

[Securities Regulation Daily Wrap Up, WHISTLEBLOWER NEWS—Gensler sounds the call for whistleblower amendments, \(Aug. 3, 2021\)](#)

Securities Regulation Daily Wrap Up

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The SEC chair has asked staff to prepare proposals to address concerns raised by the Commission's more controversial whistleblower program changes last fall.

SEC Chairman Gary Gensler has asked the Commission staff to prepare potential revisions to two rule changes adopted in September 2020 that critics believe will discourage whistleblowers from coming forward. In a [public statement](#), Gensler directed the staff to prepare a proposal for consideration later this year concerning whether the SEC's rules should be revised to permit the Commission to make awards for related actions that might otherwise be covered by an alternative whistleblower program that is not comparable to the SEC's own program. Gensler also asked staff to prepare revisions that would clarify that the SEC will not lower a whistleblower award based on its dollar amount.

By a three-to-two vote that divided along party lines, on September 23, 2020, the SEC [adopted several amendments](#) to the rules governing the whistleblower program that had been first established under the Dodd-Frank Act in 2010. The statute authorizes the SEC to pay monetary awards to eligible persons who voluntarily provide the Commission with original information about a violation of the federal securities laws that leads to successful SEC enforcement actions resulting in monetary sanctions over \$1 million. Awards must be made in an amount equal to not less than 10 percent, and not more than 30 percent, of the monetary sanctions collected in the covered SEC action and certain related actions.

Among the changes to Exchange Act Rule 21F, the SEC's amendments provided a mechanism for whistleblowers with potential awards of less than \$5 million to qualify for a presumption that they will receive the maximum award amount set forth in the statute. The amendments also affirmed that award amounts are to be determined exclusively based on the application of the award factors set forth in the SEC's whistleblower rules, with no separate assessment by the Commission of whether award amounts are too small or too large.

This latter change proved to be especially controversial, leading dissenting Commissioners Caroline Crenshaw and Allison Herren Lee to join members of the whistleblower community in questioning whether the final rules as adopted might potentially chill whistleblower activity. In particular, Commissioner Lee [objected](#) in her public statement to the final rule's treatment of the Commission's discretion to consider the dollar amount of an award in making award determinations. In her view, the final rule enshrines an approach that allows the reduction of awards on the basis of an objection by the Commission solely to the size of an award. "This kind of determination, unlike the existing award factors, has absolutely nothing to do with the merits of a whistleblower's conduct or the value of the information she provides," Lee stated. "This injects an arbitrary wildcard into what was a sensible, merits-linked calculus."

Lee also opposed rule provisions governing a related action brought by another governmental agency based on information provided to the SEC by a whistleblower, and therefore eligible for an award through the SEC's whistleblower program. In Lee's view, the SEC's ability to pay an award on a related action promotes efficiency and encourages whistleblowers to choose to bring information to the Commission, knowing they will still receive an award if the information is directed to a different agency. She stated that the SEC's amendments, however, have decreased certainty by introducing a new, subjective standard, which is whether another agency's whistleblower program has a "more direct or relevant connection to the action."

"While I appreciate the concerns about taxing our and our sister agencies' resources with whistleblowers taking "multiple bites of the apple," I believe other solutions were available, which would have better balanced the agency's interests with those of whistleblowers," Lee stated. The commissioner observed that directing whistleblowers to another agency's whistleblower program will increase the administrative burden on whistleblowers and while potentially forcing them to participate in programs with varying standards for maintaining the confidentiality of their identity. In addition, she noted that some whistleblower programs may have materially lower maximum awards, including some with statutory caps.

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