

Press Release

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

FOR IMMEDIATE RELEASE

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

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

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

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

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

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

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

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

FACT SHEET

SEC Open Meeting

September 23, 2020

Background

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

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

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

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

Highlights

Additional Tools in Award Determinations

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

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

- After carefully considering the comments received, the Commission has determined not to adopt proposed Exchange Act Rule 21F-6(d)(2), which would have provided a formalized process for the Commission to conduct an enhanced review of certain awards.
- *Allowing awards based on deferred prosecution agreements (“DPAs”) and non-prosecution agreements (“NPAs”) entered into by the U.S. Department of Justice (“DOJ”), or a settlement agreement entered into by the Commission outside of the context of a judicial or administrative proceeding to address violations of the securities laws:* This amendment will ensure that whistleblowers are not disadvantaged because of the particular form of an action that the Commission or DOJ may elect to pursue. Under the amendment, the Commission would be able to make award payments to whistleblowers based on money collected as a result of such DPAs and NPAs, as well as under settlement agreements entered into by the Commission outside of the context of a judicial or administrative proceeding to address violations of the securities laws.
 - The amendment to the definition of “action” to include NPAs, DPAs, and similar Commission settlement agreements will apply to any such agreement that was entered into after July 21, 2010 (the date the Dodd-Frank Act became effective). Individuals will have 90 days from the effective date of the amendments to apply for an award in connection with any such agreement that was entered between the July 2010 date and the effective date of the amendments.
- *Clarifying the current definition of “related action”:* This amendment codifies the Commission’s approach to determining whether an action is a related action, including clarifying that a law-enforcement or separate regulatory action does not qualify as a “related action” if the Commission determines that there is a separate award scheme that more appropriately applies to such law-enforcement or separate regulatory action. The presence of such a separate award scheme would not affect the Commission’s determination of the award based on the monetary sanctions collected by the Commission in the covered SEC action and any related action where such an award scheme was not present.

Uniform Definition of “Whistleblower”

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

- For purposes of retaliation protection, an individual is required to report information about possible securities laws violations to the Commission “in writing.” As required by the Supreme Court’s decision, to qualify for the retaliation protection under Section 21F, the individual must report to the Commission before experiencing the retaliation.
- To be eligible for an award or to obtain heightened confidentiality protection, the additional existing requirement that a whistleblower submit information on Form TCR or through the Commission’s online tips portal remains in place, subject to the additional discretion of the Commission to grant waivers described below.
- Additionally, the Commission is issuing interpretive guidance defining the scope of retaliatory conduct prohibited by Section 21F(h)(1)(A), which includes any retaliatory activity by an employer against a whistleblower that a reasonable employee would find materially adverse.

Increased Efficiency in Claims Review Process

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

- New subparagraph (e) to Exchange Act Rule 21F-8 codifies the Commission's practice of barring applicants who submit materially false, fictitious, or fraudulent statements in their whistleblower submission, in their other dealings with the Commission, or in related actions, and provides an important new tool for the Commission in processing frivolous award applications.
 - To prevent repeat submitters from abusing the award application process, the rule permits the Commission to permanently bar any applicant from seeking an award after the Commission determines that the applicant has abused the process by submitting three frivolous award applications.
 - For the first three applications determined to be frivolous, the Office of the Whistleblower will notify a claimant of its assessment and give the claimant the opportunity to withdraw the application.
- New Exchange Act Rule 21F-18 affords the Commission with a summary disposition procedure for certain types of common denials, such as untimely award applications, applications that involve a tip that was not provided to the Commission in the form and manner that the rules require, and applications where the claimant's information was never provided to or used by staff responsible for the investigation.
 - The more streamlined process is designed to help facilitate a more timely resolution of such relatively straightforward denials, while freeing up staff resources to focus on processing potentially meritorious award claims. Claimants will still have an opportunity to contest a preliminary denial of their claim before the Commission makes its final determination.

Clarification and Enhancement of Certain Policies and Procedures

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

- Exchange Act Rule 21F-4(e) is amended to clarify the definition of "monetary sanctions," codifying the Commission's current understanding and application of that term.
- Section 21F of the Exchange Act provides that the determination of the amount of an award is in the discretion of the Commission. Exchange Act Rule 21F-6 is amended to clarify the Commission's discretion in applying the award factors and setting the award amount, including the discretion to apply the award factors in percentage terms, dollar terms or some combination thereof. The amendments also confirm that the Commission will consider only the enumerated award factors set forth in the rule when determining the award amount.
- Exchange Act Rule 21F-9 is amended to provide the Commission with additional flexibility to modify the manner in which individuals may submit Form TCR (Tip, Complaint or Referral).
 - Further, the amendment clarifies that the Commission may waive compliance with Rule 21F-9(a) and (b) for a meritorious whistleblower who provided a Form TCR:
 - within 30 days of first providing the information that he or she relies upon as a basis for a claim, or
 - within 30 days of first obtaining actual or constructive notice about those requirements (or 30 days from the date the whistleblower retains counsel to represent him or her in connection with the submission of original information, whichever occurs first).

- The waiver of non-compliance with Rule 21F-9(a) and (b) is automatic, rather than discretionary, when the Commission finds that the whistleblower has established that the specified conditions are satisfied.
 - The Commission continues to retain its separate discretionary exemptive authorities under Rule 21F-8(a) and Exchange Act Section 36(a) for circumstances that may warrant exemptive relief.
- Exchange Act Rule 21F-8 is amended to provide the Commission with additional flexibility regarding the forms used in connection with the whistleblower program.
 - Exchange Act Rule 21F-12 is amended to clarify the list of materials that the Commission may rely upon in making an award determination.
 - Exchange Act Rule 21F-13 is amended to clarify the materials that may comprise the administrative record for purposes of judicial review.

Commission Interpretive Guidance

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

- Under the guidance, in order to qualify as “independent analysis,” a whistleblower’s submission must provide evaluation, assessment, or insight beyond what would be reasonably apparent to the Commission from publicly available information.
- In making that determination, the Commission will consider whether the whistleblower’s conclusion of possible securities violations derives from multiple sources, including sources that are not readily identified and accessed by a member of the public without specialized knowledge, unusual effort, or substantial cost, and the sources collectively raise a strong inference of a potential securities law violation that is not readily inferable by the Commission from any of the sources individually.

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

Guidance from the Office of the Whistleblower

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

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

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

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

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

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

Additional Information to Congress

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

What's Next?

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

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Related Materials

- Final Rule