs. rush to judgment
- Collateral consequences
- Risks and benefits of cooperation

Other Questions to Ponder

- Can we/should we require internal reporting?
- Should we reward employees for internal reports?
- Should we tell them about the bounty?
- What should we communicate about the outcomes of our investigations?

Conclusion – Internal complaints are inevitable, and external whistleblowers more likely. So:

- Plan ahead – the process by which you respond and reach a decision may be as important as the result
- Line up your resources
- Educate your leadership
- Recognize that this is not a linear process
- Take a deep breath
- Prepare to be second guessed
- Throughout, ask this question – Who are we and what do we stand for?

Summary of SEC Whistleblower Provisions

- Created by Dodd-Frank Act with Final Rules effective on August 12, 2011.
- "We're seeing tips across a wider range of subject areas - financial disclosure, FCPA, broker-dealer conduct, to name a few - and we are receiving tips from around the nation and many foreign countries."
  R. Khuzami, Director of SEC's Division of Enforcement, April 27, 2012
- SEC receiving seven whistleblower tips a day with 2-3 being "high quality"
- No awards yet.

Summary of Whistleblower Provisions

- Eligible whistleblowers are entitled to an award of between 10% and 30% of the monetary sanctions collected in actions brought by the SEC and related actions brought by other regulatory and law enforcement authorities.
- Rules prohibit retaliation by employers against employees who provide SEC with information about possible securities violations

Summary of Whistleblower Provisions

- Whistleblower must provide information voluntarily
  - WB is not required to produce information
  - But, can still be voluntary if SEC requests information from WB's employer
- Whistleblower must provide original information voluntarily about a possible violation of the federal securities laws that has occurred, is ongoing, or is about to occur.
- Information must lead SEC to open a new investigation, re-open a previously closed investigation or pursue a new line of inquiry in connection with an ongoing investigation
- SEC must also bring a successful enforcement action based at least in part on the information you provided

Summary of Whistleblower Provisions

- Who cannot bring a claim:
  - Officers, directors if they receive information from the employee alleging misconduct
  - Attorneys who obtained information in course of representation
  - Compliance personnel and internal audit – Maybe?
  - Outside Auditors – Maybe?
  - Illegally obtained information
  - But JV partners, customers, and other third parties can submit claims

Impact on Compliance Programs – More Complaints go to the Government

- Whistleblower provisions change the incentives for employees so that personal interests are ahead of loyalties to company
- Whistleblowers are now more likely to report potential violations to SEC
- Significantly increases the chances that investigations will have a government component
- Long tail on investigations
- Increased costs

Impact on Compliance Programs – Obtain Information Quicker

- To preempt potential whistleblowers identify high risk areas and redirect/increase audit resources to those areas
- Make internal reporting as accessible as possible
  - Supervisors, HR, internal audit
  - toll free lines open 24 hours
  - email reporting capability
  - multiple languages
  - ability to report anonymously (to extent possible)
- Communicate importance of internal reporting
  - highlight company policy
  - use newsletters
  - consider recognition of employees who report internally

Impact on Compliance Programs – Impact on Investigative Process

- If company learns of potential wrongdoing, the company is in a race to discover facts with potential whistleblowers
- Likely will result in more investigations which will be conducted faster (120 day rule for internal auditors to report out)
- Communicate with the whistleblower? Document everything
- Consider creating investigative protocol
- Consider a timetable for investigating complaints
- Use counsel at interviews to maintain privilege ("if an attorney in possession of the information would be precluded from recovering an award based on his or her submission, a non-attorney who learns this information through an attorney-client communication would be similarly disqualified")

Impact on Compliance Programs – Impact on Investigative Process (cont.)

- Critical to maintain confidentiality of investigation
  - Hold notices – when, limit to smaller group?
  - Scope – how broad do you go?
  - Order and number of interviews
  - Outside resources?
  - Discussion of issues during and at conclusion of investigation

Impact on Compliance Programs – HR

- Train HR on Whistleblower Rules
- Train managers on being alert to employee concerns
- Survey to test understanding of compliance program
- Annual certifications?
- Keep a file when issues are raised to better support disciplinary action and avoid retaliation claims
- Use exit interviews to develop leads on potential issues
- Watch out for confidentiality clauses on termination and scope of arbitration provisions

JANUARY 2012

Compliance and the Road Ahead

Insights for Executives and In-House Counsel

INSIDE:

Whistleblower Rules
"Clawing Back" Executive Pay
FCPA Enforcement Actions on the Rise
Looking Ahead to 2012 and Beyond

Compliance and the Road Ahead

Ten years have passed since Enron and WorldCom collapsed. Despite rules and regulations created to curtail financial reporting fraud and protect investors, the financial crisis and other corporate failures followed. As a result, more requirements have been introduced, while existing laws have been subject to greater enforcement. Among those, three in particular stand out – the effect of which senior executives must work to successfully navigate. These are the Securities and Exchange Commission's new whistleblower rules, the rules surrounding the "clawback" of executive pay, and the enforcement of the United States Foreign Corrupt Practices Act (FCPA).

WHISTLEBLOWER RULES: INCREASED REWARDS MAY YIELD MORE CLAIMS

More than a year ago, the Dodd-Frank Wall Street Reform and Consumer Protection Act became a federal law, increasing governmental oversight of the financial services industry. This sweeping legislation was aimed at helping the U.S. avert a repeat of the financial crisis by improving transparency and accountability within the financial system. In August 2011, the SEC's final rules implementing the whistleblower provisions of Dodd-Frank went into effect, expanding the protections and allowing for potential monetary rewards given to employees who report corporate wrongdoing. The new program is broader than its predecessor, and allows for rewards in all types of securities actions, including violations of the FCPA. Previously, the Commission was limited to paying bounties solely in insider trading cases, with awards capped at 10% of the penalties collected in an enforcement action. Rewards may now range from 10% to 30% of the amount recovered, provided that the amount collected related to the violation exceeds $1 million. The whistleblower rule, and the related Section 922 of Dodd-Frank, also enhances the protection of employees from retaliation. Someone who reports a violation internally or to the SEC may not be terminated or treated adversely as a result of it. While the opportunity to receive a six- or seven-figure reward is a motivation to report criminal activity, the new rule and guidance describe the hurdles that exist before a "whistleblower" may qualify to receive a portion of the recovered funds. The new rules have also spawned a burgeoning cottage industry: plaintiff attorneys have begun to solicit potential whistleblowers to seize on the windfalls that could be awarded in the event of a successful enforcement action.

The prospect of higher awards has already produced an uptick in whistleblower complaints. In November, the SEC reported that its Office of the Whistleblower received 334 complaints – approximately seven per day – in the first seven weeks of the new program.[1] The quality of the complaints received has also improved.

(1) Securities and Exchange Commission Annual Report to Congress on the Dodd-Frank Whistleblower Program, November 2011, http://www.sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf

Compliance and the Road Ahead

According to the agency, its whistleblower awards fund has more than $452 million available for payout to qualifying whistleblowers.

Companies should recognize that whistleblower complaints or tips may not necessarily be in connection with current or ongoing activities of the corporation. The information provided concerning possible violations of securities laws could, for example, entail conduct that occurred in the past, involve an issue that was addressed previously by the company or the SEC, or relate to individuals that are no longer with the company. Tips may also come from individuals with personal involvement in the alleged improper action or third parties including competitors and customers. Considering the many potential sources of whistleblower tips and the size of the fund available for payout, it would not be surprising to see a continued increase in whistleblower tips in 2012. As a result, companies should conduct reviews of their compliance policies and seek to foster a corporate culture that encourages internal reporting. Also, companies may need to reassess their procedures for identifying and appropriately handling potential problems. This should include considering when to conduct an internal investigation in-house and when to seek assistance from outside counsel or forensic experts. It may also be necessary for the human resources department to review whistleblower policies with employees and have appropriate training in place at each level of the organization.

"CLAWING BACK" EXECUTIVE PAY

Under the existing "clawback" rule, enacted under the Sarbanes-Oxley Act of 2002 (SOX), a CEO or CFO at a public company is required to return to the corporation bonuses and other payments such as option grants or stock profits if they were awarded on the basis of false financial statements that are subsequently restated as a result of misconduct.

Dodd-Frank expands the provisions governing the "clawback" of executive compensation significantly. Under Dodd-Frank, the SEC is required to write a rule requiring public companies to adopt mandatory provisions to "claw back" incentive compensation if the company is required to file a financial restatement under the Securities Exchange Act of 1934. Companies with $50 billion in assets will be required to have policies for the recovery of incentive-based compensation that was awarded during the three-year period prior to an accounting restatement. The "clawback" provisions would apply to all restatements (not just those involving misconduct), cover incentive-based compensation awarded during a three-year period prior to a restatement, and apply to executives beyond the CEO and CFO (including former executives).

Compliance and the Road Ahead

It is important to note that the "clawback" provisions apply whether or not an officer is personally charged with wrongdoing. The SEC used this more expansive policy when it reached a settlement with Maynard Jenkins, the former CEO and chairman of CSK Auto Corporation in November. Although he was never charged with wrongdoing, Jenkins agreed to return $2.8 million in bonus compensation and stock profits that he received while the company committed accounting fraud.[2]

With this more expansive "clawback" rule, we may see more actions under Dodd-Frank than have occurred under SOX. As a result, companies may consider moving away from incentive-based compensation or tying compensation to forms of measurement other than earnings. Regardless, the new "clawback" rule could have implications on the ways in which public companies structure incentive compensation. The new provision, once enacted, will create an unusual paradox in that the executives who are subject to the "clawback" provisions will also have a hand in determining whether or not financial statements should be restated.

FCPA ENFORCEMENT ACTIONS ON THE RISE

The heightened scrutiny of public companies is also demonstrated by tougher enforcement of existing laws, such as the FCPA. The FCPA, enacted in 1977, makes it illegal for publicly traded companies to pay foreign government officials in order to help them obtain or retain business. The law also provides that public companies maintain adequate books and records and systems of internal controls. In recent years, the United States Department of Justice and the SEC have stepped up enforcement of bribery offenses by increasing the number of resources committed to conducting FCPA investigations and, in the case of the SEC, creating a unit dedicated to enforcement of the FCPA. This has translated into an increase in both the number of enforcement actions and size of monetary fines related to bribery or violations of the books and records provisions. In 2010, the SEC brought more FCPA cases than ever before, against 23 entities and seven individuals, resulting in more than $600 million in disgorgement and civil penalties.[3] In its fiscal year 2011, the SEC recorded 20 enforcement actions and, for the first time, began listing FCPA violations as their own statistical category in its case tracking system.[4] Meanwhile, closer coordination between international governments and new legislation,

(2) Press release, Securities and Exchange Commission, Nov. 15, 2011, http://www.sec.gov/news/press/2011/2011-243.htm
(3) Comments by Cheryl Scarboro, Chief of the Security and Exchange Commission's FCPA Unit, The SEC Speaks, February 4-5, 2011, Washington, DC
(4) Press release, SEC, Nov. 9, 2011, http://www.sec.gov/news/press/2011/2011-234.htm

such as the UK Bribery Act, have given added weight to the enforcement of anti-corruption laws in transnational business.

It is important for companies to recognize that the risks and costs associated with failing to detect a problem can be much higher than those related to implementing effective compliance policies. The potential penalties related to a whistleblower claim, or an FCPA issue self-reported by the company, may be sizable: 2011 saw FCPA settlements with individual companies of hundreds of millions of dollars. Companies may also be subjected to years of investigations that are accompanied by an ongoing stream of legal fees. A company's officers may be at risk, with culpable individuals potentially subject to fines or imprisonment following DOJ or SEC actions. As a result, it's important to ensure that appropriate FCPA training and compliance programs are in place. It's also important to understand the company's exposure to business dealings in high-risk countries and with foreign businesses that may qualify as state-owned entities under the FCPA. Finally, problems that may be detected in one subsidiary or particular geographic region should result in the evaluation of whether problems represent an isolated incident or whether similar problems may exist in other operations across the globe. The company should ensure that it can appropriately respond to questions from securities regulators regarding the breadth and depth of any FCPA concerns.

LOOKING AHEAD TO 2012 AND BEYOND

Public companies are operating in a much tougher regulatory environment. The potential costs in fines and reputational risk, along with added incentives given to those who identify and report misconduct, have raised the stakes for failing to maintain strong corporate governance and business practices. In this environment, companies need to conduct risk assessments to identify areas of concern. It is important to evaluate existing compliance programs to ensure they are robust and effective at preventing problems from occurring or identifying problems early. In some cases, companies may find it necessary to take proactive steps in order to reduce risk, including allocating significant additional resources to the compliance area and ensuring that an appropriate level of monitoring is occurring. By implementing appropriate training and policies designed to facilitate internal reporting, companies may be better equipped to address compliance issues earlier and more quickly. In the current regulatory environment, how companies handle these issues is quickly becoming as important as the nature of the problems themselves.

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January 4, 2011

Via e-mail to: rule-comments@sec.gov

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Elizabeth M. Murphy, Secretary

Re: File No. S7-33-10
Release No. 34-63237
Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee" or "we") of the Section of Business Law (the "Section") of the American Bar Association (the "ABA"), in response to the request for comments by the U.S. Securities and Exchange Commission (the "Commission") in the proposing release referenced above (the "Proposing Release"). In the Proposing Release, the Commission has proposed rules implementing the whistleblower provisions of new Section 21F of the Securities Exchange Act of 1934 (the "Exchange Act"). This letter also reflects significant input from the Committee on Corporate Laws of the Section) (the Committees are referred to in this letter as the "Committees").

The comments expressed in this letter (the "Comment Letter") represent the views of the Committees only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section.

Overview

The implementation of the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act")[1] involves the balancing of a number of important, and sometimes competing, public policy goals. We believe that the rules the Commission adopts pursuant to new Section 21F of the Exchange Act should operate in tandem with, and support and strengthen, the existing matrix of laws, regulations and policies designed to encourage the reporting of serious violations of law, require the investigation of allegations of wrongdoing, and provide meaningful and effective responses to such allegations. These include the establishment of effective controls and procedures by companies to ensure legal compliance.[2] In addition, the Commission's rules should recognize the fiduciary duties imposed on directors and officers under state law.[3] A coherent, integrated and well-crafted legal

[1] The whistleblower provisions of the Dodd-Frank Act appear in Sections 922 through 924 of the Act. Pursuant to Section 922, a new Section 21F was added to the Exchange Act.

[2] The Sarbanes-Oxley Act of 2002 (the "Sarbanes Oxley Act") required the Commission to adopt rules mandating that companies have in place systems to receive and respond to whistleblower complaints, and also increased substantially the responsibilities of senior executives to identify and respond to violations of law that affected companies' disclosure and internal control systems. For example, pursuant to Section 301 of the Sarbanes-Oxley Act, the Commission has adopted Rule 10A-3 under the Exchange Act to require the audit committees of listed companies to establish "procedures for (i) the receipt, retention and treatment of complaints received by the listed issuer regarding accounting, internal accounting controls or auditing matters, and (ii) the confidential, anonymous submission by employees of the listed issuer of concerns regarding questionable accounting or auditing matters." In addition, Section 404 of the Sarbanes-Oxley Act requires companies to design, implement and assess internal controls over financial reporting and their principal executive and principal financial officers to certify quarterly that, among other things, they have disclosed to the company's outside auditors and audit committee any fraud, whether or not material, that involves management or other employees who have a significant role over financial reporting. (See Sections 302, 404 and 906 of the Sarbanes-Oxley Act and the Commission's rules implementing such provisions). Moreover, the Commission has adopted rules pursuant to Section 307 of the Sarbanes-Oxley Act to require attorneys appearing and practicing before the Commission on behalf of a client to report within the company evidence of a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law. See 17 U.S.C. Part 205, at http://law.justia.com/us/cfr/title17/17-2.0.1.1.6.html (the "Attorney Conduct Rules").

[3] Directors and officers owe fiduciary duties to the corporation for which they serve, which may require that they cause the corporation to take affirmative actions in response to claims of serious wrongdoing. These duties arise both from state corporate statutes and from case law. The Model Business Corporation Act (the "Model Act") sets forth director and officer duties. Under Section 8.30(a) of the Model Act, a director is required to "act (1) in good faith, and (2) in a manner the director reasonably believes to be in the best interests of the corporation." Pursuant to Section

compliance system would afford significant benefits to companies, shareholders and the investing public generally.

In considering its final rules, the Commission should also be mindful of the potential for harm that an unbalanced whistleblower program may present. The risks include rewarding and even encouraging wrongdoers, creating incentives (by reason of over-broad anti-retaliation provisions and substantial monetary awards) to bypass or upend effective company programs for the investigation of and response to wrongdoing, and eroding significant attorney-client protections. An unbalanced program could lead to a flood of frivolous and ill-informed whistleblower claims that would require the devotion, at considerable expense, of significant investigative resources by the Commission and the companies implicated. None of these undesirable results would benefit companies, their shareholders or the investing public generally.

The Committees understand that the Commission has been sensitive to many of these considerations in its Proposing Release, and we support the principal concepts reflected in proposed Regulation 21F with respect to persons eligible for whistleblower rewards, the procedural aspects of the program and the anti-retaliation provisions. We believe, however, that by refining certain of the proposed provisions and by adopting additional provisions to further enhance the integrity of Regulation 21F, the Commission can satisfy its statutory mandates and policy objectives, while at the same time minimizing the risks referred to above. It appears to us

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8.42(a) of the Model Act, an officer is required to act "(1) in good faith; (2) with the care that a person in a like position would reasonably exercise under similar circumstances; and (3) in a manner the officer reasonably believes to be in the best interests of the corporation." In *Caremark International Inc*., 698 A.2d 959 (Del. Ch. 1996), the Delaware Court of Chancery reviewed claims that directors had breached their duty of attention or care in connection with their monitoring of the on-going operation of the corporation's business. Chancellor Allen held that "In order to show that the Caremark directors breached their duty of care by failing adequately to control Caremark's employees, plaintiffs would have to show either (1) that the directors knew or (2) should have known that violations of law were occurring and, in either event, (3) that the directors took no steps in a good faith effort to prevent or remedy that situation, and (4) that such failure proximately resulted in the losses complained of…" In *Stone v. Ritter*, 911 A.2d 362 (Del. 2006), the Delaware Supreme Court held that "Caremark articulates the necessary conditions predicate for director oversight liability: (a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations. Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith." Based upon these duties, once a director is put on notice regarding a claim of serious wrongdoing, fiduciary concepts require that the director cause the corporation to undertake a reasonable effort to discover the relevant information relating to the claim.

that the Commission has been granted considerable discretion in Section 21F to craft these provisions, and we encourage the Commission to use its authority in the interest of investors and the public companies in which they invest, and in the broader public interest of fostering legal compliance.[4]

Principal Policy Recommendations

As more fully discussed below, we believe the Commission should:

1. Set minimum standards for whistleblower status, to encourage whistleblowers to provide the Commission high-quality information and to minimize false, spurious or frivolous claims;
2. Refine the definitions of "voluntary", "original information", "independent knowledge" and "independent analysis" to help assure that only persons who should be entitled to awards receive them;
3. Provide that persons who have engaged in culpable conduct would not be eligible for anti-retaliation protection or whistleblower awards; and
4. Require, as a condition for receiving an award, absent extraordinary circumstances, that company employees pursue internal company whistleblower programs prior to submitting information to the Commission.

Discussion

1. The Commission Should Impose Additional Requirements on Persons Entitled to "Whistleblower" Status and, Therefore, Anti-Retaliation Protection

The term "whistleblower" is defined broadly in Proposed Rule 21F-2(a) to include a person, who, alone or jointly with others, provides the Commission with information relating to a potential violation of the securities laws.[5] Proposed Rule 21F-2(b) provides that Section

[4] The Commission's specific rulemaking authority under Section 21F is set forth in the following sections of Section 21F: 21F(a)(6) (authority to determine the manner in which a whistleblower may provide information to the Commission); 21F(b)(1) (authority with respect to the payment of awards); and 21F(d)(2)(B) (authority to require a whistleblower to provide information to the Commission prior to the payment of an award). In addition, Section 36 of the Exchange Act grants the Commission general exemptive authority, and provides that "the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."

[5] Although we note that the proposed definition of "whistleblower" generally tracks Section 21F(a)(6) of the Exchange Act, we believe it would be appropriate for the Commission, either in the definition of the term, or in the provisions of paragraph (b) of Rule 21F-2 relating to retaliation, to limit the definition as provided in this letter. Specifically, as discussed below, we

21F(h)(1) of the Exchange Act (which prevents an employer from discharging, demoting, suspending, threatening, harassing, directly or indirectly, or in any manner discriminating against, a whistleblower because of lawful acts done by the whistleblower in certain specified activities) applies irrespective of whether a whistleblower satisfies the procedures and conditions to qualify for an award. It further provides that for purposes of the anti-retaliation provision of paragraph (h)(1)(A)(i) of Section 21(F) of the Exchange Act the requirement that a whistleblower provide "information to the Commission in accordance with" Section 21F is satisfied "if an individual provides information to the Commission that relates to a potential violation of the securities laws".

The Commission's proposed definition of "whistleblower" would clearly prevent retaliation against an employee who has provided information to the Commission relating to a potential violation of the securities laws. We are concerned, however, about the potential for abuse by employees who may make frivolous whistleblower claims solely to avail themselves of the anti-retaliation provisions of Regulation 21F or to seek a chance to receive a potentially large award. This potential for abuse could hinder the ability of companies to conduct their own internal investigations and to appropriately discipline employees who have engaged in wrongdoing, subject companies to substantial costs by increasing investigations based on unsubstantiated allegations, and also impose significant investigative burdens on the staff of the Commission. For example, the definition would bring within its scope information provided by:

(a) Persons who provide information to the Commission relating solely to their own wrongdoing;

(b) Persons who provide information that, although "relating to a potential violation of the securities laws", may be frivolous, without any factual foundation and based on mere speculation, or clearly immaterial;

(c) Persons who provide information following the public dissemination of such information (such as through news reports), or the commencement of internal investigations or civil or criminal proceedings in which the information has already been made known to the company or the Commission; and

(d) Persons who provide information in violation of a professional obligation to maintain such information in confidence.

Although we realize that the Commission needs to strike a balance to provide appropriate protections to employees who make whistleblower claims in good faith, even if the claims are ultimately determined not to be valid, we believe strongly that employees who make frivolous claims to the Commission should not be provided with a shield that could prevent companies from terminating or otherwise changing the employment status of the employee.

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suggest that the Commission refer to a "claimed" violation of the federal securities laws (or some other term), rather than a "potential" violation.

In making this observation, we understand that the anti-retaliation provisions apply only to terminations or other sanctions "because" the employee provided information to the Commission or engaged in the other activities referred to in Section 21F(h)(1)(A) of the Exchange Act. As proposed, Regulation 21F would not prevent a company from terminating, demoting or suspending an employee for reasons independent of the employee's having provided information to the Commission. We remain concerned, however, that unless the ability of employees to rely upon the anti-retaliation provisions is more narrowly defined, in practice many employees will claim that the termination or other sanctions resulted from the protected activities.

Some employees (including employees who may fear potential termination or demotion) may believe that it is in their interest to provide information solely for the purpose of obtaining a possible defense against a subsequent termination or demotion. Such information may be unreliable, immaterial or non-original, but regardless of these infirmities, proposed Rule 21F-2 would still provide such employees with a basis for a claim of retaliation. Were the employee thereafter to be terminated, demoted or suspended, he or she would be entitled to assert claims that the employer's action was in retaliation for providing the Commission with information, and, if it could be so proven, would be entitled not only to reinstatement, but to double the amount of back pay (with interest), as well as litigation costs, expert witness fees and reasonable attorneys' fees.

These burdens may affect the decision of an employer with respect to their termination or demotion of an employee, including an employee whom the employer believes it has substantial independent grounds to terminate or demote. Also, because an employer would not necessarily be placed on notice that a specific employee had provided information to the Commission,[6] an employee's claim that a termination, demotion or suspension was retaliatory may come as a complete surprise to the employer.[7]

In view of the significant incentives provided by proposed Rule 21F-2 for employees with ulterior motives to cast themselves as whistleblowers, and the costs and burdens that would

[6] We note that although the Proposing Release states that the Commission expects that in appropriate cases, consistent with the public interest and its obligation to preserve the confidentiality of a whistleblower, the staff will, upon receiving a whistleblower complaint, contact a company, describe the nature of the allegations, and give the company an opportunity to investigate the matter and report back, nothing in Regulation 21F would require this communication.

[7] If an employee claims (on information and belief) that an employer's conduct was based on the employer's knowledge that the employee had provided information to the Commission, we do not believe that the burden of proof should shift to the employer to prove either that it did not have such knowledge, or if it did, that the employment action was not based on the employee's having provided information to the Commission. We request the Commission to make clear in its final rulemaking that the burden of proof remains with the employee.

be imposed on employers in order to defend against a claim of retaliation, we are concerned that Rule 21F-2, if adopted in its proposed form, would significantly affect the ability of employers to exercise their legitimate rights, and therefore recommend that the protection of the anti-retaliation provisions should apply only to a person who provides information:

(a) about claimed violations of the securities laws "by another person or entity". It would be inappropriate for the Commission to confer whistleblower status under Regulation 21F, and therefore anti-retaliation protection, on a person who provides the Commission information relating solely to his or her own wrongdoing, or wrongdoing by an entity whose conduct the person directed, planned or initiated.[8] The Commission may want to consider including in its final rule or rule release a description of how individuals who wish to provide information to the Commission regarding their own conduct may proceed under the Commission's Policy Statement Concerning Cooperation by Individuals in Its Investigations and Related Enforcement Actions (17 C.F.R. § 202.12) ("Cooperation Initiative").

(b) that is material to the claimed violation of the securities laws. By "material" we refer both to the relationship between the information provided and the potential violation and the salience or importance of the information provided. Materiality will, of course, depend on facts and circumstances, but it is clear to us that an employee who communicates a fact which, even with the benefit of doubt, is immaterial to a claimed securities law violation, should not be accorded anti-retaliation protection. Materiality is an objective standard that a whistleblower should reasonably be expected to recognize.

(c) that has a basis in fact or knowledge (which must be articulated) rather than speculation. In view of the significant incentives provided by Regulation 21F to employees to come forward with information, we believe the whistleblower program could be significantly abused if employees would be entitled to anti-retaliation protection on the basis of providing information that is speculative and not founded on fact or knowledge. An allegation that "I think there's something inappropriate going on in the accounting department" should not, without some basis, entitle an employee to anti-retaliation protection.[9]

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[8] We note that under Proposed Rule 21F-14, a whistleblower would receive no amnesty from the Commission with respect to enforcement actions relating to his or her own conduct. We therefore question why a person who provides information to the Commission solely with respect to his or her own deeds (or conduct of an entity that he or she controlled) should be afforded any protections pursuant to Regulation 21F.

[9] We note that the Commission's Attorney Conduct Rules provide for a response by an attorney only when the attorney has "evidence of a material violation." Rule 205.2(e) states that "*Evidence of a material violation* means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that

(d) that is not based on information that is either publicly disseminated or which the employee should reasonably know is already known to the company's board of directors or chief compliance officer, a court or the Commission or another governmental entity. As drafted, it is possible for an employee to obtain the benefit of anti-retaliation protection by merely reporting to the Commission information that has previously been reported to the employee by others (including publicly available information and information the employee has been advised has previously been disclosed to the Commission by another person).[10]

(e) the provision of which does not result in the violation of a professional obligation, including the obligation to maintain such information in confidence. In this regard, we note that Rule 1.6(a) of the ABA Model Rules of Professional Conduct provides that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b) [of Model Rule 1.6]".[11] In the absence of disclosure permitted by Rule 1.6(b), the Commission would seriously undermine professional and ethical standards by providing that an attorney who has breached his or her duties of confidentiality to an employer-client is protected against retaliation by the employer arising from such breach. Presumably, based on the Proposed Rule, even if the attorney is disbarred as a result of his or her providing information to the Commission in violation of the professional conduct rules, the employer would not be able to terminate or demote such employee. We believe this to be an

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it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur." (emphasis added). This definition contrasts strongly with the complete absence of any factors relating to credible evidence or materiality in the Commission's proposed standards under Regulation 21F.

[10] The ability of a whistleblower to provide information based on public or other known sources contrasts with the Commission's proposal to limit eligibility for awards to original information. See Proposed Rule 21F-4(b).

[11] See ABA Model Rule of Professional Conduct 1.6, available at http://www.abanet.org/cpr/mrpc/rule_1_6.html. Other professionals also have ethical obligations to maintain the confidentiality of client information. See, *e.g.*, Section 301 of the AICPA Code of Professional Conduct ("Confidential Client Information") (providing that certified public accountants in public practice "shall not disclose any confidential client information without the specific consent of the client."). We note that although under the Attorney Conduct Rules and certain of the ABA Model Rules attorneys are permitted to "report out" in certain circumstances, we are concerned that any effort to reward attorneys or other professionals for reporting out creates inherent conflicts and could intrude on the attorney-client relationship.

irrational result. In our view, the Commission's rules should not provide a benefit to professionals who violate their professional obligations.[12]

The definition of "whistleblower" proposed by the Commission in Rule 21F-2(a) is self-executing, and does not require any action by the Commission; the only condition is that a person has provided information to the Commission "relating to a potential violation of the securities laws". The definition we are proposing would require the Commission to determine whether the information provided by an employee meets certain minimum criteria. Although the proper application of the minimum criteria may not always be clear, we believe that this process would be significantly superior to the overly broad system the Commission has proposed. Among other things, adoption of our proposed changes would diminish the incentive for providing low-quality information to the Commission solely to establish a predicate for a potential retaliation claim. We believe that the Rule, as revised, should state that the Commission will deliver to an employee who has met the requisite criteria to establish his or her status as a "whistleblower" a letter or other statement indicating that the person has been accorded such status pursuant to Regulation 21F by reason of the information the employee has provided to the Commission with respect to matters referred to in the letter. The Commission could issue such a letter on the basis of the quality of the information provided, even if the staff of the Commission determines not to pursue a particular matter. In the situation involving an anonymous disclosure, the Commission could deliver the letter to the attorney who submitted Form WB-DEC on behalf of an anonymous whistleblower pursuant to Rule 21F-9.[13] Absent

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[12] We note that the Commission's Attorney Conduct Rules governing attorneys appearing and practicing before the Commission do not provide for the attorney "reporting out" unless the attorney reasonably believes that such reporting is necessary (i) to prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors; (ii) to prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or (iii) to rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used. In Proposed Rule 21F-4, the Commission makes clear that information based on "independent knowledge" or "independent analysis" does not include information obtained through a communication subject to an attorney-client privilege, or as a result of the legal representation of a client on whose behalf the services of the whistleblower, or the services of the whistleblower's employer or firm, have been retained, unless in either such case, such disclosure is permitted by Commission's Attorney Conduct Rules, applicable state attorney conduct rules, or otherwise. In our view, these same disqualifications should apply to whistleblower status for the purposes of the anti-retaliation provisions.

[13] Although the letter would not be dispositive as to the identity of the whistleblower, it would provide some confirmation that the Commission had received a whistleblower complaint with respect to a specific company and a specific matter. The Commission may want to consider whether to include in Rule 21F-7 a statement that a claim made by a whistleblower against an

such a letter, there exists the possibility that a terminated employee could claim to be protected pursuant to Regulation 21F, and an employer would have no reasonable means to determine whether the employee did, in fact, speak with the Commission and whether the claim is valid, unless the employer were to compel the disclosure in a legal action.[14] This process would impose an undue burden both on companies and on the Commission.

2. The Commission Should Change the Term "Potential Violation of the Securities Laws" to "Claimed Violation of the Federal Securities Laws"

Proposed Rule 21F-2 refers to a person who, alone or jointly with others, provides the Commission with information regarding a "potential violation" of the securities laws. The term "potential violation", however, is not separately defined. The Commission makes clear in the Proposing Release that it uses the term because of the importance of being able to determine whether a person is a "whistleblower" at the time he or she submits information to the Commission. If the term "whistleblower" only encompassed individuals who provide the Commission with information about actual, proven securities violations, it would be impossible to determine whistleblower status at the time a person provides information to the Commission.

We agree that it would be unrealistic for a determination to be made as to whether a violation had, in fact, occurred at the time information was submitted. However, we believe the Commission's use of the term "potential violation" creates a significant ambiguity, because it could be read to refer to future acts or omissions, such as whether a company might engage in conduct that would constitute a violation of the securities laws after the time a whistleblower submission was made. This ambiguity may lead purported whistleblowers and their counsel to claim a good-faith reliance on the common meaning of the term, and increase the likelihood of false or spurious claims.[15] In Section 21F, Congress refers to a "violation of the securities laws" and there is nothing in Section 21F that indicates that Congress intended the whistleblower provisions to apply to conduct in which a company might engage in the future. Instead, we believe it is reasonable to conclude that Section 21F was intended to apply to actions that had

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employer based upon an alleged violation of Rule 21F-2 would be deemed to constitute a waiver by the employee of any claim of confidentiality pursuant to Regulation 21F.

[14] Although the Commission has stated in its proposal that "in appropriate cases… our staff will, upon receiving a whistleblower complaint, contact a company, describe the nature of the allegations, and give the company an opportunity to investigate the matter and report back", the Commission would likely not be permitted by Section 21F and Rule 21F-7 to reveal the identity of a whistleblower.

[15] The word "potential" is defined in the Merriam-Webster Collegiate Dictionary as "existing in possibility: capable of development into actuality." Therefore, the phrase "potential violation" may be interpreted to include securities law violations that have not even occurred or suspicions of violations that are speculative or have little or no factual support.

been taken (or actions that should have been taken, but which were not taken) prior to a whistleblower submission.

Although Item D.1 of proposed Form TCR appears to reflect that the matter has already occurred (see, for example, Item D.1 requiring the "occurrence date" to be set forth), the lack of clarity as to the term "potential violation" creates the possibility that whistleblowers will approach the Commission with claims based on possible future violations. We encourage the Commission to clarify that this was not intended, and suggest that the Commission consider using another phrase (such as "claimed violation") and adding a definition of the term to further minimize the ambiguity.

We also believe the Commission should state clearly in Regulation 21F that a "violation of the securities laws" in the Regulation relates only to the federal securities laws and not to violations of state or foreign securities laws that do not also constitute violations of the federal securities laws.[16] Although Rule 21F-1 refers specifically to "whistleblowers who provide the Commission with original information about violations of the federal securities laws" (emphasis added), and Form TCR contains a similar reference, the reference is missing in Proposed Rule 21F-2.[17] In order to avoid any ambiguity that the reference to "federal" was intentionally omitted from Proposed Rule 21F-2 in order to expand its scope, we believe the Commission should clarify that information provided pursuant to Regulation 21-F relates to potential violations of the federal securities laws.

Also, as with the definition of "whistleblower", we believe there would be merit in limiting the definition of the term "potential violation" (or "claimed violation" or such other term as the Commission may adopt) so as not to include matters that are clearly stale (*e.g.*, flawed disclosure in a ten-year old proxy statement), or immaterial (*e.g.*, erring by a year in setting forth the age of a director in a proxy statement).[18] Although these matters may also be dealt with in

[16] We note that Section 21F is not limited to violations of the securities laws by public companies, and that whistleblower protections and awards could, therefore, be applicable to such matters as antifraud claims involving private companies and to claims relating to violations of the private offering exemptions. We suggest that the Commission give special consideration to the implications of extending the Regulation 21F protections to claims against private companies that are not themselves involved in the securities industry. We also note that in the Instructions to Form TCR (Section C, Question 1 "For Entity"), there are listed many categories of entities to which a complaint relates, including the Commission and FINRA, and private/closely held companies, but that there is no reference to public companies.

[17] Although Section 3(a)(47) of the Exchange Act makes clear that "securities laws" refers only to specified federal statutes, in the interest of maintaining the "plain English" language of Regulation 21F, the term "federal" could be added to Rule 21-F.

[18] Although we would not expect whistleblowers to necessarily know applicable statutes of limitations, there may be a benefit to providing in Regulation 21F that the acts or omissions

the definition of "whistleblower", we believe it important that the Commission apply standards to the types of matters that would fall within the scope of "potential violation" so as to not invite information that would not result in Commission enforcement action, even if the information provided were substantiated and correct.

3. Persons Who Have Engaged in Culpable Conduct Should Not Be Eligible for Awards

The Commission's proposed Rules provide only a limited restriction on a person's eligibility for whistleblower awards to persons based on culpable conduct. Section (c)(3) of Proposed Rule 21F-8 would disallow an award to a person based on culpable conduct only if that person is convicted of a criminal violation that is related to the Commission action or a related action for which the whistleblower could otherwise receive an award. Unless a person has been convicted, the Commission does not propose to disallow the person from eligibility to receive an award, although proposed Rule 21F-15 would exclude from the calculation of whether the $1,000,000 threshold has been satisfied for purposes of making an award 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, the Commission would disallow amounts that the whistleblower or such an entity pays in sanctions as a result of the action or related actions from the calculation of the amounts collected for purposed of making the payment.

In our view, the Commission's proposed rules do not go far enough to deprive wrongdoers of the ability to reap rewards as a result of their wrongdoing. Simply stated, a person should not profit from his or her own misconduct, and persons who have engaged in culpable conduct should not be entitled to whistleblower awards. We believe, therefore, that Section (c)(3) of Rule 21F-8 should be revised to state that persons with any degree of direct or indirect responsibility for violations of law, regulations or codes of conduct relating to matters within the scope of the whistleblower complaint should be excluded from eligibility for receiving a whistleblower award. Our recommendation is based, among other things, on our concern that persons convicted of criminal violations represent only a small percentage of persons culpable for unlawful conduct. As the Commission is no doubt aware, establishing a criminal conviction as the only conduct-based bar to eligibility for an award creates an extremely high standard for disqualification, and may lead to the unseemly spectacle of persons subject to civil bars and civil penalties as a result of their active involvement in the reported unlawful activity receiving significant monetary awards.

We believe the absence of a more stringent standard may, in fact, create an incentive for persons to promote or engage in unlawful acts solely for the purpose of seeking awards and protections. Persons who have "crossed the line" and engaged in violations (or possible violations) of the securities laws may in fact have an incentive under the proposed whistleblower

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complained of should have occurred not less than a specified period of time (*e.g.*, 5 years) prior to the date of the whistleblower submission.

rules to maximize the seriousness of the violation in order to increase the potential amount of their awards. Rather than advising company compliance personnel or approaching the Commission at an early stage of a violation, they may determine to wait until the likely monetary sanctions exceed $1 million before coming forward with information. Although this might also be the case for non-culpable persons, those who may have contributed to the violation raise the specter of rewarding people with unclean hands, under circumstances where the violation may not have occurred, or risen to its magnitude, without the participation or assistance of a person who then seeks an award based on the violation.

For these reasons, we suggest that Subsection (c) of Proposed Rule 21F-8 provide that a person will not be eligible for an award if he or she (or an entity whose liability is based substantially on conduct that the whistleblower directed, planned or initiated) has been convicted of a criminal violation (including entering into a plea agreement or entering a plea of *nolo contendere*), or is found liable in, settles (including settlements without admitting or denying the allegations), or enters into a cooperation, deferred prosecution, or non-prosecution agreement in connection with, a proceeding brought by the Commission, a self-regulatory organization, or other securities regulator or government entity, which proceeding is related to a Commission action or a related action for which the whistleblower could otherwise receive an award.[19]

In this regard, we are of the view that eliminating the eligibility for whistleblower awards of persons who engage in culpable conduct under Regulation 21F should not eliminate the incentive of such persons to step forward with information regarding violations of law. We note, among other things, that a person with some culpability who brings information regarding potential violations of securities laws to the attention of the Commission or the Department of Justice may still be entitled to be considered for leniency pursuant to cooperation, deferred or non-prosecution agreements under Justice Department guidelines and pursuant to the Cooperation Initiative. In our view, these provisions, and not Proposed Regulation 21F, set forth the appropriate standards for the government's treatment of persons culpable for securities law violations.

Were our recommendation to expand the disqualification for culpability in Subsection (c) of Proposed Rule 21F-8 to be adopted by the Commission, Proposed Rule 21F-15 should be eliminated, because there would be no basis for providing a whistleblower award to persons who engage in culpable conduct.[20]

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[19] In our view, the Commission has authority, under Section 21F(h)(1) of the Exchange Act, to prohibit a culpable employee from claiming that he or she was subject to retaliation for having provided information to the Commission or having engaged in other authorized acts.

[20] If the Commission does not accept in full our recommendation of changes to Rule 21F-8(c), we nonetheless believe that a broad definition of culpable conduct should be adopted to ensure that a whistleblower who was an active and ongoing participant in the illegal wrongdoing is ineligible for an award.

4. The Commission Should Further Refine the Definition of "Voluntary"

Proposed Regulation 21F provides that whistleblowers would only be eligible for awards when they provide original information "voluntarily". Proposed Rule 21F-4(a)(1) would define a submission as voluntary if a whistleblower provides the Commission with information before the company receives any formal or informal request, inquiry, or demand from the Commission, Congress, any other federal, state or local authority, any self-regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information in the whistleblower's submission is relevant. In our view, the proposed definition of "voluntary" should be expanded to encompass all situations where the whistleblower may have reason to believe that certain other persons or entities charged with regulatory or oversight responsibilities are aware of the possible violations of law. Accordingly, in addition to the proposed definition, we believe that the proposed Rule should exclude from the definition of "voluntary" any information the whistleblower provides (i) after a request, inquiry, or demand from a foreign securities regulator (including a foreign securities exchange) or law enforcement organization is received, (ii) after a civil action is commenced in connection with any matter to which the information in the whistleblower's submission is relevant, and (iii) after the commencement of any inquiry or investigation by a company's in-house counsel, outside counsel, compliance staff, internal or external auditors or other persons with supervisory and governance responsibilities which is known to the whistleblower.

We discuss these suggested additional categories below.

(a) Foreign requests

With increased enforcement of securities law violations by foreign authorities and more extensive cooperation between the Division of Enforcement and foreign securities regulators, persons should not be entitled to claim an award pursuant to Section 21F with respect to matters that have previously been the subject of a formal or informal request, inquiry or demand by a foreign entity. We believe that there is a reasonable basis in policy for the Commission to consider inquiries from foreign securities regulators (including foreign securities exchanges) or law enforcement organizations to be equivalent to inquiries from domestic regulators, self-regulatory organizations or law enforcement organizations. Similarly, the whistleblower must not have been under a pre-existing legal duty to report the information to a foreign securities regulator (including a foreign securities exchange) or law enforcement organization.

Adding this exclusion would promote international comity because it would prevent the unseemly result of a person who has received an inquiry regarding a securities fraud matter from a foreign regulator being rewarded under Section 21F because that person happened to bring the matter to the attention of the Commission before U.S. regulators have acted.

(b) Civil actions

We believe that the commencement of a civil action in connection with any matter to which the information in the whistleblower's submission is relevant should render the

whistleblower ineligible for an award. Among other things, the commencement of such an action indicates that persons other than the whistleblower are aware of the alleged improprieties and may alert regulatory and law enforcement authorities to the alleged improprieties. The commencement of a civil action would involve, in many respects, the same attributes as a regulatory inquiry: it would alert the whistleblower to the matter, and would deprive the whistleblower of the ability to claim that his or her communication to the Commission is completely voluntary.

(c) Internal Investigations

In order to support more strongly a company's internal investigations, we believe that the commencement of inquiries or investigations, known to the whistleblower, by a company's in-house counsel, outside counsel, compliance staff, internal or external auditors or other persons with supervisory and governance responsibilities, based on information not provided solely by the whistleblower, should be viewed as a trigger of outside interest that would prevent a whistleblower from being eligible for an award. Our view is consistent with the views expressed above in connection with civil actions: the fact that an inquiry has commenced should negate any possibility that a whistleblower's disclosure to the Commission should be deemed to be voluntary. Good policy suggests that the internal investigation process be conducted in an orderly and intelligent manner. If the company is unable to conduct such an investigation because participants have chosen to speak with the Commission and are unwilling to lend efforts to support the internal investigation, the likely result is to hamper a company's legitimate inquiries.

5. The Commission's Rule Should More Strongly Support a Company's Internal Legal, Compliance, and Audit Procedures

(a) Employees Should be Required to Exhaust Internal Compliance Procedures in Order To Be Eligible For Whistleblower Awards

The Committees appreciate that in proposing Regulation 21F, the Commission is not seeking to undermine the efforts of companies to investigate potential securities laws violations on their own. Such internal compliance efforts permit directors and officers to appropriately discharge their fiduciary duties to a company, and are often critical to the company's effort to identify and remediate problems with the least harm to shareholders. It is critical that the Rule 21F process work in tandem with, and not in opposition to, a company's internal processes.

To the extent that a company's internal ethics or compliance guidelines contemplate or require a company employee to advise management immediately upon learning any facts regarding a potential illegality, the company's internal processes would be rendered meaningless if the employee could, without consequence from the company, gather up (and even retain) information privately and disclose it to the Commission without first disclosing it to the company and providing the company an opportunity to respond. Similarly, listed company audit committees are required to establish procedures for (a) the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls or auditing

matters, and (b) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters". These systems may be severely hampered if whistleblowers are provided an incentive to report possible violations to the Commission instead of, or even before, making any report to the company. The Committees believe that in order for whistleblowers to be eligible for an award, whistleblowers should be required, absent extraordinary circumstances, to exercise reasonable efforts to exhaust all reasonably available internal processes a company has established for reporting compliance concerns.[21] We believe that whistleblowers who are company employees should be required to demonstrate that they have made a good faith attempt to use the range of internal reporting mechanisms a company has put into place to enable the reporting of such complaints, up to and including reporting to the company's audit committee. Without such a requirement, internal processes that companies have expended substantial resources to develop, which the Commission has long sought to foster, and which have proven effective in ensuring compliance with law and established codes of conduct, will be undermined and will no longer serve the purposes for which they were specifically designed.

With approximately 10,000 public companies in the United States, we believe that effective internal compliance programs are a critical component in the mitigation of fraud, and a necessary counterpart to the enforcement efforts of the Commission. Simply stated, if the whistleblower rules undermine the effectiveness of internal compliance programs, the consequence may be to weaken, rather than strengthen, the existing corporate infrastructure dealing with the investigation and response to illegal conduct.

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[21] The Commission has stated that its proposal not to require a whistleblower to utilize internal compliance processes will not lead to the circumvention of internal processes because, "in appropriate cases… our staff will, upon receiving a whistleblower complaint, contact a company, describe the nature of the allegations, and give the company an opportunity to investigate the matter and report back." Were the Commission not to accept our recommendation to require the exhaustion of internal compliance procedures, we believe the Commission's final rule should reflect an obligation on the part of the staff to notify a company with respect to all whistleblower complaints (including complaints that do not come from company employees). Instead of limiting this practice solely to "appropriate cases," the staff of the Commission should, absent extraordinary circumstances, be required to inform appropriate company personnel of any allegations made and allow the company a reasonable period of time to investigate and report back to the Commission. Extraordinary circumstances might include a reasonable and substantiated determination by the Commission staff that providing the company with an opportunity to investigate and report back would be futile, or would result in a continued material violation of the securities law, or the existence of a criminal enterprise. In such situations, the Commission could make a discretionary determination not to communicate with the company regarding a whistleblower complaint. In this regard, the Commission should set forth in the provisions of Regulation 21F the guidelines it will use for determining whether or not to advise a company of whistleblower allegations. By providing for prompt disclosure to a company of the whistleblower reports it receives, Regulation 21F would deter a whistleblower from bypassing a company's established internal compliance processes.

Were the Commission to require an employee to "exhaust" internal reporting systems before reporting to the Commission in order to be eligible for whistleblower awards, companies would have both fair notice of potential issues and an adequate opportunity to investigate and respond to such issues prior to the time that the whistleblower approaches the Commission. An internal reporting requirement may also reduce the reporting of false, spurious or frivolous claims to the Commission and increase the quality of the information the Commission eventually receives, as such tips may indicate the existence of more serious or systemic issues at the companies in question.

The effectiveness of a company's internal reporting and compliance systems depends in large part on the willingness of persons within the company to come forward with information regarding alleged improprieties. Such information permits a company to review not only the information provided by the original source, but to consider efficient means to determine the truthfulness of the allegations and the scope and materiality of the potential issues involved. In the context of this review, a company can develop an investigation plan as well as a review of the systems implicated in the allegations. Although the allegations regarding improprieties may relate to violations of the securities laws, they may also involve state laws and other federal laws; the fiduciary duties of officers and directors; employee policies; commercial, competitive and strategic matters; and reputational considerations.

The company's shareholders would in most cases be best served by an investigation and response that addresses each of the matters implicated by the complaint. If a problem is identified, companies will need to know why it occurred, whether it is likely to happen again, what system failures may have enabled the problem, what system strengths may have mitigated its effects, and what response is appropriate. We submit that a whistleblower program that does not require the exhaustion of internal compliance procedures may both cut off the information that is necessary in order for the system to operate effectively, and also delay (and in some cases completely prevent) the company's ability to investigate and address the range of issues that may be implicated by the allegations. The Commission's concern, of course, relates to violations of the securities laws. A company's concern extends to everything that affects its compliance with all applicable laws, the quality of its management, and the conduct of its operations. In our view, it is critically important to a company and its shareholders that its internal compliance mechanisms are permitted to function efficiently and effectively. Such programs encourage vigilant oversight by companies of their conduct and promote compliance with laws. Accordingly, we believe that company employees should be encouraged by the whistleblower rules to report through internal compliance programs, and that internal investigations of alleged wrongdoing be allowed to run their course, without any unnecessary interference.[22]

[22] Proposed Regulation 21F recognizes that legal, compliance, and audit personnel should not be eligible for a whistleblower award because the prospect of an award could compromise the critical duties these individuals are entrusted to perform. Similarly, we believe that companies as a whole should be allowed to perform these same duties in a thorough and diligent way.

We are concerned that, as drafted, Regulation 21F may encourage whistleblowers to withhold information from internal investigations and instead to "front-run" any self-disclosure by a company.[23] Absent an internal reporting requirement, employees would be incentivized to speak with the Commission staff as early as possible in order to provide voluntary disclosure of original information, which may lead to the disclosure of ill-informed, incomplete or unsubstantiated information. Not only would the investigation of matters brought to the attention of the Commission staff based on low-quality information burden the staff, it may also burden company personnel, to the extent any communication by the Commission to the company regarding an allegation may impel the company to undertake a potentially costly investigation. Although a company that receives a report of possible impropriety from an employee based on unsupported information may, for good reason, determine not to commence an internal investigation in the absence of some form of substantiation, a company may be less likely to defer the investigation if the allegation is communicated by the Enforcement Division.[24]

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[23] We note that, in addressing its need to balance the whistleblower provisions, the Commission stated in the Proposing Release that it sought not to create "incentives for company personnel to seek a personal financial benefit by "front running" internal investigations and similar processes that are important components of effective company compliance programs."

[24] We note that, in addition to the statutory and fiduciary duties referred to above, there are other significant reasons why a company may determine that it needs to implement an effective internal compliance program. Under the 2010 Federal Sentencing Guidelines Manual (which became effective on November 1, 2010), companies are credited with having in place an effective compliance and ethics program and with self-reporting violations of law. As the introductory commentary to Chapter 8 (Sentencing of Organizations") (available at http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_8.pdf) provides "The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility." Section 8B2.1 (Effective Compliance and Ethics Program) provides that "to have an effective compliance and ethics program…an organization shall (1) exercise due diligence to prevent and detect criminal conduct; and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with law. Such compliance and ethics programs shall be reasonably designed, implemented and enforced so that the program is generally effective in preventing and detecting criminal conduct." The guidelines specify in some detail additional characteristics of an effective compliance and ethics program. Section 8C2.5(g)(1) provides that "if the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract 5 points..."
Were the Commission's whistleblower rules to interfere in any material respect with the operation of company's internal compliance program or undermine its ability to self-report violations of law, the consequence may be to deprive the company (and, indirectly, its security holders) of significant benefits afforded under the sentencing guidelines.

For the reasons set forth above, we suggest that the Commission provide that, in order to receive a whistleblower award, a whistleblower who is an employee of the company that is the subject of the claimed violation, absent extraordinary circumstances, would first need to exhaust the internal reporting procedures the company has made available, and would only be entitled to an award if the company either did not follow up with an investigation or if it otherwise proceeded in bad faith. In the event the Commission determines not to mandate internal reporting, we suggest that the Commission considering adding compliance with internal reporting programs to the list of factors that the Commission will consider in its criteria for determining the amount of an award pursuant to Proposed Rule 21F-6.

(b) The Commission Should Not Require the Submission of Forms TCR and WB-DEC Within 90 Days in Order for a Whistleblower To Be Eligible for an Award

Proposed Rule 21F-4(b)(7) provides that if a whistleblower provides information to specified governmental, regulatory or compliance personnel, he or she must submit Forms TCR and WB-DEC to the Commission within 90 days in order for the information to be deemed to have been provided as of the date of the original disclosure, report or submission. This rule will strongly encourage whistleblowers to submit these forms to the Commission within the 90-day period in order to protect their "place in line" if they perceive that other whistleblowers, or the company itself, might also provide the same information directly to the Commission.

The Committees believe this 90-day deadline should be eliminated. Imposing a deadline on reports to the Commission regarding alleged misconduct already reported internally would put all internal investigations—no matter how complex—on a clock, with an inquiry from the Commission likely to follow shortly thereafter if the company has not, prior to that time, self-reported. Many companies may prefer to self-report, and would want to have the benefit of having concluded a full investigation prior to the reporting. It would be unrealistic to suggest that a full investigation be completed within 90 days. Imposing a 90-day deadline may make it more likely that the companies would find themselves reporting the status of investigations, rather than the conclusions, which may not be in the best interests of the company and its shareholders.

As an alternative, the rule could provide for a whistleblower to document the date of his or her internal report of alleged misconduct, which would serve to confirm the information provided and the date it was provided, and thereby protect the whistleblower's "place in line" with respect to an award. We also suggest that, if the Commission determines to keep a deadline, it provide for a more realistic period, such as 180 days, for the submission of the Forms. This extended deadline would afford companies a more reasonable period of time to conclude an investigation.

6. The Commission Should Further Refine the Definitions of "Original Information", "Independent Knowledge" and "Independent Analysis"

(a) Original Information

The Commission proposes to limit eligibility for an award to persons who provide "original information". We concur with this concept, but believe the enumerated exclusions from the definition are not sufficiently broad to achieve the intended originality. For example, the definition would not clearly exclude information a whistleblower receives as a result of an investigation by a securities exchange or other self-regulatory organization, a foreign regulator, or information received in connection with internal investigations or civil or criminal proceedings in which the information has already been made known to the company.

To the extent that the Commission intends to provide whistleblower awards only to persons who provide the Commission with information that is original and not derived from other sources, we see no basis for not excluding from the definition all information deriving from an allegation made in any investigative or enforcement activity or proceeding, rather than limiting the scope only to allegations 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.[25] In addition, the Commission's proposed language refers to "allegations" made in such proceedings. Because allegations may constitute only a small part of the information forming part of such proceedings, and allegations are generally only made after an initial fact-finding effort is completed, we believe the scope of the exclusion should extend to all information elicited during, or deriving from, any such proceeding or other matter.

(b) Independent Knowledge

Paragraph (b)(2) of Proposed Rule 21F-4 defines "independent knowledge" as "factual information in [the whistleblower's] possession that is not obtained from publicly available sources". The Proposing Release states that "Publicly available sources may include both sources that are widely disseminated (such as corporate press releases and filings, media reports, and information on the internet), and sources that, though not widely disseminated, are generally available to the public (such as court filings and documents obtained through Freedom of Information Act requests). Importantly, the proposed definition of "independent knowledge" does not require that a whistleblower have direct, first-hand knowledge of potential violations. Instead, knowledge may be obtained from any of the whistleblower's experiences, observations, or communications (subject to the exclusion for knowledge obtained from public sources)".

We believe the Commission should restrict the definition of "independent knowledge" to first-hand knowledge. As a policy matter, this restriction would be based on the same rationale underlying the hearsay rule, which is premised on the unreliability of oral information obtained from third parties. The source of the original information may be insincere, or subject to flaws in memory or perception. Among other things, by encouraging persons without first-hand

[25] Paragraph (b)(3) of Proposed Rule 21F-4 refers to information "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.

knowledge to come forward, the Commission will be incentivizing reports based on unsubstantiated rumors or ill-informed sources.

We believe significant harm may be done to companies by a program that encourages reporting of information without foundation or basis. Especially because the program would reward those first in the door, the program would in fact encourage reporting at the most preliminary stage, without any effort being made by the reporting person to confirm sources or to consider legitimate bases for the conduct involved. Also, and importantly, we believe that the absence of a firsthand knowledge requirement would encourage collaboration to circumvent the intent of the statute. For example, a person who would be ineligible for an award directly by reason of culpable conduct might provide the information to a third person who would be the whistleblower. The two could agree to share any award eventually paid. Not only could the possibility of an award in this instance induce persons to undertake efforts to maximize the harm, and therefore the amount of the award, but also the potential large amount of any recovery may in fact encourage unethical conduct.

(c) Independent Analysis

Similarly, we believe that the term "independent analysis" in paragraph (b)(2) of Proposed Rule 21F-4 should be restricted to an analysis of the whistleblower's own "independent knowledge" along with other purely objective facts, such as share price or trading volume.

(d) Exclusions from "Independent Knowledge" and "Independent Analysis"

Proposed Rule 21F-4(b)(4) sets forth the limitations on the information that may be used as the source of a claim that a communication to the Commission derives from independent knowledge or independent analysis. With respect to the limitations set forth in Proposed Rule 21F-4(b)(4):

(i) The Committees believe that the exclusion in Proposed Rule 21F-4(b)(4)(i) for information obtained through a communication that was subject to the attorney-client privilege (subject to the stated exceptions) is appropriate; we suggest, though, that the Commission consider expanding this provision to also refer to information derived from materials that are subject to the protections of the attorney work-product doctrine;

(ii) The Committees believe that Proposed Rule 21F-4(b)(4)(iii) with respect to information obtained through the performance of an engagement required under the securities laws by an independent public accountant should also include information obtained by internal company personnel in connection with their role supporting an independent public accountant conducting an audit required under the securities laws (including both a financial statement audit and an audit of internal controls). In other words, when an internal employee is consulted by independent public accountant in connection with a required audit, any information learned by the

internal employee should be excluded from the definition of "independent knowledge" and "independent analysis" in the same manner that such information obtained by outside auditors would be excluded from the definition.

The independent audit is a vital function for companies, their investors, as well as the markets, and therefore should not be impeded from running its course under Section 10A of the Exchange Act. We note that existing requirements under Section 10A of the Exchange Act provide a process for information coming to the attention of auditors regarding illegal acts by a company to be disclosed within the company and to the Commission.[26] Keeping this regime intact not only allows for an opportunity for errors and misconduct to be corrected through existing corporate compliance mechanisms, but also would prevent potential whistleblowers who may learn of possible illegal acts by reason of their work in connection with an audit from inundating the Commission with bad faith or frivolous claims with the hope of receiving a windfall.

(iii) The Committees believe that the exclusion in Proposed Rule 21F-4(b)(4)(iv) for a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity who received information with a reasonable expectation that the recipient would act on the information should be expanded to include persons who perform such functions for subsidiaries or other units of an entity; in many instances, "reporting up" involves reporting to supervisory personnel or another responsible person at the entity where a person is employed. In addition, the recipient is responsible for ascertaining the "reasonable expectation" of the person who provided such information. We believe it would be preferable for the rule to provide that the recipient "reasonably understood that the information was communicated to you with the expectation that you would take steps…"

(iv) The exclusions in Proposed Rules 21F-4(b)(4)(iv) (discussed above) and 21F-4(b)(4)(v) (relating to information obtained from or through an

[26] Under Section 10A of the Exchange Act, auditors who believe they have discovered that an illegal act has or may have occurred at a company are required to first report it to company management and to assure that the information is also known to the audit committee. If the illegal act has a material effect on the financial statements, the senior management has not taken appropriate remedial action, and the failure to take such action would either warrant departure from the standard auditor's report or resignation of the auditor, the auditor is then required to report the illegal act to the Board, which is required to advise the Commission by notice. If the auditor has not received a copy of the notice in the prescribed time, it must either resign from the engagement or furnish the Commission with a copy of its report.

entity's legal, compliance, audit, or other similar functions or processes for identifying, reporting, and addressing potential non-compliance with the law) would not apply, and such persons would be eligible for awards, if the entity does not disclose the information to the Commission within a reasonable time or proceeds in bad faith.

The Committees believe that such persons should be eligible for awards if the entity proceeds in bad faith but that the Commission should not require that disclosure be made within a reasonable time. What may constitute a "reasonable time" before a whistleblower is able to approach the Commission would likely be difficult to determine. In fact, persons within the investigatory process may have difficulty determining this, and anyone outside the investigatory process may simply be unable to make this determination without complete information about the company's response to an allegation, the nature of which is typically highly confidential. In our view, bright line rules of what constitutes a reasonable period of time would be inappropriate in view of the varying complexities of internal investigations. To the extent that the goal of excluding certain categories of employees from award eligibility is to enable companies to operate effective internal compliance programs and conduct thorough internal investigations, such an amorphous standard would risk interfering with, rather than promoting, internal compliance efforts. Objective acts of bad faith, on the other hand, are likely to be more easily observable and are more indicative of an entity's intentions with respect to particular allegations than the amount of time an internal investigation takes.

Further, because the term "information" is not defined in Proposed Rule 21F-4(b)(4)(iv) or (v), a company may believe that, in order to protect the exclusion of the information, it will need to report to the Commission every whistleblower complaint that it receives, even conduct that may not clearly involve a securities law violation. Presumably in this context, a person who has disclosed to a company the information referred to in Proposed Rule 21F-4(b)(4)(iv) or (v) would need to determine whether the company provided such information to the Commission.[27] If the company did not provide such information to the Commission, the person may have no way of knowing whether the company had a valid basis for determining not to notify the Commission, and the person might then disclose to the Commission the information that might otherwise have been deemed not to have been derived from independent knowledge or independent analysis.

[27] It is unclear to us from the proposed Rule how a whistleblower would be in a position to determine whether the company disclosed the information to the Commission. Unless the whistleblower is a member of senior management, he or she may be unaware of the company's communications with the Commission.

The process as proposed has a number of flaws, including the fact that nothing in the exclusion may deter a person from providing to the Commission, even before notification to the company, the information that would have been excluded.

(v) The Committees believe that information obtained by internal personnel in connection with their responsibilities under Sections 302 and 404 of Sarbanes-Oxley should also be excluded from the definition of "independent knowledge" and "independent analysis" because the very purpose of these sections is to identify and elevate to senior management issues of concern, including potential violations of the federal securities laws.

(vi) The Committees believe that information obtained by company personnel, or personnel of any consulting or advisory firm engaged by the company, in connection with audits or reviews required under the securities laws (including SAS 100 reviews), reviews undertaken by companies in the context of the internal audit function, and investigations by the Board or any committee of the Board, should be excluded from the definition of "independent knowledge" and "independent analysis" in the same manner that such information obtained by the outside auditors is excluded from the definition. These audits and reviews play a critical role in a company's governance and reporting structures, and companies should, therefore, be entitled to undertake these matters without having a concern that the persons involved in these matters have a different agenda from that of the company.

(vii) Also, the Committees believe that information that is obtained by internal personnel in connection with their responsibilities relating to the preparation of Sarbanes-Oxley certifications under Sections 302, 404 and 906[28] should be excluded from the definition of "independent knowledge" and "independent analysis" because the purpose of those certification processes is to identify and elevate to senior management issues of concern, including potential violations of the federal securities laws. We propose that the exclusion also cover information provided in whatever sub-certifications management may request relating to a 302 or 906 certification.

[28] The certifications pursuant to Section 302 of the Sarbanes-Oxley Act are set forth in Rule 13a-14(a) (17 CFR 240.13a-14(a)) and Rule 15d-14(a) (17 CFR 240.15d-14(a)) under the Exchange Act. The certification pursuant to Section 906 of the Sarbanes-Oxley Act is set forth in Rule 13a-14(b) (17 CFR 240.13a-14(b)) and Rule 15d-14(b) (17 CFR 240.15d-14(b)) of the Exchange Act and Section 1350 of Chapter 63 of Title 18 of the United States Code (18 U.S.C. 1350) .

(viii) Finally, information that is obtained through communications protected by other confidentiality obligations under federal or state law (such as communications between patients and healthcare providers) should be excluded from the definition of "independent knowledge" or "independent analysis". This follows from the same rationale underlying the present exclusion of information that is obtained as a result of communication protected by the attorney-client privilege. With this broader set of exclusions, the rules would avoid chilling important confidential communications while reducing any perverse incentives individuals might have to disclose the content of such communications.

7. Even If the Commission Determines Not To Disqualify Persons with Culpability for Securities Law Violations from Award Eligibility, It Should Take Such Conduct into Consideration in Determining the Amount of any Reward

If the Commission determines not to exclude persons with civil, but not criminal, responsibility for violations of the securities laws from eligibility for whistleblower awards, we believe that any award such a whistleblower receives under Regulation 21F should be appropriately limited by including a provision that the Commission should take the person's role and culpability into consideration in determining the amount of any reward pursuant to Proposed Rule 21F-6. Although under Proposed Rule 21F-15 the monetary sanction paid by a culpable whistleblower would not be considered in determining whether the $1 million threshold has been satisfied or for the purpose of calculating the whistleblower's award, there may be instances in which such provisions would not adequately address the person's culpability. For example, a whistleblower who was an active participant in a fraud that resulted in monetary sanctions of $5 million against a company may have been personally sanctioned a significantly lesser amount.

Providing the whistleblower with a substantial award may send a message to others that "crime pays". Although we recognize that the Commission's payment of whistleblower awards may be necessary to incentivize the reporting of violations of law, we believe that the rules should afford the staff and the Commission a reasonable basis for evaluating a person's culpable conduct and for reducing the amount of an award based on that assessment and public policy considerations.[29]

[29] In conducting its analysis, the Commission and its staff should be entitled to review all judicial, administrative and other findings relating to the conduct of the whistleblower. In the case of internal company investigations, the Commission could consider any findings and supporting information a company may provide to the Commission indicating that the employee has engaged in unlawful or unethical behavior, or has materially breached the company's code of conduct in connection with the matters giving rise to the whistleblower claim.

8. Rule 21F-6 Should Expressly Permit the Commission To Deny an Award in Situations Where It Determines That an Award Would Be Against Public Policy

As we state in Paragraph 3 above, we urge the Commission to expand the definition of culpable conduct and to deny awards to persons who engage in culpable conduct. However, because not every act that may reflect some degree of responsibility for securities law violations will necessarily be within the definition of culpable conduct (even under the definition we propose), we suggest that Rule 21F-6 should expressly permit the Commission to deny an award when it determines that the payment of an award would be against public policy. Such a provision would provide flexibility in the event that circumstances arise in the future in which a person otherwise entitled to an award should not receive one due to public policy considerations not specifically addressed by the rules limiting eligibility for awards.

9. The Commission Should Reconsider the Appropriateness of Proposed Rule 21F-16(b) and, If It Determines To Adopt the Rule, Provide Detail Regarding Its Procedures for Contacting Whistleblowers Without Consent of Company Counsel

Proposed Rule 21F-16(b) provides that if a whistleblower who is a director, officer, member, agent or employee of an entity that has counsel initiates communication with the Commission relating to a potential securities law violation, Commission staff is authorized to communicate directly with such person regarding that information without seeking the consent of the entity's counsel. Although the Commission states in the Proposing Release that the objective of Proposed Rule 21F-16(b) is to implement several important policies inherent in Section 21F in a manner consistent with state bar ethics rules governing the professional responsibilities of lawyers, including Model Rule 4.2 of the ABA Model Rules of Professional Conduct,[30] we strongly disagree with the Commission's view that Section 21F authorized the Commission to bypass state bar ethics rules. In our view, Proposed Rule 21F-16(b) may have profound implications with respect to the preservation of a company's attorney-client privilege and information protected by the work-product doctrine.

As the Commission notes in the Proposing Release, the primary purpose of Model Rule 4.2 is to protect the attorney-client relationship and to protect represented persons, in the absence of their lawyers, from being taken advantage of by lawyers who are not representing their interests. Proposed Rule 21F-16(b) may result in the very harm that Model Rule 4.2 was

[30] In the Proposing Release, the Commission refers to ABA Model Rule 4.2 which prohibits lawyers from communicating about the subject of a representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. The Commission indicates that Congressional policy would be significantly impaired were the Commission required to seek the consent of an entity's counsel before speaking with a whistleblower who has initiated the contact and who is a director, officer, member, agent or employee of the entity. The Commission would justify this position by viewing the discussions with such a person as having been "authorized by law."

intended to address. For example, information the Commission staff may seek from an employee, and which an employee may disclose pursuant thereto, may have derived from privileged communications the employee or others within the organization may have had with company counsel.

The right to waive the privilege in such circumstances would belong to the company, and not to any single employee, and the ability of Commission staff to communicate with an employee without first seeking the consent of the company's counsel may affect the company's ability to claim privilege with respect to such matters. We are concerned that the Commission's communications with an employee could, therefore, have the intent and effect of undermining the privileges a company would ordinary expect to preserve.

The Commission indicates in the Proposing Release that it may be unable to fulfill its statutory role without the rights set forth in Proposed Rule 21F-16(b). We disagree. First, we note that employees would always have the ability to provide information to the Commission, and if they meet applicable standards would be entitled to anti-retaliation protection and to eligibility for awards. Such communications could be made either on a disclosed basis or anonymously. Proposed Rule 21F-16(b) deals not with the initial communication by the employee, but instead with responsive communications by the staff. Having had the benefit of a whistleblower's initial communication, we see no reasonable basis not to require the staff to communicate with company counsel prior to any further communications.[31]

We believe that, in many cases, communication by the staff with company counsel prior to further discussions with a whistleblower could assist the staff's investigative efforts. Such communications would permit company counsel to advise the staff of the information the company may have developed in connection with a matter, and assist in coordinating an appropriate investigative process. The communications would also permit company counsel to consider issues of privilege in the context of the investigations. Because of the importance to a company of preserving its attorney-client privilege and information protected by the work-product doctrine, we believe the Commission should not adopt Proposed Rule 21F-16(b) as part of Regulation 21F.

If the Commission determines to adopt Proposed Rule 21F-16(b), we suggest that in its final rule or the final rule release the Commission consider detailing procedures relating to communications by Commission staff to ensure that the attorney work-product doctrine and the attorney-client privilege are not jeopardized. There are many circumstances in which an employee may become aware of information which, if disclosed, could jeopardize the privilege protections. In order to address these considerations, the Rule could, for example, require the Commission staff to inquire, prior to any substantive discussion with an employee, as to the

[31] The Commission suggests that it in fact intends regularly to communicate in this way: "in appropriate cases… our staff will, upon receiving a whistleblower complaint, contact a company, describe the nature of the allegations, and give the company an opportunity to investigate the matter and report back." (emphasis added)

source of the information the employee may be providing, and to advise the employee that any information which the employee believes may derive directly or indirectly from communications with company counsel should not be communicated at that time. The Commission's delineation of such policies and procedures would also be consistent with current enforcement policy, which seeks to avoid situations in which staff members obtain privileged information. In light of these and other provisions, a more detailed set of guidelines on how Commission staff would seek to preserve such privileges would help to further ensure that Regulation 21F would be consistent with the Commission's prior policy statement.[32]

10. Specific Comments on the Cost-Benefit Analysis and the Need To Improve System Integrity

In our view, the cost-benefit analysis in the Proposing Release fails to take into account all of the likely costs of the proposed rules. Because the anti-retaliation protection provided by the whistleblower provisions is very broad and excludes only a very limited class of claimants, employees who fear termination by their employer because of a poor performance review or for some other legitimate reason have a very strong incentive to make whistleblower claims that are false or spurious in order to obtain that protection and deter their employers from taking otherwise justified adverse action against them. Although it is not possible to quantify the level of false or spurious claims that are likely to be filed, we believe the percentage could be very high. And if that is the case, we also believe that innocent companies may be required to expend considerable amounts due to investigations triggered by false or spurious claims and the high volume of documentation that these innocent companies would need to review and produce, often with the assistance of legal counsel and accounting firms. The Commission itself would also incur significant costs to review and evaluate all of these false or spurious claims and would need to divert its limited resources from higher priorities and legitimate claims. Such false or spurious claims can also lead to the wrongful public disparagement of innocent companies with damaging results to such innocent companies.

To help avoid this result, potential whistleblowers need to understand that the whistleblower provisions will not present an opportunity to reap a large monetary award with no downside risk associated with claims that are false, spurious or frivolous. As a result, stronger safeguards should be adopted to prevent improper use of the whistleblower provisions. We have the following suggestions for your consideration to achieve this result.

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[32] In addition to the substantive comments set forth in this letter, we note that Proposed Rule 21F-14 ("No Amnesty") refers to the Cooperation Initiative. Because the Cooperation Initiative is a policy statement that may be changed from time to time, the Commission may want to either refer to the Cooperation Initiative "or such other policy or policies that the Commission may from time to time have in place with respect to cooperation by individuals in investigations and related enforcement actions", or alternatively move the reference to the adopting release. Were the Commission to revise the Cooperation Initiative, it would be cumbersome for the Commission to also need to amend Rule 21F-14 (with notice and a rulemaking period) to make a corresponding change.

First, if documents are delivered directly to the Commission, Form TCR should be subject to penalty of perjury, similar to Form WB-DEC. If a whistleblower utilizes an attorney, then the Form TCR with such sworn declaration should be retained by the attorney.

In the cost-benefit analysis in the Proposing Release, the Commission argues that making Form WB-DEC alone subject to penalty of perjury is sufficient to "mitigate the potential harm to companies and individuals that may be caused by false or spurious allegations of wrongdoing". We respectfully disagree. Because Form WB-DEC can be submitted up to 30 days after Form TCR, claimants could cause significant resources to be expended by filing a Form TCR with a false or spurious claim if the Commission thought that the allegations warranted immediate investigation. Claimants could also fail to file a Form WB-DEC or change their stories before filing such form. Claimants might not read Form WB-DEC before filing Form TCR and might not realize that they later have to swear to its accuracy under penalty of perjury. Therefore, Form TCR should also be subject to penalty of perjury so that whistleblowers are definitely aware from the beginning that dishonest claims carry significant risks.

In addition, attorneys who assist clients in submitting anonymous claims should have special responsibilities. The ethics rules in most jurisdictions already prevent attorneys from filing false or spurious claims, but those rules should be explicitly restated with respect to whistleblower claims. Attorneys handling anonymous claims should be required to review the client's information and certify to the Commission that the client can show *particularized* facts suggesting a *reasonable probability* that a securities violation has actually occurred or is occurring. The existing Counsel Certification and other applicable forms should also be modified to reflect these requirements. This will ensure that whistleblowers who engage legal counsel do not submit claims based on mere speculation or hunches. Additionally, while lay individuals may not have the necessary level of knowledge and sophistication to know whether their information truly evidences a securities violation, attorneys are capable of making that determination and, therefore, should be required to help screen unsubstantiated claims and avoid the incurrence of unnecessary costs and labor to innocent companies.

Finally, the Commission should consider additional ways to safeguard against abuse of the whistleblower provisions and ensure the utmost integrity in the process for whistleblowers to submit tips. The goal should be to ensure that precautions are taken at each step to screen out claims that are false, spurious or frivolous.

Summary of Specific Recommendations

Our principal recommendations, as more fully discussed in this letter, are summarized below:

1. Proposed Rule 21F-2 ("Definition of a Whistleblower")

   (a) The Commission should impose additional requirements on persons entitled to "whistleblower" status and, therefore, anti-retaliation protection. We believe that

these provisions should refer to a person who provides information to the Commission:

(i) about a claimed violation of the securities laws by another person or entity;

(ii) that is material to the claimed violation;

(iii) that has a basis in fact or knowledge (which must be articulated);

(iv) that is not based on information that is either publicly disseminated or which the employee should reasonably know is already known to the company's board of directors or chief compliance officer, a court or the Commission or another governmental entity; and

(v) the provision of which does not result in the violation of a professional obligation, including the obligation to maintain such information in confidence.

(b) The Commission should change the term "potential violation of the securities laws" to "claimed violation of the federal securities laws" to avoid confusion, and should define the term to add clarity.

2. Proposed Rule 21F-4 ("Other Definitions")

(a) The Commission should further refine the definition of "voluntary".

(b) The Commission should further refine the definition of "original information".

Among other things, the Commission should not require a whistleblower who provides information to specified compliance personnel to submit Forms TCR and WB-DEC within 90 days in order for the whistleblower to be eligible for an award. If the Commission does not eliminate the time period, it should extend the period to 180 days.

(c) The Commission should further refine the definition of "independent knowledge" and "independent analysis".

3. Proposed Rule 21F-6 ("Criteria For Determining Amount of an Award")

Although we suggest in this letter that persons who have engaged in culpable conduct should not be eligible to receive a whistleblower award, should the Commission determine not to provide for a complete disqualification, the Commission should include the role and culpability of the whistleblower as express criteria that the Commission will consider in determining the amount of any award a whistleblower might receive. Culpability in this context would include not only matters determined in judicial

proceedings, but also in administrative and other proceedings. We also suggest that this Rule should contain an express provision to permit the Commission to deny an award in situations where it determines that the payment of an award would be against public policy.

4. Proposed Rule 21F-8 ("Eligibility")

   (a) The scope of culpable conduct that would disqualify a person from receiving a monetary award should be expanded. Persons who have engaged in culpable conduct should not be eligible for awards.

   (b) Employees should be required to exhaust internal compliance procedures in order to be eligible for whistleblower awards.

5. Proposed Rule 21F-15 ("Awards to Whistleblowers Who Engage in Culpable Conduct")

   If the Commission agrees with our position that a person who engages in culpable conduct should not be eligible for awards, Rule 21F-15 would no longer be necessary.

6. Proposed Rule 21F-16 ("Staff Communications with Whistleblowers")

   The Commission should reconsider the appropriateness of Proposed Rule 21F-16(b) and, if it determines to adopt the Rule, provide detail regarding its procedures for contacting whistleblowers without the consent of company counsel.

Conclusion

The Commission's whistleblower rules, if carefully crafted, should inure to the benefit of shareholders and the investing public. We encourage the Commission to make every effort in its final rules to be sensitive to the concerns we have expressed in this letter, and to eliminate incentives for frivolous or irresponsible reporting, to avoid rewarding culpable persons, and to consider the effects the rules may have on companies' internal compliance programs and legal privileges. A whistleblower program that will elicit high-quality information will contribute significantly to the effectiveness of the Commission's enforcement efforts, while providing needed protections to companies and minimizing the burdens both companies and the Commission staff will incur in responding to meritless claims.

The Committees appreciate the opportunity to comment on the Proposing Release and respectfully requests that the Commission consider the comments and recommendations set forth above. Members of the Committees are available to discuss these comments should the Commission or the staff so desire.

Very truly yours,

Jeffrey W. Rubin
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IMPLICATIONS OF THE SEC'S WHISTLEBLOWER RULES FOR ATTORNEYS, THEIR PROFESSIONAL RESPONSIBILITIES, AND THE ATTORNEY-CLIENT PRIVILEGE

Brian T. Sumner

July 24, 2012

In August 2011, the SEC's final rule implementing the whistleblower award provisions (Sections 922–24) of the Dodd-Frank Wall Street Reform and Consumer Protection Act became effective.[1] Prior to the issuance of the Final Rule, there had been considerable commentary about the extent to which lawyers would be able to blow the whistle on their clients.[2] Notwithstanding the adoption of the Final Rule, there remains some confusion regarding the implications of the inclusion of lawyers in the SEC's new whistleblower program for attorneys' professional responsibilities and the attorney-client privilege.

In short, the Final Rule permits lawyers to blow the whistle on their clients under two sets of circumstances, depending on whether the information falls within the classic definition of a client confidence or arises in connection with an internal investigation, where the contours of the privilege and confidentiality can be grayer. The Chief of the SEC's Office of the Whistleblower has said that Final Rule recognize that in "certain narrow circumstances, [the SEC] need[s] [attorneys and audit and compliance personnel] to report wrongdoing."[3] The Final Rule also permits the SEC to communicate directly with persons blowing the whistle on their employer without contacting the company's counsel.

Under the Final Rule, the circumstances under which the foregoing can take place are limited, and, as a practical matter, will not likely result in a flood of lawyers blowing the whistle on their clients. But, because the Final Rule risks intruding into areas historically protected by the attorney-client privilege and the broader shield covering client confidences, companies and their counsel need to be vigilant in understanding the nature of attorneys' confidentiality obligations and how those duties fit into the SEC's new whistleblower regime, and to think about their engagement of outside consultants through a framework similar to that which companies are adopting to handle potential whistleblowers.

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1 *See* Securities Whistleblower Incentives and Protections, Exchange Act Release No. 64,545, 76 FED. REG. 34,300 (June 13, 2011) (codified at 17 C.F.R. pts. 240, 249) (the "Final Rule").

2 *See, e.g.*, Letter from Charles E. Grassley, U.S. Senate, to Mary L. Schapiro, Sec. & Exch. Comm'n (May 10, 2011), *available at* http://www.sec.gov/comments/s7-33-10/s73310-310.pdf; Letter from Stephen N. Zack, President, Am. Bar Ass'n, to Mary L. Schapiro, Sec. & Exch. Comm'n (May 20, 2011), *available at* http://www.sec.gov/comments/s7-33-10/s73310-315.pdf.

3 Yin Wilczek, "SEC Whistleblower Office to Monitor Bounty Program for 'Unintended' Effects," BNA Daily Report for Executives (Aug. 12, 2011).

Circumstances Under Which Lawyers Can Blow the Whistle on Their Clients

Under the Final Rule, whether a lawyer can blow the whistle on a client depends on the nature of the information at issue. The Final Rule prescribes different standards for information subject to the attorney-client privilege or obtained in connection with a legal representation, on the one hand, and information obtained pursuant to inquiries and investigations by counsel, on the other.

First, information that is obtained "through a communication that was subject to the attorney-client privilege" or "in connection with the legal representation of a client on whose behalf [the whistleblower] or [the whistleblower's] employer or firm [is] providing services, and [the whistleblower] seek[s] to use the information to make a whistleblower submission for [his or her] own benefit" is not "original information"—and is therefore ineligible for a whistleblower award—unless disclosure "would otherwise be permitted by an attorney pursuant to Section 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise."[4] The Commission stated that the limited exceptions to the exclusion of privileged information "send a clear, important signal to attorneys, clients, and others that there will be no prospect of financial benefit for submitting information in violation of an attorney's ethical obligations."[5]

The circumstances under which lawyers may disclose client confidences are narrow under state bar ethics rules: most jurisdictions have adopted a variation of the crime-fraud exception found in ABA Model Rule of Professional Conduct 1.6. The issue with the Final Rule's exception to the exclusion of privileged information and client confidences arises in connection with the SEC's standards of conduct for attorneys, which are codified at 17 C.F.R. § 205 and govern attorneys appearing and practicing before the Commission on behalf of an issuer, and the tension between Part 205 and state ethics rules.[6] Specifically, Section 205(d)(2) states that an attorney may reveal client confidences to the Commission "to the extent the attorney reasonably believes necessary" under the following circumstances:

> (i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;
>
> (ii) To prevent the issuer, in a Commission investigation or administrative proceeding, from committing perjury, . . . suborning perjury, . . . or committing any act proscribed in 18 U.S.C. § 1001 [prohibiting, among other things, false statements to government officials] that is likely to perpetrate a fraud upon the Commission; or
>
> (iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to

4 *See* 17 C.F.R. §§ 240.21F-4(b)(4)(i)–(ii).

5 Final Rule at 34,315.

6 *See* Howard W. Goldstein, "Attorneys and Whistleblowing," BUS. CRIMES BULLETIN (July 2011).

> the financial interest or property of the issuer or investors in furtherance of which the attorney's services were used.

The foregoing standard differs from many states' ethics rules. Part 205 recognizes as much and provides that where state rules conflict the SEC's rules, Part 205 will control.[7] This conflict puts attorneys in a difficult spot. Disclosure and a whistleblower award may be permitted under the SEC's rules, but not under state bar rules. Attorneys who know the same information about an issuer client but practice law in different jurisdictions, and lawyers with multijurisdictional practices, might be subject to differing ethics rules relating to the disclosure of client confidences, and the status of the SEC's rules vis-à-vis their state ethics obligations might be entirely unclear. Moreover, companies will be unclear about their various lawyers' professional obligations with respect to their confidences.

The tension between Part 205 and state ethical obligations, however, has existed since Part 205 was adopted in 2003 pursuant to the Sarbanes-Oxley Act, and no court has since determined whether Part 205 preempts state ethical obligations. The whistleblower rules do not change that. Rather, they create a financial incentive for attorneys to blow the whistle, should one of the exceptions under Part 205 or state professional responsibility rules be available to them. Some commentators have expressed the concern that, in light of the potential monetary payoff, attorneys will actively seek out an exception under Part 205 in order to be able to blow the whistle on a client. For some time and without financial incentives, however, attorneys have provided information about their clients to the Commission consistent with relevant professional regulations. Given the potential consequences under state law, however, most commentators do not expect significantly more attorneys to provide such information to the SEC merely because of the whistleblower award program.

Second, only to the extent not covered by the exclusions for attorney-client privileged communications and information obtained in connection with a legal representation discussed above,[8] information "obtained . . . because [the whistleblower was]: . . . [e]mployed by or otherwise associated with a firm retained to conduct an inquiry or investigation into possible violations of law" is not "original information"—and is therefore ineligible for a whistleblower award—unless one of three exceptions applies. Those exceptions are as follows:

> (A) [The whistleblower has] a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the relevant entity from engaging in

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7 *See* 17 C.F.R. § 205.1. If a state's rules permit more disclosures than Part 205, however, the state's rules will govern. *See* Implementation of Standards of Professional Conduct for Attorneys, Exchange Act Release No. 47,276, Part II "Section 205.1 Purpose and Scope" (Jan. 29, 2003).

8 *See* Final Rule at 34,317 n.156 ("Rule 21F-4(b)(iii) only applies to the extent that an individual is not subject to any of the exclusions set forth in Rules 21F-4(b)(i) or (ii). Thus, for example, if a company officer receives a report that is covered by attorney-client privilege, paragraph (i) would govern use of the information for purposes of our rules.") and 34,318 ("Paragraph (C) of Rule 21F-4(b)(4)(iii) excludes information learned by employees or other persons associated with firms that are retained to conduct an internal investigation or inquiry into possible violations of law in circumstances (as noted above), where the information is not already excluded under Rules 21F-4(b)(4)(i) or (ii).")

> conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors;
>
> (B) [The whistleblower has] a reasonable basis to believe that the relevant entity is engaging in conduct that will impede an investigation of the misconduct;[9] or
>
> (C) At least 120 days have elapsed since [the whistleblower] provided the information to the relevant entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or [the whistleblower's] supervisor, or since [the whistleblower] received the information, if [the whistleblower] received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or [the whistleblower's] supervisor was already aware of the information.[10]

The Commission acknowledged in its adopting release that "most whistleblowers under this provision will not be attorneys,"[11] but the foregoing exceptions to the exclusion nevertheless present several issues for counsel:

- First, unlike exception (i), above, in the SEC's lawyer conduct rules,[12] no "material" violation of the federal securities laws is required to permit someone to disclose information obtained in connection with an internal investigation or similar work under exception (A), above.[13] Creating a different standard was a deliberate choice by the Commission.[14]

- Second, notwithstanding the Final Rule's statement to the contrary,[15] the 120-day period effectively puts a stopwatch on all internal investigations of allegations reported in-house. The Final Rule states that companies "frequently elect to contact the staff in the early stages of an internal investigation in order to self-report violations that have been identified" but neglect to acknowledge that most companies would prefer to determine the full scope of the violations (including whether they are material) before deciding whether to self-report, and, if the company elects to self-report, how best to approach the SEC Staff.

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9 This exception is designed to capture such conduct as document destruction and improper influencing of witnesses. *See* Final Rule at 34,319.

10 17 C.F.R. § 240.21F-4(b)(4)(v)(A)–(C).

11 Final Rule at 34,319 n.165.

12 17 C.F.R. § 205(d)(2)(i).

13 17 C.F.R. § 240.21F-b(4)(v)(A).

14 *See* Final Rule at 34,318–19 n.165.

15 *See* Final Rule at 34,319.

- Third, the 120-day clock starts when the whistleblower provides the information to any number of specified people, including his or her immediate supervisor, or when the whistleblower received the information, if he or she received it under circumstances indicating that any number of specified people, including the whistleblower's immediate supervisor, was already aware of the information.[16] Depending on the whistleblower's position and the size of the company, the whistleblower's immediate supervisor may be a junior manager far removed from the members of the audit committee, the chief legal officer, and the chief compliance officer and the various compliance issues with which those persons work on a regular basis.

The Commission's acknowledgement that attorneys will not commonly fall within the exclusion for information obtained in connection with an inquiry or investigation into possible violations of law reflects the importance the Commission has placed on preserving client confidences. It is difficult to imagine circumstances under which information obtained by a lawyer who was retained to conduct an internal investigation would not be covered by the attorney-client privilege or considered information obtained in connection with a legal representation. An example of information that would fall within the exclusion is information obtained by a non-lawyer (*e.g.*, compliance consultant) retained by a company to conduct such an investigation (without the involvement of counsel).

SEC Staff Communications with Whistleblowers

The Final Rule authorizes the SEC Staff to communicate directly with directors, officers, members, agents, and employees of entities that have counsel, provided that individual "initiated communication with the Commission relating to a possible securities law violation," without obtaining the consent of the entity's counsel.[17] This would appear to depart from long-standing ethics rules governing communications with represented persons.

ABA Model Rule 4.2 prohibits lawyers from communicating about the subject of a representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. The Commission has taken the view that Section 21F of the Exchange Act authorizes the Commission to communicate with whistleblowers without the consent of corporate counsel because Section 21F "evinces a Congressional purpose to facilitate the disclosure of information to the Commission relating to possible securities law violations and to preserve the confidentiality of those who do so."[18]

Putting aside whether the Commission is correct in its interpretation of the scope of its legal authority under Section 21F, as a practical matter, no in-house or outside counsel would be pleased with an investigation progressing to advanced stages without counsel ever hearing of it.

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16 Final Rule at 34,319.

17 17 C.F.R. § 240.21F-17(b).

18 Final Rule at 34,351.

In particular, the Commission's approach under the Final Rule risks situations where current employees have been *de facto* deputized by the SEC Staff, where a company is unable to have a meaningful dialogue with the Staff about the facts because the whistleblower has provided a one-sided story to the SEC Staff for months (if not years), and where privileged documents are turned over to the Staff by the whistleblower.[19] Unfortunately, this is not an entirely foreign concept for companies subject to government investigations, which have involved confidential informants, particularly in criminal investigations, for some time.

Considerations for Companies and Their Counsel

Although the protection of the attorney-client privilege is generally strong under the Final Rule, there remain risks to the privilege and to other confidential client information. Companies and their counsel should consider the following:

- Given the tension between relevant state confidentiality obligations and the Commission's attorney conduct rules, companies with operations in multiple jurisdictions or with lawyers licensed in multiple jurisdictions should understand the various competing professional obligations of their attorneys.

- Because the standard for whistleblower-award eligibility is lower for information obtained in connection with internal investigations and similar engagements than for information protected under the attorney-client privilege, companies should ensure that all non-attorney professionals (*e.g.*, forensic accountants, compliance consultants, and strategic/crisis media relations personnel) that are retained in connection with an inquiry or investigation into possible violations of law are retained by counsel pursuant to a *Kovel*[20] letter or similar arrangement, in order to protect communications with such professionals to the extent legally possible.

- Companies should put into place reporting mechanisms for internal inquiries and investigations, so attorneys and non-attorneys alike who are retained in connection with such matters can report irregularities and concerns internally and have confidence that the company or responsible counsel will review and resolve any issues. In short, companies should treat each person working on an internal investigation as a potential whistleblower and adopt policies and procedures similar to those that companies have in place for more traditional whistleblowers.

- Companies should have clear escalation lines for internal whistleblower complaints. Because the 120-day period can begin as early as the time when

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19 The Final Rule states that it does not authorize the Staff to depart from the Commission's existing procedures for handling potential attorney-client privileged information that comes into the Staff's possession, *see* Final Rule at 34,352, but the mere fact of a protected direct line of communication between employee-whistleblowers and the Staff increases the chance that a company will be in a dispute with the Staff at a later time about whether particular documents are privileged.

20 *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

the whistleblower informs his or her immediate supervisor of a potential violation, it will be critically important for all levels of supervisors to be aware of and comfortable with their escalation paths for such information. For companies with great geographic and organizational diversity, this will be particularly challenging.

- Companies should be prepared to make substantial progress on any internal investigations within 120 days of receiving information about possible violations of law. To that end, companies should have in-house legal staff with training and capacity to get such investigations off the ground early, including identifying the relevant individuals and preserving and collecting their electronic data.

- Because the SEC Staff will not hesitate to communicate directly with whistleblowers without first consulting counsel of the whistleblower's employer, companies should ensure that would-be whistleblowers are aware of their internal reporting options and that companies promote a culture where internal reports are encouraged.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34–64545; File No. S7–33–10]

RIN 3235–AK78

Securities Whistleblower Incentives and Protections

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Final rule.

SUMMARY: The Commission is adopting rules and forms to implement Section 21F of the Securities Exchange Act of 1934 ("Exchange Act") entitled "Securities Whistleblower Incentives and Protection." The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010 ("Dodd-Frank"), established a whistleblower program that requires the Commission to pay an award, under regulations prescribed by the Commission and subject to certain limitations, to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the Federal securities laws that leads to the successful enforcement of a covered judicial or administrative action, or a related action. Dodd-Frank also prohibits retaliation by employers against individuals who provide the Commission with information about possible securities violations.

DATES: *Effective Date:* August 12, 2011.

FOR FURTHER INFORMATION CONTACT: Sean X. McKessy, Securities and Exchange Commission, Division of Enforcement, 100 F Street, NE., Washington, DC 20549, Tel. (202) 551–4790, Fax (703) 813–9322.

SUPPLEMENTARY INFORMATION: We are adopting new rules 21F–1 through 21F–17, and new Forms TCR and WB–APP, under the Securities Exchange Act of 1934.

Table of Contents

I. Background and Summary
II. Description of the Rules
A. Rule 21F–1—General
B. Rule 21F–2—Definition of a Whistleblower
C. Rule 21F–3—Payment of Award
D. Rule 21F–4—Other Definitions
1. Voluntary Submission of Information
2. Original Information
3. Definition of Independent Knowledge
4. Definition of Independent Analysis
5. Rules 21F–4(b)(i) Through (vi)—Exclusions From Independent Knowledge and Independent Analysis
(a) Attorney-client privilege and other attorney conduct
(b) Responsible Company Personnel, Compliance Processes and Independent Public Accountants
(i) Proposed Rule 21F–4(b)(4)(iii)
(ii) Proposed Rules 21F–4(b)(iv) and (v)
(iii) Final Rules 21F–4(b)(4)(iii) and (v)
a. Rules 21F–4(b)(4)(iii)(A) Through (C)
b. Rule 21F–4(b)(4)(iii)(D)
c. Rule 21F–4(b)(4)(v)
(c) Conviction for Violations of Law
(d) Rule 21F–4(b)(4)(vi)—Information Obtained From Excluded Persons
6. Original Source
7. Original Source; Additional Information
8. Original Source: Lookback
9. Information That Leads to a Successful Enforcement
10. Action
11. Monetary Sanctions
12. Appropriate Regulatory Agency
13. Appropriate Regulatory Authority
14. SRO
E. Rule 21F–5—Amount of Award
F. Rule 21F–6—Criteria for Determining Amount of Award
G. Rule 21F–7—Confidentiality of Submissions
H. Rule 21F–8—Eligibility
I. Rule 21F–9—Procedures for Submitting Original Information
J. Rule 21F–10—Procedures for Making a Claim Based on a Successful Commission Action
K. Rule 21F–11—Procedure for Making a Claim Based on a Successful Related Action
L. Rules 21F–12 & 13—Materials That May Be Used as the Basis for an Award Determination and That May Comprise the Record on Appeal; Right of Appeal
M. Rule 21F–14—Procedures Applicable to Payment of Awards
N. Rule 21F–15—No Amnesty
O. Rule 21F–16—Awards to Whistleblowers Who Engage in Culpable Conduct
P. Rule 21F–17—Staff Communications With Whistleblowers
III. Paperwork Reduction Act
IV. Economic Analysis
V. Regulatory Flexibility Act Certification
VI. Statutory Authority

I. Background and Summary

Section 922 of Dodd-Frank added new Section 21F to the Exchange Act, entitled "Securities Whistleblower Incentives and Protection."[1] Section 21F directs that the Commission pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about a violation of the securities laws that leads to the successful enforcement of an action brought by the Commission that results in monetary sanctions exceeding $1,000,000.

On November 3, 2010, we proposed Regulation 21F to implement new Section 21F.[2] The rules contained in proposed Regulation 21F defined certain terms critical to the operation of the whistleblower program, outlined the procedures for applying for awards and the Commission's procedures for making decisions on claims, and generally explained the scope of the whistleblower program to the public and to potential whistleblowers.

We received more than 240 comment letters and approximately 1300 form letters on the proposal.[3] Commenters included individuals, whistleblower advocacy groups, public companies, corporate compliance personnel, law firms and individual lawyers, academics, professional associations, nonprofit organizations and audit firms. The comments addressed a wide range of issues. Many commenters provided views on an issue we highlighted in the proposing release—the interplay of the whistleblower program and company internal compliance processes. Commenters also expressed a range of views on other significant issues, including the proposed exclusions from award eligibility for certain categories of individuals or types of information, the availability of awards to culpable whistleblowers, the procedures for submitting information and making a claim for an award, and the application of the statutory anti-retaliation provision.

As discussed in more detail below, we have carefully considered the comments received on the proposed rules in fashioning the final rules we adopt today. We have made a number of revisions and refinements to the proposed rules. Taken together, we believe these changes will better achieve the goals of the statutory whistleblower program and advance effective enforcement of the Federal securities laws. The revisions of each proposed rule are described in more detail throughout this release, but the following are among the most significant:

• *Internal Compliance:* A significant issue discussed in the Proposing Release was the impact of the whistleblower program on companies' internal compliance processes. While we did not propose a requirement that whistleblowers report through internal compliance processes as a prerequisite to eligibility for an award, we requested comment on this topic, and we included in the proposed rules several other elements designed to encourage potential whistleblowers to utilize internal compliance. Commenters were sharply divided on the issues raised by this topic. After considering these different viewpoints, we have determined not to include a requirement that whistleblowers report violations internally, but we have made additional changes to the rules to further incentivize whistleblowers to utilize their companies' internal compliance and reporting systems when appropriate.

○ With respect to the criteria for determining the amount of an award, the final rules expressly provide: first, that a whistleblower's voluntary participation in an entity's internal compliance and reporting systems is a factor that can increase the amount of an award; and, second, that a whistleblower's interference with internal compliance and reporting is a factor that can decrease the amount of an award.

○ The final rules contain a provision under which a whistleblower can receive an award for reporting original information to an entity's internal compliance and reporting systems, if the entity reports information to the Commission that leads to a successful Commission action. Under this provision, all the information provided by the entity to the Commission will be attributed to the whistleblower, which means that the whistleblower will get credit—and potentially a greater award—for any additional information generated by the entity in its investigation.

○ The final rule extends the time for a whistleblower to report to the Commission after first reporting internally and still be treated as if he or she had reported to the Commission at the earlier reporting date. We proposed a "lookback period" of 90 days after the whistleblower's internal report, but in response to comments, we are extending this period to 120 days in the final rules.

• *Procedures for Submitting Information and Claims:* The proposed rules set forth a two-step process for submitting information, which required the submission of two different forms. In response to comments that urged us to streamline the procedures for submitting information, we have adopted a simpler process, combining the two proposed forms into a single Form TCR that would be submitted by a whistleblower under penalty of perjury. With respect to the claims application process, we have made one section of that form optional to make the form less burdensome. We also describe in greater detail below several other features of the process to assist whistleblowers that we expect will become part of the Office of the Whistleblower's standard practice.

• *Aggregation of smaller actions to meet the $1,000,000 threshold:* The proposed rules stated that awards would be available only when the Commission had successfully brought a single judicial or administrative action in which it obtained monetary sanctions of more than $1,000,000. In response to comments, we have provided in the final rules that, for purposes of making an award, we will aggregate two or more smaller actions that arise from the same nucleus of operative facts. This will make whistleblower awards available in more cases.

• *Exclusions from award eligibility for certain persons and information:* The proposed rules set forth a number of exclusions from eligibility for certain categories of persons and information. In response to comments suggesting that some of these exclusions were overly broad or unclear, we have revised a number of these provisions. Most notably, the final rules provide greater clarity and specificity about the scope of the exclusions applicable to senior officials within an entity who learn information about misconduct in connection with the entity's processes for identifying, reporting, and addressing possible violations of law.

II. Description of the Rules

A. Rule 21F–1—General

Rule 21F–1 provides a general, plain English description of Section 21F of the Exchange Act. It sets forth the purposes of the rules and states that the Commission's Office of the Whistleblower administers the whistleblower program. In addition, the rule states that, unless expressly provided for in the rules, no person is authorized to make any offer or promise, or otherwise to bind the Commission with respect to the payment of an award or the amount thereof.

B. Rule 21F–2—Definition of a Whistleblower

a. Proposed Rule

As proposed, Rule 21F–2(a) defined a whistleblower as an individual who, alone or jointly with others, provides information to the Commission relating to a potential violation of the securities laws. Under the proposed rule, a company or another entity could not qualify as a whistleblower.

Paragraph (b) of the proposed rule stated that the anti-retaliation protections set forth in Section 21F(h)(1) of the Exchange Act would apply irrespective of whether a whistleblower satisfied all the procedures and conditions to qualify for an award under the Commission's whistleblower program. Similarly, the protections against retaliation applied to any individual who provided information to the Commission about a potential violation of the securities laws.

Paragraph (c) of the proposed rule stated that, to be eligible for an award, a whistleblower must submit original information to the Commission in accordance with all the procedures and conditions described in Proposed Rules 21F–4, 21F–8, and 21F–9.

b. Comments Received

Commenters advanced a number of suggestions to refine the definition of "whistleblower." Many commenters agreed that the definition of "whistleblower" should not turn on whether a violation of the securities laws is ultimately adjudged to have occurred,[4] but expressed differing opinions on our proposal to use the term "potential violation." One commenter agreed that the whistleblower definition should include the term "potential violation" because this would allow broad application of the anti-retaliation measures in Section 21F.[5] Several other commenters recommended that the term "potential violation" should be coupled with a requirement that the individual have a "reasonable belief" or "good faith belief" that the information relates to a securities law violation.[6] Some commenters suggested instead of the term "potential violation," we should use the terms "probable violation," "likely violation," or "claimed violation."[7]

On other aspects of the definition of whistleblower, one commenter recommended that we clarify that a "violation of the securities laws" relates only to the Federal securities laws and not to violations of state or foreign

[1] Public Law 111–203, § 922(a), 124 Stat 1841 (2010).

[2] Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities and Exchange Act of 1934, Release No. 34–63237 ("Proposing Release").

[3] The public comments we received are available at *http://www.sec.gov/comments/s7–33–10/s73310.shtml*. In addition, to facilitate public input on the Dodd-Frank Act, the Commission provided a series of e-mail links, organized by topic, on its Web site at *http://www.sec.gov/spotlight/regreformcomments.shtml*.

[4] *See, e.g.*, letters from Committee on Federal Regulation of Securities, Section of Business Law, American Bar Association ("ABA"); Project of Government Oversight ("POGO"); Jones Day; Wells Fargo Advisors, LLC ("Wells Fargo"); and Society of Corporate Governance Professionals.

[5] *See* letter from POGO.

[6] *See, e.g.*, letters from Jones Day; Wells Fargo; and Morgan Lewis. As discussed further below in the text, commenters asserted that a "reasonable belief" or "good faith" standard is necessary to prevent employees from making bad-faith allegations of retaliation.

[7] *See, e.g.*, letters from ABA; Goodwin Procter.

securities laws.[8] A few commenters recommended that a whistleblower be limited to a person who provided information relating to a "material" violation of the securities laws.[9]

Two commenters disagreed with the proposed rule's limiting whistleblower status to natural persons,[10] suggesting that non-governmental organizations and/or worker representatives, including labor unions, should be permitted to bring claims.[11]

A number of commenters responded to our request for comment on whether we should limit the definition of "whistleblower" to a person who provides information regarding violations of the securities laws "by another person"—some favoring this,[12] others opposing it.[13] Several of the commenters recommended that we limit the whistleblower definition based on an individual's relative culpability for the reported violation. For example, some commenters stated that the definition of "whistleblower" should cover only individuals who report violations by another person, and who did not participate in or facilitate the violations.[14]

Commenters made several suggestions relating specifically to the scope of the anti-retaliation protections. Among other things, commenters recommended that we expressly state in the rules that the anti-retaliation provisions do not apply to an individual if (1) he files a false, fraudulent, or bad faith and meritless submission; [15] (2) he lacks a good faith or reasonable belief of a violation; [16] or (3) the submission does not evince a "reasonable likelihood of a violation of securities laws." [17] Another commenter suggested the anti-retaliation provisions should only apply to those who qualify for an award.[18]

Several commenters proposed that the anti-retaliation provisions should categorically exempt a company's adverse action against an employee based on factors other than whistleblower status,[19] such as engaging in culpable conduct,[20] failing to comply with the reporting requirements of a company's internal compliance programs,[21] or violating a professional obligation to hold information in confidence." [22] One commenter explained that, without a categorical exemption, the broad anti-retaliation provisions of the statute could prompt a "wave of litigation" alleging retaliation in such circumstances.[23]

Commenters made a series of other suggestions related to the scope and enforceability of the anti-retaliation protections, including that we should: (1) Clarify our authority to bring enforcement actions based on retaliation; [24] (2) provide that the anti-retaliation remedies may not be waived by any agreement, policy, or condition of employment; [25] and (3) exclude from anti-retaliation protection employees whose submissions are based on information that is either publicly disseminated or which the employee should reasonably know is already known to the company's board of directors or chief compliance officer, a court, the Commission or another governmental entity.[26]

c. Final Rule

In response to the comments, we have made several changes to the definition of whistleblower in Rule 21F–2(a) and the application of the anti-retaliation provisions in Rule 21F–2(b) to more precisely track the scope of Section 21F(h)(1). We are adopting Rule 21F–2(c) as proposed, but have re-designated it as Rule 21F–2(a)(2).

With respect to the definition of whistleblower, we agree with those commenters who suggested that the term "potential violation" may be imprecise, and thus in the final rule have changed this to "possible violation" that "has occurred, is ongoing, or is about to occur." We believe that this modification provides greater clarity concerning when an individual who provides us with information about possible violations, including possible future violations, of the securities laws qualifies as a whistleblower. An individual would meet the definition of whistleblower if he or she provides information about a "possible violation" that "is about to occur."

Although some commenters recommended that we use the terms "probable violation" or "likely violation," we have decided to use the term "possible violation." In our view, this requires that the information should indicate a facially plausible relationship to some securities law violation—frivolous submissions would not qualify for whistleblower status. We believe that a higher standard requiring a "probable" or "likely" violation is unnecessary, and would make it difficult for the staff to promptly assess whether to accord whistleblower status to a submission.

In the final rule, the definition of whistleblower clarifies that the submission must relate to a violation of the Federal securities laws, or a rule or regulation promulgated by the Commission. An individual who submits information that relates only to a state law or foreign law violation would not satisfy the whistleblower definition.

The final rule also clarifies that, to qualify as a whistleblower eligible for the award program and the heightened confidentiality provisions of Section 21F(h)(2) of the Exchange Act, an individual must submit his or her information to the Commission in accordance with the procedures set forth in Rule 21F–9(a).[27] Rule 21F–9(a) establishes procedures for an individual to mail, fax, or electronically submit to us information relating to a possible securities law violation. As proposed, our definition could have been misconstrued to apply to any individuals who provide us with information relating to a securities law violation, including individuals whom we subpoena and law enforcement personnel from other governmental authorities. This result would have been outside the intended scope of Section 21F.

We have not added a requirement that the information relate to a "material" violation of the securities laws. We believe that, rather than use a materiality threshold barrier that might limit the number of submissions to us, it is preferable for individuals to provide us with any information they possess about possible securities violations (irrespective of whether it appears to relate to a material violation) and for us to evaluate whether the information warrants action.[28] To the extent that commenters advanced this suggestion as a way to prevent individuals from abusing the anti-retaliation protections afforded by Section 21F(h) of the Exchange Act, we believe this issue is sufficiently addressed by the revisions to Rule 21F–2(b), discussed further below. To the extent that commenters suggested this approach as a way to reduce frivolous submissions, we believe our use of the term "possible violation" sufficiently addresses this concern.

We have decided not to extend the definition of whistleblower beyond natural persons because we believe that this is consistent with the statutory definition, which provides that a whistleblower must be an "individual." The ordinary meaning of "individual" is "natural person," [29] and nothing in the statutory text or legislative history suggests a different meaning here. Although one commenter identified a reference to "individuals" in the False Claims Act to argue that the term should be read to extend beyond natural persons, we note that the False Claims Act otherwise repeatedly refers to whistleblowers as "persons" (which ordinarily extends beyond natural persons),[30] and we believe this explains the different result under that Act.[31]

We have modified proposed Rule 21F–2(b)'s anti-retaliation protections, which are now in Rule 21F–2(b)(1). We are also adding Rule 21F–2(b)(2), which expressly states that the Commission may enforce the anti-retaliation provisions of Section 21F(h)(1) of the Exchange Act and any rules promulgated thereunder.

Rule 21F–2(b)(1) provides that, for purposes of the anti-retaliation protections afforded by Section 21F of the Exchange Act, an individual is a whistleblower if (i) he possesses a reasonable belief that the information he is providing relates to a possible securities law violation (or, where applicable, to a violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and (ii) he reports that information in a manner described in Section 21F(h)(1)(A).

With respect to the first prong of this standard, the employee must possess a "reasonable belief that the information he is providing relates to a possible securities law violation (or, where applicable, to a violation of the provisions set forth in 18 U.S.C. 1514A(a)) [32] that has occurred, is ongoing, or is about to occur." The "reasonable belief" standard requires that the employee hold a subjectively genuine belief that the information demonstrates a possible violation, *and* that this belief is one that a similarly situated employee might reasonably possess.[33] We believe that requiring a "reasonable belief" on the part of a whistleblower seeking anti-retaliation protection strikes the appropriate balance between encouraging individuals to provide us with high-quality tips without fear of retaliation, on the one hand, while not encouraging bad faith or frivolous reports, or permitting abuse of the anti-retaliation protections, on the other.[34] This approach is consistent with the approach followed by various courts that have construed the anti-retaliation provisions of other Federal statutes, including the False Claims Act,[35] to

[8] *See* letter from ABA.

[9] *See, e.g.,* letters from ABA; and Society of Corporate Secretaries and Governance Professionals ("Society of Corporate Secretaries").

[10] *See, e.g.,* joint letter from Voices for Corporate Responsibility, Change to Win, National Employment Lawyers Association, Government Accountability Project ("VOICES"); and Mike G. McCluir.

[11] *See* letter from VOICES.

[12] *See* letters from Chris Barnard; Thompson Hine LLP; William A. Jacobson, Angel Prado, and Yaozhi Ye ("Cornell Securities Law Clinic"); Evolution Petroleum Corp.; Securities Industry and Financial Markets Association ("SIFMA"); The Washington Legal Foundation; Morgan Lewis; Continewity LLC; Davis Polk & Wardwell LLP ("Davis Polk"); Oppenheimer Funds.

[13] *See, e.g.,* letters from Grohovsky, Vogel, and Lambert ("Grohovsky Group"); Peter van Schaick.

[14] *See, e.g.,* joint letter from Americans for Limited Government; Ryder Systems, Inc.; Financial Services Institute, Inc.; U.S. Chamber of Commerce; Verizon; and White & Case, LLP ("Chamber of Commerce Group").

[15] *See, e.g.,* letters from Connolly & Finkel; National Association of Corporate Directors ("NACD"); Investment Company Institute ("ICI"); Valspar; Auditing Standards Committee of the Auditing Section of the American Accounting Association ("Auditing Standards Committee"); U.S. Chamber of Commerce Center for Capital Markets Competitiveness and the U.S. Chamber of Institute for Legal Reform ("CCMC"); joint letter from General Electric Company, Google, Inc., Honeywell, Inc., JPMorgan Chase & Co., Microsoft Corporation and Northrop Grumman Corporation ("GE Group"); Jones Day; TECO Energy. Two commenters suggested that the Commission should consider "whether it can apply additional sanctions" to any person who uses the whistleblower process in bad faith." *See* joint letter from the Financial Services Roundtable and the American Bankers Association ("Financial Services Roundtable"); letter from TECO Energy.

[16] *See* letters from Chris Barnard; Paul Hastings.

[17] *See* letter from Goodwin Proctor.

[18] *See* letter from NACD (commenting that not limiting anti-retaliation protection to those who satisfy the conditions for an award "opens the door for employees to submit fake allegations that may cause reputational harm to the company and/or unfairly embarrass corporate employees and leadership").

[19] *See* letters from Thompson Hine; Americans for Limited Government ("ALG"); AT&T; Equal Employment Advisory Council ("EEAC"); Connolly & Finkel; ICI; GE Group; Society of Corporate Secretaries; Association of Corporate Counsel; Financial Services Roundtable; Davis Polk; ABA; joint letter from Allstate Insurance Company, American Institute of Certified Public Accountants, American Insurance Association, Americans for Limited Government, Association of Corporate Counsel, AT&T, Center for Business Ethics, Dover Corporation, FedEx Corporation, Financial Services Institute, Inc., Pharmaceutical Research and Manufacturers of America, Retail Industry Leaders Association, Royal Caribbean Cruises Ltd, Ryder Systems, Inc., UPS, U.S. Chamber of Commerce, U.S. Chamber of Commerce Institute for Legal Reform, Verizon and White & Case, LLP ("Allstate Group").

[20] *See* letters from ALG; Allstate Group; Morgan Lewis; Davis Polk; ABA.

[21] *See* letters from Thompson Hine; *see also* letters from ALG; Allstate Group; Connolly & Finkel; NACD; TECO Energy; Association of Corporate Counsel.

[22] *See* letter from the ABA.

[23] *See* letter from ALG; *see also* letter from Allstate Group.

[24] Letter from Alex Hoover; *see also* letters from Bryan Maloney; National Coordinating Committee for Multiemployer Plans ("NCCMP").

[25] *See* letter from Kaiser Saurborn & Mair.

[26] *See* letter from ABA.

[27] The statutory definition of "whistleblower" in Section 21F(a)(6) of the Exchange Act provides that the Commission may "establish by rule or regulation" the "manner" in which an individual provides the Commission information so as to qualify as a whistleblower for purposes of the awards program.

[28] We do not expect potential whistleblowers to make a fact-dependent materiality assessment.

[29] *See, e.g., Jove Engineering, Inc.* v. *I.R.S.,* 92 F.3d 1539, 1550–51 (11th Cir. 1996) (quoting Black's Law Dictionary 773 (6th ed. 1996), and Webster's New Collegiate Dictionary 581 (8th ed. 1979)).

[30] *Compare* 31 U.S.C. 3730(e)(4)(B) *with id.* 3730(b)(1) ("A person may bring a civil action * * *"), and *id.* 3730(b)(4)(B)(5) ("When a person brings an action * * *").

[31] The ABA made several additional recommendations to clarify and/or narrow the definition of whistleblower. *See* letter from ABA. Specifically, the ABA recommended that we: (1) Exclude from the definition individuals who provide information that is "clearly stale (*e.g.,* flawed disclosure in a ten-year old proxy statement); (2) require as part of the definition that the individual have a non-speculative "basis in fact or knowledge" to support the potential securities law violation; and (3) exclude from the definition individuals who provide information that is "either publicly disseminated [already] or which the employee should reasonably know is already known to the company's board of directors or chief compliance officer, a court or the Commission or another governmental entity." With respect to clearly stale information, we believe that this is already addressed by the requirement that the information relate to a "possible violation," because we view this term as encompassing a requirement that the violation must be potentially actionable, which would preclude plainly stale violations. Similarly, we believe that the "possible violation" requirement excludes submissions that have *no* "basis in fact or knowledge." Finally, rather than addressing in the threshold definition of whistleblower information that is already publicly known, we have addressed this issue in Rule 21F–4 in the definition of "original information."

[32] This parenthetical reflects the fact that the anti-retaliation protection afforded by Section 21F(h)(1)(A)(iii) includes not only reports of securities law violations, but also various other violations of Federal law (*e.g.,* 18 U.S.C. 1341, 1343, 1344, and 1348).

[33] *See, e.g., Livingston* v. *Wyeth, Inc.,* 520 F.3d 344, 352 (4th Cir. 2008); *Clover* v. *Total Sys. Servs., Inc.,* 176 F.3d 1346, 1351 (11th Cir. 1999).

[34] *See, e.g., Parker* v. *B&O R. Co.,* 652 F.2d 1012, 1020 (DC Cir. 1981) (holding, in Title VII retaliation case, that "[t]he employer is sufficiently protected against malicious accusations and frivolous claims by a requirement that an employee seeking the protection of the opposition clause demonstrate a good faith, reasonable belief that the challenged practice violates Title VII"); *McDonnell* v. *Cisneros,* 84 F.3d 256, 259 (7th Cir.1996) ("There is nothing wrong with disciplining an employee for filing frivolous complaints"); *Hindsman* v. *Delta Airlines,* 2010 DOL Ad. Rev. Bd. 58 LEXIS at *10 (ARB Jun. 30, 2010) (interpreting the anti-retaliation provisions of the Wendell H. Ford Aviation Investment and Reform Act, which explicitly excludes frivolous complaints and those brought in bad faith, as requiring a "reasonable belief" by the whistleblower that the violation of the statute has occurred).

[35] *See Fanslow* v. *Chi. Mfg. Ctr.,* 384 F.3d 469, 480 (7th Cir. 2004) (noting that several circuits had held that the relevant inquiry to determine whether an employee's actions are protected under the False Claims Act is whether "(1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is committing fraud against the government") (citing *Moore* v. *Cal. Inst. of Tech., Jet Propulsion Lab,* 275 F.3d 838, 845 (9th Cir. 2002); *Wilkins* v. *St. Louis,* 314 F.3d 927, 933 (8th Cir. 2002), and *McNeil* v. *Empl. Sec. Dep't,* 2002 Wash.

Continued

require that a whistleblower have a reasonable belief that he or she is reporting a violation of that statute even where the statute does not expressly require such a showing.[36]

The second prong of the Rule 21F–2(b)(1) standard provides that, for purposes of the anti-retaliation protections, an individual must provide the information in a manner described in Section 21F(h)(1)(A). This change to the rule reflects the fact that the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities *other than the Commission.* Specifically, Section 21F(h)(1)(A)(iii)—which incorporate the anti-retaliation protections specified in Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. 1514A(a)(1)(C)—provides anti-retaliation protections for employees of public companies, subsidiaries whose financial information is included in the consolidated financial statements of public companies, and nationally recognized statistical rating organizations [37] when these employees report to (i) A Federal regulatory or law enforcement agency, (ii) any member of Congress or committee of Congress, or (iii) a person with supervisory authority over the employee or such other person working for the employer who has authority to investigate, discover, or terminate misconduct. However, the retaliation protections for internal reporting afforded by Section 21F(h)(1)(A) do not broadly apply to employees of entities other than public companies.[38]

In addition, Rule 21F–2(b)(1)(iii) provides that the retaliation protections apply to a whistleblower irrespective of whether the whistleblower is ultimately entitled to an award. This provision of the rule restates a result compelled by the text of Section 21F(h)(1), which on its face provides retaliation protection to whistleblowers irrespective of whether they actually collect an award.[39]

Rule 21F–2(b)(2) states that Section 21F(h)(1) of the Exchange Act, including any rules promulgated thereunder, shall be enforceable in an action or proceeding brought by the Commission. Because the anti-retaliation provisions are codified within the Exchange Act, we agree with commenters that we have enforcement authority for violations of Section 21F(h)(1) by employers who retaliate against employees for making reports in accordance with Section 21F.[40]

With regard to the other significant comments made regarding the anti-retaliation provisions in Rule 21F–2(b), for the reasons set forth below we find that it is either inappropriate or unnecessary to make the modifications that those commenters recommended. Regarding the comments that we should categorically provide that employees who make whistleblower reports to us may be disciplined for reasons independent of their whistleblowing activities, we think this is unnecessary. By its terms, the statute only prohibits adverse employment actions that are taken "because of" any lawful act by the whistleblower to provide information; adverse employment actions taken for other reasons are not covered. Moreover, there is a well-established legal framework for making this factual determination on a case-by case basis,[41] and we see no indication that Congress intended to depart from this framework here.[42]

With regard to the comment expressing concern that entities might require employees to waive their anti-retaliation rights under Section 21F, we believe that possibility is foreclosed by the Exchange Act. Specifically, because Section 21F is codified in the Exchange Act, it is covered by Section 29(a) of the Exchange Act, which specifically provides that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this title or any rule or regulation thereunder * * * shall be void." [43] Thus, under Section 29(a), employers may not require employees to waive or limit their anti-retaliation rights under Section 21F.

C. Rule 21F–3—Payment of Award

a. Proposed Rule

Paragraphs (a) and (b) of Proposed Rule 21F–3 summarized the statutory requirements for payment of an award based on a covered action or a related action. Paragraph (a) stated that, subject to the eligibility requirements in the Regulation, the Commission will pay an award or awards to one or more whistleblowers who voluntarily provide the Commission with original information that leads to the successful enforcement by the Commission of a Federal court or administrative action in which the Commission obtains monetary sanctions totaling more than $1,000,000. Paragraph (b) described the circumstances under which the Commission would also pay an award to the whistleblower based upon monetary sanctions that are collected from a "related action." Payment based on the "related action" would occur if the whistleblower's original information led the Commission to obtain monetary sanctions totaling more than $1,000,000, the related action is based upon the same original information that led to the successful enforcement of the Commission action, and the related action is brought by the Attorney General of the United States, an appropriate regulatory agency, a self-regulatory organization, or a state attorney general in a criminal case.

Paragraph (c) of Proposed Rule 21F–3 explained that the Commission must determine whether the original information that the whistleblower gave to the Commission also led to the successful enforcement of a related action using the same criteria used to evaluate awards for Commission actions. To help make this determination, the Commission may seek confirmation of the relevant facts regarding the whistleblower's assistance from the authority that brought the related action. However, the proposed rule stated that the Commission would deny an award to a whistleblower if the Commission determined that the criteria for an award are not satisfied or if the Commission was unable to obtain sufficient and reliable information about the related action.

Paragraph (d) of Proposed Rule 21F–3 provided that the Commission would not make an award in a related action if an award already has been granted to the whistleblower by the Commodity Futures Trading Commission ("CFTC") for that same action pursuant to its whistleblower award program under section 23 of the Commodity Exchange Act.[44] Proposed Rule 21F–3(d) also provided that, if the CFTC has previously denied an award in a related action, the whistleblower will be collaterally estopped from relitigating any issues before the Commission that were necessary to the CFTC's denial.

b. Comments Received

We received a few comments on the proposed rule's treatment of related actions.

One commenter objected to paragraph (c) to the extent that it would preclude a recovery in situations where the Commission is unable to obtain sufficient and reliable information about the related action to make a conclusive determination of the whistleblower's contribution to the success of the related action, suggesting instead that the rule include a mechanism for inter-agency coordination to allow the Commission to understand the whistleblower's contribution to the related action.[45] Another commenter challenged paragraph (c) because it would preclude an award for a whistleblower in situations where the Department of Justice or another entity pursues a successful action based on a whistleblower's tip that the Commission forwarded, but the Commission does not bring an enforcement action.[46]

With respect to proposed paragraph (d) and the overlap with CFTC actions, one commenter commended the Commission for clarifying that the Commission will not make an award in a related action if the CFTC has already made an award to the whistleblower on that action,[47] while another acknowledged that there should not be double recoveries, but stated that there should be no automatic rule that would bar rewards because the interaction of the Commission and CFTC programs can be adjudicated on a case-by-case basis.[48]

c. Final Rule

After reviewing the comments, we have decided to adopt Rule 21F–3 substantially as proposed.[49] With respect to related actions, we do not believe that inter-agency coordination can always ensure that the Commission will obtain "sufficient and reliable information" about a whistleblower's contribution to the success of a related action, and thus we continue to believe that there is a need for paragraph (b)(2).[50] We have not modified the rule to permit a whistleblower to recover in a related action absent a successful Commission action, because the statute expressly requires a successful Commission action *before* there can be a "related action" upon which a whistleblower may recover.[51]

With respect to the interrelation with CFTC actions, we are adopting the rule substantially as proposed because it provides claimants with a clear statement of how the Commission will address any issues that arise where a claimant pursues either a double recovery or a "second bite at the apple" by filing an application for an award on a related action after having already pursued an award on the same action under the CFTC's whistleblower awards program.[52] Our Proposing Release had included the qualification that the issue must have been "necessary" to the CFTC's determination, but we believe this requirement would have introduced unwarranted disputes over whether a particular issue was actually necessary. Therefore, we have made a slight modification to provide that the CFTC need only have decided the issue against the award claimant.

App. LEXIS 1900, at *15–*16 (Wash. Ct. App. Aug. 9, 2002) (same)).

[36] *See, e.g., Calhoun* v. *United States Dep't of Labor* ("*US DOL*"), 576 F.3d 201, 212 (4th Cir. 2009) (anti-retaliation provisions of the Surface Assistance Transportation Act); *Knox* v. *U.S. DOL,* 232 Fed. App. 255, 258–59 (4th Cir. 2007) (Clean Air Act); *Williams* v. *U.S. DOL,* 157 Fed. Appx. 575–76 (4th Cir. 2005) (Toxic Substances Control Act, Solid Waste Disposal Act and Clean Air Act); *see also Vinnett* v. *Mitsubishi Power Systems,* 2010 DOL Ad. Rev. Bd. LEXIS 69 at *12 (ARB Jul. 27, 2010) (Energy Reorganization Act requires "reasonable belief" of violation); *Carter* v. *Electrical District No. 2 of Pinal County,* 1995 DOL Sec. Labor LEXIS 153 (July 26, 1995) (requiring reasonable belief under anti-retaliation provisions of environmental statutes). Other anti-retaliation provisions, such as the anti-retaliation provisions enacted by Section 806 the Sarbanes-Oxley Act of 2002, expressly contain a "reasonable belief" standard. *See* 18 U.S.C. 1514A(a).

[37] The anti-retaliation protections afforded by Section 806 of the Sarbanes-Oxley Act have also been read to cover employees of agents or contractors of public companies in certain situations. *See Klopfenstein* v. *PCC Holdings Corp,* 2006 DOL Ad. Rev. Bd. LEXIS 50 (ARB May 31, 2006) (employee of a private subsidiary of a public company was covered under Section 806 where private subsidiary acted at direction of public company in taking adverse action against complainant); *Lawson* v. *FMR LLC,* 724 F. Supp. 2d 167, 169 (D. Mass. 2010) (employees of private investment advisers to investment companies were covered by Section 806), on appeal, No. 10–2240 (1st Cir.).

[38] In a few limited situations—reporting by employees of subsidiaries and NRSRO's covered by SOX Section 806, and by employees whose reports were required or protected under SOX or the Exchange Act, see Section 21F(h)(1)(A)(iii)—internal reporting is expressly protected.

[39] Indeed, providing whistleblowers anti-retaliation protection only if they ultimately receive an award could unduly deter whistleblowers from coming forward with information. Under that approach, a whistleblower would not be protected from retaliation if he or she had provided accurate information about the employer's violation, but for some reason no successful Commission action was brought or the whistleblower was not awarded a payment.

[40] Section 21F(h)(1)(B).

[41] This framework involves burden-shifting analysis. *See, e.g, Roadway Express, Inc.* v. *U.S. DOL,* 495 F.3d 477, 481–82 (7th Cir. 2007); *Scott* v. *Metropolitan Health Corp.,* 234 Fed Appx. 341, 346 (6th Cir. 2007) (applying burden shifting analysis to retaliation claim under the False Claims Act). *See generally McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). It provides that (1) the employee must first make a *prima facie* case of retaliation (that is, that he or she engaged in protected activity, has suffered an adverse employment action, and that the action was causally connected to the protected activity), (2) the burden then shifts to the employer to articulate a legitimate, non-retaliatory reason for its employment decision, after which (3) the burden shifts to the employee to show that the proffered legitimate reason is in fact a pretext and that the job action was the result of the defendant's retaliatory animus. *E.g., Collazo* v. *Bristol-Myers Squibb Mfg. Inc.,* 617 F.3d 39, 46 (1st Cir. 2010) (citations and quotations omitted). While anti-retaliation claims brought under the Sarbanes-Oxley Act of 2002 ("SOX") (unlike with Section 21F) are governed by a slightly different framework, under that framework the determination of whether an employee was disciplined for retaliatory or legitimate reasons is likewise a fact-bound inquiry. SOX claims are governed by the procedures applicable to whistleblower claims brought under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. *See* 18 U.S.C. 1514A(b)(2). Under that statute, "the employee bears the initial burden of making a prima facie showing of retaliatory discrimination because of a specific act"; once the employee makes that showing, "[t]he burden then shifts to the employer to rebut the employee's prima facie case by demonstrating by clear and convincing evidence that the employer would have taken the same personnel action in the absence of protected activity." *See Day* v. *Staples, Inc.,* 555 F.3d 42, 53 (1st Cir. 2009).

[42] We note that where Congress intended to categorically exclude from anti-retaliation protections of certain statutes those employees who, without any direction from the employer, deliberatively committed violations of those statutes, it has expressly said so. *See., e.g.,* 33 U.S.C. 1367(d) (excluding such employees from anti-retaliation protections of Federal Water Pollution Control Act); 15 U.S.C. 2622(e) (TOSCA); 42 U.S.C. 6971(d) (Solid Waste Disposal Act); 42 U.S.C. 7622(g) (Clean Air Act); 42 U.S.C. 9610(d) (CERCLA); 42 U.S.C. 5851(g) (Energy Reorganization Act).

[43] 15 U.S.C. 78cc(a).

[44] *See* 7 U.S.C. 26.

[45] *See* letter from VOICES.

[46] *See* letter from Stuart D. Meissner, LLC.

[47] *See* letter from Society of Corporate Secretaries.

[48] *See* letter from the National Whistleblowers Center ("NWC").

[49] In the final rule, we have grouped proposed paragraphs (b)–(d) together under the heading "related actions," and renumbered these paragraphs (b)(1)–(b)(3), respectively. We have also changed the term "appropriate regulatory agency" to "appropriate regulatory authority" to more closely comport with the terms of Section 21F and to clarify that our rules regarding payment for awards in connection with related actions govern actions brought by other agencies, not Commission actions. *See* discussion below under Rule 21F–4(g).

[50] In cases where the Commission coordinates closely with an entity that ultimately brings a related action, we anticipate that Commission staff will know and will be able to provide information about the whistleblower's contribution to the coordinated efforts. We have added a reference to new Rule 21F–12(a)(5) which provides that neither the Commission nor the Claims Review Staff is permitted to rely upon any information received from the entity that brought the related action if the entity has precluded us from also sharing that information with a claimant. The reference to Rule 21F–12(a)(5) makes clear that if the Commission is unable to receive sufficient and reliable information that is available for the claimant's review, the Commission will deny the claimant's related-action award request.

[51] *See* Section 21F(a)(5) of the Exchange Act, 15 U.S.C. 78u–6(a)(5) (related action must be "based upon the original information * * * that led to the successful enforcement of the Commission action").

[52] Several comment letters suggested that a *qui tam* action under the False Claims Act, 31 U.S.C. 3729 *et seq,* could qualify as a "related action." *See, e.g.,* letter from VOICES. This is not correct. A *qui tam* action is not brought by the Attorney General of the United States as is required under the definition of "related action" in Section 21F(a)(5) of the Exchange Act. In a *qui tam* action, the relator "bring[s]" the action "in the name of the Government," *see Vermont Agency of Natural Resources* v. *United States ex rel. Stevens,* 529 U.S. 765, 769 (2000), and thereafter the Attorney General may "elect to intervene and proceed with the action," 31 U.S.C. 3730(b)(2), 3730(b)(4). Moreover, given that Congress has specifically provided a 15–30% award for successful *qui tam* plaintiffs, *see* 31 U.S.C. 3730(d)(1)–(2), we do not believe Congress intended Section 21F of the Exchange Act to permit additional recovery for the same action above what it specified in the False Claims Act.

D. Rule 21F–4—Other Definitions

Although the statute defines several relevant terms, Rule 21F–4 defines other terms that are important to understanding the scope of the whistleblower award program, in order to provide greater clarity and certainty about the operation and scope of the program.

1. Rule 21F–4(a)—Voluntary submission of information

a. Proposed Rule

Under Section 21F(b)(1) of the Exchange Act,[53] whistleblowers are eligible for awards only when they "voluntarily" provide original information about securities violations to the Commission. Proposed Rule 21F–4(a)(1) defined a submission as made "voluntarily" if a whistleblower provided the Commission with information before receiving any request, inquiry, or demand from the Commission, Congress, any other Federal, state or local authority, any self-regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information in the whistleblower's submission was relevant. The proposed rule covered both formal and informal requests. Thus under the proposed rule, a whistleblower's submission would not be considered "voluntary" if the whistleblower was contacted by the Commission or one of the other authorities first, whether or not the whistleblower's response was compelled by subpoena or other applicable law.

As our Proposing Release explained, this approach was intended to create a strong incentive for whistleblowers to come forward early with information about possible violations of the Federal securities laws, rather than wait to be approached by investigators. For the same reasons, Proposed Rule 21F–4(a)(2) provided that a whistleblower's submission of documents or information would not be deemed "voluntary" if the documents or information were within the scope of a prior request, inquiry, or demand to the whistleblower's employer, unless the employer failed to make production to the requesting authority in a timely manner.

Proposed Rule 21F–4(a)(3) provided that a submission also would not be considered "voluntary" if the whistleblower was under a pre-existing legal or contractual duty to report the securities violations to the Commission or to one of the other designated authorities.

[53] 15 U.S.C. 78u–6(b)(1).

b. Comments Received

Commenters had diverse perspectives on our proposal to require that whistleblowers come forward before they receive either a formal or informal request or demand from the Commission or one of the other designated authorities about any matter relevant to their submission. Some commenters believed that our proposed rule was too restrictive. For example, one commenter urged that all information provided by a whistleblower should be treated as "voluntary" until the whistleblower is testifying under compulsion of a subpoena.[54] Another commenter suggested that persons who are first contacted by an authority should remain eligible for awards if they provide information about transactions or occurrences beyond the specific parameters of the request.[55] A third commenter expressed concern that our proposed rule could have the effect of barring whistleblowers in cases where the whistleblower's information is arguably "relevant" to a general informational request from an authority, even though the authority is not focused on the issue on which the whistleblower might report.[56]

Other commenters took the view that our proposed rule did not go far enough in precluding whistleblower submissions from being treated as "voluntary." A number of commenters urged that our rules also preclude an individual from making a "voluntary" submission after the individual has been contacted for information in the course of a company's internal investigation or other internal review.[57] In response to one specific request for comment, other commenters advocated that we not treat a submission as "voluntary" if the whistleblower was aware of a governmental or internal investigation at the time of the submission, whether or not the whistleblower received a request from the Commission or one of the other authorities.[58]

Our request for comment on whether a whistleblower's submission should be deemed to be "voluntary" if the information was within the scope of a previous request to the whistleblower's employer (Proposed Rule 21F–4(a)(2)) also generated diverse reactions. Some commenters urged that we eliminate this provision because it could have a sweeping effect in cutting off large numbers of potential whistleblowers, in particular in industry-wide investigations.[59] Other commenters supported the exclusion and suggested that it be expanded in various ways.[60]

Our proposed rule to preclude whistleblowers from acting "voluntarily" if they are under a pre-existing legal or contractual duty to report the violations to the Commission or another authority (Proposed Rule 21F–4(a)(3)) also generated varied comment. Some commenters opposed the exclusion on the grounds that Section 21F(c)(2) of the of the Exchange Act sets forth a specific list of persons whom Congress deemed to be ineligible for awards, some as a result of their pre-existing duties.[61] These commenters urged that the Commission should not expand these exclusions, as doing so would be inconsistent with Congressional intent and would undermine the purposes of Section 21F.[62] One of these commenters asserted, for example, that the proposed rule could result in barring submissions from individual employees if regulators require companies under their

[54] *See* letter from NWC.

[55] *See* letter from Bijan Amini.

[56] *See* letter from Taxpayers Against Fraud ("TAF"). As an example, this commenter pointed out that a request by a municipal bond issuer for completed transaction documents from a Guaranteed Investment Contract ("GIC") provider could be interpreted to preclude a "voluntary" submission of whistleblower allegations that the GIC provider engaged in bid rigging.

[57] *See* letters from CCMC; Jones Day; and GE Group (arguing that a person who is questioned by an employer about a matter should not be permitted subsequently to become a whistleblower unless he or she provided the employer substantially the same information in response to the employer's questioning).

[58] *See* letters from ABA, Wells Fargo, and the National Society of Compliance Professionals ("NSCP").

[59] *See* letters from Section on Corporation, Finance and Securities Law of the District of Columbia Bar ("DC Bar"), Daniel J. Hurson, Continewitty LLC.

[60] *See* letters from SIFMA (urging elimination of the exception that would permit an employee to make a voluntary submission if the employer did not produce the documents or information in a timely manner), Wells Fargo (same); NCSP (employee should be regarded as having received a request to an employer if there is a reasonable likelihood that the employee would have been contacted by the employer in responding to the request); and the Institute of Internal Auditors (should expand exclusion to other persons within the scope of a request, such as contractors, agents, and service providers).

[61] Section 21F(c)(2), 15 U.S.C. 78u–6(c)(2), sets forth four categories of individuals who are ineligible for whistleblower awards. These include employees of the Commission and of certain other authorities, persons who are convicted of a criminal violation in relation to action for which they would otherwise be eligible for an award, auditors in cases where a submission would be contrary to the requirements of Section 10A of the Exchange Act, and persons who fail to submit information in the form required by the Commission's rules.

[62] *See* letters from NWC; Stuart D. Meissner, LLC; NCCMP; DC Bar; and Daniel J. Hurson.

jurisdiction to report violations of law, and could also preclude submissions from some senior corporate managers who are obligated under Federal procurement regulations to report violations of various Federal criminal laws, False Claims Act violations and overpayments on government contracts to agency inspectors general and to contracting officers.[63] This same commenter also expressed concern that the Commission should not be in a position of having to decide whether whistleblowers from within state or municipal corporations have pre-existing obligations to report violations.

Other commenters favored the "legal duty" exclusion and recommended that its reach be clarified and extended. In particular, these commenters suggested that the exclusion should be applied to various categories of individuals in the corporate context. Several commenters urged that we not consider submissions to be "voluntary" in circumstances where an employee or an outside service provider has a duty to report misconduct to a company.[64] Another commenter suggested that a company's principal financial officer, principal executive officer, senior management, audit committee, and board of directors should be viewed as having a legal duty to report violations to the government because of the officer certification requirements of Section 302 of the Sarbanes-Oxley Act, and the provisions regarding reporting of illegal acts under Section 10A of the Exchange Act.[65]

Our request for comment concerning whether the "legal duty" limitation on voluntary submissions should apply to all government employees prompted a number of responses. Some commenters appeared to take the view that government employees who are involved in law enforcement or the regulation of business or financial services should be deemed to have a legal duty to report violations.[66] Other commenters indicated that government employees should be viewed as having a duty to report violations that they uncover in the course of their official duties.[67]

Finally, most commenters who responded to our request for comment on whether the list of other authorities in the rule should include foreign authorities stated that foreign authorities should be included.[68] Two commenters argued against this approach. One of these emphasized that the Commission cannot be assured that all foreign authorities will share information they may obtain concerning possible violations of U.S. securities laws, and that it would be difficult for the Commission in many instances to determine whether an individual owed a legal duty under foreign law to report a violation to a foreign authority.[69] Another similarly argued that the fact that a whistleblower received a request from a foreign authority would not compel the whistleblower to provide the information to the Commission.[70]

c. Final Rule

After considering the comments, we have decided to adopt the rule with certain modifications. Although we continue to believe that a requirement that the whistleblower come forward before being contacted by government investigators is both good policy and consistent with existing case law from related areas,[71] we agree with the concerns expressed by some commenters that our proposed rule might have the unintended result of deterring high-quality submissions as a threshold matter based on an overly-broad construction of the concept of voluntariness. In response to this concern, we have made several changes to the final rule.

As adopted, paragraph (1) of Rule 21F–4(a) now provides that a submission of information is deemed to have been made "voluntarily" if the whistleblower makes his or her submission before a request, inquiry, or demand that relates to the subject matter of the submission is directed to the whistleblower or anyone representing the whistleblower (such as an attorney) (i) By the Commission; (ii) in connection with an investigation, inspection, or examination by the Public Company Accounting Oversight Board ("PCAOB") or any self-regulatory organization; [72] 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.

Thus, rather than apply to all information requests of any kind, as was proposed, our final rule narrows the types of requests that that may preclude a later whistleblower submission from being treated as "voluntary." All requests from the Commission are still covered, as we believe that a whistleblower award should not be available to an individual who makes a submission after first being questioned about a matter (or otherwise requested to provide information) by the Commission staff acting pursuant to any of our investigative or regulatory authorities. Only an investigative request made by one of the other designated authorities will trigger application of the rule, except that a request made in connection with an examination or inspection, as well as an investigative request, by staff of the PCAOB or a self-regulatory organization will also render a whistleblower's subsequent submission relating to the same subject matter not "voluntary." This provision recognizes the important relationship that frequently exists between examinations and enforcement investigations, as well as our regulatory oversight of the PCAOB and self-regulatory organizations. However, the rule only precludes a whistleblower from making a "voluntary" submission if a previous request, as described, was directed to the whistleblower or to his or her personal representative. For example, an examination request directed to a broker-dealer or an investment adviser would not automatically foreclose whistleblower submissions related to the subject matter of the exam from all employees of the entity. However, if a firm employee were interviewed by examiners, the employee could not later make a "voluntary" submission related to the subject matter of the interview.[73]

We have also narrowed the list of authorities set forth in the rule by limiting state and local authorities to state Attorneys General and state securities regulatory authorities.

[63] *See* letter from the DC Bar, *citing* 73 FR 67064 (December 2008).

[64] *See* letters from NSCP and from Financial Services Roundtable.

[65] 15 U.S.C. 78j–1; *see* letter from the Cornell Securities Law Clinic.

[66] *See* letters from Patrick Burns, ICI, Auditing Standards Committee, and TRACE International, Inc.

[67] *See* letters from the NACD and Grohovsky Group. *See also* letter from the Institute of Internal Auditors ("a general preclusion of government employees would be appropriate.").

[68] *See* letters from Auditing Standards Committee; NSCP; Continewity, LLC; Society of Corporate Secretaries; Institute of Internal Auditors.

[69] *See* letter from Georg Merkl.

[70] *See* letter from VOICES.

[71] *Cf. Barth* v. *Ridgedale Electric, Inc.*, 44 F.3d 699 (8th Cir. 1994); *United States ex rel. Paranich* v. *Sorgnard*, 396 F.3d 326 (3d Cir. 2005) (rejecting argument that information provided beyond that required by subpoena is voluntary for purposes of False Claims Act); *United States ex rel. Fine* v. *Chevron, USA, Inc.*, 72 F.3d 740 (9th Cir. 1995), *cert. denied*, 517 U.S.1233 (1996) (rejecting argument that provision of information to the Government is always voluntary unless compelled by subpoena).

[72] The term "self-regulatory organization" is defined in Rule 21F–4(h).

[73] As is further discussed below, individuals who wait to make their submission until after a request is directed to their employer will not face an easy path to an award. We expect to scrutinize all of the attendant circumstances carefully in determining whether such submissions "significantly contributed" to a successful enforcement action under Rule 21F–4(c)(2) in view of the previous request to the employer on the same or related subject matter.

Accordingly, whistleblowers will have the opportunity to submit information to the Commission "voluntarily" even after they receive requests from other state and local authorities. This change recognizes the fact that the Commission less regularly receives information through cooperative arrangements with state and local authorities other than state Attorneys General and state securities regulatory authorities.[74]

As adopted, our rule retains the provision (now placed in a newly-designated paragraph (2)) that a whistleblower who receives a request, inquiry, or demand as described in paragraph (1) first will not be able to make a subsequent "voluntary" submission of information that relates to the subject matter of the request, inquiry, or demand, even if a response is not compelled by subpoena or other applicable law.[75] We believe that this approach strikes an appropriate balance between, on the one hand, permitting any submission to be considered "voluntary" as long as it is not compelled, and, on the other hand, precluding a submission from being treated as "voluntary" whenever a whistleblower may have become "aware of" an investigation or other inquiry covered by the rule, regardless of whether the relevant authority contacted the whistleblower for information. A standard based on the receipt of a subpoena would go too far in permitting individuals to claim whistleblower awards even after being directly asked about conduct by staff of the Commission or other authorities. We do not believe either that Congress intended this result, or that it is suggested by existing law.[76] Conversely, a rule that prohibited a whistleblower from acting "voluntarily" any time the whistleblower became aware of an investigation or other inquiry covered by the rule is overly inclusive because the subject of the inquiry may not be clear to potential whistleblowers with valuable information or these potential whistleblowers may not be known to the Commission. Accordingly, such an interpretation of "voluntary" is likely to have a negative impact on our Enforcement program by reducing the opportunities for us to receive high-quality, valuable information in many circumstances.[77] Such a rule would create the difficult problem of determining whether a whistleblower was actually aware of an investigation or other inquiry before he or she came forward.

For similar reasons, we reject the suggestion of some commenters that a whistleblower should not be permitted to make a "voluntary" submission after being contacted for information in the course of an internal investigation. Elsewhere in our rules, we have attempted to create strong incentives for employees to continue to utilize their employers' internal compliance and other processes for receiving and addressing reports of possible violations of law. If a whistleblower took any steps to undermine the integrity of such systems or processes, we will consider that conduct as a factor that may decrease the amount of any award.[78] However, a principal purpose of Section 21F is to promote effective enforcement of the Federal securities laws by providing incentives for persons with knowledge of misconduct to come forward and share their information with the Commission. Although we acknowledge that internal investigations can be an important component of corporate compliance, and although there are existing incentives for companies to self-report violations,[79] providing information to persons conducting an internal investigation, or simply being contacted by them, may not, without more, achieve the statutory purpose of getting high-quality, original information about securities violations directly into the hands of Commission staff.

As noted, paragraph (1) of Rule 21F–4(a) provides that a whistleblower submission will not be deemed "voluntary" if made after we or another of the designated authorities have already contacted the whistleblower (or his or her representative) with an investigative or other covered request, inquiry, or demand that "relates to the subject matter" of the submission. This language is intended to provide clearer guidance than use of the word "relevant" in the proposed rule. The determination of whether an inquiry "relates to the subject matter" of a whistleblower's submission will depend on the nature and scope of the inquiry and on the facts and circumstances of each case. Generally speaking, however, we will consider this test to be met—and therefore the whistleblower's submission not to be "voluntary"—even if the submission provides more information than was specifically requested, if it only describes additional instances of the same or similar conduct, provides additional details, or describes other conduct that is closely related as part of a single scheme. For example, if our staff sends an individual an investigative request relating to a possible fraudulent accounting practice, we would ordinarily not expect to treat as "voluntary" for purposes of Rule 21F–4(a) a subsequent whistleblower submission from the same individual that describes additional instances of the same practice, or a different but related practice as part of an overall earnings manipulation scheme.[80] However, the individual could still make a "voluntary" submission that described other, unrelated violations (*e.g.,* Foreign Corrupt Practices Act violations).[81]

In further consideration of the views expressed that our proposed rule was overly-broad, and could result in precluding too many potential whistleblowers (*e.g.,* in industry-wide investigations), we have decided not to adopt a rule that would treat a request to an employer as directed as well to all employees whose documents or information fall within the scope of the request. (This provision was found in paragraph (2) of Proposed Rule 21F–4(a), and is not part of final Rule 21F–4(a).)[82] As a commenter stated, establishing this requirement as a threshold barrier to submissions could effectively "shut down" our whistleblower program because "any relevant documents or information would almost certainly be covered by an even marginally comprehensive investigative request."[83] Thus, only a request that is directed to the individual involved (or to his or her representative) will preclude that individual from subsequently making a "voluntary" submission of the requested information or closely related information. We note, however, that as part of our determination of whether a submission leads to a successful enforcement action under Rule 21F–4(c), we expect to evaluate whether a previous request to the whistleblower's employer obtained substantially the same information, or would have obtained the information but for any action of the whistleblower in not providing the information to his or her employer. In such circumstances, we ordinarily would not expect to treat the whistleblower's submission as having "significantly contributed" to the success of our action for purposes of Rule 21F–4(c)(2).

We have also decided to revise our proposed requirement that a submission will not be considered "voluntary" if the whistleblower is under a pre-existing legal or contractual duty to report the information to the Commission or to any of the other authorities designated in the rule. As adopted, Rule 21F–4(a)(3) provides that a whistleblower cannot "voluntarily" submit information if the whistleblower is required to report his or her original information to the Commission as a result of a pre-existing legal duty,[84] a contractual duty that is owed to the Commission or to one of the other authorities set forth in paragraph (1), or a duty that arises out of a judicial or administrative order.

Unlike in the proposed rule, the final rule provides that a duty to report information only to an authority other than the Commission does not result in exclusion of the whistleblower.[85] We have narrowed the reach of this provision out of concern that, as proposed, it was potentially vague and overbroad. Without a clearer and more specific description of the types of duties owed to these other authorities that might preclude a submission, the proposed rule could have the unintended consequence of discouraging some meritorious whistleblowers. In addition, we have adopted exclusions for specific types of individuals based on the definition of "independent knowledge" under Rule 21F–4(b)(4). Consistent with our approach of applying potential threshold exclusions narrowly, we intend this exclusion to govern only in cases where a whistleblower has an individual duty to report to the Commission, and not in cases where the duty belongs to the whistleblower's employer.

Although this determination of "voluntariness" turns on whether the whistleblower is under a duty to report information to the Commission, the duty to report to the Commission can arise from a contract with either the Commission or with one of the other authorities identified in the rule. Thus, the rule would not consider as "voluntary" disclosures made by an individual who has entered into a cooperation or similar agreement with another authority, such as the Department of Justice, which requires the individual to cooperate with or provide information to the Commission, or more generally to government agencies. Further, the requirement that the contractual duty be owed to the Commission or to one of the other authorities means that whistleblowers will not be precluded from award eligibility if they are subject to a contractual duty to report information to the Commission because of an agreement with a third party. In other words, submissions from such whistleblowers will be treated as "voluntary," assuming that the other requirements of this rule are satisfied. This clarification responds to the concerns of some commenters that employers should not be able to preclude their employees from whistleblower eligibility by generally requiring all employees to enter into agreements that they will report evidence of securities violations directly to the Commission.[86]

The rule also provides that a whistleblower submission will not be treated as "voluntary" if the whistleblower had a duty arising out of a judicial or administrative order to report the information to the Commission. This language covers persons such as independent monitors or consultants who may be appointed or retained as a result of Commission or other proceedings with a requirement that they report their findings, conclusions, or other information to the Commission.

Finally, this rule will not apply to an employee or a third party who has a duty of some kind to report misconduct to a company, as we believe that a wholesale exclusion of whistleblower submissions in such cases would not effectuate the purposes of Section 21F.

[74] We have also determined not to expand the list of authorities in Rule 21F–4(a) to include foreign authorities. Foreign authorities operate under different legal regimes, with different standards. Further, as some commenters pointed out, whether and under what circumstances the Commission may receive information obtained by a foreign authority is more uncertain than is the case of other Federal authorities, and state Attorneys General or securities regulators. In addition, we may have limited ability to evaluate the scope of a request from a foreign authority to an individual, and whether it relates to the subject matter of the individual's whistleblower submission. We note, however, that in cases where we request the assistance of a foreign authority to obtain documents or information through a memorandum of understanding, and the foreign authority sends a corresponding request to one of its country's residents, we will treat the request as coming from us for purposes of our rule, with the result that a subsequent whistleblower submission on the same subject matter from the foreign resident will not be treated as "voluntary."

[75] One commenter asked us to clarify that, after a whistleblower makes an initial voluntary submission, if the staff subsequently contacts the whistleblower and requests additional information, any information so provided will be eligible for an award. *See* letter from Stuart D. Meissner, LLC. While we agree that this should ordinarily be the case with respect to routine follow-up communications with most whistleblowers, there may be circumstances where the whistleblower's additional provision of information would not be deemed voluntary. For example, if the whistleblower only provides us with more detailed information pursuant to a cooperation agreement with the Department of Justice, we would not view the whistleblower as having "voluntarily" provided all of the subsequent information. In addition, potential whistleblowers are cautioned that Rule 21F–8(b) requires, as a condition of award eligibility, that a whistleblower provide the staff with all additional information in the whistleblower's possession that is related to the subject matter of the whistleblower's submission in a complete and truthful manner.

[76] One commenter expressed concern that many employees are required to sign confidentiality agreements that may prevent them from providing information to the Commission without a subpoena. *See* letter from David Sanford. We caution employers that, as adopted, Rule 21F–17(a) provides that no person may take any action to impede a whistleblower from communicating directly with the Commission about a possible securities law violation, including by enforcing or threatening to enforce a confidentiality agreement. Further, Section 21F(h)(1)(A) of the Exchange Act prohibits any form of retaliation by an employer against a whistleblower because of any lawful act done by the whistleblower in providing information to the Commission in accordance with Section 21F. 15 U.S.C. 78u–6(h)(1)(A)(i).

[77] For example, an individual who becomes aware of an investigation and who has valuable information or documents to offer may not, in the ordinary course, be approached by investigators. This is particularly likely to be the case if the individual is not directly or indirectly involved in the conduct under investigation. We do not believe that it would be appropriate to adopt a definition of "voluntary" that might prevent such individuals from coming forward and assisting our staff as whistleblowers.

[78] *See* Rule 21F–6(b)(3).

[79] *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969 (Oct. 23, 2001); U.S. Sentencing Guidelines § 8C2.5.

[80] This is a separate analysis from the question of whether information will be deemed to have "led to" a successful Commission enforcement action. As is discussed below, even after we have commenced an investigation or an examination, a whistleblower who voluntarily submits original information may be eligible for an award if the information significantly contributes to the success of our action. *See* Rule 21F–4(c)(2).

[81] We have also added to paragraph (2) a statement that a whistleblower's submission of information to the Commission will be considered "voluntary" if the whistleblower voluntarily provided the same information to one of the other authorities identified in the rule prior to receiving a request, inquiry, or demand from the Commission. This language is intended to respond to comments that, as proposed, our rule could have had the unintended consequence of precluding a submission from being considered as "voluntary" in circumstances where the whistleblower provided the information to another authority, the other authority referred the matter to the Commission, and our staff contacted the whistleblower before he or she had the opportunity to file a whistleblower submission with us. *See* letter from Grohovsky Group.

[82] This would include requests that are directed to a specific office or function of an employer where the whistleblower works.

[83] *See* letter from DC Bar.

[84] Although in certain circumstances auditors have pre-existing legal duties to report information about securities law violations to the Commission, for purposes of these rules, an auditor's eligibility for a whistleblower award will not be addressed under this rule, but will be addressed under Rules 21F–4(b)(4)(iii) and (v) and Rule 8(c)(4).

[85] As noted above, some commenters objected to the proposed rule on the grounds that Congress expressly only declared certain categories of whistleblowers to be ineligible as a result of their pre-existing legal duties. However, Congress did not define the term "voluntarily" as used in Section 21F, instead leaving it to the Commission to interpret this term and others in a manner that furthers the statutory purposes. *See* Section 21F(j), 15 U.S.C. 78u–6(j).

[86] *See* letters from Stuart D. Meissner and Georg Merkl.

2. Rule 21F–4(b)—Original Information

As proposed, Rule 21F–4(b)(1) tracked the definition of "original information" found in Section 21F(a)(3) of the Exchange Act, with the added requirement that the information must be provided to the Commission for the first time after the date of enactment of Dodd-Frank. We are adopting the rule as proposed.

a. Proposed Rule

Our proposed rule defined "original information" to mean information that is: (i) Derived from the independent knowledge or independent analysis of the whistleblower; (ii) not already known to the Commission from any other source, unless the whistleblower is 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 the whistleblower is a source of the information; [87] and (iv) provided to the Commission for the first time after July 21, 2010 (the date of the enactment of Dodd-Frank). The first three requirements recited the definition of "original information" found in Section 21F(a)(3) of the Exchange Act. The fourth requirement made clear that awards would be considered only for original information submitted after the enactment of Section 21F.

Some of the elements of this definition—specifically, "independent knowledge," independent analysis," and "original source"—are defined in other proposed rules, and are separately discussed below.

b. Comments Received

Some commenters urged that our definition of "original information" be broadened in various ways. One commenter suggested that "original information" should include information that was provided to the Commission before the enactment of Dodd-Frank if the information leads to an enforcement action after the date of enactment.[88] Another commenter offered that "original information" should include information an employee reports to his or her company and that is later reported to the Commission by the company.[89] Similarly, another commenter expressed concern that, because "original information" must be information that is "not already known" to the Commission, the definition appeared to exclude subsequent whistleblowers who provide additional helpful information.[90] This commenter urged that we not automatically exclude subsequent whistleblowers, but instead make an appropriate award allocation among the individuals involved.

Other commenters believed that our definition of "original information" should be narrowed to exclude certain information from consideration for an award. Two commenters suggested that our rule exclude information beyond the statute of limitations period for actions to recover penalties.[91] One of these commenters also urged that "original information" should not include information about a violation that has already been addressed by the entity that is alleged to have violated the securities laws.[92]

Another commenter expressed concern that, as proposed, "original information" would not clearly exclude information a whistleblower receives as a result of an investigation by a securities exchange or other self-regulatory organization, a foreign regulator, or information received in connection with internal investigations or civil or criminal proceedings.[93] This commenter urged that the rule be modified to exclude information derived from any investigative or enforcement activity or proceeding, and not merely the types of proceedings set forth in the statute (*i.e.,* "an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation").

c. Final Rule

After considering the comments, we are adopting Rule 21F–4(b)(1) as proposed. Congress enacted Section 21F in order to provide new incentives for individuals with knowledge of securities violations to report those violations to the Commission. We believe that applying Section 21F prospectively—for new information provided to the Commission after the statute's enactment and not to information previously submitted—is most consistent with Congressional intent and with the language of the statute.[94] Similarly, we do not believe that it would be consistent with Congressional intent for our rules to categorically exclude through the definition of "original information" tips about violations that may arguably be beyond an applicable statute of limitations or that a company may have addressed through remedial action. Rather, considerations such as these are better addressed through our exercise of discretion in determining whether to open an investigation, whether to bring an enforcement action, and the nature and scope of any action filed and relief granted.

In other respects, we believe that our final rules substantially address the issues raised by the commenters. For example, under Rules 21F–4(b)(5) and (6) an individual can be considered the original source of information provided to the Commission by another source (including the individual's employer), or of information that "materially adds" to information already in our possession. Further, Rule 21F–4(c), as adopted, provides that a whistleblower may be eligible for an award based upon information that the whistleblower reports through a company's internal legal and compliance procedures if the company subsequently provides the information to the Commission. In addition, Rule 21F–4(c) provides that, even after an investigation has commenced, a whistleblower can be eligible for award consideration if he or she provides original information that significantly contributes to the success of the Commission's action. Thus, our rules will permit awards to subsequent whistleblowers in appropriate circumstances.

Similarly, we believe that several provisions in our rules will ordinarily operate to exclude whistleblowers whose only source of original information is an existing investigation or proceeding. Information that is exclusively derived from a governmental investigation is expressly excluded from the definition of "original information" under Section 21F(a)(3) of the Exchange Act and our Rule 21F–4(b)(1)(iii). A whistleblower who learns about possible violations only through a company's internal investigation will ordinarily be excluded from claiming "independent knowledge" by operation of either the exclusions from "independent knowledge" set forth in Rules 21F–4(b)(4)(i), (ii), and (iii) (relating to attorneys, auditors, and other persons who may be involved in the conduct of internal investigations), or by Rule 21F–4(b)(4)(vi) (excluding information learned from such individuals). To the extent that information about an investigation or proceeding is publicly available, it is excluded from consideration as "independent knowledge" under Rule 21F–4(b)(2).[95]

3. Rule 21F–4(b)(2)—Independent Knowledge

Proposed Rule 21F–4(b)(2) defined "independent knowledge," one of the constituent elements of "original information," as factual information not derived from publicly available sources. We are adopting the rule as proposed.

a. Proposed Rule

Under our proposed rule, "independent knowledge" was defined to mean factual information in the whistleblower's possession that is not derived from publicly available sources. As we explained in our Proposing Release, publicly available sources may include both sources that are widely disseminated (such as corporate press releases and filings, media reports, and information on the Internet), and sources that, though not widely disseminated, are generally available to the public (such as court filings and documents obtained through Freedom of Information Act requests). Further, as proposed, the definition of "independent knowledge" did not require that a whistleblower have direct, first-hand knowledge of possible violations. Instead, knowledge could be obtained from any of the whistleblower's experiences, observations, or communications (subject to the exclusion for knowledge obtained from public sources, and subject further to the exclusions set forth in Rule 21F–4(b)(4)).

b. Comments Received

Several commenters supported our proposed definition of "independent knowledge." [96] Others were critical of the definition for different reasons. Some commenters criticized our exclusion of information derived from publicly available sources, and urged that awards be available for tips that are based upon various kinds of public information.[97] One of these commenters argued that, because Section 21F does not contain an express exclusion for all information derived from publicly available sources, the only public information that can be excluded from award consideration is information that is derived from the sources that are set forth in Section 21F(a)(3)(C)—*i.e.,* a judicial or administrative hearing, a government report, hearing, audit, or investigation, or the news media.[98] This commenter stated that this interpretation would be consistent with the application of the "public disclosure bar" of the False Claims Act, 31 U.S.C. § 3730(e)(4)). Similarly, this commenter argued that our proposal to exclude publicly-available information from the definition of "independent knowledge" was unsupportable because the statute only excludes claims based upon information that is "already known to the Commission." [99]

We requested comment on whether it is appropriate to consider knowledge that is not direct, first-hand knowledge as "independent knowledge" In response, one commenter urged that we limit "independent knowledge" to first-hand knowledge of the whistleblower.[100] This commenter expressed concerned about the reliability of second-hand information, and the potential that our rule could harm companies by creating an incentive for whistleblowers to report unsubstantiated rumors and other unreliable information. This commenter also suggested that the absence of a first-hand knowledge requirement would encourage circumvention of the statute by permitting persons who are ineligible for awards to give information to third persons in order to enable them to become whistleblowers.

c. Final Rule

After considering the comments, we are adopting Rule 21F–4(b)(2) as proposed. Accordingly, "independent knowledge" means any factual information in the whistleblower's possession that is not derived from publicly available sources. Congress primarily intended our whistleblower program "* * * to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated the securities laws * * *." [101] It is consistent with this purpose to require that "independent knowledge" be derived from a whistleblower's own experiences, observations, or communications, and not from information that is available to the general public.[102]

The objection that our rule should permit submissions based upon public information as long as the information is not derived from a judicial or administrative hearing, a governmental report, hearing, audit, or investigation, or from the news media is not supported by the plain language of Section 21F. The definition of "original information" found in Section 21F(a)(3) requires both that the information be derived from the whistleblower's independent knowledge or analysis (Section 21F(a)(3)(A)), and that it also not be exclusively derived from an allegation in one of these fora (Section 21F(a)(3)(C)). If "independent knowledge" were interpreted to mean merely that the information could not be derived from one of the sources specified in Section 21F(a)(3)(C), then the separate requirement that the whistleblower also have "independent knowledge" would have no meaning.[103]

The same analysis applies to the suggestion that "independent knowledge" cannot exclude publicly-available information and can only exclude information that is "not known to the Commission" from any other

[87] In our Proposing Release we stated that we will interpret the term "judicial or administrative hearing" to include hearings in arbitration proceedings. *See* Proposing Release note 19. One commenter expressed concern that this interpretation would prevent a plaintiff in arbitration from making a whistleblower submission on the basis of his allegations and the evidence adduced at the hearing. *See* letter from Stuart D. Meissner, LLC. However, in that instance, the plaintiff would qualify as the source of the allegations, and nothing in the definition of "original information" would preclude the plaintiff from using evidence adduced at the hearing to support his or her submission to the Commission. Rather, our inclusion of arbitration hearings within the scope of the rule would preclude others who are involved with the arbitration—such as the reporter, or an arbitrator—from using the plaintiff's allegations to make a whistleblower submission for their own benefit.

[88] *See* letter from Bijan Amin; *see also* pre-proposal letter from James Hill.

[89] *See* letter from Hunton & Williams LLP.

[90] *See* letter from DC Bar.

[91] *See* letters from ICI and SIFMA.

[92] *See* letter from ICI.

[93] *See* letter from ABA.

[94] Section 924(b) of Dodd-Frank provides that "Information provided to the Commission in writing by a whistleblower shall not lose the status of original information * * *, if the information is provided by the whistleblower after the effective date of this subtitle."

[95] Further, Form TCR, to be used for whistleblower submissions, requires the whistleblower to state, under penalty of perjury, how he or she obtained the information that is the subject of the submission. A truthful answer that the whistleblower obtained the information from an investigation by a securities exchange or a self-regulatory organization—if the staff were not already aware of the investigation—would likely lead the staff to contact the other authority directly for additional information. In these circumstances, where information is obtained through the normal cooperative arrangements between the Commission and other regulators, the whistleblower's submission would not be deemed to have caused the opening of an investigation, or to have significantly contributed to the success of any action, such as to make the whistleblower eligible for an award under Rule 21F–4(c).

[96] *See* Lotters from Institute of Internal Auditors, Patrick Burns, Auditing Standards Committee, Georg Merkl.

[97] *See* Letters from the VOICES, Wanda Bond, Michael Lawrence, and TAF; *see also* pre-proposal letter from Robin McLeish.

[98] *See* letter from TAF; *see also* letter from VOICES.

[99] Section 21F(a)(3)(B), 15 U.S.C. 78u–6(a)(3)(B). *See* letter from TAF.

[100] *See* letter from ABA.

[101] S. Rep. No. 111–176 at 110 (2010).

[102] However, publicly available information can be included as part of a submission of "independent analysis" under Rule 21F–4(b)(3). *See* discussion below.

[103] The "public disclosure bar" of the False Claims Act operates differently. There, "independent knowledge" is not a separate requirement, but instead is one element of an exception to the rule that otherwise requires a court to dismiss an action if substantially the same allegations or transactions were publicly disclosed in certain specified fora, such as a Federal hearing in which the Government is a party, a Federal government report or investigation, or the news media. 31 U.S.C. 3730(e)(4).

source. The requirement of "independent knowledge" is set forth in Section 21F(a)(3)(A) of the Exchange Act, and is distinct from the requirement in Section 21F(a)(3)(B) that information be not already known to the Commission. In other words, both tests must be met separately as part of the determination of whether information qualifies as "original information."

While we thus exclude information derived from publicly available sources from the definition of "independent knowledge," we do not believe that "independent knowledge" should be further limited to direct, first-hand knowledge. Such an approach could prevent the Commission from receiving valuable information about possible violations from whistleblowers who are not themselves involved in the conduct at issue, but who learn about it through their observations, relationships, or personal diligence.[104] Our final rules provide that, in order to be considered eligible for an award, a whistleblower must provide information that is sufficiently specific, credible, and timely that it causes the staff to open an investigation, or significantly contributes to the success of an enforcement action.[105] We believe that commenters' concerns about whistleblowers providing wholly speculative or unsubstantiated information is most effectively addressed in connection with these determinations rather than by requiring first-hand knowledge as a threshold limitation for whistleblower submissions.[106]

[104] Further, as discussed in our Proposing Release, Congress recently amended the "public disclosure bar" provisions of the False Claims Act, replacing the requirement that a qui tam plaintiff have "direct and independent knowledge" of information with one requiring only "knowledge that is independent and materially adds to the publicly-disclosed allegations or transactions * * *" 31 U.S.C. 3130(e)(4), Public Law 111–148 § 10104(h)(2), 124 Stat. 901 (Mar. 23, 2010). Courts generally defined "direct knowledge" to mean first-hand knowledge from the relator's own work and experience, with no intervening agency. *E.g., United States ex rel. Fried* v. *West Independent School District*, 527 F.3d 439 (5th Cir. 2008); *United States ex rel. Paranich* v. *Sorgnard*, 396 F.3d 326 (3d Cir. 2005). Although, as noted in our Proposing Release, we do not believe that False Claims Act interpretations and precedent are necessarily authoritative for purposes of Section 21F, we note that Congress recently amended the False Claims Act to eliminate the requirement of first-hand knowledge.

[105] *See* Rule 21F–4(c), discussed below.

[106] We have addressed commenters' concern about possible collusion through our revised Rule 21F–8(c)(6).

4. Rule 21F–4(b)(3)—Definition of Independent Analysis

a. Proposed Rule

Under Proposed Rule 21F–4(b)(3), "analysis" was defined to mean the whistleblower's own examination and evaluation of information that may be generally available, but which reveals information that is not generally known or available to the public. Analysis was defined as "independent" if it was the whistleblower's own analysis, whether done alone or in combination with others. As was explained in our Proposing Release, this definition was intended to recognize that there are circumstances where individuals can review publicly available information, and, through their additional evaluation and analysis, provide vital assistance to the Commission staff in understanding complex schemes and identifying securities violations.

b. Comments Received

Although we received few responses to our request for comment on suggested alternative definitions of "independent analysis," [107] most commenters who addressed the proposed rule appeared to agree with the rule's fundamental premise that "independent analysis" anticipates that the whistleblower will apply his or her own evaluation and insight to information that may be derived from publicly available sources.[108] Two commenters suggested we clarify that "independent analysis" can be based on public sources, including the sources described in Section 21F(a)(3)(C) and Proposed Rule 21F–4(b)(1)(iii).[109] One commenter criticized our proposed definition of "independent analysis" on the ground that the requirement that analysis reveal information that is "not generally known or available" would preclude an award to a whistleblower who caused us to focus on publicly available information of which we were not otherwise aware.[110] Another commenter urged that "independent analysis" be restricted to analysis of the whistleblower's own "independent knowledge," defined by the commenter to be limited to first-hand knowledge, along with other purely objective facts such as share price or trading volume.[111]

[107] *See* letters from Wanda Bond, Auditing Standards Committee, and Kurt S. Schulzke.

[108] *See* letters from Wanda Bond, Auditing Standards Committee, Kurt S. Schulzke, POGO (referencing the importance of whistleblowers "who often perform original analysis based on publicly available sources").

[109] *See* letters from POGO and VOICES.

[110] *See* letter from TAF.

[111] *See* letter from ABA.

c. Final Rule

After considering the comments, we are adopting Rule 21F–4(b)(3) as proposed, with a slight modification to clarify that "independent analysis" can be based upon the whistleblower's evaluation of publicly available sources.[112] Thus, as adopted, Rule 21F–4(b)(3) defines "analysis" to mean the whistleblower's own examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public.

We believe that "independent analysis" requires that the whistleblower do more than merely point the staff to disparate publicly available information that the whistleblower has assembled, whether or not the staff was previously "aware of" the information. "Independent analysis" requires that the whistleblower bring to the public information some additional evaluation, assessment, or insight.

As with other elements of the definition of "original information," we anticipate that whether "independent analysis" provided to the Commission may be eligible for award consideration will primarily depend (assuming all other requirements are met) on an evaluation of whether the analysis is of such high quality that it either causes the staff to open an investigation, or significantly contributes to a successful enforcement action, as set forth in Rule 21F–4(c). This analysis is discussed further below.

For reasons similar to those discussed above with respect to the definition of "independent knowledge," we also do not believe it would be consistent with the purposes of Section 21F to restrict "independent analysis" to analysis based upon facts of which the whistleblower has direct, first-hand knowledge. Such an interpretation would preclude award consideration even for highly-probative, expert analysis of data that may suggest an important new avenue of inquiry, or otherwise materially advance an existing investigation. We do not believe that Congress intended this result.

5. Rules 21F–4(b)(4)(i) through (vi)—Exclusions From Independent Knowledge and Independent Analysis

Proposed Rules 21F–4(b)(4)(i) through (vii) described circumstances under

[112] This would include public information that may be derived from the sources identified in Section 21F(a)(3)(C) and Rule 21F–4(b)(1)(iii); *i.e.*, a judicial or administrative hearing, a government report, hearing, audit, or investigation, or the news media.

which we would not consider a whistleblower's submission to be derived from independent knowledge or independent analysis. We are adopting a number of these exclusions, but with significant revisions in response to comments that we received.[113] These comments and the resulting modifications to the rules are discussed below with respect to the specific exclusions. In this section, we briefly address the exclusions as a whole.

a. Proposed Rules

As proposed, Rule 21F–4(b)(4) provided that the Commission would not credit a whistleblower with "independent knowledge" or "independent analysis" where the whistleblower obtained the knowledge, or the information upon which the whistleblower's analysis was based, under certain circumstances. These included information that was: (1) Subject to attorney-client privilege or otherwise obtained in connection with the legal representation of a person or entity (proposed Rules 21F–4(b)(4)(i) and (ii)); (2) obtained through the performance of an engagement required under the securities laws by an independent public accountant, if the information related to a violation by the engagement client, or the client's officers, directors, or employees (proposed Rule 21F–4(b)(4)(iii)); (3) communicated to a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity with the reasonable expectation that he or she would cause the entity to respond appropriately (proposed Rule 21F–4(b)(4)(iv)); (4) otherwise obtained through an entity's legal, compliance, audit, or similar functions or processes for identifying, reporting, and addressing potential non-compliance with law (proposed Rule 21F–4(b)(4)(v)); (5) obtained in violation of Federal or state criminal law (proposed Rule 21F–4(b)(4)(vi)); and (6) obtained from any of the persons excluded by Rule 21F–4(b)(4). Certain of these exclusions were subject to exceptions that are discussed below in connection with the specific rules.

b. Comments Received

Some commenters generally criticized our approach of defining exclusions from "independent knowledge" and "independent analysis." These commenters argued that Section 21F does not permit any exclusions from award eligibility other than those expressly provided for in Section 21F(c)(2). They also expressed concern that the proposed exclusions were vague and uncertain, and therefore would discourage potential whistleblowers from taking the personal and professional risks associated with coming forward. These commenters also believed that the exclusions would operate to disqualify broad categories of individuals who are most likely to have information about misconduct.[114]

In our Proposing Release, we requested comment on whether we should extend the exclusions from "independent knowledge" and "independent analysis" to other professionals (in addition to attorneys and independent public accountants) who may obtain information about possible securities violations in the course of their work for clients. A number of commenters urged that we do so. These commenters emphasized that boards and companies frequently retain outside consultants to advise them on matters such as compensation, business strategies, risk, and the effectiveness of their ethics and compliance programs. These commenters expressed concern that permitting such outside advisers and consultants to become whistleblowers will harm the free flow of candid advice and information that is necessary to these relationships.[115]

c. Final Rules

After considering the comments, we have made several changes to the exclusions set forth in Rules 21F–4(b)(4)(i) through (vii), which we have renumbered as Rules 21F–4(b)(4)(i) through (vi). We have determined not to extend the exclusions to other outside professionals.

We believe that the exclusions, as modified, are reasonable in scope and consistent with effective enforcement of the securities laws.[116] The exclusions generally apply to narrow categories of individuals whose knowledge does not, in our view, constitute "independent knowledge or analysis *of a whistleblower*," because the information or analysis was acquired by an individual: (1) On behalf of a third party operating in a sensitive legal, compliance, or governance role (exclusions (i), (ii) and (iii)(A)–(C)); or (2) in the performance of an engagement required by the Federal securities laws (exclusion (iii)(D)); or (3) by illegal means (exclusion (iv)). Only when one of the exceptions to these exclusions set forth in the rules applies should information acquired in these situations constitute independent knowledge or analysis of the whistleblower.

We believe this result is consistent with the purpose of promoting effective enforcement of the securities laws. Consultation with attorneys can improve compliance on the part of entities and individuals.[117] The

[113] We have also added the phrase "in any of the following circumstances" in the opening clause of Rule 21F–4(b)(4) in order to make clear that information is excluded from being considered as "independent knowledge" or "independent analysis" if any one of the exclusions apply.

[114] *See* letters from TAF and NWC; *see also* letter from Stuart D. Meissner, LLC.

[115] *See* letters from NACD (advocating excluding individuals hired by boards of directors for purposes of advice and consultation); the Ethisphere Institute (exclusions should extend to external advisers who evaluate corporate ethics and compliance programs); GE Group (should exclude professionals that have relationships of trust and confidence with companies, including investment bankers, financial advisers, compensation consultants, and other consultants); TRACE International, Inc. (noting particular role of outside experts in FCPA compliance efforts, and advocating that exclusions include professionals who are regularly engaged by companies to assist with auditing, creating and implementing robust anti-bribery compliance programs and internal controls, including professionals who perform due diligence on third party relationships as required by the securities laws).

[116] Section 21F does not define the terms "independent knowledge" or "independent analysis," but Section 21F(j) authorizes the Commission to issue rules "to implement the provisions of [Section 21F] consistent with the purposes of [Section 21F]." A substantial purpose of Section 21F is to promote effective enforcement of the securities laws.

[117] A number of comments asserted that, in addition to the attorney-client privilege, any information received in breach of other confidential relationships recognized by common-law evidentiary privileges should be excluded from the definition of independent knowledge. *See, e.g.,* joint letter from Alcoa Inc., Celanese Corporation, Citigroup, Ingersoll-Rand plc, Intel Corporation, Johnson & Johnson, JPMorgan Chase & Co., Kraft Foods Inc., Pfizer Inc., Prudential Insurance Company America, and Tyco International Ltd. ("Alcoa Group"); Auditing Standards Committee; TRACE International, Inc. *But see* letter from NWC (opposing any exclusion for privileged information). Those commenters generally took the position that these relationships have historically been recognized as deserving protection based on public policy considerations, and creating a monetary incentive for those holding this sort of privileged information to divulge it to us is contrary to those public policy considerations. We have determined to exclude (subject to the exceptions set forth in these rules) only information received in breach of the attorney-client privilege, not the other confidential relationships recognized at common-law. Although we recognize the significant public policies underlying all of these confidential relationships, we believe that for purposes of the whistleblower program the attorney-client privilege stands apart because of the significance of attorney-client communications for achieving compliance with the Federal securities laws. We will continue to address assertions of other evidentiary privileges through our normal investigative and litigation processes. *See e.g.,* SEC Division of Enforcement Manual § 3.3.1. In addition, contrary to the suggestion from a number of commenters, *see, e.g.,* letter from PricewaterhouseCoopers, LLP ("PwC"), we are not excluding information that is received in breach of state-law confidentiality requirements, such as those imposed on auditors, because to do so could inhibit important Federal-law enforcement interests.

recommended exclusions for certain company officials and third parties who assist companies in investigations of possible violations of law are narrowly focused, and promote the goal of ensuring that the persons most responsible for an entity's conduct and compliance with law are not incentivized to promote their own self-interest at the possible expense of the entity's ability to detect, address, and self-report violations. The exclusion for auditors performing engagements required by the securities laws reflects the fact that these individuals occupy a special position under the securities laws to perform a critical role for investors. Further, as adopted, our rule permits such individuals to become whistleblowers under certain circumstances.[118]

Finally, although we recognize the important role that outside advisers and consultants play in many aspects of corporate policy and decision-making, we believe that additional exclusions for such professionals would too broadly preclude individuals with possible inside knowledge of violations from coming forward to assist the Commission in identifying and prosecuting persons who have violated the securities laws.

(a) Attorney-Client Privilege and Other Attorney Conduct

a. Proposed Rule

As proposed, Rule 21F–4(b)(4)(i) excluded from the definition of "independent knowledge" or "independent analysis" information that was obtained through a communication that is subject to the attorney-client privilege. In addition, Proposed Rule 21F–4(b)(4)(ii) excluded from the definition of "independent knowledge" or "independent analysis" information that a potential whistleblower obtained as the result of the legal representation of a client on whose behalf the whistleblower's services, or the services of his or her employer or firm had been retained, unless the disclosure had been authorized as stated above. Neither of these exclusions applied where an attorney is permitted to disclose otherwise privileged information; for example, if the privilege has been waived or if the disclosure is permissible pursuant to the Commission's attorney conduct rules[119] or applicable state statutes or bar rules governing the ethical behavior of attorneys.[120]

The proposed exclusions in 21F–4(b)(4)(i) and (ii) recognized the prominent role that attorneys play in all aspects of practice before the Commission and the special duties they owe to clients. We observed that compliance with the Federal securities laws is promoted when individuals, corporate officers, and others consult with counsel about possible violations, and the attorney-client privilege furthers such consultation.[121] This important benefit could be undermined if the whistleblower award program created monetary incentives for counsel to disclose information about possible securities violations in violation of their ethical duties to maintain client confidentiality.[122]

The proposed exceptions for information obtained through privileged attorney-client communications and for information obtained in the legal representation of others did not apply, however, where the attorney is already permitted to disclose the substance of a communication that would otherwise be privileged. This included, for example, circumstances where the privilege has been waived, or where disclosure of confidential information to the Commission without the client's consent is permitted pursuant to either 17 CFR 205.3(d)(2) or the applicable state bar ethical rules.[123]

The exclusions did not preclude an individual who has independent knowledge of facts indicating possible securities violations from becoming a whistleblower if that individual chooses to consult with an attorney. Facts in the possession of such an individual do not become privileged simply because he or she consulted with an attorney.

b. Comments Received

The Commission received a number of comments related to the exclusions set forth in Proposed Rules 21F–4(b)(4)(i) and (ii). Most commenters were generally supportive of the exclusions for the reasons that we identified in our proposing release.[124] A few commenters, however, asserted that the exclusions are unnecessary, and that instead we should rely upon judicial decisions and state bar opinions to decide on a case-by-case basis whether we could use information that would otherwise be covered by the proposed exclusions.[125]

Many commenters who were generally supportive of the exclusions suggested modifications.[126] Several commenters recommended that the exclusions expressly apply to all information coming from

[118] *See* Rule 21F–4(b)(4)(vi). The exclusions for information obtained in violation of Federal or state criminal law and for information obtained from excluded sources are discussed below.

[119] 17 CFR 205.3(d)(2). This Commission Rule permits attorneys representing issuers of securities to reveal to the Commission "confidential information related to the representation to the extent the attorney reasonably believes necessary" (1) to prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors; (2) to prevent the issuer, in a Commission investigation or administrative proceeding, from committing perjury, suborning perjury, or committing any act that is likely to perpetrate a fraud upon the Commission; or (3) to rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

[120] *E.g.,* California Evidence Code § 956 ("There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or plan to commit a crime or fraud.").

[121] *See Upjohn Co.* v. *U.S.,* 449 U.S. 383, 389 (1981) ("[The attorney-client privilege's] purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.").

[122] *United States of America ex rel Fair Laboratory Practices Associates* v. *Quest Diagnostics, Inc.,* 2011 WL 1330542 (S.D.N.Y. Apr. 5, 2011) (emphasizing "the great Federal interest in preserving the sanctity of the attorney-client relationship," the court dismissed a False Claims Act *qui tam* action brought by a partnership where the suit was based on attorney-client privileged information that one of the relator's partners, an attorney, disclosed in violation of New York's attorney ethics laws).

[123] *See* Model Rules of Professional Conduct 1.6(b), 1.13(c). Model Rule 1.6(b), variants of which have been adopted by nearly every state in the country and the District of Columbia, permits the disclosure of information relating to the representation of a client, among other things, where the lawyer reasonably believes the disclosure is necessary (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; and (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services. *See* Model Rule 1.6(b)(1)–(3). Model Rule 1.13(c) provides that where an attorney reports violations of law to the highest authority within an organization, and "despite the lawyer's efforts * * * the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization," the lawyer may reveal information relating to the representation., notwithstanding Rule 1.6, but only to the extent "the lawyer reasonably believes necessary to prevent substantial injury to the organization."

[124] *See, e.g.,* letters from NSCP; Grohovsky Group.

[125] *See, e.g.,* letters from TAF; Stuart D. Meissner, LLC.

[126] *See, e.g.,* letters from M.J. O'Loughlin; joint letter from Apache, Cardinal Health, Goodyear, HP, Merck, Microsoft, Proctor & Gamble, TRW, United Technologies ("Apache Group"); Financial Services Roundtable; and GE Group; Arent Fox LLP; CCMC.

communications subject to the attorney-client privilege, whether or not the whistleblower was an attorney, because non-attorneys are often in possession of information that is subject to the privilege.[127] Other commenters wanted us to modify the rules to ensure that we are not receiving privileged information.[128] For example, one commenter requested that the rule explicitly state that we are not seeking privileged information, and, that if such information is provided to us, we will not argue that the privilege was waived.[129] Other commenters recommended that the rule should exclude all information coming from communications with attorneys, even if the privilege had been waived.[130]

One commenter recommended that we narrow the scope of the exclusions so that, if the privileged information relates to an entity's wrong-doing and the entity does not appropriately handle the information, a whistleblower will be eligible for an award if he submits it to us.[131]

c. Final Rule

After reviewing the comments, we are adopting proposed Rules 21F–4(b)(4)(i) and (ii) with several modifications.[132]

First, we have modified the language to clarify that both exclusions apply to non-attorneys. Thus, if an attorney in possession of the information would be precluded from receiving an award based on his or her submission of the information to us, a non-attorney who learns this information through a confidential attorney-client communication would be similarly disqualified. Correspondingly, if an attorney could submit the information to us under the same circumstances consistent with applicable state bar rules (*e.g.,* based on waiver of the privilege or a crime-fraud exception), then a non-attorney would similarly be eligible for an award for disclosing the information.

Second, we have modified Rule 21F–4(b)(4)(ii) to clarify that it applies to attorneys who work in-house for an entity and provide legal services (*e.g.,* attorneys in an entity's general counsel's office). The proposing rule may have been unclear about whether in-house attorneys would be covered by Rule 21F–4(b)(4)(ii) because language in the rule stated that the individual's services, or the services of his or her employer or firm, need to "have been retained." Additional ambiguity was created by proposed Rule 21F–(4)(b)(4)(iv), which would have created a separate exclusion for individuals who have "legal" responsibilities for an entity. The changes to the final rule clarify our intention that all attorneys—whether specifically retained or working in-house—are eligible for awards only to the extent that their disclosures to us are consistent with their ethical obligations and our Rule 205.3.

With regard to the comments that we ensure that whistleblowers are not providing us with privileged information, we believe that Rules 21F–4(b)(4)(i) and (ii) sufficiently address this concern because these rules make clear that we will not reward attorneys or others for providing us with information that could not otherwise be provided to us consistent with an attorney's ethical obligations and Rule 205.3.[133] While some comments suggested expanding [134] or narrowing [135] the exclusions in Rules 21F(B)(4)(i) and (ii), we believe that the final rule strikes the right balance because these exclusions are consistent with the public policy judgments that have been made as to when the benefits of permitting disclosure are justified notwithstanding any potential harm to the attorney-client relationship.

Nor do we agree with the comments suggesting that the exclusions are unnecessary because even if we receive attorney-client privileged information we can thereafter rely upon judicial opinions and ethics decisions to determine whether we can use it.[136] In our view, the exclusions send a clear, important signal to attorneys, clients, and others that there will be no prospect of financial benefit for submitting information in violation of an attorney's ethical obligations.

(b) Responsible Company Personnel, Compliance Processes, and Independent Public Accountants

As proposed, Rule 21F–4(b)(4)(iii) excluded independent public accountants who obtained information through an engagement required under the Federal securities laws in certain circumstances. Proposed Rules 21F–4(b)(4)(iv) and (v) provided that certain responsible company officials and others who learned information through or in relation to a company's processes for identifying and addressing possible violations of law would not be able to use that information as the basis for a whistleblower submission, subject to certain exceptions set forth in the rules. We have made substantial changes to the proposed rules. As modified, we are adopting these provisions as Rules 21F–4(b)(4)(iii) and (v).

(i) Proposed Rule 21F–4(b)(4)(iii)

a. Proposed Rule

Proposed Rule 21F–4(b)(4)(iii) excluded from the definition of "independent knowledge" or "independent analysis" information that was obtained through the performance of an engagement required under the securities laws by an independent public accountant, if that information related to a violation by the engagement client or the client's directors, officers or other employees. This proposed exclusion would have applied only if the information related to a violation by the engagement client or the client's directors, officers or other employees.

b. Comments Received

We received many comments related to this rule. Several commenters submitted substantially similar comments about the proposed rule.[137] Generally these commenters recommended expanding the statutory

[127] *See* letters from Apache Group; Financial Services Roundtable; and GE Group.

[128] *See, e.g.,* letters from Arent Fox LLP; CCMC.

[129] *See* letter from Apache Group.

[130] *See* letter from NACD. *See also* letter from Eric Dixon, LLC.

[131] Letter from the Institute of Internal Auditors.

[132] In addition, we made several stylistic changes to Rules 21F–4(b)(4)(i) and (ii) that do not affect the substance of either provision. We have replaced "authorized" with "permitted" in stating that attorney-client privileged information, or information learned from the legal representation of a client, may qualify as independent knowledge if its disclosure "would otherwise be permitted by an attorney." *See* letter from M.J. O'Loughlin. We have also moved the phrase "If you obtained the information" from Proposed Rule 21F–4(b)(4) into both Rules 21F–4(b)(4)(i) and (b)(4)(ii).

[133] We have, however, modified Form TCR to ask whether the whistleblower's submission relates to an entity of which the whistleblower is or was a "counsel." *See* Form TCR, Item D5a. In addition, we modified Item 8 on proposed form TCR to ask the whistleblower to identify with particularity any information submitted by the whistleblower that was obtained from an attorney or in a communication where an attorney was present. These questions will enhance the staff's ability to identify the risk of receiving privileged information and provide an appropriate way to balance the Commission's interest in receiving information with the policy goal of protecting the privilege. In addition, knowing this information may allow the staff to quickly segregate potentially privileged information for more detailed review and consideration.

[134] *See, e.g.,* letter from NACD (suggesting that Rule 21F–4(b)(4)(i) exclude all information coming from communications with attorneys, even if the privilege had been waived).

[135] *See, e.g.,* letter from Institute of Internal Auditors (suggesting the exclusion for information subject to the attorney-client privilege should be conditioned on the company in question having investigated and reported the violation in question, so that if the entity does not appropriately handle the information, an individual should be able to report the violation and participate in any whistleblower award).

[136] *See* letters from TAF; NSCP.

[137] Letters from PwC; Ernst & Young; KPMG; the Center for Audit Quality.

exclusion to disqualify submissions that identified violations in connection with the firm's own conduct,[138] as well as through the performance of non-audit services for audit clients,[139] and audit or other services for non-public clients.[140] These commenters cited to duties of confidence and reporting requirements to which independent public accountants are subject under state law and professional conduct codes, the importance of candor in the audit relationship, and practical problems associated with permitting employees of accounting firms to become whistleblowers in some relationship contexts but not in others.

One commenter urged that the exclusion for independent public accountants should also extend to information obtained by internal company personnel in connection with their role supporting an independent public accountant conducting an audit required under the securities laws." [141]

One commenter similarly urged that the exclusion be extended to all employees who provide information at the request of auditors (both independent and internal) and observed that under the proposed rule company accountants providing information at the request of external auditors will still be considered to have "independent knowledge and 'independent analysis." [142]

Another commenter expressed the view that independent public accountants (as well as attorneys) should be permitted to become whistleblowers, but with certain limitations.[143] This commenter pointed out that a junior member of the team may not be able to effect change within a client if the senior members are unwilling to oppose management. According to this commenter, auditors and attorneys should be required to report violations internally first, have the ability to do so anonymously, and then be permitted to make a whistleblower submission to the Commission 75 days after making an internal report (but not later than 90 days after their report) if the entity does not respond appropriately.

One commenter was concerned about circumstances where an independent public accounting firm might violate its duties to report under Exchange Act Section 10A.[144] This commenter argued that proposed Rule 21F–4(b)(4)(iii) should be revised to permit whistleblowing when information about illegal acts is not reported to the Commission by the client or the public accounting firm within the time periods specified in Section 10A.

Finally, as noted above, a number of commenters strongly objected in principle to all of our efforts to create exclusions from independent knowledge that are not expressly set forth in Section 21F, including those for independent public accountants.[145]

(ii) Proposed Rules 21F–4(b)(4)(iv) and (v)

a. Proposed Rules

Proposed Rule 21F–4(b)(4)(iv) excluded from the definitions of "independent knowledge" and "independent analysis" information obtained by a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity if the information was communicated to that person with the reasonable expectation that he or she would take appropriate steps to cause the entity to respond to the violation. Proposed Rule 21F–4(b)(4)(v) excluded information that was otherwise obtained from or through an entity's legal, compliance, audit, or similar functions or processes for identifying, reporting, and addressing potential non-compliance with applicable law. Each rule was subject to an exception that made the exclusion inapplicable if the entity did not disclose the information to the Commission in a reasonable time, or proceeded in bad faith.

As we explained in our Proposing Release, the rationale for these proposed exclusions was our interest in not implementing Section 21F in a way that created incentives for responsible persons who are informed of wrongdoing, or others who obtain information through an entity's legal, audit, compliance, and similar functions, to circumvent or undermine the proper operation of the entity's internal processes for responding to violations of law. We were concerned about creating incentives for company personnel to seek a personal financial benefit by "front running" internal investigations and similar processes that are important components of effective company compliance programs. On the other hand, we proposed that these exclusions would no longer apply if the entity did not disclose the information to the Commission within a reasonable time or proceeded in bad faith, thereby making an individual who knew this information eligible to become a whistleblower based upon his or her "independent knowledge" of the violations.

b. Comments Received

We received many comments expressing sharply different views on these rules. Several commenters expressed strong opposition to the proposed rules. Among other things, these commenters said that the proposed rules would preclude submissions from large numbers of individuals who were in the best position to know about misconduct at companies; that such deference to internal compliance processes is not warranted; that compliance and audit officials may be subject to retaliation, in particular in cases where senior management is implicated in wrongdoing; that the proposed rules were overly broad in their potential application to all supervisors and all employees who had any exposure to compliance and related processes even if the employee had other sources of knowledge; and that the exceptions to the proposed rules suffered from a lack of clarity that would make them unworkable in practice and would strongly discourage potential whistleblowers.[146]

Other commenters generally supported these exclusions in concept, but offered numerous and varied suggestions for expanding, clarifying, or modifying the proposed rules. For example, some recommended broadening the exclusions to encompass other categories of employees, or clarifying that the proposed rules would cover specific functions, including operations, finance, technology, credit, risk, and similar internal control functions; product management or other personnel responsible for independent valuations of positions at financial services firms; persons who perform the designated functions at subsidiaries or other units of an entity; persons involved in processes relating to required officer certifications and management disclosures under Sections 302, 404, and 906 of the Sarbanes-Oxley Act; and persons performing or supporting an internal audit function, including those individuals who may perform the functions of internal audit but whose job titles and responsibilities may differ.[147]

[138] Letters from PwC; Ernst & Young; KPMG.

[139] Letters from PwC; Deloitte & Touche, LLP ("Deloitte"); KPMG.

[140] Letters from PwC; Deloitte; KPMG.

[141] Letter from ABA.

[142] Letter from NACD.

[143] Letter from DC Bar.

[144] Letter from TAF.

[145] Letters from NWC; NCCMP; Stewart D. Meissner, LLC; TAF.

[146] *See* letters from NWC; Stuart D. Meissner, LLC; Daniel J. Hurson; TAF; POGO; and Mark Thomas.

[147] *See* letters from ABA; SIFMA; Davis Polk; NSCP; and NACD.

Commenters also offered different views on the exceptions to the proposed rules permitting use of the excluded information if the entity failed to disclose the information to the Commission within a reasonable time or acted in bad faith. A number of commenters argued against the exceptions and in favor of an absolute preclusion of persons in the designated categories from becoming whistleblowers. These commenters generally took the view that the persons described in Proposed Rules 21F–4(b)(4)(iv) and (v) should promote a culture of compliance and should be required to utilize internal procedures and systems to address and report instances of noncompliance in all circumstances.[148] Certain other commenters recommended that our rules provide that persons who have a legal, compliance, or similar function in a company would be ineligible for an award unless they have first reported the information to an entity's chief legal officer, chief compliance officer, or a member of the board of directors.[149]

A number of commenters took issue with the "reasonable time" language in Proposed Rules 21F–4(b)(4)(iv) and (v) and suggested alternative approaches for determining when persons described in the rules might be permitted to make whistleblower submissions.[150] Many of these commenters argued that the "reasonable time" standard would, in practice, require companies to disclose all allegations of wrongdoing, regardless of considerations such as the materiality or credibility of the allegations, or the results of the company's investigation. Others pointed out that, because the standard lacked clarity, it would be difficult for persons in these categories to determine whether the company had disclosed the violation and whether it had done so within a "reasonable time." Some commenters recommended that we define a "reasonable time" as some fixed period; *e.g.,* 90–180 days.[151]

Finally, commenters from diverse perspectives shared the view that aspects of the proposed rules were vague and open to subjective interpretations. Some believed that the lack of clarity could have the effect of discouraging potential whistleblowers because they would not want to risk their livelihoods and reputations in the face of uncertainty concerning whether they might be eligible for an award.[152] However, others suggested that vagueness would encourage persons in the categories designated in the proposed rules to make their own subjective determinations (for example, of whether a "reasonable time" had passed), and would therefore prove disruptive to internal compliance mechanisms.[153]

(iii) Final Rules 21F–4(b)(4)(iii) and (v)

After considering the comments, we are adopting the proposed rules with substantial modifications. These provisions have been combined and are now set forth in Rules 21F–4(b)(4)(iii) and (v).

As adopted, Rules 21F–4(b)(4)(iii)(A) through (C) address responsible company personnel with compliance-related responsibilities. Rule 21F–4(b)(4)(iii)(D) (in conjunction with Rule 21F–8(c)(4), discussed below) addresses independent public accountants.[154] Rule 21F–4(b)(4)(v) sets forth exceptions that apply to these exclusions. These rules are discussed separately below.

a. Rules 21F–4(b)(4)(iii)(A) Through (C)

As discussed above, we believe there are good policy reasons to exclude information from consideration as "independent knowledge" or "independent analysis" in the hands of certain persons, and in certain circumstances, where its use in a whistleblower submission might undermine the proper operation of internal compliance systems. At the same time, we do not think it serves the purposes of Section 21F to apply this principle in a manner that creates expansive new exclusions for broad categories of company personnel (*e.g.,* any supervisor, or any employee involved in control functions or in processes related to required CEO and CFO certifications). Instead, we believe that the better approach, and one consistent with Congressional intent, is to adopt more tailored exclusions for "core" persons and processes related to internal compliance mechanisms, and to enhance the incentives for employees to report wrongdoing through their company's established internal procedures.[155]

In addition, we agree with the commenters who stated that greater clarity in these rules will assist both whistleblowers and companies. For this reason, we have identified by title or function specific categories of personnel to whom the rules apply.

Thus, as adopted, Rules 21F–4(b)(4)(iii)(A) through (C) describe three categories of persons whom we will not treat as having "independent knowledge" or "independent analysis" for purposes of a whistleblower submission, unless one of the exceptions listed in paragraph (b)(4)(vi) applies.[156] The first category, set forth

[148] *See* letters from Davis Polk; Jones Day; National Association of Criminal Defense Lawyers; Paul, Hastings, Janofsky & Walker LLP ("Paul Hastings"); Financial Services Roundtable; Alcoa Group; Michael Davis; Les M. Taeger; AT&T Inc.; Eric Dixon, LLC; Valspar; joint letter from Joseph Murphy, Esq., Donna Boehme, Esq., Rebecca Walker, Esq. ("Murphy"); Ethisphere Institute.

[149] *See* joint letter from U.S. Chamber of Commerce, Americans for Limited Government, Ryder Systems, Inc. Financial Services Institute, Inc., Verizon, White & Case, LLP ("Chamber of Commerce Group"); letters from AT&T; National Association of Criminal Defense Lawyers and Apache Group; *see also* letter from DC Bar (suggesting that individuals in these categories be required to report violations internally first and wait 75 days for the entity to respond appropriately before they are eligible to become whistleblowers).

[150] *See* letters from ABA (eliminate "reasonable time" standard and only permit use of information in the event of bad faith); Society of Corporate Secretaries (same); DC Bar (require individuals in these categories to report violations internally first and wait 75 days for the entity to respond appropriately before they are eligible to become whistleblowers.); Cleary Gottlieb Steen & Hamilton LLP (replace "reasonable time" with "reasonable and appropriately substantiated basis for believing that the company has failed to remediate the alleged problem or has acted in bad faith"); Apache Group (permit compliance personnel to become whistleblowers if company failed to investigate and remediate, including consideration of whether to self-report, within a reasonable time); Chamber of Commerce Group (permit personnel in these categories to use information only after reporting internally, and if company failed to disclose information concerning substantiated violations in a reasonable time).

[151] *See* letters from Patrick Burns, NACD, John G. Connolly, Auditing Standards Committee, Financial Services Roundtable.

[152] *See* letters from TAF, DC Bar, Daniel J. Hurson, Stuart D. Meissner LLC.

[153] *See* letters from ABA, Financial Services Roundtable, Society of Corporate Secretaries, Protiviti, Alcoa Group.

[154] We are addressing independent public accountants through the rules noted above instead of adopting proposed Rule 21F–4(b)(4)(iii). Paragraph (D) of Rule 21F–4(b)(4)(iii), discussed below, excludes from the definition of independent knowledge or analysis information that an accountant learns because of his work on an engagement required under the Federal securities laws unless certain enumerated exceptions apply. Rule 21F–8(c)(4) makes a whistleblower ineligible from being considered for an award if the information is gained through an audit of financial statements required under the securities laws and the submission is "contrary to the requirements of Section 10A * * *" as provided for in Section 21F(c)(2)(C) (15 U.S.C. 78u–6(c)(2)(C)). After considering the competing views of commenters, we believe these provisions, taken together, strike a balance between the statute's goal of encouraging high quality submissions by whistleblowers and a policy of preventing auditors from getting a windfall from performing their duties.

[155] With respect to enhanced incentives, as discussed below, we are adopting a rule that creates additional opportunities for employees to obtain whistleblower awards by reporting information through a company's internal whistleblower, legal, or compliance mechanisms before or at the same time that they file a whistleblower submission with us. *See* Rule 21F–4(c).

[156] Rule 21F–4(b)(4)(iii) only applies to the extent that an individual is not subject to any of the exclusions set forth in Rules 21F–4(b)(4)(i) or (ii). Thus, for example, if a company officer receives a

Continued

in paragraph (A), is officers, directors, trustees, or partners of an entity if they obtained the information because another person informed them of allegations of misconduct, or they learned the information in connection with the entity's processes for identifying, reporting, and addressing potential non-compliance with law. The term "officer" is defined in Rule 3b–2 under the Exchange Act,[157] and means "a president, vice president, secretary, treasurer or principal financial officer, and any person routinely performing corresponding functions with respect to any organization whether incorporated or unincorporated." For example, a managing member of a limited liability company who performs these types of functions would ordinarily fall within this rule.

This provision combines and modifies several concepts that were previously included in Proposed Rules 21F–4(b)(4)(iv) and (v). As noted, we have identified with greater specificity the persons who are covered by the rule. Further, instead of making the exclusion applicable when information is communicated to one of these persons "with the reasonable expectation that [the recipient] would take steps to cause the entity to respond appropriately to the violation," the rule applies whenever one of the designated persons is "informed * * * of allegations of misconduct." Thus, when an officer or one of the other designated persons receives a report of possible illegal conduct, the rule applies without the recipient having to evaluate the "expectations" of the person who made the report.[158] We have also narrowed the scope of the proposed rule by removing non-officer supervisors from the list of designated persons. We agree with those commenters who stated that including all supervisors at any level would create too sweeping an exclusion of persons who may be in a key position to learn about misconduct, and that such an exclusion would not further the purposes of Section 21F.[159]

Paragraph (A) does not preclude officers and the other designated persons from obtaining an award for a whistleblower submission in all circumstances. As noted, the rule applies when someone else informs a person in the designated categories about allegations of misconduct, or the designated individual learns the information in connection with the entity's processes for identifying, reporting, and addressing potential non-compliance with law.[160] Examples include learning about a violation because an employee reports misconduct to the designated person, being informed of an allegation of misconduct that came into the company's hotline, or learning of a report from the company's auditors regarding a potential illegal act. Paragraph (A) is not intended to establish a general bar against officers, directors, and other designated persons becoming whistleblowers any time they observe possible violations at a company or other entity. For example, paragraph (A) does not prevent an officer from becoming eligible for a whistleblower award if the officer discovers information indicating that other members of senior management are engaged in a securities law violation.

The second category of persons that Rule 21F–4(b)(4)(iii) excludes from the definitions of "independent knowledge" and "independent analysis," as set forth in paragraph (B), are employees whose principal duties involve compliance or internal audit responsibilities, as well as employees of outside firms that are retained to perform compliance or internal audit work for an entity. For example, a compliance officer is subject to the rule whether he or she learns about possible violations in the course of a compliance review or another employee reports the information to the compliance officer. Unlike the proposed rule, the rule does not include a company's lawyers in either of paragraphs (A) or (B), because lawyers are subject to professional obligations in their dealings with clients, and these are specifically addressed in Rules 21F–4(B)(4)(i) and (ii).[161]

Paragraph (C) of Rule 21F–4(b)(4)(iii) excludes information learned by employees or other persons associated with firms that are retained to conduct an internal investigation or inquiry into possible violations of law in circumstances (as noted above), where the information is not already excluded under Rules 21F–4(b)(4)(i) or (ii).

b. Rule 21F–4(b)(4)(iii)(D)

Paragraph (D) of Rule 21F–4(b)(4)(iii) excludes information that is learned by employees of, or other persons associated with, a public accounting firm through an audit or other engagement required under the Federal securities laws, if that information relates to a violation by the engagement client or the client's directors, officers, or other employees. It only applies to those engagements which are not covered by Rule 21F–8(c)(4).

Similar to other provisions under Rule 21F–4(b)(4), we are adopting this new paragraph based on our concern about creating incentives for independent public accountants to seek a personal financial benefit by "front running" the firm's proper handling of information obtained through engagements required under the Federal securities laws. Examples include engagements for broker dealer annual audits pursuant to Rule 17a–5 under the Exchange Act [162] and compliance with the custody rule by advisors.[163]

Paragraph (D), however, does not limit an individual from making a specific and credible submission alleging that the public accounting firm violated the Federal securities laws or professional standards.[164] If a whistleblower makes such an allegation, and if that submission leads to a successful action against the engagement client, its officers, or employees, then the whistleblower can obtain an award for that action as well. Moreover, this exclusion does not apply whenever the facts and circumstances fall within the scope of exceptions contained in Rule 21F–4(b)(4)(v).

c. Rule 21F–4(b)(4)(v)

Rule 21F–4(b)(4)(v) sets forth exceptions to the application of Rule 21F–4(b)(4)(iii). If any one of these circumstances is present, a person in one of the designated categories under Rule 21F–4(b)(4)(iii) may be eligible for a whistleblower award using information that is otherwise excluded to that individual by operation of Rule 21F–4(b)(4)(iii).

The first exception to the operation of Rule 21F–4(b)(4)(iii) applies when the designated person has 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.[165] For purposes of Rule 21F–4(b)(4)(v), in order for a whistleblower to claim a reasonable belief that disclosure of information to the Commission is necessary to prevent the relevant entity from committing substantial harm, we expect that in most cases the whistleblower will need to demonstrate that responsible management or governance personnel at the entity were aware of the imminent violation and were not taking steps to prevent it. In short, the whistleblower must have a reasonable basis for believing that the entity is about to engage in conduct that is likely to cause substantial injury to the financial interests of the entity or investors, and that notification to the Commission is necessary to prevent the entity from engaging in that conduct. In such cases, we believe it is in the public interest to accept whistleblower submissions and to reward whistleblowers—whether they are officers, directors, auditors, or similar responsible personnel—who give us information that allows us to take enforcement action to prevent substantial injury to the entity or to investors.

The second exception to the operation of Rule 21F–4(b)(4)(iii) applies when the designated person has a reasonable basis to believe that the entity is engaging in conduct that will impede an investigation of the misconduct. Our proposed rule included a similar exception for the entity's "bad faith," and the language, as adopted, is intended to make this standard clearer. Thus, for example, an officer or other individual covered by Rule 21F–4(b)(4)(iii) is not subject to the exclusion of that paragraph if he or she has a reasonable basis to believe that the entity is destroying documents, improperly influencing witnesses, or engaging in other improper conduct that may hinder our investigation.

Finally, under the third exception to Rule 21F–4(b)(4)(iii), an officer, director, auditor or one of the other designated persons can become a whistleblower after at least 120 days have elapsed since the whistleblower provided the information to the audit committee, chief legal officer, or chief compliance officer (or their equivalents) of the entity at which the violation occurred, or to his or her supervisor, or since the whistleblower received the information, if he or she received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or his or her supervisor was already aware of the information. As noted above, many commenters criticized as too vague and unpredictable our proposed rule that would have permitted one of the designated persons to make a whistleblower submission if an entity failed to disclose the information to the Commission within a reasonable time. In response to these comments, we have instead adopted an exception that will permit a person in one of the designated categories to become a whistleblower after a fixed period.

The 120-day period begins to run either from the date the whistleblower informed other senior responsible persons at the entity, or his or her supervisor, about the violations, or from the date the whistleblower received the information, if the whistleblower was aware that these other persons already knew of the violations. Thus, an officer, director, or other designated person cannot receive a report of misconduct, and keep silent about it while waiting for the 120-day period to run, in order to become eligible for a whistleblower award.

The inclusion of a fixed 120-day period is intended for the benefit of potential whistleblowers, so that they will have a date certain after which they will no longer be ineligible to make a submission based upon the information in their possession. It is not intended to suggest to entities that they have a 120-day "grace period" for determining their response to the violations. Furthermore, when considering whether and to what extent to grant leniency to entities for cooperating in our investigations and related enforcement actions, the promptness with which entities voluntarily self-report their misconduct to the public, to regulatory agencies, and to self-regulatory organizations is an important factor.[166]

At the same time, it is important to note that this rule is not intended to, and does not, create any new or special duties of disclosure on entities to report violations or possible violations of law to the Commission or to other authorities. The provisions of this rule are solely designed to provide greater specificity to certain types of potential whistleblowers about the circumstances in which their submissions will or will not make them eligible to receive an award.

Nor do we intend to suggest that an internal investigation should in all cases be completed before an entity elects to self-report violations, or that 120 days is intended as an implicit "deadline" for such an investigation. Companies frequently elect to contact the staff in the early stages of an internal investigation in order to self-report violations that have been identified. Depending on the facts and circumstances of the particular case, and in the exercise of its discretion, the staff may receive such information and agree to await further results of the internal investigation before deciding its own investigative course. This rule is not intended to alter this practice in the future.

(c) Rule 21F–4(b)(4)(iv)—Conviction for Violations of Law

a. Proposed Rule

Proposed Rule 21F–4(b)(4)(iv) excluded from the definition of "independent knowledge" information that a whistleblower obtained by a means or in a manner that violates applicable Federal or state criminal law. We explained our preliminary view that a whistleblower should not be rewarded for violating a Federal or state criminal law.

b. Comments Received

Comments on this proposal were divided. Several commenters argued that the proposal went too far in excluding information provided by whistleblowers.[167] One commenter explained that the exclusion would raise difficult questions involving state or Federal criminal law, including who would decide whether evidence was gathered in violation of State or Federal criminal law and under what standard of proof".[168]

Another commenter stated that the Government has historically been permitted to use documents without concern for how a whistleblower obtained them as long as the Government did not direct a whistleblower to take documents [169] and there is no reason to bar a whistleblower

report that is covered by attorney-client privilege, paragraph (i) would govern use of the information for purposes of our rules.

[157] 17 CFR 240.3b–2.

[158] *See* letter from ABA (noting problem of requiring the recipient of information to ascertain the "reasonable expectation" of the person who reported the information).

[159] *See* letter from TAF.

[160] The phrase "in connection with the entity's processes for identifying, reporting, and addressing potential non-compliance with law" requires that the officer, director, or other designated individual learn the information through official responsibilities that relate to such processes.

[161] *See* letter from SIFMA.

[162] *See* § 240.17a–5.

[163] *See* § 275.206(4)–2.

[164] *See infra* discussion of Rule 21F–8(c)(4).

[165] This provision is similar to the standard that governs the circumstances in which an attorney appearing and practicing before the Commission in the representation of an issuer may reveal confidential information related to the representation without the issuer's consent. *See* 17 CFR 205.3(d). However, we have not included a requirement of a "material violation," as is found in the attorney conduct rule. As most whistleblowers under this provision will not be attorneys, we have decided not to require that they make legal judgments about whether a material violation has occurred, but simply consider whether they have a reasonable basis to believe that a report to the Commission is necessary to prevent conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors.

[166] *See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions,* SEC Rel. Nos. 34–44969 and AAER–1470 (Oct. 23, 2001) (*http://www.sec.gov/litigation/investreport/34–44969.htm.*)

[167] *See, e.g.,* letters from Stuart D. Meissner, LLC; False Claims Act Legal Center; NWC; Kurt Schulzke; Patrick Burns.

[168] *See* letter from Stuart D. Meissner, LLC.

[169] *See* letter from False Claims Act Legal Center. *See also* letter from Patrick Burns.

from obtaining an award if the Government would be permitted to use those documents.

Several commenters were supportive of the exclusion.[170] One, for example, stated that, even if additional securities law violations might be uncovered by illegal acts, the result would be to undermine respect for the rule of law.[171] Another commenter recommended that the exclusion should go beyond domestic criminal law violations to include, among other things, state and Federal civil law.[172]

With respect to whether the exclusion should extend to violations of foreign criminal law, comments were divided.[173] One commenter stated that, without such an exclusion, individuals might be encouraged to break the laws of foreign countries by the prospect of a whistleblower award.[174] Other commenters urged the Commission not to extend the exclusion to violations of foreign criminal laws. One commenter, for example, argued that there may be situations in which a violation of a foreign criminal law is not a violation of a U.S. Federal or state law, and that in such situations a whistleblower should be able to obtain an award.[175]

In addition, commenters were sharply divided on whether we should exclude information obtained in violation of a judicial or administrative protective order.[176] Commenters that supported the exclusion expressed concern that trade secrets and other sensitive information might be disclosed if we were to permit awards for information provided in violation of judicial or administrative protect orders.[177] Other commenters expressed a general concern that protective orders are often negotiated between the parties and entered in private litigation as a way to protect proprietary information and should not operate to shield from the Commission information related to securities law violations.[178]

c. Final Rule

After reviewing the comments, we have decided to adopt the proposed rule, renumbered as Rule 21F–4(b)(4)(iv), but with a modification. Under Rule 21F–4(b)(4)(iv), a whistleblower's information will be excluded from the definition of "independent knowledge" if he or she obtained the information by a means or in a manner that is determined by a domestic court to violate applicable Federal or state criminal law.[179]

We continue to believe that this exclusion is consistent with the intent of Congress that the whistleblower award program not be used to encourage or reward individuals for obtaining information in violation of Federal or state criminal law—even if the information might otherwise assist our enforcement of the Federal securities laws. Nonetheless, we have decided that the exclusion will only apply where a domestic court determines that the whistleblower obtained the information in violation of Federal or state criminal law.[180] We believe that Federal and state courts are better positioned than we are to determine whether a whistleblower obtained the information in violation of criminal law.

We have determined not to extend the exclusion to cover information obtained in violation of domestic civil or foreign law, or judicial or administrative protective orders. Commenters raise a number of persuasive points supporting and opposing these additional exclusions. With respect to foreign law, we recognize that other countries often have legal codes that vary greatly from our own, and we are not in a position to decide as a categorical rule when it is appropriate to deny an award based on foreign law.[181] With respect to material that may have been obtained in violation of domestic civil law, we believe that, on balance, these exclusions would sweep too broadly and be difficult to apply consistently given the patchwork of state and municipal civil laws that might be implicated.

Finally, we find persuasive the comments that protective orders are frequently negotiated between parties to private litigation and are generally intended to protect proprietary information against public disclosure or improper use. It would be against public policy for litigants to obtain a protective order, or to seek enforcement of such an order, for the purpose of preventing the disclosure of information regarding violations of law to a law enforcement agency. For this reason, we have determined not to exclude whistleblowers who provide us with information that an opposing party may contend comes within the scope of a protective order.

(d) Rule 21F–4(b)(4)(vi)—Information Obtained From Excluded Persons

Proposed Rule 21F–4(b)(4)(vii) excluded persons from making whistleblower submissions based upon information they obtained from other persons in whose hands the same information would be excluded as "independent knowledge" or "independent analysis." We are adopting the proposed rule with slight modifications to respond to comments and to increase clarity. This provision is now set forth at Rule 21F–4(b)(4)(v).

a. Proposed Rule

The proposed rule provided that we would not treat a whistleblower submission as derived from "independent knowledge" or "independent analysis" if the whistleblower obtained the information on which the submission was based from any of the individuals described in Proposed Rules 21F–4(b)(4)(i) through (vi) (the other exclusion provisions).

b. Comments Received

One commenter expressed the view that the proposed rule effectively created a "hearsay" exception to the whistleblower provisions that could produce unintended results.[182] The commenter offered the example of an employee who overhears a conversation in which a compliance officer admits to participation in a Ponzi scheme. Under the proposed rule, the commenter pointed out, the employee would be ineligible to receive a whistleblower award.

c. Final Rule

After considering the comments, we are adopting a modified version of the

[170] *See, e.g.,* letters from the NSCP; the American Accounting Association; GE Group. *See also* letter from Wanda Bond.

[171] *See* letter from the NSCP.

[172] *See* letter from Financial Services Roundtable.

[173] *Compare* letters from Financial Services Roundtable, American Accounting Association, National Society of Corporate Responsibility, TRACE International, Inc. (supporting extending exclusion to violations of foreign law); *with* letters from VOICES, POGO, and Georg Merkl (opposing extending exclusion to violations of foreign law).

[174] *See* letter from TRACE International, Inc. *See also, e.g.,* letters from the American Accounting Association; Financial Services Roundtable; NSCP.

[175] *See* letter from POGO. *See also* letters from VOICES and Georg Merkl.

[176] Pursuant to Rule 21F–17(a), protective orders entered in SRO proceedings may not be used to prohibit parties from providing the Commission with information about a possible securities law violation.

[177] *See, e.g.,* letters from Alcoa Group; Financial Services Roundtable; and GE Group.

[178] *See, e.g.,* letters from VOICES; Georg Merkl; Patrick Burns.

[179] This exclusion is also supported by Section 21F(c)(2)(B) of the Exchange Act.

[180] If a criminal case is pending or known to be contemplated against a whistleblower, we may defer decision on an award application until the criminal matter is resolved.

[181] While the proposed rule does not extend the exclusion to information obtained or disclosed in violation of foreign law, we recognize that potential whistleblowers in foreign jurisdictions may have obligations to comply with applicable foreign laws. For instance, some foreign jurisdictions impose criminal penalties for unlawfully obtaining certain information or for unlawfully disclosing certain information to authorities outside their borders.

[182] *See* letter from NWC.

rule. As adopted, Rule 21F–4(b)(vi) provides that a submission will not be deemed to be derived from "independent knowledge" or "independent analysis" if the whistleblower obtained the information for the submission from a person who is subject to this section unless the information is not excluded from that person's use, or the whistleblower is providing the Commission with information about possible violations involving that person.

We added the phrase "unless the information is not excluded from that person's use" to the proposed rule in order to clarify that Rule 21F–4(b)(4)(vi) is intended to be purely derivative; *i.e.,* if the person from whom the information was obtained is free to use the information in a submission (for example, pursuant to the exceptions for officers, directors, auditors and others found in Rule 21F–4(b)(4)(v)), then this rule does not bar use of the information. In order to address the potential for the unintended consequence suggested in the comment, we also added the proviso that this exclusion does not apply if the whistleblower is providing information about violations involving the person from whom the information was obtained.

We expect that Rule 21F–4(b)(4)(vi) will work in tandem with the other exclusions set forth in Rule 21F–4(b)(4) to preclude submissions in a limited set of circumstances. Thus, for example, if an employee only learns about possible violations because he or she is interviewed in the course of a company internal investigation, Rule 21F–4(b)(4)(vi) will not permit that employee to file a whistleblower submission claiming the information as his or her "independent knowledge" or "independent analysis".[183] Similarly, if a senior company officer, after receiving a report concerning possible securities violations, gives the information to his or her assistant, the assistant will not be able to seek an award based on the information as long as the officer is barred from doing so.

6. Rule 21F–4(b)(5)—Original Source

Proposed Rule 21F–4(b)(5) described how we would determine if a whistleblower was the "original source" of information that we received from another source. We are adopting the rule as proposed, with a slight modification to maintain consistency with other rule changes.

a. Proposed Rule

The proposed rule provided that we would consider a whistleblower to be the "original source" of the same information that we obtained from another source if the information satisfied the definition of original information and the other source obtained the information from the whistleblower or the whistleblower's representative. If the whistleblower claimed to be the "original source" of information provided to us by any of the authorities set forth in Proposed Rule 21F–4(a) (relating to the "voluntary" submission of information), then the whistleblower would be required to have "voluntarily" provided the information to the other authority within the meaning of Proposed Rule 21F–4(a).

The proposed rule also required that the whistleblower establish his or her status as the original source of information to our satisfaction. In the event that the whistleblower claimed to be the original source of information provided to us by one of the authorities set forth in the rule or by another entity (including the whistleblower's employer), the proposed rule further stated that we might seek assistance and confirmation of the whistleblower's status from the other entity.

b. Comments Received

The few comments we received on this proposed rule primarily sought clarification on its application to particular circumstances.

One commenter requested that we clarify the situation in which one person makes a submission based upon information obtained from a second person, and the second person (the original source of the information) later submits the same information.[184] Another commenter noted the potential for inequity that may result if the person who makes the first whistleblower submission is later displaced from award eligibility because the second submitter (*e.g.,* the first person's supervisor) claims to be "the original source" of information submitted by the first person. The commenter expressed concern that the second submitter might obtain the award, to the exclusion of the first person, even though the second person may have known about the violations for an extended period, done nothing to stop them, and only made a submission after learning about the first person's submission.[185]

Another commenter suggested we make clear that if an individual reports misconduct through a company's internal compliance or other reporting processes, and the company subsequently self-reports the violations to the Commission, the individual will be eligible for an award as the "original source" of the information reported by the company.[186]

c. Final Rule

After considering the comments, we are adopting Rule 21F–4(b)(5) as proposed with a slight modification to conform to other rule changes. Specifically, we are modifying the list of governmental and other authorities set forth in the rule to conform to the revised list set forth in Rule 21F–4(a) (see discussion above).

In addition, we provide the following clarifications to address the comments. As the language of our rule indicates, if B makes a whistleblower submission based upon information obtained from A, and A later makes his or her own submission of that information, then A will be considered the "original source" of the information (assuming that A establishes his or her status as the original source and that the information otherwise qualifies as "original information").[187]

However, A's status as the "original source" of the information does not exclude B from award eligibility. In this example, because B obtained the facts underlying his or her submission from A, and those facts were not derived from publicly available sources, B would also be deemed to have submitted information derived from his or her "independent knowledge." Thus, both submissions could qualify as "original information;" B's because he or she was first to bring the Commission information derived from "independent knowledge," and A's because he or she was the "original source" of information that, as of B's submission, was already known to the Commission.

Further, by virtue of being first-in-time, B may have an advantage over A. If B's submission were sufficiently specific, credible, and timely that it caused us to open an investigation, and if a successful enforcement action

[183] This assumes that the employee learns the information in the interview from an attorney or other person subject to Rules 21F–4(b)(4)(i) or (ii), or from someone subject to Rule 21F–4(b)(4)(iii)(C). Depending on all of the facts and circumstances, the employee could also be directly excluded under Rule 21F–4(b)(4)(i) if the interview is determined to be covered by the attorney-client privilege.

[184] *See* letter from SIFMA.

[185] *See* letter from TAF.

[186] *See* letter from Baron & Budd, P.C.

[187] This does not by itself mean that an award is due. The submitter must still satisfy all of the other requirements of Section 21F and of our rules, including that the information was submitted voluntarily, it led to a successful Commission enforcement action or related action, and the submitter is not ineligible for an award.

resulted, then we would consider whether B's submission "led to" our successful action under the lower standard set forth in Rule 21F–4(c)(1). Correspondingly, if A made his or her submission after we were already investigating the matter that B brought to us, then A's information would be evaluated under Rule 21F–4(c)(2), and A would have to meet the additional requirement that his or her information "significantly contributed" to the success of the action. In this regard, we note that A would also be considered the "original source" of any additional information he or she provided that materially added to our base of knowledge.[188]

An individual can also be the "original source" of information that we receive from an entity, including, for example, other government authorities, the whistleblower's employer, or other entities to which the individual may report misconduct. For example, an individual would be the original source of information provided to the Commission by his or her employer if the individual reports possible violations in the first instance through his or her employer's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law, the company later self-reports the individual's information to the Commission, and the individual thereafter files a whistleblower submission. In fact, as is further described below, our final rules seek to enhance the incentives for employees to utilize their company's internal reporting systems, and we provide a clear alternate path for persons who do so to be considered eligible for an award if the company later self-reports violations to the Commission as result of the individual's internal report.[189]

7. Rule 21F–4(b)(6)—Original Source; Additional Information

a. Proposed Rule

Proposed rule 21F–4(b)(6) addressed circumstances where we already know some information about a matter from other sources at the time that we receive a whistleblower submission related to the same matter. In that case, the proposed rule provided that we would consider the whistleblower to be an "original source" of any information he or she provided that was derived from the whistleblower's independent knowledge or independent analysis, and that materially added to the information already in our possession. As our Proposing Release explained, this standard was modeled after the definition of "original source" that Congress included in the False Claims Act through recent amendments.[190]

b. Comments Received

One commenter suggested that we clarify how we plan to address the situation where one whistleblower provides original information that leads to successful enforcement of an action, and a second whistleblower provides additional information that "materially aids" the enforcement of the same case.[191]

c. Final Rule

After considering the comments, we are adopting Rule 21F–4(b)(6) as proposed. Accordingly, a whistleblower will be deemed to be an "original of source" of information he or she provides that materially adds to the Commission's base of knowledge about a matter. In cases where a second whistleblower voluntarily provides information that materially adds to what we already know about the matter, and assuming that all of the other requirements of our rules are satisfied, we will assess whether the additional information provided by the second whistleblower also led to successful enforcement of our action pursuant to the standards described in Rule 21F–4(c). If so, and if, as a result, we determine that the second whistleblower is also entitled to an award, then we will determine an award allocation among whistleblowers pursuant to the criteria set forth in Rule 21F–6.

8. 21F–4(b)(7): Original Source: Lookback

a. Proposed Rule

Proposed Rule 21F–4(b)(7) provided that, if a whistleblower reported the original information to other authorities or people identified in Proposed Rules 21F–4(b)(4)(iv) and (v) (personnel involved in compliance or similar functions, or who are informed about possible violations with the expectation that they will take steps to address them), and the whistleblower within 90 days submitted the same information to the Commission, we would consider that the whistleblower provided the information as of the date of his or her original disclosure to one of these other authorities or people. In proposing this rule in this manner, we were seeking to protect the ability of the whistleblower to pursue internal or other channels to quickly address the violation while ensuring that the Commission receives this critical information in a timely fashion.

b. Comments Received

The Commission received numerous comments suggesting that we extend the lookback period or eliminate it altogether. Commenters suggested that 90 days was not sufficient time for an internal compliance or review program to conduct a sufficiently thorough investigation and suggested extending the period to 120 days, 180 days, or a reasonable period of time.[192] Others, also calling for a longer lookback period or none at all, suggested that the time limit would burden whistleblowers seeking to complete their own investigations and complicate the process.[193] Some commenters suggested that the Commission should coordinate with other authorities to determine timing rather than burden a whistleblower with proving the timing.[194]

c. Final Rule

In response to the almost uniform view of commenters suggesting a longer lookback period, we are modifying the proposed rule to extend the lookback period to 120 days. Thus, a whistleblower who first reports to an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law and within 120 days reports to the Commission could be an eligible whistleblower whose submission is measured as if it had been made at the earlier internal reporting date. This means that even if, in the interim, another whistleblower has made a submission that caused the staff to begin an investigation into the same matter, the whistleblower who had first reported internally will be considered the first whistleblower who came to the Commission, assuming that his information was sufficiently specific and credible to have caused the staff to begin an investigation.[195]

We are balancing priorities with the length and existence of this lookback

[188] *See* Rule 21F–4(b)(6).

[189] *See* Rules 21F–4(b)(7) and 4(c).

[190] 31 U.S.C. 3730(e)(4)(B), Public Law 111–148 § 10104(h)(2), 124 Stat. 901 (Mar. 23. 2010).

[191] *See* letter from SIFMA.

[192] *See, e.g.,* letters from Association of Criminal Defense Lawyers, AT&T, Business Roundable Institute for Corporate Ethics ("Business Roundtable"), NSCP.

[193] *See, e.g.,* letters from Georg Merkl, NWC.

[194] *See e.g.* letter from Storch, Amini & Munves PC.

[195] However, in that instance, the other whistleblower would still be considered for an award if his information significantly contributed to the success of our enforcement action. *See* Rule 21F–4(c)(2).

period, each with the ultimate objective of identifying and remedying violations of the Federal securities laws quickly. On the one hand, the Commission's primary goal, consistent with the congressional intent behind Section 21F, is to encourage the submission of high-quality information to facilitate the effectiveness and efficiency of the Commission's enforcement program. For this reason, we are not requiring that a whistleblower utilize an available internal compliance program prior to submission to the Commission, and we are not providing for a lookback period as long as requested by some commenters. Because of our strong law enforcement interest in receiving high quality information about misconduct quickly we have chosen a lookback period shorter than the 180 days or more that some commenters requested.

On the other hand, compliance with the Federal securities laws is promoted when companies have effective programs for identifying, correcting, and self-reporting unlawful conduct by company officers or employees. The objective of this provision is to support, not undermine, the effective functioning of company compliance and related systems by allowing employees to take their concerns about possible violations to appropriate company officials first while still preserving their rights under the Commission's whistleblower program. This objective is also important because internal compliance and reporting systems are essential sources of information for companies about misconduct that may not be securities-related (*e.g.,* employment discrimination or harassment complaints), as well as for securities-related complaints. We believe that the balance struck in the final rule will promote the continued development and maintenance of robust compliance programs. As we noted in our proposing release, we are not seeking to undermine effective company processes for receiving reports on possible violations including those that may be outside of our enforcement interest, but are nonetheless important for companies to address.

The inclusion of this provision is designed for the benefit of whistleblowers by providing a reasonable period of time to make their decisions. As discussed elsewhere in this release, we are not requiring potential whistleblowers to use internal compliance and reporting procedures before they make a whistleblower submission to the Commission. Among our concerns was the fact that, while many employers have compliance processes that are well-documented, thorough, and robust, and offer whistleblowers appropriate assurances of confidentiality, others do not. Thus, there may well be instances where internal disclosures could be inconsistent with effective investigation or the protection of whistleblowers. Ultimately, we believe that whistleblowers are in the best position to assess whether reporting potential securities violations through their companies' internal compliance and reporting systems would be effective.

Nevertheless, as we noted in our proposing release, we expect that in appropriate cases, consistent with the public interest and our obligation to preserve the confidentiality of a whistleblower, our staff will, upon receiving a whistleblower complaint, contact a company, describe the nature of the allegations, and give the company an opportunity to investigate the matter and report back. The company's actions in these circumstances will be considered in accordance with the Commission's Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions.[196] This has been the approach of the Enforcement staff in the past, and the Commission expects that it will continue in the future. Thus, in this respect, we do not expect our receipt of whistleblower complaints to minimize the importance of effective company processes for addressing allegations of wrongful conduct.[197]

9. Rule 21F–4(c)—Information That Leads to Successful Enforcement

a. Proposed Rule

As proposed, Rule 21–4(c) explained when we would consider original information to have led to successful enforcement. The Proposed Rule distinguished between information regarding conduct not under investigation or examination and information regarding conduct already under investigation or examination.

For information regarding conduct not under investigation or examination, the Proposed Rule established a two-part test for determining whether the information led to successful enforcement. First, the information must have caused the staff to commence an investigation or examination, reopen an investigation that had been closed, or to inquire into new and different conduct as part of an existing examination or investigation. Second, the information must have "significantly contributed" to the success of an enforcement action filed by the Commission.

For information regarding conduct under investigation or examination, the Proposed Rule provided a significantly higher standard. To establish that information led to successful enforcement, a whistleblower would need to demonstrate that the information: (1) would not have otherwise been obtained; and (2) was essential to the success of the action.

b. Comments Received

Although a few commenters approved of the standards in the Proposed Rule,[198] most stated that the standards were too high, ambiguous, or both.[199] Several commenters criticized the requirement that information not only cause the staff to open an investigation or examination but also that it "significantly contributed" to the success of the action, noting that the "significantly contributed" element is not contained in the statute and is too high a standard.[200] Commenters also expressed concern that the standard would create uncertainty over when awards would be granted, which in turn would make potential whistleblowers less likely to come forward with information.[201] One commenter suggested that we should examine whether the whistleblower has provided "enough information to get the Commission to open an investigation."[202]

Commenters also criticized the proposed standard applicable when there is already an examination or investigation underway, arguing that it would be almost impossible for whistleblowers to show that information

[196] Exchange Act Release No. 44969 (October 23, 2001).

[197] *See* Rule 21F–6. In addition, as discussed below, in order to encourage whistleblowers to utilize internal reporting processes, we expect to give credit in the calculation of award amounts to whistleblowers who utilize established internal procedures for the receipt and consideration of complaints about misconduct. And, in determining whether to give a company the opportunity to investigate and report back, we may consider a number of factors, including, but not limited to, information we have concerning the nature of the alleged conduct, the level at which the conduct allegedly occurred, and the company's existing culture related to corporate governance. We may also consider information we have about the company's internal compliance programs, including what role, if any, internal compliance had in bringing the information to management's or the Commission's attention.

[198] *See* Chris Barnard; American Accounting Association, Auditing Standards Committee.

[199] *See, e.g.,* TAF; VOICES.

[200] *See* letters from American Association for Justice; Grohovsky Group; Cornell Securities Law Clinic; TAF; VOICES; NWC.

[201] Letters from TAF; VOICES.

[202] *See* letter from Grohovsky Group.

would not have otherwise been obtained and was essential to the success of the action.[203] One commenter expressed concern that the standards could result in anomalous outcomes, providing an example where one whistleblower provides a bare-boned tip that causes the staff to open an investigation (but does not "significantly contribute" to the success of the action), and another whistleblower provides a subsequent tip that is a complete roadmap of the case after the investigation has been opened (but the information is not "essential" to the success of the action), yet neither would receive an award.[204]

As noted, we requested comment on whether our rules should require whistleblowers to report violations of the securities laws through their internal compliance and reporting systems before submitting the information to us. Comments on this issue were sharply divided. Many commenters strongly supported such a requirement. In particular, commenters argued that we should require internal reporting because doing so will:

1. Allow companies to take appropriate actions to remedy improper conduct at an early stage; [205]
2. Allow companies to self-report; [206]
3. Avoid undermining internal compliance programs and preserve systems companies have installed designed to deter, indentify, and correct violations; [207]
4. Allow the whistleblower program to supplement, rather than supersede the internal control requirements under the Sarbanes-Oxley Act of 2002; [208]
5. Allow the Commission to preserve its scarce resources by relying upon corporate internal compliance programs; [209]
6. Promote a working relationship between the Commission and companies; [210]
7. Allow compliance personnel to address conduct that does not yet rise to the level of a violation or is not a violation (based on a misunderstanding of fact or law); [211]
8. Increase the quality of tips the Commission receives; [212] and
9. Avoid internal investigations being compromised by unwillingness on the part of whistleblowers to participate.[213]

Many other commenters strongly opposed a requirement that whistleblower report internally before reporting to the Commission. Several commenters argued that doing so would:

1. Prohibit whistleblowers from reporting fraud directly and immediately to the Commission; [214]
2. Be inconsistent with Congressional intent; [215]
3. Create unnecessary and improper hurdles for whistleblowers; [216]
4. Place whistleblowers at risk of retaliation; [217]
5. Result in whistleblowers deciding not to report misconduct; [218]
6. Eliminate incentives for companies to improve their internal compliance programs.[219]
7. Contravene an employee's right to disclose information anonymously and directly to the Commission;[220] and
8. Be inconsistent with the DOJ and IRS whistleblower programs.[221]

c. Final Rule

After considering the comments, we have significantly modified Rule 21F–4(c). First, we are persuaded by those commenters who stated that the standards in the Proposed Rule were too high. As such, we have adopted standards that should be easier to satisfy—both for information regarding conduct not under investigation or examination and information regarding conduct already under investigation or examination—in the Final Rule.

Moreover, as further described below, internal compliance programs are not substitutes for rigorous law enforcement. However, we believe that internal compliance programs play an important role. While we are not requiring whistleblowers to report misconduct internally before reporting to us, we agree that the incentives to do so should be strengthened. Accordingly, the Final Rule includes a provision for a new standard applicable to a whistleblower who reports information internally. The details of the final rule are discussed below.

i. *Rule 21F–4(c)(1): Standard for information concerning conduct not under investigation or examination.*

We have decided to lower the standard applicable to information that concerns conduct not under investigation or examination. As noted above, the Proposed Rule required that the information must have "significantly contributed" to the success of the action. In the Final Rule, we have deleted "significantly contributed" from the standard. Under the Final Rule, information will be considered to have led to successful enforcement when it is 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 brings a successful judicial or administrative action based in whole or in part on the conduct identified in the original information.

We do not anticipate a rigid, mechanical application of this standard. As a general matter, in assessing whether information 'led to' a successful enforcement action, we will examine the relationship between the information in a submission and the allegations in the Commission's complaint filed in the civil action or order filed in the administrative proceeding. Our inquiry will focus on whether the submission identifies persons, entities, places, times and/or conduct that correspond to those alleged by the Commission in the judicial or administrative action. As part of this analysis, we may consider whether, and the extent to which, the information included: (1) Allegations that formed the basis for any of the Commission's claims in the judicial or administrative action; (2) provisions of the securities laws that the Commission alleged as having been violated in the judicial or administrative action; (3) culpable persons or entities (as well as offices, divisions, subsidiaries or other subparts of entities) that the Commission named as defendants, respondents or uncharged wrongdoers in the judicial or administrative action; or (4) investors or a defined group of investors that the Commission named as victims or injured parties in the judicial or administrative action.

The Final Rule also states that the information submitted by the whistleblower must be sufficiently "specific, credible and timely" to cause the Commission to commence an investigation or examination. This new language is intended to describe generally the type of information that would cause our staff to open an investigation or examination. While we believe it is appropriate to adopt a lower standard in the Final Rule, due to our limited resources and the high volume of tips that we receive each year, high-quality tips—ones that are specific, credible and timely—are most likely to lead to a successful enforcement action.

ii. *Rule 21F–4(c)(2): Standard for information concerning conduct already under investigation or examination.*

We have also decided to lower the standard applicable for information that concerns conduct already under investigation or examination. We agree with the commenters who expressed concern that the standard in the Proposed Rule—that the information would not have otherwise been obtained and was essential to the success of the action—in practice might be too difficult to satisfy. As a result, for information concerning conduct already under investigation or examination, we will find information to have led to successful enforcement when the information "significantly contributed" to the success of our action.

While we continue to believe that the primary focus of the program is to encourage the submission of information regarding conduct not already known to us, we recognize that in some cases information voluntarily provided by a whistleblower can play a vital role in advancing an existing investigation. Thus, a whistleblower will be eligible for an award in a matter already under investigation if his or her information "significantly contributes" to our success. In applying this standard, among other things, we will look at factors such as whether the information allowed us to bring: (1) Our successful action in significantly less time or with significantly fewer resources; (2) additional successful claims; or (3) successful claims against additional individuals or entities.

At the same time, we do not want to reward a whistleblower who has obstructed an ongoing investigation in an effort to obtain an award. In this regard, absent extraordinary circumstances, we will not consider information to have "significantly contributed" to the success of our action if: (i) We or some other law enforcement agency has issued a subpoena or other document request, inquiry or demand to an entity or an individual other than the whistleblower; (ii) there is evidence that the whistleblower was aware of the investigative request, inquiry, or demand; and (iii) the whistleblower withheld or delayed providing responsive documents prior to making the related submission to the Commission. This approach is consistent with one of the principal goals of the program: To incentivize whistleblowers to come forward early with information of possible violations of the securities laws rather than wait until they become aware of an investigation by the Commission or other agency.[222] Further, it would not be good policy for a person to be rewarded for "significantly contributing" to the success of an action when he has knowingly obstructed the investigation of the misconduct.

iii. *Rule 21F–4(c)(3): Additional incentives to encourage reporting through internal compliance programs.*

Paragraph (3) of Rule 21F–4(c) is a new provision that has been added, in response to comments, to create a significant financial incentive for whistleblowers to report possible violations to internal compliance programs before, or at the same time, they report to us. The final rule provides that if: (1) A whistleblower reports original information through his or her employer's internal whistleblower, legal or compliance procedures before or at the same time he or she reports them to the Commission; (2) the employer provides the Commission with the whistleblower's information or with the results of an investigation initiated in response to the whistleblower's information; and (3) the information provided by the employer to the Commission "led to" successful enforcement under the criteria of Rule 21F–4(c)(1) or (2) discussed above, then the whistleblower will receive full credit for the information provided by the employer as if the whistleblower had provided the information to us.[223] Thus, when the employer provided information "led to" a successful enforcement action, the whistleblower will be eligible for an award, even if the information the whistleblower originally provided to the employer would not have satisfied the "led to" requirements.

To qualify for an award under this new provision, the rule requires that a whistleblower must provide information "through an entity's internal whistleblower, legal or compliance procedures for reporting allegations of possible violations of law." A report to a supervisor will qualify under this standard if the entity's internal compliance procedures require or permit reporting misconduct in the first instance to supervisors. Furthermore, if an entity does not have established internal procedures for reporting violations of law, we will consider an employee who reports a possible violation to the entity's legal counsel, senior management, or a director or trustee to have provided the information through the appropriate "internal whistleblower, legal or compliance procedures." [224]

Rule 21F–4(c)(3) incentivizes whistleblowers to report internally in appropriate circumstances by providing them a meaningful opportunity to increase their probability of receiving an award. In effect, reporting internally provides a second potential path to an award. We anticipate that not only individuals who were predisposed to report internally prior to the enactment of the whistleblower award program, but also some who would not have been inclined to report internally, will respond to Rule 21F–4(c)(3)'s financial incentive by utilizing internal reporting procedures. Put differently, the rule's financial incentives should both mitigate any diversion from internal reporting of individuals who would be predisposed to report internally in the absence of the whistleblower program, and incentivize new individuals who otherwise might never have reported internally to enter the pool of potential internal whistleblowers. As a result, the provision should increase the likelihood that individuals will report misconduct to effective internal reporting programs, allowing such programs to continue to play an important role in facilitating compliance with the securities laws.

Although many commenters argued that we should require whistleblowers to report possible violations internally either before or contemporaneously with reporting to us, we are not

[203] Letter from VOICES (arguing that, particularly given our funding issues, we should not condition awards on the theoretical possibility that the staff could uncover the evidence).

[204] Letter from Grohovsky Group.

[205] *See* letters from Lum; Chamber of Commerce Group.

[206] *See* letter from Baker, Donaldson, Bearman, Caldewell & Berkowitz ("Baker Donaldson").

[207] *See* letters from Baker Donaldson; Chamber of Commerce Group; Foster Wheeler; Apache Group; Alcoa Group; Allstate Group.

[208] *See* letters from Arent Fox; Alcoa Group.

[209] *See* letter from ALG.

[210] *Id.*

[211] *See* letters from Foster Wheeler; Apache Group.

[212] *See* letter from Apache Group.

[213] *See* letter from Apache Group.

[214] *See* letter from NWC.

[215] *See* letters from TAF; POGO. *See also* Letter from Senator Charles Grassley ("requiring whistleblowers to first go through internal compliance programs would be at odds with the law Congress wrote").

[216] *See* letter from TAF.

[217] *See* letters from TAF; Grohovsky Group; POGO.

[218] *See* letters from Grohovsky Group; POGO.

[219] *See* letter from POGO.

[220] *See* letters from NWC and Daniel J. Hurson.

[221] *See* letters from TAF and NWC.

[222] *See* S. Rep. No. 111–176 at 110 (2010) ("The Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws * * *.").

[223] Employees who report internally in this manner will have anti-retaliation employment protection to the extent provided for by Section 21F(h)(1)(A)(iii) of the Exchange Act, which incorporates the broad anti-retaliation protections of Sarbanes-Oxley Section 806, *see* 18 U.S.C. 1514A(b)(2).

[224] To qualify for consideration under Rule 21F–4(c)(3), a whistleblower must establish that he or she provided original information through the appropriate "internal whistleblower, legal or compliance procedures." Accordingly, prospective whistleblowers will be better able to support their claims under this provision if they generate, obtain and retain contemporaneous documentation (*e.g.*, e-mails or other written records) demonstrating their compliance with the requirements of the Rule, including documents evidencing: (i) the substance of the information; (ii) the means by which the information was provided; (iii) the recipients of the information; and (iv) the date on which the information was provided.

persuaded that such a requirement would achieve better overall enforcement of the Federal securities laws than the approach we are adopting for several reasons. First, we believe that there are a significant number of whistleblowers who would respond to the financial incentive offered by the whistleblower program by reporting *only* to the Commission, but who would not come forward *either* to the Commission or to the entity if the financial incentive were coupled with a mandatory internal reporting requirement.[225] In those cases, the Commission would not receive critical information about possible securities law violations, and companies and investors would suffer harm as ongoing violations remained undetected and unremedied.

Second, our approach should encourage companies to continue to strengthen their internal compliance programs in an effort to promote internal reporting. Potential whistleblowers are more likely to respond to Rule 21F–4(c)(3)'s financial incentive by reporting internally when they believe that the company or entity has a good internal compliance program—*i.e.*, a compliance program that will take their information seriously and not retaliate.[226] We anticipate that companies will recognize this, take steps to promote a corporate environment where employees understand that internal reporting can have a constructive result, and that the net effect of this will be enhanced corporate compliance with the Federal securities laws.

Third, while internal compliance programs are valuable, they are not substitutes for strong law enforcement. In some cases, law enforcement interests will be better served if we know of potential fraud before the entities or individuals involved learn of our investigation. This is particularly true when there is a risk that an entity or individual may try to hinder or impede our investigation by, for example, destroying documents or tampering with witnesses.[227] Similarly, there are circumstances where a whistleblower may have legitimate reasons for not wanting to report the information internally, for example, legitimate concerns about misconduct by the company's management or within the internal compliance program, or a reasonable basis to fear retaliation or personal harm.

In addition, we do not believe that a general requirement on whistleblowers to report possible violations through internal compliance procedures would be consistent with the language of, or legislative intent underlying, Section 21F. As evidenced by the text of Section 21F, the broad objective of the whistleblower program is to enhance the Commission's law enforcement operations by increasing the financial incentives for reporting and lowering the costs and barriers to potential whistleblowers, so that they are more inclined to provide the Commission with timely, useful information that the Commission might not otherwise have received.[228] However, as discussed above, a general requirement that employees report internally as a condition of participating in the whistleblower program would impose a barrier that in some cases would dissuade potential whistleblowers from providing information to the Commission, contrary to the purpose of the whistleblower provision.[229] Moreover, a mandatory internal reporting requirement would deviate from the operation of other established Federal whistleblower award programs, and there is no indication in the text or legislative history of Section 21F that Congress intended that result.[230]

At the same time, we also do not agree with the comment that no provisions should be made in our rule to encourage internal reporting because whistleblowers would do so anyway.[231] Although some evidence suggests that many whistleblowers will continue to report misconduct internally,[232] we understand that the financial incentives established by Section 21F could have the potential to divert other whistleblowers away from reporting internally. If this diversion were significant, it might impair the usefulness of internal compliance programs, which can play an important role in achieving compliance with the securities laws. Accordingly, we believe that it is appropriate for us to provide significant financial incentives as part of the whistleblower program to encourage employees and other insiders to report violations internally, while still leaving the ultimate decision whether to report internally to the whistleblower.

10. Rule 21F–4(d)—Action

Proposed Rule 21F–4(d) defined the term "action" to mean a single captioned judicial or administrative proceeding. We are revising the proposed rule to permit consideration of multiple cases that arise out of a common nucleus of operative facts as a single "action."

a. Proposed Rule

For purposes of calculating whether monetary sanctions in a Commission action exceed the $1,000,000 threshold required for an award payment pursuant to Section 21F of the Exchange Act, as well as determining the collected sanctions on which awards are based,[233] proposed rule 21F–4(d) defined "action" to mean a single captioned civil or administrative proceeding. Under the proposed rule, "action" included all defendants or respondents and all claims brought within that proceeding without regard to which specific defendants or respondents, or which specific claims, were included in the action as a result of the information that the whistleblower provided.

Also, the proposed rule meant that the Commission would not aggregate sanctions that are imposed in separate judicial or administrative actions for purposes of determining whether the $1,000,000 threshold is satisfied, even if the actions arise out of a single investigation. For example, if a whistleblower's submission leads to two separate enforcement actions, each with total sanctions of $600,000, then no whistleblower award would be authorized because no single action will have obtained sanctions exceeding $1,000,000.

b. Comments Received

Commenters offered competing views on the proposed interpretation of "action." A number of commenters supported our proposed definition.[234] Several commenters disagreed with the proposal, urging that the Commission should aggregate multiple Commission actions arising out of a whistleblower's submission for purposes of satisfying the $1,000,000 threshold[235] because to do otherwise was to put form over substance and not fully reward whistleblowers for the information they provided that led to successful actions.[236]

Two other commenters argued that our definition of "action" should be narrowed so that, in a case involving multiple counts, only the counts resulting from the whistleblower's information are considered.[237] These commenters were concerned that, without this limitation, the rules would encourage whistleblowers to report even minor violations in the hope that they will be grouped with more serious violations in a single action with the result that all of the sanctions in the action together meet the covered action threshold.

c. Final Rule

After reviewing the comments, we are adopting the rule with substantial modifications. Notwithstanding the use of the singular term "action" in Section 21F, we agree with the commenters who urged that Congress did not intend for a meritorious whistleblower to be denied consideration for an award simply because we chose to bring separate proceedings against respondents or defendants involved in the same or closely related conduct.[238]

Accordingly, as adopted, Rule 21F–4(d) defines the term "action" generally to mean a single captioned judicial or administrative proceeding brought by the Commission. However, the rule also identifies two exceptions to this general definition. First, an "action" will constitute two or more Commission proceedings arising from the same nucleus of operative facts for purposes of making an award under Rule 21F–10. Second, for purposes making payments under Rule 21F–14 on a Commission action for which we have already made an award, we will treat as part of that same action 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.

The same-nucleus-of-operative-facts test is a well-established legal standard that is satisfied where two proceedings, although brought separately, share such a close factual basis that the proceedings might logically have been brought together in one proceeding.[239] In exercising our discretion and deciding whether two or more proceedings arise from the same nucleus of operative

[225] Specifically, the fear of retaliation and other forms of harassment, as well as other social and psychological factors, can have a chilling effect on certain whistleblowers who, absent a mandatory internal reporting requirement, would respond to the financial incentive offered by the whistleblower program by providing the Commission with information about possible securities law violations. *See* discussion in Part IV(A)(7) of the Economic Analysis. A number of commenters who routinely work with whistleblowers supported this assessment. *See, e.g.*, letters from Grohvosky (explaining that if potential whistleblowers were required to report internally, many would remain silent); TAF (same).

[226] *See generally* Richard E. Moberly, Sarbanes-Oxley's Structural Model To Encourage Corporate Whistleblowers, 2006 BYU L. REV. 1107, 1144 (2006).

[227] Similarly, we note that a requirement for mandatory internal reporting before reporting to the Commission would result in undesirable outcomes in the case of entities' with ineffective internal compliance processes. In these cases, mandatory internal pre-reporting would lead to unnecessary delays before the violation can be addressed by the Commission, resulting in potentially increased injuries to the company and investors.

[228] The statute incentivizes whistleblowers to report possible securities law violations to the Commission by offering them financial awards, reducing the risks from employment retaliation, and lowering the barriers through user-friendly procedures and appellate redress. *See* Section 21F(b)–(c) of the Exchange Act (10–30% awards); *id.* 21F(d) (whistleblower anonymity); *id.* 21F(e) (no contractual obligations can be imposed on whistleblowers unless provided for in a Commission rule or regulation); *id.* 21(f) (right of appeal); *id.* 21F(h) (anti-retaliation protection and heightened confidentiality requirements for whistleblower identifying information). *See also* Section 922(d) of Dodd-Frank Act (mandating a study of the "whistleblower protections" established in Section 21F of the Exchange Act).

[229] Similarly, an internal reporting requirement would appear inconsistent with the provisions of Section 21F that are designed to protect the identity of a whistleblower. *See* Section 21F(d)(2) & (h)(2). Simply put, even where an entity may have implemented generally effective procedures for anonymous reporting, there will be situations where a whistleblower's tip might, by the nature of the information it discloses, reveal the identity of the whistleblower—*e.g.*, situations where only a few people would have assess to the information. The financial incentives approach that we are adopting allows the whistleblower to access whether an internal report might disclose his identity and, if so, whether he wishes to report internally notwithstanding this possibility.

[230] We also considered suggestions by some commenters that we should require internal reporting by employees of issuers that are subject to Section 301 of the Sarbanes-Oxley Act of 2002 ("SOX") in order to harmonize Section 21F with the requirement of Section 301 that listed companies have audit committee procedures for the receipt, retention, and treatment of complaints regarding accounting, internal accounting control, and auditing matters, including procedures for the submission of information anonymously. *See, e.g.* letters from Business Roundtable; ABA; U.S. Chamber of Commerce Group; Alcoa Group. In Section 301 of SOX, Congress mandated that listed companies establish structural mechanisms to facilitate internal whistleblowing by employees. In Section 21F, however, Congress chose a wholly different model—one that provides financial incentives for employees and others to report violations directly to the Commission. *See* Richard E. Moberly, *Sarbanes-Oxley's Structural Model To Encourage Corporate Whistleblowers,* 2006 BYU L. REV. 1107, 1108 n.5 (2006); Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers,* 87 B.U.L.Rev. 91 (2007). We do not think it appropriate to limit the path opened by Section 21F by a Commission-imposed requirement that employees of listed companies also utilize internal audit committee or other complaint procedures. Further, even if a company has anonymous complaint procedures consistent with Section 301 of SOX, in some cases an anonymous whistleblower's identity can be gleaned from the facts and circumstances surrounding the whistleblower's complaint. In those situations, requiring the whistleblower to report internally would be in tension with the mandate of Section 21F that we protect information that could reasonably be expected to reveal the identity of a whistleblower. *See* Section 21F(h)(2) of the Exchange Act. Finally, as discussed above, we believe that our approach will incentivize individuals who were pre-disposed to report internally to continue to do so, and thus will significantly mitigate the concern of commenters that our rules will undermine internal reporting processes established pursuant to Section 301.

[231] *See, e.g.,* letter from NWC ("NWC strongly urges that the Commission rules be revised and * * * treat employees equally whether they choose to make their disclosures internally, externally, or both."). *But cf.* Chamber of Commerce Group ("In the absence of an affirmative restriction on external reporting when effective internal compliance channels are available, *or provision of a significant incentive for using those internal channels,* employees will face an irresistible temptation to go to the SEC with their report.") (emphasis added).

[232] *See* letter from NWC. This comment included a study indicating that roughly 90% of individuals who eventually filed *qui tam* suits under the False Claims Act also reported the misconduct internally, without any incentives for internal reporting. It is not clear that data about whistleblower behavior under the False Claims Act necessarily will be an accurate predictor of behavior under our program. The barriers to participation as a False Claims Act whistleblower are appreciably higher than in our program: for example, to be eligible for an award under the False Claims Act, a *qui tam* relator must file a Federal court complaint alleging fraud with specificity as required by Rule 9(b) of the Federal Rules of Civil Procedure, whereas under our program, a whistleblower only needs to complete a Form TCR, sworn under penalty of perjury.

[233] *See* Proposed Rule 21F–5.

[234] *See* letters from Chris Barnard, Auditing Standards Committee, and Institute of Internal Auditors.

[235] *See,* letters from VOICES, NWC, Stuart D. Meissner, LLC, Georg Merkl, and Wanda Bond.

[236] *See* letter from the NWC.

[237] *See* letters from the NSCP and SIFMA.

[238] As noted above, two commenters argued that we should interpret "action" narrowly such that we would only pay an award to a whistleblower for monetary sanctions related to specific counts in an action that were based upon the whistleblower's information. We decline to do so. First, we do not believe that such a narrow interpretation is consistent with the purpose of the whistleblower program, which is to encourage whistleblowers to provide the Commission with information that leads to successful enforcement actions. The proposed narrow interpretation of action would reduce incentives for whistleblowers to provide the Commission with information because (i) it would create uncertainty regarding how monetary sanctions may be assigned to specific counts and (ii) it would not reward whistleblowers who provide the Commission with information regarding lesser misconduct (although misconduct sufficient to cause the Commission to open an investigation) but which led the Commission to uncover much more significant misconduct. Second, we do not believe that such a narrow interpretation of action is practical. In contested actions, courts often do not assign monetary sanctions against a single defendant on a per count basis, and neither do Commission settlements. As such, we would have no reasonable basis to assign specific amounts to various counts in an action.

[239] *See, e.g., Harper* v. *AutoAlliance Intern., Inc.,* 392 F.3d 195, 209 (6th Cir. 2004) ("Claims form part of the same case or controversy [for purposes of supplemental jurisdiction] when they 'derive from a common nucleus of operative facts.'") (quoting *Ahearn* v. *Charter Township of Bloomfield,* 100 F.3d 451, 454–55 (6th Cir. 1996)). To determine whether two or more proceedings involve the same nucleus of operative facts, courts look at "factors such as 'whether the facts are related in time, space, origin or motivation,' 'whether they form a convenient trial unit,' and whether treating them as a unit 'conforms to the parties' expectations.'" *In re Iannochino,* 242 F.3d 36, 46 (1st Cir. 2001) (quoting *Restatement (Second) of Judgments* § 24 (1982)) (internal quotation marks omitted). *See also Airframe Systems, Inc.* v. *Raytheon Co.,* 601 F.3d 9, 15 (1st Cir. 2010). Put another way, "as long as the new complaint grows out of the same transaction or series of connected transactions as the old complaint, the causes of action are considered to be identical." *Kale* v. *Combined Ins. Co.,* 924 F.2d 1161, 1166 (1st Cir. 1991) (internal quotation marks and citations omitted).

facts, we intend to apply a flexible approach and will consider a number of factors, including whether the separate proceedings involve the same or similar: (1) Parties (whether named as defendants/respondents or simply named within the complaint or order); (2) factual allegations; (3) alleged violations of the Federal securities laws; or (4) transactions or occurrences.[240]

Paragraph (d)(1) allows us to treat together as a covered action for purposes of making an award under Rule 21F–10, two or more administrative or judicial proceedings brought by the Commission if those proceedings arise from the same nucleus of operative facts. So, for example, if we bring multiple proceedings during the course of an investigation, and these proceedings involve the same nucleus of operative facts but none yields a monetary sanction in excess of $1,000,000, we may nonetheless issue a Notice of Covered Action and treat these proceedings as one covered action for purposes of making an award under Rule 21F–10. Thus, if a qualified whistleblower provided us with original information that led to the successful enforcement of any one of the proceedings, we will make an award to that whistleblower for 10 to 30 percent of the total monetary sanctions collected in those proceedings.

Similarly, we will treat together a proceeding that yielded a monetary sanction of $1,000,000 or less with a Commission proceeding that alone would qualify as a covered action if the two proceedings involve the same nucleus of operative facts. Here again, we believe this is consistent with Congress's intent that qualified whistleblowers who provide us with original information that leads to enforcement proceedings yielding monetary sanctions in excess of $1,000,000 should receive an award payout that fully reflects the monetary sanctions collected.

Paragraph (d)(1) also authorizes us to treat as a covered action under Rule 21F–10 two or more Commission proceedings that otherwise might individually qualify as covered actions where these proceedings involve the same nucleus of operative facts. We believe that treating these proceedings together under the Rule 21F–10 procedures as one covered action, rather than processing them as separate covered actions, will help make the awards procedures more efficient and user-friendly, thereby further encouraging whistleblowers to come forward.

Finally, paragraph (d)(2) provides that, for purposes of determining the payment on an award pursuant to Rule 21F–14, we 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.[241] For example, if we make a whistleblower award for a covered action brought against an entity, but thereafter bring a separate proceeding against the officer who was responsible for the entity's conduct in which we do not recover in excess of $1,000,000, we may in our discretion determine to treat the second proceeding as part of the previous covered action and provide a payment based on the total of the two proceedings.

11. Rule 21F–4(e)—Monetary Sanctions

Proposed Rule 21F–4(e) tracked the definition of "monetary sanctions" found in Section 21F(a)(4) of the Exchange Act to mean any money, including penalties, disgorgement, and interest, ordered to be paid and any money deposited into a disgorgement fund or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002 as a result of a Commission action or a related action.[242] We received no comments on the proposed rule. We are adopting the rule as proposed. As was explained in our Proposing Release, we interpret the reference in Section 21F(a)(4) to "penalties, disgorgement, and interest" to be examples of monetary sanctions, and not exclusive. Thus, regardless of how designated, we will consider all amounts that are "ordered to be paid" in a Commission action or a related action as "monetary sanctions" for purposes of Section 21F.

12. Rule 21F–4(f)—Appropriate Regulatory Agency

a. Proposed Rule

Section 3(a)(34) of the Exchange Act defines the term "appropriate regulatory agency." Consistent with this definition, the proposed rule defined the term "appropriate regulatory agency" to mean 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 added to Section 3(a)(34) of the Exchange Act by future amendment.[243] Although Section 3(a)(34) defines the Commission and these other agencies to be "appropriate regulatory agencies" for specified functions and purposes, we stated in our Proposing Release that we would treat these agencies as "appropriate regulatory agencies" for all purposes under these rules. This would mean that, under Section 21F(c)(2)[244] and Rule 21F–8, a member, officer, or employee of one of the designated agencies would be ineligible to receive a whistleblower award even if the information that the person possesses is unrelated to the agency's regulatory function. This interpretation would place members, officers, and employees of appropriate regulatory agencies on equal footing with those of other organizations, such as the Public Company Accounting Oversight Board and law enforcement organizations, who are also statutorily ineligible to receive whistleblower awards.[245]

b. Comments Received

Two commenters supported our definition.[246] One commenter suggested that, in cases involving auditors, we should treat the PCAOB as an "appropriate regulatory agency."[247]

c. Final Rule

After considering the comments, we are adopting Rule 21F–4(f) as proposed. As Congress placed Section 21F in the Exchange Act, we believe it appropriate to define "appropriate regulatory agency" for purposes of Section 21F consistently with the existing Exchange Act definition of the same term. For this reason, we have determined not to define "appropriate regulatory agency" to include the PCAOB or any other authority not set forth in Section 3(a)(34) of the Exchange Act.

This approach does not inappropriately exclude the PCAOB for any relevant purposes under our rules. Section 21F(c)(2)(A)[248] and Rule 21F–8(c)(1) exclude from award eligibility members, officers, or employees of "appropriate regulatory agencies," and

[240] An administrative or judicial proceeding brought by the Commission will be treated as part of only one covered action.

[241] If a subsequent Commission proceeding arises from the same nucleus of operative facts as two covered actions for which we have already made awards, we will treat the subsequent proceeding as part of the covered action to which it bears the closest relationship.

[242] 15 U.S.C. 78u–6(a)(4).

[243] Title III of Dodd-Frank abolishes the Office of Thrift Supervision and transfers its functions to other agencies one year after the date of enactment, unless the transfer date is extended.

[244] 15 U.S.C. 78u–6(c)(2).

[245] *See* Section 21F(c)(2)(A), 15 U.S.C. 78u–6(c)(2)(A).

[246] *See* letters from Chris Barnard and Georg Merkl.

[247] *See* letter from Auditing Standards Committee.

[248] 15 U.S.C. 78u–6(c)(2)(A).

of the PCAOB. Similarly, under Section 21F(h)(2)(D)[249] and Rule 21F–7(a)(2), the PCAOB is separately set forth as an authority with which we may share whistleblower-identifying information.[250]

13. Rule 21F–4(g)—Appropriate Regulatory Authority

Rule 21F–4(g) defines an "appropriate regulatory authority" to mean an appropriate regulatory agency other than the Commission.

Section 21F(h)(2)(D)[251] of the Exchange Act provides that, without the loss of its status as confidential in the hands of the Commission, we may provide information that identifies a whistleblower to other authorities set forth in the statute, including "an appropriate regulatory authority." Through the operation of Section 21F(a)(5),[252] we are also directed to pay awards on related actions brought by an "appropriate regulatory authority."

The proposed rules did not include a definition of "appropriate regulatory authority." Instead, we used the defined Exchange Act term "appropriate regulatory agency" for purposes of the provisions dealing with ineligibility for awards, where that term expressly appears,[253] as well as the provisions dealing with sharing of whistleblower-identifying information and awards in connection with related actions, where the statute actually uses the term "appropriate regulatory authority."[254] As a result of this approach, the proposed rules could have been read to mean that an action brought by the Commission was a "related action," even though our intention was to consider only actions brought by authorities other than the Commission as "related actions."

In response to comments, and as discussed above, we have revised our definition of "action" in order to provide for payment of awards on additional Commission enforcement actions that might otherwise have qualified as "related actions" under a literal reading of the proposed rules. As a result of that revision, there is no other reason to treat the Commission as an "appropriate regulatory authority" for the purposes set forth in the statute. Accordingly, in order to avoid confusion and to establish a single consistent route to payment of an award based on Commission enforcement actions, we have determined to adopt a separate definition of the term "appropriate regulatory authority" that excludes the Commission.[255]

14. Rule 21F–4(h)—SRO

Proposed Rule 21F–4(g) defined the term "self-regulatory organization" to mean 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. As was explained in our Proposing Release, Section 3(a)(26) includes each of these organizations as a "self-regulatory organization," except that the Municipal Securities Rulemaking Board is designated as a self-regulatory organization solely for purposes of Sections 19(b) and (c) of the Exchange Act (relating to rulemaking).[256] Consistent with the approach taken with regard to the definition of "appropriate regulatory agency" (see discussion above), Proposed Rule 21F–4(g) would make clear that the Municipal Securities Rulemaking Board is considered to be a "self-regulatory organization" for all purposes under Section 21F.

The few commenters on this proposal all supported it.[257] We are adopting Rule 21F–4(g) as proposed, but re-designating it as Rule 21F–4(h).

E. Rule 21F–5—Amount of Award

a. Proposed Rule

Proposed Rule 21F–5 stated that, if all conditions are met, the Commission will pay an award of at least 10 percent and no more than 30 percent of the total monetary sanctions collected in successful Commission and related actions. This is the range that is specified in Section 21F(b)(1) of the Exchange Act.

b. Comments Received

We received few comments on this section. One commenter, a Member of Congress, suggested that we should consider placing an upper-end limit on the dollar amount that any one whistleblower could receive to avoid giving excessive awards.[258] Another commenter suggested that we should give further guidance on how award percentages would be determined as between Commission and related actions.[259]

c. Final Rule

We are adopting the final rule as proposed, except that we have added a new paragraph (a) to reflect Congress's clear direction that the determination of the amount of an award lies in our discretion.[260]

Paragraph (b) of Section 21F of the Exchange Act states that the Commission will independently determine the appropriate award percentage for each whistleblower, but total award payments, in the aggregate, will equal between 10 and 30 percent of the monetary sanctions collected in the Commission's action and the related action. Our final rule tracks this provision. Thus, for example, one whistleblower could receive an award of 25 percent of the collected sanctions, and another could receive an award of 5 percent, but they could not each receive an award of 30 percent. As we noted in our proposed rule, since the Commission anticipates that the timing of award determinations and the value of a whistleblower's contribution could be different for the Commission's action and for related actions, the proposed rule would provide that the percentage awarded in connection with a Commission action may differ from the percentage awarded in related actions. But, in any case, the amounts would, in total, fall within the statutory range of 10 to 30 percent. As to the suggestion that we use our discretion to avoid giving excessive awards, we note that the statute requires that we give an award of a minimum of 10 percent of the amount collected regardless of the overall size, and we do not have discretion to reduce that statutory minimum.

F. Rule 21F–6—Criteria for Determining Amount of Award

Assuming that all of the conditions for making an award to a whistleblower have been satisfied, Rule 21F–6 sets forth the criteria that the Commission will take into consideration in determining the percentage of the award between 10 and 30 percent.

[249] 15 U.S.C. 78u–6(h)(2)(D).

[250] However, Section 21F does not permit us to treat PCAOB actions as "related actions" for purposes of payment of an award. *See* Sections 21F(a)(5), 15 U.S.C. 78u–6(a)(5) and 21F(h)(2)(D), 15 U.S.C. 78u–6 (h)(2)(D).

[251] 15 U.S.C. 78u–6(h)(2)(D).

[252] 15 U.S.C. 78u–6(a)(5).

[253] Section 21F(c)(2), 15 U.S.C. 78u–6(c)(2); Proposed Rule 21F–8(c).

[254] Section 21F(a)(5) and (h)(2)(D)(i), 15 U.S.C. 78u–6(a)(5) and (h)(2)(D)(i); Proposed Rules 21F–3(b) and 21F–7(a)(2).

[255] As noted, Section 21F(h)(2)(D) provides that, "without the loss of its status as confidential in the hands of the Commission," we may provide whistleblower-identifying information to "an appropriate regulatory authority." Thus, it seems clear that for that purpose the term "appropriate regulatory authority" must apply to entities other than the Commission.

[256] 15 U.S.C. 78s(b) and (c).

[257] *See* letters from Auditing Standards Committee, Georg Merkl, and Chris Barnard.

[258] Letter from Senator Carl Levin.

[259] Letter from Auditing Standards Committee, Institute of Internal Auditors.

[260] *See* Section 21F(c)(1)(A), 15 U.S.C. 78u–6(c)(1)(A).

a. Proposed Rule

As proposed, Rule 21F–6 provided that the Commission would consider four general criteria, when determining the percentage of a whistleblower award: (1) Significance of the information provided by a whistleblower to the success of the Commission action or related action; (2) degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action; (3) programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to successful enforcement actions; and (4) whether an award otherwise enhances the Commission's ability to enforce the Federal securities laws, protect investors, and encourage the submission of high quality information from whistleblowers. The proposing release also stated that, when determining the percentage of a whistleblower award, the Commission would also be authorized to consider the following optional considerations: (1) Character of the enforcement action; (2) dangers to investors or others presented by the underlying violations involved in the enforcement action; (3) timeliness, degree, reliability, and effectiveness of the whistleblower's assistance; (4) time and resources conserved as a result of the whistleblower's assistance; (5) whether the whistleblower encouraged or authorized others to assist the staff who might otherwise not have participated in the investigation or related action; (6) any unique hardships experienced by the whistleblower as a result of his or her reporting and assisting in the enforcement action; (7) degree to which the whistleblower took steps to prevent the violations from occurring or continuing; (8) efforts undertaken by the whistleblower to remediate the harm caused by the violations; (9) whether the information provided by the whistleblower related to only a portion of the successful claims brought in the Commission or related action; (10) culpability of the whistleblower; and (11) whether, and the extent to which, a whistleblower reported the possible violation through effective internal whistleblower, legal, or compliance procedures before reporting the violations to the Commission.

b. Comments Received

We received a wide range of comments on Proposed Rule 21F–6. The comments addressed the general methodology for making award determinations, and suggestions for additional criteria to be included in the rule. Commenters also responded to our specific questions about whether to include in the rule criteria concerning whether to increase awards to whistleblowers who reported into an internal compliance or reporting system and whether to reduce awards to culpable whistleblowers.

With respect to methodology, some commenters recommended that we adopt a more transparent methodology for making award determinations.[261] Others urged we adopt a methodology in which certain criteria would have the same impact on our award determinations in all cases, such as by giving the factor greater weight than other criteria,[262] or by using a factor to decrease a whistleblower's award [263] or to cap a whistleblower's award at 10 percent.[264] Several commenters suggested that some of the optional considerations for making awards outlined in the release should be required and placed into the rule text.[265] Other commenters recommended additional factors that should be considered by the Commission when making an award.[266]

Commenters expressed strong and divergent views on whether to include a factor related to a whistleblower's use of internal compliance and reporting systems. Many commenters suggested that the optional award consideration relating to whether a whistleblower reported a possible securities violation through effective internal whistleblower, legal, or compliance procedures before reporting it to the Commission should be listed as a required factor in the rule text.[267] Others, however, argued that the optional award consideration should be eliminated because it is inconsistent with the statute's purpose, vague, and impractical because it would require the Commission to independently determine the effectiveness of internal compliance programs and to make subjective conclusions about the whistleblower's specific circumstances and mindset.[268]

In response to our question regarding whether the Commission should consider a whistleblower's role and culpability in the unlawful conduct to exclude the whistleblower from eligibility or as a criteria that would reduce the award amount, comments were also sharply divided.[269] Many commenters recommended that the Commission should reduce a culpable whistleblower's award because the failure to do so would create incentives for individuals to engage in wrongdoing or to conceal wrongdoing.[270] Other commenters suggested that the Commission should place this optional consideration into the rule text so that it would be required to be considered in every case.[271] Many other commenters opposed rules that would exclude culpable whistleblowers from eligibility for awards or would reduce the amount of their awards beyond what is already contained in the statute.[272] These commenters contended that, without sufficient financial incentives, insiders with the most knowledge and evidence about wrongdoing will not come forward, resulting in securities laws violations going undetected (or at least experiencing a further delay before they are detected).

[261] *See, e.g.,* letters from Harold Burke and Partrick Burns.

[262] *See* the letter from the NSCP.

[263] *See, e.g.,* letters from Valspar, Institute of Internal Auditors, and Washington Legal Foundation.

[264] *See, e.g.,* letters from Anixter Int., Business Roundtable, Taft, Financial Services Roundtable, Alcoa Group.

[265] *See, e.g.,* letters from the Association of Corporate Counsel, Foster Wheeler, Anixter Int., Business Roundtable, Financial Services Roundtable, Society of Corporate Secretaries, Wells Fargo, Ethics & Compliance Officer Association, Alcoa Group, Deloitte, CCMC, Apache Group.

[266] *See, e.g.,* letters from Harold Burke (whether the submission exposed a nationwide practice; whether the whistleblower, or whistleblower's counsel, did not provide or offer to provide any help after submitting the tip, or hampered the government's efforts in developing its case; and whether the whistleblower substantially delayed reporting the fraud); John Wahh (whether the whistleblower benefitted from the securities violation); Chris Barnard (the role and culpability of the whistleblower in the reported securities violations); Auditing Standards Committee (the relative amount of the award, rather than the relative percentage amount); Georg Merkl (the economic risk the whistleblower took to come forward and report the securities violations); and DC Bar (new more detailed criteria for encouraging use of existing compliance programs).

[267] *See, e.g.,* letters from the Association of Corporate Counsel, Foster Wheeler, Anixter Int., Business Roundtable, Financial Services Roundtable, Society of Corporate Secretaries, Wells Fargo, Ethics & Compliance Officer Association, Alcoa Group, Deloitte, and CCMC.

[268] *See, e.g.,* letters from the NCCMP, Georg Merkl, Daniel J. Hurson, and Auditing Standards Committee.

[269] *See, e.g.,* letters from the Auditing Standards, Apache Group, Georg Merkl, NWC, Connolly & Finkel, Target, SIFMA, Business Roundtable, Washington Legal Foundation, Morgan Lewis, Financial Services Roundtable, Society of Corporate Secretaries, Wells Fargo, TRACE International, Inc, Alcoa Group, Oppenheimer Funds, Association of Corporate Counsel, and CCMC.

[270] *See, e.g.,* letters from Connolly & Finkel, Target, SIFMA, Business Roundtable, Washington Legal Foundation, Morgan Lewis, Financial Services Roundtable, Society of Corporate Secretaries, Wells Fargo, Trace, Alcoa Group, Oppenheimer Funds, Association of Corporate Counsel, and CCMC.

[271] *See, e.g.,* letters from Apache Group.

[272] *See, e.g.,* Auditing Standards, Georg Merkl, and NWC.

c. Final Rule

Although we continue to believe the four criteria set forth in Proposed Rule 21F–6—three of which derive from the statute—are important, we have significantly revised and restructured the final rule in response to comments. The changes are designed to describe more specifically the factors relevant to the Commission's determinations, and thus make award determinations more transparent, predictable, and fair. Similar to the approach used by the Department of Justice and Internal Revenue Service,[273] we adopt a methodology for determining awards where some factors suggest an increase and others a decrease in award percentage. This analytical framework incorporates into the final rule text the four required criteria from the proposed rule and the eleven optional considerations from the proposing release.

Under the final rule, when determining the percentage of a whistleblower award, the following required criteria may increase a whistleblower's award percentage: (1) Significance of the information provided by the whistleblower (the first required criteria in the proposed rule and the statute); (2) assistance provided by the whistleblower (the second required criteria in the proposed rule and the statute); (3) law enforcement interest in making a whistleblower award (the third and fourth required criteria in the proposed rule and the third required criteria in the statute); and (4) participation by the whistleblower in internal compliance systems. In contrast, the following required criteria may decrease a whistleblower's award percentage: (1) Culpability of the whistleblower; (2) unreasonable reporting delay by the whistleblower; and (3) interference with internal compliance and reporting systems by the whistleblower. Under many of the required criteria, we have set forth in the final rule related optional considerations that may be taken into account when considering the criteria. These potentially relevant factors are designed to provide greater detail regarding how award determinations will be made and to address commenters' other concerns and recommendations.

Although we have considered the views of commenters who recommended that the presence or absence of certain criteria should have a distinct and consistent impact on our award determinations, the final rule does not establish such a methodology that would permit a mathematical calculation of the appropriate award percentage. Since every enforcement matter is unique, the analytical framework adopted by the Commission in the final rule provides general principles without mandating a particular result. Accordingly, no attempt has been made to list the factors in order of importance, weigh the relative importance of each factor, or suggest how much any factor should increase or decrease the award percentage. Depending upon the facts and circumstances of each case, some factors may not be applicable or may deserve greater weight than others. Furthermore, the absence of any one of the positive factors does not mean that the award percentage will be lower than 30 percent, nor does the absence of negative factors mean the award percentage will be higher than 10 percent. Thus, a whistleblower would not be penalized for not satisfying any one of the positive factors. For example, a whistleblower who provides the Commission with significant information about a possible securities violation and provides substantial assistance in the Commission action or related action could receive the maximum award regardless of whether the whistleblower satisfied other factors such as participating in internal compliance programs. In the end, we anticipate that the determination of the appropriate percentage of a whistleblower award will involve a highly individualized review of the facts and circumstances surrounding each award using the analytical framework set forth in the final rule.

In response to concerns expressed by commenters that the proposed rules could incentivize whistleblowers to bypass corporate compliance programs, delay reporting violations, or otherwise interfere with internal compliance systems in order to enhance their future award, we have taken several steps to address this in the final rule. First, to reflect the important investor protection role that corporate compliance programs can serve and increase the incentive for whistleblowers to participate in these programs, the final rule includes a positive factor that requires the Commission to assess whether the whistleblower participated in his or her company's internal compliance and reporting systems.[274] Second, to minimize ongoing investor harm, maximize the deterrent impact of our enforcement cases, and to discourage delayed reporting by whistleblowers, the final rule includes a negative factor that requires the Commission to assess whether the whistleblower substantially and unreasonably delayed reporting the securities violations. Lastly, to penalize whistleblowers who attempt to undermine their employer's internal compliance or reporting systems, the final rule includes a negative factor that requires the Commission to assess whether there is evidence provided to the Commission that the whistleblower intentionally interfered with his or her company's internal compliance systems. Together, these provisions are designed to give whistleblowers appropriate incentives to report securities violations voluntarily to their corporate compliance programs and not to impair the effectiveness of these important programs.

As discussed in greater detail below in the discussion of Rule 21F–16, we do not believe that a *per se* exclusion for culpable whistleblowers is consistent with Section 21F of the Exchange Act. By allowing certain less-culpable whistleblowers to receive awards consistent with the limitations set forth in the final rules, we have provided incentives for persons involved in wrongdoing to come forward and disclose illegal conduct involving others while limiting awards to those whistleblowers. However, after considering the public policy concerns expressed by commenters, we have included in the final rule a negative factor that requires the Commission to assess the culpability or involvement of the whistleblower in matters associated with the Commission's action or related actions.

G. Rule 21F–7—Confidentiality of Submissions

a. Proposed Rule

Proposed Rule 21F–7 reflected the confidentiality requirements set forth in

[273] *E.g.,* Internal Revenue Manual § 25.2.2.9.2.

[274] Unlike the optional consideration in the release to the proposed rule, the final rule does not require the Commission to evaluate whether the internal compliance and reporting systems of an entity are "effective." We believe that defining what constitutes "effective" internal compliance procedures for a wide range of entities is beyond the scope of these rules and determining whether such procedures existed at a specific entity would impose an unnecessary administrative burden on the staff. Accordingly, the final rule relies on whistleblowers to determine whether reporting potential securities violations internally would be appropriate or desirable at their entity, without requiring us to independently and subsequently assess the effectiveness of their entity's internal compliance procedures. However, in determining whether to give a company the opportunity to investigate and report back, the Commission may consider information we have about the company's internal compliance programs." *See supra* at n. 199.

Section 21F(h)(2) of the Exchange Act [275] with respect to information that could reasonably be expected to reveal the identity of a whistleblower. As a general matter, it is the Commission's policy and practice to treat all information obtained during its investigations as confidential and nonpublic. Disclosures of enforcement-related information to any person outside the Commission may only be made as authorized by the Commission and in accordance with applicable laws and regulations. Consistent with Section 21F(h)(2), we proposed Rule 21F–7 to explain that the Commission will not reveal the identity of a whistleblower or disclose other information that could reasonably be expected to reveal the identity of a whistleblower, except under circumstances described in the statute and the rule.[276]

Paragraph (a)(1) of the proposed rule authorized disclosure of information that could reasonably be expected to reveal the identity of a whistleblower when disclosure is required to a defendant or respondent in a Federal court or administrative action that the Commission files or in another public action or proceeding filed by an authority to which the Commission may provide the information. For example, in a related action brought as a criminal prosecution by the Department of Justice, disclosure of a whistleblower's identity may be required, in light of the requirement of the Sixth Amendment of the Constitution that a criminal defendant have the right to be confronted with witnesses against him.[277] Proposed paragraph (a)(2) authorized disclosure to the Department of Justice, an appropriate regulatory agency, 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 when it is necessary to achieve the purposes of the Exchange Act and to protect investors. With the exception of foreign securities and law enforcement authorities, each of these entities is subject to the confidentiality requirements set forth in Section 21F(h) of the Exchange Act. Since foreign securities and law enforcement authorities are not bound by these confidentiality requirements, the rule stated that the Commission may determine what assurances of confidentiality are appropriate prior to disclosing such information. Paragraph (a)(3) authorized disclosure in accordance with the Privacy Act of 1974.

Because many whistleblowers may wish to provide information anonymously, paragraph (b) of the proposed rule stated that anonymous submissions will be permitted with certain specified conditions. Proposed paragraph (b)(1) required that anonymous whistleblowers be represented by an attorney and that the attorney's contact information be provided to the Commission at the time of the whistleblower's initial submission. The purpose of this requirement was to prevent fraudulent submissions and to facilitate communication and assistance between the whistleblower and the staff. Any whistleblower may be represented by counsel—whether submitting information anonymously or not.[278] Proposed paragraph (b)(2) required that anonymous whistleblowers and their counsel follow the required procedures outlined in Proposed Rule 21F–9. Paragraph (b)(3) required that anonymous whistleblowers disclose their identity, pursuant to the procedures outlined in Proposed Rule 21F–10, before the Commission will pay any award, as is required by the statute. In the proposing release, we also solicited comments on whether we should include limits on the fees attorneys may collect from whistleblowers under our program.

b. Comments Received

We received few comments related to the confidentiality provisions. One commenter expressed concern about the Commission's exercise of its authority to share the identity of a whistleblower with a foreign law enforcement or regulatory authority because the whistleblower will have no assurance against the possibility of adverse consequences other than "trust[ing] the [foreign] country's regulators".[279] Another commenter stated that the Commission has no authority to compel an attorney to reveal the identity of an anonymous whistleblower, and that, in cases where we know the whistleblower's identity, our rules should require that we notify the whistleblower, and provide the whistleblower an opportunity to seek a protective order, any time the whistleblower's identity may be revealed.[280] A third commenter noted that allowing a whistleblower to remain anonymous could encourage false or overstated claims.[281]

Because an anonymous whistleblower must retain an attorney and because an attorney representing a whistleblower will be deemed to be practicing before the Commission, we requested comments on whether the Commission should adopt rules governing conduct by attorneys representing whistleblowers and in particular rules regarding attorneys' fees in the representation of whistleblowers. The majority of commenters opposed the adoption of a rule regarding fees.[282] The rationales offered in support of this objection included that such a rule would make it nearly impossible for corporate whistleblowers to obtain attorneys to represent them in Dodd-Frank cases; excessive attorneys' fees already are governed by state bar rules; and such a rule would interfere with the contractual relationship between a whistleblower and his or her attorney.

In contrast, several commenters recommended that the Commission adopt by rule or otherwise publicly state that attorneys representing a whistleblower will not be entitled to receive a contingency fee based on any amount ultimately rewarded to the whistleblower.[283] The rationales offered for this recommendation included that a whistleblower's counsel is not likely to participate materially in the investigation of a matter filed through the whistleblower program; [284] public companies may be inundated with frivolous claims or claims based on incomplete information brought by attorneys who represent multiple complainants, hoping that one of them will be successful in an award from the Commission; [285] and a whistleblower in a difficult situation may have limited ability to negotiate appropriate fees for representation.[286]

Other commenters addressed the question of whether the Commission should adopt rules regarding attorney conduct generally. Two commenters suggested that the Commission adopt attorney conduct standards for attorneys representing whistleblowers since a myriad of law firms will be advertising and soliciting work on whistleblowing. One suggested adopting, for the representation of whistleblowers, some form of 17 CFR 205.1 *et seq.,* which details the requirements of Section 307 of the Sarbanes Oxley Act addressing standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of issuers.[287] The other noted that the Commission should clarify or confirm that an attorney representing a whistleblower under Section 21F(d)(1) or (2) will be deemed to be "appearing or practicing before the Commission" and thereby be bound by Section 4C of the Exchange Act and Section 102 of the Rules of Practice of the Commission.[288]

c. Final Rule

We are adopting Rule 21F–7 largely as proposed. The rule tracks the provisions of the statute and identifies those instances where the Commission, in furtherance of its regulatory responsibilities, may provide information to certain delineated recipients.

We made two changes. First, we changed the term "appropriate regulatory agency" to "appropriate regulatory authority." As discussed above, our use of this newly-defined term, which excludes the Commission, better reflects the facts that we share information with *other* agencies, and, that under our rules, related actions similarly are actions brought by other agencies that are based upon a whistleblower's information.[289]

Second, where we share information that could reasonably be expected to reveal the identity of a whistleblower with foreign securities or law enforcement authorities, we proposed that we "may determine what assurances of confidentiality" we deem necessary. We have changed that language to state that we "will" make such a determination, thereby making clear, consistent with Section 21F, that we will obtain appropriate assurances of confidentiality before sharing such information with foreign authorities. We plan to work closely with whistleblowers or their attorney in an effort to take appropriate steps to maintain their confidentiality, consistent with the requirements of Section 21F(h)(2).[290] At the same time, however, Congress expressly authorized us to disclose whistleblower-identifying information subject to the limitations and conditions set forth in Section 21F(h)(2). Accordingly, we do not believe it would be consistent with either Congress's intent or with the proper exercise of our enforcement responsibilities to require by rule that our staff notify a whistleblower before any authorized disclosure, and provide the whistleblower with an opportunity to seek a protective order.

In addition, as we noted in our proposing release, pursuant to Rule 102(e) of the Commission's Rules of Practice,[291] the Commission may deny the privilege of practicing before the Commission to any person who, after notice and opportunity for hearing, is found not to possess the requisite qualifications to represent others, to be lacking in character or integrity, to have engaged in unethical or improper professional conduct, or to have willfully violated or willfully aided and abetted the violation of any provision of the Federal securities laws or rules. Practice before the Commission is defined to include transacting any business with the Commission.[292] Representation of whistleblowers will constitute practice before the Commission, and thus, misconduct by an attorney representing a whistleblower can result in the attorney being subject to disciplinary sanctions under any of the conditions set forth in Rule 102(e).

We have also decided not to include a rule regarding attorneys' fees in our Final Rule. While there are reasonable arguments on both sides, we think the better approach is to leave issues of attorneys' fees to state bar authorities and to contractual arrangements between prospective whistleblowers and their attorneys. We believe that both state bar authorities and individual whistleblowers are better equipped than the Commission to make determinations regarding the appropriate amount of attorneys' fees.

H. Rule 21F–8—Eligibility

a. Proposed Rule

Paragraph (a) of Proposed Rule 21F–8 provided that whistleblowers must provide information in the form and manner required by these rules in order to be eligible for a whistleblower award.[293] The proposed rule also stated that the Commission, in its sole discretion, may waive any of these procedural requirements based upon a showing of extraordinary circumstances.

The specific procedures required for submitting original information and making a claim for a whistleblower award were described in Proposed Rules 21F–9 through 21F–11. Proposed Rule 21F–8(b) contained several additional procedural requirements designed to assist the Commission in evaluating and using the information provided. These included that the whistleblower, upon request, agree to provide explanations and other assistance including, but not limited to, providing all additional information in the whistleblower's possession that is related to the subject matter of his submission.

Paragraph (b) of the proposed rule also required whistleblowers, if requested by the staff, to provide testimony or other acceptable evidence relating to whether they are eligible for or otherwise satisfy any of the conditions for an award. Proposed paragraph (b) also authorized the staff to require that a whistleblower enter into a confidentiality agreement in a form acceptable to the Office of the Whistleblower, including a provision that a violation may result in the whistleblower being ineligible for an award.[294]

Paragraph (c) of Proposed Rule 21F–8 recited the categories of individuals ineligible for an award, many of which are set forth in Section 21F(c)(2). These include persons who are, or were at the time they acquired the original information, a member, officer, or employee of the Department of Justice, an appropriate regulatory agency, a self-regulatory organization, the Public Company Accounting Oversight Board, or any law enforcement organization; anyone who is convicted of a criminal violation that is related to the Commission action or to a related action for which the person otherwise could receive an award; any person who obtained the information provided to the Commission through an audit of a company's financial statements, and making a whistleblower submission would be contrary to the requirements of Section 10A of the Exchange Act (15

[275] 15 U.S.C. 78u–6(h)(2).

[276] Under Section 21F(h)(2), whistleblower-identifying information is also expressly exempted from the provisions of the Freedom of Information Act, 5 U.S.C. 552.

[277] *See* U.S. Const. Amend. VI.

[278] *See* Section 21F(d)(1), 15 U.S.C. 78u–6(d)(1). Under the statute, however, an anonymous whistleblower seeking an award is required to be represented by counsel. Section 21F(d)(2), 15 U.S.C. 78u–6(d)(2).

[279] *See* letter from Eric Dixon, LLC; *see also* pre-release letter from Ruby Monroe (expressing concern for confidentiality of whistleblowers from foreign jurisdictions).

[280] Letter from NWC.

[281] Letter from Bruce McPheeters.

[282] *See, e.g.,* NWC; Grohovsky Group; American Association for Justice; Continewity; Stuart D. Meissner, LLC.

[283] Letters from Baker Donelson; Washington Legal Foundation; Institute of Internal Auditors.

[284] Letter from Baker Donelson.

[285] *Id.*

[286] Letter from Institute of Internal Auditors.

[287] Letter from Americans for Limited Government.

[288] Letter from Baker Donelson, PC.

[289] *See* Rule 21F–4(g).

[290] For example, we are adding a question to our whistleblower submission form that asks whistleblowers to tell us if they are giving us any particular documents or other information in their submission that they believe could reasonably be expected to reveal their identity.

[291] 17 CFR 201.102(e).

[292] 17 CFR 102(f).

[293] *See* Section 21F(c)(2)(D), which prohibits the Commission from paying an award to any whistleblower "who fails to submit information to the Commission in such form as the Commission may, by rule, require. 15 U.S.C. 78u–6(c)(2)(D)."

[294] Section 21F(e) of the Exchange Act authorizes the Commission to require that a whistleblower enter into a contract. 15 U.S.C. 78u–6(e).

U.S.C. 78j–1); and any person who in his whistleblower submission, his other dealings with the Commission, or his dealings with another authority in connection with a related action, knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or uses any false writing or document, knowing that it contains any false, fictitious, or fraudulent statement or entry. Paragraph (c)(2) of Proposed Rule 21F–8 also made foreign officials ineligible to receive a whistleblower award. In order to prevent evasion of these exclusions, paragraph (c)(5) of the proposed rule also provided that persons who acquire information from ineligible individuals are ineligible for an award. In addition, paragraph (c)(6) made any person ineligible who is the spouse, parent, child, or sibling of a member or employee of the Commission, or who resides in the same household as a member or employee of the Commission, in order to prevent the appearance of improper conduct by Commission employees.

b. Comments Received

We received several comments on these sections. One commenter opposed the provision under which the Commission could require whistleblowers to enter into confidentiality agreements, stating that the statute does not authorize this requirement and it may violate a whistleblower's free speech rights and interfere with a whistleblower's ability to sue Commission staff.[295] Other commenters stated that the Commission should not add to the list of ineligible persons designated by Congress.[296] One commenter suggested that the provision making ineligible any whistleblower who knowingly uses a false writing or document in a submission should be redrafted to clarify that the exclusion only applies if a whistleblower does so with intent to deceive the Commission. The commenter stated that this change would permit a whistleblower to submit a false document created by someone else as evidence of that other person's or entity's wrongdoing.[297]

Another commenter noted that significant information could come from whistleblowers who are employees of state-owned foreign companies, and that our rule would treat those employees as foreign officials and would thus deem them ineligible for an award.[298]

[295] Letter from NWC.

[296] Letters from Stuart D. Meissner, LLC, Chris Barnard.

[297] Letter from Grohovsky Group.

[298] Letter from NWC.

Although proposed Rule 21F–8(c)(5) was intended to prevent evasion of our rules by making ineligible any whistleblower who acquires information from other ineligible persons, some comments suggested that, as proposed, the rule was at once too broad and too narrow in certain respects. One commenter noted that a similar provision in proposed Rule 21F–4(b)(4) created, in effect, a "hearsay exception" that would exclude from eligibility any whistleblower who overheard an excluded individual talking about a fraud in which the other person was a participant.[299] Another commenter pointed out that a culpable whistleblower could evade the limitations of proposed Rule 21F–15 simply by providing information about violations to a third party.[300]

Finally, one commenter urged that we deem ineligible any whistleblower who refused to cooperate with a company's internal investigation, or who provided inaccurate or incomplete information or otherwise hindered such an investigation.[301]

c. Final Rule

After considering these comments, we are adopting the proposed rule with certain modifications. The eligibility requirements reflect the express requirements and limitations set forth in Section 21F, and are otherwise a reasonable exercise of our authority to adopt rules that are necessary or appropriate to implement the provisions of Section 21F.

As adopted, Rule 21F–8(b)(4) provides that a whistleblower may be required to enter into a confidentiality agreement as to any non-public information that the Commission provides to the whistleblower. The addition of the reference to "non-public" information that "the Commission provides" clarifies that the rule does not limit the whistleblower's use of information that he or she already knows, or learns from other sources, and does not acquire through our investigation.

We have also changed proposed Rule 21F–8(c)(5) (now re-designated as Rule 21F–8(c)(6)) to provide that a person is ineligible if he or she acquires original information from either a person who is subject to the auditors exclusion found in paragraph (c)(4) (discussed below), unless the information is not excluded from that person's use, or the whistleblower is providing the Commission with information about possible violations involving that person, or from any person with intent to evade any provision of these rules. The first part of this provision tracks the language of Rule 21F–4(b)(4)(vi), and is simply intended to assure consistent treatment under Rule 21F–8 and Rule 21F–4(b)(4) of potential whistleblowers who obtain their information from independent public accountants involved in engagements required under the Federal securities laws. The second part of this provision is designed to prevent persons who are prohibited or limited in making a claim under any provision of our rules (including culpable whistleblowers under Rule 21F–16) from evading our rules by colluding with a third party. This change also clarifies that the intent of the exclusion is to address efforts to evade our rules, and not persons who legitimately learn about violations being perpetrated by ineligible persons.

We have decided to maintain the exclusion for "foreign officials" as proposed. The exclusion for foreign officials would include employees of foreign instrumentalities, including state-owned entities. Our conclusion is informed by the Foreign Corrupt Practices Act,[302] which includes within its definition of "foreign officials" those who are employed by an instrumentality of a foreign government, which includes state-owned entities.[303] We believe that it is appropriate to treat the exclusion for foreign officials under the whistleblower program consistent with the definition of foreign official under the FCPA, because FCPA enforcement actions are the contexts in which the exclusion is most likely to apply. Inconsistent treatment could, we believe, risk unnecessary confusion as to when and under what circumstances someone is a foreign official for purposes of two closely related provisions of the securities laws.

In addition, whistleblower awards to employees of foreign state-owned

[299] *See* letter from NWC.

[300] *See* letter from ABA.

[301] Letter from SIFMA.

[302] Broadly, the anti-bribery provisions of the FCPA make it unlawful for issuers (and their officers, directors, employees, agents and stockholders), domestic concerns, and foreign persons and entities (acting within the U.S.), to make, offer or authorize the payment of bribes, directly or indirectly, to foreign officials, foreign parties, foreign party officials, and foreign candidates for public office for the purpose of obtaining or retaining business for or with, or directing business to, any person. *See* 15 U.S.C. 78dd–1, *et seq.*

[303] A "foreign official" is defined in the FCPA as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization." *See* 15 U.S.C. 78dd–2(h)(2)(A).

entities have the potential to create some of the same negative repercussions discussed in the proposed rule, *i.e.,* the perception that the United States is interfering with foreign sovereignty, potentially undermining foreign government cooperation under existing treaties (including multilateral and bilateral mutual legal assistance treaties), the incentive for foreign officials to make reports to the United States rather than to local authorities, and concerns about protection of foreign officials who become whistleblowers.

We have also modified Rule 21F–8(c)(7) to clarify that the exclusion of a whistleblower for using any false writing or document that contains a false, fictitious, or fraudulent statement or entry will only apply when the whistleblower thereby intends to mislead or otherwise hinder the Commission or another authority in connection with a related action.[304]

We have determined not to adopt an eligibility exclusion based on a whistleblower's conduct with respect to an internal investigation. In some cases, a whistleblower may have a reasonable concern that causes him or her to report misconduct directly to the Commission. In other cases, this concern may be less justified. However, we believe that a categorical rule that excludes whistleblowers for failure to reasonably cooperate with internal investigations would create too much uncertainty, and too great a disincentive, for whistleblowers who are considering how to report misconduct. Thus, such a rule would undermine the effectiveness of the whistleblower program. In appropriate circumstances, however, we will consider the whistleblower's conduct in connection with an internal investigation in the determination of whether the whistleblower's conduct "led to" a successful enforcement action,[305] and/or in determining the amount of an award.

Finally, Rule 21F–8(c)(4) reflects the exclusions set forth in Section 21F(c)(2)(C) for persons who obtain information through the performance of an audit of financial statements and for whom a whistleblower submission "would be contrary to the requirements of Section 10A" of the Exchange Act.

We are adopting Rule 21F–8(c)(4) as it was originally proposed without change, as it largely tracked the language of Section 21F(c)(2)(C). The statute prohibits an award "* * * to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–1)."

Rule 21F–8(c)(4) accordingly only disqualifies those submissions that are contrary to Section 10A. The most obvious example is where the auditor did not file a "10A Report" with the SEC's Office of Chief Accountant, but instead submitted information about the company's illegal act to us to be considered for the award under the whistleblower program.

In adopting this rule we carefully considered the comments on Rule 21F–4(b)(4)(iii) because those issues are similar to ones implicated in determining eligibility. In connection with that proposal, some commenters advocated that individuals should not be allowed to make a submission alleging that the firm violated Section 10A, while others recommended allowing such a rule.[306] The rule we are adopting today allows an accountant to make a submission alleging that his firm violated Section 10A (or other professional standards), because such a submission is not "contrary to the requirements of Section 10A." If such a submission is made, then, as is the case with Rule 21F–4(b)(4)(iii)(D), the whistleblower will also be able to obtain an award if the information leads to a successful action against the engagement client.

An allegation that a firm violated Section 10A is consistent with the statute especially when the allegation is that an audit firm failed to assess or investigate illegal acts or make a report to the Commission. Accordingly, a person can make a submission that alleges not only that the audit firm failed to make a report with the Commission under Section 10A(b)(3), but also that the firm failed to follow any other procedures set forth in Section 10A or professional standards.[307] By specifically allowing allegations of violations of the Federal securities laws or professional standards the rule may help insure that wrongdoing by the firm (or its employees) is reported in a timely fashion. This is especially important because of the important gatekeeper role that auditors play in the securities markets.

Commission staff will carefully evaluate a submission alleging a Section 10A violation to determine whether it contains a specific and credible allegation of a violation of Section 10A.[308] A specific and credible allegation is one made in good faith and is not a pretext for circumventing the requirements of Section 10A. In assessing whether an allegation of a firm's Section 10A violation is specific and credible, the staff may consider the facts and circumstances surrounding the submission, including the level of detail, documentary support, descriptions of particularized conduct or omissions by identified persons, as well as the materiality or non-triviality of the alleged Section 10A violation. For example, the Commission may consider, among other things:

- Whether the audit firm conducted an assessment of or investigation into the alleged illegal act by the issuer and the quality of that investigation;
- Whether the audit firm followed the requirements of Section 10A and its response to the allegation of an illegal act;
- The position or title of the whistleblower and the role the person played in the firm's violations;
- The role of the whistleblower in the Section 10A investigation or assessment; and
- The timing of the submission.

We are also providing guidance about several important aspects of Rule 21F–8(c)(4). First, the information must be gained through the work done for an audit for an issuer.[309] Non-issuers, such

[304] *See* letter from Grohovsky Group.

[305] For example, if a whistleblower hindered an internal investigation, but the company nonetheless self-reported violations, we could consider the whistleblower's conduct in determining whether the whistleblower caused us to open an investigation into the matter.

[306] Letters from PwC, KPMG, Center for Audit Quality ("CAQ"), Deloitte, Ernst & Young ("EY"), TAF. *Compare,* CAQ ("The CAQ has concerns about the Proposed Rules to the extent that they permit whistleblower awards for information reported by an independent public accountant regarding his or her firm's performance of services related to an engagement required under the securities laws (*i.e.,* whistleblower reporting by an accountant with respect to his or her own firm's performance of services"), *with* TAF ("* * * where that legal duty is not honored, and the audit film fails to comply with its obligations under Section 10A, a whistleblower's submission of the information to the SEC is consistent with both Section 10A and the Commission's overall enforcement mission. In such circumstance, the policies underlying both Section 10A and Dodd Frank weigh in favor of rewarding the whistleblower who reports wrong doing when the audit firm has failed to.").

[307] Violations of law are not restricted to the audit or interim review work performed by an audit firm. For example, if an employee observes insider trading, auditor independence failures at a firm or other quality control failures that are not specific to any particular audit, then a submission containing those allegations is permitted.

[308] As with other submissions, the contents are sworn under penalty of perjury which provides additional safeguards against pretextual submissions.

[309] The text of Section 10A only refers to audits of financial statements of issuers and thus the requirements—including the reporting requirements—are imposed on audits for issuers. Issuer is a defined term under Section 10A.

as broker dealers or investment advisors,[310] are not covered by Section 10A and, subject to Rule 21F–(b)(4)(iii)(D), submissions relating to them are allowed.

Second, we interpret the phrase "through an audit of a company's financial statements" in Rule 21F–8(c)(4) as meaning information that is learned through an audit of a company's financial statements when it is linked to audit procedures or audit work. Accordingly, the phrase clearly and most directly applies to members of an audit engagement team. It applies to the engagement partner, quality review partner, and other people working directly on the engagement. It also applies to foreign affiliates or specialists who are used by the engagement team.[311]

Third, although both Dodd-Frank and Section 10A only refer to "audits of financial statements," we believe this includes quarterly reviews, which are frequently viewed as a step in the annual audit process and therefore may properly be considered as encompassed within Section 10A's scope. Accordingly, if an auditor discovers or detects an illegal act during either a quarterly review or annual audit, it is required to comply with Section 10A.[312] An audit firm's failure to follow the procedures or otherwise comply with Section 10A when confronted with an illegal act—regardless of whether the violation is detected during a year-end audit or an interim review—is a violation of law and an individual would be able to make a submission alleging that his audit firm violated the law or professional standards.

Information gained through the audit of financial statements extends beyond illegal conduct with respect to the financial statements themselves. Section 10A broadly defines "illegal act" as any "act or omission that violates any law, or any rule or regulation having the force of law." Further, the statutory disqualification was not limited to information gained only about financial statements; rather, it disqualified a submission where the person "gains the information through the performance of an audit of financial statements required under the securities laws."

In response to a footnote in the proposing release, certain commenters from the audit profession advocated expanding the scope of the exclusion to disqualify virtually all employees of accounting firms, regardless of whether those employees are performing audit services or are performing services for public companies.[313] The footnote stated: "The Commission anticipates this exclusion would also apply to information gained through another engagement by the independent public accountant for the same client, given that the independent public accountant would generally already have an obligation to consider the information gained in the separate engagement in connection with the Commission-required engagement."

As noted above, we are clarifying the application of information obtained "through an audit of a company's financial statements" with respect to firm personnel outside of the audit engagement team itself. We decline to codify a *per se* exclusion for all employees or all engagements, especially engagements involving non-issuer clients. Persons working on other engagements, to the extent that they are not covered by Section 10A or are not required under the Federal securities laws, will not be deemed ineligible simply because the engagement is with an audit client of the firm.

Several commenters recommended that whistleblowers should have to use internal reporting processes by either reporting up the chain at the audit firm or reporting to the audit client.[314] We are declining to adopt a rule that would require all employees of accounting firms use the internal processes whether at the audit firm or at the audit client. This approach is consistent with the final rule regarding internal compliance persons, and we address certain of these commenters' concerns through our adoption of Rule 21F–4(b)(4)(D).

Finally, a submission is not contrary to 10A—even where the 21F–8(c)(4) exception would otherwise apply—where the whistleblower has a reasonable basis to believe either of the following: (i) The disclosure of the information to the Commission is necessary to prevent the relevant entity from committing a material violation of the securities laws that is likely to cause substantial injury to the financial interest or property of the entity or investors; or (ii) the relevant entity is engaging in conduct that will impede an investigation of misconduct even if the submission does not contain an allegation of audit firm wrongdoing.[315]

I. Rule 21F–9—Procedures for Submitting Original Information

Proposed Rule 21F–9 set forth a two-step process for the submission of original information. The first step required the submission of information either on a standard form or through the Commission's online database for receiving tips, complaints and referrals. The second step required the whistleblower to complete a separate declaration form, signed under penalty of perjury, in which the whistleblower would be required to make certain representations concerning the veracity of the information provided and the whistleblower's eligibility for a potential award. In response to comments, we are adopting a more streamlined process that requires submitting only one form signed under penalty of perjury.

a. Proposed Rule

Paragraph (a) of Proposed Rule 21F–9 required the submission of information in one of two ways. A whistleblower could submit the information electronically through the Commission's Electronic Data Collection System available on the Commission's Web site or by completing and submitting proposed Form TCR—*Tip, Complaint or Referral*.[316] Proposed Form TCR, and the instructions thereto, were designed to capture basic identifying information about a complainant and to elicit sufficient information to determine whether the conduct alleged suggests a violation of the Federal securities laws.[317]

In addition to submitting information in the form and manner required by paragraph (a), we proposed in paragraph (b) of Proposed Rule 21F–9 that whistleblowers who wish to be considered for an award in connection with the information they provided to the Commission must also complete and provide the Commission with a separate form—proposed Form WB–DEC, *Declaration Concerning Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934*. Proposed Form WB–DEC required a whistleblower to answer certain threshold questions concerning the whistleblower's eligibility to receive an award. The form also contained a statement from the whistleblower acknowledging that the information contained in the Form WB–DEC, as well as all information contained in the whistleblower's submission, was true, correct and complete to the best of the whistleblower's knowledge, information and belief. Moreover, the statement acknowledged the whistleblower's understanding that the whistleblower may be subject to prosecution and be ineligible for an award if, in the whistleblower's submission of information, other dealings with the Commission, or dealings with another authority in connection with a related action, the whistleblower knowingly and willfully made any false, fictitious, or fraudulent statements or representations, or used any false writing or document knowing that the writing or document contained any false, fictitious, or fraudulent statement or entry.

In instances where information is provided by an anonymous whistleblower, paragraph (c) of Proposed Rule 21F–9 required the attorney representing the whistleblower to provide the Commission with a separate Form WB–DEC certifying that the attorney has verified the identity of the whistleblower, and will retain the whistleblower's original, signed Form WB–DEC in the attorney's files. In the proposing release, we explained that the proposed certification from counsel was an important element of the whistleblower program to help ensure that the Commission is working with whistleblowers whose identities have been verified by their counsel. Additionally, the proposed certification process provided a mechanism for anonymous whistleblowers to be advised by their counsel regarding their preliminary eligibility for an award.[318]

Finally, Proposed Rule 21F–9(d)(1) stated how whistleblowers who provided original information to the Commission in writing after the enactment of Dodd-Frank but before the adoption of final rules could perfect their status as whistleblowers under the Commission's award program. This provision required a whistleblower who provided original information to the Commission in a format or manner other than that required by paragraph (a) of Proposed Rule 21F–9 to either submit the information electronically through the Commission's Electronic Data Collection System or to submit a completed Form TCR within one hundred twenty (120) days of the effective date of the proposed rules, and to otherwise follow the procedures set forth in paragraph (b) of Proposed Rule 21F–9. If the whistleblower provided the original information to the Commission in the format or manner required by paragraph (a) of Proposed Rule 21F–9, paragraph (d)(2) would require the whistleblower to submit Form WB–DEC within one hundred twenty (120) days of the effective date of the proposed rules in the manner set forth in paragraph (b) of Proposed Rule 21F–9.

b. Comments Received

Commenters generally were of the view that our proposed procedures for submitting information should be streamlined.[319] Two commenters recommended that we adopt a process similar to that of the Internal Revenue Service, which requires the submission of only one form.[320] One commenter recommended eliminating the forms altogether and requiring only a written submission.[321] A few commenters urged us to retain the flexibility to exercise our discretion to waive technical

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[310] In some instances, broker dealers or investment advisors may also be issuers as that term is defined in Section 10A.

[311] Information is also learned through an audit of a company's financial statements when other professionals learn of a company's illegal act as a result of communications with the audit engagement team as part of the audit. For example, if the national office of an audit firm were consulted about a possible illegal act, including accounting irregularities, then the national office personnel consulted on the matter would not be eligible for a whistleblower award based on that information. Similarly, if a tax professional at an audit firm were consulted to assist in auditing the tax footnote for an issuer and learned of an illegal act, then that person would not be eligible for a whistleblower award. In other words, where professional staff is performing procedures for an audit or have been contacted by someone performing procedures for an audit, the information was gained through an audit. However, if one of these other professionals who are performing work for an audit also learns of a violation by the audit firm or its associated persons, then he may be eligible for an award with respect to a violation by the firm.

[312] Under Section 10A auditors must notify senior management of the issuer and the audit committee of illegal acts even if they are immaterial to the financial statements. *See* Section 10A(b)(1).

[313] *E.g.,* PwC ("The exclusion should extend to all reports by employees of accounting firms with respect to information obtained through performing services of any nature for an audit client. The exclusion should not be limited to information obtained through the engagement required by the securities laws itself."); Deloitte ("Deloitte urges the Commission to provide expressly in the final rules that whistleblowers whose information was obtained through any services to public company audit clients provided by an accounting firm are excluded from eligibility to receive a whistleblower award.")

[314] *E.g.,* letter from Deloitte ("'Any final rule should require, as a condition of eligibility to receive a monetary award that whistleblowers report their concerns fully and in good faith through company sponsored whistleblower systems before reporting externally. At a minimum, the final rules should require the concurrent submission of internal and external reports. In the alternative, any final rule should expressly state that good-faith internal reporting prior to making any external report will be considered a strongly positive factor in determining the amount of a whistleblower award, and that a whistleblower's failure to use internal whistleblower systems prior to reporting to the SEC will be considered a strongly negative factor.")

[315] We have not adopted the 120-day exclusion set forth in Rule 4(b)(4)(vi)(C) because we believe it is unnecessary here. Section 10A provides that, if an issuer fails to report to the Commission any securities law violations discovered in the course of the Section 10A audit, the independent public accounting firm must do so. The firm's failure to promptly report the information to the Commission constitutes a violation of Section 10A. A whistleblower may *at any point* thereafter report this Section 10A violation to the Commission, and thus become eligible for an award based on a covered action against the public accountant or the issuer.

[316] The Electronic Data Collection System is the Commission's interactive, web-based database for submission of tips, complaints and referrals. Both the online database and proposed Form TCR are designed to elicit substantially similar information concerning the individual submitting the information and the violation alleged. On November 9, 2010, we separately submitted a request to the Office of Management and Budget for Paperwork Reduction Act approval of the Electronic Data Collection System. Accordingly, for purposes of these rules, we are only discussing proposed Form TCR.

[317] Items A1 through A4 of proposed Form TCR requested the whistleblower's personal information, including name, contact information and occupation. In instances where a whistleblower submitted information anonymously, the identifying information for the whistleblower would not be required, but proposed Items B1 through B4 of the form required the name and contact information of the whistleblower's attorney. This information could also be included in the case of whistleblowers whose identities are known and who are represented by counsel in the matter. Proposed Items C1 through C4 requested basic identifying information for the individual(s) or entit(ies) to which the complaint relates. Proposed Items D1 through D9 were designed to elicit details concerning the alleged securities violation. The questions posed on proposed Form TCR were designed to elicit the minimum information required for the Commission to make a preliminary assessment concerning the likelihood that the alleged conduct suggested a violation of the securities laws. Moreover, the proposed instructions to Form TCR were designed to assist the whistleblower and facilitate the completion of the form.

[318] Items A1 through A3 of proposed Form WB–DEC requested the whistleblower's name and contact information. In the case of submissions by an anonymous whistleblower, the form required the name and contact information of the whistleblower's attorney instead of the whistleblower's identifying information in proposed Items B1 through B4. This section could also be completed in cases where a whistleblower's identity is known but the whistleblower is represented by an attorney in the matter. Proposed Items C1 through C3 requested information concerning the information submitted by the whistleblower to the SEC. Item C1 required the whistleblower to indicate the manner in which the information was submitted to the Commission. Proposed Item C2 asked for the TCR number assigned to the whistleblower's submission. Proposed Items C3 asked a whistleblower to identify any communications the whistleblower or his counsel may have had with the Commission concerning the matter since submitting the information. Proposed Item C4 asked whether the whistleblower has provided the same information being provided to the Commission to any other agency or organization and, if so, requested details concerning the submission, including the name and contact information for the point of contact at the agency or organization, if known. Proposed Items D1 through D9 required the whistleblower to make certain representations concerning the whistleblower's eligibility for an award. Finally, the form required the sworn declarations from the whistleblower and the whistleblower's counsel discussed above.

[319] *See, e.g.,* letters from NWC; Jane Liu; Patrick Burns; Alexander Hoover; NCCMP; DC Bar; Georg Merkl; Michael Lawrence.

[320] Letter from NCCMP; DC Bar. Two commenters also suggested that we adopt the IRS's certification language in IRS Form 211. *See* NCCMP; NWC.

[321] Letter from NWC.

requirements as appropriate in particular circumstances, so as not to disqualify otherwise meritorious whistleblower tips on technical grounds.[322]

Several commenters recommended that we require proposed Form TCR to be signed under penalty of perjury, similar to the requirement for proposed Form WB–DEC.[323] These commenters expressed the view that the lapse of time between the filing of proposed Form TCR and the sworn Form WB–DEC could cause significant resources to be expended by a company in cases where a TCR containing a false or spurious claim is immediately investigated by the SEC.[324] One commenter recommended that, to protect against submissions that are not necessarily made in bad faith but nevertheless lack merit, the rules should require all submissions for which a whistleblower seeks an award to be certified by third-party professionals (such as attorneys, accountants and individuals with experience in compliance, ombuds and human resources functions) who would attest to their good faith, foundation, accuracy and relevance.[325]

A few commenters recommended modifications to the attorney certification requirement of Proposed Rule 21F–9(c) relating to submissions by anonymous whistleblowers. Two commenters suggested that, to ensure that whistleblowers who engage legal counsel do not submit claims based on mere speculation or hunches, attorneys handling anonymous claims should be required to review the client's information and certify that the client can show "particularized facts suggesting a reasonable probability" that a securities violation has actually occurred or is occurring.[326] By contrast, one commenter opposed the attorney certification requirement on grounds that it inappropriately shifts to attorneys responsibility for a client's fraudulent submission, the nature of which the attorney may be unaware.[327]

We received two comments relating to the proposed process for perfecting whistleblower status under paragraph (d) of Proposed Rule 21F–9. One commenter urged us to eliminate the 120-day deadline for perfecting whistleblower status.[328] Another took issue with the requirement that original information submitted after the date of enactment of the Dodd-Frank Act but before adoption of the final rules must be in writing in order to retain the status of original information.[329]

In the proposing release, we solicited comment on whether it would be appropriate to eliminate the fax and mail options and require that all submissions be made electronically. Some commenters expressed the view that eliminating fax and mail submission could discourage some whistleblowers, such as those with concerns about security and privacy [330] and persons who may be less familiar and comfortable with computers.[331] By contrast, one commenter supported mandating electronic submission for environmental and cost reasons.[332]

A number of commenters did not take issue with our proposed process but suggested specific modifications to the proposed forms. Recommendations included:

- Revising the forms to accommodate joint submissions by more than one person.[333]
- Adding a checkbox to the current TCR form to effectively allow complainants to elect whistleblower status.[334]
- Removing the question concerning the whistleblower's occupation from the TCR form.[335]
- Amending Form WB–DEC to include a question as to whether the whistleblower reported the matter to a company's internal compliance reporting system.[336]
- Revising Item 3 on proposed Form TCR, which asked whether the potential whistleblower held any of a list of positions at the company, to add "company counsel" to the list.[337]
- Adding an item to Proposed Form WB–DEC that requires whistleblowers to identify whether and to what extent the information they are providing was obtained from any lawyer working for or on behalf of the entity that is the subject of the complaint.[338]
- Replacing the phrase "compliance officers" in the instructions for completing Form TCR with the phrase "compliance professionals" to make clear that the question is intended to capture others performing compliance-related functions in companies.[339]

Finally, several commenters advanced what may be characterized as policy-type recommendations for operation of the whistleblower program.[340] Although these comments do not require specific changes to the proposed rules, we have considered them and anticipate that, where appropriate, we will incorporate some of the suggestions in implementing policies and procedures for our whistleblower program.

c. Final Rule

After considering the comments, we have adopted a more streamlined process for submission of information that eliminates the requirement of a separate Form WB–DEC and requires the submission of only one form—Form TCR—signed under penalty of perjury. Form TCR essentially combines the key questions posed in Proposed Form TCR and Proposed Form WB–DEC into a single form. By consolidating the two forms, we have simplified the process by eliminating the burden on whistleblowers of having to file a second form and eliminating some duplicative questions that appeared on both proposed forms. Rule 21F–9(b) provides that, to be eligible for an award, a whistleblower at the time he submits his TCR must declare under penalty of perjury that the information he is providing is true and correct to the best of his knowledge and belief.

In response to comments, we also made several modifications to Form TCR. Specifically, we revised Form TCR to allow for joint submissions by more than one whistleblower. This comports with the intent of Section 21F, which defines "whistleblower" as "any individual, or 2 or more individuals acting jointly, who provides information relating to a violation of the securities laws to the Commission * * *"

In addition, to address commenters' concerns regarding the receipt by the Commission of potentially privileged information, we added "counsel" to the list of positions held by a whistleblower, and amended Item 8 on Proposed Form TCR (renumbered as item 10 in the form as adopted), which asks the whistleblower to describe how he or she obtained the information that supports the claim, to identify with particularity any information submitted by the whistleblower that was obtained from an attorney or in a communication where an attorney was present. As explained in our proposing release, the attorney-client privilege could be undermined if the whistleblower award program created monetary incentives for counsel to disclose information about potential securities violations that they learned of through privileged communication. In our view, a specific question that could elicit whether counsel was the source of information would enhance the staff's ability to identify the risk of receiving privileged information and would be an appropriate means of balancing the Commission's interest in receiving information with the policy goal of protecting the privilege. In addition, knowing this information would allow the staff to quickly segregate the information for more detailed review and consideration.

As discussed elsewhere, several provisions in our rules encourage, but do not require, whistleblowers to utilize their companies' internal compliance and reporting systems when appropriate. In response to comments urging us to include a question on our form asking whether the whistleblower reported the matter to a company's internal compliance program, and to address those instances in which a whistleblower *chooses* to report the violation internally, we amended questions 4a and 4b of proposed Form TCR, which asked the whistleblower to provide details about any prior action taken regarding the complaint, to specifically state whether the whistleblower reported the violation to his or her supervisor, compliance office, whistleblower hotline, ombudsman, or any other available mechanism at the entity for reporting violations. This language borrows from the instructions to question 4a on Proposed Form TCR.

Finally, we added an optional question to Form TCR to enable the whistleblower to identify any particular documents or other information in the submission that the whistleblower believes could reasonably be expected to reveal his or her identity. The purposes of this question is to afford whistleblowers who wish to remain anonymous the opportunity to guard documents or information which, if shown to a third party, may reasonably be expected to reveal their identity. It would also assist the investigative staff utilizing the information in making this determination.[341]

As to the submission of Form TCR, we agree with commenters' suggestion that we should require submissions of information made pursuant to our whistleblower program to be made under penalty of perjury, and accordingly, are requiring that the form be accompanied by sworn certifications by the whistleblower and counsel. We are not adopting the recommendation that all whistleblower submissions be certified by third party professionals because we think that the requirement is inconsistent with our user-friendly mandate and would unnecessarily add to a whistleblower's financial burden of submitting a tip to the Commission. Moreover, in our view, the requirement of a certification by the whistleblower or, in case of anonymous submission, the whistleblower's counsel, is sufficient to deter false or meritless submissions.

In response to comments that the counsel certification places an undue burden on counsel for anonymous whistleblowers, we have amended the counsel certification provision to include the phrase "true, correct and complete to the best of [counsel's] knowledge, information and belief." The addition of this phrase makes clear that we will not hold attorneys accountable if they possess a good-faith belief that the information they are submitting on behalf of the whistleblower is true, correct and complete. The addition of this phrase also achieves consistency with the whistleblower's certification, which contained this language.

Form TCR as adopted also includes in the counsel certification a representation by the attorney representing an anonymous whistleblower that the attorney has "obtained the whistleblower's non-waiveable consent to provide the Commission with his or her original signed Form TCR upon request in the event that the Commission requests it "due to concerns that the whistleblower 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." Moreover, the certification reflects the attorney's consent to be legally obligated to do so within 7 calendar days of receiving such a request from the Commission. We believe that this modification to the attorney certification is necessary to effectuate the "penalty of perjury" provision in the whistleblower's declaration, and to enable the Commission to enforce the provision in appropriate cases.

Although some commenters recommended that we require attorneys to certify that the client can show "particularized facts suggesting a reasonable probability" that a securities violation has actually occurred or is occurring, we have decided not to adopt this standard. In our view, requiring attorneys to verify the form for completeness and accuracy and certify that the information is true, correct and complete to the best of the attorney's knowledge, information and belief is sufficient to discourage frivolous submissions to the Commission. We further believe that a higher standard that might require a "reasonable probability" that a securities violation actually has occurred or is occurring is unnecessary in light of an attorney's already existing ethical obligations in dealing with the Commission.

With regard to other comments relating to the process for submitting information and our proposed forms, we have decided to keep the fax and mail submissions as options to ensure that whistleblowers who do not have access to a computer or who may be averse to electronic transmissions have an alternative means of submitting

[322] *See, e.g.* letters from DC Bar; NWC.
[323] Letters from ABA; Goodwin Proctor.
[324] *Id.*
[325] Letter from Taft, Stettinius & Hollister, LLP.
[326] Letters from ABA; Goodwin Procter.
[327] *See* letter from Eric Dixon, LLP.
[328] Letter from Georg Merkl.
[329] Letter from Storch Amini. We note that this requirement emanates from the statute and not from our proposed rules.
[330] Letter from Auditing Standards Committee; Institute of Independent Auditors.
[331] Letter from Georg Merkl.
[332] Letter from Continewity LLC.
[333] Letter from Grohovsky Group. This commenter also was of the view that the rules should recognize that there are two distinct situations where more than one person might be considered a "whistleblower" with respect to an enforcement action: "(1) when two or more persons make a joint submission, or (2) when two or more persons, not acting in concert with each other, make submissions at different times that relate to the same enforcement action." In the latter situation, the commenter suggested that there should be a mechanism to encourage those persons to reach an agreement with each other so that, at some point, they can proceed jointly.
[334] Letter from Jane Liu and Michael Lawrence.
[335] Letter from Auditing Standards Committee.
[336] *See, e.g.*, letters from SIFMA; ICI; Society of Corporate Secretaries.
[337] Letter from Auditing Standards Committee ("Knowing from the initial form whether the whistleblower was counsel to a company makes sense as a threshold review issue, and could serve as an important first indicator to the Commission staff reviewing the form that the whistleblower's complaint involved potentially privileged information and documents.")
[338] Letter from Auditing Standards Committee (a specific question "that could elicit whether counsel was the source of information would greatly enhance the staff's ability to identify the risk of receiving privileged information and would be an appropriate means of balancing the Commission's interest in receiving information with the need to protect the privilege * * * "Knowing this information would allow the Commission staff to quickly and efficiently segregate the report for more detailed review and consideration and should present no additional burdens on whistleblowers seeking to submit the form * * * It seems appropriate to exclude any illegally obtained information, whether domestically or abroad.")
[339] Letter from Murphy.
[340] *See, e.g.*, Georg Merkl (rules should require staff to inform potential whistleblowers who submit information that they may be eligible for an award and provide them with information about the program); Harold Burke (Commission should assign case officers to all filed matters, require staff to provide annual updates to whistleblowers and require at least one face-to-face meeting with a whistleblower); Wanda Bond (Commission should provide date and time-stamped receipt of information received from whistleblowers and establish mechanism by which whistleblowers can check the status of their claims).
[341] The Commission will reach its own conclusion about whether the information that the whistleblower identifies in fact could be reasonably expected to reveal the whistleblower's identity, but we believe this analysis could be significantly aided by a whistleblower's identification of documents that he or she believes might reasonably reveal his or her identity.

information to us. In addition, we made the response to item A4 of Form TCR, which asked for the whistleblower's occupation, optional.

In response to comments that we should eliminate the form requirement so as not to disqualify whistleblowers on technical grounds, we note that we address such instances elsewhere in our rules. Specifically, Rule 21F–8(a) retains the Commission's discretion to waive the procedural requirements of the rules upon a showing of extraordinary circumstances.

A. Procedure for Submitting Original Information

As adopted, paragraph (a) of Rule 21F–9 requires whistleblowers to submit their information in one of two ways: (1) Through the Commission's Web-based, interactive database for the submission of tips, complaints and referrals; or (2) by completing Form TCR (*Tip, Complaint or Referral*) and mailing or faxing the form to the SEC Office of the Whistleblower, 100 F Street NE., Washington, DC 20549–5631, Fax (703) 813–9322. Paragraph (b) provides that, to be eligible for an award, a whistleblower must submit his or her original information under penalty of perjury.

In instances where information is provided by an anonymous whistleblower, paragraph (c) of Rule 21F–9 provides that the attorney for the whistleblower must submit the information on the whistleblower's behalf pursuant to paragraph (a). In addition, the attorney must retain a copy of the submission, signed by the whistleblower under penalty of perjury, and must sign the counsel certification discussed above.

In response to commenters' general suggestion that we make the application process more user friendly, we have eliminated the proposed requirement that whistleblowers who made their submission after the date of enactment of Dodd-Frank but before the effective date of these rules must perfect their whistleblower status by re-submitting their information in the format required by these rules. We agree that it would be unnecessarily burdensome to require these whistleblowers to make a duplicative submission to us. To the extent that there is additional information that the TCR form might otherwise solicit and which we might desire prior to the award application phase, the staff can contact these whistleblowers (or their counsel if applicable) to obtain that information. For those whistleblowers who submitted their information anonymously during this period, however, we are requiring them to provide their attorney with a completed and signed copy of Form TCR within 60 days of the effective date of these rules. This is generally consistent with our proposed rule, and we believe that it is necessary and appropriate because, unlike whistleblowers whose identity we are aware of, we are more constrained in our ability to confirm an anonymous whistleblower's information and eligibility. We believe that requiring whistleblowers to provide their attorney within 60 days the signed declaration from the Form TCR may help ensure earlier in the process that these whistleblowers are eligible for an award and have provided truthful information to us.

Thus, as adopted, paragraph (d) provides that, if a whistleblower 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, the whistleblower's submission will be deemed to satisfy the requirements set forth in paragraphs (a) and (b). However, if the whistleblower submitted the information anonymously, paragraph (d) requires the whistleblower to provide his or her attorney with a completed and signed copy of Form TCR within 60 days of the effective date of these rules. In addition, the attorney must retain the signed form in his or her records, and the whistleblower must provide a copy of the signed form to the Commission staff upon request by Commission staff prior to any payment of an award to the whistleblower in connection with the submission. Notwithstanding the foregoing, paragraph (d) provides that the whistleblower must follow the procedures and conditions for making a claim for a whistleblower award described in Rules 21F–10 and F–11.

B. Form TCR

As adopted, items A1 through A3 of Form TCR request name and contact information for each whistleblower submitting the information. In instances where a whistleblower submits information anonymously, the identifying information for the whistleblower is not required, but items B1 through B4 require the name and contact information of the whistleblower's attorney. This information may also be included in the case of whistleblowers whose identities are known and who are represented by counsel in the matter. Items C1 through C4 request basic identifying information for the individual(s) or entit(ies) to which the complaint relates. Items D1 through D12 are designed to elicit details concerning the alleged securities violation. Items D1 and D2 ask the whistleblower to provide the date of the occurrence and describe the nature of the complaint. Items D3 and D4 correspond to the same-numbered items on former Proposed Form WB–DEC. Items 3a and 3b ask whether the complainant or their counsel had any prior communications with the SEC concerning the matter and, if so, the name or the person with whom they communicated. Items 4a through 4c ask whether the whistleblower has provided the same information to any other agency or organization, or whether any other agency or organization has requested the information from the whistleblower and, if so, to provide details, including the name and contact information for the point of contact at the other agency or organization, if known.

Item 5a of Section D asks whether the complaint relates to an entity of which the whistleblower is or was an officer, director, counsel, employee, consultant or contractor. Items 5b through 5d ask whether the whistleblower has reported the violation to his or her supervisor, compliance office, whistleblower hotline, ombudsman, or any other available mechanism at the entity for reporting violations.

Items 6a and 6b ask whether the whistleblower took any other action regarding the complaint and request details regarding any such action. Although our rules do not mandate internal reporting prior to providing information to the SEC, this question is designed to address instances in which a whistleblower chooses to report the violation to his or her company first and will afford such whistleblowers the opportunity to provide the Commission with any additional relevant details relating to their internal reporting.

Item D7 asks about the type of security or investment involved, the name of the issuer and the ticker symbol or CUSIP number, if applicable. Item D8 asks the whistleblower to state in detail all facts pertinent to the alleged violation and to explain his or her belief that the acts described constitute a violation of the Federal securities laws. Item D9 asks for a description of all supporting materials in the whistleblower's possession and the availability and location of any additional supporting materials not in the whistleblower's possession. Item D10 asks for an explanation of how and from whom the whistleblower obtained the information that supports the claim. In addition, the whistleblower is asked to identify any information that was obtained from an attorney or in a communication where an attorney was present. Item D11 asks the whistleblower to identify any particular documents or other information in their submission that they believe could reasonably be expected to reveal their identity, and requests the whistleblower to explain the basis for his or her belief that his or her identity would be revealed if the documents were disclosed to a third party. Item D12 provides the whistleblower with an opportunity to furnish any additional information the whistleblower thinks may be relevant to his submission.

Section E of Form TCR corresponds to Section D on Proposed Form WB–DEC. Items E1 through E9 require the whistleblower to make certain representations concerning the whistleblower's eligibility for an award.[342]

[342] Item E1 asks the whistleblower to state whether he or she is currently, or was at the time the whistleblower acquired the original information that is being submitted to the SEC, a member, officer, or employee of the Department of Justice; the Securities and Exchange 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; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, or the Municipal Securities Rulemaking Board. Item 2 asks the whistleblower to state whether he or she is, or was at the time the whistleblower acquired the original information being submitted to the SEC, 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 Securities Exchange Act of 1934. Item 3 asks if the whistleblower acquired the information through the performance of an engagement required under the securities laws by an independent public accountant. Item 4 asks whether the whistleblower is providing the information pursuant to a cooperation agreement with the SEC or with any other agency or organization. In item 5, we ask the whistleblower to state whether he or she is a spouse, parent, child or sibling of a member or employee of the SEC, or whether the whistleblower resides in the same household as a member or employee of the SEC. Item 6 asks whether the whistleblower is providing the information before the whistleblower (or anyone representing the whistleblower) received any request, inquiry or demand that relates to the subject matter of the submission (i) From the SEC, (ii) in connection with an investigation, inspection or examination by the PCAOB, or any SRO; or (iii) in connection with an investigation by the Congress, any other authority of the Federal government, or a state Attorney General or securities regulatory authority. In item 7, we ask whether the whistleblower is the subject or target of a criminal investigation or has been convicted of a criminal violation in connection with the information being submitted to the SEC and request details concerning any such investigation or conviction. Item 8 asks whether the whistleblower acquired the information being submitted to the Commission from any person described in Item E1 through E6. Item 9 requests additional details concerning the whistleblower's responses to items 1 through 8.

In Section F, the whistleblower is required to declare under penalty of perjury under the laws of the United States that the information contained in the form is true, correct and complete to the best of the whistleblower's knowledge, information and belief. In addition, the whistleblower acknowledges his understanding that he may be subject to prosecution and ineligible for a whistleblower award if, in his submission of information, his other dealings with the SEC, or his dealings with another authority in connection with a related action, the whistleblower knowingly and willfully makes any false, fictitious, or fraudulent statements or representations, or uses any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

The counsel certification in Section G requires an attorney for an anonymous whistleblower to certify that the attorney reviewed the form for completeness and accuracy and that the attorney has verified the identity of the whistleblower on whose behalf the form is being submitted by viewing the complainant's valid, unexpired government issued identification (*e.g.,* driver's license, passport). In addition, the attorney must certify that he or she will retain an original, signed copy of the form, with Section F signed by the whistleblower, in his or her records. Finally, the attorney must indicate that the attorney has obtained the whistleblower's non-waiveable consent to provide the Commission with his or her original signed Form TCR upon request in the event that the Commission requests it due to concerns that the whistleblower 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. The certification also reflects the attorney's consent to be legally obligated to do so within 7 calendar days of receiving such a request from the Commission.

J. Rule 21F–10—Procedures for Making a Claim Based on a Successful Commission Action

a. Proposed Rule

In Proposed Rule 21F–10, we described the procedures that a whistleblower would be required to follow in order to make a claim for an award based on a Commission action, and the Commission's proposed claims review process. The proposed process would begin with the publication of a "Notice of a Covered Action" ("Notice") on the Commission's Web site. Whenever a judicial or administrative action brought by the Commission results in the imposition of monetary sanctions exceeding $1,000,000, the Office of the Whistleblower would cause this Notice to be published on the Commission's Web site subsequent to the entry of a final judgment or order in the action that by itself, or collectively with other judgments or orders previously entered in the action, exceeds the $1,000,000 threshold. If the monetary sanctions are obtained without a judgment or order—as in the case of a contribution made pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002—the Notice would be published within thirty (30) days of the deposit of monetary sanctions into a disgorgement or other fund pursuant to Section 308(b) that causes total monetary sanctions in the action to exceed $1,000,000. The Commission's proposed rule would require claimants to file their claim for an award within sixty (60) days of the date of the Notice. A claimant's failure to timely file a request for a whistleblower award would bar that individual from later seeking a recovery.

Paragraph (b) of Proposed Rule 21F–10 described the procedure for making a claim for an award. Specifically, a claimant would be required to submit a claim for an award on Proposed Form WB–APP, *Application for Award for Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934*. Proposed Form WB–APP, and the instructions thereto, would elicit information concerning a whistleblower's eligibility to receive an award at the time the whistleblower files his claim. The purpose of the form is, among other things, to provide an opportunity for the whistleblower to "make his case" for why he is entitled to an award by describing the information and assistance he has provided and its significance to the Commission's successful action. Proposed Items A1 through A3 required the claimant to provide basic identifying information, including first and last name and contact information. Proposed Items B1 through B4 requested the name and contact information for the whistleblower's attorney, if applicable. Proposed Items C1 and C2 requested information concerning the original tip or complaint underlying the claim, including the TCR number, the date the information was submitted and the subject of the tip, complaint or referral. Proposed Items D1 through D3

requested information concerning the Notice of Covered Action to which the claim relates, including the date of the notice, notice number, and the name and case number of the matter to which the notice relates. Proposed Items E1 through E3 requested information concerning related actions. A whistleblower would be required to complete Section E in cases where the whistleblower's claim was submitted in connection with information submitted to another agency or organization in a related action (the questions pertaining to related actions are explained in the discussion of Proposed Rule 21F–11, below). Proposed Items F1 through F9 required the claimant to make certain representations concerning the claimant's eligibility to receive an award at the time the claim is made. In Item G, a claimant may set forth the grounds for the claimant's belief that he is entitled to an award in connection with the information submitted to the Commission, or to another agency or organization in a related action. Finally, item H contained a declaration, to be signed by the claimant, certifying that the information contained on the form is true, correct and complete to the best of the claimant's knowledge, information and belief. The declaration would further acknowledge the claimant's understanding that he may be subject to prosecution and ineligible for a whistleblower award for knowingly and willfully making any false, fictitious, or fraudulent statements or representations in his or her submission or dealings with the SEC or other authority.

Paragraph (b) of Proposed Rule 21F–10 provided that a claim on Form WB–APP, including any attachments, must be received by the Office of the Whistleblower within sixty (60) days of the date of the Notice of Covered Action in order to be considered for an award.

Paragraph (c) required a whistleblower who submitted information to the Commission anonymously to disclose his identity to the Commission on Proposed Form WB–APP and to verify his identity in a form and manner that is acceptable to the Office of the Whistleblower prior to the payment of an award. This requirement is derived from Subsection 21F(d)(2)(B) of the Exchange Act.

Paragraph (d) of Proposed Rule 21F–10 described the Commission's claims review process. The claims review process would begin 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.

Under the proposed process, the Office of the Whistleblower and designated Commission staff (defined in Proposed Rule 21F–10 as the "Claims Review Staff") would evaluate all timely whistleblower award claims submitted on Form WB–APP. In connection with this process, the Office of the Whistleblower could require that claimants provide additional information relating to their eligibility for an award or satisfaction of any of the conditions for an award, as set forth in Proposed Rule 21F–8(b). Following that evaluation, the Office of the Whistleblower would send any claimant 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.

The proposed rule would allow a claimant the opportunity to contest the Preliminary Determination made by the Claims Review Staff. Under paragraph (e) of Proposed Rule 21F–10, the claimant could take any of the following steps:

- Within thirty (30) days of the date of the Preliminary Determination, the claimant may request that the Office of the Whistleblower make available for the claimant's review the materials that formed the basis of the Claims Review Staff's Preliminary Determination.
- Within thirty (30) days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (1) above, then within thirty (30) days of the Office of the Whistleblower making those materials available for the claimant's review, a claimant may submit a written response to the Office of the Whistleblower setting forth the grounds for the claimant's objection to either the denial of an award or the proposed amount of an award. The claimant may also include documentation or other evidentiary support for the grounds advanced in his response.
- Within thirty (30) days of the date of the Preliminary Determination, the claimant may request a meeting with the Office of the Whistleblower. However, such meetings are not required and the Office of the Whistleblower may in its sole discretion decline the request.

Paragraph (f) of Proposed Rule 21F–10 made clear that if a claimant fails to submit a timely response pursuant to paragraph (e), then the Preliminary Determination of the Claims Review Staff would be deemed the Final Order of the Commission (except where the Preliminary Determination recommended an award, in which case the Preliminary Determination would be deemed a Proposed Final Determination, which would make it subject to review by the Commission under paragraph (h)). In addition, a claimant's failure to submit a timely response to a Preliminary Determination where the determination was to deny an award would constitute a failure to exhaust the claimant's administrative remedies, and the claimant would be prohibited from pursuing a judicial appeal.

Paragraph (g) of Proposed Rule 21F–10 described the procedure in cases where a claimant submits a timely response pursuant to Paragraph (f). In such cases, the Claims Review Staff would consider the issues and grounds advanced in the claimant's response, along with any supporting documentation provided by the claimant, and would prepare a Proposed Final Determination. Paragraph (h) provides that the Office of the Whistleblower would notify the Commission of the Proposed Final Determination, but would not make the Proposed Final Determination public. Within thirty (30) days thereafter, any Commissioner would be able to request that the Proposed Final Determination be reviewed by the Commission. If no Commissioner requested such a review within the 30-day period, then the Proposed Final Determination would become the Final Order of the Commission. In the event a Commissioner requested a review, the Commission would review the record that the staff relied upon in making its determination, including the claimant's previous submissions to the Office of the Whistleblower. On the basis of its review of the record, the Commission would issue its Final Order, which the Commission's Secretary will provide to the claimant.

b. Comments Received

We received a number of comments suggesting that the claims process be simplified, streamlined, or made less formal. Several commenters criticized the initial requirement that a whistleblower submit an award application within 60 days of a Notice of Covered Action.[343] These commenters generally stated that this requirement could be eliminated if the Office of the Whistleblower were required to contact whistleblowers directly to inform them that a covered action has been successfully litigated and contended that the proposal places an undue burden on whistleblowers to monitor the SEC Web site to learn of

[343] *See, e.g.,* letters from VOICES; Grohovsky Group; NWC; Wanda Bond; False Claims Act Legal Ctr.

their potential eligibility for an award.[344]

A few commenters stated that claims resolution process should be less formal and more focused on reaching a negotiated settlement. One such comment asserted that the procedures for determining awards seemed "overly formalistic," noting that negotiation has been highly effective in resolving issues in *qui tam* cases under the False Claims Act.[345] Another commenter recommended that a settlement process be built into the claims resolution process.[346]

Finally, several commenters suggested additional procedures or guidance that we could employ to assist whistleblowers with the claims process. One commenter recommended that the application form should be simplified.[347] Another commenter recommended that we send whistleblowers a checklist of any further requirements once the whistleblower submits information, including how and where the whistleblower can find the 'Notice of Covered Action' on the SEC's Web site and a contact for any further questions.[348] This commenter also recommended that we provide a method for whistleblowers to check on the progress of the claims process.[349]

c. Final Rule

After reviewing the comments, we are adopting the rule with several modifications.

We have decided not to eliminate the Notice of Covered Action or to otherwise model the procedures after those employed in the *qui tam* context. The *qui tam* context is substantially different from our situation because *qui tam* actions necessarily will involve one or more known relators with whom the Department of Justice will have worked. By contrast, in enforcement actions that we institute and litigate (based in part on information and assistance from one or more whistleblowers), there may be one whistleblower with whom we have worked closely, but other claimants who have a potential basis for award eligibility as well. Our procedures must provide due process to *all* potential claimants and accordingly cannot be tailored only to those claimants with whom the staff has worked closely. For that reason, we believe the "Notice of Covered Action" procedure provides the best mechanism to provide notice to all whistleblower claimants who may have contributed to the action's success. Nevertheless, we anticipate that the Office of the Whistleblower's standard practice will be to provide actual notice to whistleblowers with whom the staff has worked closely. We also believe the application form, preliminary determination, opportunity for response, and final determination together should operate to ensure that all potential claimants have a fair opportunity to pursue an award claim. A more informal process modeled after the *qui tam* procedures might favor those whistleblowers who have worked closely with our staff and might not provide a full and fair opportunity for claims by others who nonetheless may have provided original information that led to the successful covered action.[350]

Nonetheless, to respond to some of the concerns raised by commenters and to make the process more accessible to whistleblowers, we have made several modifications in the final rule. First, we have decided to increase the period for claimants to file their claim for an award from sixty (60) days to ninety (90) days. This additional time should provide claimants with a better opportunity to review the Commission's Web site and file an application following the publication of a Notice. In our view, this 90-day period strikes an appropriate balance between competing whistleblower interests—allowing all potential whistleblowers a reasonable opportunity to periodically review the Commission's Web site and to file an application, on the one hand, but providing finality to the application period so that the Commission can begin the process of assessing any applications and making a timely award to any qualifying whistleblowers, on the other hand.[351]

Second, in light of comments that we simplify the WB–APP form, we have made Section G of the form optional. As commenters stated, when a whistleblower has worked closely with the staff on a matter, requiring that whistleblower to furnish a submission explaining the degree and value of his or her assistance may well be unnecessary. At the same time, such a whistleblower—or other claimants who have not worked as closely with the staff and wish to advocate the value of their assistance—should have the opportunity to do so. We have determined not to make any further modifications to the form, however, because the remaining information that we request is in our view necessary so that we have a sufficient record to consider the claimant's application (and, if a petition for review is filed, so that the court of appeals has a sufficient record to conduct a review).

Third, in paragraph (d), we have provided the Director of Enforcement with express authority to designate the staff members to serve on the Claims Review Staff. The Director of Enforcement may designate staff from the Enforcement Division, the Office of the Whistleblower, or other Commission divisions or offices to serve on the Claims Review Staff, either on a case-by-case basis or for fixed periods, as the Director deems appropriate.

Fourth, in paragraph (e), we have clarified that any response a claimant files to a Preliminary Determination must be in a form and manner that the Office of the Whistleblower shall require. Fifth, in paragraph (e)(1)(i), we have added a reference to new Rule 21F–12, clarifying that a claimant can request that the Office of the Whistleblower make available for his or her review the materials from among those set forth in Rule 21F–12 that the Claims Review Staff used as the basis for its Preliminary Determination.[352]

[344] *See* letters from VOICES; Grohovsky Group; False Claims Act Legal Center.

[345] *See* letter from Grohovsky Group.

[346] *See* letter from NWC.

[347] *See* letter from NWC (recommending that a whistleblower should submit a "simplified form, consistent with the form recommended by the Inspector General," rather than the proposed WB–APP).

[348] *See* letter from Wanda Bond.

[349] *See* letter from Wanda Bond.

[350] In addition, in those situations where the Claims Review Staff determines that it may be appropriate, the rule provides the Office of the Whistleblower with a mechanism to engage in discussions with known whistleblowers. Indeed, paragraph (e)(1)(ii) provides claimants with an opportunity to request a meeting with the Office of the Whistleblower following a Preliminary Determination. The Office of the Whistleblower could use these meetings in appropriate cases as an opportunity to reach a tentative agreement with a meritorious whistleblower on the terms of a Proposed Final Determination, which could then be presented to the Commission for approval.

[351] Two commenters asserted that there is no support in the statute for a rule barring a whistleblower from obtaining an award if he fails to file a timely claim after the 60-day notice. *See* letter from VOICES. *See also* letter from False Claims Act Legal Center. We disagree. The statutory authority to adopt rules necessary or appropriate to implement the awards program, which is contained in Section 21F(j), plainly permits the Commission to establish procedures for submitting information and making claims for awards. See also Section 21F(b)(1) (providing for payments "under regulations promulgated by the Commission"). The 90-day bar provides finality at the end of a reasonable application period so that we may assess the award applications and conclusively determine which applicant, if any, is entitled to an award, and in what percentage amount.

[352] We have also revised final rule 21F–10 (and made a corresponding revision in final rule 21F–11) to provide that the Final Order of the Commission will be provided to a claimant by the Office of the Whistleblower instead of the SEC Office of the Secretary (although the Office of the Secretary will continue to issue the Order). We have done so to reflect the fact that the Office of the Whistleblower

Continued

The following chart represents a general overview of the process that we are adopting:

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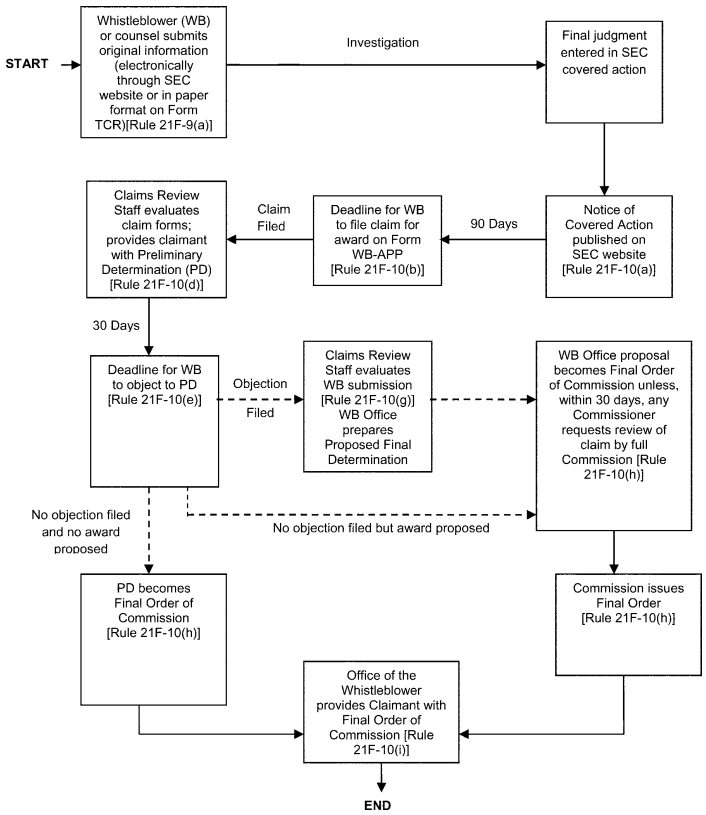

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K. Rule 21F–11—Procedure for Making a Claim Based on a Successful Related Action

a. Proposed Rule

Proposed Rule 21F–11 set forth the procedures for determining awards based upon related actions. Paragraph (a) of Proposed Rule 21F–11 informed a whistleblower who is eligible to receive an award following a Commission action that results in monetary sanctions totaling more than $1,000,000 that the whistleblower may also be eligible to receive an award based on the monetary sanctions that are collected from a related action.

Paragraph (b) of Proposed Rule 21F–11 described the procedures for making a claim for an award in a related action. The process essentially mirrored the procedure for making a claim in connection with a Commission action and would require the claimant to submit the claim on Form WB–APP. In addition to the questions previously described in our discussion of Proposed Rule 21F–10, the claimant in a related action would be required to complete Section D of Proposed Form WB–APP. Proposed Items D1 through D4 requested the name of the agency or organization to which the whistleblower provided the information and the date the information was provided, the name and telephone number for a contact at the agency or organization, if available, and the case name, action number and date the related action was filed.

Paragraph (b) of Proposed Rule 21F–11 set forth the deadline by which a claimant must file his or her Form WB–APP in a related action. Specifically, under proposed paragraph (b)(1), if a final order imposing monetary sanctions has been entered in a related action at the time the claimant submits the claim for an award in connection with a Commission action, the claimant would be required to submit the claim for an award in that related action on the same Form WB–APP used for the Commission action. Under proposed paragraph (b)(2), if a final order imposing monetary sanctions in a related action has not been entered at the time the claimant submits a claim for an award in connection with a Commission action, then the claimant would be required to submit the claim on Form WB–APP within sixty (60) days of the issuance of a final order imposing sanctions in the related action.

The proposed rule provided that the Office of the Whistleblower may request additional information from the claimant in connection with the claim for an award in a related action to demonstrate that the claimant directly (or through the Commission) voluntarily provided the governmental agency, regulatory authority or self-regulatory organization 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. In addition, the Office of the Whistleblower may, in its discretion, seek assistance and confirmation from the other agency in making this determination.

Paragraphs (d) through (i) of Proposed Rule 21F–11 described the Commission's claims review process in related actions. The Commission proposed to utilize the same claims review process in related actions that it would utilize in connection with claims submitted in connection with a covered Commission action.

b. Comments Received

The Commission did not receive any comments directed specifically to this proposed rule. Nonetheless, several of the comments on Rule 21F–10—those recommending that we employ certain additional procedures or guidance to assist whistleblowers with the claims process—are also relevant to Rule 21F–11.

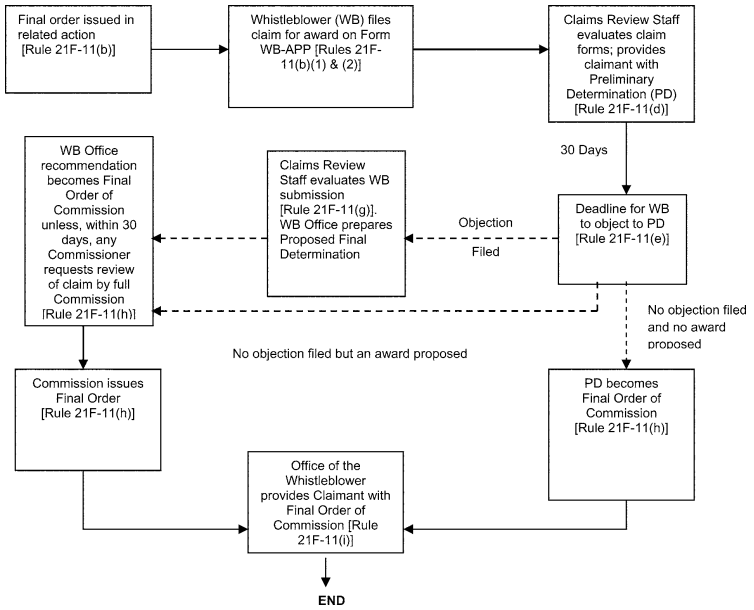
c. Final Rule

We are adopting Rule 21F–11 with several modifications, which parallel certain of the changes we made to Rule 21F–10.

First, in paragraph (b)(2), we have extended to ninety (90) days the period that a whistleblower has to file a claim following the entry of a final order imposing monetary sanctions in a related action where the entry of the final order occurs after the whistleblower has submitted a claim for an award in the Commission's covered action. This gives whistleblowers a longer time in which to file a claim, reducing the likelihood that a meritorious whistleblower would miss the filing deadline. Second, in paragraph (e), we have clarified that any response a claimant files to a Preliminary Determination must be in a form and manner that the Office of the Whistleblower shall require. Third, in paragraph (e)(1)(i), we have added a reference to new Rule 21F–12, clarifying that a claimant can request that the Office of the Whistleblower make available for his or her review the materials from among those set forth in Rule 21F–12 that the Claims Review Staff used as the basis for its Preliminary Determination.

The following chart represents a general overview of the process that we are adopting:

is the appropriate Commission liaison with whistleblower claimants.



L. Rules 21F–12 & 13—Materials That May Be Used as the Basis for an Award Determination and That May Comprise the Record on Appeal; Right of Appeal

a. Proposed Rule

In Proposed Rule 21F–12, we described claimants' appeal rights and designated the materials that could comprise the record on appeal.

We intended paragraph (a) of the proposed rule to track Section 21F(f) of the Exchange Act, which provides for certain rights of appeal of Commission orders with respect to whistleblower awards. Under Section 21F, a decision of the Commission regarding the amount of an award would not be appealable when the Commission has followed the statutory mandate to award between 10 and 30 percent of the monetary sanctions collected after taking into consideration the criteria established under Section 21F(c)(1)(B) of the Act. A decision regarding whether or to whom to make an award could be appealed to an appropriate court of appeals within 30 days after the Commission issues its final decision. Under Section 25(a)(1) of the Exchange Act, appeals of final orders of the Commission entered pursuant to the Exchange Act could be made 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.

Paragraph (b) of the proposed rule designated the materials that comprise the record on appeal. These included the Claims Review Staff's Preliminary Determination, any materials submitted by the claimant or claimants (including the claimant's Forms TCR, WB–DEC, WB–APP, and materials filed in response to the Preliminary Determination), and any other materials that supported the Final Order of the Commission, with the exception of any internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim, such as the staff's Proposed Final Determination in the event it does not become the Final Order.

Other than the materials identified for inclusion in the record on appeal, the proposed rule provided the Claims Review Staff and the Commission with discretion on a case-by-case basis to determine the materials that could be relied upon to form the award determination.[353]

b. Comments Received

We received only a few comments on this proposal. One commenter stated that the proposed rule unduly restricted the whistleblower's appeals rights by foreclosing judicial review of the Commission's determination of the amount of the award and claims of abuse of discretion in applying the statutory criteria set forth in Dodd-Frank 922(f).[354] Another commenter recommended that the rule should include a provision to permit a whistleblower who is wrongfully denied a reward to obtain, as a matter of course, attorney's fees under the Equal Access to Justice Act if the claimant prevails on

[353] *See, e.g.,* Proposed Rule 21F–10(e)(1)(i); Proposed Rule 21F–11(e)(1)(i).

[354] *See* letter from False Claims Act Legal Center (citing Senate Report No. 111–176, at 112 (April 30, 2010)).

appeal.[355] A third commenter criticized our proposal to the extent that it would not make available internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim.[356]

c. Final Rule

After reviewing the comments, we are adopting a new Rule 21F–12 that specifies the material that may form the record of the Commission's award determination, and rule 21F–13, concerning appeals, which substantially follows proposed rule 21F–12.

Rule 21F–12(a) specifies the materials that we may rely upon to form the basis for an award determination. We believe that specifying the materials that we may rely upon will promote transparency and consistency in the claims review process.

Under Rule 21F–12(a), the Commission and staff may rely on the following items:

- 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.
- The whistleblower's Form TCR, including attachments, and other related materials provided by the whistleblower to assist the Commission with the investigation or examination.
- The whistleblower's Form WB–APP, including attachments, and any other filings or submissions from the whistleblower in support of the award application.
- Sworn declarations (including attachments) from the Commission's staff regarding any matters relevant to the award determination.
- With respect to an award claim involving a related action by another entity, any statements or other information that the entity provides or identifies in connection with an award determination. However, we will not consider any materials if the entity that provided them has not authorized us to share the information with the claimant, because we do not believe it would be fair or appropriate to rely upon information that may not be made available to the claimant.[357]
- Any other documents or materials including sworn declarations from third-parties that are received or obtained by the Office of the Whistleblower to assist us in resolving the claimant's award application, including information related to the claimant's eligibility (provided that we are also permitted to share it with the claimant).[358]

Rule 21F–12(b) provides that a claimant is not entitled to obtain any materials beyond those that form the basis of an award determination, including "pre-decisional or internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim." The proposed rules did not provide claimants with an opportunity to review materials that we did not rely upon to form the basis for an award determination, and Rule 21F–12(b) simply clarifies that claimants are not entitled to obtain these materials.[359]

In Proposed Rule 21F–12(b) (which is now Final Rule 21F–13(b)), we provided that a claimant is not entitled to include pre-decisional material in the record on appeal, and we are now further clarifying in Rule 21F–12(b) that a claimant is not entitled to receive those materials from the Commission. We do not agree with the suggestion that internal deliberative process materials that are prepared exclusively to assist the Commission's decisional process should be included within the record on appeal. These materials are by their nature pre-decisional work product that may often contain the staff's "frank discussion of legal and policy making materials,"[360] and the disclosure of these materials would have a chilling effect on our decision-making process.[361]

Rule 21F–12(b) also consolidates provisions from Proposed Rules 21F–10(e)(1)(i) and 21F–11(e)(1)(i) that provide that the Office of the Whistleblower may: (1) 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; and (2) require a claimant to sign a confidentiality agreement before providing these materials.

We are adopting Rule 21F–13(a)—which substantially tracks Proposed Rule 21F–12(a)—to clarify that when the Commission makes an award between 10 and 30 percent, and that determination is based on the factors set forth in Rule 21F–6, our final order regarding the amount of an award (including the award allocation among multiple whistleblowers) is not appealable. The proposing rule had not expressly stated that the award determination must be based on a consideration of the factors in Rule 21F–6, but we believe this clarification ensures that the rule is consistent with Section 21F(f) of the Exchange Act. We have further clarified that, consistent with Section 21F(f), "any factual findings, legal conclusions, policy judgments, or discretionary assessments" that we make in considering the Rule 21F–6 factors are *not* appealable.[362]

We are adopting Rule 21F–13(b)—which substantially tracks Proposed Rule 21F–12(b); however, we have modified the proposed language to clarify that the record on appeal shall consist of the Preliminary Determination, the Final Order of the Commission, and any other items from among those set forth in Rule 21F–12(a)

[355] *See* letter from NWC.

[356] *See* letter from Eric Dixon.

[357] For instance, if a state Attorney General should provide us with information to assist us in processing a whistleblower claim, but should expressly tell us that the information is highly sensitive and may not be shared with the whistleblower because it might jeopardize on-going criminal law enforcement investigations, we will not rely on the particular information in processing the whistleblower's claim because we cannot also share the information with the claimant.

[358] For instance, if a third party should voluntarily provide us with information related to a whistleblower's claim, but expressly request that we not disclose the information to the claimant for fear the claimant would realize the third-party had been the source, we will not rely on the particular information because we cannot also share it with the claimant.

[359] *See, e.g.,* Proposed Rule 21F–10(e)(1)(i); Proposed Rule 21F–11(e)(1)(i). *See also* Proposed Rule 21F–12(b).

[360] *See, e.g., NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 151 (1975); *see also United States* v. *Farley,* 11 F.3d 1385, 1389 (7th Cir. 1993) ("[F]rank discussion of legal and policy matters is essential to the decision-making process of a governmental agency."); *Town of Norfolk* v. *U.S. Army Corps of Eng'rs,* 968 F.2d 1438, 1458 (1st Cir. 1992).

[361] *See generally Dep't of Interior* v. *Klamath Water Users Protective Ass'n,* 532 U.S. 1, 8–9 (2001) (stating that the "deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news").

[362] Although one commenter cited to legislative history to contend that we are unduly restricting the scope of appeals under Section 21F(f), the legislative history identified in fact refers to an earlier draft of the bill that became the Dodd-Frank Act. That provision was subsequently changed before it was incorporated into the Dodd-Frank Act so that it expressly precluded appeal of an award amount where the Commission considered the relevant factors in assessing the award. *See* 156 Cong. Rec. S5929 (daily ed. July 15, 2010) (statement of Sen. Dodd) ("amended to eliminate the right of a whistleblower to appeal the amount of an award.") Indeed, the relevant provision of the earlier draft of the bill did not, unlike Section 21F(f), include language that expressly excluded from the scope of appeal "the determination of the amount of an award if the award was based on a consideration of the" awards factors.

that either the Commission *or the claimant* identifies for inclusion in the record. We believe that this modification is appropriate because it expressly provides the claimant with an opportunity to designate items for the appellate record from among those items set forth in Rule 21F–12(a).

Finally, with respect to the suggestion that we include a provision that would afford attorneys' fees pursuant to the Equal Access to Justice Act to a claimant any time he or she prevails on appeal, we believe that this would be inconsistent with EAJA's substantive terms,[363] which set forth the specific circumstances under which a prevailing party may obtain attorney's fees.

M. Rule 21F–14—Procedures Applicable to Payment of Awards

Proposed Rule 21F–13 addressed the procedures for payment of awards to whistleblowers. After considering the comments on this proposal, we are adopting the rule as proposed, except that we are redesignating the rule as Rule 21F–14.

a. Proposed Rule

Paragraph (a) of the proposed rule provided that any award made pursuant to the rules would be paid from the Securities and Exchange Commission Investor Protection Fund (the "Fund") established by Section 21F(g) of the Exchange Act.[364] Paragraph (b) provided that a recipient of a whistleblower award would be 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. Both of these provisions derive from language in Section 21F(b) of the Exchange Act.[365]

Paragraph (c) addressed the timing for payment. It stated that any payment of an award for a monetary sanction collected in a Commission action would be made following the later of either the completion of the appeals process for all whistleblower award claims arising from the Notice of Covered Action for that action, or the date on which the monetary sanction is collected. Likewise, the payment of an award for a monetary sanction collected in a related action would be made following the later of either the completion of the appeals process for all whistleblower award claims arising from the related action, or the date on which the monetary sanction is collected.

Paragraph (d) of the proposed rule described how the Commission would address situations where there are insufficient amounts available in the Fund to pay an award to a whistleblower or whistleblowers within a reasonable period of time of when payment otherwise should be made. In general, the provision specified the priority among whistleblowers for payment when amounts become available in the Fund to pay awards.

b. Comments Received

We received only a few comments on the payment procedures under proposed rule 21F–13 and our request for comment on the possibility that whistleblowers could be paid with monies that otherwise could be distributed to victims pursuant to a Commission action.[366]

One commenter stated that it was improper to reward whistleblowers at the expense of victims and suggested that the Commission consider the interests of victims first and reward whistleblowers only after victims have been made whole.[367] Another commenter believed that the tension between paying an award to a whistleblower and compensating victims is unlikely to occur given the present balance of the Fund, but suggested that, if the tension did arise, the Commission could defer paying an award to a whistleblower until all victims have been compensated, or alternatively, ask the whistleblower to voluntarily defer payment of an award until all victims have been compensated.[368] A third commenter stated that the Commission should make sure that the IRS is notified of any payments to whistleblowers and that any award recipient receives a Form 1099.[369]

c. Final Rule

After reviewing and considering the comments, we are adopting Rule 21F–13 as proposed, except that we are redesignating the rule as Rule 21F–14.

We are sympathetic to the commenters' concern that in some circumstances whistleblowers might be paid with monies that otherwise could be distributed to victims pursuant to a Commission action. That possibility is a consequence of the whistleblower statute, however, not the rule. Moreover, deferring payment to a whistleblower would not resolve this issue. If there are insufficient amounts in the Fund to pay a whistleblower award, the statute requires that monies needed to satisfy the award be deposited into the Fund from any monies collected in the Commission action on which the award is based. Once deposited into the Fund, these monies can be paid only to a whistleblower (or for specified purposes to the SEC's Inspector General), not to victims. Deferring payment to a whistleblower would not free up these monies to compensate victims first. Accordingly, we are constrained by the funding mechanism established in the whistleblower statute, and do not believe that the issue can be resolved through payment procedures.[370]

As in the proposed rule, paragraph (a) of the rule that we are adopting today provides that any award made pursuant to the rules will be paid from the Fund. This provision derives directly from Section 21F(b)(2) of the Exchange Act, which states that any amount paid to a whistleblower shall be paid from the Fund.[371] Paragraph (b) provides that 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. [372] This requirement derives from Section 21F(b)(1) of the Exchange Act, which provides that an award is based upon the monetary sanctions collected in the Commission action or related action.[373]

[363] *See, e.g.,* Equal Access to Justice Act (EAJA) 28 U.S.C. 2412(d)(1)(A) ("[A] court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.").

[364] 15 U.S.C. 78u–6(g).

[365] 15 U.S.C. 78u–6(b).

[366] 15 U.S.C. 78u–6(g)(3)(B). That possibility arises from a provision in the law that requires the Commission to deposit into the Fund an amount equal to the unsatisfied portion of a whistleblower award from any monetary sanction collected by the Commission in the Commission action on which the award is based if the balance of the Fund is not sufficient to satisfy the award.

[367] *See* letter from Americans for Limited Government.

[368] *See* letter from Georg Merkl.

[369] *See* letter from John Wahh.

[370] We agree with the comment that we notify the IRS and issue Form 1099 for any whistleblower payment, but we do not believe that any change to the rule is necessary to accomplish this. We expect to issue Form 1099–MISC to each whistleblower and the IRS upon payment of an award to a whistleblower who is not a foreign national. We will coordinate with the IRS regarding the tax filing requirements that may be applicable to the payment of an award to a whistleblower who is a foreign national.

[371] 15 U.S.C. 78u–6(b)(2).

[372] Where the Commission receives a monetary sanction that is deemed satisfied by payment of a separate money judgment obtained by an entity described in Rule 21F–3(c)(1)—*i.e.*, a payment in a "related action"—the monetary sanction will not be counted as having been collected in both the Commission action and in the related action.

[373] 15 U.S.C. 78u–6(b)(1). We note that, if monetary sanctions are ordered to be paid in a Commission or related action, but payment is waived, in whole or in part, for inability to pay or for other reasons, payment to a whistleblower is made only with respect to the amounts actually collected in such action. However, this does not affect whether the $1,000,000 monetary sanctions threshold is satisfied for purposes of qualifying as a covered action.

Paragraph (c) of the final rule, like the proposed rule, provides that any payment of an award for a monetary sanction collected in a Commission action will be made following the later of either the completion of the appeals process for all whistleblower award claims arising from the Notice of Covered Action for that action, or the date on which the monetary sanction is collected. Likewise, the payment of an award for a monetary sanction collected in a related action would be made following the later of either the completion of the appeals process for all whistleblower award claims arising from the related action, or the date on which the monetary sanction is collected. This provision is intended to cover situations where a single action results in multiple whistleblower claims. In that circumstance, if one whistleblower appealed a Final Determination of the Commission denying the whistleblower's claim for an award, the Commission would not pay any awards in the action until that whistleblower's appeal has been concluded, because the disposition of that appeal could require the Commission to reconsider its determination and thereby could affect all payments for that action.

Finally, as in the proposed rule, paragraph (d) of the final rule describes how the Commission will address situations where there are insufficient amounts available in the Fund to pay an award to a whistleblower or whistleblowers within a reasonable period of time of when payment should otherwise be made. In this situation, the whistleblower or whistleblowers will be paid when amounts become available in the Fund, subject to the terms set forth in paragraphs (d)(1) and (d)(2). Under paragraph (d)(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 payment on these awards 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. Under paragraph (d)(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.

N. Rule 21F–15—No Amnesty

a. Proposed Rule

Proposed rule 21F–14 stated that the provisions of Section 21F of the Exchange Act do not provide whistleblowers with amnesty or immunity for their own misconduct. However, the proposed rule noted that the Commission will take whistleblowers' cooperation into consideration in accordance with its Policy Statement Concerning Cooperation by Individuals in [SEC] Investigations and Related Enforcement Actions (17 CFR 202.12).

b. Comments Received

We received few comments on this proposed rule. All of the commenters urged the Commission to adopt a liberal approach to granting amnesty to whistleblowers.[374] One commenter suggested that there will be a large group of high-quality potential whistleblowers that have concerns about their potential liability and will not come forward to report securities violations without assurances that they will not be civilly or criminally prosecuted.[375] Another commenter stated that there should be no firm rule on amnesty.[376]

c. Final Rule

We are adopting the proposed rule without modification, except that we have redesignated it as Rule 21F–15. The final rule provides notice that whistleblowers will not automatically receive amnesty if they provide information about securities violations to the Commission. Of course, whistleblowers who have not participated in misconduct will not need amnesty.

With respect to the suggestion that we establish a process in which whistleblowers can receive amnesty or other forms of leniency, such policies and procedures have already been publicly promulgated in the "Fostering Cooperation" section of the Enforcement Manual for the Division of Enforcement. This section discusses in detail the wide spectrum of tools available to the Commission and its staff for facilitating and rewarding whistleblowers and other cooperators, ranging from taking no enforcement action to pursuing reduced charges and sanctions in connection with enforcement actions.[377]

O. Rule 21F–16—Awards to Whistleblowers who Engage in Culpable Conduct

a. Proposed Rule

Proposed rule 21F–15 stated that, for purposes of determining whether the required $1,000,000 threshold for an award has been satisfied, the Commission would not include any monetary sanctions that the whistleblower is ordered to pay, or that an entity is ordered to pay if the entity's liability is based substantially on conduct that the whistleblower directed, planned, or initiated. The proposed rule also stated that the Commission will not include any such amounts in the total monetary sanctions collected for purposes of calculating the amount of an award payment to a whistleblower.

b. Comments Received

We received many comments on this proposed rule. The comments addressed whether whistleblowers' culpability in the unlawful conduct should be a basis for excluding them from eligibility for an award or reducing the amount of their awards.

Many of the commenters opposed any rule that would exclude culpable whistleblowers from eligibility for awards or would reduce the amount of their awards, reasoning that without sufficient financial incentives potential high-quality whistleblowers would not come forward and fraud schemes would go undetected or be discovered much later than they otherwise might.[378] Some commenters contended that the Commission did not have the statutory authority to exclude culpable whistleblowers from eligibility for awards beyond what is already contained in the statute—that is, whistleblowers who are convicted of a criminal violation related to the covered action.[379] Other commenters argued that culpable whistleblowers are often "insiders" with valuable first-hand knowledge of fraudulent conduct, and as such are frequently the best sources of information about companies and senior level management involved in

[374] *See, e.g.,* letters from NWC, John Wahh and Stuart D. Meissner, LLC.

[375] *See* letter from Stuart D. Meissner, LLC.

[376] *See* letter from NWC.

[377] *See http://www.sec.gov/divisions/enforce/enforcementmanual.pdf#6.2.*

[378] *See, e.g.,* letters from Auditing Standards Committee, NWC and Sipio.

[379] *See, e.g.,* letter from NWC.

misconduct.[380] One commenter suggested that allowing culpable whistleblowers to be eligible for awards may also deter future misconduct because securities violators would know that they forever face an increased risk that one of their co-conspirators "might turn state's evidence against them." [381]

Many other commenters advocated that culpable whistleblowers should not be eligible for awards because the failure to exclude such whistleblowers would create significant incentives for individuals to engage in wrongdoing.[382] Some commenters stated that, if the final rule allows for awards to culpable whistleblowers, a whistleblower would have an incentive to conceal or fail to disclose a fraud as it continues to grow in order to satisfy the $1,000,000 threshold for award eligibility or to receive a larger award.[383] Others expressed concern that paying awards to culpable whistleblowers would harm internal compliance programs because it is critical that employees raise ethical and compliance concerns before a violation occurs and the proposed rules would incentivize whistleblowers to bypass or delay reporting violations internally.[384]

Other commenters recommended that the final rule should limit, but not prohibit, awards to culpable whistleblowers.[385] One commenter stated that the rules should allow the Commission to evaluate a person's culpable conduct and use that evaluation as a basis for reducing the amount of an award.[386] Several commenters stated that the role and culpability of the whistleblower in the unlawful conduct should be a required criterion that would result in reducing the amount of an award within the 10 to 30 percent range.[387] Others suggested that a partial exclusion of culpable whistleblowers would be more appropriate. Specifically, these commenters recommended that whistleblowers' unlawful conduct should not be considered for determining the amount of a whistleblower award but should be considered when determining whether the $1,000,000 threshold has been met because the proposed rule disincentivizes individuals even marginally involved in the wrongful conduct from helping the Commission bring a successful enforcement action.[388]

c. Final Rule

We are adopting the proposed rule without modification, except that we are redesignating it as Rule 21F–16. After carefully considering the comments, we believe that the final rule appropriately incentivizes culpable whistleblowers to report securities violations while preventing culpable whistleblowers from financially benefiting from their own misconduct or misconduct for which they are substantially responsible.

As a preliminary matter, we do not believe that a *per se* exclusion for culpable whistleblowers is consistent with Section 21F of the Exchange Act. As commenters noted, the original Federal whistleblower statute—the False Claims Act—was premised on the notion that one effective way to bring about justice is to use a rogue to catch a rogue.[389] This basic law enforcement principle is especially true for sophisticated securities fraud schemes which can be difficult for law enforcement authorities to detect and prosecute without insider information and assistance from participants in the scheme or their coconspirators. Insiders regularly provide law enforcement authorities with early and invaluable assistance in identifying the scope, participants, victims, and ill-gotten gains from these fraudulent schemes. Accordingly, culpable whistleblowers can enhance the Commission's ability to detect violations of the Federal securities laws, increase the effectiveness and efficiency of the Commission's investigations, and provide important evidence for the Commission's enforcement actions.

Nevertheless, we share commenters' concern that failing to limit culpable whistleblowers' eligibility for awards could create incentives that are contrary to public policy. Accordingly, for purposes of determining whether the $1,000,000 threshold has been satisfied or calculating the amount of an award, the Commission will not count any monetary sanctions that the whistleblower is ordered to pay or that are ordered to be paid against any entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated.[390] This final rule provides an incentive for less culpable individuals to come forward and disclose illegal conduct involving others. At the same time, the rule limits awards based on the conduct attributable to the culpable whistleblower. The rationale for this limitation is that the common understanding of a whistleblower is one who reports misconduct *by another person* and it would be contrary to public policy for whistleblowers to benefit from their own misconduct. As for the suggestion that a partial exclusion for culpable whistleblowers should be adopted by the Commission, we believe that it would be inappropriate to treat culpable whistleblowers more favorably than other less or non-culpable whistleblowers, even if such differential treatment could result in additional submissions from culpable whistleblowers. Accordingly, we do not believe that the monetary sanctions of an entity associated with misconduct that the whistleblower substantially directed, planned, or initiated the reported misconduct should be considered when determining whether the culpable whistleblower met the $1,000,000 threshold. Finally, to minimize any incentive for whistleblowers to conceal misconduct or to delay reporting it, we have included in Rule 21F–6 a provision that requires the Commission to consider whether it would be appropriate to decrease a whistleblower's award percentage because of the culpability of the whistleblower or any substantial and unreasonable reporting delay by the whistleblower.[391]

P. Rule 21F–17—Staff Communications With Individuals Reporting Possible Securities Law Violations

a. Proposed Rule

Proposed Rule 21F–16(a) provided that no person may take any action to impede a whistleblower 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) & (ii) of this chapter related to the legal representation of a client) with respect to such communications. The Congressional purpose underlying Section 21F of the Exchange Act is to encourage whistleblowers to report possible violations of the securities laws by providing financial incentives, prohibiting employment-related retaliation, and providing various confidentiality guarantees.

Proposed Rule 21F–16(b) clarified the staff's authority to communicate directly with whistleblowers who are directors, officers, members, agents, or employees of an entity that has counsel, and who have initiated communication with the Commission related to a possible securities law violation. The proposed rule stated that the staff is authorized to communicate directly with these individuals without first seeking the consent of the entity's counsel. The objective of paragraph (b) is to implement several important policies inherent in Section 21F in a manner consistent with the state bar ethics rules governing the professional responsibilities of members of the staff who act in the capacity of attorneys.

Every jurisdiction that regulates the professional responsibility of lawyers has adopted some variation of ABA Model Rule 4.2, which provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."[392]

In the context of organizational entities represented by lawyers,[393] a difficulty in applying the various state versions of ABA Model Rule 4.2 is identifying those actors within the entity—such as directors or officers—that are the embodiment of the represented entity such that the proscription against contact applies.[394] This is so in part because the various state bar ethics rules have differing definitions of which organizational constituents are covered by Rule 4.2.[395]

As explained above, however, Section 21F of the Exchange Act evinces a Congressional purpose to facilitate the disclosure of information to the Commission relating to possible securities law violations and to preserve the confidentiality of those who do so.[396] This Congressional policy would be significantly impaired were the Commission required to seek the consent of an entity's counsel before speaking with a whistleblower who contacts us and who is a director, officer, member, agent, or employee of the entity. Similarly, whistleblowers falling within these categories could be less inclined to report possible securities law violations if they believed there was a risk that the Commission staff might be required to request consent of the entity's counsel—thus disclosing the whistleblower's identity—before speaking to him or her.

For this reason, Section 21F necessarily authorizes the Commission to communicate directly with these individuals without first obtaining the consent of the entity's counsel. Paragraph (b) of the proposal would clarify this authority by providing that, in the context of whistleblower-initiated contacts with the Commission, all discussions with a director, officer, member, agent, or employee of an entity that has counsel are "authorized by law"[397] and, will therefore not require consent of the entity's counsel as might otherwise be required by rules of professional conduct.[398]

b. Comments Received

The comments that we received on Proposed Rule 21F–16(a) supported it. One commenter noted that the proposed rule is especially important because many firms require employees to sign confidentiality agreements.[399]

With respect to Proposed Rule 21F–16(b), a couple of commenters supported the proposal,[400] but others opposed it.[401] Those commenters

[380] *See, e.g.*, letters from Vogel, Slade & Goldstein; Kenney & McCafferty; Georg Merkl; and NWC.

[381] *See* letter from NWC.

[382] *See, e.g.*, letters from SIFMA, Business Roundtable, Washington Legal Foundation, Morgan Lewis, Financial Services Roundtable, Society of Corporate Secretaries, Wells Fargo, Trace, Alcoa Group, Oppenheimer Funds, Association of Corporate Counsel, CCMC, Connolly & Finkel, Target, Thompson Hine, Americans for Limited Government, Ryder Systems, Verizon, AT&T, Institute for Corporate Ethics, TRACE International, Inc., and ABA.

[383] *See, e.g.*, letters from AT&T, Davis Polk, and John Wahh.

[384] *See, e.g.*, letters from the Business Roundtable and AT&T.

[385] *See, e.g.*, letters from Chris Barnard and Peter van Schaick.

[386] *See* the letter from ABA.

[387] *See, e.g.*, letters from the Auditing Standards Committee of the Auditing Section of the American Accounting Association, Wells Fargo, Chris Barnard and Peter van Schaick.

[388] *See, e.g.*, letters from DC Bar and Connolly & Finkel.

[389] *See* Cong. Globe, 37th Cong., 3d Sess. 955–56 (1863), *quoted in* Issues and Developments in Citizen Suits and Qui Tam Actions: Private Enforcement of Public Policy 119, 121 (1996) (U.S. Senator Jacob M. Howard—"I have based (the provisions of False Claims Act) on the old fashioned idea of holding out a temptation and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way of bringing rogues to justice.").

[390] In addition, as part of a negotiated settlement agreement, deferred prosecution agreement, non-prosecution agreement, immunity agreement, cooperation agreement, or other similar agreement with a highly culpable whistleblower, we have the ability to obtain the whistleblower's agreement to accept less than the statutory minimum or to forgo seeking a whistleblower award. We may exercise this authority in appropriate cases, including cases involving whistleblowers who seek to participate in the Commission's Cooperation Program and who substantially directed, planned, or initiated the violation.

[391] We do not agree with the suggestion of some commenters that the rule will create an incentive for culpable whistleblowers to delay reporting in order to increase the potential for a larger award. Under these rules, a whistleblower has the greatest likelihood of receiving an award if he reports misconduct to us *first*. If a culpable whistleblower delays reporting, he runs the substantial risk that another person will report first, or that the misconduct will otherwise come to light, which will not only make the whistleblower unlikely to obtain an award, but will increase the likelihood that he will be prosecuted for his involvement in the misconduct.

[392] Model Rules of Prof'l Conduct R. 4.2. The primary purpose of ABA Model Rule 4.2 is to protect the attorney-client relationship and to protect represented persons, in the absence of their lawyers, from being taken advantage of by lawyers who are not representing their interests.

[393] *See generally Upjohn Co.* v. *United States*, 449 U.S. 383 (1981).

[394] Comment 7 to ABA Model Rule 4.2 addresses this issue: In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.

[395] Comment 5 to the ABA Model Rule 4.2 specifically carves out a potential exception for "investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings." The commentary, and most state professional responsibility rules, do not specify which governmental investigative activities are exempt.

[396] *See, e.g.*, Exchange Act Section 21F (b) through (d) and (h), 15 U.S.C 78u–6 (b) through (d) and (h).

[397] As noted, ABA Model Rule 4.2 allows for contacts with represented persons without the consent of the person's lawyer if such contacts are "*authorized by law*." Every state bar ethics rules, in accordance with ABA Model Rule 4.2, has some variation of an authorized by law exception. Thus, in the context of communications initiated by a whistleblower who is also the director, officer, member, agent, or employee of an entity that has counsel, the proposed rule would make clear that contacts and communications between these individuals and the staff are "authorized by law."

[398] The proposed rule is not intended, and will not be used, to obtain otherwise privileged information about the entity. *See* SEC Division of Enforcement Manual § 3.3.1.

[399] *See* letter from POGO. *See also, e.g.*, letters from Kurt Schulzke (stating the proposed rule represents an improvement over the False Claims Act and IRS whistleblower regimes because of "(a) the effective nullification of confidentiality agreements and other actions to 'impede a whistleblower from communicating directly with the Commission staff about a potential securities law violation' and (b) the empowerment of the Commission staff to communicate directly with whistleblowers regardless of state bar ethics rules governing communications with represented parties."); VOICES (stating that a whistleblower should not be prevented from communicating directly with the Commission staff by actions such as enforcing, or threatening to enforce, a confidentiality agreement because such actions would "conflict with the purpose of the statute").

[400] *See, e.g.*, letters from NWC; Kurt Schulzke. *See also* Letter from Society of Corporate Secretaries (stating the Commission "does not 'need permission' to speak directly with a whistleblower," but should "be required to give the company notice that it intends to do so[.]").

[401] *See, e.g.*, letters from Business Roundtable; Financial Services Roundtable; GE Group; Alcoa

Continued

opposing the proposal generally expressed concern that it could significantly erode the protections of the attorney-client privilege because the staff could seek to obtain attorney-client privileged information during the communications, or treat any attorney-client information that the whistleblower conveys as a waiver of the privilege. Several of these commenters recommended that the final rule should contain express language stating that the staff is not permitted to obtain attorney-client information during any communications authorized by the rule.[402]

Finally, a few comment letters asserted that the Commission lacks authority to establish an "authorized by law" [403] exception to state attorney ethics rule that would permit the staff to engage in these types of communications without the consent of the entity's counsel.[404] One of these commenters argued that nothing in Section 21F of the Exchange Act indicates that Congress intended to undermine the so-called McDade-Murtha Amendment, which requires attorneys at the Department of Justice to comply with the state bar disciplinary rules of the state in which they are licensed.[405]

c. Final Rule

After reviewing the comments, we are adopting Rule 21F–16 as proposed, except that we have redesignated it as Rule 21F–17.[406]

Rule 21F–17(a) is necessary and appropriate because, as we noted in the proposing release, efforts to impede an individual's direct communications with Commission staff about a possible securities law violation would conflict with the statutory purpose of encouraging individuals to report to the Commission.[407] Thus, an attempt to enforce a confidentiality agreement against an individual to prevent his or her communications with Commission staff about a possible securities law violation could inhibit those communications even when such an agreement would be legally unenforceable,[408] and would undermine the effectiveness of the countervailing incentives that Congress established to encourage individuals to disclose possible violations to the Commission.[409]

With respect to Rule 21F–17(b), we believe that this rule is a necessary and appropriate means to implement Section 21F's purposes of facilitating the disclosure of information to the Commission relating to possible securities law violations and preserving the confidentiality of those who do so.[410] As a result, our rulemaking authority under Section 21F(j) permits us to authorize our staff to communicate directly with directors, officers, members, agents, or employees of an entity that has counsel where the individual first initiates communication with the Commission as a whistleblower. Moreover, because Rule 21F–17(b) fits within the "authorized to do so by law" exception of ABA Model Rule 4.2 and the state bar rules modeled after it, Rule 21F–17(b) is fully consistent with state bar rules.[411]

Although a number of commenters expressed concern that this rule will undermine the attorney-client privilege, we emphasize that nothing about this rule authorizes the staff to depart from the Commission's existing procedures and practices when dealing with potential attorney-client privileged information.[412] As stated above,[413] compliance with the Federal securities laws is promoted when individuals, corporate officers, and others consult about possible violations, and the attorney-client privilege furthers such consultation. None of the rules that we are promulgating under Section 21F, *including* Rule 21F–17(b), is intended to undermine this benefit by having individuals disclose to us information about possible securities laws violations that they learned of through privileged communications. Thus, to the extent that the staff may be engaged in a communication authorized under Rule 21F–17(b) and issues relating to attorney-client privilege should develop, the staff will proceed in accordance with established Commission practices.[414]

III. Paperwork Reduction Act

Certain provisions of the Proposed Rules contained "collection of information" requirements within the meaning of the Paperwork Reduction Act ("PRA") of 1995.[415] An agency may not sponsor, conduct, or require a response to an information collection unless a currently valid Office of Management and Budget ("OMB") control number is displayed. The Commission submitted proposed collections of information to OMB for review in accordance with the PRA.[416] The titles for the collections of information were: (1) Form TCR (Tip, Complaint or Referral), (2) Form WB–DEC (Declaration Concerning Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934), and (3) Form WB–APP (Application for Award for Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934). These three forms were proposed to implement Section 21F of the Exchange Act. The proposed forms allowed a whistleblower to provide information to the Commission and its staff regarding (i) potential violations of the securities laws and (ii) the whistleblower's eligibility for and entitlement to an award.

The Commission did not receive any comments that directly addressed its Paperwork Reduction Act analysis or its burden estimates.[417] In comments on the rule proposals, a number of commenters suggested that the three-form process proposed for obtaining information from whistleblowers was burdensome.[418] As we discuss in connection with Rule 21F–9, our final Rules require largely the same information to be collected, but in response to comments we have combined the information collection into only two forms—Form TCR, which incorporates several questions previously posed on Proposed Form WB–DEC, and Form WB–APP—to simplify the process for whistleblowers.

A. Summary of Collection of Information

Form TCR, submitted pursuant to Rule 21F–9, requests the following information:

1. Background information regarding each complainant submitting the TCR, including the person's name and contact information. We have added a section for the identification of additional complainants.

2. If the complainant is represented by an attorney, the name and contact information for the complainant's attorney (in cases of anonymous submissions the person must be represented by an attorney);

3. Information regarding the person or entity that is the subject of the tip or complaint, including contact information;

4. Information regarding the tip or complaint, including the date of the alleged violation; the nature of the complaint; the type of security or investment, ticker symbol or CUSIP number and name of the issuer or security, if relevant; whether the complainant or counsel has had prior contact with Commission staff and with whom; whether information has been communicated to another agency and, if so, details about that communication, including the name and contact information for the point of contact at the agency, if available; whether the complaint relates to an entity of which the complainant is or was an officer, director, counsel, employee, consultant or contractor; whether the complainant has taken any prior actions regarding the complaint including reporting the violation to a supervisor, compliance office, whistleblower hotline, ombudsman, or any other available mechanism at the entity for reporting violations; and the date of such action was taken;

5. A description of the facts pertinent to the alleged violation, including an explanation of why the complainant believes the acts described constitute a violation of the Federal securities laws;

6. A description of all supporting materials in the complainant's possession and the availability and location of any additional supporting materials not in the complainant's possession;

7. An explanation of how the person submitting the complaint obtained the information and, if any information was obtained form an attorney or in a communication where an attorney was present, the identification of any such information;

8. A description of any information obtained from a public source and a description of such source;

9. A description of any documents or other information in the complainant's submission that the complainant believes could reasonably be expected to reveal his or her identity, including an explanation of the basis for the complainant's belief that his or her identity would be revealed if the documents were disclosed to a third party; and

10. Any additional information the complainant believes may be relevant.

Also included in Form TCR are several items previously included in proposed Form WB–DEC, which was required to be submitted pursuant to Proposed Rule 21F–9. First, there are several questions that require a complainant to provide eligibility-related information, by checking a series of "yes/no" answers.[419] Second, the form contains a declaration, signed under penalty of perjury, that the information provided to the Commission pursuant to Proposed Rule 21F–9 is true, correct and complete to the best of the person's knowledge, information and belief. Third, there is a counsel certification, which is required to be executed in instances where a complainant makes an anonymous submission pursuant to the whistleblower program and thus must be represented by an attorney. This statement certifies that the attorney has verified the complainant's identity, and has reviewed the complainant's 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. The certification also contains new statements, which were not included in proposed Form WB–DEC, that: (i) The attorney has obtained the complainant's non-waivable consent to provide the Commission with the original completed and signed Form TCR in the event that the Commission requests it due to concerns that the form may contain false, fictitious or fraudulent statements or representations that were knowingly or willfully made by the complainant; and (ii) the attorney consents to be legally obligated to provide the signed Form TCR within seven (7) calendar days of receiving such request from the Commission.

Form WB–APP, submitted pursuant to Rules 21F–10 and F–11, requires the following information:

(1) The applicant's name, address and contact information;

(2) The applicant's social security number, if any;

(3) If the person is represented by an attorney, the name and contact information for the attorney (in cases of anonymous submissions the person must be represented by an attorney);

(4) Details concerning the tip or complaint, including (a) the manner in which the information was submitted to the SEC, (b) the subject of the tip, complaint or referral (TCR), (c) the TCR number, and (d) the date the TCR was submitted to the SEC;

(5) Information concerning the Notice of Covered Action to which the claim relates, including (i) the date of the Notice, (ii) the Notice number, and (iii) the case name and number;

(6) For related actions, (i) the name and contact information for the agency or organization to which the person provided the original information; (ii) the date the person provided this information, (ii) the date the agency or organization filed the related action, (iv) the case name and number of the related action, and (v) the name and contact information for the point of contact at the agency or organization, if known;

(7) A series of questions concerning the person's eligibility to receive an

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Group; Association of Corporate Counsel; GE Group; Auditing Standards Committee.

[402] *See, e.g.,* letters from GE Group; Auditing Standards Committee; Business Roundtable.

[403] Model Rules of Professional Conduct, Rule 4.2.

[404] *See, e.g.,* letters from GE Group; Financial Services Roundtable; Association of Corporate Counsel.

[405] 28 U.S.C. 530B.

[406] We have modified the rule text to make clear that it applies to any individual seeking to report possible securities law violations to the Commission, and not just those who provide information to us pursuant to the procedures set forth in Rule 21F–9(a).

[407] Based on the suggestion of a commenter, we wish to clarify that confidentiality agreements or protective orders entered in SRO arbitration or adjudicatory proceedings may *not* be used to prevent a party from reporting to us possible securities law violations that he or she discovers during the proceedings. *See* letter from Stuart D. Meissner, LLC. Indeed, given that the SRO's are charged with helping us enforce the Federal securities laws, it would be an odd result if one party in an SRO proceeding could use a protective order to prevent another party from reporting a possible securities law violation to us.

[408] *See, e.g., In re JDS Uniphase Corp. Sec. Litig.,* 238 F.Supp.2d 1127, 1137 (N.D.Cal.2002) ("To the extent that [the confidentiality] agreements preclude former employees from assisting in investigations of wrongdoing that have nothing to do with trade secrets or other confidential business information, they conflict with public policy in favor of allowing even current employees to assist in securities fraud investigations."); *Chambers* v. *Capital Cities/ABC,* 159 F.R.D. 441, 444 (S.D.N.Y.1995) (holding that "it is against public policy for parties to agree not to reveal * * * facts relating to alleged or potential violations of [Federal] law").

[409] The proposed rule would not, however, address the effectiveness or enforceability of confidentiality agreements in situations other than communications with the Commission about potential securities law violations. Paragraph (a) of the proposal is not intended to prevent professional or religious organizations from responding to a breach of a recognized common-law or statutory privilege (*e.g.,* psychiatrist-patient, priest-penitent) by one its members.

[410] We have made one non-substantive clarifying change to the final rule text, replacing the term "subject of your communication" with "possible securities law violation." The final rule provides that "the staff is authorized to communicate directly with you regarding the possible securities law violation without seeking the consent of the entity's counsel."

[411] We disagree with the comment that Rule 21F–17(b) is inconsistent with the McDade-Murtha Amendment, 28 U.S.C. 530B. First, as we discussed above, Rule 21F–17(b) does not preempt state bar ethics rules, but instead is simply an application of the "authorized by law" exception. Second, McDade-Murtha does not apply to Commission attorneys.

[412] *See generally* SEC Division of Enforcement Manual § 4.

[413] *See supra* discussion of Rule 21F–4(b)(4)(i).

[414] One commenter recommended that we should establish operating procedures to deal with potentially privileged material. *See* letter from Standards Committee of the Auditing Section of the American Accounting Association. The staff is in the process of developing internal operating protocols for dealing with attorney-client information that whistleblowers may provide us.

[415] 44 U.S.C. 3501 *et seq.*

[416] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[417] We received one comment generally opining that our proposed rules failed to adequately account for the time expended by counsel in representing whistleblowers that extends beyond the completion of our proposed forms. *See* letter from Stuart D. Meissner, LLC at n. 3.

[418] *See. e.g.,* letters from Jane Liu; NWC; Patrick Burns.

[419] *See supra* note 342 for a more detailed description of these questions.

award as described in the discussion Form TCR above; [420]

(8) An optional explanation of the reasons that the person believes he is entitled to an award in connection with his submission of information to the Commission, or to another agency in a related action, including any additional information and supporting documents that may be relevant in light of the criteria for determining the amount of an award set forth in Rule 21F–6, and any supporting documents; and

(9) A declaration, signed under penalty of perjury, that the information provided in Form WB–APP is true, correct and complete to the best of the person's knowledge, information and belief.

B. Use of Information

The collection of information on Forms TCR and WB–APP will be used to permit the Commission and its staff to collect information from whistleblowers regarding alleged violations of the Federal securities laws and to determine claims for whistleblower awards.

C. Respondents

The likely respondents to Form TCR will be individuals who wish to provide information relating to possible violations of the Federal securities laws and who wish to be eligible for whistleblower awards. The likely respondents to Form WB–APP will be individuals who have provided the Commission or to another agency in a related action with information relating to a possible violation of the Federal securities laws and who believe they are entitled to an award.

D. Total Annual Reporting and Recordkeeping Burden

i. Form TCR

The Commission estimates that it will receive approximately 30,000 tips, complaints and referrals submissions each year through its Electronic Data Collection System or completed forms TCR.[421] Of those 30,000 submissions, the Commission estimates that it will receive approximately 3,000 Forms TCR each year.[422] Each respondent would submit only one Form TCR and would not have a recurring obligation. In the proposing release, we proposed that a whistleblower would have to complete two forms, proposed Form TCR and proposed Form WB–DEC, to be eligible for an award. In the Final Rules, we have eliminated Form WB–DEC and added the eligibility questions from that proposed form to Form TCR.

The Commission estimates that it will take a whistleblower, on average, one hour to complete the portion of Form TCR that does not include the questions that had previously been included in proposed Form WB–DEC. The completion time will depend largely on the complexity of the alleged violation and the amount of information the whistleblower possesses in support of the allegations. As a result, the Commission estimates that the annual PRA burden of Form TCR is 3,000 hours.

A person who submits information through a Form TCR or the Electronic Data Submission System and who wishes to be eligible for an award under the program must complete the remainder of Form TCR (the additional questions related to eligibility that had been included in Proposed Form WB–DEC). The Commission estimates that it will receive this additional information in roughly 50 percent of the cases in which the Commission receives a Form TCR or an electronic submission of information.[423] As noted above, the Commission estimates that it will receive approximately 30,000 combined electronic submissions and submission on Form TCR each year. Thus, the Commission estimates that it will receive responses to these additional questions in approximately 15,000 instances. We estimate that it will take a whistleblower, on average, 0.5 hours to complete the remainder of Form TCR.[424] Accordingly, we estimate that the annual PRA burden of the remainder of Form TCR is 7,500 hours.

ii. Form WB–APP

Each whistleblower who believes that he is entitled to an award because he provided original information to the Commission that led to successful enforcement of a covered judicial or administrative action, or a related action, is required to submit a Form WB–APP to be considered for an award. A whistleblower can only submit a Form WB–APP after there has been a "Notice of Covered Action" published on the Commission's Web site pursuant to Proposed Rule 21F–10. We originally estimated that we would post approximately 130 such Notices each year. Because the final rules allow for the aggregation of proceedings in certain circumstances, as described in Rule 21F–4(d), we have increased that estimate to 143 Notices per year.[425] In addition, we estimate that we will receive approximately 129 Forms WB–APP each year.[426] Finally, we estimate that it will take a whistleblower, on average, two hours to complete Form WB–APP. The completion time will depend largely on the complexity of the alleged violation and the amount of information the whistleblower possesses in support of his application for an award. As a result, the Commission estimates that the annual PRA burden of Form WB–APP is 258 hours.

iii. Involvement and Cost of Attorneys

Under the Proposed Rules, an anonymous whistleblower is required, and a whistleblower whose identity is known may elect, to retain counsel to represent the whistleblower in the whistleblower program. The Commission expects that, in most of those instances, the whistleblower's counsel will complete, or assist in the completion, of some or all of the required forms on behalf of the whistleblower. The Commission also expects that in the vast majority of cases in which a whistleblower is represented by counsel, the whistleblower will enter into a contingency fee arrangement with counsel, providing that counsel will be paid for the representation through a fixed percentage of any recovery by the whistleblower under the program. Thus, most whistleblowers will not incur any direct, quantifiable expenses for attorneys' fees for the completion of the required forms.

The Commission anticipates that a small number of whistleblowers (no more than five percent) will enter into hourly fee arrangements with counsel.[427] In those cases, a whistleblower will incur direct expenses for attorneys' fees for the completion of the required forms. To estimate those expenses, the Commission makes the following assumptions:

(i) The Commission will receive approximately 3,000 Forms TCR, 1,500 of which contain eligibility-related information previously contained in Proposed Form WB–DEC, and 129 Forms WB–APP annually; [428]

(ii) Whistleblowers will pay hourly fees to counsel for the submission of approximately 75 Forms TCR and 6 Forms WB–APP annually; [429]

(iii) Counsel retained by whistleblowers pursuant to an hourly fee arrangement will charge on average $400 per hour; [430] and

(iv) Counsel will bill on average: (i) 2.5 hours to complete a Form TCR,[431] (ii), and (iii) 10 hours to complete a Form WB–APP.[432]

Based on those assumptions, the Commission estimates that each year whistleblowers will incur the following total amounts of attorneys' fees for completion of the whistleblower program forms: (i) $75,000 for the completion of Form TCR; (ii) $24,000 for the completion of Form WB–APP.

E. Mandatory Collection of Information

A whistleblower would be required to complete either a Form TCR or submit his or her information electronically and to complete Form WB–APP or submit his or her information electronically to qualify for a whistleblower award.

F. Confidentiality

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

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

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

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

IV. Economic Analysis

As discussed above, Section 21F of the Exchange Act (added by Section 922 of the Dodd-Frank Act) establishes substantial new incentives and protections for whistleblowers.[433] First, eligible whistleblowers are entitled to an award equal to 10 to 30 percent of the money recovered when they voluntarily provide us with original information that leads to a monetary sanction greater than $1 million in a Commission enforcement action. Second, Section 21F prohibits employment retaliation against individuals for making submissions to us and it provides that whistleblowers may make these submissions anonymously.

Although many of the requirements of the whistleblower award program are established by Section 21F, Congress authorized the Commission to issue rules and regulations as necessary or appropriate to implement the program. In doing so, we faced a number of policy issues on which we solicited public comment, including:

- Whether the whistleblower program should provide financial incentives for attorneys and others to breach the attorney-client privilege in order to seek an award?
- To what extent should the program provide awards to individuals who have violated the Federal securities laws?
- Whether the program should require employees to first report possible violations through their employer's internal compliance procedures before coming to the Commission? If not, should the program provide other incentives to encourage

[420] *See supra* at 211 and note 342.

[421] This number is a staff estimate based upon the volume of tips, complaints or referrals received by the Commission on a monthly basis during the past year. The staff believes that the volume of tips, complaints and referrals the Commission has received more recently, and particularly in the months since the passage of Dodd-Frank, provides a more accurate basis for estimating future volumes.

[422] This number is a staff estimate based upon the expectation that roughly 10 percent of all tips received by the Commission will be submitted in hard copy on Form TCR. The staff anticipates that most whistleblowers will elect to submit their information electronically. The electronic submission of information will provide whistleblowers with increased ease of use and will allow whistleblowers to submit more detailed information in roughly the same amount of time it would take them to complete a hard copy Form TCR. Moreover, the Commission should be able to use the information submitted electronically more effectively and efficiently. For example, the Commission will be able to conduct electronic searches of information without first having to convert the data into an electronic format.

[423] This number is a staff estimate. Because this is a new program, the staff does not have prior relevant data on which it can base its estimate.

[424] This is consistent with our estimate of the time it would take a whistleblower, on average, to complete proposed Form WB–DEC.

[425] This number is a staff estimate based upon (i) the average number of actions during the past five years in which the Commission recovered monetary amounts, including penalties, disgorgement or prejudgment interest, in excess of $1,000,000; (ii) the assumption that there should be an increase (roughly 10 percent) in the number of such actions as a result of the aggregation of proceedings permitted under Rule 21F–4(d); and (iii) the assumption that there should be an additional increase (roughly 30 percent) in the number of such actions as a result of the whistleblower program.

[426] This number is a staff estimate based upon two expectations: first, that the Commission will receive Forms WB–APP in approximately 30 percent of cases in which it posts a Notice of Covered Action because we expect that we will continue to bring a substantial number of enforcement cases that are not based on whistleblower information; and second, that we will receive approximately 3 Forms WB–APP in each of those cases. Because this is a new program, the staff does not have prior relevant data on which it can base these estimates.

[427] This estimate is based, in part, on the Commission's belief that most whistleblowers likely will not retain counsel to assist them in preparing the forms.

[428] The bases for these assumed amounts are explained in Sections V.D.i., V.D.ii. and V.D.iii. above.

[429] These amounts are based on the assumption, as noted above, that no more than 5 percent of all whistleblowers will be represented by counsel pursuant to an hourly fee arrangement. The estimate of the number of Forms TCR submitted by attorneys on behalf of whistleblowers may turn out to be high because it is likely that most attorneys will submit tips electronically, rather than use the hard-copy Form TCR. However, in the absence of any historical data to rely upon, the Commission assumes that attorneys will submit hard-copy Forms TCR in the same percentages as all whistleblowers.

[430] The Commission uses this hourly rate for estimating the billing rates of securities lawyers for purposes of other rules. Absent historical data for the Commission to rely upon in connection with the whistleblower program, the Commission believes that this billing rate estimate is appropriate, recognizing that some attorneys representing whistleblowers may not be securities lawyers and may charge different average hourly rates.

[431] In the proposing release, we estimated that it would take an attorney, on average, 2 hours to complete proposed Form TCR. As noted above, in the Final Rules, we have added to Form TCR questions regarding eligibility that had been in proposed Form WB–DEC. As a result, we estimate that it will take an attorney, on average, 2.5 hours to complete Form TCR.

[432] The Commission expects that counsel will likely charge a whistleblower for additional time required to gather from the whistleblower or other sources relevant information needed to complete Forms TCR and WB–APP. Accordingly, the Commission estimates that on average counsel will bill a whistleblower 2.5 hours for the completion of Form TCR and 10 hours for completion of Form WB–APP (even though the Commission estimates that a whistleblower will be able to complete the entire Form TCR (including the eligibility questions that had been found in Form WB–DEC) in 1.5 hours and Form WB–APP in two hours).

[433] Whistleblowing is an individual decision that is generally guided by a complex mix of pecuniary elements (*e.g.*, fear of job loss) and non-pecuniary elements (*e.g.*, sense of "doing the right thing," fear of social ostracism). *See* Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 Boston Univ. L. Rev. 91, 112–13 (2007) (citing sources); *id.* ("Assuming rational decision making, an employee will blow the whistle when the marginal private benefits exceed the marginal private costs."). The whistleblower award program established by Section 21F seeks to shift the balance of these factors in favor of timely blowing the whistle over silence for individuals who may have useful, quality information about possible securities law violations.

employees to report internally in appropriate circumstances?

In order to implement the program effectively, we addressed these and other issues in our proposed rules, which defined and interpreted various statutory provisions, and established procedures that whistleblowers must follow both when submitting information to us and when applying for awards.

We requested comments and empirical data on all aspects of the economic analysis of the proposed rules, and received only a few comments specifically directed to that analysis. Two commenters recommended that we should consider the costs to companies and other entities that would result if employees are not required to report internally before coming to us.[434] Likewise, two commenters recommended that we should revise the rules to reduce the costs on companies and the Commission that may result from "false or spurious claims" or "meritless complaints" of possible securities law violations.[435] Although the commenter did not quantify these costs, it noted these costs would include companies' legal and accounting fees, and the Commission's costs to review and evaluate these frivolous submissions.

Below we consider the costs and benefits of the final rules, and their effects on efficiency, competition, and capital formation. We limit our analysis to those rules on which we exercised discretion.

A. Analysis of Benefits, Costs, and Economic Effects of the Rules

In promulgating these rules, we have sought to strike the right balance in defining terms and otherwise implementing the whistleblower program so as not to be overly restrictive or overly broad. Overly restrictive definitions or requirements could render the program ineffective if this meant that only a small fraction of whistleblowers who provide us with significant information would qualify for monetary rewards. This could discourage potential whistleblowers from coming forward with information about possible securities law violations, thereby depriving us of meritorious tips. This could in turn mean that some securities law violations would continue unreported for longer periods of time, with the result that overall enforcement and deterrence of violations would be less effective.

By contrast, overly broad definitions and unduly permissive provisions could result in inefficient use of the Investor Protection Fund—especially in situations where the Commission is already well into the process of obtaining sufficient information to bring a successful enforcement action. An important effect of the whistleblower program is reduced economic cost of collecting necessary information about possible securities law violations. To achieve this, the rules should incentivize the prompt and early submission of high-quality, credible tips. From a cost-benefit perspective, doing so leverages the Investor Protection Fund to obtain the maximum benefit from the whistleblower program with respect to the twin goals of protecting investors and increasing public confidence in the markets.

In addition to these considerations, we also assessed the economic impact of our final rules on investors, companies, and other corporate entities. We particularly focused on how the whistleblower program could effectively and efficiently use internal compliance programs in appropriate circumstances to best achieve the statutory objectives, without imposing undue costs on whistleblowers, investors, our enforcement efforts, or companies. We recognized that various policy options presented different trade-offs with respect to the costs and benefits imposed on these various interests.

With these considerations in mind, and after reviewing the public comments we received, we have structured the definitions, interpretations, and other rule provisions to seek to (i) encourage high-quality submissions and discourage frivolous submissions, (ii) encourage whistleblowers to provide information early, rather than waiting to receive a request or inquiry from a relevant authority; (iii) minimize unnecessary burdens on whistleblowers and establish fair, transparent procedures; and (iv) promote the use of effective internal compliance programs in appropriate circumstances.

1. Eligibility for Anti-Retaliation Protection

Rule 21F–2(b) states that anti-retaliation employment protection will be provided to whistleblowers who have a "reasonable belief" that the information they provide reveals a possible securities law violation. The "reasonable belief" standard provides a familiar legal framework that puts potential whistleblowers on notice that meritless submissions cannot be the basis for anti-retaliation protection.

Reducing frivolous submissions in this way should provide benefits. First, Commission resources will be freed up to focus on more meritorious submissions. Second, the costs that employers can be forced to incur when employees abuse the anti-retaliation protections should be lower. These costs can include not only litigation costs resulting from bad faith claims of anti-retaliation, but also inefficiencies stemming from some employers' decisions not to take legitimate disciplinary action due to the threat of bad faith anti-retaliation litigation.

2. The Penalty of Perjury

Rule 21F–9(b)—which requires whistleblowers who wish to participate in the whistleblower program to declare, under penalty of perjury, that their submission is truthful to the best of their knowledge—should similarly discourage frivolous submissions. This should reduce the costs incurred by the Commission from devoting resources to review and evaluate frivolous submissions, and also create efficiency gains by permitting the Commission to place greater reliance on the accuracy of information that is received.[436] By reducing false and frivolous submissions, Rule 21F–9(b) should also reduce the costs to companies and other persons that might otherwise result from the Commission opening investigations based on false or spurious allegations of wrongdoing.

3. Monetary Award Eligibility

Rule 21F–4 provides definitions for "voluntary" (*e.g.,* before the Commission issues a subpoena or makes a request)[437] and "information that leads to successful enforcement."[438] These definitions are designed to ensure that the Commission receives actionable whistleblower information—tips indicating a high likelihood of a substantial securities violation—in a timely manner. More specifically, the definitions seek to incentivize submissions involving information that is unobservable to the Commission, that is not likely to be uncovered as part of any on-going investigations or examinations, that increases the probability of a successful enforcement action, and that reduces our enforcement costs in terms of time, effort, and resources. We believe that paying awards for whistleblower information that satisfies these criteria helps leverage the Investor Protection Fund to provide the maximum law enforcement benefit. By contrast, however, we do not believe that information provided by a whistleblower in instances where the Commission is about to obtain the same information in the ordinary course of an ongoing investigation would justify the expenditure of funds from the Investor Protection Fund, thus warranting the exclusion of such submissions from the definition of "voluntary" (so as to not qualify for an award). This will provide the additional benefit of incentivizing whistleblowers to report possible violations early—before they receive a subpoena or are otherwise requested to provide information by the Commission or other regulatory authority.[439]

The eligibility exclusions outlined in Rule 21F–4(b) under the definitions of "independent knowledge" and "independent analysis" are similarly sensitive to cost-benefit considerations. Rule 21F–4(b) excludes individuals in particular relations of trust from receiving awards in certain limited situations where, in our view, doing so on balance better promotes the overall enforcement of the Federal securities laws. For example, we believe that we can achieve more efficient enforcement of the securities laws by not creating incentives for attorneys or others to breach the attorney-client privilege by submitting tips disclosing privileged communications. Attorneys are uniquely positioned to advise clients when conduct may violate the Federal securities laws, and therefore they can plan a critical role in preventing or stopping such conduct. Accordingly, we believe that overall compliance with the Federal securities laws is better promoted by generally excluding information that is shared in confidence with attorneys by their clients so as to promote open attorney-client consultations.

For similar reasons, we have placed certain limitations on the ability of particular categories of individuals to receive awards based on information that they learn in their professional capacity because of the positions that they occupy—*e.g.,* officers, directors, trustees, or partners of an entity; employees with internal audit or compliance responsibilities; and employees or associates of either firms that are retained to investigate possible securities law violations, or independent public accountants that are retained to conduct engagements required by the securities laws. As a general matter, these individuals occupy sensitive roles that can enable them to identify and stop possible violations of the securities law, and their diligence in doing so can be an important factor that companies or other entities achieve compliance. Thus, we believe it is a more efficient and cost-effective use of the Investor Protection Fund to provide further incentive to these individuals to fulfill those responsibilities rather than allowing them to use knowledge of possible wrongdoing to obtain an award by reporting to the Commission. That said, we have recognized certain exceptions to the exclusions that, in our view, reflect situations where the benefit of paying an award—in terms of reducing the harm to the entity and investors, and in preserving our enforcement capacity—justifies the cost associated with a claim on the Investor Protection Fund.[440]

Additionally, with respect to employees with internal audit or compliance responsibilities, we believe the exclusion is appropriate because to do otherwise would undermine the incentives for companies and other entities to establish and maintain effective internal compliance programs. As we discussed in more detail below in Part (A)(7), effective internal compliance programs can in appropriate circumstances provide significant benefits both in terms of reducing the harm that entities and investors experience from securities law violations, and in terms of efficiently assisting our own enforcement efforts.

Finally, Rule 21F–4(d) interprets the statutory term "action" to allow the Commission to aggregate the monetary sanction from two or more closely

[434] *See* letters from the Association of Corporate Counsel and Edison Electric Institute. A number of other commenters also generally raised the concern that companies would be burdened if we did not require employees to report possible violations of the securities laws internally either before or simultaneously with the submission of information to the Commission. In our discussion of Rule 21F–4(c)(3) above, we discuss our views on this issue and our decision not to require whistleblowers to report internally.

[435] *See* letters from the ABA and Edison Electric Institute.

[436] *See, e.g.,* Alexander Dyck *et al., Who Blows the Whistle on Corporate Fraud?,* J. Fin. (2011), *available at http://www.afajof.org/afa/forthcoming/4820p.pdf.* The staff will review and evaluate all TCRs, regardless of whether the whistleblower has completed the declaration portion. However, because the declaration would aid in assessing reliability, the staff may consider whether a whistleblower has executed a declaration in prioritizing the investigation of TCRs and the allocation of the Division of Enforcement's limited resources. As Rule 21F–9 provides, a whistleblower will not be eligible for an award if he fails to complete the declaration at the time he submitted his TCR form.

[437] Rule 21F–4(a) defines "Voluntary Submission of Information" to require that the whistleblower make his or her submission before a request, inquiry, or demand that relates to the subject matter of the submission is directed to the whistleblower or anyone representing the whistleblower (i) by the Commission; (ii) in connection with an investigation, inspection, or examination by the PCAOB or any self-regulatory organization; or (iii) in connection with an investigation by the Congress, any other authority of the Federal government, or a state Attorney General or securities regulatory authority. The rule further provides that a whistleblower's submission will be deemed voluntary if it was provided after a Commission request, inquiry, or demand directed to the whistleblower, *provided* that the whistleblower had previously disclosed the information voluntarily to one of the other authorities identified in the rule. Finally, the rule provides that a submission is not voluntary if the whistleblower was required to report the 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 the rule, or a duty that arises out of a judicial or administrative order.

[438] Rule 21F–4(c) defines "Information that Leads to Successful Enforcement" such that a whistleblower is only entitled to an award if one of three general standards is satisfied. The first standard is met if a whistleblower 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 the whistleblower's original information. The second standard is met if the whistleblower gave the Commission original information about conduct that was already under examination or investigation by the Commission, or certain other specified law enforcement or regulatory entities, and the whistleblower's submission significantly contributed to the success of the action. Finally, the third standard permits a whistleblower to report 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 he reports the information to the Commission (but no later than 120 days after the internal submission); this standard under the led-to definition will be satisfied if the entity thereafter provided the whistleblower's information to us, or provided results of an audit or investigation initiated in response to the whistleblower's report, and the information the entity provided to us satisfies either (1) or (2) above.

[439] We note that there may be an adverse incentive for would-be whistleblowers to delay blowing the whistle on a violation in progress in order to allow the magnitude of the harm to increase and thus qualify the potential whistleblower for a larger amount. *See, e.g.,* Robert Howse & Ronald J. Daniels, *Rewarding Whistleblowers: The Costs and Benefits of an Incentive-Based Compliance Strategy,* UNIV. PENN. SCHOLARLY COMMONS, Departmental Paper (1995) 527 ("[I]t is often suggested that the calibration of the amount of the reward from whistleblowing directly to the amount of the penalty * * * provides whistleblowers with an incentive to report wrongdoing later rather than earlier, and to do so only after the corruption has produced much more serious consequences, rather than disclosing evidence of corruption in the corporation immediately."). However, we believe that other elements of the whistleblower program provide additional incentives for whistleblowers to report information early. For example, a potential whistleblower who does not report information early runs the risk that another person may provide the same information to the Commission thereby possibly denying the dilatory whistleblower from receiving an award.

[440] These exceptions, which are set forth in Rule 21F–4(b)(4)(v), permit a submission where: (i) a report to the Commission is necessary to prevent substantial harm to the entity or investors; (ii) the entity is engaging in conduct that will impede our investigation; or (iii) 120 days have elapsed.

associated judicial or administrative proceedings.[441] From a cost perspective, this will result in more awards, as well as larger awards, being paid from the Securities Investor Protection Fund. However, we believe the benefits of these additional award expenditures justify those costs. The ability to aggregate the monetary sanctions from two or more closely associated Commission proceedings should enhance the incentive for whistleblowers to come forward in a timely manner where there is the potential for multiple closely-associated Commission proceedings that collectively may reflect more than a million dollars in monetary sanctions, but none of which would likely do so individually. Without the ability to aggregate Commission proceedings in these instances, a potential whistleblower might prefer to delay reporting possible violations until he is sufficiently confident that the Commission can bring at least one single proceeding that satisfies the covered action threshold; this could lead to unnecessary additional costs for entities and investors due to the delay in reporting on-going violations.

4. Eligibility for Culpable Whistleblowers

Rule 21F–16 is designed to minimize the potential costs and enhance the benefits of paying a culpable whistleblower an award.[442] On the one hand, we do not believe the Investor Protection Fund should pay culpable whistleblowers for their own misconduct or with respect to highly culpable whistleblowers, to also pay for the misconduct of entities that they directly cause. On the other hand, we also recognize that culpable whistleblowers can be a valuable source of information about undetected securities law violations. Thus, we believe the Investor Protection Fund should pay culpable whistleblowers for information that leads to monetary sanctions against other participants in the violation; indeed, to do otherwise could unduly reduce the amount of useful information the Commission receives, thereby resulting in some on-going violations remaining undetected to the detriment of investors.

5. Award Amount Factor

The revisions to final Rule 21F–6, governing the criteria used in determining the amount of an award, are designed to provide strong incentives for the whistleblower to report violations with increasing levels of quality, timeliness, and validity.[443] Rule 21F–6 allows the Commission to set the award percentage based, among other things, on the significance of the information provided by the whistleblower and any unreasonable delay by the whistleblower in making the submission.[444] Taken together, these rules provide for greater awards for more timely and more useful information, and reduced awards for whistleblowers whose dilatory or uncooperative conduct may impair our enforcement efforts.

The rules also encourage whistleblowers to work with the Commission as we investigate and litigate enforcement actions, which should provide the benefit of enhanced Commission enforcement of the Federal securities. For example, Rule 21F–6(a)(2) provides that, in setting the award percentage, we will consider the assistance the whistleblower provided us. To complement this, Rule 21F–17(a) makes it unlawful for another person to take action that impedes a whistleblower's efforts to communicate with the Commission. Likewise, Rule 21F–17(b), by authorizing communications between the Commission staff and a whistleblower without seeking consent of the counsel of an entity with whom the whistleblower is employed, has the benefit of encouraging whistleblowers to communicate with us without the fear that their communications will lead to disclosure of their identity to their employer.[445] We believe that these rules provide benefits by ensuring that whistleblowers are able to work with the Commission as it takes actions in response to possible securities law violations, and thus justify any costs on companies.

6. Procedures Required for a Whistleblower to Qualify for an Award

The procedural rules adopted also further the effective implementation of the program.[446] Form WB–APP requires the submission of information that is necessary for the Commission to determine award eligibility. The Commission recognizes that it will take time and effort on the part of whistleblowers to complete and submit the forms. While requiring an additional form imposes a cost on potential whistleblowers, determining the appropriate level of award for each instance of qualified whistleblower is critical to successful implementation of the whistleblower rule. The Commission needs to collect pertinent information from the whistleblower to determine whether he or she should receive an award and, if so, in what amount. This information will need to be evaluated in conjunction with the Commission's enforcement action to determine the significance of the whistleblower's contribution. While we have simplified the procedures in the final rules, it is still possible that some prospective whistleblowers could find the procedures burdensome, and as a result, be deterred from coming forward to provide information to the Commission.

The procedural elements in the rules are structured to provide a fair, transparent process for consideration of whistleblower award claims. We believe that this should help incentivize individuals to participate in the whistleblower award program by coming forward with high-quality, timely information about possible securities law violations.

There is also an additional cost on whistleblowers who wish to participate anonymously in the whistleblower program—Rule 21F–9(c) requires that these whistleblowers locate and retain counsel to make a submission on their behalf.[447] We recognize that this requirement may, in some instances, discourage potential whistleblowers from making submissions of valuable information. Nonetheless, we believe that on balance this requirement is appropriate. For example, the attorney is needed to serve as the point-of-contact for us when we need to elicit additional information, while at the same time continuing to preserve the confidentiality of the whistleblower. The involvement of an attorney can also help to protect against the possibility that anonymous whistleblowers are making frivolous or false submissions, can help the whistleblower develop and draft his submission to maximize its informational value to the Commission (and thus the whistleblower's chance of an eventual award), and can assist in verifying the whistleblower's eligibility for participation in the program early in the process.

The 120-day "look back" period for whistleblowers who make submissions internally may also impose costs on whistleblowers in that it requires them to act within a certain period of time to ensure that their eligibility for an award under the program is not compromised. The Commission has set the 120-day period based on a consideration of those costs against the concern that a longer grace period could serve to delay the Commission's receipt of valuable information that could be used to protect investors.[448]

7. Incentives for Internal Reporting

As discussed above, we have built significant incentives into the whistleblower award program that we believe will encourage whistleblowers to report internally in appropriate circumstances. We believe that this approach effectuates the general statutory purpose of Section 21F of the Exchange Act—which is to enhance the enforcement of the Federal securities laws by encouraging whistleblowers to come forward to the Commission[449] with quality tips regarding possible securities law violations—in a manner that is consistent with, and reflective of, cost-benefit considerations.

Our proposed rules solicited comment on the question of how, if at all, to incorporate internal compliance reporting into the whistleblower award program. The focus of the proposed rules was on the principal purpose of the statute, which is ensuring that the Commission receives quality tips as a result of the financial incentive created by Section 21F of the Exchange Act.[450]

In response to the proposed rules, many commenters from the corporate community argued that whistleblowers would divert from internal reporting in response to the financial incentive of a potential whistleblower award from the Commission.[451] These commenters further argued that companies and other entities would experience significant costs as a result. Among the costs that they identified are the following: (i) Increased harm to entities and investors due to the delay in entities learning about on-going violations from the Commission rather than from internal whistleblowing; (ii) increased defense and litigation costs in responding to Commission enforcement proceedings from, among other things, non-meritorious whistleblower complaints that could have been resolved internally; (iii) increased harm to entities and investors when *non-*securities law violations go unreported to the entity. These commenters did not provide us with projections or estimations regarding either the degree to which whistleblowers would likely be diverted from internal reporting under our proposed rule, or the resulting costs to companies or other entities.[452]

Analysis of the academic literature, although not wholly conclusive, provides reason to believe that a sizable percentage of whistleblowers who currently report internally are motivated

[441] Rule 21F4(d) defines a Commission "action" generally as a single captioned judicial or administrative proceeding brought by the Commission. However, the rule identifies two exceptions to this general definition to allow payment of an award in cases where we may have chosen for various reasons to bring separate proceedings against respondents or defendants involved in the same or closely related conduct. The first exception to the general definition provides that an action will constitute two or more Commission proceedings arising from the same nucleus of operative facts for purposes of making an award under Rule 21F–10; this will permit, for example, considering two or more proceedings together to determine that there are monetary sanctions in excess of $1,000,000 and that an award may be paid. The second exception provides that, for purposes of making payments under Rule 21F–14 on a Commission action for which we have already made an award, we will treat as part of the same action 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.

[442] Rule 21F–16 provides that, in determining whether the required $1 million threshold for an award has been satisfied, the Commission will not include any monetary sanctions (i) that the whistleblower is ordered to pay, or (ii) that an entity is ordered to pay if the entity's liability is based substantially on conduct that the whistleblower directed, planned, or initiated. The rule also provides that the Commission will not include any such amounts in the total monetary sanctions collected for purposes of calculating the amount of an award payment to a whistleblower.

[443] Rule 21F–6 sets forth the factors for determining the award percentage. Four general factors may lead to an increase in the award percentage: the significance of the information provided by the whistleblower; the assistance provided by the whistleblower; the law enforcement and programmatic interests; and the whistleblower's voluntary participation in internal compliance systems. In addition, three general factors may lead to a decrease in the award percentage: the whistleblower's culpability or involvement in the matters associated with the Commission or related action; a substantial and unreasonable reporting delay; or, in cases where the whistleblower, while interacting with his entity's internal compliance or reporting system, interferes with or otherwise undermines the system's integrity.

[444] *See* Ben Depoorter & Jef De Mot, *Whistleblowing: An Economic Analysis of the False Claims Act,* 14 Sup. Ct. Econ. Rev. 135, 158 2006 (awards should be structured to align whistleblowers private incentives with the public interest in timely reporting).

[445] Rule 21F–17(b) states that if a whistleblower who is a director, officer, member, agent, or employee of an entity that has counsel has initiated communications with the Commission relating to a possible securities law violation, the staff is authorized to communicate directly with the whistleblower regarding the subject of the communication without seeking the consent of the entity's counsel.

[446] Rules 21F–9, 10 and 11 set forth the procedures for submitting information and making a claim for an award. First, Rule 21F–9(a) provides that an individual qualifies as a whistleblower if he submits a Form TCR electronically through the Commission's web page or provides the Commission with a completed copy by mail or facsimile. Second, Rule 21F–9(b) provides that, to qualify for an award, the whistleblower must declare under penalty of perjury that the information in the Form TCR is true, correct, and complete to the best of his knowledge, information, and belief. The rules also require potential whistleblowers to complete a second form in the claims phase to establish potential eligibility for an award under the program. Pursuant to Rules 21F–10 and 21F–11, a whistleblower must complete Form WB–APP to apply for an award for a covered judicial or administrative action by the Commission or a related action.

[447] The statute requires that a whistleblower who makes an anonymous claim for an award must be represented by counsel. Section 21F(d)(2)(A) of the Exchange Act.

[448] As stated in the release discussion of Rule 21F–4(b)(7), this 120-day period applies only to whistleblowers and does not prescribe for companies the appropriate time limits for reporting violations to the Commission, nor does it impose an obligation to report.

[449] *See* S. Rep. No. 111–176 at 110 (2010) ("The Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated the securities laws * * *.").

[450] Our proposing release did explain, however that whistleblower reporting through internal compliance procedures can complement or otherwise appreciably enhance our enforcement efforts in appropriate circumstances. For instance, the subject company may at times be better able to distinguish between meritorious and frivolous claims, and may make such findings available for the Commission. This would be particularly true in instances where the reported matter entails a high level of institutional or company-specific knowledge and/or the company has a well-functioning internal compliance program in place. Screening allegations through internal compliance programs may limit false and frivolous claims, provide the entity an opportunity to resolve the violation and report the result to the Commission, and allow the Commission to use its resources more efficiently.

[451] *See, e.g.,* letters from CAQ, Edison and GE Group. *See also* letter from the CCMC ("In the absence of an affirmative restriction on external reporting when effective internal compliance channels are available, or provision of significant incentive for using those internal channels, employees will face an irresistible temptation to go to the SEC with their report.").

[452] We do note, however, that other commenters provided some evidence to counter the assertion that whistleblowers would be diverted from reporting internally in significant numbers. For example, one commenter cited an empirical study of the False Claims Act (FCA)—which requires no mandatory internal reporting—stating that "the overwhelming majority of employees voluntarily utilize internal reporting processes, despite the fact that they were potentially eligible for a large reward under the FCA." Letter from NWC at 4. This study claims that "89.7 percent of employees who eventually filed False Claims Act cases had made an internal report, despite the absence of a legal requirement that they do so." *See supra* discussion in footnote 232. *See also* letter from TAF at 22 ("[I]t is our membership's experience that the vast majority of whistleblowers *do,* in fact, report their concerns first to either their superiors or compliance officers, and only avail themselves of statutory whistleblower programs when their concerns have been dismissed or unaddressed, or when they suffer retaliation.") (emphasis in original). *See generally* Aaron S. Kesselheim *et al., Whistle-Blowers' Experiences in Fraud Litigation Against Pharmaceutical Companies,* 362 New England J. Med. 1832, 1834 & 1836 (2010) (a study of *qui tam* cases involving pharmaceutical companies that showed "[n]early all (18 of 22) insiders first tried to fix matters internally by talking to their superiors, filing an internal complaint, or both" despite the fact that the ultimate monetary awards from external reporting were large, ranging from $100,000 to $42 million, with a median of $3 million."); *id.* at 1839 (discussing possible limitations with the study).

by non-monetary reasons.[453] Thus, we anticipate that many whistleblowers would continue to report internally.

Nonetheless, we recognize that there could be a sizeable percentage of whistleblowers who, under our rules, could now be more motivated to report to the Commission in lieu of reporting internally because of the financial incentives created by the whistleblower program. In response to this possibility, we have tailored the final rules to provide whistleblowers who are otherwise pre-disposed to report internally, but who may also be affected by financial incentives, with additional economic incentives to continue to report internally. The final rules provide that a whistleblower who reports internally can collect a whistleblower award from the Commission if his internal report to the company or entity results in a successful covered action. In addition, the final rules provide that when determining the amount of an award, the Commission will consider as a plus-factor the whistleblower's participation in an entity's internal compliance procedures.

We believe these provisions should substantially reduce the degree of diversion of whistleblower reporting from companies. Assuming that some significant percentage of whistleblowers who were pre-disposed to report internally prior to the whistleblower program are inclined to change their behavior in response to financial incentives, these provisions should mitigate any diversion effect. These provisions do so by providing that an internal report can be an additional path to a whistleblower award. Indeed, to the extent that this sub-set of potential whistleblowers is responsive to economic incentives, they should be motivated to report internally by the final rules because by doing so they can increase both the probability and the magnitude of a potential recovery. Specifically, if they submit their tip internally, and either simultaneously or within 120 days make the same submission to the Commission, it is conceivable that they can increase the probability of an award because they now have two paths to a recovery—a Commission investigation, or an internal corporate investigation. They can increase the magnitude of a potential award because of the award criteria that provides a plus-factor for participation in an entity's internal compliance procedures.[454]

These additional financial incentives for whistleblowers to report internally should make it less likely that significant numbers of tips will be diverted from internal reporting.[455] This in turn should mitigate companies' costs from lost internal whistleblower reports. Moreover, while some whistleblower tips may nonetheless be diverted to the Commission,[456] any decrease in internal reporting should be offset at least in part by the fact that our final rules will incentivize other individuals who might not have reported internally prior to the whistleblower program to do so now. The financial incentives offered by the final rules to report internally should induce individuals to report who, absent any financial incentive, would never have reported either internally or to the Commission.[457] As a result, companies and other entities should now receive some information related to possible violations that they would not have otherwise received, which in turn may allow these entities to stop on-going violations, thereby limiting the harm to the entities and investors sooner than might otherwise have been the case.

In addition to considering the benefits and costs of the final rules on companies and other entities, we considered the benefits and costs of the final rules on our own enforcement program. As we stated in our proposing release, internal reporting to effective compliance programs can provide valuable assistance to our own enforcement efforts. By providing a strong financial incentive for whistleblower to report internally when appropriate, we are leveraging the Investor Protection Fund established by Section 21F of the Exchange Act to obtain the benefit of effective internal compliance programs that can respond to whistleblower tips by, among other things, undertaking prompt investigations that can lead to timely, well-documented reports of violations to the Commission.

As alternatives to the significant incentives approach that we have adopted, we considered the suggestions from commenters that we adopt some form of a mandatory internal reporting requirement as a condition on whistleblowers for award eligibility. Such an approach could take the following forms: (1) Mandatory internal pre-reporting, where the whistleblower's eligibility would be conditioned on his first making a report internally and providing the company's internal compliance function a meaningful period of time to respond; or (2) mandatory simultaneous reporting, under which the whistleblower's eligibility is conditioned upon a simultaneous report to internal compliance and the Commission. We evaluated these alternatives by analyzing how whistleblowers' expected behavior might change relative to the significant incentives approach adopted in the final rules, and what those changes might mean for the resulting costs and benefits to companies as well as the Commission's enforcement efforts.

We believe that either a mandatory pre-reporting or a simultaneous reporting requirement would not achieve an appreciable cost-benefit advantage over the approach we are adopting, and indeed a mandatory internal reporting requirement could be less advantageous because it could result in less overall whistleblowing. With respect to those whistleblowers who are already pre-disposed to report internally, a mandatory internal reporting requirement should have little or no net difference from the significant financial incentives approach that we are adopting.[458] To the extent that these whistleblowers respond to the financial incentives of a potential whistleblower award, we would expect them to report internally under a mandatory internal reporting requirement to be eligible for a whistleblower award from us, or to report internally under our final rules so as to seek to increase the probability and magnitude of any potential award.

The most likely difference between a mandatory regime and the significant financial incentives approach is with respect to the category of whistleblowers who, prior to the whistleblower award program, were not predisposed to report either internally or to the Commission, but who are now willing to come forward in response to a financial inducement. Within this category of whistleblowers, we believe there is some subset who would respond to the financial incentive offered by our final rules by reporting *only* to us, but who would not come forward either to us or to the entity if the financial incentive were coupled with a mandatory internal reporting requirement.[459] Requiring internal reporting would have several adverse consequences: The Commission would lose critical information about some possible securities law violations, and companies and investors in turn would suffer as on-going violations remained undetected and unremedied.[460]

Finally, we have considered the alternative of mandating that a whistleblower report internally within a specified period of time *after* reporting to us, *unless* upon reviewing the submission we direct the whistleblower not to report internally. Conceptually, this approach could allow the Commission an opportunity to review a whistleblower's submission and direct him not to report internally in situations where, among other things, (i) we identify a basis to believe that he might in fact suffer retaliation, or (ii) there would be no benefit to reporting internally either because the entity might engage in a cover-up or the internal compliance program is ineffective. This approach could encourage *some* whistleblowers who might otherwise be discouraged from reporting to us under a pure mandatory reporting regime because these whistleblowers could perceive an opportunity to persuade the Commission that they should be excused from making the mandatory internal report.[461]

Notwithstanding this potential benefit, however, we do not believe that this approach would have any significant cost-benefit advantage over the approach that we have adopted. In fact, this alternative approach would have significant disadvantages over the adopted rules. Simply put, for this approach to operate effectively and efficiently, the Commission would need to be in a position to meaningfully assess within a very short time—likely a few weeks—whether a whistleblower should be excused from reporting internally. However, the Commission is not in a position to make the necessary fact-intensive assessments identified above in a considered and reliable manner, especially within this short time frame.[462] Moreover, this could

Continued

[453] Whistleblowers are often willing to report notwithstanding the absence of financial incentives and the potential for costs to them in terms of time, money, social stigma, and a possible job loss. Non-monetary incentives that often motivate individuals to whistleblow include: (i) Cleansing the conscience, (ii) punishing wrongdoers (in some cases out of spite), (iii) simply "doing the right thing" for the sake of a general increase in social welfare, or (iv) motive for self-preservation. *See* Anthony Heyes & Sandeep Kapur, *An Economic Model of Whistleblower Policy*, 25 J. L. Econ. & Org. 157, 159 (2009) (providing a short review of academic literature on sociology and psychology and listing non-monetary motives for whistleblowing); *see also* Aaron S. Kesselheim *et al., Whistle-Blower's Experience in Fraud Litigation Against Pharmaceutical Companies,* 362 New England J. Med. 1832, 1834 (2010) (listing as primary motivations for *qui tam* lawsuit self-preservation, justice, integrity, altruism or public safety) (cited by letter from NWC). Research has also shown that the likelihood of internal whistleblowing increases when ethical and legal compliance policies exist in an organization, particularly if specific whistleblowing procedures are in place. Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers,* 2006 B.Y.U. L. Rev. 1107, 1142–43 (2006) ("A disclosure channel also harmonizes with a whistleblower's tendency to report misconduct internally—by this sense of loyalty. * * * [Internal reporting] fits well with the psyche of the American employee, whose sense of loyalty to the organization keeps her from reporting misconduct externally, but who may report internally if encouraged by the organization.") (cited in letter from CCMC).

[454] We believe that the final rules' financial incentives to report internally should be particularly attractive to whistleblowers who may be uncertain that their information is sufficiently compelling to cause the Commission staff to open an investigation. Where this is the case, whistleblowers may reasonably view internal compliance as the more likely path for an eventual award on the belief that an effective internal compliance process will investigate the information.

[455] A commenter suggested that some whistleblowers could still decline to report a violation internally based on the strategic calculation that the company could reduce the monetary sanctions through remediation, self-reporting, cooperation, etc., which in turn might reduce the whistleblower's award. *See* letter from CCMC. Although the commenter provided neither anecdotal nor empirical evidence to support this proposition, we think the incidence of this (if it should occur) would be relatively small for several reasons. *Cf.* letter from NWC at 7. First, no whistleblower can safely assume that his decision to bypass internal compliance will in fact lead to larger monetary sanctions. We will make our own assessment of the circumstances—indeed, as noted at pp. 92, sometimes our first step will be to contact the company—and good cooperation by the company overall, even in response to contact from the Commission staff, might mean that the monetary sanctions will not be any greater than if the whistleblower had simultaneously reported internally. Second, various factors in Rule 21F–6 allow us to account for a reduced monetary sanction by providing for an upward adjustment in the award determination where the internal reporting potentially resulted in a lower monetary sanction. Finally, to the extent there is any impact on whistleblower behavior, we believe it will generally mean that whistleblowers decide to report simultaneously, rather than availing themselves of the 120-day look-back period, out of concern that the latter course might afford companies an increased opportunity to take actions that could possibly result in a reduced monetary sanction.

[456] For example, we recognize that, notwithstanding the strong financial incentives to report internally, whistleblowers may bypass internal compliance procedures in cases involving clear fraud or other instances of serious securities law violations by senior management. In these cases, however, we believe the benefits of coming to the Commission, both in terms of our enforcement efforts and in terms of investors' interests, will often be quite significant, so as to justify any potential costs to the entity.

[457] *See* Elletta Sanrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act,* 37 Vill. L. Rev. 273, 284 (finding that "money rewards for whistleblowing may produce the desired result of increasing the number of individuals willing to report activity" and stating that "financial incentives should encourage a new type of whistleblower to step forward"). *See generally* Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers,* 87 Boston Univ. L. Rev. 91, 118–26 (2007) (discussing reasons that insiders may not report information about ongoing corporate and financial fraud in the absence of significant financial incentives to do so).

[458] Some commenters suggested that a mandatory internal pre-reporting requirement could reduce the Commission's cost of information processing by filtering out frivolous or low quality tips from being submitted to us. *See* Americans for Limited Government. However, we believe other mechanisms in the final rules are reasonably designed to discourage frivolous submissions and thus reduce the attendant costs. *See supra* discussion in Parts IV.A (1)–(2).

[459] We believe that the fear of retaliation and other forms of harassment, as well as other social and psychological factors, can have a chilling effect on certain whistleblowers who, absent a mandatory internal reporting requirement, would respond to the financial incentive offered by the whistleblower program by providing the Commission with information about possible securities law violations. A number of commenters who have experience dealing with whistleblowers support this assessment. *See, e.g.,* letters from TAF at 21–23 (Dec. 17, 2010); POGO at 4–5 (Dec. 17, 2010); Grohovsky Group at 4 (Dec. 16, 2010). Our review of the academic literature further supports this assessment. *See generally* Luigi Zingales, *Want to Stop Corporate Fraud? Pay Off Those Whistle-Blowers,* AEI-Brookings Joint Center Policy Matters (January 18, 2004); Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers,* 87 Boston Univ. L. Rev. 91; Pamela H. Bucy, *Information as a Commodity in the Regulatory World,* 39 Hous. L. Rev. 905, 948–959; Aaron S. Kesselheim *et al., Whistle-Blowers' Experiences in Fraud Litigation Against Pharmaceutical Companies,* 362 New England J. Med. 1832, 1834 (2010); *see also* Letter from Eric Dixon LLC (Dec. 19, 2010) ("[W]histleblowers expose them[selves] to serious risk, including harm to them and their families, professional or career reprisals and community ostracization. Whistleblowers may also face retaliation from alleged wrongdoers or their associates, including civil suits").

[460] There are additional costs that could follow from a mandatory internal pre-reporting requirement where the company or entity's internal compliance process is ineffective and thus unlikely to respond properly to the violation. In these situations, the mandatory internal pre-reporting requirement would result in delays before the violation can be addressed by the Commission, resulting in potentially increased injuries to the company and investors. *See* letter from CCMC at 6 ("Of course, when internal reporting systems are nonexistent or illusory, it is appropriate and beneficial for employees to report information of wrongdoing directly to the SEC."). In other cases, mandatory internal reporting could result in spoliation or other interference with our ability to investigate.

[461] We believe that many whistleblowers would still elect not to participate in the whistleblower program because of the uncertainty ahead of time regarding whether we would tell them not to report internally. As a result, we believe that it remains the case even under this approach that many whistleblowers would not report possible securities law violations to us due to the internal reporting requirement, and thus on-going violations would continue undetected resulting in further harms to entities and investors.

[462] In contrast to any of the alternative mandatory reporting regimes, we believe that the financial incentives approach has the additional advantage that it allows whistleblowers to select the proper reporting procedures under the specific circumstances. Whistleblowers can balance the potential increase in the probability and magnitude of an award by participating in an effective internal compliance mechanism, against the particular risks that may result from doing so, which could include retaliation, loss of anonymity (for those companies that may not have effective anonymous reporting procedures), delay due to an ineffective or questionable internal compliance mechanism, and destruction of evidence based on the nature of the allegations or the corporate environment. On

divert limited resources from the primary objective of investigating allegations of wrongdoing.

As stated earlier, Congress did not include an internal reporting requirement in the statute, which is modeled upon the DOJ and IRS whistleblower program.[463] Instead, Congress enacted a requirement that provides financial incentives and employment retaliation protections for reporting directly to the Commission. Internal compliance programs are valuable, and under appropriate circumstances, these rules provide financial encouragement for whistleblowers to utilize those programs. At the same time, however, internal compliance programs cannot serve as adequate substitutes for our obligation to identify and remedy violations of the Federal securities laws. In addition, there are circumstances where whistleblowers may have legitimate reasons for not wanting to report information internally, even if the company provides an avenue for anonymous reporting. For these reasons, the adopted approach encourages the whistleblower to report allegations internally, yet ultimately and appropriately leaves that decision to the whistleblower.

B. Additional Considerations of Competition, Efficiency, and Capital Formation

Section 23(a)(2)[464] of the Securities Exchange Act of 1934 requires the Commission, in promulgating rules under the Exchange Act, to consider the impact that any rule may have on competition and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Further, Section 3(f) of the Exchange Act[465] requires the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

We expect that the impact of the final rules on capital formation and efficiency will be generally positive. As discussed above, the final rules are structured to encourage the submission of more actionable information both to the Commission and to internal compliance programs regarding possible securities law violations. This will have several positive effects on capital formation. First, to the extent that more effective enforcement leads to earlier detection of violations and increased deterrence of potential future violations, this should assist in a more efficient allocation of investment funds. Serious securities frauds, for example, can cause inefficiencies in the economy by diverting investment funds from more legitimate, productive uses. Second, the deterrent effect of our rules should result in a higher level of investors' trust in the securities markets. We believe that this increased investor trust in the fairness of the market will promote lower capital costs as more investment funds enter the market, and as investors generally demand a lower risk premium due to a reduced likelihood of securities fraud.[466] This, too, should promote the efficient allocation of capital formation.

In addition, there will be certain gains and losses in efficiency due to our rules, most of which were discussed in our cost-benefit analysis. As stated above, we believe that the final rules, by encouraging internal reporting without mandating it, allow whistleblowers to balance the potential increase in the probability and magnitude of an award by participating in an effective internal compliance mechanism against the particular risks that may result from doing so. By allowing potential whistleblowers to make this assessment and encouraging them to report internally in situations where their tips will be appropriately addressed, the final rules should promote efficiency in how violations are reported and resolved. Furthermore, issuers who previously may have underinvested in internal compliance programs may respond to our rules by making improvements in corporate governance generally,[467] and strengthening their internal compliance programs in particular. While these improvements will involve costs on companies, there should be an overall increased efficiency from the perspective of investors to the extent that these companies achieve a more optimal investment in these programs.

We do not believe the final rules will impose undue burdens on competition and, indeed, we believe the rules may have a potential pro-competitive effect. Specifically, by increasing the likelihood that misconduct will be detected, of securities law violations, the rules should reduce the unfair competitive advantages that some companies can achieve by engaging in undetected violations.

We are aware of the possible concern that smaller companies may bear a disproportionately greater cost under the final rules than larger companies. We do not believe this is likely for several reasons, however. First, we believe that the relative likelihood that any particular employee will blow the whistle on a possible violation should not significantly vary between smaller and larger companies, and thus we believe that the incidence of whistleblowing and the resulting costs borne by companies should be relatively consistent on a per-employee basis irrespective of a company's size. Second, because the final rules do not dictate the structure of effective compliance processes for internal reporting by employees under Rule 21F–4(c)(iii), including allowing companies to utilize upward reporting practices, we believe that companies of all sizes should be able to design cost-effective processes that meet their particular needs based on company size and structure. Overall, we do not believe these effects will result in undue burdens on competition.

V. Regulatory Flexibility Act Certification

In our proposing release, we certified that a regulatory flexibility analysis is not required because the persons that would be subject to the rules—individuals—are not "small entities" for purposes of the Regulatory Flexibility Act and the rules therefore would not have a significant economic impact on a substantial number of small entities. One commenter disagreed with this conclusion, contending that our proposal not to require mandatory internal reporting will cause small businesses to experience significant costs and disruptions.[468] Notwithstanding the possibility of such indirect impacts, we disagree with the comment's conclusion that this means a Regulatory Flexibility Act analysis is required. These rules do not directly affect or impose responsibilities on small entities.[469]

VI. Statutory Authority

The Commission is adopting rules and forms contained in this document under the authority set forth in Sections 3(b), 21F and 23(a) of the Exchange Act.

List of Subjects in 17 CFR Parts 240 and 249

Securities.

Text of the Amendments

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows.

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

■ 1. The authority citation for part 240 is amended by adding the following citation in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i-i, 78j, 78j-1, 78k, 78k-1, 78*l*, 78m, 78n, 78n-1, 78*o*, 78*o*-4, 78p, 78q, 78s, 78u-5, 78w, 78x, 78*ll*, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.*; 18 U.S.C. 1350; and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

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

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■ 2. Add an undesignated center heading and §§ 240.21F–1 through § 240.21F–17 to read as follows:

Securities Whistleblower Incentives and Protections

Sec.

240.21F–1 General.
240.21F–2 Whistleblower status and retaliation protections.
240.21F–3 Payment of award.
240.21F–4 Other definitions.
240.21F–5 Amount of award.
240.21F–6 Criteria for determining amount of award.
240.21F–7 Confidentiality of submissions.
240.21F–8 Eligibility.
240.21F–9 Procedures for submitting original information.
240.21F–10 Whistleblower award in SEC actions that result in monetary sanctions in excess of $1,000,000
240.21F–11 Procedures for determining awards based upon a related action.
240.21F–12 Materials that may be used as the basis for an award determination and that may comprise the record on appeal.
240.21F–13 Appeals.
240.21F–14 Procedures applicable to the payment of awards.
240.21F–15 No amnesty.
240.21F–16 Awards to whistleblowers who engage in culpable conduct.
240.21F–17 Staff communications with individuals reporting possible securities law violations.

* * * * *

§ 240.21F–1 General.

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 and retaliation protection.

(a) *Definition of a whistleblower.* (1) You are a whistleblower if, alone or jointly with others, you provide the Commission with information pursuant to the procedures set forth in § 240.21F–9(a) of this chapter, and the information relates to a possible violation of the Federal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing, or is about to occur. A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower.

(2) To be eligible for an award, you must submit original information to the Commission in accordance with the procedures and conditions described in §§ 240.21F–4, 240.21F–8, and 240.21F–9 of this chapter.

(b) Prohibition against retaliation: (1) For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you are a whistleblower if:

(i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and;

(ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).

(iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.

(2) 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.

(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:

(i) The Attorney General of the United States;

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balance, we believe that, from a law-enforcement perspective, overall efficiency is better promoted by allowing whistleblowers to make this assessment on a case-by-case basis.

[463] *See* S. Rep. No. 111–176 at 111 (2010).

[464] 15 U.S.C. 78w(a)(2).

[465] 15 U.S.C. 78c(f).

[466] If investors fear theft, fraud, manipulation, insider trading, or conflicted investment advice, their trust in the markets will be low, both in the primary market for issuance or in the secondary market for trading. This would increase the cost of raising capital, which would impair capital formation—in the sense that it will be less than it would or should be if rules against such abuses were in effect and properly enforced and obeyed.

[467] *See* Robert M. Bowen *et al.*, "Whistle-Blowing: Target Firm Characteristics and Economic Consequences," working paper (2009) at 29, *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=890750* (cited in letter from CCMC) (documenting that firms respond to external whistleblowing with subsequent governance changes).

[468] *See* letter from Association for Corporate Counsel.

[469] In advancing the argument, the commenter relies on *Aeronautical Repair Station Association* v. *Federal Aviation Administration,* 494 F.3d 161 (DC Cir. 2007). This case is inapposite, however, because there the agency's own rulemaking release expressly stated that the rule *imposed responsibilities directly* on certain small business contractors. The court reaffirmed its prior holdings that the Regulatory Flexibility Act limits its application to small entities "which will be subject to the proposed regulation—that is, those small entities to which the proposed rule will apply." *Id.* at 176 (emphasis and internal quotations omitted). *See also Cement Kiln Recycling Coal* v. *EPA,* 255 F. 3d 855, 869 (DC Cir. 2001).

(ii) An appropriate regulatory authority;

(iii) A self-regulatory organization; or

(iv) A state attorney general in a criminal case, 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.

Note to paragraph (b)(1): The terms *appropriate regulatory authority* and *self-regulatory organization* are defined in § 240.21F–4 of this chapter.

(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 Commission will not make an award to you for a related action if you have already been granted an award by the Commodity Futures Trading Commission ("CFTC") for that same action pursuant to its whistleblower award program under Section 23 of the Commodity Exchange Act (7 U.S.C. 26). Similarly, if the CFTC has previously denied an award to you in a related action, you will be precluded from relitigating any issues before the Commission that the CFTC resolved against you as part of the award denial.

§ 240.21F–4 Other definitions.

(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)(4) 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.

(e) *Monetary sanctions* means 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.

(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.

(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.

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. 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.

§ 240.21F–7 Confidentiality of submissions.

(a) Section 21F(h)(2) of the Exchange Act (15 U.S.C. 78u–6(h)(2)) requires that the Commission not disclose information that could reasonably be expected to reveal the identity of a whistleblower, 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.

(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) In your whistleblower submission, your other dealings with the Commission, or your dealings with another authority in connection with a related action, you knowingly and willfully make any false, fictitious, or fraudulent statement or representation, or use any false writing or document knowing that it contains any false, fictitious, or fraudulent statement or entry with intent to mislead or otherwise hinder the Commission or another authority.

§ 240.21F–9 Procedures for submitting original information.

(a) To be considered a whistleblower under Section 21F of the Exchange Act (15 U.S.C. 78u–6(h)), you must submit your information about a possible securities law violation by either of these methods:

(1) Online, through the Commission's Web site located at *http://www.sec.gov;* or

(2) By mailing or faxing a Form TCR (Tip, Complaint or Referral) (referenced in § 249.1800 of this chapter) to the SEC Office of the Whistleblower, 100 F Street NE., Washington, DC 20549–5631, Fax (703) 813–9322.

(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) or (2) 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 (referenced in § 249.1800 of this chapter) 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 (referenced in § 249.1800 of this chapter) 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 (referenced in § 249.1800 of this chapter) 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 (referenced in § 249.1800 of this chapter) 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 (referenced in § 249.1800 of this chapter) 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.

§ 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.

(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, *Application for Award for Original Information Provided Pursuant to Section 21F of the Securities Exchange Act of 1934* (referenced in § 249.1801 of this chapter). You must sign this form as the claimant and submit it to the Office of the Whistleblower by mail or fax. 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.

(c) If you provided your original information to the Commission anonymously, you must disclose your identity on the Form WB–APP (referenced in § 249.1801 of this chapter), 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, the staff designated by the Director of the Division of Enforcement ("Claims Review Staff") will evaluate all timely whistleblower award claims submitted on Form WB–APP (referenced in § 249.1801 of this chapter) 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 that evaluation, 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.

(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.

(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 (referenced in § 249.1801 of this chapter) to submit a claim for an award in a related action. You must sign this form as the claimant and submit it to the Office of the Whistleblower by mail or fax as follows:

(1) If a final order imposing monetary sanctions has been entered in a 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 (referenced in § 249.1801 of this chapter) that you use for the Commission action.

(2) If a final order imposing monetary sanctions in a 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 (referenced in § 249.1801 of this chapter) within ninety (90) days of the issuance of a final order imposing sanctions in the 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 agency, regulatory authority or self-regulatory organization 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. The Office of the Whistleblower may, in its discretion, seek assistance and confirmation from the other agency in making this determination.

(d) Once the time for filing any appeals of the final judgment or order in a related action has expired, or if an appeal has been filed, after all appeals in the action have been concluded, the Claims Review Staff will evaluate all timely whistleblower award claims submitted on Form WB–APP (referenced in § 249.1801 of this chapter) 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 this evaluation, 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.

(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.

(a) The following items constitute the materials that the Commission and the Claims Review Staff may rely upon to make an award determination pursuant to §§ 240.21F–10 and 240.21F–11 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 (referenced in § 249.1800 of this chapter), 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 (referenced in § 249.1800 of this chapter), including attachments, and any other filings or submissions from the whistleblower in support of the award application;

(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 including sworn declarations from third-parties that are received or obtained by the Office of the Whistleblower to assist the Commission resolve the claimant's award application, including information related to the claimant's eligibility. (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).

(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.

(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 Preliminary Determination, the Final Order of the Commission, and any other items from those set forth in § 240.21F–12(a) of this chapter that either the claimant or the Commission identifies for inclusion in the record. The record on appeal shall not include any pre-decisional or internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim (including the staff's Draft Final Determination in the event that the Commissioners reviewed the claim and issued the Final Order).

§ 240.21F–14 Procedures applicable to the payment of awards.

(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.

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.

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.

(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.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 3. The authority citation for Part 249 is amended by adding the following citations in numerical order to read as follows:

Authority: 15 U.S.C. 78a, *et seq.* and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

Section 249.1800 is also issued under Public Law 111.203, § 922(a), 124 Stat 1841 (2010).

Section 249.1801 is also issued under Public Law 111.203, § 922(a), 124 Stat 1841 (2010).

* * * * *

■ 4. Add Subpart S to read as follows:

Subpart S—Whistleblower Forms

Sec.

249.1800 Form TCR, tip, complaint or referral.

249.1801 Form WB–APP, Application for award for original information submitted pursuant to Section 21F of the Securities Exchange Act of 1934.

§ 249.1800 Form TCR, tip, complaint or referral.

This form may be used by anyone wishing to provide the SEC with information concerning a violation of the Federal securities laws. The information provided may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing the Federal securities laws, rules, or regulations consistent with the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act (15 U.S.C. 78u–6(h)(2)) and § 240.21F–7 of this chapter.

§ 249.1801 Form WB–APP, Application for award for original information submitted pursuant to Section 21F of the Securities Exchange Act of 1934.

This form must be used by persons making a claim for a whistleblower award in connection with information provided to the SEC or to another agency in a related action. The information provided will enable the Commission to determine your eligibility for payment of an award pursuant to Section 21F of the Securities Exchange Act of 1934 (15 U.S.C. 78u–6). This information may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or

implementing the Federal securities laws, rules, or regulations consistent with the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act (15 U.S.C. 78u–6(h)(2)) and § 240.21F–7 of this chapter. Furnishing the information is voluntary, but a decision not to do so may result in you not being eligible for award consideration.

Note: The following Forms will not appear in the Code of Federal Regulations.

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549

FORM TCR
TIP, COMPLAINT OR REFERRAL

A. INFORMATION ABOUT YOU

COMPLAINANT 1:

1. Last Name | First | M.I.

2. Street Address | Apartment/ Unit #

City | State/ Province | ZIP/ Postal Code | Country

3. Telephone | Alt. Phone | E-mail Address | Preferred method of communication

4. Occupation

COMPLAINANT 2:

1. Last Name | First | M.I.

2. Street Address | Apartment/ Unit #

City | State/ Province | ZIP/ Postal Code | Country

3. Telephone | Alt. Phone | E-mail Address | Preferred method of communication

4. Occupation

B. ATTORNEY'S INFORMATION (If Applicable - See Instructions)

1. Attorney's Name

2. Firm Name

3. Street Address

City | State/ Province | ZIP/ Postal Code | Country

4. Telephone | Fax | E-mail Address

C. TELL US ABOUT THE INDIVIDUAL OR ENTITY YOU HAVE A COMPLAINT AGAINST

INDIVIDUAL/ENTITY 1:

1. Type: ☐ Individual ☐ Entity | If an individual, specify profession: | If an entity, specify type:

2. Name

3. Street Address | Apartment/ Unit #

City | State/ Province | ZIP/ Postal Code | Country

4. Phone | E-mail Address | Internet address

INDIVIDUAL/ENTITY 2:

1. Type: ☐ Individual ☐ Entity | If an individual, specify profession: | If an entity, specify type:

2. Name

3. Street Address | Apartment/ Unit #

City | State/ Province | ZIP/ Postal Code | Country

4. Phone | E-mail Address | Internet Address

D. TELL US ABOUT YOUR COMPLAINT

1. Occurrence Date (mm/dd/yyyy): / / | 2. Nature of complaint:

3a. Has the complainant or counsel had any prior communication(s) with the SEC concerning this matter? YES ☐ NO ☐

3b. If the answer to 3a is "Yes," name of SEC staff member with whom the complainant or counsel communicated

4a. Has the complainant or counsel provided the information to any other agency or organization, or has any other agency or organization requested the information or related information from you?

YES ☐ NO ☐

4b. If the answer to 4a is "Yes," please provide details. Use additional sheets if necessary.

4c. Name and contact information for point of contact at agency or organization, if known

5a. Does this complaint relate to an entity of which the complainant is or was an officer, director, counsel, employee, consultant or contractor?
YES NO

5b. If the answer to question 5a is "yes," has the complainant reported this violation to his or her supervisor, compliance office, whistleblower hotline, ombudsman, or any other available mechanism at the entity for reporting violations? YES NO
5c. If the answer to question 5b is "yes," please provide details. Use additional sheets if necessary.

5d. Date on which the complainant took the action(s) described in question 5b (mm/dd/yyyy): / /

6a. Has the complainant taken any other action regarding your complaint? YES NO
6b. If the answer to question 6a is "yes," please provide details. Use additional sheets if necessary.

7a. Type of security or investment, if relevant

7b. Name of issuer or security, if relevant

7c. Security/ Ticker Symbol or CUSIP no.

8. State in detail all facts pertinent to the alleged violation. Explain why the complainant believes the acts described constitute a violation of the federal securities laws. Use additional sheets if necessary.

9. Describe all supporting materials in the complainant's possession and the availability and location of any additional supporting materials not in complainant's possession. Use additional sheets, if necessary.

10. Describe how and from whom the complainant obtained the information that supports this claim. If any information was obtained from an attorney or in a communication where an attorney was present, identify such information with as much particularity as possible. In addition, if any information was obtained from a public source, identify the source with as much particularity as possible. Attach additional sheets if necessary.

11. Identify with particularity any documents or other information in your submission that you believe could reasonably be expected to reveal your identity and explain the basis for your belief that your identity would be revealed if the documents were disclosed to a third party.

12. Provide any additional information you think may be relevant.

E. ELIGIBILITY REQUIREMENTS AND OTHER INFORMATION

1. Are you, or were you at the time you acquired the original information you are submitting to us, a member, officer or employee of the Department of Justice, the Securities and Exchange 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; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, or the Municipal Securities Rulemaking Board?

YES ☐ NO ☐

2. Are you, or were you at the time you acquired the original information you are submitting to us, 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 Securities Exchange Act of 1934 (15 U.S.C. §78c(a)(52))?

YES ☐ NO ☐

3. Did you acquire the information being provided to us through the performance of an engagement required under the federal securities laws by an independent public accountant?

YES ☐ NO ☐

4. Are you providing this information pursuant to a cooperation agreement with the SEC or another agency or organization?

YES ☐ NO ☐

5. Are you a spouse, parent, child, or sibling of a member or employee of the SEC, or do you reside in the same household as a member or employee of the SEC?

YES ☐ NO ☐

6. Are you providing this information before you (or anyone representing you) received any request, inquiry or demand that relates to the subject matter of your submission (i) from the SEC, (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 the Congress, any other authority of the federal government, or a state Attorney General or securities regulatory authority?

YES ☐ NO ☐

7. Are you currently a subject or target of a criminal investigation, or have you been convicted of a criminal violation, in connection with the information you are submitting to the SEC?

YES ☐ NO ☐

8. Did you acquire the information being provided to us from any person described in questions E1 through E7?

YES ☐ NO ☐

9. Use this space to provide additional details relating to your responses to questions 1 through 8. Use additional sheets if necessary.

F. WHISTLEBLOWER'S DECLARATION

I declare under penalty of perjury under the laws of the United States that the information contained herein is true, correct and complete to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if, in my submission of information, my other dealings with the SEC, or my dealings with another authority in connection with a related action, I knowingly and willfully make any false, fictitious, or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

Print name

Signature Date

G. COUNSEL CERTIFICATION

I certify that I have reviewed this form for completeness and accuracy and that the information contained herein is true, correct and complete to the best of my knowledge, information and belief. I further certify that I have verified the identity of the whistleblower on whose behalf this form is being submitted by viewing the whistleblower's valid, unexpired government issued identification (*e.g.*, driver's license, passport) and will retain an original, signed copy of this form, with Section F signed by the whistleblower, in my records. I further certify that I have obtained the whistleblower's non-waiveable consent to provide the Commission with his or her original signed Form TCR upon request in the event that the Commission requests it due to concerns that the whistleblower 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 that I consent to be legally obligated to do so within 7 calendar days of receiving such a request from the Commission.

Signature Date

BILLING CODE 8011–01–C

Privacy Act Statement

This notice is given under the Privacy Act of 1974. This form may be used by anyone wishing to provide the SEC with information concerning a possible violation of the federal securities laws. We are authorized to request information from you by various laws: Sections 19 and 20 of the Securities Act of 1933, Sections 21 and 21F of the Securities Exchange Act of 1934, Section 321 of the Trust Indenture Act of 1939, Section 42 of the Investment Company Act of 1940, Section 209 of the Investment Advisers Act of 1940 and Title 17 of the Code of Federal Regulations, Section 202.5.

Our principal purpose in requesting information is to gather facts in order to determine whether any person has violated, is violating, or is about to violate any provision of the federal securities laws or rules for which we have enforcement authority. Facts developed may, however, constitute violations of other laws or rules. Further, if you are submitting information for the SEC's whistleblower award program pursuant to Section 21F of the Securities Exchange Act of 1934 (Exchange Act), the information provided will be used in connection with our evaluation of your or your client's eligibility and other factors relevant to our determination of whether to pay an award to you or your client.

The information provided may be used by SEC personnel for purposes of investigating possible violations of, or to conduct investigations authorized by, the federal securities law; in proceedings in which the federal securities laws are in issue or the SEC is a party; to coordinate law enforcement activities between the SEC and other federal, state, local or foreign law enforcement agencies, securities self regulatory organizations, and foreign securities authorities; and pursuant to other routine uses as described in SEC–42 "Enforcement Files."

Furnishing the information requested herein is voluntary. However, a decision not provide any of the requested information, or failure to provide complete information, may affect our evaluation of your submission. Further, if you are submitting this information for the SEC whistleblower program and you do not execute the Whistleblower Declaration or, if you are submitting information anonymously, identify the attorney representing you in this matter, you may not be considered for an award.

Questions concerning this form maybe directed to the SEC Office of the Whistleblower, 100 F Street, NE, Washington, DC 20549, Tel. (202) 551–4790, Fax (703) 813–9322.

Submission Procedures

- After manually completing this Form TCR, please send it by mail or delivery to the SEC Office of the Whistleblower, 100 F. Street, NE, Washington, DC 20549, or by facsimile to (703) 813–9322.
- You have the right to submit information anonymously. If you are submitting anonymously and you want to be considered for a whistleblower award, however, you must be represented by an attorney in this matter and Section B of this form must be completed. Otherwise, you may, but are not required, to have an attorney. If you are not represented by an attorney in this matter, you may leave Section B blank.
- **If you are submitting information for the SEC's whistleblower award program, you must submit your information either using this Form TCR or electronically through the SEC's Electronic Data Collection System, available on the SEC web site at *www.sec.gov*.**

Instructions for Completing Form TCR:

Section A: Information about You

Questions 1–3: Please provide the following information about yourself:

- Last name, first name, and middle initial
- Complete address, including city, state and zip code
- Telephone number and, if available, an alternate number where you can be reached
- Your e-mail address (to facilitate communications, we strongly encourage you to provide your email address),
- Your preferred method of communication; and
- Your occupation

Section B: Information about Your Attorney. Complete this section only if you are represented by an attorney in this matter. You must be represented by an attorney, and this section must be completed, if you are submitting your information anonymously and you want to be considered for the SEC's whistleblower award program.

Questions 1–4: Provide the following information about the attorney representing you in this matter:
- Attorney's name
- Firm name
- Complete address, including city, state and zip code
- Telephone number and fax number, and
- E-mail address

Section C: Tell Us about the Individual and/or Entity You Have a Complaint Against. If your complaint relates to more than two individuals and/or entities, you may attach additional sheets.

Question 1: Choose one of the following that best describes the individual or entity to which your complaint relates:
- **For Individuals:** accountant, analyst, attorney, auditor, broker, compliance officer, employee, executive officer or director, financial planner, fund manager, investment advisor representative, stock promoter, trustee, unknown, or other (specify).
- **For Entity:** bank, broker-dealer, clearing agency, day trading firm, exchange, Financial Industry Regulatory Authority, insurance company, investment advisor, investment advisor representative, investment company, Individual Retirement Account or 401(k) custodian/administrator, market maker, municipal securities dealers, mutual fund, newsletter company/investment publication company, on-line trading firm, private fund company (including hedge fund, private equity fund, venture capital fund, or real estate fund), private/closely held company, publicly held company, transfer agent/paying agent/registrar, underwriter, unknown, or other (specify).

Questions 2–4: For each subject, provide the following information, if known:
- Full name
- Complete address, including city, state and zip code
- Telephone number,
- E-mail address, and
- Internet address, if applicable

Section D: Tell Us about Your Complaint

Question 1: State the date (mm/dd/yyyy) that the alleged conduct began.

Question 2: Choose the option that you believe best describes the nature of your complaint. If you are alleging more than one violation, please list all that you believe may apply. Use additional sheets if necessary.
- Theft/misappropriation (advance fee fraud; lost or stolen securities; hacking of account)
- Misrepresentation/omission (false/misleading marketing/sales literature; inaccurate, misleading or non-disclosure by Broker-Dealer, Investment Adviser and Associated Person; false/material misstatements in firm research that were basis of transaction)
- Offering fraud (Ponzi/pyramid scheme; other offering fraud)
- Registration violations (unregistered securities offering)
- Trading (after hours trading; algorithmic trading; front-running; insider trading, manipulation of securities/prices; market timing; inaccurate quotes/pricing information; program trading; short selling; trading suspensions; volatility)
- Fees/mark-ups/commissions (excessive or unnecessary administrative fees; excessive commissions or sales fees; failure to disclose fees; insufficient notice of change in fees; negotiated fee problems; excessive mark-ups/markdowns; excessive or otherwise improper spreads)
- Corporate disclosure/reporting/other issuer matter (audit; corporate governance; conflicts of interest by management; executive compensation; failure to notify shareholders of corporate events; false/misleading financial statements, offering documents, press releases, proxy materials; failure to file reports; financial fraud; Foreign Corrupt Practices Act violations; going private transactions; mergers and acquisitions; restrictive legends, including 144 issues; reverse stock splits; selective disclosure—Regulation FD, 17 CFR 243; shareholder proposals; stock options for employees; stock splits; tender offers)
- Sales and advisory practices (background information on past violations/integrity; breach of fiduciary duty/responsibility (IA); failure to disclose breakpoints; churning/excessive trading; cold calling; conflict of interest; abuse of authority in discretionary trading; failure to respond to investor; guarantee against loss/promise to buy back shares; high pressure sales techniques; instructions by client not followed; investment objectives not followed; margin; poor investment advice; Regulation E (Electronic Transfer Act); Regulation S–P, 17 CFR 248, (privacy issues); solicitation methods (non-cold calling; seminars); suitability; unauthorized transactions)
- Operational (bond call; bond default; difficulty buying/selling securities; confirmations/statements; proxy materials/prospectus; delivery of funds/proceeds; dividend and interest problems; exchanges/switches of mutual funds with fund family; margin (illegal extension of margin credit, Regulation T restrictions, unauthorized margin transactions); online issues (trading system operation); settlement (including T+1 or T=3 concerns); stock certificates; spam; tax reporting problems; titling securities (difficulty titling ownership); trade execution.
- Customer accounts (abandoned or inactive accounts; account administration and processing; identity theft affecting account; IPOs: problems with IPO allocation or eligibility; inaccurate valuation of Net Asset Value; transfer of account)
- Comments/complaints about SEC, Self-Regulatory Organization, and Securities Investor Protection Corporation processes & programs (arbitration: bias by arbitrators/forum, failure to pay/comply with award, mandatory arbitration requirements, procedural problems or delays; SEC: complaints about enforcement actions, complaints about rulemaking, failure to act; Self-Regulatory Organization: failure to act; Investor Protection: inadequacy of laws or rules; SIPC: customer protection, proceedings and Broker-Dealer liquidations;
- Other (analyst complaints; market maker activities; employer/employee disputes; specify other).

Question 3a: State whether you or your counsel have had any prior communications with the SEC concerning this matter.

Question 3b: If the answer to question 3a is yes, provide the name of the SEC staff member with whom you or your counsel communicated.

Question 4a: Indicate whether you or your counsel have provided the information you are providing to the SEC to any other agency or organization.

Question 4b: If the answer to question 4a is yes, provide details.

Question 4c: Provide the name and contact information of the point of contact at the other agency or organization, if known.

Question 5a: Indicate whether your complaint relates to an entity of which you are, or were in the past, an officer, director, counsel, employee, consultant, or contractor.

Question 5b: If the answer to question 5a is yes, state whether you have reported this violation to your supervisor, compliance office, whistleblower hotline, ombudsman, or any other available mechanism at the entity for reporting violations.

Question 5c: If the answer to question 5b is yes, provide details.

Question 5d: Provide the date on which you took the actions described in questions 5a and 5b.

Question 6a: Indicate whether you have taken any other action regarding your complaint, including whether you complained to the SEC, another regulator, a law enforcement agency, or any other agency or organization; initiated legal action, mediation or arbitration, or initiated any other action.

Question 6b: If you answered yes to question 6a, provide details, including the date on which you took the action(s) described, the name of the person or entity to whom you directed any report or complaint and contact information for the person or entity, if known, and the complete case name, case number, and forum of any legal action you have taken. Use additional sheets if necessary.

Question 7a: Choose from the following the option that you believe best describes the type of security or investment at issue, if applicable:
- 1031 exchanges
- 529 plans
- American Depositary Receipts
- Annuities (equity-indexed annuities, fixed annuities, variable annuities)
- Asset-backed securities
- Auction rate securities
- Banking products (including credit cards)
- Certificates of deposit (CDs)
- Closed-end funds
- Coins and precious metals (gold, silver, etc.)
- Collateralized mortgage obligations (CMOs)
- Commercial paper
- Commodities (currency transactions, futures, stock index options)
- Convertible securities
- Debt (corporate, lower-rated or "junk", municipal)
- Equities (exchange-traded, foreign, Over-the-Counter, unregistered, linked notes)
- Exchange Traded Funds
- Franchises or business ventures
- Hedge funds
- Insurance contracts (not annuities)
- Money-market funds
- Mortgage-backed securities (mortgages, reverse mortgages)
- Mutual funds
- Options (commodity options, index options)
- Partnerships
- Preferred shares
- Prime bank securities/high yield programs
- Promissory notes
- Real estate (real estate investment trusts (REITs))
- Retirement plans (401(k), IRAs)
- Rights and warrants
- Structured note products
- Subprime issues
- Treasury securities
- U.S. government agency securities
- Unit investment trusts (UIT)
- Viaticals and life settlements
- Wrap accounts
- Separately Managed Accounts (SMAs)
- Unknown
- Other (specify)

Question 7b: Provide the name of the issuer or security, if applicable.

Question 7c: Provide the ticker symbol or CUSIP number of the security, if applicable.

Question 8: State in detail all the facts pertinent to the alleged violation. Explain why you believe the facts described constitute a violation of the federal securities laws. Attach additional sheets if necessary.

Question 9: Describe all supporting materials in your possession and the availability and location of additional supporting materials not in your possession. Attach additional sheets if necessary.

Question 10: Describe how you obtained the information that supports your allegation. If any information was obtained from an attorney or in a communication where an attorney was present, identify such information with as much particularity as possible. In addition, if any information was obtained from a public source, identify the source with as much particularity as possible. Attach additional sheets if necessary.

Question 11: You may use this space to identify any documents or other information in your submission that you believe could reasonably be expected to reveal your identity. Explain the basis for your belief that your identity would be revealed if the documents or information were disclosed to a third party.

Question 12: Provide any additional information you think may be relevant.

Section E: Eligibility Requirements

Question 1: State whether you are currently, or were at the time you acquired the original information that you are submitting to the SEC, a member, officer, or employee of the Department of Justice; the Securities and Exchange 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; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board

Question 2: State whether you are, or were you at the time you acquired the original information you are submitting to the SEC, 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 Securities Exchange Act of 1934.
- Section 3(a)(52) of the Exchange Act (15 U.S.C. § 78c(a)(52)) currently defines "foreign financial regulatory authority" as "any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above."

Question 3: State whether you acquired the information you are providing to the SEC through the performance of an engagement required under the securities laws by an independent public accountant.

Question 4: State whether you are providing the information pursuant to a cooperation agreement with the SEC or with any other agency or organization.

Question 5: State whether you are a spouse, parent, child or sibling of a member or employee of the SEC, or whether you reside in the same household as a member or employee of the SEC.

Question 6: State whether you acquired the information you are providing to the SEC from any individual described in Question 1 through 5 of this Section.

Question 7: If you answered "yes" to questions 1 though 6, please provide details.

Question 8a: State whether you are providing the information you are submitting to the SEC before you (or anyone representing you) received any request, inquiry or demand that relates

to the subject matter of your submission in connection with: (i) an investigation, inspection or examination by the SEC, the Public Company Accounting Oversight Board, or any self-regulatory organization; or (ii) an investigation by Congress, or any other authority of the federal government, or a state Attorney General or securities regulatory authority?

Question 8b: If you answered "no" to questions 8a, please provide details. Use additional sheets if necessary.

Question 9a: State whether you are the subject or target of a criminal investigation or have been convicted of a criminal violation in connection with the information you are submitting to the SEC.

Question 9b: If you answered "yes" to question 9a, please provide details, including the name of the agency or organization that conducted the investigation or initiated the action against you, the name and telephone number of your point of contact at the agency or organization, if available and the investigation/case name and number, if applicable. Use additional sheets, if necessary.

SECTION F: Whistleblower's Declaration.

You must sign this Declaration if you are submitting this information pursuant to the SEC whistleblower program and wish to be considered for an award. If you are submitting your information anonymously, you must still sign this Declaration, and you must provide your attorney with the original of this signed form.

If you are *not* submitting your information pursuant to the SEC whistleblower program, you do not need to sign this Declaration.

SECTION G: COUNSEL CERTIFICATION

If you are submitting this information pursuant to the SEC whistleblower program and are doing so anonymously, your attorney *must* sign the Counsel Certification section.

If you are represented in this matter but you are *not* submitting your information pursuant to the SEC whistleblower program, your attorney does not need to sign the Counsel Certification Section.

BILLING CODE 8011–01–P

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549

FORM WB-APP

APPLICATION FOR AWARD FOR ORIGINAL INFORMATION SUBMITTED PURSUANT TO SECTION 21F OF THE SECURITIES EXCHANGE ACT OF 1934

A. APPLICANT'S INFORMATION (REQUIRED FOR ALL SUBMISSIONS)

1. Last Name | First | M.I. | Social Security No.

2. Street Address | Apartment/ Unit #

City | State/ Province | ZIP Code | Country

3. Telephone | Alt. Phone | E-mail Address

B. ATTORNEY'S INFORMATION (IF APPLICABLE – SEE INSTRUCTIONS)

1. Attorney's name

2. Firm Name

3. Street Address

City | State/ Province | ZIP Code | Country

4. Telephone | Fax | E-mail Address

C. TIP/COMPLAINT DETAILS

1. Manner in which original information was submitted to SEC: SEC website ☐ Mail ☐ Fax ☐ Other ☐

2a. Tip, Complaint or Referral number | 2b. Date TCR referred to in 2a submitted to SEC / /

2c. Subject(s) of the Tip, Complaint or Referral:

D. NOTICE OF COVERED ACTION

1. Date of Notice of Covered Action to which claim relates: / / | 2. Notice Number:

3a. Case Name | 3b. Case Number

E. CLAIMS PERTAINING TO RELATED ACTIONS

1. Name of agency or organization to which you provided your information

2. Name and contact information for point of contact at agency or organization, if known.

3a. Date you provided your information / / | 3b. Date action filed by agency/organization / /

4a. Case Name | 4b. Case number

F. ELIGIBILITY REQUIREMENTS AND OTHER INFORMATION

1. Are you, or were you at the time you acquired the original information you submitted to us, a member, officer or employee of the Department of Justice, the Securities and Exchange 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; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board? YES ☐ NO ☐

2. Are you, or were you at the time you acquired the original information you submitted to us, 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 Securities Exchange Act of 1934 (15 U.S.C. §78c(a)(52))?
YES ☐ NO ☐

3. Did you obtain the information you are providing to us through the performance of an engagement required under the federal securities laws by an independent public accountant? YES ☐ NO ☐

4. Did you provide the information identified in Section C above pursuant to a cooperation agreement with the SEC or another agency or organization? YES ☐ NO ☐

5. Are you a spouse, parent, child, or sibling of a member or employee of the Commission, or do you reside in the same household as a member or employee of the Commission? YES ☐ NO ☐

6. Did you acquire the information you are providing to us from any person described in questions F1 through F5? YES ☐ NO ☐

7. If you answered "yes" to any of questions 1 through 6 above, please provide details. Use additional sheets if necessary.

8a. Did you provide the information identified in Section C above before you (or anyone representing you) received any request, inquiry or demand that relates to the subject matter of your submission (i) from the SEC, (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 the Congress, any other authority of the federal government, or a state Attorney General or securities regulatory authority?
YES ☐ NO ☐

8b. If you answered "yes" to question 8a, please provide details. Use additional sheets if necessary.

9a. Are you currently a subject or target of a criminal investigation, or have you been convicted of a criminal violation, in connection with the information upon which your application for an award is based? YES ☐ NO ☐

9b. If you answered "Yes" to question 9a, please provide details. Use additional sheets if necessary.

G. ENTITLEMENT TO AWARD

Explain the basis for your belief that you are entitled to an award in connection with your submission of information to us, or to another agency in a related action. Provide any additional information you think may be relevant in light of the criteria for determining the amount of an award set forth in Rule 21F-6 under the Securities Exchange Act of 1934. Include any supporting documents in your possession or control, and attach additional sheets, if necessary.

H. DECLARATION

I declare under penalty of perjury under the laws of the United States that the information contained herein is true, correct and complete to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if, in my submission of information, my other dealings with the SEC, or my dealings with another authority in connection with a related action, I knowingly and willfully make any false, fictitious, or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

Signature Date

BILLING CODE 8011–01–C

Privacy Act Statement

This notice is given under the Privacy Act of 1974. We are authorized to request information from you by Section 21F of the Securities Exchange Act of 1934. Our principal purpose in requesting this information is to assist in our evaluation of your eligibility and other factors relevant to our determination of whether to pay a whistleblower award to you under Section 21F of the Exchange Act.

However, the information provided may be used by SEC personnel for purposes of investigating possible violations of, or to conduct investigations authorized by, the federal securities law; in proceedings in which the federal securities laws are in issue or the SEC is a party; to coordinate law enforcement activities between the SEC and other federal, state, local or foreign law enforcement agencies, securities self regulatory organizations, and foreign securities authorities; and pursuant to other routine uses as described in SEC–42 "Enforcement Files."

Furnishing this information is voluntary, but a decision not do so, or failure to provide complete information, may result in our denying a whistleblower award to you, or may affect our evaluation of the appropriate amount of an award. Further, if you are submitting this information for the SEC whistleblower program and you do not execute the Declaration, you may not be considered for an award.

Questions concerning this form may be directed to the SEC Office of the Whistleblower, 100 F Street, NE, Washington, DC 20549–5631, Tel. (202) 551–4790, Fax (703) 813–9322.

General

- This form should be used by persons making a claim for a whistleblower award in connection with information provided to the SEC or to another agency in a related action. In order to be deemed eligible for an award, you must meet all the requirements set forth in Section 21F of the Securities Exchange Act of 1934 and the rules thereunder.
- You must sign the Form WB–APP as the claimant. If you provided your information to the SEC anonymously, you must now disclose your identity on this form 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.
- ○ If you are filing your claim in connection with information that you provided to the SEC, then your Form WB–APP, and any attachments thereto, **must be received by the SEC Office of the Whistleblower within sixty (60) days of the date of the Notice of Covered Action to which the claim relates.**
- ○ If you are filing your claim in connection with information you provided to another agency in a related action, then your Form WB–APP, and any attachments thereto, must be received by the SEC Office of the Whistleblower as follows:
- If a final order imposing monetary sanctions has been entered in a 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.**
- If a final order imposing monetary sanctions in a 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 sixty (60) days of the issuance of a final order imposing sanctions in the related action.**
- You must submit your Form WB–APP to us in one of the following two ways:
- ○ By mailing or delivering the signed form to the SEC Office of the Whistleblower, 100 F Street NE, Washington, DC 20549–5631; or
- ○ By faxing the signed form to (703) 813–9322.

Instructions for Completing Form WB–APP

Section A: Applicant's Information

Questions 1–3: Provide the following information about yourself:
- First and last name, and middle initial
- Complete address, including city, state and zip code
- Telephone number and, if available, an alternate number where you can be reached
- E-mail address

Section B: Attorney's Information. If you are represented by an attorney in this matter, provide the information requested. If you are not representing an attorney in this matter, leave this Section blank.

Questions 1–4: Provide the following information about the attorney representing you in this matter:
- Attorney's name
- Firm name
- Complete address, including city, state and zip code
- Telephone number and fax number, and
- E-mail address.

Section C: Tip/Complaint Details

Question 1: Indicate the manner in which your original information was submitted to the SEC.

Question 2a: Include the TCR (Tip, Complaint or Referral) number to which this claim relates.

Question 2b: Provide the date on which you submitted your information to the SEC.

Question 2c: Provide the name of the individual(s) or entity(s) to which your complaint related.

Section D: Notice of Covered Action

The process for making a claim for a whistleblower award begins with the publication of a "Notice of a Covered Action" on the Commission's Web site. This notice is published whenever a judicial or administrative action brought by the Commission results in the imposition of monetary sanctions exceeding $1,000,000. The Notice is published on the Commission's Web site subsequent to the entry of a final judgment or order in the action that by itself, or collectively with other judgments or orders previously entered in the action, exceeds the $1,000,000 threshold.

Question 1: Provide the date of the Notice of Covered Action to which this claim relates.

Question 2: Provide the notice number of the Notice of Covered Action.

Question 3a: Provide the case name referenced in Notice of Covered Action.

Question 3b: Provide the case number referenced in Notice of Covered Action.

Section E: Claims Pertaining to Related Actions

Question 1: Provide the name of the agency or organization to which you provided your information.

Question 2: Provide the name and contact information for your point of contact at the agency or organization, if known.

Question 3a: Provide the date on which that you provided your information to the agency or organization referenced in question E1.

Question 3b: Provide the date on which the agency or organization referenced in question E1 filed the related action that was based upon the information you provided.

Question 4a: Provide the case name of the related action.

Question 4b: Provide the case number of the related action.

Section F: Eligibility Requirements

Question 1: State whether you are currently, or were at the time you acquired the original information that you submitted to the SEC a member, officer, or employee of the Department of Justice; the Securities and Exchange 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; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board

Question 2: State whether you are, or were you at the time you acquired the original information you submitted to the SEC, 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 Securities Exchange Act of 1934.

- Section 3(a)(52) of the Exchange Act (15 U.S.C. § 78c(a)(52)) currently defines

"foreign financial regulatory authority" as "any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above."

Question 3: Indicate whether you acquired the information you provided to the SEC through the performance of an engagement required under the securities laws by an independent public accountant.

Question 4: State whether you provided the information submitted to the SEC pursuant to a cooperation agreement with the SEC or with any other agency or organization.

Question 5: State whether you are a spouse, parent, child or sibling of a member or employee of the Commission, or whether you reside in the same household as a member or employee of the Commission.

Question 6: State whether you acquired the information you are providing to the SEC from any individual described in Question 1 through 5 of this Section.

Question 7: If you answered "yes" to questions 1 though 6, please provide details.

Question 8a: State whether you provided the information identified submitted to the SEC before you (or anyone representing you) received any request, inquiry or demand from the SEC, Congress, or any other federal, state or local authority, or any self regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information your submission was relevant.

Question 8b: If you answered "no" to questions 8a, please provide details. Use additional sheets if necessary.

Question 9a: State whether you are the subject or target of a criminal investigation or have been convicted of a criminal violation in connection with the information upon which your application for award is based.

Question 9b: If you answered "yes" to question 9a, please provide details, including the name of the agency or organization that conducted the investigation or initiated the action against you, the name and telephone number of your point of contact at the agency or organization, if available and the investigation/case name and number, if applicable. Use additional sheets, if necessary. If you previously provided this information on Form WB-DEC, you may leave this question blank, unless your response has changed since the time you submitted your Form WB–DEC.

Section G: Entitlement to Award

This section is optional. Use this section to explain the basis for your belief that you are entitled to an award in connection with your submission of information to us or to another agency in connection with a related action. Specifically address how you believe you voluntarily provided the Commission with original information that led to the successful enforcement of a judicial or administrative action filed by the Commission, or a related action. Refer to Rules 21F–3 and 21F–4 under the Exchange Act for further information concerning the relevant award criteria. You may attach additional sheets, if necessary.

Rule 21F–6 under the Exchange Act provides that in determining the amount of an award, the Commission will evaluate the following factors: (a) the significance of the information provided by a whistleblower to the success of the Commission action or related action; (b) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action; (c) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and (d) whether the award otherwise enhances the Commission's ability to enforce the federal securities laws, protect investors, and encourage the submission of high quality information from whistleblowers. Address these factors in your response as well.

Additional information about the criteria the Commission may consider in determining the amount of an award is available on the Commission's Web site at *www.sec.gov/complaint/info_whistleblowers.shtml.*

Section H: Declaration

This section must be signed by the claimant.

Dated: May 25, 2011.

By the Commission.

Elizabeth M. Murphy,

Secretary.

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