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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34-83557; File No. S7-16-18]

RIN 3235 – AM11

Whistleblower Program Rules

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is proposing for public comment several amendments to the Commission's rules implementing its whistleblower program. Section 21F of the Securities Exchange Act of 1934 ("Exchange Act") provides, among other things, that the Commission shall 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. On May 25, 2011, the Commission adopted a comprehensive set of rules to implement the whistleblower program. The proposed rules would make certain changes and clarifications to the existing rules, as well as several technical amendments. The Commission is also including interpretive guidance concerning the terms "unreasonable delay" and "independent analysis."

DATES: Comments should be received on or before September 18, 2018.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-16-18 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-16-18. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method of submission. The Commission will post all comments on the Commission's Internet Web site (http://www.sec/gov/rules/proposed.shtml). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by e-mail.

FOR FURTHER INFORMATION CONTACT: Emily Pasquinelli, Office of the Whistleblower, Division of Enforcement, at (202) 551-5973; Brian A. Ochs, Office of the General Counsel, at (202) 551-5067, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing to amend 17 CFR 240.21F-3 ("Rule 21F-3"), 240.21F-4 ("Rule 21F-4"), 240.21F-6 ("Rule 21F-6"), 240.21F-8 ("Rule 21F-8") through 240.21F-13 ("Rule 21F-13"). The Commission is also proposing to add a new rule that would be codified as 17 CFR 240.21F-18 ("Rule 21F-18").

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I. Background

A. The Whistleblower Award Program

In July 2010, Congress amended the Exchange Act to add new Section 21F.[1] That provision, entitled "Securities Whistleblower Incentives and Protection," established the Commission's whistleblower program. Among other things, Section 21F directs that the Commission pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about a violation of the securities laws that leads to the successful enforcement of an action brought by the Commission that results in a covered judicial or administrative action[2] and certain related actions.[3]

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

- define key terms and phrases in Section 21F that determine whether an individual's information qualifies for an award—terms such as "original information," "voluntary," and "leads to successful enforcement";
- specify the form and manner in which an individual must submit information to qualify as a whistleblower eligible for an award;
- establish the procedures for anonymous submissions;

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

[2] 15 U.S.C. 78u-6(a)(1).

[3] 15 U.S.C. 78u-6(a)(5).

- exclude certain individuals from eligibility, such as individuals who are, or were at the time that they acquired the original information provided to the Commission, a member, officer, or employee of a foreign government;
- explain which law-enforcement proceedings undertaken by other authorities may qualify for a related action award from the Commission;
- establish the procedures for determining awards both in Commission actions and related actions; and
- identify the criteria that the Commission will consider in setting the percentage amount of an award.

The Commission's whistleblower program has made significant contributions to the effectiveness of the Commission's enforcement of the federal securities laws. The Commission has received over 22,000 whistleblower tips since the inception of the program through the end of Fiscal Year 2017. Original information provided by whistleblowers has led to enforcement actions in which the Commission has obtained over $1.4 billion in financial remedies, including more than $740 million in disgorgement of ill-gotten gains and interest, the majority of which has been or is scheduled to be returned to harmed investors. The Commission has ordered over $266 million in whistleblower awards to 55 individuals whose information and cooperation assisted the Commission in bringing successful enforcement actions and, in some instances, other enforcement authorities in bringing related actions against wrongdoers. That said, approximately $112 million of that amount was paid to just four individuals in connection with two Commission enforcement actions and a related action.[4]

[4] The average (mean) of these awards was approximately $38 million and the median award was approximately $33 million.

We recognize that individuals who step forward to provide information to the Commission may do so at great personal peril and professional sacrifice. We view the three key tenets of the program—monetary awards, confidentiality, and retaliation protections—as complementary and critical to the success of the program.

B. Overview of the Proposed Rule Changes and Other Items

After nearly seven years of experience administering the whistleblower program, we have identified various ways in which the program might benefit from additional rulemaking. We believe that the changes that we are proposing will build on the program's success by continuing to encourage individuals to come forward and by permitting us to more efficiently process award applications, among other potential benefits.

Based on our experience to date, we propose the following substantive amendments to our rules:

- *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 state attorney general in a criminal case, or a settlement agreement entered into by the Commission outside of the context of a judicial or administrative proceeding to address violations of the securities laws*: We propose an amendment that would expressly allow for the payment of awards based on money collected under these types of arrangements. Currently, our whistleblower rules do not address whether the Commission may pay an award when an eligible whistleblower voluntarily provides original information that leads to a DPA or NPA entered into by DOJ or a state attorney general in a criminal proceeding. Nor do our rules currently address whether the Commission may pay an award to an eligible whistleblower who voluntarily provides

information that leads to 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. We are proposing to amend the definition of an "action" in Rule 21F-4(d)[5] to include, as administrative actions, these arrangements, with the money paid under such arrangements deemed to be "monetary sanctions" under Rule 21F-4(e),[6] and, thus to expressly permit us to pay awards thereon.

- *Elimination of potential double recovery under the current definition of related action:* We propose an amendment to our rules to clarify that a law-enforcement action would not qualify as a related action if the Commission determines that there is a separate whistleblower award scheme that more appropriately applies to the enforcement action. Although neither Section 21F of the Exchange Act (nor the whistleblower program rules thereunder) expressly addresses this situation, the Commission and the Claims Review Staff in the context of processing award applications have interpreted the term "related action" under Section 21F to exclude those matters brought by one of the entities listed in Rule 21F-3(b)(1)[7] for which there is a more directly applicable award program. The proposed rule would codify this interpretation.
- *Additional considerations for small and exceedingly large awards:* In the context of potential awards that could yield a payout of $2 million or less to a whistleblower, the proposed rules would authorize the Commission to adjust the award percentage upward under certain circumstances (subject to the 30% statutory maximum) to an amount that

[5] 17 CFR 240.21F-4(d).

[7] 17 CFR 240.21F-3(b)(1).

the Commission determines more appropriately achieves the program's objectives of rewarding meritorious whistleblowers and sufficiently incentivizing future whistleblowers who might otherwise be concerned about the low dollar amount of a potential award. Relatedly, in the context of potential awards that could yield total collected monetary sanctions of at least $100 million, the proposed rules would authorize the Commission to adjust the award percentage so that it would yield a payout (subject to the 10% statutory minimum) that does not exceed an amount that is reasonably necessary to reward the whistleblower and to incentivize other similarly situated whistleblowers; however, in no event would the award be adjusted below $30 million.[8] Currently, the whistleblower rules do not expressly permit the Commission to consider whether a relatively small or exceedingly large potential payout is appropriate to advance the program's goals of rewarding whistleblowers and incentivizing future whistleblowers. We are proposing to amend the whistleblower program rules to include these considerations as additional award criteria.

The three proposed rule changes described above are intended to serve two important and related objectives. *First*, the amendments are designed to help ensure that an eligible, meritorious whistleblower is appropriately rewarded for his or her efforts when the Commission or a related-action authority recovers monetary sanctions from wrongdoing that violates the securities laws. *Second*, the amendments would help ensure that the Investor Protection Fund (IPF) that Congress has established to pay meritorious whistleblowers is used in a manner that

[8] In determining whether a large award would provide a payout that goes beyond what would be necessary to achieve the program's goals, we anticipate that the Commission would consider, among other factors, the value of the whistleblower's information and the personal and professional sacrifices made in reporting the information.

effectively and appropriately leverages the IPF to further the Commission's law-enforcement objectives.[9]

We believe that using the IPF to compensate whistleblowers who come forward with original information that leads to a DPA or NPA entered into by DOJ or a state attorney general, or a settlement agreement entered into by the Commission outside of the context of a judicial or administrative proceeding (provided the total money required to be paid in the action, including any other proceedings that arise out of the same nucleus of operative facts, exceeds $1,000,000) achieves both of these objectives. We similarly believe that these objectives are furthered by providing the Commission with additional discretion to determine that an action does not qualify as a related action if Congress or another authority has established a more directly applicable or relevant award program. Additionally, we believe that these two objectives are furthered by authorizing the Commission to adjust upward the award percentage in certain cases where the award would otherwise yield a payout of $2 million or less to a whistleblower, as well as to consider whether, in the context of an award issued in connection with certain large Commission or related actions, any whistleblower award exceeds an amount that is reasonably necessary to

[9] By statute, the IPF "is established in the Treasury of the United States" and "is available to the Commission, without further appropriation or fiscal year limitation," to pay "awards to whistleblowers" under Section 21F(b). Exchange Act § 21F(g)(1), 15 U.S.C. 78-6(g) (1). The IPF may also be used to fund certain limited activities of the Inspector General and the Office of the Whistleblower. As of the end May 2018, the balance of the IPF for the first time fell below the $300 million threshold that triggers the statutory replenishment mechanism; this occurred when the Commission paid $83 million—its largest payout to date on an enforcement action—to three individuals. For a complete description of the mechanisms that Congress established to replenish the IPF, see Section 21F(g)(3) of the Exchange Act, 15 U.S.C. 78-6(g)(3). Generally speaking, the IPF is funded in the following way: (i) deposits of any monetary sanction collected by the Commission in any judicial or administrative action brought by the Commission under the securities laws that is not added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) or otherwise distributed to victims of a violation of the securities laws, unless the balance of the IPF at the time the monetary sanction is collected exceeds $300,000,000; (ii) deposits of any monetary sanction added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) that is not distributed to the victims for whom the fund was established, unless the balance of the disgorgement fund at the time the determination is made not to distribute the monetary sanction to such victims exceeds $200,000,000; and (iii) if the amounts deposited in the IPF under item (i) and (ii) above are not sufficient to satisfy a whistleblower award, the Commission must deposit money into the fund from the monetary sanctions collected in the covered action that the whistleblower's information led to (even if the money could have been directed to victims of the violation) in an amount equal to the unsatisfied portion of the award.

advance the program's goals. Absent this last amendment, the Commission may find itself faced with the possibility of paying out significantly large awards that are in excess of the amounts appropriate to advance the goals of the whistleblower program. These awards could substantially diminish the IPF, requiring the Commission to direct more funds to replenish the IPF rather than making that money available to the United States Treasury, where they could be used for other important public purposes.[10]

Beyond the amendments discussed above, we are proposing to modify Exchange Act Rule 21F-2.[11] The amendments that we are proposing to this rule are in response to the Supreme Court's recent decision in *Digital Realty Trust, Inc. v. Somers*.[12] In that decision, the Court held that Section 21F(a)(6) of the Exchange Act unambiguously requires that an individual report a possible securities law violation to the Commission in order to qualify for employment retaliation protection, and that the Commission's rule interpreting the anti-retaliation protections in Section 21F(h)(1) more broadly was therefore not entitled to deference.[13] We are proposing to modify Rule 21F-2 so that it comports with the Court's holding by, among other things, promulgating a uniform definition of "whistleblower" that would apply to all aspects of Exchange Act Section 21F. We are also proposing to provide certain related clarifications to Rule 21F-2 and to address certain other interpretive questions that have arisen in connection with the Court's holding.

[10] Any funds used to replenish the IPF otherwise would be directed to the Treasury for use in funding other public programs.

[11] 17 CFR 240.21F-2.

[12] 138 S. Ct. 767 (2018).

[13] 138 S. Ct. at 781-82.

In addition to the foregoing amendments, we are proposing several other amendments that are intended to clarify and enhance certain policies, practices, and procedures in implementing the program. We are proposing to revise Exchange Act Rule 21F-4(e)[14] to clarify the definition of "monetary sanctions" so that it codifies the agency's current understanding and application of that term. We are also proposing to revise Exchange Act Rule 21F-9[15] to provide the Commission with additional flexibility to modify the manner in which individuals may submit Form TCR (Tip, Complaint or Referral). We are similarly proposing to revise Exchange Act Rule 21F-8[16] to provide the Commission with additional flexibility regarding the forms used in connection with the whistleblower program.[17] Further, we are proposing an amendment to Exchange Act Rule 21F-12[18] to clarify the list of materials that the Commission may rely upon in making an award determination. We are also proposing an amendment to Rule 21F-13[19] to clarify the materials that may comprise the administrative record for purposes of judicial review.

Two further changes are designed to help increase the Commission's efficiency in processing whistleblower award applications. We are proposing to add paragraph (e) to Exchange Act Rule 21F-8[20] to clarify the Commission's ability to bar individuals from submitting whistleblower award applications where they are found to have submitted false

[14] 17 CFR 240.21F-4(e).

[15] 17 CFR 240.21F-9.

[16] 17 CFR 240.21F-8.

[17] 17 CFR 249.1800 and 249.1801.

[18] 17 CFR 240.21F-12.

[19] 17 CFR 240.21F-13.

[20] 17 CFR 240.21F-8.

information in violation of Exchange Act Section 21F(i)[21] and Rule 8(c)(7)[22] thereunder, as well as to afford the Commission the ability to bar individuals who repeatedly make frivolous award claims in Commission actions. We are also proposing to add new Exchange Act Rule 21F-18 to afford the Commission with a summary disposition procedure for certain types of likely denials, such as untimely award applications and those applications that involve a tip that was not provided to the Commission in the form and manner that the Commission's rules require.

We are also proposing a technical correction to Exchange Act Rule 21F-4(c)(2)[23] to modify an erroneous internal cross-reference, as well as several technical modifications to Exchange Act Rules 21F-9, 10, 11, and 12[24] to accommodate certain of the substantive and procedural changes described above.

We have included two additional items beyond the proposed amendments to our rules. *First*, we are including proposed interpretive guidance to help clarify the meaning of "independent analysis" as that term is defined in Exchange Act Rule 21F-4 and utilized in the definition of "original information." Second, we are including a general inquiry for public comment regarding whether the Commission in a future rulemaking could establish a potential discretionary award mechanism for Commission enforcement actions that either do not qualify as covered actions, are based on publicly available information (and not "original information" as

[21] 15 USC 78u-6(i).

[22] 17 CFR 240.21F-8(c)(7).

[23] 17 CFR 240.21F-4(c)(2).

[24] 17 CFR 240.21F-9 through 240.21F-12.

that term is defined in Exchange Act Rule 21F-4(b)(1)(i)[25]), or where the monetary sanctions collected are *de minimis*.[26]

II. Discussion of Proposed Amendments

The proposed amendments are set forth below.

A. Proposed Amendment to Exchange Act Rule 21F-4(d)[27] defining an "action"[28]

Section 21F of the Exchange Act authorizes us to pay whistleblower awards in relation to the "successful enforcement" of "covered judicial or administrative actions" brought by the Commission and certain "related actions" of other authorities, most notably DOJ.[29] Awards

[25] 17 CFR 240-21F-4(b)(1)(i).

[26] In July 2014, the Commission received two petitions for rulemaking relating to the whistleblower program. The petitions for rulemaking can be found on the Commission's website at this location: https://www.sec.gov/rules/petitions.shtml. Both petitions sought the same or similar amendments to the whistleblower program rules in two respects. In connection with issuing this proposing release, we have considered the two petitions and determined to proceed as follows. *First*, to the extent that the petitions requested clarification through rulemaking in connection with employment anti-retaliation protections for internal reporting, we believe that the amendments we are proposing to Exchange Act Rule 21F-2 (discussed above) appropriately address this issue following the Supreme Court's recent decision in *Digital Realty*. *Second*, to the extent the rulemaking petitions request that we add clarifying language to Exchange Act Rule 21F-17(a), 17 CFR 240.21F-17(a), we find the amendments unnecessary at this juncture because, as noted by the petitioners, "the plain language of Rule 21F-17 and existing case law compel the conclusion" that the contracts the petitioners are concerned with are already "unenforceable[.]" See Exchange Act Rule 21F-17(a), 17 CFR 240.21F-17(a) (providing that 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 (ii) of the chapter related to the legal representation of a client) with respect to such communications.). In fact, the Commission has successfully brought nine enforcement actions for violations of Rule 21F-17. *See generally* SEC National Exam Program Risk Alert: Examining Whistleblower Rule Compliance at 1-2 & n. 3 (October 24, 2016), *available at* https://www.sec.gov/ocie/announcement/ocie-2016-risk-alert-examining-whistleblower-rule-compliance.pdf (summarizing Commission enforcement actions). Finally, in accordance with Rule 192 of the Commission's Rules of Practice, *see* 17 CFR 201.192, the Secretary of the Commission shall notify the petitioners of the action taken by the Commission following the publication of this proposing release in the Federal Register.

[27] 17 CFR 240.21F-4(d).

[28] The Commission anticipates that this proposed rule change, if adopted, would apply to all new DPAs, NPAs, and Commission settlement agreements covered by the proposed rule that are entered into after the effective date of the rules. The proposed rule would not apply to any such agreements entered on or before the effective date of the rules.

[29] 15 U.S.C. 78u-6(b)(1). A "covered judicial or administrative action" is any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1 million. *Id.* 6(a)(1). A "related action" is a judicial or administrative action brought by any of several authorities designated in

range between 10 percent and 30 percent "of what has been collected of the monetary sanctions imposed" in the action.[30] Proposed Rule 21F-4(d)(3) would provide that, for purposes of making a whistleblower award, a DPA or NPA entered into by DOJ or a state attorney general in a criminal case would be deemed to be an "administrative action" and any money required to be paid thereunder would be deemed a "monetary sanction." The same result would follow for 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. The premise of proposed Rule 21F-4(d)(3) is the same as that underlying current Rule 21F-4(d)(1)[31]: our view that Congress did not intend for meritorious whistleblowers to be denied awards simply because of the procedural vehicle that the Commission (or the other authority) has selected to pursue an enforcement matter.[32]

Moreover, we also believe that the statutory term "administrative action" is sufficiently ambiguous and broad enough to permit us to interpret the term to include DPAs and NPAs when these instruments are employed by DOJ or a state attorney general, or settlement agreements entered into by the Commission outside of the context of judicial or administrative proceedings,

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the statute that is based upon the original information provided by a whistleblower that led to successful enforcement of a Commission covered action. *Id.* 6(a)(5).

[30] *Id.* 6(b)(1)(A)-(B).

[31] 17 CFR 240.21F-4(d)(1).

[32] *See Securities Whistleblower Incentives and Protections*, Exchange Act Release No. 64545, 76 FR 34300, 34327 (June 13, 2011). Recognizing that an "action" is generally considered to be a single captioned case or matter, the Commission adopted Rule 21F-4(d)(1) to clarify that it would treat two or more separate cases that arise out of the same nucleus of operative facts as a single "action" for purposes of making an award. In this way, the sanctions ordered in closely connected proceedings, even if individually under $1 million, are aggregated for purposes of assessing whether the actions reach the $1 million "covered action" threshold that is necessary to permit consideration of whistleblower award claims. The critical principle behind this rule is that a whistleblower should not be denied an award for his or her contributions to the closely connected cases or matters merely because the Commission (or other authority) determined not to bring these cases as one captioned law-enforcement case.

as an appropriate resolution to a law-enforcement investigation.[33] We find it particularly telling that Congress used the term "action" in Section 21F of the Exchange Act, rather than the term "proceeding," to describe the universe of administrative enforcement outcomes that might give rise to a whistleblower award. As used elsewhere in Section 21F, as well as in other provisions of the securities laws and the Commission's rules thereunder, the term "proceeding" refers to various specifically identified formal processes instituted before the Commission.[34] Therefore, the use of the term "administrative action" in describing actions that can give rise to whistleblower awards suggests that Congress did not clearly intend to limit the scope of the Commission's authority under Section 21F (outside of judicial actions) to only the Commission's formal adjudicatory proceedings specified in the securities laws (or adjudicatory proceedings of designated related action authorities).

The Commission has previously exercised its interpretive authority to pay a whistleblower award with respect to a DPA entered into by DOJ on the basis that such agreements are filed in a federal court action that charges the defendant with violations of law.[35]

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[33] In DOJ's practice, DPAs and NPAs occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation in circumstances where the collateral consequences of a corporate conviction for innocent third parties would be significant. *See United States Attorneys' Manual* 9-28.200, 9-28.1100, *available at* https://www.justice.gov/usam/united-states-attorneys-manual. As one example, DPAs and NPAs have been a prominent tool in DOJ's criminal enforcement of the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. 78dd-1 *et seq.*, an area that overlaps with our own enforcement jurisdiction. In 2017, DOJ entered into six DPAs or NPAs to resolve FCPA investigations of corporate entities, securing over $1.4 billion in monetary recoveries. *See FCPA Related Enforcement Actions:2017*, *available at* https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2017.

[34] *See, e.g.*, Exchange Act Sections 21F(h)(2)(A), 15 U.S.C. 78u-6(h)(2)(A) (disclosure of whistleblower identities to a "respondent in connection with a public proceeding instituted by the Commission"), 21B, 15 U.S.C. 78u-2 ("Civil Remedies in Administrative Proceedings"), 21C, 15 U.S.C. 78u-3 ("Cease-and-Desist Proceedings"); Securities Act of 1933 Section 8A, 15 U.S.C. 77h-1 ("Cease-and-Desist Proceedings"); Investment Advisers Act Section 203(i), 15 U.S.C. 80b-3(i) ("Money Penalties in Administrative Proceedings"); Investment Company Act Section 9(d), 15 U.S.C. 80a-9(d) ("Money Penalties in Administrative Proceedings"); *see also* SEC Rule of Practice 101(4), 17 CFR 201.101(4) (defining "enforcement proceeding").

[35] *See generally* DOJ Criminal Division and SEC Enforcement Division, *A Resource Guide to the Foreign Corrupt Practices Act* at 74 (2012), *available at* https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf ("FCPA

However, as is further discussed below, DOJ's practice with respect to NPAs has been *not* to commence an accompanying proceeding in either a judicial or administrative tribunal. Moreover, we have entered into settlement agreements outside of judicial or administrative proceedings. Notwithstanding this distinction in form (*i.e.*, whether an accompanying judicial or administrative proceeding was undertaken), these agreements are all similar in important respects: typically, they reward meaningful cooperation, are premised on significant remedial and compliance commitments, and obtain monetary remedies for past violations. Based on our experience with the whistleblower program, we are of the view that the entry of each of these types of agreements should be considered the successful enforcement of an administrative action within the meaning of Section 21F, and that whistleblowers who voluntarily provide original information that leads to such enforcement should not be disadvantaged because DOJ, a state attorney general in a criminal case, or the Commission, in the exercise of enforcement discretion, may elect to proceed in a form that does not include the filing of a complaint or indictment in federal (or state) court, or the institution of an administrative proceeding.[36] For this reason, we are proposing Rule 21F-4(d)(3) to clarify that these agreements would be treated as "administrative actions" upon which whistleblower awards may be based (provided the total money required to be paid in the Commission action, including any other proceedings that arise out of the same nucleus of operative facts, exceed $1,000,000).

In arriving at this preliminary interpretation, we have found several considerations to be persuasive. *First*, we believe that our rulemaking authority under the Exchange Act and our

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Resource Guide") (describing function and operation of DPAs).

[36] *See United States v. Fokker*, 818 F.3d 733, 737 (D.C. Cir. 2016) ("In certain situations, rather than choose between the opposing poles of pursuing a criminal conviction or forgoing any criminal charges altogether, the Executive may conclude that the public interest warrants the intermediate option of a deferred prosecution agreement.").

authority to define Exchange Act terms is best read as permitting us to incorporate such agreements within the definition of an "action."[37] *Second*, as discussed above, we do not believe that Congress's use of the phrase "administrative action" in Section 21F limits us to considering whistleblower awards only when investigations are resolved through formal adjudicatory administrative proceedings. This is especially so given that such an approach would appear to draw arbitrary distinctions among otherwise meritorious whistleblowers based solely on the vehicle that we, DOJ, or a state criminal law authority, in the exercise of enforcement discretion, may view as the most appropriate in a particular case. *Third*, we are cognizant of the context in which Section 21F was enacted. Congress enacted the Commission's whistleblower program in 2010, which is the same year that the Commission initiated, as part of its enforcement cooperation program, forms of settlement agreements outside of the context of a judicial or administrative proceeding as an alternative mechanism to resolve securities law violations.[38] Given that Commission actions are the primary focus of the whistleblower program, it is reasonable to understand that Congress may not have focused on the implications of such agreements when enacting Section 21F of the Exchange Act.

For similar reasons, we believe that the payments required of a company under the terms of the agreements that would be covered by the proposed rule should be deemed to be "monetary

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

[38] *SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist Investigations*, SEC Press Release 2010-6 (Jan. 13, 2010). To date, we have entered into 17 settlements outside of judicial or administrate proceedings requiring payment of disgorgement, prejudgment interest, and penalties totaling more than $53 million.

sanctions" within the meaning of Section 21F of the Exchange Act.[39] Section 21F(b)(1) authorizes us to pay meritorious whistleblowers between 10 percent and 30 percent "of what has been collected of the monetary sanctions imposed in the action or related actions."[40] "Monetary sanctions" are defined, in pertinent part, as money that are "ordered to be paid" as a result of a judicial or administrative action.[41] Although the actions that would be covered by the proposed rule take the form of an agreement between a company and the Government, payment of disgorgement or other amounts is required of the company in order to resolve a Commission enforcement investigation or a DOJ criminal investigation without formal action by a court or agency.[42] Accordingly, our view is that it is reasonable to treat the monetary components of the agreements that would be covered by the proposed rule as "monetary sanctions" that are "imposed" within the meaning of Section 21F. Proposed Rule 21F-4(d)(3) thus would clarify that any money required to be paid under a DPA or NPA will be deemed a monetary sanction.[43]

[39] Our view on this issue would not be impacted by the revisions that we are proposing in the next section to the definition of "monetary sanctions."

[40] 15 U.S.C. 78u-6(b)(1).

[41] *Id.* (a)(4); 17 CFR 240.21F-4(e).

[42] We believe that the agreements covered by this proposed rule impose monetary sanctions for purposes of Section 21F of the Exchange Act because they effectively compel or require monetary payments. For example, when the Commission has utilized certain agreements entered outside of judicial or administrative proceedings, the Commission has reserved the authority under the agreement to pursue an enforcement action if the individual or company fails to pay the monetary obligations. *Enforcement Manual* 6.2.2 (Nov. 28, 2017), *available at* https://www.sec.gov/divisions/enforce/enforcementmanual.pdf. When the Commission has utilized certain other settlement forms entered outside of judicial or administrative proceedings, the staff has to date retained its ability to recommend an enforcement action to the Commission against the individual or company. *Id.* at 6.2.3. DOJ DPAs and NPAs have similar mechanisms available to effectively require an individual or company to comply with the monetary obligations specified therein or face prosecution for the violations that are the subject of the agreement. *See* U.S. Gov't Accountability Off., GAO-10-110, *DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness* at 11 (2009) ("As part of DPAs and NPAs, companies are generally *required* to comply with a set of terms for a specified duration in exchange for prosecutors deferring the decision to prosecute or deciding not to prosecute," including "monetary payments – such as restitution to victims of crime, forfeiture of the proceeds of the crime, and monetary penalties *imposed* by DOJ ….") (emphasis added).

[43] We believe the statute and our current rules already authorize payment of a related action award in connection

Finally, we are proposing conforming amendments to Rule 21F-11(b)[44] to make clear that the time period for filing a claim for an agreement covered by this proposed rule would run from earliest public availability of the instrument reflecting the arrangement if evidenced by a press release or similar dated publication notice, or, absent such publication notice, the date of the last signature necessary for the agreement.[45]

Request for Comment:

1. Should DPAs and NPAs entered by DOJ or a state attorney general in a criminal case be treated as administrative actions, and the monetary payments obtained through these DPAs and NPAs treated as monetary sanctions, for purposes of making whistleblower awards? Should the same result follow for settlement agreements entered by the Commission to resolve securities law violations? Why or why not?

2. Are there other types of arrangements (*e.g.*, the use of declination letters in cases where the subject company pays all disgorgement, forfeiture amounts and/or restitution resulting from the misconduct at issue[46]) that should be included in any rule the Commission adopts? How would any such arrangements satisfy the statutory requirements that they constitute a "judicial or administrative action brought by" the Commission or a related-action authority and that they

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with a settlement reached pursuant to the Financial Industry Regulatory Authority's Acceptance, Waiver, and Consent ("AWC") process. An AWC is a form of FINRA disciplinary proceeding in which sanctions, including fines can be imposed on a member firm or associated person. *See* FINRA Rule 9216, *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3926.

[44] 17 CFR 240.21F-11(b).

[45] In a rare case where a claimant could demonstrate that compliance with this proposed rule was impracticable because an agreement covered by it was not made available to the public before the passage of the claim deadline calculated under the rule, the Commission could consider exercising its authority to waive compliance with the rule. *See* Section 36(a) of the Exchange Act, 15 U.S.C. 78mm(a), and Exchange Act Rule 21F-8(a), 17 CFR 240.21F-8(a).

[46] *See United States Attorneys' Manual* 9-47.120 *available at* https://www.justice.gov/usam/usam-9-47000-foreign-corrupt-practices-act-1977#9-47.120.

include "monetary sanctions" (*i.e.*, "monies…ordered to be paid") that are "imposed" in the action?[47]

3. Are there specific standards that we should apply in determining whether other vehicles for resolving investigations should be deemed to be administrative actions upon which whistleblower awards can be based? Is it sufficient that a resolution results in a monetary payment?

4. As discussed above, we are proposing conforming amendments to Rule 21F-11(b)[48] to make clear that the time period for filing a claim for an agreement covered by this proposed rule would run from earliest public availability of the instrument reflecting the arrangement if evidenced by a press release or similar dated publication notice, or, absent such publication notice, the date of the last signature necessary for the agreement. Please comment on whether this conforming edit fully covers all potential agreements covered by proposed Rule 21F-4(d)(3). If there are other types of arrangements that should be included, would any additional changes to this rule be necessary or appropriate?

B. Proposed Amendment to Exchange Act Rule 21F-4(e)[49] defining "monetary sanctions"[50]

We propose to amend the definition of "monetary sanctions" to provide additional clarity concerning the class of payments that fall within the term's scope. The proposed definition,

[47] *See* 15 U.S.C. 78u-6(a)(1), (4) and (5) and (b)(1)(A)-(B).

[48] 17 CFR 240.21F-11(b).

[49] 17 CFR 240.21F-4(e).

[50] The Commission anticipates that this proposed rule change, if adopted, would be utilized by the Commission after the effective date of the final rules in determining whether an action qualifies as a "covered action" and in calculating any outstanding payments to be made to meritorious whistleblowers.

which is based on the Commission's experiences to date in administering the program, codifies the understanding of the term "monetary sanctions" that is already employed by the agency.

Under Section 21F, the determination of what qualifies as a monetary sanction is important for two reasons. *First*, a Commission action qualifies as a "covered action" for which a whistleblower award might be made only if the action "results in monetary sanctions exceeding $1,000,000."[51] Whether a payment obligation is a "monetary sanction" is thus a threshold question for the Commission in determining whether to post a Notice of Covered Action.[52] *Second*, to the extent that one or more whistleblowers receives an award, award payments are calculated based upon the amount that "has been collected of the monetary sanctions imposed in the action or related actions."[53]

Section 21F(a)(4) of the Exchange Act defines the term "monetary sanctions," when used with respect to any judicial or administrative action, to mean: (A) any monies, including penalties, disgorgement, and interest, ordered to be paid; and (B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.[54]

Exchange Act Rule 21F-4(e) is substantively identical. Based on our experience to date in administering the program, we believe that it would be beneficial to provide additional clarity

[51] 15 U.S.C. 78u-6(a)(1).

[52] *See* Exchange Act Rule 21F-10(a), 17 CFR 240.21F-10(a).

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

[54] 15 U.S.C. 78u-6(a)(4).

regarding the scope of the potential payments that are encompassed within subparagraph (A) of the statutory definition.[55]

The language used in subparagraph (A) of Section 21F(a)(4), when read in isolation, could potentially be understood to direct that the Commission treat any order to pay money that is entered in a judicial or administrative action as a monetary sanction for purposes of the whistleblower award program. Interpreted in this way, monetary sanctions would include, for example, orders to pay discovery sanctions, receivership fees and costs, taxes, and even attorney's fees imposed under the Equal Access to Justice Act ("EAJA").[56]

We believe, however, that other portions of Section 21F counsel in favor of a narrower understanding of which money "ordered to be paid" in an action should be treated as monetary sanctions for purposes of the whistleblower program. We find particularly relevant the definition of a "covered action" in Section 21F(a)(1),[57] which provides that the Commission action must "*result[] in* monetary sanctions exceeding $1,000,000" in order for a whistleblower award to be considered. We believe that the phrase "results in" suggests that Congress was addressing those monetary obligations that the action secures "as relief" for the violations that are the subject of the Commission's enforcement action.[58] Similarly, we believe that the phrase "monetary sanctions imposed in the action" in Section 21F(b)(1)[59] indicates that the congressional focus

[55] We are not proposing to provide any additional clarification regarding subparagraph (B) as we believe that it does not create uncertainty as to the scope of the money that it covers.

[56] *See* 5 U.S.C. 504; 28 U.S.C. 2412.

[57] 15 U.S.C. 78u-6(a)(1).

[58] *See generally* BLACK'S LAW DICTIONARY 1541 (10th ed. 2014) (defining a "sanction" as "[a] penalty or coercive measure that *results from* a failure to comply with a law, rule, or order") (emphasis added).

[59] 15 U.S.C. 78u-6(b)(1)(A) and (B).

was on monetary obligations that are in the nature of relief for the violations. So, for example, while in normal parlance a person might say that civil penalties were "imposed" as a result of a securities-law violation, we do not believe that one would say that a court order approving a court-appointed receiver's request for fees or costs "impos[ed]" a monetary sanction.

Finally, we find support for our proposed approach in the purpose of Section 21F to reward whistleblowers for their contributions to the "successful enforcement" of Commission actions and related actions,[60] and in the common-sense understanding that relief against wrongdoers is perhaps the essential measure of an action's success. Given this context, we believe that the term "monetary sanctions" is better understood to mean those requirements to pay money that the Commission or a related-action authority obtain "as relief" in the underlying action.

Based on the language within Section 21F, therefore, we believe that the language in subparagraph (A) of the statutory definition is better understood to encompass only those required payments in a Commission action or related action that are designed as relief for the violations successfully resolved in the action. Accordingly, we propose to amend Exchange Act Rule 21F-4(e) to provide that the term "monetary sanctions" means: (1) a required payment that results from a Commission action or related action and which is either (i) expressly designated as disgorgement, a penalty, or interest thereon, or (ii) otherwise required as relief for the violations that are the subject of the covered action or related action; or (2) any money deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.[61]

[60] *See* 15 U.S.C. 78u-6(b)(1).

[61] Our use of the phrase "required payment" rather than "ordered" is intended to be consistent with proposed Rule

We believe that paragraph (e)(1)(i) of the proposed definition should generally be straightforward to apply. This part of the rule encompasses any payment requirement that is expressly designated as disgorgement, a penalty, or interest thereon. That money paid by a wrongdoer in satisfaction of a disgorgement or penalty obligation may thereafter be used to pay costs of a receiver, trustee, or fund administrator would not change the analysis under this part of the proposed rule. Because the wrongdoer was ordered to pay such money pursuant to a disgorgement or penalty obligation, paragraph (e)(1)(i) would be satisfied.

With respect to paragraph (e)(1)(ii), only requirements to pay money as relief for the underlying violations would qualify. Thus, for example, if a court orders an asset freeze and appoints a receiver in a Commission enforcement action, and, without separately entering a disgorgement order, the court subsequently issues an order approving the receiver's plan to distribute money to injured investors, we would treat that second order as a monetary sanction under paragraph (e)(1)(ii) of the proposed rule.[62] However, if the receiver requests approval to use frozen funds to pay creditors, taxes to a governmental authority, attorney's fees, or other costs of the receivership, such payments would not qualify "as relief" obtained because of the

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21F-4(d)(3), and recognizes that whistleblower tips may be important to successful enforcement actions that the agreements described in that proposed rule in which the Commission, DOJ, or a state attorney general in a criminal case require substantial monetary relief that is not, however, contained in a Commission order a court order, or an order issued by an administrative-law judge. *See* discussion of proposed Rule 21F-4(d)(3), *supra*. In our view, a payment that is required as part of such a resolution is reasonably treated as "ordered" when the agency has some mechanism to compel the payment either directly or indirectly. This could include, but does not necessarily require, the ability to obtain a court order requiring the payment. In the context of the agreements described in proposed Rule 21F-4(d)(3), the mechanism to compel the payment could include the ability either to revive an action or to bring an action if the signatory does not make the payments provided for in the agreement.

[62] Where a receiver is appointed to gather assets for potential distribution to harmed investors, an award payment to a meritorious whistleblower would not need to await actual distribution of the receivership assets to the harmed investors. In our view, the statutory requirements that the monetary sanctions be both "ordered" and "collected" before a payment to a whistleblower can be made would typically be satisfied at the time a court approves the distribution to the harmed investors of assets within the receiver's control. *See* Exchange Act section 21F(a)(4) ("ordered") & 21F(b)(1) ("collected"), 15 U.S.C. 78u-6(a)(4), &78u-6(b)(1).

successful enforcement action and would not constitute monetary sanctions under paragraph (e)(1)(ii).

In proposing the amended rule language, we have also considered the legislative purpose underlying whistleblower award provisions generally. In our view, these types of award programs are intended to allow a whistleblower to receive a percentage of the monetary relief that the government is able to obtain as remedies for the violations that are the subject of the action to which the whistleblower's information led. The approach outlined above would comport with this understanding of how whistleblower award programs generally operate.[63] We have also considered the fact that a broader approach could lead to potentially irrational results such as the Commission paying whistleblowers a share of any discovery sanctions or EAJA fees imposed on the government, even though such monetary sanctions would have no connection to the information the whistleblower provided that led to the enforcement action and that contributed to the success of that action.

Request for Comment:

5. Should "monetary sanctions" be defined as those obligations to pay money that are obtained "as relief" for the violations that are charged in a Commission enforcement action or a related action? Why or why not?

6. Are there additional classes of monetary requirements or payment obligations (beyond those discussed above) that may be ordered in an action covered by the Commission's whistleblower award program that the Commission should specifically consider or address in clarifying the definition of "monetary sanctions"?

[63] *Cf.* S. REP. 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 and recover money for victims of financial fraud.").

C. Proposed Amendment to Exchange Act Rule 21F-3(b)(1)[64] defining "related action" [65]

Under Exchange Act Section 21F(b)[66] and Rule 21F-11,[67] any whistleblower who obtains an award based on a Commission enforcement action may be eligible for an award based on monetary sanctions that are collected in a related action. Exchange Act Section 21F(a)(5)[68] and Rule 21F-3(b)(1)[69] provide that a related action is a judicial or administrative action that is both: (i) brought by DOJ, an appropriate regulatory authority (as defined in Rule 21F-4(g)),[70] a self-regulatory organization (as defined in Rule 21F-4(h)[71]), or a state attorney general in a criminal case; and (ii) based on the same original information that the whistleblower voluntarily provided to the Commission and that led to the successful enforcement of the Commission action.

The proposed amendment adding paragraph (b)(4) to Rule 21F-3 would apply in situations where both the Commission's whistleblower program and a second, separate whistleblower award scheme have potential application to the same action. During the implementation and administration of our whistleblower program, it has become increasingly apparent to us that additional, separate whistleblower award schemes might apply to an action that could otherwise qualify as a related action. In this regard we note that, since the adoption of

[64] 17 CFR 240.21F-3(b)(1).

[65] The Commission anticipates this proposed rule change, if adopted, would apply only to covered-action and related action award applications that are connected to a Notice of Covered Action (*see* Exchange Act Rule 21F-10(a), 17 CFR 240.21F-10(a)) posted on or after effective date of the final rules.

[66] 15 U.S.C. 78u-6(b).

[67] 17 CFR 240.21F-11.

[68] 15 U.S.C. 78u-6(a)(5).

[69]17 CFR 240.21F-3(b)(1).

[70] 17 CFR 240.21F-4(g).

[71] 17 CFR 240.21F-4(h).

our whistleblower program rules, two states have adopted their own whistleblower award programs in connection with state securities-law enforcement actions.[72] We are also aware that DOJ might pursue law-enforcement actions that potentially implicate both the Commission's whistleblower program and the whistleblower award program that the Internal Revenue Service ("IRS") administers.[73] Further, Congress in 2015 established a new motor-vehicle-safety whistleblower award program that allows employees or contractors of a motor-vehicle manufacturer, parts supplier, or dealership who report serious violations of federal vehicle-safety laws to obtain an award of 10 percent to 30 percent of any monetary sanction over $1 million that the Federal Government recovers based on that information.[74] To date, the Commission has never paid an award on a matter where a second whistleblower program also potentially applied to the same matter, nor has the Commission ever indicated that it would do so.

Proposed paragraph (b)(4) would expressly authorize two mechanisms for the Commission to use in situations where at least one other award scheme might also apply. *First*, the first sentence of proposed paragraph (b)(4) would provide that, notwithstanding the definition of related action in Rule 21F-3(b)(1), if a judicial or administrative action is subject to a separate monetary award program established by the Federal Government, a state government, or a self-regulatory organization, the Commission will deem the action a related action only if the Commission finds (based on the unique facts and circumstances of the action) that its

[72] In 2011, Utah established a whistleblower-award scheme to provide rewards of up to 30 percent of the money collected in state securities-law enforcement actions. Utah Code Annotated 61-1-101 *et seq*. The following year, Indiana enacted a whistleblower award scheme to provide rewards up to 10 percent of the monies collected in a state securities-law enforcement action. Indiana Code 23-19-7-1 *et seq*.

[73] 26 U.S.C. 7623.

[74] 49 U.S.C. 30172 (enacted by Section 24352 of the Fixing America's Surface Transportation Act of 2015 (FAST Act), Pub. L. 114-94).

whistleblower program has the more direct or relevant connection to the action.[75] In analyzing this question, the Commission will consider whether Congress (or a state) has enacted a specific whistleblower program that appears to apply directly to the case at hand; if so, we will generally determine that Congress reasonably would not have intended our more general, secondary "related action" award mechanism to sweep in the case. In reaching this determinination, we would look to the complaint in the action, the overall monetary sanctions recovered (*e.g.*, are they principally tied to a different whistleblower program for which Congress provided an award mechanism), and the court's final order to assess which award program has the closer relationship to the overall case. We might also consult the agency involved with that other case to obtain its overall assessment of whether the action is in fact one that is primarily tied to violations for which Congress (or the states) have established a more specifically applicable whistleblower program and for which our general, "related action" award mechanism should not apply. Critically, this standard would not yield a clear brightline but would turn on the particular facts and circumstances of the case at hand and the Commission would explain the grounds for its conclusion in any final order.

Second, the second sentence of proposed paragraph (b)(4) provides that even if the Commission determines to deem the action a related action, the Commission will not make an award to you for the related action if you have already been granted an award by the authority responsible for administering the other whistleblower award program; further, if you were denied an award by the other award program, you will not be permitted to readjudicate any issues before

[75] Notably, the Utah whistleblower-award program (*see* note 72, *supra*) provides that a person may not receive an award thereunder if he or she "qualifies for an award as described in Section 21F of the Securities Exchange Act, 15 U.S.C. Sec. 78u-6, and regulations issued under that section." We assume that this provision is intended to prevent a double recovery on a Utah criminal-enforcement action brought by the State's Attorney General that could potentially be covered by both the Commission's whistleblower program and the Utah program.

the Commission that the authority responsible for administering the other whistleblower award program resolved against you as part of the award denial.[76] The proposed rule provides that, if the Commission makes an award before an award determination is finalized by the authority responsible for administering the other award scheme, the Commission would condition its award on the meritorious whistleblower making a prompt, irrevocable waiver of any claim to an award from the other award scheme.

The proposed rule also provides that, in determining whether a potential related action has a more direct or relevant connection to the Commission's whistleblower program than another award program, the Commission would consider the nature, scope, and impact of the misconduct charged in the purported related action, and its relationship to the federal securities laws. This inquiry would include consideration of, among other things: (i) the relative extent to which the misconduct charged in the potential related action implicates the public policy interests underlying the federal securities laws (*e.g.*, investor protection) versus other law-enforcement or regulatory interests (*e.g.*, tax collection or fraud against the Federal Government); (ii) the degree to which the monetary sanctions imposed in the potential related action are attributable to conduct that also underlies the federal securities law violations that were the subject of the Commission's enforcement action; and (iii) whether the potential related action involves state-law claims and the extent to which the state may have a whistleblower award scheme that potentially applies to that type of law-enforcement action.[77] Thus, for

[76] This sentence of proposed paragraph (b)(4) is modeled after existing Rule 21F-3(b)(3), 17 CFR 240.21F-3(b)(3), which is discussed further below.

[77] To the extent that a state adopts a whistleblower award program relating directly to securities law violations, we would generally anticipate the Commission would find that the state award scheme should apply over the Commission's award program. However, to the extent that the particular state criminal action may implicate an award scheme that is not directed at securities-law violations (such as a state-award scheme focused on consumer protection), the Commission might conclude that our whistleblower program should not apply based on an

example, if an action by DOJ charges a scheme to avoid tax obligations and imposes monetary sanctions, we would expect that such an action would lack a more direct or relevant connection to the Commission's whistleblower program relative to the IRS's award program.[78] As a second example, where a state whistleblower award program is available to award a whistleblower whose tip leads to state criminal charges in connection with a fraudulent securities offering, we anticipate that the Commission would not view such an action as a related action under the test in proposed paragraph (b)(4). In this circumstance, the state program would be the more direct or relevant program and the appropriate avenue for the whistleblower to seek an award.

In proposing paragraph (b)(4), we acknowledge that, on its face, Exchange Act Section 21F does not exclude from the definition of related actions those judicial or administrative actions that have a less direct or relevant connection to our whistleblower program than another whistleblower scheme. We nonetheless perceive ambiguity when considering this language in the context of the overall statutory scheme. We believe that an understanding focused exclusively on the statutory definition of related action would produce a result that Congress neither contemplated nor intended. We believe that our rulemaking authority under the Exchange Act and our authority to define Exchange Act terms permit us to reach this interpretation.[79] We base this determination on several considerations.

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assessment of the particular facts and circumstances of the state action.

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

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

First, when Congress established the Commission's whistleblower program, it set a firm ceiling on the maximum amount that should be awarded for any particular action—"*not more* than 30 percent, in total, of what has been collected of the monetary sanctions imposed" in the action.[80] Indeed, it appears that in establishing federal whistleblower award programs in the modern era Congress has determined that an award of more than thirty percent on any particular action is not necessary or appropriate.[81] Yet if both the Commission's whistleblower program *and* another whistleblower award scheme were to apply to the same action, this would create the potential for a total award exceeding the 30-percent ceiling due to a dual recovery.

Second, the purpose of the related action award component of the Commission's whistleblower program was to allow meritorious whistleblowers the opportunity to obtain additional financial awards for the ancillary recoveries that may result from the same original information that the whistleblowers gave to the Commission. In this way, the potential for a related action recovery can further enhance the incentives for an individual to come forward to the Commission. But neither the text of Section 21F, nor the relevant legislative history[82] suggests that Congress considered the unusual situation in which there may be a separate whistleblower award scheme that has a more direct or relevant connection to the judicial or

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provides us with the "power by rules and regulations to define … terms used in [the Exchange Act]."

[80] 15 U.S.C. 78u-6(b)(1)(B).

[81] *See, e.g.*, 7 U.S.C. 26 (providing under the CFTC's whistleblower program for awards of "not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions"); 26 U.S.C. 7623(b)(1) (providing under the IRS administered whistleblower award program for "an award … not more than 30 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts)"); 31 U.S.C. 3730 (providing in a False Claims Action that a *qui tam* plaintiff shall receive "not more than 30 percent of the proceeds of the action or settlement"). Our preliminary analysis indicates that Congress's determination not to go above a 30-percent ceiling for awards appears to comport with a similar determination by those states that have adopted their own false claims acts and securities-law whistleblower programs.

[82] *See generally* S. REP. NO. 111-176 at 110-12 (2010).

administrative action,[83] and that would therefore be providing a financial incentive to encourage individuals to report misconduct without the need for the incentive effect produced by the related-action component of the Commission's award program.

Third, we believe that permitting potential whistleblowers to recover under both our award program and a separate award scheme for the same action would produce the irrational result of encouraging multiple "bites at the apple" in adjudicating claims for the same action and potentially allowing multiple recoveries.[84] In the adopting release that accompanied the original whistleblower rules, the Commission recognized the irrational result that would flow from allowing a whistleblower to have multiple separate opportunities to adjudicate his or her contributions to a case and to potentially obtain multiple separate rewards on that same enforcement action. Further, the Commission barred this result from occurring in the specific contexts that the Commission considered at the time it adopted the whistleblower program rules. Specifically, the Commission adopted Rule 21F-3(b)(3), which provides that the Commission will not pay on a related action if the whistleblower program administered by the Commodity Futures Trading Commission ("CFTC") has issued an award for the same action, nor will the Commission allow a whistleblower to readjudicate any issues decided against the whistleblower as part of the CFTC's award denial. In adopting that rule, the Commission made clear its view

[83] *See generally Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."); ANTHONY SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) at 183 (noting that a specifically applicable statutory provision should govern a more general provision because "the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence"); *id.* at 184 (explaining that "the general/specific canon [of statutory construction] does not meant that the existence of a contradictory specific provision voids the general provision[,]" but rather that "its application to cases covered by the specific provision is suspended").

[84] *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) ("If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity."); *see also United States v. X–Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994) (rejecting the "most natural grammatical reading" of a statute to avoid "absurd" results).

that a whistleblower should neither have two recoveries on the same action nor multiple bites at the adjudicatory apple.[85] Relatedly, the Commission explained in the adopting release that it would for similar reasons not make an award to a whistleblower who was also a *qui tam* plaintiff under the False Claims Act.[86] Although at the time of the original rulemaking for the whistleblower program the Commission did not expressly consider the potential for multiple separate awards due to the existence of any other award schemes (such as the whistleblower program administered by the IRS), the principles underlying Rule 21F-3(b)(3) appear similarly relevant to that circumstance.

To illustrate the significance of our existing rule and the rule that we are proposing, consider a future DOJ enforcement action involving predominately tax claims that results from the same original information that a Commission whistleblower shared with both the Commission and the CFTC. In this scenario, it is entirely possible based purely on the words of the relevant statutes that the SEC and the CFTC could *each* have to pay up to 30 percent on the DOJ action, and that the IRS could have to pay an additional 30 percent; the Commission whistleblower could thus take home an amount that is equal to as much as 90 percent of the money collected for the violations in the DOJ action. In our view, this is an "obviously *unintended*" outcome that would "make[] no substantive sense,"[87] and the rule that we already have in place and the rule that we are proposing would prevent it and similar duplicative payments from multiple whistleblower programs.

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[85] 76 FR 34300, 34305/3.

[86] *Id.* n.52 ("[W]e 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.").

[87] SCALIA & GARNER, *supra* note 33, at 235, 239 (emphasis in original).

In addition to the foregoing, we are also proposing two amendments to the definition of "related action" in Rule 21F-3(b)(1). *First*, the proposed amendment would add clarity to the existing requirement that, to potentially obtain an award for a related action, a whistleblower must have provided to the other entity (or the Commission must have shared with the other entity) the same original information that the whistleblower provided to the Commission and that led to the successful enforcement of the Commission action.[88] We think that where the Commission staff determines to share the whistleblower's information with the other entity, it is consistent with the purposes of the program to allow an award even if the whistleblower did not directly step forward to that agency.[89]

This new language to the definition of "related action" merely clarifies what is already required by Exchange Act Rule 21F-11(c),[90] which provides in relevant part that a whistleblower must "demonstrate [that the whistleblower] 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[.]" Further, we believe that this interpretation is consistent with the requirement in Section 21F(a)(5) of the Exchange Act[91] that a related action must be "based upon the original information provided by a whistleblower." To be "based upon" the whistleblower's original information, in our view, the same information that the whistleblower provided to the Commission must have been provided to the other authority and that information must have itself directly contributed to the other

[88] *See* Rules 21F-3(b)(2), 17 CFR 240.21F-3(b)(2), and 21F-4(c)(1)-(3), 17 CFR 240.21F-4(c)(1)-(3).

[89] Section 21F provides express authority for the Commission to share information that may identify a whistleblower with other authorities that may, in turn, bring related actions. *See* 15 U.S.C. 78u-6(a)(5) and (h)(2)(D)(i).

[90] 17 CFR 240.21F-11(c).

[91] 15 U.S.C. 78u-6(a)(5).

authority's investigative or litigation efforts leading to the success of that authority's enforcement action. In practice, this can occur either because the whistleblower provided the original information to the other authority, or because the Commission through its information sharing mechanisms provided the original information to the other authority, and in either case the authority utilized that information directly in its own investigation and/or its resulting enforcement action.

We note that, under our existing interpretation of the "based upon" language in Section 21F(a)(5) and the clarifying rule that we are proposing, the other authority's enforcement action would not be a related action in circumstances where the other authority's enforcement action was in some manner "based upon" the results or findings of the Commission's enforcement action without the other authority ever actually receiving and utilizing the whistleblower's original information. Rather, in this situation the whistleblower's original information could, at best, be described as a derivative factor potentially contributing to the success of the other authority's action, and we deem this too attenuated a causal connection to meet the "based upon" standard, which in our view requires actual reliance on the whistleblower's original information by the other entity.[92] Indeed, in these circumstances any claim for an award would fail under Rule 21F-3(b)(2), which unambiguously requires that the success of a related action be based upon "the same original information that the whistleblower gave to the Commission" as a predicate to the Commission authorizing a related action award.[93]

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[92] The "based upon" language in Exchange Act section 21F(a)(5), 15 U.S.C. 78u-6(a)(5) is separate and distinct from the requirement that the whistleblower's original information must have "led to" the success of the other entity's action, *see* Exchange Act section 21F(b)(1), 15 U.S.C. 78u-6(b)(1); *see also* Exchange Act Rule 21F-4(c), 17 CFR 240.21F-4(c). Even if a whistleblower satisfies the "based upon" standard because his information was directly provided to the other entity by the whistleblower or the Commission, and used in some fashion by that entity, this does not mean the whistleblower's information necessarily "led to" the success of that action.

[93] 17 CFR 240.21F-3(b)(2). Rule 21F-3(b)(2) contemplates that "the Commission may seek confirmation of the

Second, we are making a technical modification to the definition of "related action" in Rule 21F-3(b)(1) that would make clear that the existing clause "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," applies to all related actions and not just criminal actions brought by a state attorney general. This technical modification would conform the definition in the rule to the substantive requirements of the statutory definition as set forth in Section 21F(a)(6) of the Exchange Act.[94]

Request for Comment:

7. Is the proposed "direct or relevant" standard appropriate for assessing whether an action should qualify as a related action? Are there alternative formulations that should be adopted instead?

8. Instead of adopting the proposed rule, which would authorize the Commission on a case-by-case basis to consider whether an action should qualify as a related action, should the Commission adopt a categorical exclusion from the definition of related action for any judicial or administrative action that may have an alternative applicable award scheme?

9. As part of this rulemaking, we are considering whether to repeal Exchange Act Rule 21F-3(b)(3), 17 CFR 240.21F-3(b)(3),[95] so that proposed Rule 21F-3(b)(4) would also apply to

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relevant facts regarding the whistleblower's assistance from the authority that brought the related action," and we will deny a related action award where sufficient and reliable information cannot be obtained from the other authority. 76 FR 34300, 34305/1. These requirements would be rendered null if the "based upon" requirement could be satisfied without the other authority actually receiving and utilizing the whistleblower's original information.

[94] 15 U.S.C. 78u-6(a)(6).

[95] Exchange Act Rule 21F-3(b)(3) provides that the Commission will not make an award to an individual for a related action if the individual has already been granted an award by the CFTC for the same action pursuant to its whistleblower program under Section 23 of the Commodity Exchange Act (7 U.S.C. 26). Similarly, if the CFTC has previously denied an award to an individual in a related action, the individual will be precluded from relitigating any issues before the Commission that the CFTC resolved against the individual as part of an award.

potential related actions that might produce a double recovery with the CFTC's whistleblower program. Existing Rule 21F-3(b)(3) applies somewhat differently than our proposed Rule 21F-3(b)(4), as it does not provide the Commission express authority to determine whether a potential related action is more closely connected with the SEC's whistleblower program or the CFTC's whistleblower program. Should we repeal existing Exchange Act Rule 21F-3(b)(3) so that proposed Rule 21F-3(b)(4) would apply instead to afford a uniform treatment for all potential related actions for which multiple whistleblower programs might apply? Please explain.

D. Proposed Amendment to Exchange Act Rule 21F-6 regarding awards to a single whistleblower below $2 million or in cases yielding at least $100 million in collected monetary sanctions[96] and guidance on the meaning of "unreasonable delay" under Rule 21F-6.

Rule 21F-6[97] establishes the analytical framework that the Commission follows both in setting the appropriate percentage amount of an award in connection with a particular Commission or related action and in determining an individual percentage award for each whistleblower where the Commission makes awards to more than one whistleblower in connection with the same action. In the adopting release accompanying the promulgation of the

[96] The Commission anticipates this proposed rule change, if adopted, would apply only to covered-action and related-action award applications that are connected to a Notice of Covered Action (*see* Exchange Act Rule 21F-10(a), 17 CFR 240.21F-10(a)) posted on or after effective date of the final rules.

[97] 17 CFR 240.21F-6.

whistleblower program rules, the Commission explained that Rule 21F-6 "provides general principles without mandating a particular result" and "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 rule.[98]

Rule 21F-6 identifies four criteria that may increase an award percentage and three criteria that may decrease a whistleblower's award percentage. As provided in Rule 21F-6(a), the criteria that may increase an award percentage are: (1) significance of the information provided by the whistleblower; (2) assistance provided by the whistleblower; (3) law-enforcement interest in making a whistleblower award; and (4) participation by the whistleblower in internal compliance systems. As provided in Rule 21F-6(b), the criteria that may decrease an award percentage are: (1) culpability of the whistleblower; (2) unreasonable reporting delay by the whistleblower; and (3) interference with internal compliance and reporting systems by the whistleblower.

Proposed paragraph (c) would add to Rule 21F-6's existing analytical framework by providing a mechanism for the Commission to adjust upwards any awards that would potentially be below $2 million to a single whistleblower. Specifically, proposed Rule 21F-6(c) would provide that, if the resulting award after applying the award factors specified in paragraphs (a) and (b) would yield a potential payout to a single whistleblower below $2 million (or any such greater amount that the Commission may periodically establish through publication of an order in the Federal Register), the Commission may adjust the award upward so that the likely total award payout to the whistleblower reflects a dollar amount that the Commission determines is appropriate to achieve the program's objectives of rewarding meritorious whistleblowers and

[98] 76 FR 34300, 34331/2.

sufficiently incentivizing future whistleblowers who might otherwise be concerned about the low dollar amount of a potential award; provided that in no event shall this provision be utilized to raise a potential award payout (as assessed by the Commission at the time it makes the award determination) above $2 million (or by such other amount as the Commission may designate by order) or will the total amount awarded to all whistleblowers in the aggregate be greater than 30 percent.

We believe that proposed paragraph (c) could provide an important new tool for the Commission to ensure that even in cases where the collected monetary sanctions may be relatively small (and award amounts correspondingly modest), whistleblowers could receive an appropriate award for their efforts in coming forward to the Commission. We also anticipate that, where the proposed rule is triggered, there would be a presumption in favor of some award enhancement, though the precise amount of the enhancement may vary from case to case depending on the unique facts and circumstances at issue. In this way, we believe proposed paragraph (c) could provide an important additional incentive for potential whistleblowers to come forward.[99]

[99] We believe that proposed paragraph (c) would in many respects work similar to proposed paragraph (d), as discussed further below; this would include, for example, how we would determine whether the $2 million threshold is met in cases involving joint whistleblowers. To the extent that either proposed paragraph (c) or proposed paragraph (d) is triggered by a potential award, it would open up discretion for the Commission to assess the award factors in Exchange Act Rules 21F-6(a)-(b), 17 CFR 240.21F-6(a)-(b), in terms of dollar amounts, not merely in terms of award percentages. This would give the Commission, for example, the authority to boost a 20 percent award upwards based on a reassessment of the positive factors relative to the actual dollar amounts at issue in the particular award. Thus, even if the whistleblower might otherwise receive a 20 percent award on a small case (for example, one with collections of $100,000), the Commission could reassess the whistleblower's contributions in dollar terms and determine to enhance the award upwards (potentially up to the 30 percent maximum, which in the particular example would yield a payout of $30,000). The Commission could do so if it determines that this enhancement in dollar terms would better acknowledge the whistleblower's contribution and better help incentivize similarly situated future whistleblowers. Further, in assessing whether the $2 million threshold has been, or likely will be satisfied, the Commission will consider collectively the total award amounts from all the Commission and related actions that were the result of the whistleblower's original information.

We note that the new authority proposed in paragraph (c) would come with important limitations. Specifically, the Commission will not adjust an award upward under the proposed provision if any of the negative award factors that are identified in Exchange Act Rule 21F-6(b)[100]—and which are specified above—were found to be present with respect to the whistleblower's award claim, or if the award claim triggers Exchange Act Rule 21F-16 (concerning awards to whistleblowers who engage in culpable conduct).[101] Thus, for example, if a whistleblower whose award claim might otherwise be eligible for an enhancement under this provision were found by the Commission to have unreasonably delayed reporting to the Commission under Exchange Act Rule 21F-6(b)(2), then the Commission could not increase his or her award under this provision.

In addition, we are proposing a new paragraph (d) that would add to Rule 21F-6's existing analytical framework by providing a mechanism for the Commission to conduct an enhanced review of awards in situations where a whistleblower has provided information that led to the success of one or more covered or related actions that, collectively, result in at least $100 million in collected monetary sanctions. As we explain below, under proposed paragraph (d), the Commission, first, would consider the dollar amount of an award at given percentage levels in determining whether and how to adjust the award based on the positive and negative factors in paragraphs (a) and (b) of this section; and second, the Commission could determine that an exceedingly large potential payout resulting from the assessment under paragraphs (a) and (b) was not reasonably necessary to fulfill the purposes of the program and thus exercise its discretion to reduce the award to an appropriate amount. The Commission's ability to reduce an

[100] 17 CFR 240.21F-6(d).

[101] 17 CFR 240.21F-16.

award under this provision would be subject to two significant limitations. *First*, in no event could the Commission reduce the total payout for any award(s) resulting from the whistleblower's original information below $30 million. *Second*, the Commission could not reduce the award for any specific action such that the total amount paid to all whistleblowers for that action would go below the 10 percent minimum statutory floor of collected monetary sanctions in that action.[102]

An important principle underlying proposed paragraph (d) is that, as the dollar value of an award amount grows exceedingly large, there is a significant potential for a diminishing marginal benefit to the program in terms of compensating the whistleblower and incentivizing future whistleblowers. In these situations, we believe that it is in the public interest that we scrutinize the dollar impact of these awards more carefully in considering award enhancements and reductions under the existing award criteria of paragraphs (a) and (b) of this section and, further, where appropriate, adjust an award downward so that the dollar amount of the payout is more in line with the program's goals of rewarding whistleblowers and incentivizing future whistleblowers from a cost-benefit perspective (again, subject to the $30 million floor for any whistleblower subject to a reduction under this provision and the 10 percent statutory minimum referenced above).

As an illustration of a potential situation to which proposed paragraph (d) might be utilized, consider the settlements that the Commission and DOJ entered with Siemens AG in 2008. The total monetary sanctions collected in these two actions was $800 million (the

[102] For example, if the collected amount is $150 million, the Commission could exercise its discretion to reduce a potential payout of 25% ($37.5 million), but the Commission could not reduce the award below $30 million. In another example, if the collected amount is $400 million, the Commission could exercise its discretion to reduce a potential payout of 25% ($100 million), but the Commission could not reduce the award below 10% ($40 million). Finally, if the collected amount is $150 million and the potential payout is 18% ($27 million), then the Commission could not reduce that award because it already is below the $30 million floor.

Commission received $350 million in disgorgement of profits[103] and DOJ received $450 million in criminal penalties[104]). Suppose that these two actions occurred today and that these actions were based on original information voluntarily provided to the Commission by an eligible whistleblower. In such a situation, the Commission would be required to pay an award to that whistleblower of between $80 million (a 10 percent award) and $240 million (a 30 percent award) for the two actions. Critically, under the existing framework of Rule 21F-6—without proposed paragraph (d)—the Commission in setting the appropriate amount of an award would be unable to consider the extraordinarily large dollar amounts that would be associated with any assessments and adjustments made when applying the existing award factors of Rule 21F-6; the Commission would also lack the authority to adjust the award amount downward if it found that amount unnecessarily large for purposes of achieving the whistleblower program's goals. So if the hypothetical meritorious whistleblower were an individual who did everything right in connection with his or her whistleblowing (that is, he or she were the model whistleblower), the Commission would almost certainly be obligated to pay this individual an award at or near the maximum $240 million level under the existing rules. What paragraph (d) would do, as we explain below, is to afford the Commission the discretion to determine whether such an extraordinarily large payout is actually necessary to further the whistleblower program's goals of rewarding whistleblowers and incentivizing future whistleblowers, and if not, proposed paragraph (d) would afford the Commission the ability to adjust the actual payout to an award amount that is closer to the $80 million minimum that would be required to be paid pursuant to

[103] *See* SEC Litigation Release No. 20829 (dated Dec. 15, 2008) (discussing the settlement reached *SEC v. Siemens Aktiengellschaft*, Civ. Action No. 08-CV-02167 (D.D.C.)).

[104] *See* DOJ Press Release entitled "Siemens AG and Three Subsidiaries Plead Guilty to FCPA Violations and Agree to Pay $450 Million in Combined Criminal Fines"(dated Dec. 15, 2008) (available at: www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html).

Section 21F(b). We believe that adopting paragraph (d) to afford us a discretionary mechanism to make such common-sense adjustments to extraordinarily large awards to ensure that they do not exceed an amount that is appropriate to achieve the goals and interests of the program is, to put it simply, good public policy.

Turning to the text of proposed paragraph (d), this new provision would do two important things that should help us ensure that any large awards are in fact aligned with the program's goals and not unnecessarily large to achieve the program's goals. *First*, proposed paragraph (d)(1) would permit the Commission to consider the potential dollar amount of the payout to a whistleblower resulting from his or her original information (in any Commission actions or related actions, collectively) when applying each of the existing award criteria; when the potential amount of an award payout could be in the range of 10 to 30 percent of at least $100 million, we believe it is reasonable and appropriate to consider the adjustments that we make for each award factor in dollar terms rather than to apply exclusively a percentage assessment that does not take into account what those percentage adjustments would translate to in actual dollars paid to the whistleblower.[105] This would allow us to consider the relative (or marginal) value of the actual dollar amounts associated with any enhancements that we are considering under the positive award factors. We think that this is particularly important where the percentage enhancements are corresponding with particularly large dollar enhancements because, to the extent that individuals are motivated to come forward based on a potential award, it is the total

[105] The statutory framework that Section 21F establishes appears to permit—and at a minimum does not expressly prohibit—the Commission from considering the dollar amount of a potential award. Indeed, the language in Section 21F refers to the "amount of the award," which appears to afford the Commission discretion to set the awards based on a consideration of the appropriate dollar amount that should be paid (provided that this dollar amount is between 10 percent and 30 percent of the collected monetary sanctions). Notwithstanding the statutory language, the Commission's existing rules do not expressly authorize the Commission to consider the dollar amount of a potential award when setting the award percentage. Proposed paragraph (d) would make it clear that the Commission may consider the dollar amount of a potential award when setting the award percentage where at least $100 million in monetary sanctions has been collected.

dollar payout that would be relevant to them. Allowing us to assess each enhancement or reduction in dollar terms should permit us to more realistically and concretely assess the appropriate amount that is reasonably necessary to recognize a whistleblower's contributions in cases involving large potential awards.

Second, proposed paragraph (d)(2) would permit the Commission to adjust the award downward if, after consideration of the existing award factors in paragraphs (a) and (b) of this section, the Commission finds that the potential award amount (from any Commission actions and related actions, collectively) exceeds what is reasonably necessary to reward the whistleblower and to incentivize similarly situated whistleblowers.[106] Importantly, proposed paragraph (d)(2) would *not* mandate that the Commission make a downward adjustment. Further, proposed paragraph (d)(2) would make clear that any adjustment to a whistleblower's award under that paragraph shall not yield a potential award payout (as assessed by the Commission at the time that it makes the award determination) below $30 million, nor may any downward adjustment result in the total amount awarded to all the meritorious whistleblowers, collectively, for each covered or related action constituting less than 10 percent of the monetary sanctions collected in that action.

Critically, the $30 million reference in proposed rule (d)(2) would *not* be a ceiling on awards, and we do not intend that it would be applied as such. Rather, $30 million for a potential payout is the floor below which we would not lower any award that is subject to a reduction under the proposed rule. Further, the proposed amendment would be triggered *only* in situations where a whistleblower (including two or more individuals who acted together as a joint

[106] Notably, this authority to make a downward adjustment would be available only if the resulting payout after applying the existing award factors would be at least $30 million (or such greater alternative amount that the Commission may periodically establish through publication of an order in the *Federal Register*).

whistleblower) provides information that leads to the success of one or more covered actions and related actions that results in at least $100 million in collected monetary sanctions.[107] In the nearly seven years of experience that we have had in implementing and administering the whistleblower program, we have issued final orders granting 50 whistleblower awards to 55 individuals (including, as explained above, individuals who acted as joint whistleblowers).[108] To date, only two Commission covered actions and related actions have crossed the threshold of collecting at least $100 million in monetary sanctions and for which the payout exceeded our proposed $30 million floor.[109] Those two actions taken alone involved the payment of $112 million to four individuals.

We believe that the $100 million collected-monetary-sanctions threshold reflects the appropriate level at or above which it would be reasonable for the Commission to consider

[107] In assessing whether the $100 million threshold has been crossed to invoke proposed paragraph (d), we preliminarily anticipate considering not just the likely payout in any Commission covered actions that resulted from the whistleblower's information, but also any potential payout that might result from any related actions that resulted from the whistleblower's information. Thus, for example, if a Commission covered action and a related action brought by the Department of Justice, and a related action brought by an appropriate regulatory authority, collectively, resulted in the collection of at least $100 million in monetary sanctions based on a whistleblower's original information, then proposed paragraph (d) would be triggered. We would then decide whether one or more of the awards should be adjusted downward to yield a total payout that complies with the terms of the proposed rule. Further, we note that in the context of a joint whistleblower, for purposes of applying the proposed rule, we would treat them collectively as one whistleblower in applying proposed paragraph (d), including in assessing whether the $100 million threshold is satisfied; however, in determining whether and to what extent to make a downward adjustment, we would expect to consider the need to appropriately incentivize individuals even when acting jointly to come forward and report to the Commission.

[108] These totals are through April 2018 and treat as single awards several cases where whistleblowers' original information led to multiple covered actions that were processed together in one award Order recognizing the total contributions of the whistleblower. Similarly, consistent with the approach proposed above governing cases where we grant an award for both a Commission enforcement action and a related action by another agency based on the same information provided by the whistleblower (*see* 17 CFR 240.21F-3(b)), we consider covered-action awards together with their corresponding related action awards as single whistleblower awards.

[109] One of the awards that exceeded $30 million was issued in September 2014 for more than $30 million in a Commission action and related actions. *See Order Determining Whistleblower Award Claim,* Exchange Act Release No. 34-73174 (Sept. 22, 2014), *available at https://www.sec.gov/rules/other/2014/34-73174.pdf.* Two other awards were issued in March 2018 for $49 and $33 million, respectively, to three individuals (two of whom were acting as joint whistleblowers) in a single covered action. *See Order Determining Whistleblower Award Claim,* Exchange Act Release No. 34-82897 (March 19, 2018), *available at* https://www.sec.gov/rules/other/2018/34-82897.pdf.

whether the likely award payout from the collected monetary sanctions will exceed an amount that is appropriate to achieve the program's goals. For matters involving collected sanctions at or above the $100 million threshold, we think the potential for a whistleblower award to exceed the amount necessary to achieve the program's goals exists and that awards based on $100 million or more are sufficiently large to warrant heightened scrutiny under the rule that we are proposing. Our proposed approach in triggering proposed paragraph (d) based on the amount of monetary sanctions collected is not unlike the approach that the DOJ utilizes (and which some courts also utilize) in the context of the False Claims Act ("FCA") when determining the appropriate amount of an award to a relator. Specifically, DOJ has developed a series of guidelines to determine the appropriate size of an award, and one consideration that may lead to a downward adjustment is whether the "FCA recovery was relatively large."[110]

We similarly believe that the $30 million floor is appropriate. In our view, there is a potential that as the payout to a whistleblower grows beyond the $30 million floor, the marginal benefit of each additional dollar paid may decrease to such an extent that, in terms of furthering the program's overall goals, the payout may be more than is reasonably necessary. In our judgment $30 million represents a reasonable line at which to draw the floor.[111] In this regard, we note that utilizing 2016 data on net worth, an individual who received *just the $30 million*

[110] *See* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT section 8.4 (updated June 2018) (citing DOJ Relator's Guidelines, reprinted in 11 *False Claims Act and Qui Tam Q. Rev.* 17 (Oct. 1997); *see also U.S. ex rel. Simmons v. Samsung Electronics Am., Inc.*, 116 F. Supp. 3d 575, 580-81 (quoting and applying the DOJ award guidelines).

[111] *See, e.g., WorldCom, Inc. v. FCC*, 238 F.3d 449, 462 (D.C.Cir.2001) (citation omitted) (explaining that "[a]n agency has 'wide discretion' in making line-drawing decisions and '[t]he relevant question is whether the agency's numbers are within a zone of reasonableness'"); *see also, e.g., National Shooting Sports Foundation, Inc. v. Jones*, 716 F.3d 200, 214, (D.C. Cir. 2013) (citation omitted) ("An agency 'is not required to identify the optimal threshold with pinpoint precision. It is only required to identify the standard and explain its relationship to the underlying regulatory concerns.").

floor—even allowing for a reduction due to taxes—would find himself or herself in the range of the the top 99.5 percentile to 99.9 percentile of the U.S. population by net worth.[112] Further, the analysis conducted in Part VII(B)(5) demonstrates for us that even this sum (again, allowing for a reduction due to taxes) if modestly invested should produce a reasonable lifetime income stream for most potential whistleblowers. We thus believe it is appropriate and reasonable to afford the agency a mechanism to more closely scrutinize awards that exceed this floor to determine whether and to what extent they are necessary to reward the whistleblower or incentivize similarly situated whistleblowers.

While we believe that the $30 million floor should reflect an amount that in most cases would be an extremely attractive inducement for company insiders across many industries to come forward to report securities-law violations, we recognize that future experience in the years ahead could suggest that some adjustment is appropriate.[113] Accordingly, to the extent that our experience with the program in future years may suggest that an adjustment to the floor is appropriate, we propose to establish a mechanism by which the Commission may publicly notice an order announcing such an increase by publishing it in the Federal Register.

In considering the appropriateness of the $30 million floor below which we could not make a downward departure for any payouts stemming from a whistleblower's original

[112] In 2016, approximately 0.5 percent of the U.S. population had a net worth of $16.12 million while 0.1 percent of the U.S. population had a net worth of $43.1 million. *See https://dqydj.com/net-worth-brackets-wealth-brackets-one-percent/.*

[113] The economic analysis, *infra* Part VII, discusses various potential annual incomes that a meritorious whistleblower might obtain from investing a $30 million award payout in various types of annuities. We note that, to the extent that certain whistleblowers may experience significant harmful consequences, such as large financial sacrifices or career-ending ramifications, as a result of their whistleblowing activities, the proposed rule (should it be triggered by the potential payout) would allow the Commission the flexibility to consider these particular facts and circumstances to determine an appropriate award level. Proposed paragraph (d) would allow the Commission similar flexibility in situations involving multiple individuals acting as a joint whistleblower.

information, we also note that the monetary incentive may often be an important reason a whistleblower comes forward, but it is typically not the only reason in our experience to date. In this regard, we note that the monetary incentive is one component in a package of reporting incentives made available under Section 21F, which includes employment retaliation protections and confidentiality requirements (including, critically, the ability of whistleblowers to remain anonymous through the course of an investigation and resulting enforcement action).[114] Indeed, our experience to date has been that approximately one-half of the whistleblowers who have received awards for information regarding their current or former employers took advantage of the opportunity to submit their tips to the Commission anonymously; the ability to report anonymously is an additional attractive feature of our program that helps to encourage company insiders and others to come forward by lessening their fear of potential exposure.

In advancing proposed paragraph (d), we are mindful of our own responsibility to investors and the general public to ensure that the Investor Protection Fund (IPF) that Congress established to fund awards is used efficiently and effectively to achieve the program's objectives.[115] We recognize that the Commission has obtained significant monetary judgments against parties in enforcement actions in recent years. Several individual matters involved orders in excess of $300 million in monetary sanctions in FY-2016 and FY-2017.[116] If there were an eligible whistleblower in one of these matters, and assuming the Commission collected the amounts ordered, an exceedingly large whistleblower award, beyond what we believe was

[114] *See* 15 U.S.C. 78u-6(d) (anonymity); *id.* 78u-6(h)(1) (employment retaliation protection); *id.* 78u-6(h)(2) (confidentiality protections); *see also* 17 CFR 240.21F-9(c) and 240.21F-10(c).

[115] *See* Exchange Act section 21F(g), 15 U.S.C. 78u-6(g).

[116] *See, e.g.*, SEC Division of Enforcement Annual Report for 2017 (Nov. 15, 2017), *available at* https://www.sec.gov/files/enforcement-annual-report-2017.pdf.

intended when the program was established, could result. Multiple such awards would, in turn, cause the funds in the IPF to be diminished. As of the end May 2018, the balance of the IPF for the first time fell below the $300 million threshold that triggers the statutory replenishment mechanism; this occurred when the Commission paid $83 million—its largest payout to date on an enforcement action—to three individuals.[117] Whenever the reserve in the IPF falls below $300 million, Section 21F(g)(3) requires the Commission to replenish the IPF.[118] These funds otherwise would be directed to the Treasury, where they could be made available for use in funding other valuable public programs.

In light of the foregoing, we believe that, where a whistleblower's original information leads to Commission or related actions that, collectively, involve at least $100 million in collected monetary sanctions, it is consistent with the interests of investors and the broader public interest that the Commission have a mechanism to ensure that the payout does not exceed an amount beyond what is reasonably necessary to achieve the program's goals and, to the extent that it is, to adjust the award percentage so that it better aligns with those goals. In our view, proposed paragraph (d) would provide such a mechanism if adopted.

We generally anticipate that the Commission's application of proposed paragraph (d) would be based on the unique facts and circumstances of each award matter. We believe that in determining whether a payout exceeds what is appropriate to achieve the program's objectives, the Commission would carefully assess the potential payout in relation to both any unusually

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[117] At the end of 2010, the IPF had just under $452 million in it, with no awards having yet been made. *See* Annual Report on the Dodd-Frank Whistleblower Program, Fiscal Year 2011, at 8 (available at: https://www.sec.gov/files/whistleblower-annual-report-2011.pdf), and by the end of fiscal year 2017, the IPF had approximately $322 million in it. Thus, from the end of 2010 until the end of fiscal year 2017, approximately $130 million in awards were paid out. The $83 million awards that were just paid for a single enforcement action were approximately equal to 64% of the sum of all of the other awards that the Commission had paid up through fiscal year 2017.

[118] *See* 15 U.S.C. 78u-6(g)(3).

detrimental circumstances that impact the whistleblower and the level of financial incentive that may be necessary to encourage future similarly situated whistleblowers to come forward. Facts that would be relevant to determining whether the large payout may be appropriate given the specific whistleblower's circumstances include, for example, whether the whistleblower made an extraordinary and highly unusual sacrifice by coming forward (such as placing himself or herself in legal jeopardy to bring the Commission information that it would otherwise not have been able to obtain or demonstrably suffering career-ending consequences commensurate with the potential large award). In a situation involving two or more individuals acting as a joint whistleblower, we would consider the need to appropriately incentivize individuals even when acting jointly to come forward and report to the Commission. Facts that would be relevant to determining whether the large payout is necessary and appropriate to encourage future similarly situated whistleblowers to come forward include the industry in which knowledgeable whistleblowers might work, the type of position held by that whistleblower,[119] and the compensation levels within that industry,[120] and whether potential whistleblowers may be located overseas and the likely compensation levels in those countries (to the extent available).[121]

In making any downward adjustment to a large award, the Commission would retain discretion to determine the appropriate award amount and proposed paragraph (d) is not intended

[119] According to the Office of the Whistleblower, of the 55 individuals who have received awards, approximately 10 percent were high-ranking corporate executives at companies of varying sizes. Each whistleblower award determination is based on the facts and circumstances of the case, including the monetary sanctions collected. Based on this subset of prior cases, a large majority of these executives received awards that were under $5 million.

[120] We would generally contemplate using publicly available data on compensation levels in making this determination. Award applicants could submit information as part of their award application to the extent that they are concerned that the proposed rule might be implicated by their application.

[121] The existence of any of these facts would not foreclose the Commission from finding that any large payout that exceeded the $30 million floor in proposed rule 21F-6(d) was nonetheless not reasonably necessary to achieve the program's goals and to thus reduce the award to an appropriate amount. Conversely, the absence of special circumstances or extraordinary sacrifices does not mean that the Commission would in all cases determine to reduce the amount of the award.

to mandate any specific reduction or one-size-fits-all result. Nonetheless, we anticipate that in those cases where proposed paragraph (d) is triggered and the Commission determines that a downward adjustment is warranted, the extent to which the Commission exercises its authority to decrease such awards would vary along a sliding scale that corresponds with the overall size of the potential award in dollar terms. For example, we generally anticipate that the nature and magnitude of any decrease applied to an award in the $35-40 million range would typically be less than the magnitude of the decrease applied to an award in the $100-$150 million range. In our view, this sliding-scale approach would make sense because the larger the dollar amount of a payout away from the $30 million floor, the greater the likelihood of diminishing marginal benefits to the program from each additional dollar paid to the whistleblower. In no event, however, would the Commission decrease an award below the $30 million floor (or whatever future floor the Commission might establish by order) using the authority afforded to the Commission pursuant to the proposed rule.

We preliminarily contemplate that proposed paragraph (d) would be applied in any instance where the Commission determines to process two or more separate covered actions together in the same final order, provided that both actions involve the same information submitted by the whistleblower. We would similarly expect that the Commission could apply this rule if, after having made an award to a whistleblower, the Commission subsequently processes an award application for that whistleblower (either in connection with a second covered action or a related action) and the subsequent award application is based on the same general information from the whistleblower as the earlier award determination.

We do not believe that the proposed rule conflicts with the statutory directive in Section 21F(c)(1)(B)(ii)[122] that "[i]n determining the amount of an award," the Commission "shall not take into consideration the balance of the [IPF]." This statutory provision prevents the Commission from adjusting an individual award based on the availability of money in the IPF. Critically, proposed paragraph (d) would not permit the Commission to consider the balance of the IPF when determining whether an award should be reduced. Rather, as noted above, paragraph (d) would only authorize the Commission to consider whether a potential award payout exceeds an amount that is reasonably necessary to achieve the program's goals. In this way, proposed paragraph (d) would provide a mechanism for the Commission to ensure that it is granting awards in an efficient and effective manner that serves the "twin goals of protecting investors and increasing public confidence in the markets"[123] and our adoption of this proposed rule would be within our authority to adopt "additional relevant [award] factors."[124] To make this clear, we are adding a provision to proposed pararagraph (d) stating that the Commission shall not take into account the balance of the IPF in determining whether to make a downward adjustment under the proposed paragraph or in making any other award determinations under Exchange Act Rule 21F-6.

Finally, the proposed rule would provide certain standards for the Commission to consider in determining whether to issue an order that adjusts the $2 million award threshold, the $100 million threshold, and the $30 million award(s) floor under proposed paragraphs (c) or (d), respectively. Specifically, the proposed rule would state that in issuing such an order "the

[122] 15USC78u-6(c)(1)(B)(ii).

[123] 76 FR 34300, 34356/2.

[124] Exchange Act section 21F(c)(1)(B)(iv); 15 U.S.C. 78u-6(c)(1)(B)(iv).

Commission shall consider (among other factors that it deems relevant) whether the adjustment is necessary or appropriate to encourage whistleblowers to come forward and the potential impact the adjustments might have on the Investor Protection Fund."

* * * * *

Guidance regarding the meaning of "unreasonable delay" in existing Rule 21F-6(b)(2) and proposed Rule 21F-6(c). In proposing the foregoing modifications to the criteria that govern award determinations, we believe it is appropriate to provide guidance on our approach regarding "unreasonable delay" as relates to an award determinations. We believe that any delay in reporting to the Commission beyond 180 days is presumptively unreasonable. In light of the Supreme Court's recent decisions in *Kokesh v. SEC*[125] and *Gabelli v. SEC*,[126] delay on the part of a whistleblower can have a debilitating impact on the Commission's ability to make a full recovery of ill-gotten gains and to obtain civil penalties and, in this way, delay may impair our ability to return funds to investors who have been harmed by the wrongdoing. Further, although this 180-day presumption is not expressly codified in either Exchange Rule 21F-6(b)(2),[127] which deals with "unreasonable delays," or the rule that we are proposing, we would typically expect to treat any delay exceeding this period as unreasonable for purposes of both rules going forward. That said, in assessing unreasonable delay under both the existing rule and the proposed rule, we would still consider any highly unusual facts and circumstances of a particular award application in assessing unreasonable delay, such that the general presumption of "unreasonable delay" might be overcome in certain rare instances. Finally, we caution that shorter periods of delay

[125] 137 S. Ct. 1635 (2017) (providing that the Commission must bring any enforcement action seeking to obtain disgorgement within five years of the date the violation occurred).

[126] 568 U.S. 442 (2013) (providing that the Commission must bring any enforcement action seeking to obtain civil penalties within five years of the date the violation occurred).

[127] 17 CFR 240.21F-6(b)(2).

(*i.e.*, less than 180 days) may also readily qualify as unreasonable depending on the particular facts and circumstances at issue, including, for example, whether the violations were ongoing, whether investors continued to experience harm or the whistleblower continued to profit from the wrongdoing during the period of the whistleblower's delay or whether the delay had a discernable impact on the monetary sanctions that were ordered in the enforcement action. Put simply, a whistleblower who delays reporting to the Commission should expect that his or her "reward" for reporting might well be negatively impacted.

Request for Comment:

10. With respect to proposed paragraph (c), is it appropriate to consider increasing smaller awards and would doing so help to further incentivize insiders and others to come forward with tips? If so, is the $2 million ceiling for invoking the rule appropriate or is it either too high or too low? Please explain.

11. With respect to proposed paragraph (c), should the enhancement authority be unavailable in the situation where a whistleblower's award was reduced under Rule 21F-6(b) or Rule 21F-16? Please explain.

12. Would the proposed amendments to paragraph (d) of Rule 21F-6 appropriately balance the Commission's various programmatic interests, in particular encouraging company insiders and others to come forward while also ensuring that awards are not unnecessarily large beyond an amount that is sufficient to compensate whistleblowers and achieve the Commission's law-enforcement interests? If not, is there an alternative formulation of the proposed rule that the Commission should adopt to guard against payouts that are in excess of amounts that are reasonably necessary to further the Commission's goals?

13. With respect to proposed paragraph (d), are the $100 million collected sanctions threshold and the $30 million floor appropriate? Is there another threshold or floor that the Commission should adopt? If so, please explain what should be the appropriate threshold or floor.

14. In considering whether to make a downward adjustment to a potential award under proposed paragraph (d), is it reasonable for the Commission to consider the likely amount of the award in relation to the whistleblower program's goals of rewarding meritorious whistleblowers and sufficiently incentivizing future similarly situated whistleblowers?

a. In the release, we explain that facts that would be relevant to determining whether the large payout may be appropriate given the specific whistleblower's circumstances include, for example, whether the whistleblower made an extraordinary and highly unusual sacrifice by coming forward (such as placing himself or herself in legal jeopardy to bring the Commission information that it would otherwise not have been able to obtain or demonstrably suffering career-ending consequences commensurate with the potential large award). Are there other (or additional) considerations that the Commission should assess in making that determination?

b. Also in the release, we explain that facts that would be relevant to determining whether the large payout is needed and appropriate to encourage future similarly situated whistleblowers to come forward include the industry in which knowledgeable whistleblowers might work, the type of position held by that whistleblower, and the compensation levels within that industry, and whether potential whistleblowers may be located overseas and the likely compensation levels in those countries (to the extent available). Are there other (or additional) considerations that the Commission should assess in making that determination?

15. In the context of two or more individuals acting together as a whistleblower, should the $30 million floor in proposed paragraph (d) apply where the aggregate award to both individuals exceeds $30 million or where the award to each individual would potentially exceed $30 million? Please explain the reasons for your views.

16. In determining whether the $100 million threshold has been met for application for the proposed rule, should the Commission consider not just the likely payout in any Commission covered action that results from the original information that the whistleblower provided to the Commission, but also any potential payout that might result from any related actions? Why or why not?

17. As discussed above, the Commission could apply proposed paragraph (d) if, after having made an award to a whistleblower, the Commission subsequently processes an award application for that whistleblower (either in connection with a second covered action or a related action) and the subsequent award application is based on the "same general information" from the whistleblower as the earlier award determination. Is there a different standard that the Commission should apply for invoking the rule in these situations? In particular, should the proposed rule be applicable in either a narrower or a broader set of circumstances where information provided by a whistleblower results in multiple actions? Please explain the reasons for your view.

18. Proposed paragraph (d) would permit the Commission to consider the potential dollar amount of the award when applying each of the existing award criteria in Exchange Act Rule 21F-6(a) and 6(b), provided that the Commission determined that the likely total payout to the whistleblower resulting from the original information that he or she provided was $100 million or greater. As explained above, this would allow the Commission to consider each award factor

in dollar terms rather than to apply exclusively a percentage assessment that does not take into account what those percentage adjustments would translate to in actual dollars paid to the whistleblower.

a. Should the Commission consider the dollar value of an award that involves the collection of at least $100 million in monetary sanctions in determining the size of the award? Why or why not?

b. As part of this rulemaking, should we expand this approach so that it would cover all awards considered under Exchange Act Rule 21F-6, even those below the $100 million threshold? Would such a revision to the award determination approach under Exchange Act Rule 21F-6 allow us to better assess each enhancement or reduction in dollar terms (as well as percentage terms) so that we could more realistically and concretely assess the impact of each award factor on the overall award to ensure that we are appropriately rewarding the whistleblower and incentivizing future whistleblowers? Why or why not?

19. With respect to the interpretive guidance concerning "unreasonable delay," is the 180-day rebuttable presumption of unreasonable delay appropriate? Does establishing such a presumption help to put individuals on notice that they should come forward without an inappropriate delay? Please explain.

E. Proposed Amendment to Exchange Act Rule 21F-2[128] addressing whistleblower status and certain threshold criteria related to award eligibility, heightened confidentiality from identity disclosure, and employment anti-retaliation protection[129]

[128] 17 CFR 240.21F-2.

[129] The Commission anticipates that this proposed rule change, if adopted, would apply as follows: with respect to employment retaliation claims, the proposed rule would apply only to employment-retaliation violations occurring after the effective date of the rules; with respect to award eligibility and confidentiality protections, the proposed rule would apply only to information about a potential securities law violation that is submitted for the first time by an individual after the effective date of the rules.

As adopted by the Commission in 2011, Rule 21F-2(a)[130] describes the qualifications to be a whistleblower for purposes of the award program and heightened confidentiality protections, and Rule 21F-2(b)[131] provides a separate, broader definition of the term that is applicable to the employment anti-retaliation provisions in Section 21F(h)(1) of the Exchange Act.[132] Specifically, unlike Rule 21F-2(a), Rule 21F-2(b) defines a whistleblower not by reference to the statutory definition of the term in Exchange Act Section 21F(a)(6)[133]—*i.e.*, as one who reports to the Commission—but instead by reference to the protected activities described in Section 21F(h)(1)(A)(i)-(iii), including the internal reporting described in clause (iii) of that provision.[134] The Supreme Court recently held in *Digital Realty Trust, Inc. v. Somers*,[135] however, that a whistleblower under Section 21F of the Exchange Act must report a possible securities law violation to the Commission in order to qualify for employment retaliation protection under Section 21F(h)(1), and that the Commission's rule interpreting the term more broadly in connection with Section 21F's retaliation protections was therefore not entitled to deference.[136] The Court reasoned that Dodd-Frank's definition of "whistleblower," codified in Section 21F(a)(6), requires such a report to the Commission as a prerequisite for anti-retaliation

[130] 17 CFR 240.21F-2(a).

[131] 17 CFR 240.21F-2(b).

[132] 15 U.S.C. 78u-6(h)(1).

[133] 15 U.S.C. 78u-6(a)(6).

[134] 15 U.S.C. 78u-6(h)(1)(A)(i)-(iii).

[135] 138 S. Ct. 767 (2018).

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

protection, and that this definition is "clear and conclusive."[137] The Court also determined that strict application of the definition's reporting requirement in the employment anti-retaliation context is consistent with Congress's core objective of "'motivat[ing] people who know of securities law violations to tell the SEC.'"[138]

Accordingly, we believe that it is appropriate to amend Rule 21F-2 to conform to the Supreme Court's construction of Section 21F. Proposed Rule 21F-2(a) would provide a uniform definition for whistleblower status to apply for all purposes under Section 21F—award eligibility, confidentiality protections, and anti-retaliation protections—consistent with the Supreme Court's application of the whistleblower definition in Section 21F(a)(6), which defines the term "whistleblower" as any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.[139]

Proposed Rule 21F-2(a) would track this whistleblower definition by conferring whistleblower status only on (i) an individual (ii) who provides the Commission with information "in writing" and only if (iii) "the information relates to a possible violation of the federal securities laws (including any law, rule, or regulation subject to the jurisdiction of the Commission) that has occurred, is ongoing, or is about to occur." We address these three points in turn.

First, proposed Rule 21F-2(a)(2) would provide whistleblower status to individuals and not to legal entities (such as corporations). This proposed provision would carry forward the

[137] *Id*.

[138] *Id*. at 777 (quoting S. Rep. No. 111-176, at 38 (2010)).

[139] 15 U.S.C. 78u-6(a)(6).

similar language in existing Rule 21F-2(a)(1) without substantive change. We believe this position follows from the use of the term "individual" in the whistleblower definition in Section 21F(a)(6) and is consistent with the focus in Section 21F(h)(1)(A) on retaliation by employers in the terms and conditions of employment.

Second, proposed Rule 21F-2(a)(1) would afford whistleblower status only to an individual who provides the Commission with information "in writing." As the Supreme Court recognized,[140] the whistleblower definition in Section 21F(a)(6) gives the Commission express authority to establish the required "manner" of reporting by rule or regulation. In the awards eligibility and confidentiality contexts, our whistleblower rules (specifically, Rule 21F-2(a)(2)[141] and Rule 21F-9(a)[142]) already require that information be provided to the Commission in writing either through the online portal at www.sec.gov or by mailing or faxing a Form TCR (Tip, Complaint or Referral) to the Commission's Office of the Whistleblower. We now believe it is appropriate to exercise our discretion to require that an individual provide information "in writing" to the Commission to qualify as a "whistleblower," not only in the awards and confidentiality context but also in the anti-retaliation context.[143] Our experience to date in the awards context suggests that requiring that information be provided in writing presents, at most,

[140] *Digital Realty*, 138 S. Ct. at 781 ("[T]he statute expressly delegates authority to the SEC to establish the 'manner' in which information may be provided to the Commission by a whistleblower.") (citing Section 21F(a)(6)).

[141] 17 CFR 240.21F-2(a).

[142] 17 CFR 240.21F-9(a).

[143] We believe that Section 21F(a)(6) and *Digital Realty* do not *require* a uniform "manner" of providing information for all purposes under Section 21F, and that we have discretion whether to specify different manners for the awards, confidentiality, and retaliation contexts. But we believe that specifying a uniform "manner" of providing information—that is, in writing—for all three contexts is appropriate for the reasons that follow in the discussion above. *See also* 15 U.S.C. 78u-6(c)(2)(D) ("No award under subsection (b) shall be made . . . to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.").

a minimal burden to individuals who want to blow the whistle to the Commission while facilitating the staff's ability to track its use of the information. Moreover, if we recognized additional manners of reporting for anti-retaliation purposes (such as placing a telephone call), the Commission's staff could be ensnared by disputes in private anti-retaliation lawsuits over what information was provided to whom on what dates. Requiring that any reporting be done in writing obviates these difficulties.[144]

Third, proposed Rule 21F-2(a)(1) would afford whistleblower status only to an individual who provides the Commission with information that "relates to a possible violation of the federal securities laws (including any law, rule, or regulation subject to the jurisdiction of the Commission) that has occurred, is ongoing, or is about to occur." Much of this language carries over from existing Rule 21F-2[145] and simply reflects the extent to which that provision already tracked the whistleblower definition in Section 21F(a)(6). At the same time, we are mindful of the whistleblower definition's focus on "information relating to a violation of *the securities laws*"[146] and of the Supreme Court's admonition that Section 21F, as enacted by Dodd-Frank, is "a law concerned only with encouraging the reporting of '*securities* law violations,'" as opposed to other types of misconduct.[147] Consistent with that statutory language and purpose, we believe it is appropriate to clarify what is implicit in the phrase "securities laws"—namely, that

[144] We believe it appropriate not to enumerate the activities in Section 21F(h)(1)(A)(ii) (specifically, "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission") as additional manners of providing information to the Commission under Section 21F(a)(6). *See Digital Realty*, 138 S. Ct. at 781 ("Nothing in today's opinion prevents the agency from enumerating additional means of SEC reporting—including through testimony protected by clause (ii)" of Section 21F(h(1)(A).). Given clause (ii)'s cross-reference to "such information" provided under clause (i), we believe that clause (ii) is best read as extending employment retaliation protections to acts of continued cooperation by a person who has already provided information to the Commission.

[145] 17 CFR 240.21F-2(a)(1).

[146] 15 U.S.C. 78u-6(a)(6) (emphasis added).

[147] *Digital Realty*, 138 S. Ct. at 781 (quoting S. REP. NO. 11-176, at 38).

whistleblower status (and thus Section 21F's employment retaliation protection) extends only to reports of possible violations of federal law, not state law, and that it extends broadly to reports of possible violations of any law, rule, or regulation subject to the jurisdiction of the Commission.[148] Although Section 3(a)(47) of the Exchange Act defines the phrase "securities laws" more narrowly as encompassing only certain statutes,[149] by its terms that definition only applies "unless the context otherwise requires."[150] We believe that the context of Section 21F requires departing from that definition, given the textual clues that Congress designed Section 21F to encompass whistleblowing with respect to the full sweep of federal securities statutes, rules, and regulations,[151] given Congress's core objective of "'motivat[ing] people who know of securities law violations to tell the SEC,'"[152] and given the many securities regulations whose reported violations would fail to trigger award eligibility and anti-retaliation protection if "securities laws" were more narrowly defined.[153]

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[148] As proposed, Rule 21F-2 would not repeat the parenthetical "(including any law, rule, or regulation subject to the jurisdiction of the Commission)" when the phrase "federal securities laws" reappears later in the rule. This would be strictly for concision and ease of reading, and not to imply any difference of meaning.

[149] Section 3(a)(47) of the Exchange Act states that the term "securities laws" means the Securities Act of 1933 (15 U.S.C. 78a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), the Sarbanes-Oxley Act of 2002, the Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.), the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.), the Investment Advisers Act of 1940 (15 U.S.C. 80b et seq.), and the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.).

15 U.S.C. 78c(a)(47).

[150] 15 U.S.C. 78c(a).

[151] *See, e.g.*, Section 21F(h)(1)(A)(iii) (protecting "disclosures that are required or protected under . . . any other law, rule, or regulation subject to the jurisdiction of the Commission").

[152] *Digital Realty*, 138 S. Ct. at 777 (quoting S. Rep. No. 111-176, at 38).

[153] *See American Bankers Assn v. SEC*, 804 F.2d 739, 753 (D.C. Cir. 1986) ("We read the context clause [in Section 3 of the Exchange Act] as meaning only that if in the case of a frequently occurring statutory term, its immediate context suggests that a literal application of the statutory definition would produce absurd consequences *or run counter to the obvious thrust of the section*, the agency may appropriately modify the definition.") (emphasis added).

Additionally, proposed Rule 21F-2(a) would confer whistleblower status "as of the time that" an individual meets all three of the above conditions. We believe that this language would clarify that whistleblower status is conferred only prospectively and not retrospectively once all three conditions to achieve whistleblower status are met.

Proposed Rule 21F-2(b), (c), and (d) would specify how the whistleblower status conferred by subsection (a) operates across the various contexts of awards eligibility, confidentiality protections, and anti-retaliation protections, respectively. Much like current Rule 21F-2(a), proposed Rule 21F-2(b) would specify that, to be eligible for an award in a Commission action based on information provided to the Commission, a person "must comply with the procedures and the conditions described in Rules 21F-4, 21F-8, and 21F-9 (respectively, sections 240.21F-4, 240.21F-8, and 240.21F-9 of this chapter)."[154] Proposed Rule 21F-2(b) reiterates, "You should carefully review those rules before you submit any information that you may later wish to rely upon to claim an award." We believe that this proposed language will adequately alert individuals who intend to claim an award that they must comply with the cross-referenced rules, especially proposed Rule 21F-9(a) and (b), which require the submission of information to the Commission either on Form TCR or through www.sec.gov, accompanied by a

[154] We note that, under the Commission's existing rules, in order to make an award in connection with a related action brought by one of the regulatory or law-enforcement entities listed in Rule 21F-3(b)(1) (17 CFR 240.21F-3(b)(1)), we 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 that govern awards made in connection with Commission actions (*see* Rule 21F-3(b)(2), 17 CFR 240.21F-3(b)(2)). This means that a whistleblower must comply with the other procedures and conditions described in Rules 21F-4 and 21F-8 (17 CFR. 240.21F-4 and 240.21F-8) for a related action in the same manner and to the same degree as is required for the Commission action to which the other entity's action is related. For example, under Rule 21F-4(c) (17 CFR 240.21F-4(c)) the whistleblower must provide the same original information that he or she provided to the Commission directly to the other regulatory or law-enforcement entity and that the information the whistleblower gave to the other entity must lead to successful enforcement of that entity's action using the same criteria described in Rule 21F-4(c)(1)-(3) (17 CFR 240.21F-4(c)(1)-(3)) for Commission enforcement actions. However, we are proposing to modify this requirement through our amendments to Exchange Act Rule 21F-3 (17 CFR 24.21F-3) to also permit an award in situations where the Commission itself shares the whistleblower's information with the other agency.

declaration sworn under penalty of perjury that the information submitted is true and correct.[155] In our experience to date in the awards context, compliance with existing Rule 21F-9(a) has proven to be beneficial for enabling the Commission to determine, in a precise and reliable manner, which persons submitted which information on which dates.

Proposed Rule 21F-2(c) would specify that, to qualify for confidentiality protections afforded by Section 21F(h)(2) of the Exchange Act[156] based on information provided to the Commission, a person "must comply with the procedures and the conditions described in" Rule 21F-9(a)—that is, must submit information using the Commission's online portal or Form TCR.[157] We believe it is appropriate to adopt this provision both to codify the current practice of the Commission's staff and to clarify for future whistleblowers the conditions for receiving confidentiality protections. Further, requiring whistleblowers to adhere to the procedures specified in Rule 21F-9(a) helps the staff to appreciate quickly and clearly which whistleblowers are seeking the heightened confidentiality protections provided by Section 21F(h)(2) of the Exchange Act when, among other things, sharing the whistleblowers' information with other governmental agencies.[158]

Proposed Rule 21F-2(d) would revise existing Rule 21F-2(b) to define the scope of anti-retaliation protections in a way that mirrors the Supreme Court's authoritative reading of Section

[155] We believe that additional express authority in this regard is conferred by Section 21F(c)(2)(D) of the Exchange Act. *See* 15 U.S.C. 78u-6(c)(2)(D) ("No award under subsection (b) shall be made . . . to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.").

[156] 15 U.S.C. 78u-6(h)(2).

[157] 17 CFR 240.21F-9(a).

[158] We are proposing to make a conforming amendment to Exchange Act Rule 21F-7(a) (17 CFR 240.21F-7(a)) to acknowledge the proposed requirement that a whistleblower must submit information according to the procedures specified in Exchange Act Rule 21F-9(a) (17 CFR 240.21F-9(a)) in order to qualify for the heightened confidentiality protections provided for in Exchange Act 21F(h)(2), 15 U.S.C. 78u-(h)(2).

21F. As the Court explained in *Digital Realty*, the whistleblower definition in Section 21F(a)(6) "first describes *who* is eligible for protection—namely, a whistleblower who provides pertinent information 'to the Commission,'"[159] while "[t]he three clauses of [Section 21F(h)(1)(A)] then describe what *conduct*, when engaged in by a whistleblower, is shielded from employment discrimination."[160] Consistent with that reading, proposed Rule 21F-2(d) would explain both who is eligible for protection as a whistleblower and also what conduct by such a person is protected from employment retaliation, by requiring a person to satisfy several criteria listed in paragraph (d)(1).

In explaining who is eligible for employment retaliation protection, proposed Rule 21F-2(d)(1)(i) would first require that a person "qualify as a whistleblower under subsection (a) before experiencing the retaliation" for which redress is sought. We believe that this proposed rule implements the most natural reading of Section 21F(h)(1)(A), which prohibits retaliation "against[] a *whistleblower*" (emphasis added)[161] and also follows from the Supreme Court's focus in *Digital Realty* on whether the plaintiff had reported to the Commission before the alleged retaliation.[162] In addition, proposed Rule 21F-2(d)(1)(ii) would carry forward the requirement in existing Rule 21F-2(b)(1)(i)[163] that the person "reasonably believe" that the information provided relates to a possible securities law violation.

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[159] 138 S. Ct. at 777 (quoting Section 21F(a)(6), 15 U.S.C. 78u-6(a)(6)).

[160] *Id.* (citing Section 21F(h)(1)(A)(i)-(iii), 15 U.S.C. 78u-6(h)(1)(A)(i)-(iii)).

[161] 15 U.S.C. 78u-6(h)(1)(A).

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

[163] 17 CFR 240.21F-2(b)(1)(i).

In explaining what conduct is protected from retaliation, Rule 21F-2(d)(1)(iii) requires that a person must perform a "lawful act" that both is performed in connection with any of the activities described in Section 21F(h)(1)(A)(i)-(iii)[164] and "relate[s] to the subject matter of" the person's submission to the Commission under proposed Rule 21F-2(a).[165] We believe that extending protection to all such lawful acts is most consistent with the text of Section 21F(h)(1)(A), which prohibits retaliation not simply for the activities described in Section 21F(h)(1)(A)(i)-(iii) but for "any lawful act done by the whistleblower" in performing those activities. Given the breadth of Congress's language, we preliminarily anticipate that anti-retaliation protection under proposed Rule 21F-2(d)(1)(iii) will properly encompass actions that are preparatory to the conduct described in Section 21F(h)(1)(A)(i)-(iii), such as printing and completing a Form TCR and depositing the completed form in a mailbox. We also preliminarily anticipate that protected conduct under proposed Rule 21F-2(d)(1)(iii) will not be limited strictly to reports to the Commission, since that limitation would render clauses (ii) and (iii) of Section 21F(h)(1)(A) superfluous, given clause (i)'s express coverage of Commission reports.[166]

At the same time, proposed Rule 21F-2(d)(1)(iii) would limit anti-retaliation protection to lawful acts that "relate to the subject matter" of the person's submission to the Commission

[164] 15 U.S.C. 78u-6(h)(1)(A)(i)-(iii).

[165] We are not proposing to define the term "lawful act" under Section 21F(h)(1)(A) or otherwise to offer guidance as to its meaning. We note that the term does appear in a number of federal employment anti-retaliation statutes, but it does not appear that any of these statutes define the term. *See, e.g.*, Marcella Auerbachian and Michael W. Paddock, *Legal Ethics: Lines in the Sand–The Intersection of Bringing and Defending a* Qui Tam *False Claims Act Case*, 20141006 AHLA Seminar Papers 19 (Oct. 6, 2014) (available on Westlaw) ("The FCA does not define 'lawful acts'").

[166] We are aware of one circuit decision suggesting in dicta, before the *Digital Realty* decision, that anti-retaliation protection under Section 21F(h)(1) should be limited exclusively to reports to the Commission. *See Martensen v. Chicago Stock Exch.*, 882 F.3d 744, 746 (7th Cir. 2018). We preliminarily believe that, in this respect, *Martensen* is inconsistent with the Supreme Court's subsequent decision in *Digital Realty*. *See* 138 S. Ct. at 779 ("With the statutory definition incorporated, clause (iii) protects a whistleblower who reports misconduct *both* to the SEC and to another entity, but suffers retaliation because of the latter, non-SEC, disclosure.").

under proposed Rule 21F-2(a). Given the silence of Section 21F and the Supreme Court's reluctance to address whether any subject-matter connection should be required,[167] we believe it appropriate to clarify that, to receive protection, a lawful act must relate to the subject matter of the submission to the Commission.[168]

Proposed Rule 21F-2(d)(2) would address a timing issue under Section 21F's anti-retaliation provisions by clarifying that a person does not need to qualify as a whistleblower under Rule 21F-2(a) before performing the lawful act described in Rule 21F-2(d)(1)(iii), in order to be eligible for anti-retaliation protection. In other words, whether conduct is protected from retaliation would not depend on whether the person performing that conduct reported to the Commission beforehand or afterward (in order to qualify as a whistleblower). Section 21F is silent on this issue, and we believe that this clarification will help maintain appropriate incentives for persons to make the internal reports described in Section 21F(h)(1)(A)(iii) before or at the same time as reporting to the Commission. Proposed Rule 21F-2(d)(2) would reiterate, however, that a person must qualify as a whistleblower under proposed Rule 21F-2(a) before experiencing retaliation. Thus, for example, an individual who experiences repeated retaliation for a prior lawful act, and who first reports to the Commission while the retaliation is still ongoing, would be protected with respect to any retaliation experienced after the Commission report but not for any retaliation experienced before the Commission report.

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

[168] We preliminarily believe that this clarification helps avoid the incongruous result that a person could qualify just once as a whistleblower and then receive lifetime protection for any non-Commission reports described in clause (iii) with respect to distinct securities law violations that occur years later. Given the Supreme Court's instruction that Congress's core objective was to encourage reports to the Commission, 138 S. Ct. at 777, it makes more sense that such a person needs to return to the Commission to report the later violations in order to receive protection.

Proposed Rule 21F-2(d)(3) would carry forward existing Rule 21F-2(b)(1)(iii)[169] without substantive change. That provision states that the anti-retaliation protections apply regardless of whether a person satisfies the procedures and conditions to qualify for an award described in Rules 21F-4, 21F-8, and 21F-9 (such as, for example, submitting the information to the Commission using the electronic TCR portal on whe Commission's website or completing the required declaration as to the accuracy of the information submitted in the whislteblower's tip).

Proposed Rule 21F-2(d)(4) would carry forward existing Rule 21F-2(b)(2)[170] without substantive change. That provision states that the retaliation prohibition in Section 21F(h)(1)[171] and the rules thereunder shall be enforceable in an action or proceeding brought by the Commission.

To illustrate how we anticipate proposed Rule 21F-2 would operate in practice, consider the following hypothetical scenario: An employee at a publicly traded issuer overhears a conversation by colleagues discussing a scheme to create an artificial boost for reported sales. The employee investigates and discovers that sales invoices are being generated without any corresponding movement of inventory, and then reports the possible misconduct to the issuer's chief compliance officer. But a week passes without any action being taken on the report. If the Commission then receives an email from that employee in which the employee reports the same possible misconduct, and in sending the email the employee reasonably believed that the report relates to a possible securities laws violation, then the employee would qualify as a whistleblower under Rule 21F-2(a) and would be eligible for anti-retaliation protections under

[169] 17 CFR 240.21F-2(b)(1)(iii).

[170] 17 CFR 240.21F-2(b)(2).

[171] 15 U.S.C. 78u-6(h)(1).

Rule 21F-2(d)(1)(i)-(ii) as of the time the employee provides the information to the Commission. Assuming that the employee's internal report was within the scope Section 806(a) of Sarbanes-Oxley, that internal report itself would be a protected "lawful act" under Rule 21F-2(d)(1)(iii). The fact that the employee made the internal report before the Commission report would not make a difference for anti-retaliation protections under Rule 21F-2(d)(2). That said, if the employee wanted to be eligible for an award under Rule 21F-2(b) and to qualify for confidentiality protections under Rule 21F-2(c), he or she would need to make his or her first report of that information to the Commission using Form TCR or through the online portal at www.sec.gov, as required by Rule 21F-9(a), and not through an email to the Commission. To qualify for an award, the employee would additionally need to comply with the procedures and the conditions described in Rules 21F-4, 21F-8, and 21F-9.

Request for Comment:

20. Is it reasonable to require that an individual provide information to the Commission "in writing" to qualify as a whistleblower? Is this approach either too restrictive or too broad? Are there situations in which only some other form of communication would be possible or preferred? Please explain.

21. Should our whistleblower rules enumerate any other "manner" of providing information to the Commission for purposes of anti-retaliation protection? For example, should our rules enumerate testifying under oath in an investigation or judicial or administrative action of the Commission as an additional "manner" of providing information to the Commission?[172]

[172] *See Digital Realty*, 138 S. Ct. at 781 ("Nothing in today's opinion prevents the agency from enumerating additional means of SEC reporting—including through testimony protected by clause (ii)" of Section 21F(h(1)(A).).

22. Does the proposed rule reasonably require that the lawful acts done by the whistleblower must relate to the subject matter of the whistleblower's submission to the Commission in order for the employment retaliation protections to apply? Should a different standard apply? Why or why not?

23. Does the proposed rule appropriately address the timing of an individual's report to the Commission relative to the protected conduct and to any retaliation?

24. In determining the amount of an award, the Commission considers participation in internal compliance systems. Given the change in anti-retaliation protections, should the Commission still use this criteria in determining the size of whistleblower awards? Why or why not?

25. Would it be necessary or appropriate to specify additional types of misconduct that fall within the prohibition in Section 21F(h)(1)(A) against "any other manner [of] discriminat[ion] against[] a whistleblower"? For example, should our rules clarify that if an employer rejects a prospective employee, or a past employer attempts to cause such rejection, because that individual had engaged in activity protected under Rule 21F-2, this would be a form of retaliation covered by Section 21F(h)(1)(A)?[173]

[173] The Supreme Court has held that a former employer's retaliatory negative reference was actionable under Title VII. *See, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). Other federal anti-retaliation statutes have been held to cover such conduct, which is often referred to as "blacklisting." *See* BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "blacklist" as "[t]o put the name of (a person) on a list of those who are disfavored and are therefore to be avoided or punished," and giving as an example, "the firm blacklisted the former employee"). The Department of Labor's regulations implementing Section 806 of the Sarbanes-Oxley Act of 2002 expressly prohibit "blacklisting" of an employee, 29 CFR 1980.102(a), and define an "employee" as "an individual presently or formerly working for a covered person, an individual applying to work for a covered person, or an individual whose employment could be affected by a covered person." *Id.* §1980.101(g). In relevant part, Section 806 of the Sarbanes-Oxley Act is similar to Section 21F(h), providing that no covered entity or person may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment, and, under Section 21F(h)(1)(A), that no employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment.

F. Proposed Amendment to Rule 21F-8 to add new paragraph (d) to provide the Commission with additional flexibility regarding the forms used in connection with the whistleblower program (and corresponding amendments to Rule 21F-10, Rule 21F-11, and Rule 21F-12)[174]

Currently an applicant seeking to submit information to the Commission in order to qualify as a whistleblower (for purposes of the award and confidentiality components of the whistleblower program) must submit this information by using one of two methods: (1) By providing the information through an online portal on the Commission's website, or (2) by submitting the paper Form TCR that was adopted by the Commission as part of the original whistleblower rulemaking in 2011.[175] Periodically the Commission has determined that it would be beneficial to modify the online portal. However, this has resulted in discrepancies forming over time between the information collected through the online portal and that elicited by Form TCR.

To provide the Commission with the ability to make timely corresponding adjustments to the Form TCR when the Commission determines to modify the online portal, the Commission proposes to modify Exchange Act Rule 21F-8[176] by adding a new paragraph (d)(1) providing that

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Both statutes broadly prohibit "any . . . manner" of discrimination in the terms or conditions of employment. *See also Wanamaker v. Columbian Rope Co*., 108 F.3d 462, 466 (2d Cir. 1997) (noting that former employees can state a claim for retaliation under the Age Discrimination in Employment Act for "blacklist[ing]"); *Boscarello v. Audio Video Sys., Inc.*, 784 F. Supp. 2d 577, 582 (E.D. Va. 2011) (former contractor stated a retaliation claim under the Fair Labor Standards Act against former employer by alleging blacklisting).

[174] The Commission anticipates that proposed Rule 21F-8(d)(1), if adopted, would apply only in connection with submissions of information that are made by an individual after the effective date of the proposed rules. Further, the Commission preliminarily anticipates that proposed Rule 21F-8(d)(2), if adopted, would apply only to covered-action and related-action award applications that are connected to a Notice of Covered Action (*see* Exchange Act Rule 21F-10(a), 17 CFR 240.21F-10(a)) posted on or after effective date of the final rules.

[175] *See* Exchange Act Rule 21F-9(a), 17 CFR 240-21F-9(a). Under the proposed amendments to Exchange Act Rule 21F-2, 17 CFR 240.21F-2, these procedures will remain necessary in order for a whistleblower to be eligible for an award and to obtain the confidentiality protections afforded by Exchange Act Section 21F(h)(2), 15 U.S.C. 78u-6(h)(2), even though an individual's status as a "whistleblower" would no longer turn on compliance with these procedures.

[176] 17 CFR 240.21F-8.

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

In addition to the paper Form TCR, the Commission also adopted a paper Form WB-APP when it adopted the existing rules for the whistleblower program. Individuals seeking awards must make their award request using Form WB-APP. Like Form TCR, Form WB-APP can only be modified by amending the Code of Federal Regulations. However, we believe that it may be beneficial to provide the Commission with greater administrative flexibility to modify the form. Providing the Commission with the ability to modify the form's informational requirements in a timely fashion should also help promote the program's overall efficiency. Accordingly, the Commission proposes to modify Exchange Act Rule 21F-8 by adding a new paragraph (d)(2) providing the Commission will also periodically designate on the Commission's web page a Form WB-APP for use by individuals seeking to apply for an award in connection with a Commission covered judicial or administrative action (15 U.S.C. 21F(a)(1)), or a related action (§ 240.21F-3(b)(1) of the chapter).

In proposing this additional flexibility, we note that both Form TCR and Form WB-APP elicit information used by the Commission to administer its whistleblower award program and are not public disclosure documents. Moreover, we anticipate that the forms designated on the Commission's website for use in the whistleblower program would be substantially similar to those currently referenced in the Code of Federal Regulations.

In accordance with the changes discussed above, the following corresponding amendments would be made. *First*, the Form TCR[177] that the Commission adopted when it

[177] 17 CFR 249.1800.

promulgated its whistleblower rules in 2011 would be repealed and the parenthetical Code of Federal Regulation citations to that form in Exchange Act Rule 21F-9(c)[178] and Rule 21F-12(a)(2)[179] would be removed. *Second*, the existing Form WB-APP currently referenced in the Code of Federal Regulations would be repealed and Rule 21F-10,[180] Rule 21F-11,[181] and Rule 21F-12[182] would be amended by removing the parenthetical references found throughout those rules to the Code of Federal Regulation citation to the current Form WB-APP.

Request for Comment:

26. Are there any additional considerations or limitations that the Commission should consider in connection with the proposed rule change? For example, should we provide that any revisions to paper Form TCR or Form WB-APP shall not take effect for a 30-day period after posting on the Commission website?

G. Proposed Amendment to Rule 21F-8 to add new paragraph (e) to clarify and enhance the Commission's authority to address claimants who submit false information to the Commission or who abuse the award application process[183]

In our experience implementing the whistleblower award program to date, a small number of claimants have imposed an undue burden on the award determination process by submitting dozens and in some cases over a hundred award applications that lack any colorable connection between the tip that they provided and the Commission enforcement actions for

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[178] 17 CFR 21F-9(c).

[179] 17 CFR 21F-12(a)(2).

[180] 17 CFR 21F-10.

[181] 17 CFR 21F-11.

[182] 17 CFR 21F-12.

[183] The Commission anticipates these proposed rule changes would apply only to whistleblower submissions that are made after the effective date of the proposed rules.

which they are seeking awards. Processing these frivolous award applications uses staff resources that could otherwise be devoted to potentially meritorious award applications. Beyond the diversion of staff resources, we have found that, by utilizing the procedural opportunities to object to an award, these repeat applicants can significantly delay the processing of meritorious award applications and the eventual payment of awards.

To prevent these repeat submitters from continuing to abuse the award application process to the detriment of potentially meritorious applicants, we believe that it would be appropriate to adopt a rule that would permit 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.[184] Specifically, under our proposal, if an applicant submits three or more award applications for Commission actions that the Commission finds to be frivolous or lacking a colorable connection between the tip (or tips) and the Commission action, the Commission may permanently bar the applicant from submitting any additional award applications (either for Commission actions or related actions) and the Commission would not consider any other award applications that the claimant has submitted or may seek to submit in the future.[185]

[184] We are relying on our broad rulemaking authority to propose the amendments in this section. As noted earlier, Section 21F(j) of the Exchange Act, 15 U.S.C. 78u-6(j) grants us "the authority to issue such rules and regulations as may be necessary or appropriate to implement" the whistleblower award program. Similarly, Section 23(a)(1) of the Exchange Act, 15 U.S.C. 78w(a)(1), expressly provides the Commission the "power to make such rules and regulations as may be necessary or appropriate to implement the provisions" of the Exchange Act, and has long been understood to provide the Commission with broad authority to issue rules and regulations carrying the force of law.

[185] Under the proposed rule, the Commission would *not* consider any applications made for related actions in assessing whether an applicant has submitted three or more award applications that are frivolous or lack any colorable connection between the tip and the enforcement action. The Commission would assess only applications submitted for Commission actions.

The proposed rule would expressly provide, however, that the Office of the Whistleblower shall as an initial matter (*i.e.*, before any preliminary determination or preliminary summary disposition would be issued) advise any claimant of the Office's assessment that the claimant's award application for a Commission action is frivolous or lacking a colorable connection between the tip and the action for which the individual has sought an award. If the applicant withdraws the application at that time, it would not be considered by the Commission in determining whether to exercise its authority to impose a bar for three or more frivolous applications or applications lacking a colorable connection between the tip and the Commission action for which the award was sought.

In addition, the proposed rule would codify the Commission's current practice with respect to applicants who violate Rule 21F-8(c)(7).[186] That rule provides that an applicant shall be ineligible for an award if, in the whistleblower's submission, his or her other dealings with the Commission, or his or her dealings with another authority in connection with a related action, he or she 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.[187] The Commission has issued two final orders that have permanently barred the applicants from submitting any further whistleblower award applications based on violations of Rule 21F-8(c)(7). The proposed rule would clarify and codify the Commission's authority to bar applicants by providing that if the Commission finds that a claimant has violated paragraph (c)(7) of Rule 21F-8, the Commission may permanently bar the applicant from making any

[186] 17 CFR 240.21F-8(c)(7).

[187] *See* Exchange Act section 21F(i), 15 U.S.C. 78u-6(i).

future award applications, and shall decline to process any other award applications that the claimant has already submitted.

In our view, it is appropriate to assess whether an applicant who engages in egregious behavior vis-à-vis the Commission in violation of Rule 21F-8(c)(7) should be permanently ineligible from obtaining an award. Such egregious conduct can result in the unnecessary and wasteful diversion of staff resources and in extreme cases it may expose investors and the public to potential harm (particularly where the misconduct concerns ongoing Commission law-enforcement actions).[188] Moreover, we believe that this proposed rule could discourage individuals from engaging in the egregious conduct prohibited by Rule 21F-8(c)(7), particularly when they are submitting their award applications, because they should recognize that it may not only lead to a denial of their current award claim but may also permanently disqualify them from obtaining a whistleblower award.

Under the proposed rule, the Commission would consider a permanent bar in the context of processing an award application. We expect that the preliminary determination or preliminary disposition addressing the award application would include a recommendation that the applicant be permanently barred; this should serve to place the applicant on notice that a bar is being considered and afford the applicant an opportunity to advance any arguments in connection with a potential bar before the Commission issues a final order.[189]

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[188] Importantly, the proposed rule would apply to false, fictitious, or fraudulent representations, statements, or documents beyond those made in connection with an award determination. For example, if the Commission finds that an individual knowingly or willfully made a false representation in testimony to the Commission in one matter, the Commission could bar that individual in connection with a whistleblower award submitted by that individual for an entirely separate matter. In this way, we believe that the proposed rule would provide an important additional incentive for individuals to behave truthfully and honestly with the Commission in all aspects of their dealings with the agency.

[189] We do not intend to foreclose the potential that the Commission could impose such a bar in the context of a formal adjudicatory proceeding to which the individual was a respondent if the Enforcement Division made such a

Request for Comment:

27. Is it appropriate for OWB to advise a claimant of the Office's assessment that the claimant's award application for a Commission action is frivolous, and to offer the claimant the opportunity to withdrawal his or her award application(s), such that the application(s) would not be considered by the Commission in determining whether to impose a bar?

28. Is it appropriate for the Commission to adopt a rule that would permanently bar any applicant after he or she has been found by either the Commission to have submitted at least three frivolous award applications? Should the number of frivolous award applications be fewer or greater before a bar would be imposed?

29. Are there any additional procedures, considerations, or limitations that the Commission should consider in connection with the proposed rule change?

H. Proposed Amendments to Rule 21F-9 to provide additional flexibility and clarity regarding Form TCR (and corresponding technical amendments to Rule 21F-10, Rule 21F-11, and Rule 21F-12)[190]

As noted above, Exchange Act Rule 21F-9(a)[191] currently provides that to qualify as a whistleblower an individual may submit information about a possible securities law violation by one of two methods: "(1) Online, through the Commission's website located at www.sec.gov," or "(2) [b]y mailing or faxing a Form TCR (Tip, Complaint or Referral) (17 CFR 249.1800) to the SEC Office of the Whistleblower, 100 F Street NE, Washington, DC 20549-5631, Fax (703) 813-9322." We propose to amend this rule to conform to the proposed amendments to Exchange

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request and the parties litigated it before the Commission.

[190] The Commission anticipates these proposed rule changes, if adopted, would apply only in connection with submissions of information that are made by an individual to qualify as a whistleblower after the effective date of the proposed rules.

[191] 17 CFR 240.21F-9(a).

Act Rule 21F-2 and to clarify that online submissions must be made through the Commission's online TCR portal. Similarly, we propose to revise the rule text to provide the Commission additional discretion in designating where paper Form TCRs may be sent and how whistleblowers may submit information to the Commission to qualify for an award or confidentiality protections.

The revised language in Rule 21F-9(a) would provide that to submit information in a manner that satisfies § 240.21F-2(b) and (c) of the chapter, an individual must submit his or her information to the Commission by either of these methods: (1) Online, through the Commission's website located at www.sec.gov, using the Commission's electronic TCR portal (Tip, Complaint or Referral); (2) by mailing or faxing a Form TCR to the SEC Office of the Whistleblower at the mailing address or fax number identified on the SEC's webpage for making such submissions; or (3) by any other such method that the Commission may expressly designate on its website as a mechanism that satisfies § 240.21F-2(b) and (c).[192] We believe that the clarifications and flexibility afforded by the proposed revisions should help to make the whistleblower program more user-friendly for potential whistleblowers.[193] New paragraph (b)(3) would, among other things, afford the Commission discretion to identify alternative

[192] For purposes of the Exchange Act Rule 21F-12(a)(2), which provides that a "whistleblower's Form TCR" may be included within the administrative record upon which the Commission relies in considering a whistleblower award application, the reference to Form TCR in this rule refers to both the online submission made through the Commission's electronic TCR portal and the paper Form TCR.

[193] The changes that we are proposing to Exchange Act Rule 21F-2, 17 CFR 240.21F-2—specifically the unified definition of "whistleblower" that would apply in the award, employment anti-retaliation, and confidentiality contexts—as well as the amendments that we are proposing to Exchange Act Rule 9(a), 17 CFR 240.21F-9(a), would render inapplicable on a going-forward basis the formal interpretation that the Commission issued in 2015 regarding the meaning of Exchange Act Rule 21F-9. *See* 80 FR 47829, 47830/1, 2015 WL 4710732 (Aug. 10, 2015) ("Rule 21F-9(a) … specif[ies] the reporting procedures that must be followed by an individual who seeks to qualify as a whistleblower under Rule 21F-2(a)….").

mechanisms for submitting information in instances where, for example, the Commission's on-line portal may be unavailable due to a maintenance or replacement.[194]

We are also proposing to add new paragraph (e) to Exchange Act Rule 21F-9 to clarify that the first time an individual provides information to the Commission that the individual will rely upon as a basis for claiming an award, the individual must provide that information in accordance with the procedures specified in Rules 21F-9(a) and (b). If an individual fails to do so, the individual will—subject to the limited exception discussed below—be barred from subsequently resubmitting the same information to the Commission in accordance with Rules 21F-9(a) and (b) and seeking to obtain an award based on that information, even if the individual has previously qualified as a whistleblower under the proposed amendment to Rule 21F-2(a) by submitting the information in some other written form.[195] To date, this has been the approach that the Commission has followed in making award determinations.[196] We believe that the proposed rule language would provide additional clarity to potential whistleblowers to further

[194] We are making a conforming amendment to Exchange Act Rule 21F-9(b), 17 CFR 240-21F-9(b), to make clear that if a whistleblower provides information pursuant to a method permited by proposed section 9(b)(3), the whistleblower must also complete the declaration required by Exchange Act Rule 21F-9(b).

[195] To illustrate the intersection of proposed amended Rule 21F-2(a) and proposed Rule 21F-9(e): An individual who provides the Commission with information about a possible violation of the federal securities laws in writing will qualify as a whistleblower and obtain the retaliation protections provided under Section 21F(h)(1) of the Exchange Act, 15 U.S.C. 78u-6(h)(1). However, to be eligible for an award as to that information, the individual must make the initial submission of that information in accordance with the procedures set forth in Rules 21F-9(a) and (b); *i.e.*, the individual must submit the information on Form TCR or through the Commission's online TCR portal and must execute the required declaration. The individual may remain award-eligible for any new information that is submitted in accordance with the Rule 21F- 9 procedures, but not for the information that was previously submitted without following those procedures.

[196] In a few instances, the Commission has allowed individuals to perfect a defective submission provided that the individual did so promptly and before any significant investigative steps had occurred with respect to the submission. Any opportunity to perfect a defective submission would, under the proposed rule, be governed by the limited exception provided therein (which is generally consistent with the opportunities the Commission has to date provided in allowing individuals to perfect their submissions).

alert them to the importance of following the procedures specified in Rules 21F-9(a) and (b).[197] In proposing this amendment, we observe that compliance with the procedures in Rules 21F-9(a) and (b) advances many programmatic purposes. These include allowing the Commission to promptly determine whether an individual who submits information is subject to heightened whistleblower confidentiality protections; helping the staff efficiently process the information and other documentation provided by the individual and assess its potential credibility; and assisting the Commission in eventually evaluating the individual's potential entitlement to an award.

Proposed paragraph (e) would also incorporate a limited exception that would permit the Commission, in its sole discretion, to make an award to a whistleblower who failed to comply with the procedural requirements of Rules 21F-9(a) and (b) when the individual first provided information to the Commission. The limited exception permitted by paragraph (e) would provide that notwithstanding the foregoing, the Commission, in its sole discretion, may waive an individual's non-compliance with paragraphs (a) and (b) of Rule 21F-9 if the Commission determines that the administrative record clearly and convincingly demonstrates that the individual would otherwise qualify for an award and the individual demonstrates that he or she complied with the requirements of paragraphs (a) and (b) within 30 days of the first

[197] If the proposed amendments in this release are adopted, Exchange Act 21F-9(a) would be revised to provide that to submit information in a manner that satisfies § 240.21F-2(b) and (c) of the chapter an individual must submit his or her information to the Commission by any of these methods: (1) Online, through the Commission's website located at www.sec.gov, using the Commission's electronic TCR portal (Tip, Complaint or Referral); (2) Mailing or faxing a Form TCR to the SEC Office of the Whistleblower at the mailing address or fax number designated on the SEC's webpage for making such submissions; or (3) By any other such method that the Commission may expressly designate on its website as a mechanism that satisfies § 240.21F-2(b) and (c). Based on the proposed modifications to Exchange Act Rule 21F-9(b), it would provide that, further, to be eligible for an award, the individual must declare under penalty of perjury at the time he or she submits the information pursuant to paragraph (a)(1), (2), or (3) of the section that the information is true and correct to the best of his or her knowledge and belief.

communication with the staff about the information that the individual provided.[198] There may be some situations where an individual will have provided information to the Commission about a potential securities law violation but may have failed to perfect his or her submission in accordance with the procedures required to be a whistleblower eligible for an award. For example, an individual may learn about a potential securities law violation that is about to occur and may telephonically inform the staff in an effort to permit the Commission to take action before the violation occurs. Similarly, the Office of the Whistleblower periodically receives letters from individuals seeking to report securities law violations and the Office will generally provide deficiency notices to these individuals to the extent that it appears that these individuals want to become whistleblowers eligible for an award.[199] We believe that, to the extent that the information that any such individual might provide could be the basis for the Commission bringing a successful enforcement action, the Commission should have within its discretion the ability to make an award provided that the individual complies with Rules 21F-9(a) and (b) within 30 days of receiving a deficiency letter (or having any other communication with the staff concerning the information that the individual provided).[200]

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[198] By requiring that the Commission must find that the administrative record "clearly and convincingly" demonstrates that the individual would (but for the untimely compliance with the requirements of Exchange Act Rules 21F-9(a) and (b)) qualify for an award, we mean to make this discretionary mechanism available only in those cases where there can be no serious doubt about the individual's contribution to the successful action and the individual's compliance with the award criteria and eligibility conditions. Otherwise, in determining whether to employ its discretion, the Commission would have to potentially expend considerable staff time and effort carefully developing an administrative record and analyzing whether the applicant would have been a meritorious whistleblower, and only then turn to decide whether to exercise its discretion to waive what is otherwise a threshold procedural requirement.

[199] Individuals do not have an entitlement to a deficiency letter and their failure to receive one will not be deemed a basis to excuse their failure to comply with the terms of Exchange Act Rule 21F-2. It is each individual's own responsibility to comply with the requirements of the Commission's rules with respect to submitting information to qualify for an award.

[200] We believe that using a 30-day time period is sufficient here. We note that in connection with judicial proceedings 30-day filing deadlines are not uncommon—indeed, Congress itself provided only a 30-day window for

Request for Comment:

30. Does proposed Rule 21F-9(a) provide additional clarity and flexibility that may help make the submission of information by potential whistleblowers more user-friendly? Are there any additional factors that the Commission should assess in connection with the proposed rule amendments?

31. Please comment on the limited exception provided for in proposed Rule 9(e) appropriate. Should the exception be adopted? If so, should it be narrowed or broadened? Should the 30-day time period be extended or reduced?

I. Proposed Amendment to Rule 21F-12 regarding the materials that may form the basis of the Commission's award determination[201]

Rule 21F-12[202] lists the materials that the Commission and the Claims Review Staff ("CRS") may rely upon to make a whistleblower award determination. We are proposing to make two clarifying amendments to that rule.

First, Rule 21F-12(a)(3)[203] currently permits the Commission and the CRS to rely upon the whistleblower's Form WB-APP, including attachments, and "any other filings or submissions from the whistleblower in support of the award application." Based on this provision's silence as to the timeliness of such "other filings or submissions," some whistleblower award claimants have submitted hundreds of pages of supplemental information

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unsuccessful whistleblowers to challenge a Commission final order denying their award application, *see* Exchange Act section 21F(f), 15 U.S.C. 78u-6(f)—and that our proposed Rule 21F-18, discussed *infra*, affords a 30-day time period for applicants to respond to preliminary summary dispositions that would be issued under that proposed rule.

[201] The Commission anticipates this proposed rule change, if adopted, would apply only to covered-action and related-action award applications that are connected to a Notice of Covered Action (*see* Exchange Act Rule 21F-10(a), 17 CFR 240.21F-10(a)) posted on or after effective date of the final rules.

[202] 17 CFR 240.21F-12.

[203] 17 CFR 240.21F-12(a)(3).

on an ongoing basis even after expiration of the respective time periods for responding to a Notice of Covered Action or a Preliminary Determination, resulting in significant administrative burdens on the Office of the Whistleblower and potential delays to the whistleblower claims process. We believe that expressly excluding untimely supplemental submissions from consideration by the Commission and the CRS would incentivize applicants to make thorough submissions in the first instance when responding to the Notice of Covered Action and the CRS's Preliminary Determination (or a Preliminary Summary Disposition issued by the Office of the Whistleblower under Proposed Rule 21F-18, discussed *infra*), which should reduce these administrative burdens and the potential for delays to the claims process.

Accordingly, we propose amending Rule 21F-12(a)(3) to clarify that the Commission and the CRS (and the Office of the Whistleblower when processing a claim pursuant to proposed Rule 21F-18) may rely upon materials *timely* submitted by the whistleblower in response either to the Notice of Covered Action, to a request from the Office of the Whistleblower or the Commission, or to the Preliminary Determination. The deadline for filing a claim for a whistleblower award is ninety (90) days after the relevant Notice of Covered Action under Rule 21F-10(a) & (b)[204] and Rule 21F-11(a) & (b).[205] Consistent with Rule 21F-8(b),[206] the Commission may specify a deadline when it requests additional information from the whistleblower in support of an award application. The time frame for responding to the Preliminary Determination is expressly established by Rule 21F-10(e)[207] and Rule 21F-11(e).[208]

[204] 17 CFR 240.21F-10(a) & (b).

[205] 17 CFR 240.21F-11(a) & (b).

[206] 17 CFR 240.21F-8(b).

[207] 17 CFR 240.21F-10(e).

Under our proposal, materials submitted outside those respective time frames would not be considered absent extraordinary circumstances excusing the delay.[209]

Second, we propose amending Rule 21F-12(a)(6),[210] which currently provides in pertinent part that the Commission and the Claims Review Staff in making an award determination may consider any "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." We propose to modify this provision to clarify that it applies only to materials submitted by third parties, because some claimants have misinterpreted it as also encompassing materials submitted by the claimants themselves. Moreover, in light of the modification that we are proposing to Rule 21F-12(a)(3) to require that a claimant make a "timely" submission in response to a Preliminary Determination, we believe that it is important to clarify that Rule 21F-12(a)(6) does not apply to information provided by whistleblowers.

Request for Comment:

32. Does the proposed amendment as to timeliness provide an appropriate safeguard against abusive supplemental filings by whistleblower award claimants?

33. Do the proposed amendments provide sufficient clarity? Is there alternative language that might provide greater clarity about the materials that the Commission and the CRS may rely upon in making an award determination?

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[208] 17 CFR 240.21F-11(e).

[209] *See* Exchange Act Rule 21F-8(a), 17 CFR 240.21F-8(a).

[210] 17 CFR 240.21F-12(a)(6).

J. Proposed Amendment to Rule 21F-13 regarding the administrative record on appeal[211]

Rule 21F-13[212] describes the availability of judicial review and the record on appeal of a whistleblower award determination by the Commission. Rule 21F-13(b) provides that the record on appeal will consist of the Preliminary Determination (or a Preliminary Summary Disposition issued under proposed Rule 21F-18, discussed *infra*), the Final Order of the Commission, "and any other items from those set forth in Rule 21F-12(a) of this chapter that either the claimant or the Commission identifies for inclusion in the record."[213] That provision thus ensures that the record on appeal will include the materials described in Rule 21F-12(a) that were the basis for the Commission's award determination.

Some claimants have interpreted Rule 21F-13(b) as permitting them to designate materials for inclusion in the record on appeal that technically meet the descriptions in Rule 21F-12(a) but that were never actually before the Commission in issuing the Final Order. However, that interpretation creates significant tension with the basic principle of administrative law that, on appeal, "the court's review is limited to the administrative record before the agency at the time of its decision."[214] That interpretation also would inappropriately expand the record on appeal beyond the limits in Rule 16 of the Federal Rules of Appellate Procedure.[215]

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[211] The Commission anticipates this proposed rule change, if adopted, would apply only to covered-action and related action award applications that are connected to a Notice of Covered Action (*see* Exchange Act Rule 21F-10(a), 17 CFR 240.21F-10(a)) posted on or after effective date of the final rules.

[212] 17 CFR 240.21F-13.

[213] 17 CFR 240.21F-13(b).

[214] *EarthReports, Inc. v. FERC*, 828 F.3d 949, 959 (D.C. Cir. 2016).

[215] Rule 16(a) states,

> The record on review or enforcement of an agency order consists of:

As amended, Rule 21F-13(b) would eliminate the designation of items for inclusion in the record on appeal and instead would define the record on appeal in a manner that conforms more closely to Rule 16 of the Federal Rules of Appellate Procedure. Materials designated or submitted by a whistleblower for the first time after the Commission issues its Final Order would not be deemed part of the administrative record.

Under amended Rule 21F-13(b), the record on appeal therefore would include the Final Order of the Commission, any materials that were considered by the Commission in issuing the Final Order, and any materials that were part of the claims process leading from the Notice of Covered Action to the Final Order. In the interest of clarity, Rule 21F-13(b) would specify that this includes, but is not limited to, the materials that are part of the claims process described in Rules 21F-10 and 21F-11 and proposed Rule 21F-18: the Notice of Covered Action, whistleblower award applications filed by the claimant, the Preliminary Determination (or Preliminary Summary Disposition), materials that were considered by the Claims Review Staff in issuing the Preliminary Determination (or by the Office of the Whistleblower in issuing a Preliminary Summary Disposition), and materials that were timely submitted by the claimant in response to the Preliminary Determination (or the Preliminary Summary Disposition). Additional materials not specifically listed in the parenthetical in proposed Rule 21F-13(b) might become part of the claims process and therefore part of the record if, for example, the Office of

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(1) the order involved;

(2) any findings or report *on which it is based*; and

(3) the pleadings, evidence, and other parts of the proceedings *before the agency*.

FED. R. APP. P. 16(a)(1)-(3) (emphases added).

the Whistleblower obtains materials from a third party and provides them to the Commission for its consideration in resolving a whistleblower award application. *See* Rule 21F-12(a)(6).

In addition, we are proposing to amend the second sentence of Rule 21F-13(b) to clarify that the record on appeal would not include any pre-decisional or internal deliberative process materials that are prepared exclusively to assist *either* the Commission *or* the CRS. That provision currently references only the Commission. This change would clarify the Commission's current practice in order to give greater clarity to claimants pursuing appeals.

We also propose adding a third sentence to Rule 21F-13(b) providing that, when more than one claimant applies for an award under a single Notice of Covered Action, the Commission may exclude from the record on appeal any materials that exclusively concern any claimant other than the claimant who brought the appeal, as necessary to comply with the confidentiality protections in Section 21F(h)(2)(A) of the Exchange Act.[216] This sentence would codify the Commission's current practice in order to give greater clarity to claimants pursuing appeals.

Request for Comment:

34. We seek comments about whether the proposed language sufficiently conforms to Rule 16 of the Federal Rules of Appellate Procedure and whether alternative language would provide greater conformity or clarity.

K. Proposed Rule 21F-18 establishing a summary disposition process[217]

Over the course of the years that the Commission has implemented the whistleblower award program, it has become apparent to us that a significant number of award applications may

[216] 15 U.S.C. 78u-6(h)(2)(A).

[217] The Commission anticipates that proposed Rule 21F-18, if adopted, would apply to any whistleblower award application for which the Commission has not yet issued a Preliminary Determination as of the effective date of the proposed rules, as well as to any future award applications that might be filed.

be denied on relatively straightforward grounds because they do not implicate novel or important legal or policy questions. These grounds for denial include, among other things, the fact that the individual did not comply with the form-and-manner requirements as specified in Rule 21F-9 for submitting information to be eligible for an award, or that the information was not used by the staff responsible for investigating, preparing and litigating the covered action and thus the individual's information did not "lead to" the success of the covered action.

In an effort to provide a more timely resolution of relatively straightforward denials, we are proposing a summary disposition process. This process would be in lieu of the claims adjudication processes that are specified in Rule 21F-10 and Rule 21F-11.[218] The principal difference between the proposed summary disposition process and the existing processes specified in Rule 21F-10 and 21F-11 is that for a claim designated for summary disposition the CRS would not be involved in reviewing the record, issuing a Preliminary Determination, considering any written response filed by the claimant, or issuing the Proposed Final Determination; these functions would be assumed by the Office of the Whistleblower in an effort to streamline the Commission's consideration of denials that are relatively straightforward.

The proposed summary disposition process incorporates two other modifications that should help expedite the processing of denials. *First*, the 30-day period for replying to a Preliminary Summary Disposition would be shorter than the 60-day period for replying to a Preliminary Determination provided for by Rule 21F-10(e)(2)[219] and 21F-11(e)(2).[220] We

[218] 17 CFR 240.21F-10; 17 CFR 240.21F-11.

[219] 17 CFR 240.21F-10(e)(2) (providing that if an individual decides to contest the Preliminary Determination, he or she must submit his or her 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 the section, then within sixty (60) calendar days of the Office of the Whistleblower making those materials available for your review.).

[220] 17 CFR 240.21F-11(e)(2). We believe that 30-day response period is sufficient and have considered the fact that

believe that this shorter period should be sufficient for a claimant to reply and that it is appropriate given that the matters subject to summary disposition should be relatively straightforward. *Second*, under the proposed summary disposition process, a claimant would not have the opportunity to receive the full administrative record upon which a Preliminary Denial would have been based. Instead, the Office of the Whistleblower would (to the extent appropriate given the nature of the denial) provide the claimant with a staff declaration that contains the pertinent facts upon which the Preliminary Summary Disposition is based. Given the relatively straightforward nature of the matters that would generally be eligible for summary disposition, we believe that this modification from the record-review process specified in Rules 21F-10 and 21F-11 should still afford any claimant a sufficient opportunity to provide a meaningful reply to a Preliminary Summary Denial. This should eliminate the delay that can arise when a claimant does not expeditiously request the record, thereby helping to further expedite the summary adjudication process.

The proposed summary disposition process would be available for any non-meritorious award application that falls within any of the following five categories: (1) untimely award application;[221] (2) noncompliance with the requirements of Rule 21F-9,[222] which concerns the manner for submitting a tip to be eligible for an award; (3) claimant's information was never provided to or used by the staff handling the covered action or the underlying investigation (or

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judicial proceedings often rely on this same time period for filing responsive materials. *See, e.g.*, FED. R. OF APP. P. 31(a)(1) (establishing a default 30-day time period for an appellee or respondent to file a response brief to the appellant or petitioner's opening brief). *See also* Rule 450(a) of the SEC's Rules of Practice (providing that in adjudicatory proceedings pending before the Commission "[o]pposition briefs shall be filed within 30 days after the date opening briefs are due").

[221] The time periods for submitting an award application are specified in Rule 21F-10(b) and Rule 21F-11(b). *See* 17 CFR 240.21F-10(b) & 240.21F-11(b).

[222] 17 CFR 240.21F-9.

examination), and those staff members otherwise had no contact with the claimant; (4) noncompliance with Rule 21F-8(b),[223] which requires an applicant to submit supplemental information that the Commission may require[224] and to enter into a confidentiality agreement; and (5) failure to specify in the award application the submission that the claimant made pursuant to Rule 21F-9(a)[225] upon which the claim to an award is based. In addition, the proposed rule would provide that other defective or non-meritorious award applications could be subject to the summary disposition process under appropriate circumstances.

Under the proposed summary disposition process, the Office of the Whistleblower would issue a Preliminary Summary Disposition denying an application. This Preliminary Summary Disposition would be in lieu of the Preliminary Determination that the Claims Review Staff would issue under Rule 21F-10 or Rule 21F-11. A claimant would then have a 30-day period to reply with a written response explaining the grounds for contesting the denial. Failure to file a timely written response would constitute a failure to exhaust the administrative process and the Preliminary Summary Disposition would automatically become the final order with respect to that applicant's award claim. If an applicant does file a timely response, the Office of the Whistleblower would consider the full record, including the applicant's response (and any materials the applicant timely submitted therewith), and prepare a Proposed Final Summary Disposition to be provided to the Commission.[226] Similar to the procedure under Rule 21F-10

[223] 17 CFR 240.21F-8(b).

[224] The authority to require additional information of an applicant is delegated to the Office of the Whistleblower. *See* 17 CFR 240.21F-10(d).

[225] 17 CFR 240.21F-9(a).

[226] Although the CRS has to date approved all proposed final orders involving a challenge to a preliminary determination, we do not believe the absence of the CRS's role at the comparable stage of the proposed summary disposition process should have a meaningful impact given the relatively straight-forward nature of the claims that

and 21F-11, the Commission would have thirty (30) days to consider the Proposed Final Summary Disposition; if no Commissioner requests that the full Commission consider the Proposed Final Summary Disposition within the 30-day period, it would become the final order of the Commission. If a Commissioner does request full Commission consideration, the Commission would consider the matter and issue a final order. The Office of the Whistleblower would then notify the claimant of the final order.

If the Commission has received more than one award application for a particular matter, the Office of the Whistleblower could use the summary disposition process for any of those award applications that qualify, even if other of the applications are subjected to the regular consideration processes specified in Rules 21F-10 and 21F-11. Even in the multiple whistleblower context, we believe that there could be efficiencies in summarily considering and disposing of applications that constitute reasonably straightforward denials. For example, this could free up staff resources to concentrate on the meritorious claims or the more difficult determinations. Relatedly, to the extent that a claim is denied under the summary disposition process while other claims may remain pending under the Rule 21F-10 or Rule 21F-11 process, this should allow the summarily denied claimant an earlier ability to exhaust his opportunities for judicial review.[227] This, in turn, may potentially permit the Commission to more promptly pay

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would be processed under the proposed rule. Further, as a matter of agency internal procedure, all proposed final orders are reviewed by the Office of the General Counsel and we anticipate that this review would occur in connection with all Proposed Summary Dispositions issued under this proposed rule, further reducing any potential negative impact from the elimination of the CRS's role.

[227] We note that, the Commission has consistently interpreted Rules 10 and 11 to require that all claims processed under those rules should be addressed in one omnibus final order. The summary disposition process that we are proposing would, we believe, permit a more expeditious adjudication of any relatively straightforward denials that might otherwise have been folded into a final order under Rule 10 or 11.

any meritorious whistleblower on any award that may eventually result from the final order issued under the Rule 21F-10 or Rule 21F-11 process.[228]

Finally, the proposed rule would clarify that Rule 21F-12,[229] which governs the items that may be considered when the Commission entertains an award application under Rule 21F-10 or Rule 21F-11, applies in the context of summary dispositions. Specifically, the proposed rule would state that "[i]n considering an award determination pursuant to this rule, the Office of the Whistleblower and the Commission may rely upon the items specified in [Rule 21F-12(a)]. Further, [Rule 21F-12(b)] applies to summary dispositions."

Request for Comment:

35. We seek comments about the proposed summary disposition process, including whether the categories of award applications that would be eligible for summary disposition are appropriate, whether the proposal would afford claimants sufficient process, and whether there are any specific modifications that we should consider making to the proposed process.

L. Technical Amendment to Rule 21F-4(c)(2)[230]

We propose to amend Rule 21F-4(c)(2)[231] concerning the definition of information that led to a successful enforcement action because it contains an erroneous cross-reference. The

[228] Pursuant to Rule 21F-14(c)(2), 17 CFR 240.21F-14(c)(2), the Commission cannot pay an award to any meritorious whistleblower in a particular matter until the completion of the appeals process for all whistleblower award claims has been exhausted.

[229] 17 CFR 240.21F-12.

[230] The Commission anticipates this proposed rule change, if adopted, would apply to all new whistleblower award applications filed after the effective date of the amended final rules, as well as all whistleblower award applications that are pending and have not yet been the subject of a final order of the Commission by the effective date.

[231] 17 CFR 240.21F-4(c)(2).

reference is intended to be to Rule 21F-4(b)(5) regarding the definition of original source. The rule currently refers to paragraph (b)(4) of the section.

III. Proposed interpretive guidance regarding the meaning and application of "independent analysis" as defined in Exchange Act Rule 21F-4(b)(3)[232]

Two core requirements of the whistleblower award program are: (1) that the whistleblower must have provided "original information" to the Commission; and (2) that such information must have "led to" the successful enforcement of an action. Congress defined "original information" in relevant part as information that is derived from *either* a whistleblower's "independent knowledge" *or* the whistleblower's independent "analysis." This guidance addresses the potential availability of a whistleblower award in cases where information provided by a whistleblower is not based on the whistleblower's "independent knowledge" but, instead, is premised on information derived from the whistleblower's "independent analysis" of publicly available information. Such cases implicate both the scope of the independent analysis prong of the "original information" requirement and what is necessary for independent analysis to "lead to" the successful enforcement of an action.

In formulating our views on how a whistleblower may satisfy the requirement of "original information" through the alternative of "independent analysis," we have considered Congress's and the Commission's determinations to substantially restrict any role for publicly available information in potential whistleblower awards. When the Commission in 2011 adopted the rules implementing the whistleblower program, it explained that paying awards for publicly

[232] 17 CFR 240.21F-4(b)(3). Although we are proposing this interpretive guidance for public comment, the Commission may determine to rely on the principles articulated therein for any whistleblower claims that are currently pending because we believe that this guidance clarifies the existing rules that define and apply the term "independent analysis."

available information was not consistent with Congress's purpose in establishing the program. Specifically, the Commission stated that "Congress primarily intended our 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[.]'"[233] The Commission further acknowledged that Congress sought to make awards available in cases where "highly-probative, expert analysis of data … suggest[s] an important new avenue of inquiry, or otherwise materially advance[s] an existing investigation."[234] But critically, the Commission made clear that, in its view, Congress did not intend to base awards "on information that is available to the general public."[235]

Independent Analysis Standard. Consistent with these understandings of congressional intent and consistent with the Commission's views when it adopted the definition of "original information" in the original whistleblower rulemaking, we are proposing the following standard: In order to qualify as "independent analysis," a whistleblower's submission must provide evaluation, assessment, or insight beyond what would be reasonably apparent to the Commission from publicly available information. In assessing whether this requirement is met, the Commission would determine based on its own review of the relevant facts during the award adjudication process whether the violations could have been inferred from the facts available in public sources. While we recognize that this standard does not constitute a bright line, we believe that it should provide a solid foundation for the Commission to apply when assessing awards involving potential independent analysis.

[233] 76 FR 34300, 34311/3.

[234] *Id.* at 34312/3.

[235] *Id*. at 34311/3. We note that although publicly available information may not serve as the basis for an award, the provision of such information to the Commission can be an important public service.

The Independent Analysis Must "Lead to" the Success of the Enforcement Action. Even when this standard is met, however, a whistleblower's independent analysis must still have "led to" a successful covered enforcement action. This standard requires an assessment of whether the whistleblower's analysis—as distinct from the publicly available information on which the analysis was based—either (1) was a principal motivating factor in the staff's decision to open its investigation, or (2) made a substantial and important contribution to the success of an existing investigation.

In the sections that follow, we explain the relevant background and reasoning for the standards that we have set forth above.

A. Background: "Original Information" and Publicly Available Information

In formulating this guidance, we have considered the *qui tam* provisions of the False Claims Act,[236] the federal government's principal bounty statute and an important forerunner of the Commission's whistleblower award authority.[237] The False Claims Act requires that *qui tam* relators must provide their own, independent information—and not publicly available information—in order to avoid the so-called "public disclosure bar."[238] Specifically, in its present form (and excluding one exception that is not relevant here[239]), the public disclosure bar

[236] 31 U.S.C. 3730.

[237] *See Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 34-63237, 75 FR 70488, 70491 n.14 (Nov. 3, 2010) (noting that cases interpreting the *qui tam* provisions of the False Claims Act can provide helpful guidance in the interpretation of Section 21F, though not necessarily controlling or authoritative in all circumstances).

[238] *See Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 294 (2010) (explaining that, through the public disclosure bar, Congress sought "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own") (*quoting, United States ex rel. Springfield Terminal Railway v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)).

[239] 31 U.S.C. 3730(4)(A).

requires a court to dismiss a *qui tam* action "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed" in certain designated sources.[240]

In Section 21F, Congress similarly limited awards to "original information"—defining the term to require a whistleblower's own, independent information rather than publicly available information.[241] While not taking precisely the same approach as in the False Claims Act, Congress nonetheless required that "original information" for purposes of the Commission's award program must not be exclusively derived from the news media or certain other public sources.[242] Further, Congress affirmatively required that "original information" be derived from a whistleblower's "independent knowledge or analysis."[243] The Senate report issued in

[240] Not all public sources of information implicate the public disclosure bar. The sources specified in the statute are a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or the news media. There is a limited exception for situations where the *qui tam* relator was an original source of the information. 31 U.S.C. 3730(e)(4)(A).

[241] Although the term "original information" does not appear in the False Claims Act, courts have used the term to differentiate a *qui tam* relator's own, independent information upon which an award may be based from information that is available in the designated public sources. *See, e.g.*, *United States ex rel. Colquitt v. Abbott Labs*, 858 F.3d 365, 374-75 (5thCir. 2017); *United States v. Walker*, 438 F. A'ppx 885, 888 (11thCir. 2011); *United States ex rel. JDJ and Associates LLP v. Natixis*, 2017 U.S. Dist. Lexis 164106, *33 (S.D.N.Y. 2017). In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), a seminal False Claims Act case that prompted Congress to enact a forerunner of the public disclosure bar, the Court permitted a *qui tam* suit to proceed where the same defendants had been criminally indicted for the same conduct alleged in the *qui tam* action. In dissent, Justice Jackson termed it a "misuse of the statute" to permit an action where the averments in the complaint substantially copied the indictment and it was not shown that the petitioner "had any original information, that he added anything by investigations of his own, …." 317 U.S. at 558 (Jackson, J., dissenting). "Original information" as a term to describe information upon which an award may be based has been a part of various federal bounty statutes for more than 100 years. *See, e.g.*, *United States v. Simons*, 7 F. 709 (E.D. Mich. 1881) (discussing statute that permitted awards for "original information concerning any fraud upon the customs revenue").

[242] 15 U.S.C. 78u-6(a)(3)(C). These other sources are allegations made in a judicial or administrative hearing, or in a governmental report, hearing, audit, or investigation (unless the whistleblower is a source of the information). Further, we note that both the False Claims Act and the Internal Revenue Service whistleblower statute permit discretionary awards of up to 10% in the event that the government proceeds with a case based principally on public disclosures. *See* 31 U.S.C. 3730(d)(1); 26 U.S.C. 7623(b)(2)(A). Congress did not include any similar discretionary award authority in Section 21F.

[243] 15 U.S.C. 78u-6(a)(3)(A).

connection with Dodd-Frank, which enacted Section 21F,[244] explained Congress's expectation that in order to obtain an award a whistleblower would be required to provide the "critical components" of information that supported an enforcement action beyond any information about the matter that was publicly available.[245]

In promulgating rules to implement the whistleblower program, the Commission further restricted any role for publicly available information in a potential whistleblower award. While Congress had defined "original information" as that which is derived from a whistleblower's "independent knowledge" or "independent analysis," Congress did not define either of these terms. The Commission's definitional rules, however, effectively preclude awards merely for the submission of publicly available information.

First, the Commission excluded publicly available information as a source of a whistleblower's "independent knowledge," which the Commission defined as "factual information in [the whistleblower's possession] that *is not* derived from publicly available sources."[246] At the adopting stage for the whistleblower rules, the Commission considered comments that were critical of this blanket exclusion and that recommended some allowance for particular kinds of public information.[247] The Commission rejected such an approach and chose

[244] Pub. L. 111-203, section 922(a), 124 Stat. 1376, 1841 (July 21, 2010).

[245] *See* S. REP. NO. 111-176 at 111 (2010). The Senate Report stated: "'Original information' is defined as information that is derived from the independent analysis or knowledge of the whistleblower, and is not derived from an allegation in court or government reports, and is not exclusively from news media. In circumstances when bits and pieces of the whistleblower's information were known to the media prior to the emergence of the whistleblower, and that for the purposes of the SEC enforcement the critical components of the information was supplied by the whistleblower, the intent of the Committee is to require the SEC to reward such person(s) in accordance with the degree of assistance that was provided."

[246] 17 CFR 240.21F-4(b)(2) (emphasis added).

[247] For example, one commenter suggested that the Commission should exclude only information from sources such as news media and governmental reports that are specifically set forth in the statute. *See Securities Whistleblower Incentives and Protections*, Release No. 34-64545, 76 FR 34300, 34311/3 (June 13, 2011) (citing comment letter

to adopt the broad exclusion of *any* publicly available information that had been proposed.[248] Moreover, the Commission interpreted "publicly available sources" expansively to include not only sources that are widely disseminated (such as corporate press releases and filings, media reports, and information on the internet), but also 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).[249]

Second, in defining the term "independent analysis," the Commission permitted a whistleblower to employ publicly available information, but required that the whistleblower produce insights that are non-public, providing that independent analysis means an individual's own analysis, whether done alone or in combination with others and analysis means an individual's examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public.[250]

Significantly, the Commission considered—and rejected—a suggestion that the proposed definition of "independent analysis" be revised to permit an award to a whistleblower whose tip brings publicly available information to the staff's attention:

> 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"

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from Taxpayers Against Fraud).

[248] *Id.*

[249] 76 FR 34300, 34311/1.

[250] 17 CFR 240.21F-4(b)(3).

the information. "Independent analysis" requires that the whistleblower bring to the public information some additional evaluation, assessment, or insight.[251]

In setting forth the standard for "independent analysis" in this guidance, we are particularly mindful that the appropriate standard should be sufficiently demanding that it would not undermine the clear exclusion of public information from the definition of "independent knowledge." Any other approach would, in our view, undermine the overall framework that was established by the Commission in 2011 when it adopted the definitions of "independent knowledge" and "independent analysis."

B. "Independent Analysis"

As noted, the Commission defined "analysis" as the whistleblower's "examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public."[252] Thus, if a whistleblower submits publicly available information in a TCR and alleges a fraud or other securities violations on the basis of that information, the Commission must determine whether the whistleblower's "examination and evaluation" of the publicly available information "reveal[ed]" the possible violations.

To "reveal" means to make something known that was previously secret or hidden, or to open something up to view.[253] Accordingly, to be considered "analysis," the whistleblower's

[251] 76 FR 34300, 34305, 34312/3.

[252] 17 CFR 240.21F-4(b)(3).

[253] *See* MERRIAM-WEBSTER DICTIONARY, *available at https://www.merriam-webster.com/dictionary/reveal;* OXFORD ENGLISH DICTIONARY, *available at https://en.oxforddictionaries.com/definition/reveal;* Cambridge Dictionary, *available at http://dictionary.cambridge.org/us/dictionary/english/reveal;* BLACK'S LAW DICTIONARY (10th ed. 2014) (citing "to reveal" as one definition of "disclose"); *see also* 15 U.S.C. 78u-6 (h)(2)(A) (prohibiting the Commission or staff from disclosing information "which could reasonably be expected to *reveal* the identity of a whistleblower….") (emphasis added).

submission must include some insight—beyond the existence of the publicly available information—that is revelatory; that is, the whistleblower's evaluation of the publicly available information should do the work of making known and opening up to view for the Commission the possible securities violations.

As a principal illustration of how to apply our rule on "independent analysis," we look to the model that Congress had before it at the time it enacted the whistleblower program; the work of Harry Markopolos in his efforts to expose Bernard Madoff's Ponzi scheme.[254] Among other things, Markopolos brought to bear his expertise as a certified fraud examiner and his knowledge of the options markets to demonstrate that Madoff's purported investment strategy could not have produced his claimed investment returns.[255] For example, in a 2000 submission, beginning from the premise that Madoff purported to manage between $3 billion and $7 billion in assets pursuant to his "split-strike conversion" strategy, Markopolos explained that the strategy as described in public materials "would require lots of options trading and lots of options in open interest"[256] for hedging purposes. Based upon his calculations of the total value of call option open interest on the Chicago Board Option Exchange and of OEX put option open interest, Markopolos revealed that "'hedging cannot be taking place as described. … [I]f only $3 billion are allocated to this strategy then there still aren't enough options in open interest for this type of

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[254] *See* S. Rep. No. 111-176 at 110 (2010) (citing to Markopolos's testimony).

[255] Markopolos also submitted a large amount of information that likely would have satisfied the "independent knowledge" prong of "original information" under Rule 21F-4(b)(2), 17 CFR 240.21F-4(b)(2). For example, he described his own firm's inability to duplicate Madoff's returns using the same strategy and provided information about Madoff's claims and purported operations that he obtained from speaking with third parties who invested with Madoff. *See Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme*, Report No. OIG-509 (Aug. 31, 2009) ("OIG Report"), Exh. 137, *available at* https://www.sec.gov/news/studies/2009/oig-509/oig-509_exhibits.htm.

[256] OIG Report, Exh. 134.

hedging to occur, since Madoff would be at least 1/3 of the open interest and we know that is not the case.'"[257] Similarly, in a 2005 submission, Markopolos offered a specific mathematical illustration of how he believed the income and protection parts of Madoff's strategy would be expected to function under real-world market conditions, arguing that the income that might be expected from stock dividends and the sale of equity call options offset by the cost of purchasing put options, made Madoff's claimed returns "way too good to be true."[258] In the same submission, Markopolos also calculated that Madoff would have had to account for more than 100% of the total OEX put option open interest in order to hedge his stock holdings as depicted in certain marketing literature.[259]

Markopolos's submissions included information that would qualify as "independent analysis" as defined in our whistleblower rules (and explained further in this guidance) if submitted today. Markopolos's information was "highly-probative,"[260] going beyond the publicly available information itself to "reveal" that Madoff's claimed returns were unachievable under real market conditions. We anticipate that we may find a requisite level of "analysis" in analogous cases where an individual with a high level of specialized training or expertise reviews publicly available information and illuminates for the Commission possible violations that are obscured because of the technical nature of the source material.[261]

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[257] OIG Report at 62, *quoting* Markopolos 2000 submission, Exh. 134.

[258] OIG Report, Exh. 268.

[259] OIG Report, Exh. 268.

[260] 76 FR 34300, 34312/3.

[261] However, we caution that we expect this standard may be particularly demanding for attorneys and accountants who seek whistleblower awards based on their review of publicly available information. As the Enforcement staff is substantially comprised of experienced attorneys and accountants, an outside attorney or accountant would generally be expected to contribute insights or revelations that would not be reasonably evident to an accountant or attorney on the Enforcement staff who reviewed the same publicly available information.

Importantly, this is not to suggest that "independent analysis" is limited to persons with technical expertise or other specialized training. In each case, the touchstone is whether the whistleblower's submission is revelatory in utilizing publicly available information in a way that goes beyond the information itself and affords the Commission with important insights or information about possible violations.

While "independent analysis" is evident in Markopolos's tips, other submissions that utilize publicly available information may not be so clear. However, we believe that case law interpreting the False Claims Act's public disclosure bar generally suggests a helpful framework for distinguishing tips in which the whistleblower's "independent analysis" of publicly available information reveals important information about possible violations beyond the public sources themselves. The public disclosure bar precludes recovery when "substantially the same allegations or transactions" as alleged by the *qui tam* relator were previously disclosed publicly in one of the designated sources. The D.C. Circuit and other federal courts of appeals have held that fraudulent transactions are publicly disclosed—and a *qui tam* suit thus barred—when essential facts that are sufficient to give rise to an inference of fraud are in the public domain.[262] This rule bars *qui tam* suits when publicly disclosed information provides "the government . . . [with] enough information 'to investigate the case and to make a decision whether to prosecute' or . . . 'could at least have alerted law-enforcement authorities to the likelihood of wrongdoing.'"[263] Conversely, where a *qui tam* relator "supplie[s] the missing link between the

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[262] *See, e.g., United States ex rel. Oliver v. Philip Morris USA Inc.*, 826 F.3d 466, 471-73 (D.C. Cir. 2016), *reh. en banc denied*, 2016 U.S. App. Lexis 17161 (D.C. Cir. 2016); *Amphastar Pharmaceuticals Inc. v. Aventis Pharma SA*, 856 F.3d 696, 703 (9thCir. 2017); *Cause of Action v. Chicago Transit Authority*, 815 F.3d 267, 278 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 205 (2016).

[263] *Phillip Morris USA*, 826 F.3d at 472; *see also United States ex rel. Solis v. Millennium Pharms., Inc.*, 885 F.3d 623, 626 (9th Cir. 2018) ("A prior disclosure and an allegation may be substantially similar when the prior public

public information and the alleged fraud," and thereby "'bridge[s] the gap by [his] own efforts and experience,' the public disclosure bar does not apply."[264] In this way, *qui tam* awards are reserved for relators who "'contributed significant independent information' about a possible fraud."[265]

Relying in part on the False Claims Act framework to assist us in formulating a proposed standard for interpreting Exchange Act Rule 21F-4(b)(3), we believe the following is appropriate: A whistleblower's examination and evaluation of publicly available information does not constitute "analysis" if the facts disclosed in the public materials on which the whistleblower relies and in other publicly available information are sufficient to raise an inference of the possible violations alleged in the whistleblower's tip. This is because, where the violations that the whistleblower alleges can be inferred by the Commission from the face of public materials, those violations are not "reveal[ed]" to the Commission by the whistleblower's tip or any purported analysis that the whistleblower has submitted. Rather, in order for a whistleblower to be credited with providing "independent analysis," the whistleblower's examination and evaluation should contribute "significant independent information" that "bridges the gap" between the publicly available information and the possible securities violations.

As noted, "significant independent information" that "bridges the gap" in revealing violations may be found in the application of technical expertise, but this is not required.[266]

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disclosure put the government 'on notice to investigate the fraud before the relator filed his complaint.'").

[264] *United States ex rel. Shea v. Cellco Partnership*, 863 F.3d 923, 935 (D.C. Cir. 2017).

[265] *Id.* at 933 (*quoting United States ex rel. Springfield Terminal Railway v. Quinn*, 14 F.3d 645, 653 (D.C. Cir. 1994)).

[266] For example, non-experts may configure publicly available information in a non-obvious way that reveals

However, we have received tips in which a whistleblower merely offers observations drawn from publicly available information. In these cases, the whistleblower typically directs the staff to publicly available information and states that the information itself suggests a fraud or other violations. Examples would be where the whistleblower points to common hallmarks of fraud on the face of the public materials (*e.g.*, impossibly high, guaranteed investment returns or extravagant claims in press releases) or to public discourse (*e.g.*, discussions on a public message board) in which investors or others are alleging a fraudulent scheme. Further, it would not matter whether the individual relied on only one source (*e.g.*, a single website) to collect the publicly available information that demonstrates the hallmarks of the fraud, or whether the individual relied on a multitude of different publicly available sources to collect the information. These tips generally would not qualify as "independent analysis" under our interpretation because the whistleblower's essential contribution is merely that he or she directed the staff to publicly available information that gives rise to an inference of violations; the whistleblower's tip has not "bridged the gap" between public information that does not itself provide a basis for inferring a possible violation and a conclusion that a violation may have occurred. Further, we believe that this same result would generally obtain whether the whistleblower directs the staff to a single piece of publicly available information or the whistleblower aggregates information from multiple different sources.[267] If the violations can be inferred by the Commission from the

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patterns indicating possible violations that would not be otherwise inferable from the public information or may engage in highly probative calculations or some other meaningful exercise with the information that may demonstrate the possibility of securities violations.

[267] As noted above, we explained in the adopting release for our whistleblower rules that a whistleblower would need to do more than point us to disparate public information in order to provide "independent analysis" within the meaning of our rule. 76 FR 34300, 34305, 34312/3.

available and/or assembled publicly available information, without more, then the whistleblower has not contributed significant independent information that reveals the violations. [268]

Thus, in each case the Commission should consider whether publicly available information (both that supplied by the whistleblower and other public sources) was sufficient to give rise to an inference of the violations alleged by the whistleblower, or whether the whistleblower's examination and evaluation of public source material revealed new, significant, and independent information that "bridged the gap" for the staff in demonstrating the possibility of violations. Moreover, under our rules the whistleblower will be notified of any preliminary determination that his or her tip did not constitute "independent analysis," and will have an opportunity to contest that determination in a written submission to the Commission.[269]

C. Leads to Successful Enforcement

Assuming that a whistleblower's submission meets the threshold requirement that it constitute "independent analysis," for the whistleblower to be eligible for an award the "information that … is derived from the … [whistleblower's] analysis" must also lead to a successful enforcement action. This determination turns "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)."[270] Further, if the staff looks to other information as well in determining to open an investigation, the

[268] The Commission, in its adjudicatory capacity, routinely draws reasonable inferences from facts in the record. *See, e.g.*, SEC Rule of Practice 250, 17 CFR 201.250 (drawing reasonable inferences from factual allegations in deciding dispositive motions). "Drawing inferences from direct and circumstantial evidence is a routine and necessary task of any factfinder. 'The very essence of [the factfinder's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable.'" *Siewe v. Gonzalez*, 480 F.3d 160, 166 (2d Cir. 2007) (*quoting Tennant v. Peoria and Pekin Union Railway*, 321 U.S. 29 (1944)).

[269] *See* 17 CFR 240.21F-10(e).

[270] 76 FR 34300, 34312/3. This would require that the whistleblower's analysis made a substantial and important contribution to the action. *See* Whistleblower Award Proceeding 2016-9, Release No. 34-77833 (May 13, 2016).

Commission will only find that the independent analysis "led to" the success of the enforcement action if the Commission determines that the whistleblower's analysis was a "principal motivating factor" in the staff's decision to open the investigation.[271]

Thus, even an otherwise compelling analysis may not satisfy the "leads to" requirement depending on the nature of other information already in the staff's possession. For example, if the staff has already obtained testimony from insiders describing the facts of a violation, a subsequent whistleblower submission that demonstrates the possibility of the violation through independent analysis of publicly available information would not likely qualify for an award because, against the backdrop of the facts already known to the staff, the whistleblower's analysis would not significantly contribute to the staff's investigation.

Request for Comment:

30. We seek comment on the interpretation of "independent analysis" in light of the background set forth above. Are there additional considerations that the Commission should factor into the interpretation? For example, should the interpretation address more explicitly cases in which an individual selects, compiles, and presents publicly available information in a new way for the staff? If so, how?

31. Should any aspect of the interpretation be codified in rule text? For example, should the Commission adopt rule text that would make clear that for a whistleblower to be credited with providing "original information" through "independent analysis," the whistleblower's examination and evaluation should contribute "significant independent information" that "bridges the gap" between the publicly available information and the possible securities violations?

[271] 75 FR 70488, 70497/2.

IV. Request for comment regarding a potential discretionary award mechanism for Commission actions that do not qualify as covered actions, involve only a *de minimis* collection of monetary sanctions, or are based on publicly available information.

Beyond the specific rule proposals and interpretations expressly advanced above, we invite public comment on whether the Commission could at a future point propose a rule that would permit the Commission on a discretionary basis to pay awards to whistleblowers in Commission enforcement actions that do not result in an order for monetary sanctions that exceeds $1,000,000[272] or enforcement actions where the whistleblower's tip consisted of publicly available information.[273] Similarly, do we have the statutory authority to propose and adopt a rule that would permit the Commission on a discretionary basis to make award payments that are not tied to the monetary payments collected where a meritorious whistleblower has received an award determination in a covered action, but the ordered monetary sanctions cannot be collected or the amount collected would result in a *de minimis* payment? Alternatively, would a legislative change be required for the Commission to establish the type of discretionary award mechanisms described in this section? Moreover, whether by rule or legislative change, would such discretion to make awards in these instances be in the public interest? Please explain the grounds for your views.

V. General Request for Public Comment

We request and encourage any interested person to submit comments on any aspect of the proposed rule amendments, interpretations, or other items specified above. With respect to any

[272] For example, could we propose and adopt a rule that would authorize the Commission on a discretionary basis to utilize the IPF to pay awards to whistleblowers who make significant contributions in Commission Enforcement actions that do not qualify as covered actions for which we can currently pay awards?

[273] These would be situations where, under the existing statute and our current rules, the information provided by the whistleblower would not qualify as information that was derived from the whistleblower's "independent knowledge" or independent analysis," *see* Exchange Act Rule 21F-4(b)(2) & (3), 17 CFR 240.21F-4(b)(2) & (3), and thus would not be "original information" upon which the Commission could base an award, *see* Exchange Act Rule 21F-4(b)(1)(i), 17 CFR 240.21F-4(b)(1)(i).

comments on the economic analysis contained below, we note that such comments would be of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed therein and by alternatives to our proposals where appropriate.

Finally, other than the items specifically identified in this release, persons wishing to comment are expressly advised that the Commission is not proposing any other changes to the whistleblower program rules (*i.e.*, Exchange Act Rules 21F-1 through 21F-17), nor is the Commission otherwise reopening any of those rules for comment.

VI. Paperwork Reduction Act

A. Background

The proposed amendments would affect certain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[274] The Commission is submitting the proposal to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[275] The titles for the affected collections of information are:

"Electronic Data Base Collection System -TCR" (OMB Control No. 3235-0672); and

"Form TCR" and "Form WB-APP" (OMB Control No. 3235-0686).

Currently an applicant seeking to submit information to the Commission in order to qualify as a whistleblower must submit this information by using one of two methods: (1) by providing the information through an online portal on the Commission's website that is designed for receiving electronic submissions, or (2) by submitting the paper Form TCR that was initially adopted by the Commission as part of the original whistleblower rulemaking in 2011.[276] In

[274] 44 U.S.C. 3501 *et seq*.

[275] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[276] *See* Exchange Act Rule 21F-9, 17 CFR 240-21F-9(a).

addition to the paper Form TCR, the Commission also adopted a paper Form WB-APP when it adopted the existing rules for the whistleblower program. Individuals seeking awards must make their award request using Form WB-APP. The hours and costs associated with preparing and submitting information through the online portal and affected forms constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number.

B. Summary of the Proposed Amendments

As described in more detail above, to provide the Commission with the ability to make timely corresponding adjustments to the paper Form TCR when it determines to modify the online portal, the Commission proposes to modify Exchange Act Rule 21F-8[277] by adding a new paragraph (d)(1) providing that the Commission will periodically designate a Form TCR (Tip, Complaint, or Referral) that individuals seeking be eligible for an award through the process identified in § 240.21F-9(a)(2) shall use. In addition, to provide the Commission with greater administrative flexibility to modify Form WB-APP, the Commission proposes to modify Exchange Act Rule 21F-8 by adding a new paragraph (d)(2) providing that the Commission will also periodically designate a Form WB-APP for use by individuals seeking to apply for an award under either § 240.21F-10 or § 240.21F-11.

In connection with these proposed amendments, we propose to reorganize the OMB control numbers and associated burden estimates for the collections of information contained in the Commission's online portal, Form TCR and Form WB-APP. Although the online portal and

[277] 17 CFR 240.21F-8.

Form TCR collect substantially the same type of information—information alleging potential securities law violations—they currently have separate OMB control numbers. In addition, although Form TCR and Form WB-APP collect different types of information, the latter of which collects information from individuals applying for whistleblower awards, these collections of information are currently gathered pursuant to the same OMB control number.

Pursuant to the proposed reorganization, both the online portal and Form TCR would fall under the same OMB control number (No. 3235-0672). The title for this collection of information and the associated burden estimate would be adjusted accordingly to reflect the submission of relevant information through both the online portal and the paper Form TCR (*see* Table 2 of section VI(C)). Form WB-APP would this have its own OMB control number (No. 3235-0686) and the collection of information would be retitled accordingly (*see* Table 2 of section VI(C)).

C. Burden and Cost Estimates Related to the Proposed Amendments

We do not anticipate that the proposed amendments would increase the burden or cost to individuals preparing and submitting the required information through the online portal and affected forms. Although we intend to make certain modifications to Form TCR so that the information elicited by the form is consistent with the information collected through the online portal, we do not believe that these conforming modifications will increase appreciably the burden for individuals completing the form.

We estimate that the combined burden associated with both paper Form TCR and the online complaint form is 9,050 hours annually. We anticipate that the burdens imposed by the online complaint form will vary depending on the complexity of the alleged violations that are the subject of the tip and the amount of information possessed by the individual submitting the tip. We estimate that it takes a complainant, on average, 30 minutes to complete the online

complaint form. Based on an estimate of 16,000 annual responses, we estimate that the annual PRA burden for the online complaint form is 8,000 hours. Although the completion time will depend on the complexity of the alleged violation and the amount of information the whistleblower possesses in support of the allegations, we estimate that it takes a whistleblower, on average, one and one-half hours to complete and submit Form TCR. We estimate that it may take individuals more time to complete Form TCR than the online complaint form because a person will have to hand write in the required information and spend time mailing and faxing the form to the Commission. Based on the receipt of an average of approximately 700 annual Form TCR submissions for the past three fiscal years, the Commission estimates that the annual reporting burden of Form TCR is 1,050 hours.

We estimate that it takes a whistleblower, on average, one hour to complete Form WB-APP, though the completion time depends largely on the complexity of the alleged violation and the amount of information the whistleblower possesses in support of his or her application for an award. Based on the receipt of an average of approximately 110 annual properly filed Form WB-APP submissions for the past six fiscal years,[278] the Commission estimates that the annual reporting burden of Form WB-APP is 110 hours.

We do not believe that the proposed amendments would increase the professional costs associated with preparing and submitting the affected forms. Under the whistleblower rules, an anonymous whistleblower who is seeking an award is required, and a whistleblower whose identity is known may elect, to retain counsel to represent the whistleblower in the whistleblower program. We expect that in most instances the whistleblower's counsel will complete, or assist

[278] This figure does not include Form WB-APP submissions which were facially deficient, subsequently withdrawn or submitted by individuals who have been barred by the Commission from participation in the whistleblower program.

in the completion, of some or all of the required forms on behalf of the whistleblower. However, we expect 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 be paid for the representation through a fixed percentage of any recovery by the whistleblower under the program. Thus, we expect most whistleblowers will not incur any direct out of pocket expenses for attorneys' fees for the completion of the affected forms.

We expect that a very small number of whistleblowers (no more than 5%) enter into hourly fee arrangements with counsel.[279] In those cases, a whistleblower will incur direct expenses for attorneys' fees for the completion of the required forms. To estimate those expenses,[280] we make the following assumptions:

(i) The Commission will continue to receive on average approximately 700 Forms TCR and 110 Forms WB-APP annually;

(ii) Individuals will pay hourly fees to counsel for the submission of approximately 35 Forms TCR and 6 Forms WB-APP annually;[281]

(iii) Counsel retained by whistleblowers pursuant to an hourly fee arrangement will charge on average $400 per hour;[282] and

[279] This estimate is based, in part, on the Commission's belief that most whistleblowers likely will not retain counsel on an hourly basis to assist them in preparing the forms.

[280] Individuals submitting their information in writing who are not seeking to be eligible for the Commission's whistleblower award program are not required to retain an attorney, even if they choose to submit their information anonymously, and thus are not required to use either the Form TCR or the Form WB-APP. As such, for purposes of calculating the estimated costs of the forms, we have only included the potential costs associated with completing and submitting the Form TCR and Form WB-APP.

[281] These amounts are based on the assumption, as noted above, that no more than 5% of all whistleblowers will be represented by counsel pursuant to an hourly fee arrangement.

[282] The Commission uses this hourly billing rate for purposes of estimating the professional costs of other rules, and we believe it is an appropriate billing rate to use in this context, recognizing that some attorneys representing

(iv) Counsel will bill on average: (i) three hours to complete a Form TCR, and (ii) two hours to complete a Form WB-APP.[283]

For purposes of the PRA, we estimate that each year whistleblowers will incur the following total amounts of attorneys' fees in connection with completing Forms TCR and WB-APP: (i) $42,000[284] for the reporting burden of Form TCR; and (ii) $4,800[285] for the reporting burden of Form WB-APP.

The tables below summarize the burden and cost estimates associated with the online portal and affected forms both currently and after the proposed reorganization of the relevant control numbers:

Table 1 of Section VI(C). Current Burden Estimates

Title	OMB Control Number	Burden Hours	Costs
"Electronic Data Base Collection System - TCR"	3235-0672	8,000	$0
"Form TCR" and "Form WB-APP"	3235-0686	1,160	$46,800

Table 2 of Section VI(C). Revised Burden Estimates under the Proposed Reorganization

whistleblowers may not be securities lawyers and may charge different average hourly rates.

[283] 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, we estimate that, on average, counsel will bill a whistleblower three hours for the completion of Form TCR and two hours for completion of Form WB-APP (even though we estimate that a whistleblower acting without counsel will be able to complete the Form TCR in 1.5 hours and Form WB-APP in 1 hour).

[284] 35 x ($400 x 3) = $42,000.

[285] 6 x ($400 x 2) = $4,800.

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

D. Mandatory Collection of Information

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

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

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

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

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

F. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Evaluate the accuracy of our assumptions and estimates of the burden of the proposed collection of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collection of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct their comments to the Office of Management and Budget, Attention: Desk Officer for the U.S. Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy to, Brent J. Fields, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549, with reference to File No. S7-08-17. Requests for materials submitted to OMB by the Commission with regard to the collection of information should be in writing, refer to File No. S7-08-17 and be submitted to the U.S. Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington DC 20549. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this proposed rule. Consequently, a comment to OMB is best assured of having its full effect if the OMB receives it within 30 days of publication.

VII. Economic Analysis

The Commission is sensitive to the economic consequences of its rules, including the benefits, costs, and effects on efficiency, competition, and capital formation. Section 23(a)(2)[286] 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[287] requires the Commission, when engaging in rulemaking

[286] 15 U.S.C. 78w(a)(2).

[287] 15 U.S.C. 78c(f).

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.

The economic analysis in this part focuses on the proposed amendments to Rule 21F-2, Rule 21F-4(d)(3), Rule 21F-6, Rule 21F-3(b)(4), Rule 21F-8, newly proposed Exchange Act Rule 21F-18, and the proposed interpretive guidance. As discussed above, the proposed amendments to Rule 21F-2 are in response to the Supreme Court's recent decision in *Digital Realty Trust, Inc. v. Somers*;[288] proposed Rule 21F-4(d)(3) would allow awards based on non-prosecution agreements or deferred prosecution agreements entered into by the DOJ or state attorneys general, and settlement agreements entered into by the Commission ; proposed Rule 21F-3(b)(4) would eliminate potential double recovery under the current definition of related action; proposed amendments to Rule 21F-6 would allow additional considerations for small and large awards; proposed Rule 21F-8(e) would provide authority to bar applicants from future award applications in certain limited situations; proposed Rule 21F-18 would provide a streamlined award consideration process for certain limited categories of non-meritorious applications; and the proposed interpretive guidance would help clarify the meaning of "independent analysis" as that term is defined in Exchange Act Rule 21F-4 and utilized in the definition of "original information." The other proposed amendments in this release are either procedural, technical in nature or codify existing practice, and therefore we do not expect them to significantly impact efficiency, competition, and capital formation.

Many of the benefits and costs discussed below are difficult to quantify. For example, although the analysis that follows details the specific ways in which we expect the proposed

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[288] 138 S. Ct. 767 (2018).

rules to affect whistleblower incentives, we lack the data necessary to estimate the magnitudes of these effects separately or in the aggregate. Similarly, we do not know the precise cost—in terms of awards paid out of the IPF—of defining a non-prosecution agreement or deferred prosecution agreement entered into by the DOJ or a state attorney general or a settlement agreement entered into by the Commission as an "administrative action" and any money required to be paid thereunder as a "monetary sanction." Moreover, we do not know the funds that might be conserved in the IPF by the avoidance of double recoveries for the same action and the avoidance of large awards that are not reasonably necessary to achieve the goals of the whistleblower program. Therefore, while we have attempted to quantify economic impacts where possible, much of the discussion of economic effects is qualitative in nature.

A. Economic Baseline

To examine the potential economic effects of the amendments, we employ as a baseline the comprehensive set of rules that the Commission adopted in May 2011 to implement the whistleblower program. The baseline also includes: the Supreme Court's recent decision in *Digital Realty Trust, Inc. v. Somers*; a description of whistleblower programs administered by other regulatory authorities; and a discussion of the IPF (including its replenishment mechanism), summary statistics that describe the distribution of awards paid by the whistleblower program under the 2011 rules, and estimates of wages and salaries obtained from a number of surveys.

1. Whistleblower Programs

In this section, we discuss a non-exhaustive list of the various federal and state whistleblower programs that are currently administered by other agencies or authorities and

which might be implicated by the proposed rules.[289] The CFTC administers its own whistleblower award program under section 23 of the Commodity Exchange Act.[290] Both the SEC and CFTC programs were established by the Dodd-Frank Act and are substantially identical in their substantive terms.[291] As discussed above, since the adoption of our whistleblower program rules, two states have adopted their own whistleblower award programs in connection with state securities-law enforcement actions. In 2011, Utah established a whistleblower-award scheme to provide rewards of up to thirty percent of the money collected in state securities-law enforcement actions.[292] The following year, Indiana enacted a whistleblower award scheme to provide rewards up to ten percent of the money collected in a state securities-law enforcement action.[293] We are also aware that DOJ might pursue law-enforcement actions that potentially implicate both the Commission's whistleblower program and the whistleblower award program that the IRS administers.[294] Further, Congress in 2015 established a new motor-vehicle-safety whistleblower award program that allows employees or contractors of a motor-vehicle manufacturer, parts supplier, or dealership who report serious violations of federal vehicle-safety laws to obtain awards of 10 percent to 30 percent of any monetary sanction over $1 million that the Federal Government collects based on that information.[295]

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[289] Although we discuss several federal whistleblower programs that we believe are more likely to be implicated by the proposed rules, there are other federal whistleblower programs that are not discussed but which could potentially be implicated.

[290] 7 U.S.C. 26.

[291] *See* Securities Whistleblower Incentives and Protections Proposing Release, 75 FR at 70490.

[292] Utah Code Annotated 61-1-101 *et seq*.

[293] Indiana Code 23-19-7-1 *et seq*.

[294] 26 U.S.C. 7623.

[295] 49 U.S.C. 30172 (enacted by Section 24352 of the Fixing America's Surface Transportation Act of 2015 (FAST

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

The Supreme Court recently held in *Digital Realty Trust, Inc. v. Somers*,[296] that Section 21F(h)(1) of the Exchange Act unambiguously requires that a person report a possible securities law violation to the Commission in order to qualify for employment retaliation protection, and that the Commission's rule interpreting the retaliation protections in Section 21F more broadly was therefore not entitled to deference.[297] The Court reasoned that the definition of "whistleblower" codified in Section 21F(a)(6) requires such a report to the Commission as a prerequisite for employment retaliation protection, and that this definition is "clear and conclusive."[298] The Court also determined that strict application of the definition's reporting requirement in the employment anti-retaliation context is consistent with Congress's core objective of "'motivat[ing] people who know of securities law violations to tell the SEC.'"[299]

3. IPF and Awards Issued by the SEC Whistleblower Program

In Section 21F(g) of the Exchange Act, Congress established the IPF to provide funding for the payment of whistleblower awards. The IPF has a permanent indefinite appropriation that is available without further appropriation or fiscal year limitation for the purpose of funding awards to whistleblowers (and to fund the Office of Inspector General's Employee Suggestion Program).[300]

Act), Pub. L. 114-94).

[296] 138 S. Ct. 767 (2018).

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

[298] *Id*.

[299] *Id*. at 777 (quoting S. REP. NO. 111-176, at 38 (2010)).

[300] However, the Commission is required to request and obtain an annual apportionment from the Office of Management and Budget to use these funds. *See* SEC Agency Financial Report for 2017 (Nov. 14, 2017), available at https://www.sec.gov/files/sec-2017-agency-financial-report.pdf.

As of the end of Fiscal Year 2017, the balance of the IPF was approximately $322 million.[301] Whenever the reserve in the IPF falls below $300 million, Section 21F(g)(3) requires the Commission to replenish the IPF.[302] In May 2018, the balance of the IPF for the first time fell below the $300 million threshold that triggers the statutory replenishment mechanism[303]; this occurred when the Commission paid $83 million—its largest payout to date on an enforcement action—to three individuals.

From August 2012 through April 2018, the Commission's whistleblower program issued 50 whistleblower awards to 55 individuals (including, as explained above, individuals who acted as joint whistleblowers). [304] Table 1 of Section VII(A)(3) reports the frequency distribution of these awards by award size. Forty-two of these awards were less than $5 million, of which thirty-one awards were less than $2 million. Of the remaining eight awards, five were at least $5 million but less than $30 million and three exceeded $30 million.[305] According to the Office of the Whistleblower, of the 55 individuals who have received awards, approximately 10 percent

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[301] *See* Section II.D, above.

[302] *See* 15 U.S.C. 78u-6(g)(3).

[303] For a description of the IPF's statutory replenishment mechanisms, see Section 21F(g)(3) of the Exchange Act, 15 U.S.C. 78u-6(g)(3).

[304] These totals treat as single awards several cases where whistleblowers' original information led to multiple covered actions that were processed together in one award order recognizing the total contributions of the whistleblower. Similarly, consistent with the approach proposed above governing cases where we grant an award for both a Commission enforcement action and a related action by another agency based on the same information provided by the whistleblower (*see* 17 CFR 240.21F-3(b)), we consider covered-action awards together with their corresponding related-action awards as single whistleblower awards.

[305] One of the three awards that exceeded $30 million was issued in September 2014 in a Commission action and related actions. *See Order Determining Whistleblower Award Claim*, Exchange Act Release No. 34-73174 (Sept. 22, 2014), *available at https://www.sec.gov/rules/other/2014/34-73174.pdf.* The other two awards were issued in March 2018 for $49 and $33 million, respectively, to three individuals (two of whom were acting as joint whistleblowers). *See Order Determining Whistleblower Award Claim*, Exchange Act Release No. 34-82897 (March 19, 2018), *available at, https://www.sec.gov/rules/other/2018/34-82897.pdf.* We note that these three awards alone reduced the balance of the IPF by approximately $112 million.

are high-ranking corporate executives at companies of varying sizes and a large majority of these executives received awards that were under $5 million.

Table 1 of Section VII(A)(3): Frequency distribution of whistleblower awards. We use awards issued to whistleblowers by the SEC Whistleblower Program from August 2012 through April 2018. Number is the number of awards that fall within an award size category. Percent is the number of awards in an award size category as a fraction of the total number of awards.

Award size category	Number	Percent
Less than $2 million	31	62%
At least $2 million but less than $5 million	11	22%
At least $5 million but less than $10 million	2	4%
At least $10 million but less than $15 million	1	2%
At least $15 million but less than $20 million	1	2%
At least $20 million but less than $30 million	1	2%
At least $30 million	3	6%
Total	50	100%

In addition to summarizing the distribution of awards to whistleblowers, we also summarize the distribution of awards by enforcement action. For each enforcement action, we identify all whistleblowers who receive an award for that enforcement action and sum up their awards to arrive at the aggregate award for that enforcement action. Table 2 of section VII(A)(3) indicates that between August 2012 and April 2018, there were 45 enforcement actions for which the Commission issued whistleblower awards.[306] Thirty-seven enforcement actions had awards of less than $5 million, of which twenty-eight awards were less than $2 million. Of the remaining eight actions, six had aggregate awards of at least $5 million but less than $30 million and only two had an aggregate award that exceeded $30 million.

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

Table 2 of Section VII(A)(3): Frequency distribution of awards by enforcement action. We use awards issued to whistleblowers by the SEC Whistleblower Program from August 2012 through April 2018. For each enforcement action, we identify all whistleblowers who receive an award for that enforcement action and sum up their awards to arrive at the aggregate award for that enforcement action. We then plot the distribution of aggregate awards by enforcement action. Number is the number of aggregate awards that fall within an award size category. Percent is the number of aggregate awards in an award size category as a fraction of the total number of awards.

Award size category	Number	Percent
Less than $2 million	28	62%
At least $2 million but less than $5 million	9	20%
At least $5 million but less than $10 million	3	7%
At least $10 million but less than $15 million	2	4%
At least $15 million but less than $20 million	0	0%
At least $20 million but less than $30 million	1	2%
At least $30 million	2	4%
Total	45	100%

4. Estimates of current annual wages

Prospective whistleblowers' annual wages are potentially relevant to various aspects of the proposed rules. Table 3 of Section VII(A)(3) presents, by industry, the pre-tax annual wages per employee ("average wages") estimated by the Bureau of Labor Statistics for 2016.[307] Average wages vary from a low of $22,445 in the leisure and hospitality industry to a high of $98,458 in the information industry.

These averages do not reflect the substantial degree of within-industry wage variation. For example, more senior employees involved in financial activities likely earn higher wages than their more junior counterparts, and staff that supply significant expertise may earn more than those that do not. A survey of 2,499 firms registered with the Commission and included in

[307] Wage data used for calculating the annual wages per employee are derived from the quarterly tax reports submitted to state government workforce agencies by employers, subject to state unemployment insurance laws, and from Federal agencies subject to the Unemployment Compensation for Federal Employees program. Further information is available at https://www.bls.gov/cew/cewbultn16.htm.

the Russell 3000 Index as of May 2017 revealed median total CEO compensation at approximately $3.8 million.[308] A study of the 200 largest pay packages awarded to CEOs at U.S. public companies in fiscal year 2016 revealed that the median pay for this group of CEOs was $16.9 million, while the average pay was $19.7 million.[309] A 2017 report documenting survey responses from 377 financial professionals included average base salaries for senior-level financial executives of between $133,859 and $342,154, depending on title and whether companies are public or private.[310] Notwithstanding the foregoing, we think it is relevant to observe that although the compensation of CEOs and other senior ranking officials provides insights into the wage variation within a particular industry, in our experience a company's workforce typically consists of far more lower-paying positions, relatively speaking. For example, the average base salary for securities professionals working in New York City in 2015 (the last year for which such data is available) was $388,000 and the nominal value of the average annual bonus for that year was approximately $146,200.

[308] *See* "CEO and Executive Compensation Practices: 2017 Edition" (available at: https://www.conference-board.org/publications/publicationdetail.cfm?publicationid=7584).

[309] *See* "Equilar 200: Ranking the Largest CEO Pay Packages" (available at http://www.equilar.com/reports/49-equilar-200-ranking-the-largest-ceo-pay-pakages-2017.html) for a summary of the study and its findings. See "Equilar 200: The Largest CEO Pay Packages of 2016" (available at http://www.equilar.com/reports/49-table-equilar-200-ranking-largest-ceo-pay-packages.html) for the ranking of CEOs by their pay packages. See "How the C.E.O. Rankings Were Done" (https://www.nytimes.com/2017/05/26/business/how-the-ceo-rankings-were-done.html) for a discussion of the study's methodology.

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

Table 3 of Section VII(A)(3): 2016 annual wages per employee by industry. This table presents the pre-tax annual wages per employee at privately owned establishments aggregated by industry as reported by the Bureau of Labor Statistics.

Industry	Annual wages per employee ($)
Natural resources and mining	56,115
Construction	58,647
Manufacturing	64,870
Trade, transportation, and utilities	44,764
Information	98,458
Financial activities	88,841
Professional and business services	69,992
Education and health services	48,058
Leisure and hospitality	22,445
Other services	35,921
Unclassified	51,837

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

In this section, we discuss the potential benefits, costs, and economic effects of the proposed rules. For proposed Rule 21F-6(c), we also discuss alternatives to the approach contemplated in the proposed rule as well as reasons for rejecting those alternatives.

1. Proposed amendments to Rule 21F-2

Most of the proposed amendments to Rule 21F-2 are either in response to the Supreme Court's decision in *Digital Realty Trust, Inc. v. Somers*[311] or do not differ substantively from current rules and practice. Two proposed amendments, however, do represent changes relative to the economic baseline, and their potential benefits, costs, and economic effects are discussed here. Proposed Rule 21F-2(a)(1) would extend employment retaliation protection only to an individual who provides the Commission with information "in writing." Proposed Rule 21F-2(d)(1)(iii) would, among other things, limit employment retaliation protection to lawful acts that

[311] 138 S. Ct. 767 (2018).

"relate to the subject matter" of the person's submission to the Commission under proposed Rule 21F-2(a).

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

Proposed Rule 21F-2(a)(1) could potentially impose a burden on those individuals who want to report potential violations to the Commission and wish to qualify as a "whistleblower" solely for employment retaliation protection. Such individuals might decide not to report to the Commission if the reporting burden is perceived to outweigh the benefits associated with retaliation protection. Our experience to date in the awards context suggests that requiring that information be provided in writing presents, at most, a minimal burden to individuals who want to report violations to the Commission. To the extent that this experience is informative about the reporting burden in the retaliation context, such a burden would also be, at most, minimal. Accordingly, the proposed rule would likely not have an adverse impact on the whistleblowing incentives of those individuals who wish to qualify as a "whistleblower" solely for employment retaliation protection.

We have considered several alternatives to the approach contemplated in proposed Rule 21F-2(a). The first alternative is to require information to be provided to the Commission through the online portal at http://www.sec.gov, or mailing or faxing a Form TCR to the Office of the Whistleblower. The second alternative is to permit additional manners of reporting for anti-retaliation purposes (such as placing a telephone call).

We rejected the first alternative because it would, in our view, unnecessarily limit the means of reporting to the Commission by individuals who are merely seeking employment retaliation protection. Limiting whistleblower status to those individuals who follow the first alternative could result in the unnecessary exclusion of individuals from the benefits of Section

21F(h)(2)'s employment retaliation protections without providing any accompanying benefit to the Commission, whistleblowers, or the public generally. Further, requiring individuals to report "in writing" could potentially impose lower costs (including time spent) on these individuals than the costs they would have borne under the first alternative.

We rejected the second alternative because of potential costs that could arise if the Commission's staff became ensnared by disputes in private anti-retaliation lawsuits over what information was provided to whom on what dates. Requiring that any reporting be done in writing obviates these potential costs.

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

Proposed Rule 21F-2(d)(1)(iii) helps avoid the result that an individual could qualify just once as a whistleblower and then receive lifetime protection for any non-Commission reports described in clause (iii) of Section 21F(h)(1)(A). For individuals who want to make non-Commission reports about potential violations to their employers and desire employment retaliation protection for such lawful acts, the proposed rule could increase the incentives of these individuals to instead report directly to the Commission. These individuals would only qualify for employment retaliation protection if they report to the Commission under the proposed rule. Reporting to the Commission "in writing" as contemplated under proposed Rule 21F-2(a) could potentially impose a burden on these individuals. In light of the analysis of proposed Rule 21F-2(a)(1) *supra*, we believe that such a reporting burden would, at most, be minimal and would likely not limit the reporting incentives afforded by proposed Rule 21F-2(d)(1)(iii).

2. Proposed Rule 21F-3(b)(4)

Proposed Rule 21F-3(b)(4) would provide that a law-enforcement action will not qualify as a related action if the Commission determines that there is a separate whistleblower award scheme that more appropriately applies to the enforcement action. Further, proposed Rule 21F-3(b)(4) would provide that the Commission will not make an award to the whistleblower for the related action if the whistleblower has already been granted an award by the authority responsible for administering the more applicable whistleblower award program. Further, under proposed Rule 21F-3(b)(4), if the whistleblower was denied an award by the other award program, the whistleblower would not be permitted to readjudicate any issues before the Commission that the authority responsible for administering the other whistleblower award program resolved as part of the award denial.

The proposed rule would prevent a whistleblower from adjudicating his or her contributions in separate forums and potentially obtaining two separate awards on the same enforcement action. While the existing rules preclude this result when an action is applicable to both the Commission's whistleblower program and the CFTC's whistleblower program,[312] the existing rules do not expressly preclude this result when the non-SEC whistleblower program is administered by an authority other than the CFTC. Thus, the proposed rule would help the Commission avoid paying awards that are not reasonably necessary in light of the whistleblower program's goals in cases where an action is applicable to the Commission's whistleblower program and the whistleblower program of an authority other than the CFTC.

The proposed rule would likely not have an adverse impact on the incentives of individuals who may report violations that result in enforcement actions potentially implicating both the Commission's whistleblower program and the whistleblower program of another

[312] *See* 17 CFR 240.21F-3(b)(3).

authority other than the CFTC. As discussed earlier in Section II(C), to date, the Commission has never paid an award on a matter where a second whistleblower program also potentially applied to the same matter, nor has the Commission ever indicated that it would do so. Given that the proposed rule codifies the Commission's current practice, we believe that these potential whistleblowers would have already taken such current practice into account when deliberating on whether to report.

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

Proposed Rule 21F-4(d)(3) would provide that, for purposes of making a whistleblower award, a non-prosecution agreement or deferred prosecution agreement entered into by the DOJ or a state attorney general in a criminal case, or a settlement agreement entered into by the Commission outside of the context of a judicial or administrative proceeding to address violations of the securities laws will be deemed to be an "administrative action" and any money required to be paid thereunder will be deemed a "monetary sanction." The proposed rule will result in more awards being paid from the IPF because awards would be paid for non-prosecution and deferred prosecution agreements entered into by the U.S. Department of Justice or a state attorney general as well as settlement agreements entered into by the Commission in addition to judicial or administrative proceedings covered by the existing rules. While potentially increasing payouts from the IPF, the proposed rule should enhance the incentives for whistleblowers to come forward in a timely manner to the extent that it signals to prospective whistleblowers that a wider array of enforcement resolutions may result in awards.

4. Proposed Rule 21F-6(c)

Proposed Rule 21F-6(c) would provide a mechanism for the Commission to adjust upwards any awards that would potentially be below $2 million to a single whistleblower.

However, this new authority would come with important limitations. Specifically, the Commission will not adjust an award upward if any of the negative award factors that are identified in Exchange Act Rule 21F-6(b)[313] were found to be present with respect to the whistleblower's award claim, or if the award claim triggers Exchange Act Rule 21F-16 (concerning awards to whistleblowers who engage in culpable conduct).[314]

The proposed rule could enhance the whistleblowing incentives of those individuals who anticipate receiving awards below $2 million and do not expect to be subject to any of the above conditions that would preclude an application of the award enhancement mechanism. The prospect of a larger award could encourage these individuals to report violations to the Commission. By withholding the upward adjustment if a whistleblower unreasonably delayed reporting to the Commission after learning the relevant facts, the proposed rule could increase whistleblowing incentives by encouraging individuals to report violations promptly and thereby facilitate the Commission's ability to protect investors.

The proposed rule could have a deterrent effect on potential violators because these individuals understand that they would lose the opportunity for an award enhancement if they engage in securities law violations and subsequently act as whistleblowers of those violations. Similarly, the proposed rule could have a deterrent effect on potential whistleblowers who contemplated interfering with an internal compliance and reporting system by denying award enhancements to such potential whistleblowers.

From a cost perspective, the proposed rule could potentially result in larger awards being paid from the IPF because an award that would yield a potential payout to a single whistleblower

[313] 17 CFR 240.21F-6(b).

[314] 17 CFR 240.21F-16.

below $2 million may be adjusted upward. As indicated in Table 1 of Section VII(A)(3), the Commission has granted 31 whistleblower awards (*i.e.*, 62% of awards) that were below $2 million. To the extent that the distribution of past awards provides a reasonable estimate of the distribution of likely future awards, smaller awards are likely in the future, some of which could be subject to the proposed rule.

5. Proposed Rule 21F-6(d)

a. Consideration of proposed rule

Proposed Rule 21F-6(d) would provide a mechanism for the Commission to conduct an enhanced review of awards where the total monetary sanctions collected in the Commission or related actions would equal at least $100 million and where the potential payout to a single whistleblower in connection with those actions would exceed $30 million. Where these two conditions are met, the proposed rule would afford the Commission the discretion to determine if it is appropriate to adjust the award downward. The goal of any downward adjustment is to ensure that the likely total award payout to the whistleblower does not exceed an amount that the Commission determines is appropriate to achieve the program's objectives of rewarding meritorious whistleblowers and sufficiently incentivizing future whistleblowers. However, consistent with the statutory mandate, in no event would the total amount awarded to all whistleblowers in the aggregate be less than 10 percent of the monetary sanctions collected from the action. Further, an application of the proposed rule would not result in a reduction of an award below $30 million. We believe that the proposed rule could foster a more efficient use of the IPF by reducing the likelihood of awards that are excessive in light of the whistleblower program's goals and the interests of investors and the broad public interest. As indicated in Table 1 of Section VII(A)(3), we have granted three whistleblower awards that exceeded $30

million. These three awards alone reduced the balance of the IPF by approximately $112 million. To the extent that the distribution of past awards provides a reasonable estimate of the distribution of likely future awards, large awards are likely in the future, some of which could be subject to the proposed rule. Absent the proposed rule, the Commission may find itself faced with the possibility of paying out significantly large awards that are in excess of the amounts appropriate to advance the goals of the whistleblower program, the interests of investors and the broad public interest. These awards could also substantially diminish the IPF, requiring the Commission to direct more funds to replenish the IPF rather than directing those funds to the United States Treasury where they could be used for other important public purposes.[315]

As whistleblowers consider their reporting decisions, they weigh, among other things, the expected size of the award and the expected costs associated with their whistleblowing. We acknowledge that proposed paragraph 6(d) could shift the upper end of the distribution of expected awards. However, we recognize that realized awards to date are typically substantially smaller in magnitude. In addition, according to the Office of the Whistleblower, of the 55 individuals who have received awards, approximately 10 percent are high-ranking corporate executives at companies of varying sizes and a large majority of these executives received awards that were under $5 million. This indicates to us that, as a practical matter, even those whistleblowers with the most to lose in terms of potential income have been willing to come forward for a recovery below the proposed $30 million floor. Thus, the data available does not indicate that proposed paragraph 6(d) would discourage whistleblowers from coming forward.

Additional factors further support the view that potential whistleblowers will not be discouraged from coming forward as a result of proposed paragraph 6(d). As discussed earlier,

[315] *See* Section VII(A)(3) for a discussion of the IPF and its replenishment mechanism.

$30 million would be a floor, not a ceiling on large awards. Rather, $30 million is the point above which we would begin to consider whether the likely award is consistent with the program's objectives; we may choose not to reduce the award.

Further, the operation of proposed paragraph 6(d) would likely affect only a small subset of potential whistleblowers. As discussed in Section VII(A)(3) above, to date we have issued 50 whistleblower awards to 55 individuals (including, as explained above, individuals who acted as joint whistleblowers) and only three awards (*i.e.*, 6% of awards) have exceeded $30 million.[316] To the extent that the distribution of past awards provides a reasonable estimate of the distribution of likely future awards, and potential whistleblowers do not systematically over- or underestimate the size of recoveries,[317] only a minority of potential whistleblowers would be potentially affected by the proposed rule.[318]

Additionally, our review of the academic literature relevant to whistleblower incentives indicates that whistleblowers are often willing to report notwithstanding the absence of financial incentives. Non-monetary incentives that can motivate individuals to report include: (i) a desire to see wrongdoers punished, (ii) an interest in ''doing the right thing'' for the sake of investors or

[316] One award that exceeded $30 million was issued in September 2014 in a Commission action and related actions. *See Order Determining Whistleblower Award Claim,* Exchange Act Release No. 34-73174 (Sept. 22, 2014), *available at https://www.sec.gov/rules/other/2014/34-73174.pdf.* The second and third awards that exceeded $30 million were issued in March 2018 in a Commission action. *See Order Determining Whistleblower Award Claim,* Exchange Act Release No. 34-82897 (March 19, 2018), *available at https://www.sec.gov/rules/other/2018/34-82897.pdf.*

[317] The proposed rule could affect a larger subset of potential whistleblowers if potential whistleblowers systematically overestimate the size of the recovery; conversely, the proposed rule could affect a smaller subset of potential whistleblowers if potential whistleblowers systematically underestimate the size of the recovery.

[318] We acknowledge that there are other pending awards that could exceed the $30 million floor. We do not discuss those matters here because they have not been finalized, but we note that such awards would still constitute a relatively small proportion of the overall future potential awards that the Commission is likely to make.

others who might be harmed by the wrongdoing, or (iii) a desire to protect one's own self-interests.[319]

Moreover, even at the $30 million floor that we are proposing, it appears to us that a $30 million award could yield a lump sum that, if invested in an annuity, could generate an annual return that is attractive in light of the wage and salary data presented in Section VII(A)(4).[320] A number of non-mutually exclusive factors can contribute to making the lump sum smaller than the whistleblower award. *First*, to the extent that the whistleblower wishes to remain anonymous through the course of an investigation and resulting enforcement action, that whistleblower must have an attorney represent him or her in connection with a submission of information and claim for an award.[321] The payment of attorney fees out of the whistleblower award would likely reduce the lump sum that could be invested in an annuity. *Second*, if the whistleblower award is awarded to two or more individuals who acted together as a joint whistleblower, then the award would likely be divided among the individual whistleblowers. Such a division of the award among the individual whistleblowers would reduce the lump sum that each individual could invest in an annuity.

To illustrate the annual income that a whistleblower could potentially receive by investing the lump sum residual award that remains after accounting for the factors discussed

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[319] *See* Anthony Heyes & Sandeep Kapur, *An Economic Model of Whistleblower Policy*, 25 J. L. Econ. & Org. 164-166 (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. 1834, 1835 (2010) (listing self-preservation, justice, integrity, altruism or public safety as primary motivations for *qui tam* lawsuits). *See* Securities Whistleblower Incentives and Protections, Exchange Act Release No. 64545, 76 FR at 34360, note 453 (June 13, 2011).

[320] We note that the annual incomes presented below are pre-tax numbers, as are the wage and salary data presented in Section VII(A)(4).

[321] *See* 17 CFR 240.21F-7(b)(1).

above, we annuitize a range of possible lump sums to generate different streams of payments. Such payments could potentially replace the stream of wage payments that a whistleblower would lose by leaving his or her employer. Alternatively, if the whistleblower experiences no change in his or her employment situation, the payments could be interpreted as additional income.

In Table 4 in Section VII(B)(5)(a), we report the annual income that could be generated over twenty years by investing a lump sum upfront payment in a twenty-year annuity.[322] To capture the potential effects associated with taxes, attorneys' fees, and award division among individuals acting as a joint whistleblower, we calculate different annual incomes by varying the upfront payment from $5 million to $50 million in $5 million increments, and by varying the rate of return on the annuity from 2% per annum to 10% per annum in 2% increments. As an example, investing an upfront amount of $20 million in the annuity at 2% per annum generates an annual income of approximately $1.2 million.[323] Table 4 indicates that increasing the upfront payment while holding the rate of return constant increases the annual income; in addition, increasing the rate of return while holding the upfront payment constant also increases the annual income. To illustrate the effects of lengthening the duration of income generation, we repeat the calculations assuming a lump sum investment in a forty-year annuity (Table 5 in Section

[322] The other assumptions used in the calculations are: a fixed income is paid at the end of every month; monthly compounding of interest; there is no residual income at the end of the annuity; the annuity has 12 x 20 = 240 monthly payments; income is pre-tax; annual income is 12 multiplied by the monthly income generated by the annuity (*e.g.*, for an upfront payment of $20 million and a 2% rate of return per annum, the annuity generates a monthly income of $101,176.67. Multiplying $101,176.67 by 12 yields the $1,214,120 figure reported in the table.) These assumptions notwithstanding, we note that only a portion of the fixed income generated by a purchased commercial annuity is taxable under IRS rules. *See* Internal Revenue Service Publication 939, General Rule for Pensions and Annuities available at https://www.irs.gov/pub/irs-pdf/p939.pdf.

[323] *Id*.

VII(B)(5)(a)), a sixty-year annuity (Table 6 in Section VII(B)(5)(a)), and a perpetuity[324] (Table 7 in Section VII(B)(5)(a)). In Tables 5, 6, and 7, we continue to calculate different annual incomes by varying the upfront payment from $5 million to $50 million in $5 million increments, and by varying the rate of return on the annuity from 2% per annum to 10% per annum in 2% increments.[325]

[324] A perpetuity is a stream of fixed, periodic payments that go on indefinitely.

[325] The other assumptions used in Table 6-8 are: a fixed income is paid at the end of every month; monthly compounding of interest; there is no residual income at the end of the annuity; the annuity has monthly payments; income is pre-tax; annual income is 12 multiplied by the monthly income generated by the annuity. These assumptions notwithstanding, we note that only a portion of the fixed income generated by a purchased commercial annuity is taxable under IRS rules. *See* Internal Revenue Service Publication 939, General Rule for Pensions and Annuities available at https://www.irs.gov/pub/irs-pdf/p939.pdf.

Table 4 in Section VII(B)(5)(a): Annual income generated by a twenty year annuity. We assume that a lump sum upfront payment is invested in a twenty-year annuity to generate annual income over twenty years. We calculate different annual incomes by varying the upfront payment from $5 million to $50 million in $5 million increments, and by varying the rate of return on the annuity from 2% per annum to 10% per annum in 2% increments.

	Rate of return				
	2%	4%	6%	8%	10%
Upfront payment					
$5,000,000	$303,530	$363,588	$429,859	$501,864	$579,013
$10,000,000	$607,060	$727,176	$859,717	$1,003,728	$1,158,026
$15,000,000	$910,590	$1,090,765	$1,289,576	$1,505,592	$1,737,039
$20,000,000	$1,214,120	$1,454,353	$1,719,435	$2,007,456	$2,316,052
$25,000,000	$1,517,650	$1,817,941	$2,149,293	$2,509,320	$2,895,065
$30,000,000	$1,821,180	$2,181,529	$2,579,152	$3,011,184	$3,474,078
$35,000,000	$2,124,710	$2,545,117	$3,009,010	$3,513,048	$4,053,091
$40,000,000	$2,428,240	$2,908,706	$3,438,869	$4,014,912	$4,632,104
$45,000,000	$2,731,770	$3,272,294	$3,868,728	$4,516,776	$5,211,117
$50,000,000	$3,035,300	$3,635,882	$4,298,586	$5,018,640	$5,790,130

Table 5 in Section VII(B)(5)(a): Annual income generated by a forty year annuity. We assume that a lump sum upfront payment is invested in a forty-year annuity to generate annual income over forty years. We calculate different annual incomes by varying the upfront payment from $5 million to $50 million in $5 million increments, and by varying the rate of return on the annuity from 2% per annum to 10% per annum in 2% increments.

	Rate of return				
	2%	4%	6%	8%	10%
Upfront payment					
$5,000,000	$181,695	$250,763	$330,128	$417,187	$509,488
$10,000,000	$363,391	$501,526	$660,256	$834,374	$1,018,975
$15,000,000	$545,086	$752,289	$990,385	$1,251,561	$1,528,463
$20,000,000	$726,782	$1,003,052	$1,320,513	$1,668,748	$2,037,950
$25,000,000	$908,477	$1,253,815	$1,650,641	$2,085,935	$2,547,438
$30,000,000	$1,090,172	$1,504,578	$1,980,769	$2,503,122	$3,056,925
$35,000,000	$1,271,868	$1,755,342	$2,310,897	$2,920,309	$3,566,413
$40,000,000	$1,453,563	$2,006,105	$2,641,025	$3,337,496	$4,075,900
$45,000,000	$1,635,258	$2,256,868	$2,971,154	$3,754,683	$4,585,388
$50,000,000	$1,816,954	$2,507,631	$3,301,282	$4,171,870	$5,094,875

Table 6 in Section VII(B)(5)(a): Annual income generated by a sixty year annuity. We assume that a lump sum upfront payment is invested in a sixty-year annuity to generate annual income over sixty years. We calculate different annual incomes by varying the upfront payment from $5 million to $50 million in $5 million increments, and by varying the rate of return on the annuity from 2% per annum to 10% per annum in 2% increments.

	Rate of return				
	2%	4%	6%	8%	10%
Upfront payment					
$5,000,000	$143,163	$220,042	$308,505	$403,373	$501,274
$10,000,000	$286,326	$440,083	$617,011	$806,746	$1,002,548
$15,000,000	$429,489	$660,125	$925,516	$1,210,119	$1,503,821
$20,000,000	$572,652	$880,166	$1,234,022	$1,613,492	$2,005,095
$25,000,000	$715,815	$1,100,208	$1,542,527	$2,016,865	$2,506,369
$30,000,000	$858,978	$1,320,249	$1,851,033	$2,420,238	$3,007,643
$35,000,000	$1,002,141	$1,540,291	$2,159,538	$2,823,611	$3,508,917
$40,000,000	$1,145,304	$1,760,332	$2,468,044	$3,226,984	$4,010,191
$45,000,000	$1,288,466	$1,980,374	$2,776,549	$3,630,357	$4,511,464
$50,000,000	$1,431,629	$2,200,415	$3,085,055	$4,033,730	$5,012,738

Table 7 in Section VII(B)(5)(a): Annual income generated from a perpetuity. We assume that a lump sum upfront payment is invested in a perpetuity to generate annual income in perpetuity. We calculate different annual incomes by varying the upfront payment from $5 million to $50 million in $5 million increments, and by varying the rate of return on the annuity from 2% per annum to 10% per annum in 2% increments.

	Rate of return				
	2%	4%	6%	8%	10%
Upfront payment					
$5,000,000	$100,000	$200,000	$300,000	$400,000	$500,000
$10,000,000	$200,000	$400,000	$600,000	$800,000	$1,000,000
$15,000,000	$300,000	$600,000	$900,000	$1,200,000	$1,500,000
$20,000,000	$400,000	$800,000	$1,200,000	$1,600,000	$2,000,000
$25,000,000	$500,000	$1,000,000	$1,500,000	$2,000,000	$2,500,000
$30,000,000	$600,000	$1,200,000	$1,800,000	$2,400,000	$3,000,000
$35,000,000	$700,000	$1,400,000	$2,100,000	$2,800,000	$3,500,000
$40,000,000	$800,000	$1,600,000	$2,400,000	$3,200,000	$4,000,000
$45,000,000	$900,000	$1,800,000	$2,700,000	$3,600,000	$4,500,000
$50,000,000	$1,000,000	$2,000,000	$3,000,000	$4,000,000	$5,000,000

The annuity figures in Tables 4 through 7 in Section VII(B)(5)(a) are consistent with our belief that the proposed $30 million floor should not negatively impact the overall pecuniary incentives faced by most potential whistleblowers considering whether to come forward to the Commission to report potential misconduct.[326]

In addition, to the extent that the costs associated with whistleblowing include social stigma and a possible job loss for the whistleblower, the employment anti-retaliation protections and confidentiality requirements (including, critically, the ability of whistleblowers to remain anonymous) can serve to reduce the costs associated with whistleblowing to some extent.[327] Indeed, our experience to date has been that many company insiders have submitted their tips to the Commission anonymously.

b. Estimating Incentives to Provide Information

The Commission has sought to provide a quantitative estimate of the incentives to provide information via the whistleblower program. We acknowledge that a rigorous approach to analyzing the potential impact of the proposed changes on whistleblower incentives, would be to compare the number of whistleblower tips that resulted in successful enforcement actions before and after the establishment of the Commission's whistleblower program. Such a comparison could elucidate changes in behavior due to the whistleblower program, including potentially those due to the provision of monetary awards. However, data on whistleblower tips that led to successful enforcement actions prior to the establishment of the Commission's whistleblower program is not available, thus rendering such a comparison infeasible. Even

[326] It is possible that the proposed rule could introduce uncertainty or ambiguity about the likely size of the whistleblower award, which may affect the incentives of individuals to report potential violations. *See e.g.* Itzhak Gilboa & David Schmeidler, Maxmin Expected Utility with Non-Unique Prior, 18 J. Mathematical Econ. 141 (1989) (proposing an axiomatic foundation of a decision rule based on maximizing expected minimum payoff of a strategy). *See also infra* note 330

[327] *See* 15 U.S.C. 78u-6(d) and (h); 17 CFR 240.21F-9(c).

absent such data, the Commission has engaged in a limited comparison of a pre-2011 awards program with the current whistleblower program. Section 21A(e) of the Exchange Act, added in 1988, authorized the Commission to award a bounty to a person who provides information leading to the recovery of a civil penalty from an insider trader, from a person who tipped information to an insider traders, or from a person who directly or indirectly controlled an insider trader. Section 21A(e) also established a limit on bounties of 10% of the amount recovered.

A March 2010 report by the SEC's Office of the Inspector General documented bounty applications and awards under the Commission's bounty program since its inception in 1989.[328] Between 1989 and 2010, the program had paid a total of $159,537 to five claimants in seven insider trading cases, at the statutory limit of 10% of recoveries.[329] In contrast, since the inception of the whistleblower program in 2011 the Commission has ordered a single whistleblower payout related to an insider trading case, and that payout was less than $500,000.

Any comparison of the bounty program and the whistleblower program is limited by substantial differences between the bounty program and the whistleblower program in scope and process. Although the number of payments in insider trading cases has declined under the current program, the larger scope and breadth of the whistleblower program has resulted in a substantial increase in the number and magnitude of payments overall. Differences in measures of whistleblower incentives before and after the establishment of the whistleblower program likely will reflect a combination of changes to Commission processes that occurred simultaneously or very close in time, limiting our ability to identify the impact of any single change on whistleblower incentives. For example, while the 2011 rules implemented an increase

[328] *See* U.S. Securities and Exchange Commission, Office of the Inspector General, *Assessment of the SEC's Bounty Program*, March 29, 2010.

[329] *Id* at 5.

in the maximum award percentage to 30% from the previous 10% maximum, they also established a 10% minimum award percentage.[330] Further, the 2011 rules also increased the scope of potential claims to include actions beyond insider trading and established an Office of the Whistleblower, actions that likely served to increase the prominence of the whistleblower program relative to the bounty program that preceded it. The implementing rules also set forth an updated process for the submission and evaluation of claims following criticisms that the bounty program was opaque and difficult for whistleblowers to navigate. Further, the statutory changes to the Exchange Act that established the whistleblower program also included explicit whistleblower protections. As we acknowledge that these factors limit the degree to which we can assess the potential impact on incentives of the proposed changes to the whistleblower program based on the transition from the bounty program to the whistleblower program, the Commission welcomes comment on changes to other whistleblower programs or alternative analytical methods that would permit more precise identification and quantification of the proposal's potential impacts.

c. Alternatives

The Commission has considered several alternatives to proposed Rule 21F-6(d). We discuss each of those alternatives below.

The first alternative is to set the floor at $5 million, and the second alternative is to set the floor at $50 million.

We believe that a $5 million floor could potentially apply to awards that are not the focus of the proposed amendment. As indicated in Table 1 of Section VII(A)(3), approximately 16%

[330] *See* S. REP. NO. 111-176 at 110-12 (2010) at 111 (noting the majority view that "the critical component of the Whistleblower Program is the minimum that any individual could look towards in determining whether to take the enormous risk of blowing the whistle in calling attention to fraud").

of past whistleblower awards are at least $5 million. To the extent that the distribution of past awards is a reasonable estimate of the distribution of likely future awards, this floor could result in the enhanced review of awards that are aligned with the program's goals. Because the focus of the proposed rule is on large awards that are not reasonably necessary to achieve the program's goals and that could disproportionately diminish the IPF, the $5 million floor is not preferable to the proposed approach.

A $50 million floor is not preferable to the proposed approach. We have not granted awards that are at least $50 million. Even if there were some cases where the proposed rule might be triggered, our discretion to make a meaningful and appropriate downward adjustment would be substantially reduced. Thus, the $50 million floor would likely not support the proposed rule's goal of ensuring that the likely total award payout to the whistleblower does not exceed an amount that the Commission determines is appropriate to further the goals of the whistleblower program. Because of this concern, we believe that the $50 million floor is not preferable to the proposed approach.

6. Proposed Rule 21F-8(e)

Under proposed Rule 21F-8(e), if an applicant submits three or more award applications that the Commission finds to be frivolous or lacking a colorable connection between the tip and the Commission action, the Commission may permanently bar the applicant from submitting any additional award applications (either for Commission actions or related actions) and the Commission would not consider any other award applications that the claimant has submitted or may seek to submit in the future.

The proposed rule would expressly provide, however, that the Office of the Whistleblower shall as a preliminary matter advise any claimant of the Office's assessment that

the claimant's award application for a Commission action is frivolous or lacking a colorable connection between the tip and the action for which the applicant has sought an award. If the applicant withdraws the application at that time, it would not be considered by the Commission in determining whether to exercise its authority to impose a bar.

In addition, the proposed rule would generally codify the Commission's current practice with respect to applicants who violate Rule 21F-8(c)(7).[331] That rule provides that an applicant shall be ineligible for an award if, in his or her whistleblower submission, his or her other dealings with the Commission, or his or her dealings with another authority in connection with a related action, the individual 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 with intent to mislead or otherwise hinder the Commission or another authority. The Commission has issued two final orders that have permanently barred the applicants from submitting any further whistleblower award applications based on violations of Rule 21F-8(c)(7). The proposed rule would clarify and codify the Commission's authority to bar applicants by providing that if the Commission finds that a claimant has violated paragraph (c)(7) of Rule 21F-8, the Commission may permanently bar the applicant from making any future award applications, and shall decline to process any other award applications that the claimant has already submitted.

The proposed rule could increase the speed and efficiency of the award determination process.[332] By permanently barring applicants that make three or more frivolous award

[331] 17 CFR 240.21F-8(c)(7).

[332] We acknowledge that this potential benefit rests, in part, on the premise that the applicants covered by the proposed rule would likely not change their behavior with respect to the overall award determination process. For example, an applicant that has been found to submit multiple frivolous award applications in the past would likely

applications, as well as not processing any future applications from these barred applicants, the proposed rule could help free up staff resources that could then be devoted to processing potentially meritorious award applications. In the Commission's experience to date, two individuals have submitted approximately 24% of all award applications in connection with Commission covered actions. All but one of the applications submitted by these two individuals have been found by the Office of the Whistleblower to be entirely frivolous. To the extent that the agency's historical experience is informative about the likely behavior of applicants that submit multiple frivolous award applications in the future, the proposed rule would have a meaningful impact in terms of freeing up staff resources that could then be devoted to processing potentially meritorious award applications. This redeployment of staff resources in turn could expedite the processing of potentially meritorious award applications. More broadly, staff resources that are freed up as a result of the proposed rule could be devoted to other work related to the whistleblower program including, but not limited to, the posting of Notices of Covered Actions, determining potential payouts, and manning the whistleblower hotline.[333] Further, as discussed in Section II(F), *above*, we have found that the repeat applicants that would be covered by proposed Rule 21F-8(e)(1) can significantly delay the processing of meritorious award applications and the eventual payment of awards by utilizing the procedural opportunities to object to an award. By barring such applicants, the proposed rule could reduce the delay in processing meritorious award applications and the eventual payment of awards.

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continue to do so in the future.

[333] To help promote the SEC's whistleblower program and establish a line of communication with the public, the Office of the Whistleblower operates a hotline where whistleblowers, their attorneys, or other members of the public with questions about the program may call to speak to the Office of the Whistleblower's staff. During FY 2017, the Office of the Whistleblower returned nearly 3,200 calls from members of the public, exceeding the number of calls returned the prior fiscal year. Since May 2011 when the hotline was established, the Office of the Whistleblower has returned over 18,600 calls from the public. *See* SEC Whistleblower Program 2017 Annual Report to Congress (Nov. 15, 2017), available at https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf.

The abovementioned benefit would also potentially arise from the proposed rule's deterrent effect to the extent that the proposed rule discourages individuals from submitting frivolous award applications because they recognize that the submission of frivolous award applications may ultimately permanently disqualify them from obtaining a whistleblower award.

Overall, the proposed rule could increase the speed and efficiency of the award determination process by expediting the processing of potentially meritorious award applications, as well as the payment of awards. To the extent that faster award application processing and award payment motivate whistleblowing, individuals are more likely to come forward and report potential violations as a result of the proposed rule.

The proposed rule could help protect investors and the public from potential harm (particularly where the misconduct concerns ongoing Commission actions) that may flow from the provision of false, fictitious, or fraudulent statement or representation, or false writing or document with intent of misleading or otherwise hindering the Commission or another authority. This benefit would potentially arise because the proposed rule would grant the Commission discretion to permanently bar applicants that violated Rule 21F-8(c)(7) from submitting any future award applications.[334] This benefit would also potentially arise from the proposed rule's deterrent effect to the extent that the proposed rule discourages individuals from engaging in the conduct prohibited by Rule 21F-8(c)(7), particularly when they are submitting their award applications, because they should recognize that it may not only lead to a denial of their current award claim but may also permanently disqualify them from obtaining a whistleblower award.

Individuals who are permanently barred under the proposed rule might subsequently have information about possible securities law violations that could be provided to the Commission.

[334] *See supra* text accompanying notes 184-189, 331.

To the extent that these barred individuals' decision to report is based solely on the pecuniary motivation of obtaining a whistleblowing award, these individuals may decide not to report even if they have information about possible violations because they can no longer obtain a whistleblower award as a result of the proposed rule. We believe that this potential cost of the proposed rule could be mitigated by a number of factors.

First, the number of individuals who may be permanently barred by the proposed rule for submitting three or more frivolous applications and who might subsequently have information about possible securities law violations that could be provided to the Commission is likely to be a small fraction of the population of award applicants. Based on our experience to date, we have found that individuals that submitted three or more award applications make up 6.6% of the population of covered action award applicants. This estimate constitutes an upper bound of the actual fraction of applicants that submitted three or more frivolous applications and subsequently had information about possible securities law violations that could be provided to the Commission.[335] To the extent that our estimate is informative of the likely fraction of award applicants who may be permanently barred by the proposed rule, the potential cost associated with the proposed rule would be limited.

Second, as discussed above, the Commission has issued two final orders that have permanently barred the applicants from submitting any further whistleblower award applications based on violations of Rule 21F-8(c)(7). The proposed rule would clarify and codify the Commission's authority to bar applicants by providing that if the Commission finds that a claimant has violated paragraph (c)(7) of Rule 21F-8, the Commission may permanently bar the

[335] To date, four applicants submitted three or more applications that were determined to be potentially meritorious and not frivolous.

applicant from making any future award applications, and shall decline to process any other award applications that the claimant has already submitted. Given that the proposed rule codifies the Commission's current practice, we believe that individuals who have been barred on the basis of Rule 21F-8(c)(7) would have already taken such current practice into account when deliberating on whether to report, even in the absence of the proposed rule.

Finally, as discussed in the adopting release that accompanied the original whistleblower rules, whistleblowing is an individual decision that is generally guided by a complex mix of pecuniary elements and non-pecuniary elements.[336] Individuals that are permanently barred from applying for whistleblower awards may still come forward and provide information about possible violations if they are sufficiently motivated by non-pecuniary elements.[337]

We also acknowledge the possibility that individuals who have made fewer than three frivolous award applications[338] might be discouraged from reporting possible securities law violations because their next award application could be determined to be frivolous, which would increase the likelihood of a permanent bar from making any future award applications. We believe that this potential cost of the proposed rule could be mitigated by a number of factors.

First, as discussed above, the proposed rule would expressly provide that the Office of the Whistleblower shall as a preliminary matter advise any claimant of the Office's assessment that the claimant's award application for a Commission action is frivolous or lacking a colorable connection between the tip and the action for which the applicant has sought an award. If the applicant withdraws the application at that time, it would not be considered by the Commission

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

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

[338] These individuals include those who are considering reporting a possible violation for the first time, those who have made one frivolous claim, and those who have made two frivolous claims.

in determining whether to exercise its authority to impose a bar. We believe that this aspect of the proposed rule should alleviate the concerns among those individuals who have made fewer than three frivolous award applications that their next award application could be determined to be frivolous, which would increase the likelihood of a permanent bar from making any future award applications. *Second*, the claims adjudication processes that are specified in Rule 21F-10 and Rule 21F-11 afford a whistleblower the opportunity to demonstrate the meritorious nature of her claim should her claim be preliminarily denied on the grounds of being frivolous. Thus, the claims adjudication processes should help ensure that potentially meritorious claims will be considered as such by the Commission. *Third*, as discussed above, whistleblowing is an individual decision that is generally guided by a complex mix of pecuniary elements and non-pecuniary elements.[339] Individuals who are concerned about being permanently barred from applying for whistleblower awards may still come forward and provide information about possible violations if they are sufficiently motivated by non-pecuniary elements.[340]

7. Proposed Rule 21F-18

Proposed Rule 21F-18(a) provides that the Office of the Whistleblower may use a summary disposition process to deny any award application that falls within any of the following categories: (1) untimely award application;[341] (2) noncompliance with the requirements of Rule 21F-9,[342] which concerns the manner for submitting a tip to qualify as a whistleblower and to be eligible for an award; (3) claimant's information was never provided to or used by the staff

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

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

[341] The time periods for submitting an award application are specified in Rule 21F-10(b) and Rule 21F-11(b). *See* 17 CFR 240.21F-10(b) & 11(b).

[342] 17 CFR 240.21F-9.

handling the covered action or the underlying investigation (or examination), and those staff members otherwise had no contact with the claimant; (4) noncompliance with Rule 21F-8(b),[343] which requires an applicant to submit supplemental information that the Commission may require[344] and to enter into a confidentiality agreement; or (5) failure to specify in the award application the submission that the claimant made pursuant to Rule 21F-9(a)[345] upon which the claim to an award is based. In addition, the proposed rule would provide that other defective or non-meritorious award applications could be subject to the summary disposition process under appropriate circumstances. Proposed Rule 21F-18(b) specifies the procedures that shall apply to any award application designated for summary disposition.

The proposed rule could reduce the diversion of staff resources and time that it might otherwise take to process claims that may be rejected on straightforward grounds. An award application that is processed by the proposed summary disposition process would not require the Claims Review Staff to review the record, issue a Preliminary Determination, consider any written response filed by the claimant, or issue the Proposed Final Determination; these functions would be assumed by the Office of the Whistleblower. The summary disposition process incorporates two other modifications. *First*, the 30-day period for replying to a Preliminary Summary Disposition is shorter than the time period for replying to a Preliminary Determination provided for in Rules 21F-10(e)(2)[346] and 21F-11(e)(2).[347] This shorter period should be

[343] 17 CFR 240.21F-8(b).

[344] The authority to require additional information of an applicant is delegated to the Office of the Whistleblower. *See* 17 CFR 240.21F-10(d).

[345] 17 CFR 240.21F-9(a).

[346] 17 CFR 240.21F-10(e)(2).

[347] 17 CFR 240.21F-11(e)(2).

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

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

We acknowledge the potential that certain aspects of the proposed rule might make it more difficult for whistleblowers to respond to the denial of award applications. The proposed rule might reduce the whistleblowing incentives of those individuals who consider the ease of

responding to award application denials when deciding whether to come forward and report potential violations.

However, certain factors limit this potential for increased difficulties for whistleblowers. *First*, given that the matters subject to summary disposition should be relatively straightforward, we believe that the 30-day period for replying to a Preliminary Summary Disposition and the provision of a staff declaration (where applicable) should afford any claimant a sufficient opportunity to provide a meaningful reply to a Preliminary Summary Disposition. *Second*, as discussed above, the proposed rule may only be used to deny award applications that fall under certain restricted categories. *Third*, as discussed in the adopting release that accompanied the original whistleblower rules, whistleblowing is an individual decision that is generally guided by a complex mix of pecuniary elements and non-pecuniary elements.[348] Individuals who may be concerned with the ease of responding to award application denials may still come forward and provide information about possible violations if they are sufficiently motivated by non-pecuniary elements.

8. Proposed interpretive guidance regarding the meaning and application of "independent analysis" as defined in Exchange Act Rule 21F-4(b)(3) [349]

The proposed interpretive guidance helps to clarify the meaning of "independent analysis" as that term is defined in Exchange Act Rule 21F-4 and utilized in the definition of "original information." As discussed earlier, a whistleblower's examination and evaluation of publicly available information does not constitute "analysis" if the facts disclosed in the public materials on which the whistleblower relies and in other publicly available information are

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

[349] 17 CFR 240.21F-4(b)(3).

sufficient to raise an inference of the possible violations alleged in the whistleblower's tip. In order for a whistleblower to be credited with "analysis," the whistleblower's examination and evaluation should contribute "significant independent information" that "bridges the gap" between the publicly available information and the possible securities violations. Assuming that a whistleblower's submission meets the threshold requirement that it constitutes "independent analysis," for the whistleblower to be eligible for an award the "information that … is derived from the … [whistleblower's] analysis" must also be of such high quality that it leads to a successful enforcement action.

The interpretive guidance could potentially reduce the whistleblowing incentives of those individuals who wish to satisfy the "independent analysis" prong of the "original information" requirement by examining publicly available information and providing observations that do not go beyond the information itself and reasonable inferences to be drawn therefrom. In light of the interpretive guidance, these individuals may decide not to provide such public information knowing that such information would not be credited as "independent analysis" and therefore not eligible for a whistleblower award. To the extent that the provision of public information improves Commission enforcement or otherwise provides a benefit, any potential reduction in such provision would be a cost associated with the interpretive guidance. Nevertheless, individuals who are aware that public information would not be credited with "independent analysis" may still come forward and provide public information to the Commission if they are sufficiently motivated by non-pecuniary elements.

The interpretive guidance could increase the whistleblowing incentives of those individuals who possess "significant independent information" that "bridges the gap" between the publicly available information (and reasonable inferences therefrom) and the conclusion that

possible securities violations are indicated, but may decide against reporting to the Commission because they do not fully understand the meaning of "independent analysis" in the absence of the interpretive guidance. To the extent that these individuals come forward and report such significant independent information to the Commission in light of the interpretive guidance, the quantity and quality of reported information might increase, which in turn might improve the Commission's ability to enforce Federal securities laws, detect violations and deter potential future violations. Further, the clarification afforded by the interpretive guidance might also reduce the number of award applications that are made solely on the basis of the provision of public information and do not meet the "independent analysis" threshold. To the extent that the number of such claims declines as a result of the interpretive guidance, staff resources could be freed up and devoted to processing potentially meritorious award applications and other work related to the whistleblower program as discussed earlier.[350]

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

As discussed earlier, the Commission is sensitive to the economic consequences of its rules, including the benefits, costs, and effects on efficiency, competition, and capital formation. The Commission believes that the proposed amendments will make incremental changes to its whistleblower program. Thus, the Commission does not anticipate the effects on efficiency, competition, and capital formation to be significant.

The proposed rules could have a positive indirect impact on investment efficiency and capital formation by increasing the incentives of potential whistleblowers to provide information

[350] *See supra* Sections VII(B)(6) and VII(B)(7).

on possible violations.[351] Providing such information could increase the effectiveness of the Commission's enforcement activities More effective enforcement could lead to earlier detection of violations and increased deterrence of potential future violations, which should assist in a more efficient allocation of investment funds. Serious securities frauds, for example, can cause inefficiencies in the economy by diverting investment funds from more legitimate, productive uses.[352]

Additionally, to the extent that the proposed rules increase deterrence of potential future violations, investors' trust in the securities markets would also increase. This increased investor trust will promote lower capital costs as more investment funds enter the market, and as investors generally demand a lower risk premium due to a reduced likelihood of securities fraud.[353] This, too, should promote the efficient allocation of capital formation.

At the same time, some proposed rules could reduce whistleblowing incentives in certain cases, although any such reduction in whistleblowing incentives—to the extent that it occurs—is justified in light of the positive indirect impact on investment efficiency and capital formation discussed earlier. Proposed Rule 21F-6(d) could reduce the whistleblowing incentives of those potential whistleblowers who anticipate receiving awards in excess of $30 million and make their reporting decision by trading off the expected size of the award against the expected costs

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

[352] *See* Securities Whistleblower Incentives and Protections Adopting Release, 76 FR at 34362.

[353] *See id*. note 466, which explains the link between investor trust in the fairness of the market and capital cost ("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."). *See also* Ko, K.. Jeremy, "Economics Note: Investor Confidence", October 2017, available at https://www.sec.gov/files/investor_confidence_noteOct2017.pdf.

associated with whistleblowing.[354] Proposed Rule 21F-8(e) might reduce the whistleblowing incentives of (i) those individuals who are permanently barred under the proposed rule from submitting award applications and (ii) those individuals who have made fewer than three frivolous award applications. Proposed Rule 21F-18 might reduce the whistleblowing incentives of those individuals who consider the ease of responding to award application denials when deciding whether to come forward and report potential violations. The interpretive guidance might reduce the whistleblowing incentives of those individuals who wish to rely on the provision of solely public information to satisfy the "independent analysis" prong of the "original information" requirement for a whistleblower award. These potential reductions in whistleblowing incentives may be limited for reasons discussed earlier.[355] Further, we reiterate our belief that any such reduction in whistleblowing incentives–to the extent that is occurs–is justified in light of the positive impact on investment efficiency and capital formation discussed earlier.

The proposed rules that provide the Commission with additional considerations for awards may have opposite, albeit indirect, impacts on investment efficiency and capital formation by potentially altering the level of monetary incentives that whistleblower would expect at different recovery levels. On one hand, proposed Rule 21F-6(d) could reduce the whistleblowing incentives of those individuals who anticipate receiving awards in excess of $30 million by reducing their anticipated award to an amount of $30 million or greater; on the other hand proposed Rule 21F-6(c) could enhance the whistleblowing incentives of those individuals

[354] *See supra* SectionVII(B)(4).

[355] *See supra* Sections VII(B)(4), VII(B)(6), VII(B)(7), and VII(B)(8).

who anticipate receiving awards below $2 million by increasing their anticipated award to an amount of up to $2 million.

The proposed rules could also improve other forms of efficiency. Proposed Rule 21F-3(b)(4) and proposed Rule 21F-6(d) could foster a more efficient use of the IPF by avoiding awards that are not reasonably necessary in light of the whistleblower program's goals and the interests of investors and the broad public interest. Further, certain proposed rules could promote efficiency in the processing of award applications. By permanently barring applicants that make frivolous or fraudulent award applications, proposed Rule 21F-8(e) could help free up staff resources that could be used to expedite the processing of potentially meritorious award applications as well as the payment of awards. Staff resources that are freed up as a result of proposed Rule 21F-18 could also expedite the processing of potentially meritorious award applications. As discussed in Sections VII(B)(6) and VII(B)(7) above, to the extent that faster award application processing and award payment motivate whistleblowing, individuals are more likely to come forward and report potential violations as a result of proposed Rule 21F-8(e) and proposed Rule 21F-18. To the extent that the proposed rules promote the timely reporting of possible violations by increasing whistleblowing incentives and prevent the provision of false, fictitious, or fraudulent statement or representation, or a false writing or document with intent of misleading or otherwise hindering the Commission or another authority,[356] the efficiency in detecting violations would be enhanced in the sense that violations could be detected sooner, reducing losses associated with the misuse of resources. Greater efficiency in detecting violations could also speed up the public disclosure of such violations to securities markets.

[356] *See supra* Section VII(B)(6).

Price efficiency could be improved if earlier public disclosure of violations speeds up the incorporation of such news into security prices.

Similar to the effects on capital formation, the effects of the proposed rules on competition would be indirect, and would flow from their effects on whistleblowing incentives. To the extent that the proposed rules increase the likelihood of detecting misconduct by increasing whistleblowing incentives, the proposed rules could reduce the unfair competitive advantages that some companies can achieve by engaging in undetected violations.[357] Conversely, to the extent that the proposed rules decrease the likelihood of detecting misconduct by reducing whistleblowing incentives, the proposed rules could increase the unfair competitive advantages that some companies can achieve by engaging in undetected violations.

Request for Comment:

The Commission seeks commenters' views on all aspects of its economic analysis of the proposed amendments. In particular, the Commission asks commenters to consider the following questions:

1. Are there costs and benefits associated with the proposed amendments that the Commission has not identified? If so, please identify them and if possible, offer ways of estimating these costs and benefits.
2. Do, and if so at what point, awards become unreasonably large in light of the goals of the whistleblower program? Please explain and provide details.
3. Are there effects on efficiency, competition, and capital formation stemming from the proposed amendments that the Commission has not identified? If so, please identify them and explain how the identified effects result from one or more amendments.

[357] *See* 76 FR at 34362.

4. How will lowering award amounts based on dollar figures impact the incentives of whistleblowers to provide the Commission with information on misconduct? Will potential whistleblowers view the $30 million floor as a cap? Why or why not?
5. Are there data sources or data sets that can help the Commission refine its estimates of the lost wages earned by whistleblowers from their previous jobs? Besides lost wages, are there other ways to determine the effectiveness of whistleblower awards?
6. Are there alternatives to the proposed rules that the Commission has not identified? If so, please identify and describe them.

IX. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),[358] the Commission solicits data to determine whether the proposed rule amendments constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

Commenters should provide empirical data on (a) the potential annual effect on the economy; (b) any increase in costs or prices for consumers or individual industries; and (c) any potential effect on competition, investment or innovation.

[358] Pub. L. 104-121, tit. II, 110 Stat 857 (1996).

X. Regulatory Flexibility Act Certification

Section 603(a) of the Regulatory Flexibility Act[359] requires the Commission to undertake an initial regulatory flexibility analysis of the proposed rules unless the Commission certifies that the proposed rules, if adopted, would not have a significant economic impact on a substantial number of small entities.[360]

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

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

Solicitation of Comments: We encourage the submission of comments with respect to any aspect of this Regulatory Flexibility Act Certification. To the extent that commenters believe that the proposed rules might have a covered impact, we ask they describe the nature of any impact and provide empirical data supporting the extent of the impact. We will place any such comments in the same public file as comments on the proposed amendments themselves.

[359] 5 U.S.C. 603(a).

[360] 5 U.S.C. 605(b).

XI. Statutory Basis and Text of Proposed Amendments

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

List of Subjects in 17 CFR Parts 240 and 249

Securities, Whistleblowing.

Text of the Proposed Amendments

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

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

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

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78*o*, 78*o*-4, 78*o*-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 et seq.; and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1887 (2010); and secs. 503 and 602, Pub. L. 112-106, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

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

* * * * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Section 240.21F-3 is amended by:

a. Revising paragraph (b)(1); and

b. Adding paragraph (b)(4).

The revision and addition read as follows:

§ 240.21F-3 Payment of awards.

* * * * *

(b) * * *

(1)(i) A *related action* is a judicial or administrative action that is brought by one of the entities listed in paragraphs (b)(1)(i)(A) through (D) of this section, that is based upon information that either the whistleblower provided directly to the entity or the Commission itself passed along to the other entity pursuant to the Commission's procedures for sharing information, and which is the same original information that the whistleblower voluntarily provided to the Commission and that led the Commission to obtain monetary sanctions totaling more than $1,000,000.

(A) The Attorney General of the United States;

(B) An appropriate regulatory authority;

(C) A self-regulatory organization; or

(D) A state attorney general in a criminal case.

(ii) The terms *appropriate regulatory authority* and *self-regulatory organization* are defined in § 240.21F-4.

* * * * *

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

(ii) In determining whether a potential related action has a more direct or relevant connection to the Commission's whistleblower program than another award program, the

Commission will consider the nature, scope, and impact of the misconduct charged in the potential related action, and its relationship to the federal securities laws. This inquiry may include consideration of, among other things:

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

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

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

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

4. Section 240.21F-4 is amended by:

a. Revising paragraph (c)(2);

b. In paragraph (d)(2), removing the period from the end of the paragraph and adding in it place "; and";

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

d. Revising paragraph (e).

The revisions and addition read as follows:

§ 240.21F-4 Other definitions.

* * * * *

(c) * * *

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

* * * * *

(d) * * *

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

(i) A non-prosecution agreement or deferred prosecution agreement entered into by the U.S. Department of Justice or a state attorney general in a criminal case; or

(ii) 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.

(e) *Monetary sanctions* means:

(1) A required payment that results from a Commission action or related action and which is either:

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

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

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

5. Section 240.21F-6 is amended by adding paragraphs (c), (d) and (e) to read as follows:

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

* * * * *

(c) *Additional considerations in connection with certain smaller awards.* When considering any meritorious whistleblower award application where the Commission—after applying the award factors specified in paragraphs (a) and (b) of this section—determines that the resulting payout to that whistleblower for the original information that he or she provided that led to one or more successful covered or related action(s), collectively, would be below $2 million (or any such greater amount that the Commission may periodically establish through publication of an order in the *Federal Register*), the Commission may adjust the award upward as provided for in this paragraph (c).

(1) The Commission may make an upward adjustment that it determines is appropriate to ensure that the total payout to the whistleblower more appropriately achieves the program's objectives of rewarding meritorious whistleblowers and sufficiently incentivizing future whistleblowers who might otherwise be concerned about the low dollar amount of a potential award;

(2) The Commission shall not adjust an award upward under this paragraph (c) if any of the negative award factors specified in paragraph (b) of this section were found present with respect to the whistleblower's award claim, or if the award claim triggers §240.21F-16 (concerning awards to whistleblowers who engage in culpable conduct);

(3) In no event shall the Commission make an upward adjustment under this section to raise a potential payout (as assessed by the Commission at the time it makes the award determination) above $2 million (or by such other amount as the Commission may designate by order); and

(4) The total amount awarded to all whistleblowers in the aggregate may not be greater than 30 percent of the total monetary sanctions collected, or likely to be collected, in any action (as assessed by the Commission at the time it makes the award determination).

(d) *Additional considerations in connection with certain large awards where the monetary sanctions collected would equal or exceed $100 million*. When considering any meritorious whistleblower award application where the whistleblower's original information led to one or more successful covered or related action(s), collectively, that resulted in the collection of $100 million or more in monetary sanctions or will likely result in such collections (as assessed by the Commission at the time it considers the award application(s)), the Commission shall determine the award amount as specified in paragraphs (d)(1) through (4) of this section.

(For purposes of this rule, the Commission may adjust the $100 million threshold upward through publication of an order in the *Federal Register*).

(1) When applying the award factors in paragraphs (a) and (b) of this section, the Commission shall make any upward or downward adjustments by considering the impact of the adjustments on both the award percentage and the approximate corresponding dollar amount of the award. If the resulting payout would be below $30 million (or such greater alternative amount that the Commission may periodically establish through publication of an order in the Federal Register), then the downward adjustment provided for in paragraph (d)(2) of this section shall not be applicable.

(2) After completing the award analysis required by paragraph (d)(1) of this section and determining the total dollar amount of the potential award for any action(s) based upon the whistleblower's original information, the Commission shall consider whether that amount exceeds what is reasonably necessary to reward the whistleblower and to incentivize similarly situated whistleblowers. If the Commission finds that the total payout for any action(s) based upon the whistleblower's original information would exceed an amount that is reasonably necessary, it may adjust the total payout for the action(s) downward to an amount that it finds is sufficient to achieve those goals. As is the case with every aspect of any award determination under this section, the Commission shall not consider the balance of the Investor Protection Fund ("IPF") when determining whether to make an adjustment to an award under this paragraph (c).

(3) Any downward adjustment to a whistleblower's award for any actions based upon the whistleblower's original information under paragraph (d)(2) of this section shall under no circumstances yield a potential total payout on all the actions, collectively, (as assessed by the Commission at the time that it makes the award determination) of less than either $30 million or

such greater alternative amount that the Commission may periodically establish through publication of an order in the *Federal Register*.

(4) Further, any adjustments under paragraph (d)(2) of this section shall in no event result in the total amount awarded to all meritorious whistleblowers, collectively, for each covered or related action constituting less than 10 percent of the monetary sanctions collected in that action.

(e) *Future adjustments.* Finally, in any order that adjusts any of the dollar amounts specified under paragraph (c) or (d) of this section, the Commission shall consider (among other factors that it deems relevant) whether the adjustment is necessary or appropriate to encourage whistleblowers to come forward and the potential impact any adjustment might have on the IPF.

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

§ 240.21F-7 Confidentiality of submissions

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

* * * * *

7. Section 240.21F-8 is amended by:

a. Revising the section heading.

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

The revision and addition read as follows:

§ 240.21F-8 Eligibility and forms.

* * * * *

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

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

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

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

(2) If the Commission finds that you have violated paragraph (c)(7) of this section. Before any Preliminary Determination or Preliminary Summary Disposition is issued, the Office of the Whistleblower shall advise you of any assessment by that Office that your award application is frivolous or lacking a colorable connection between the tip and the action for which you have sought an award. If you withdrawal your application at that time, it will not be considered by the Commission in determining whether to exercise its authority under paragraph (e)(1) of this

section. The Commission will consider whether to issue a permanent bar in connection with an award application that would trigger such a bar; the Preliminary Determination or Preliminary Disposition must state that a bar is being recommended and the applicant would thereafter have an opportunity to submit a response in accordance with the award processing procedures specified in §§ 240.21F-10(e)(2) and 240.21F-18(b)(3).

8. Section 240.21F-9 is amended by:

a. Revising paragraphs (a) and (b);

b. In paragraphs (c) and (d), removing the parenthetical phrase "(referenced in § 249.1800 of this chapter)" wherever it appears; and

c. Adding paragraph (e).

The revisions and addition read as follows:

§ 240.21F-9 Procedures for submitting original information.

(a) To submit information in a manner that satisfies § 240.21F-2(b) and (c) you must submit your information to the Commission by any of these methods:

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

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

(3) By any other such method that the Commission may expressly designate on its website as a mechanism that satisfies § 240.21F-2(b) and (c).

(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), (2), or (3) of this section that your information is true and correct to the best of your knowledge and belief.

* * * * *

(e) You must follow the procedures specified in paragraphs (a) and (b) of this section the first time you provide the Commission with information that you rely upon as a basis for claiming an award. If you fail to do so, then you will be deemed ineligible for an award in connection with that information (even if you later resubmit that information in accordance with paragraphs (a) and (b) of this section). Notwithstanding the foregoing, the Commission, in its sole discretion, may waive your noncompliance with paragraphs (a) and (b) of this section if the Commission determines that the administrative record clearly and convincingly demonstrates that you would otherwise qualify for an award and you demonstrate that you complied with the requirements of paragraphs (a) and (b) of this section within 30 days of the first communication with the staff about the information that you provided.

9. Section 240.21F-10 is amended by revising paragraphs (b), (c), and (d) to read as follows:

§ 240.21F-10 Procedures for making a claim for a whistleblower award in SEC actions that result in monetary sanctions in excess of $1,000,000.

* * * * *

(b) To file a claim for a whistleblower award, you must file Form WB-APP, Application for Award for Original Information Provided Pursuant to Section 21F of the Securities Exchange Act of 1934. You must sign this form as the claimant and submit it to the Office of the Whistleblower by mail or fax (or any other manner that the Office permits). 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, 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 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). 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.

* * * * *

10. Section 240.21F-11 is amended by revising paragraphs (b) and (d) to read as follows:

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

* * * * *

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

(1) If a final order imposing monetary sanctions has been entered in a potential related action at the time you submit your claim for an award in connection with a Commission action, you must submit your claim for an award in that related action on the same Form WB-APP that you use for the Commission action. For purposes of this paragraph (b)(1) and paragraph (b)(2) of this section, a final order imposing monetary sanctions is entered on the date of a court or administrative order imposing the monetary sanctions; however, with respect to any agreement covered by § 240.21F-4(d) (such as a deferred prosecution agreement or a nonprosecution agreement entered by the Department of Justice), the Commission will deem the date of the entry of the final order to be the date of the earliest public availability of the instrument reflecting the arrangement if evidenced by a press release or similar dated publication notice; otherwise, the date of the last signature necessary for the agreement.

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

* * * * *

(d) Once the time for filing any appeals of the final judgment or order in a potential related action has expired, or if an appeal has been filed, after all appeals in the action have been concluded, the Claims Review Staff will evaluate all timely whistleblower award claims submitted on Form WB-APP in connection with the related action. The evaluation will be undertaken pursuant to the criteria set forth in these rules. In connection with this process, the Office of the Whistleblower may require that you provide additional information relating to your eligibility for an award or satisfaction of any of the conditions for an award, as set forth in §

240.21F-8(b). 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.

* * * * *

11. Section 240.21F-12 is amended by:

a. Revising the introductory text of paragraph (a);

b. In paragraph (a)(2), removing the parenthetical phrase "(referenced in § 249.1800 of this chapter)"; and

c. Revising paragraphs (a)(3) and (6).

The revisions read as follows:

§ 240.21F-12 Materials that may form the basis of an award determination and that may comprise the record on appeal.

(a) The following items constitute the materials that the Commission, the Claims Review Staff, and the Office of the Whistleblower may rely upon to make an award determination pursuant to §§ 240.21F-21F-10, 240.21F-11, and 240.21F-18:

* * * * *

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

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

(ii) To the Preliminary Determination or Preliminary Summary Disposition;

* * * * *

(6) Any other documents or materials from third parties (including sworn declarations) that are received or obtained by the Office of the Whistleblower to resolve the claimant's award application, including information related to the claimant's eligibility. (Neither the Commission, the Claims Review Staff, nor the Office of the Whistleblower may rely upon information that the third party has not authorized the Commission to share with the claimant.)

* * * * *

12. Section 240.21F-13 is amended by revising paragraph (b) to read as follows:

§ 240.21F-13 Appeals.

* * * * *

(b) The record on appeal shall consist of the Final Order, any materials that were considered by the Commission in issuing the Final Order, and any materials that were part of the claims process leading from the Notice of Covered Action to the Final Order (including, but not limited to, the Notice of Covered Action, whistleblower award applications filed by the claimant, the Preliminary Determination or Preliminary Summary Disposition, materials that were considered by the Claims Review Staff in issuing the Preliminary Determination or that were provided to the claimant by the Office of the Whistleblower in connection with a Preliminary Summary Disposition, and materials that were timely submitted by the claimant in response to the Preliminary Determination or Preliminary Summary Disposition). The record on appeal shall not include any pre-decisional or internal deliberative process materials that are prepared exclusively to assist the Commission and the Claims Review Staff 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). When more than one claimant has sought an award based

on a single Notice of Covered Action, the Commission may exclude from the record on appeal any materials that do not relate directly to the claimant who is seeking judicial review.

13. Add § 240.21F-18 to read as follows:

§ 240.21F-18 Summary disposition.

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

(1) You submitted an untimely award application;

(2) You did not comply with the requirements of § 240.21F-9 when submitting the tip upon which your award claim is based;

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

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

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

(6) Your application does not raise any novel or important legal or policy questions and the Office of the General Counsel concurs that the matter is appropriate for summary disposition.

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

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

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

(i) Provide you with the staff declaration; or

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

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

(A) The date of the Preliminary Summary Disposition; or

(B) The date that the Office of the Whistleblower sends the staff declaration to you following your timely return of a signed confidentiality agreement.

(ii) The response should identify the grounds for your objection to the denial (or in the case of paragraph (a)(5) of this section, correct the defect). The response must be in the form and manner that the Office of the Whistleblower shall require. You may include documentation or other evidentiary support for the grounds advanced in your response.

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

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

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

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

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

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

14. The general authority citation for part 249 continues to read as follows and sectional authorities for §§ 249.1800 and 249.1801 are removed:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; 12 U.S.C. 5461 et seq.; 18 U.S.C. 1350; Sec. 953(b), Pub. L. 111-203, 124 Stat. 1904; Sec. 102(a)(3), Pub. L. 112-106, 126 Stat. 309 (2012); Sec. 107, Pub. L. 112-106, 126 Stat. 313 (2012), and Sec. 72001, Pub. L. 114-94, 129 Stat. 1312 (2015), unless otherwise noted.

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Subpart S—[Removed and Reserved]

15. Remove and reserve subpart S.

By the Commission.

Dated: June 28, 2018.

Brent Fields,
Secretary.