



October 3, 2023

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE Washington, DC 20549
Via Electronic Delivery

Re: Petition for Formal Rulemaking Addressing Modification of Rule 21F-10(d) and Rule 21F-11(d) of the Whistleblower Program Rules

Dear Secretary Countryman:

Pursuant to Rule 192(a) of the Commission’s Rules of Practice, we hereby request that the Commission initiate a rulemaking proceeding regarding Rules 21F-10(d) and 21F-11(d)¹ concerning the Dodd-Frank whistleblower program administered by the U.S. Securities and Exchange Commission (“SEC”).

This petition concerns an amendment to Rules 21F-10(d) and 11(d) made during the 2020 rulemaking that was not subject to public notice and comment as required under law. This change in the regulations allows a preliminary determination drafted by the Claims Review Staff (“CRS”) to be reviewed by one or more of the SEC Commissioners *before* the preliminary determination is provided to the whistleblower. Under the regulations in place from 2011 to 2020, the preliminary determination of the CRS was submitted directly to the whistleblower for comment. The regulations as changed in September 2020 permit a Commissioner to review the preliminary determination *before* it is submitted to the whistleblower. The actions a Commissioner may take after reviewing the preliminary determination are not discussed, and there are no rules or deadlines governing this review process.

As explained below, changing the regulations to include Commissioner review of an initial preliminary determination after the CRS drafts the Preliminary Determination, but before the preliminary determination is provided to the whistleblower required, as a matter of law, a formal rulemaking proceeding.

This letter requests that the SEC comply with these procedural requirements.

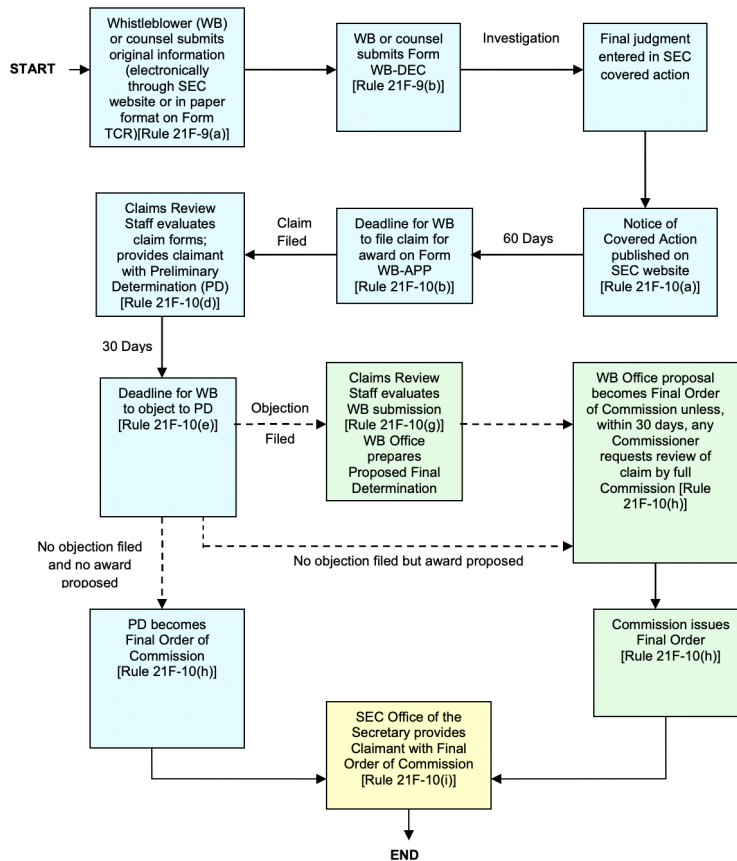
¹ SEC Rules 21F-10(d) and 21F-11(d) are substantially identical. Rule 10(d) concerns the filing of a reward application in a Commission proceeding, while Rule 11(d) concerns filing an award application in a “related action” proceeding. For the sake of simplicity, this letter generally cites only to Rule 10(d), as the operative language in Rule 10(d) and 11(d) is identical. However, this petition requests that the Commission initiate a rulemaking proceeding related to both Rules 10(d) and 11(d).

I. Statement of Interest

The law firm of Kohn, Kohn and Colapinto, LLP (“KKC”) has provided legal representation to whistleblowers since 1988. As advocates for whistleblowers in Commission proceedings, KKC has a longstanding interest in the procedural and substantive due process rights of whistleblowers. The efficiency of the claims review process is of utmost importance to KKC and the firm’s whistleblower clients.

II. Facts

- On November 17, 2010, the SEC published a notice of proposed rules governing the Dodd-Frank whistleblower program in the Federal Register. As reflected in the below flowchart, the Proposed Rules required the CRS to issue a preliminary determination and thereafter provide a whistleblower a copy of that determination for review and comment. There was no provision for a Commissioner to be provided a copy of the initial preliminary determination prior to the opportunity for the whistleblower to review and comment on the preliminary determination. The following is a copy of the flowchart published by the SEC:



- The relevant portion of proposed Rule 21F-10(d) in the Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 read:

“Following that evaluation, the Whistleblower Office 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.”

3. The above flowchart, *supra* II.1, cites Rule 21F-10(d) as the basis for “Claims Review Staff evaluates claim forms; provides claimant with Preliminary Determination[.]”
4. The same flowchart, *supra* II.1, was included in the Commission’s Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, issued May 25, 2011, and duly published in the Federal Register on June 13, 2011. The flowchart indicates that once a whistleblower award claim is filed, the “Claims Review Staff evaluates [the] claim forms,” “provides [the] claimant with [a] Preliminary Determination,” and provides an opportunity for the whistleblower to comment on the preliminary determination before the preliminary determination is provided to the Commissioners. Rule 21F-10(d) is cited as support for this segment of the process. At this point in time, the relevant portion of final Rule 21F-10(d) read:

“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.”

The only change between the proposed Rule 21F-10(d) and the final Rule 21F-10(d) was the shift in terminology from “Whistleblower Office” to “Office of the Whistleblower.” There were no substantive changes made to the text of Rule 21F-10(d).

5. On January 18, 2013, the Commission OIG Office of Audits issued its “Evaluation of the SEC’s Whistleblower Program,” Report No. 511. Rule 21F-10 is cited as authority for the responsibility of the Claims Review Staff to issue preliminary determinations. “[T]he Claims Review Staff will decide on a preliminary determination and consider appeals of their decision if submitted timely.” Report No. 511 at 5, n. 6.
6. Both the flowchart included in the Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 and the OIG Evaluation of the SEC’s Whistleblower Program specify that, under Rule 21F-10(d), the Claims Review Staff is solely responsible for constructing and issuing the preliminary determination, and that the preliminary determination is not published to the Commissioners until after the whistleblower has an opportunity to review and comment on the preliminary determination.
7. On June 29, 2018, and duly published in the Federal Register on July 20, 2018, the Commission proposed several amendments to the Commission’s rules implementing its whistleblower program for public comment. The text of Rule 21F-10(d) remained

unchanged from the language implemented in 2011, and no potential amendments to this subsection were proposed in the Commission’s submission for public comment.

8. On September 23, 2020, and duly published in the Federal Register on November 5, 2020, the Commission issued its final rules adopting several amendments to the Whistleblower Program Rules that had been published in its 2018 notice of proposed rulemaking. However, in the final version of the rules, Rule 21F-10(d) was modified *without any notice to the public, and without the notice and comment obligations required under law*. The modifications to the rule are shown below, using the “compare dates” visual tool on the electronic Code of Federal Regulations to view changes to Rule 21F-10(d) made on November 5, 2020.

(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 one or more staff members~~ designated by the Director of the Division of Enforcement (“Claims Review Staff”) will evaluate all timely whistleblower award claims submitted on Form WB-APP (referenced in ~~§ 249.1801 of this chapter~~) in accordance with the criteria set forth in these rules. In connection with this process, the Office of the Whistleblower may require that you provide additional information relating to your eligibility for an award or satisfaction of any of the conditions for an award, as set forth in ~~§ 240.21F-8(b) of this chapter~~. Following ~~that evaluation~~ **a determination by the Claims Review Staff (and an opportunity for the Commission to review that determination)**, the Office of the Whistleblower will send you a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award **dollar and percentage amount, and the grounds therefore**.

9. Specifically, key language of Rule 21F-10(d), *supra* II.3, was modified by inserting a parenthetical allowing the Commission the opportunity to review a preliminary determination of the Claims Review Staff.
10. Without any indication in the July 29, 2018 proposed rules that a change to Rule 10(d) was forthcoming, this material parenthetical – **“(and an opportunity for the Commission to review that determination)”** – was inserted into the language of the rule.
11. The Final Rules issued by the Commission on September 23, 2020, and duly recorded in the Federal Register on November 5, 2020, include a footnote explaining the change to Rule 21-F10(d) and Rule 21F-11(d):²

“Exchange Act Rule 21-F10(d) and Rule 21-F11(d) authorize the CRS to make a preliminary determination on an award application for a covered action and a related action, respectively. Further, in accordance with Section 4A(b) of the Exchange Act, both rules now clarify that [*sic*] Commission will be provided the opportunity to review any preliminary determination before it is provided to a claimant. *See id.* (providing that “the Commission shall retain a discretionary

² Rule 21F-11(d) regarding procedures for determining awards based upon related actions contains an identical parenthetical in the September 23, 2020 final rules, inserted without notice or opportunity for public comment in the July 29, 2018 proposed rules. As referenced in n. 1, all references to the 2020 modifications and requests for rulemaking regarding Rule 21F-10(d) contained in this letter also apply to Rule 21F-11(d) covering related actions.

right to review” actions taken “[w]ith respect to the delegation of any of [the Commission’s] functions.”³

12. The portion of the Securities Exchange Act, Section 4A(b) cited in this footnote to the Final Rules issued by the Commission provides, in relevant part:

“With respect to the delegation of any of its functions...the Commission shall retain a discretionary right to review the action...upon its own initiative or upon petition of a party to or intervenor in such action, **within such time and in such manner as the Commission by rule shall prescribe.**” [emphasis added].

13. No rulemaking was ever issued regarding this modification to Rule 21F-10(d). There are no regulations or procedures identifying the time and manner for Commissioner review of a preliminary determination. There was no notice or opportunity for public comment regarding this change.

III. Argument

We hereby request that the Commission issue a rulemaking regarding the 2020 modification to Rule 21F-10(d) as required by the Exchange Act of 1934 § 4A(b). The Commission must prescribe the time and manner of review that Commissioners may exercise over the initial preliminary determination of the Claims Review Staff (i.e., the preliminary determination drafted by the CRS that would be shown to the Commissioners prior to that determination being provided to the whistleblower, with an opportunity for the whistleblower to comment on the preliminary determination).

Consequently, we hereby request that this provision be temporarily suspended until the Commission publishes regulations, interim or otherwise, setting forth the time and manner procedures required by statute.

Because the Commission has the right to issue the Final Determination, Commissioners are fully able to participate in the decision-making process *de novo*, even if they do not review the initial preliminary determination. Allowing for the intermediate interception at an earlier stage of the whistleblower awards process may contribute to undue delay or create other issues that would be addressed in the public comments that may be submitted once the requirements of § 4A(b) are complied with.

We want to be very clear that we have the utmost respect for the Commission and all individuals involved in the claims review process. We are not asserting that this procedure has ever been misused. Our primary concern is the potential for delay and inefficiency resulting from Commissioner review of an initial preliminary determination without strict limits on the time and manner of review. Additionally, the current regulations are unclear as to the purpose of this preliminary review, whether Commissioners can make recommendations to the Claims Review Staff concerning the merits of a claim, and what, if any, actions the Claims Review Staff must take after the Commissioners review a preliminary determination.

³ Whistleblower Program Rules, 85 Fed. Reg. 70898, 70900 n. 10 (Nov. 5, 2020).

The press release issued with the final 2020 amendments to the Whistleblower Program Rules emphasized the importance of “clarity, efficiency, and transparency” in the program’s success. Instituting a rulemaking proceeding regarding the changes made to Rules 21F-10(d) and 11(d) is consistent with these goals.

We hereby request an opportunity to meet with the Commissioners and staff members to discuss this request.

We sincerely appreciate your attention to this matter. We look forward to meeting with you to further explain this critical issue.

Respectfully submitted,

/s/

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Partner

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/s/

Allison Wise

Public Interest Law Fellow

Kohn, Kohn & Colapinto, LLP

CC: Hon. Gary Gensler, Chairman, Securities and Exchange Commission
Hon. Hester M. Peirce, Commissioner, Securities and Exchange Commission
Hon. Caroline A. Crenshaw, Commissioner, Securities and Exchange Commission
Hon. Mark T. Uyeda, Commissioner, Securities and Exchange Commission
Hon. Jaime Lizárraga, Commissioner, Securities and Exchange Commission
Nicole Creola Kelly, Chief, Office of the Whistleblower