

[Securities Regulation Daily Wrap Up, TOP STORY—Divided Commission amends whistleblower program rules, \(Sept. 23, 2020\)](#)

Securities Regulation Daily Wrap Up

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The SEC's rule amendments and guidance seek to provide greater clarity to whistleblowers and increase the award program's efficiency and transparency.

By a three-to-two vote that cleaved along party lines, the SEC has adopted amendments to the rules governing the whistleblower program established under the Dodd-Frank Act. Among other changes, the amendments provide 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 affirm 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 (*Whistleblower Program Rules*, [Release No. 34-89963](#), September 23, 2020).

"The Commission's enforcement efforts, and most importantly, American investors and markets, have greatly benefitted from the credible information and assistance that whistleblowers have provided," said SEC Chairman Jay Clayton in a [news release](#). "Today's rule amendments will help us get more money into the hands of whistleblowers, and at a faster pace. Experience demonstrates this added clarity, efficiency and transparency will further incentivize whistleblowers, enhance the whistleblower award program and benefit investors and our markets." Clayton was joined by Republican Commissioners Hester Peirce and Elad Roisman in voting to approve the amendments.

Added under Section 922 of the Dodd-Frank Act, Exchange Act Section 21F authorized the SEC to pay monetary awards to eligible whistleblowers 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. Under the statute, 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. Since the program was established in 2011, original information provided by whistleblowers has led to enforcement actions in which the SEC has obtained over \$2.5 billion in financial remedies, and the Commission has awarded approximately \$523 million to 97 individuals.

Presumption of statutory maximum for awards of \$5 million or less. For awards where the statutory maximum award amount for the covered action and any related actions is in the aggregate \$5 million or less, new Exchange Act Rule 21F6(c) creates a presumption that the SEC will pay a meritorious claimant the statutory maximum amount where none of the negative award criteria specified in Rule 21F-6(b) are present, subject to certain exceptions. For awards over \$5 million, the SEC will continue to analyze the award factors identified in Rule 21F-6 and issue awards based on the application of those factors.

Chairman Clayton [noted](#) that the SEC has been limited by statute to awarding \$5 million in roughly 75 percent of its whistleblower cases, and in most of those cases, the Commission has awarded amounts in the top quarter of the range. "In addition to providing greater transparency and certainty, this presumption will reduce the time the Commission would otherwise spend determining the precise award amounts," said the chairman. "For awards where the statutory maximum is greater than \$5 million, the Commission will continue to determine the award amount using the same framework that we have used from the inception of the program."

Allowing awards based on DPAs and NPAs. The Commission had added a new paragraph (3) to existing Rule 21F-4(d) to allow awards based on deferred prosecution agreements (DPAs) and non-prosecution

agreements (NPAs) entered into by the Department of Justice or a settlement agreement entered into by the SEC outside of the context of a judicial or administrative proceeding to address violations of the securities laws. The amendment reflects the Commission's view that Congress did not intend for meritorious whistleblowers to be denied awards simply because of the procedural vehicle selected by the SEC or another governmental entity to resolve an enforcement matter.

Definition of "related action." The SEC has adopted amendments to the definition of "related action" in Rule 21F-3(b) so that a law enforcement or separate regulatory action does not qualify as a "related action" if the Commission determines that there is a separate award scheme that more appropriately applies to that non-SEC action. The presence of a separate award scheme would not affect the SEC's determination of the award based on the monetary sanctions collected by the Commission in the covered SEC action and any related action where such an award scheme was not present.

Definition of "whistleblower." Following the Supreme Court's decision in *Digital Realty Trust, Inc. v. Somers*, where the Court held that Dodd-Frank's definition of "whistleblower" requires a report to the SEC as a prerequisite for retaliation protection, the SEC has modified Exchange Act Rule 21F-2 to establish a uniform definition of "whistleblower" that will apply to all aspects of Exchange Act Section 21F—i.e., the award program, heightened confidentiality requirements, and employment anti-retaliation protections—while tracking the "whistleblower" definition in the statute.

For purposes of retaliation protection, an individual is required to report information about possible securities laws violations to the SEC "in writing." As required by the Supreme Court's decision in *Digital Realty Trust*, to qualify for the retaliation protection under Section 21F, the individual must report to the Commission before experiencing the retaliation. To be eligible for an award or to obtain heightened confidentiality protection, the additional existing requirement that a whistleblower submit information on Form TCR or through the Commission's online tips portal remains in place, subject to the additional discretion of the Commission to grant certain waivers. The SEC has also issued interpretive guidance defining the scope of prohibited retaliatory conduct.

Claims review efficiencies. New subparagraph (e) to Exchange Act Rule 21F-8 permits the SEC to bar permanently any applicant from seeking an award after the Commission determines that the applicant has abused the process by submitting three frivolous award applications. New Exchange Act Rule 21F-18 also provides the Commission with a summary disposition procedure for certain types of common denials, such as untimely award applications, applications that involve a tip that was not provided to the SEC in the required form and manner, and applications where the claimant's information was never provided to or used by staff responsible for the investigation.

Other clarifications and enhancements. Among several other changes, Exchange Act Rule 21F-6 has been amended to clarify the SEC's discretion in applying the whistleblower award factors and setting the award amount, including the discretion to apply the award factors in percentage terms, dollar terms or some combination of those terms. Chairman Clayton noted that the SEC's rules recognize that whistleblowers are motivated by dollar amounts, not percentages. "To provide greater transparency to whistleblowers, our rule amendments make clear that Congress provided the Commission with the discretion to set awards, and apply the award factors, in dollar terms or percentage terms," stated the chairman. "Also, to be clear, in determining the award amounts, we apply the factors and only the factors, to determine the amount. There is no separate (post application of the award factors) assessment of whether award amounts are too small or too large or any type of a cap apart from the statutory maximum established by Congress," he stated.

Guidance on "independent analysis." The SEC has also published interpretive guidance to help clarify the meaning of "independent analysis" under Exchange Act Rule 21F-4 and as that term is used in award applications. 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 SEC from publicly available information. The adopting release notes that the SEC expects the guidance to encourage more high-quality

submissions, promote transparency, reduce the volume of non-meritorious claims, and increase the efficiency of the whistleblower program.

Commissioner Crenshaw's dissent. In voting against the amendments, Commissioner Caroline Crenshaw [shared concerns](#) with fellow dissenting Commissioner Allison Herren Lee about the degree of discretion granted to the Commission to consider the dollar amount of whistleblower awards. "I hope that future Commissioners will exercise the discretion as carefully as we do," she cautioned.

Crenshaw also worried that the SEC's guidance on what constitutes "independent analysis" will inadvertently affect perceptions of the type of information that the Commission considers valuable. "Given that, we should not focus on whether the staff "could have" inferred the information from what was provided, but whether the staff did infer the information prior to getting the submission," she stated.

Finally, Crenshaw expressed concern about whether the amended rules sufficiently protect certain whistleblowers by limiting the anti-retaliation protections to those who submit information in writing, pointing out that whistleblowers who provide information to the SEC through interviews or testimony do not necessarily get the benefits of the anti-retaliation provision. "I think we could have approached our response to Digital Realty differently in light of our nation's strong history of protecting whistleblowers, and our agency's interest in continuing to do so," she stated.

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

The release is [No. 34-89963](#).

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