

## Public Statement

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# Statement on the Commission's Action to Disregard Recently-Amended Whistleblower Rules



**Commissioner Hester M. Peirce**



**Commissioner Elad L. Roisman**

**Aug. 5, 2021**

Today the Commission issued a [statement](#) announcing new procedures for addressing certain issues under Exchange Act Rule 21F-3(b)(3) and Exchange Act Rule 21F-6 (the “Whistleblower Rules”).

The Commission, of course, is within its authority to engage in notice and comment rulemaking to amend its rules at any time—even when, as with the Whistleblower Rules, they are less than one year old. Indeed, the Chair already has signaled his intention to do so with respect to Rules 21F-3(b)(3) and 21F-6.<sup>[1]</sup> The Commission’s action today, however, announces and adopts (via a Commission statement) new procedures designed to ensure that two rule provisions, which are subject to litigation, are substantively ignored while proposed amendments are formulated and considered. This effectively nullifies standing Commission rules under the guise of changes to “agency procedures.”

This course of action is unwise and continues a troubling and counterproductive precedent:<sup>[2]</sup> If a rule challenge is pending in court when the presidential administration changes, the Commission believes it may immediately abandon proposed, noticed, and adopted rules at the majority’s will via public statements. Abandonment of duly-adopted rules without notice and request for comment raises the prospect that the rules that the Commission adopts in compliance with the Administrative Procedure Act may be interim at best, and transitory at worst. This reduces the certainty of the law, a consequence that does not bode well for the Commission or those it regulates.

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[1] See, e.g., SEC’s Spring 2021 Regulatory Agenda (publicly available at: <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3235-AN03>); see also Statement in Connection with the SEC’s Whistleblower Program (publicly available at: <https://www.sec.gov/news/public-statement/gensler-sec-whistleblower-program-2021-08-02>).

[2] See Response to Chair Gensler's and the Division of Corporation Finance's Statements Regarding the Application of the Proxy Rules to Proxy Voting Advice (publicly available at: <https://www.sec.gov/news/public-statement/peirce-roisman-response-statements-application-proxy-rules-060121>).