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## **An Overview of the SEC's Whistleblower Award Program**

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# An Overview of the SEC's Whistleblower Award Program\*

Michael H. Hurwitz and Jonathan Kovacs

## Abstract

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act in response to the stock market collapse and economic downturn as well as the Bernard Madoff scandal and other well-publicized frauds perpetrated against investors. Among its numerous provisions, the Dodd-Frank Act amended the Securities Exchange Act of 1934 to add a new section—Section 21F—entitled “Securities Whistleblower Incentives and Protection.” The Dodd-Frank Act also directed the Securities and Exchange Commission to establish an Office of the Whistleblower to administer the provisions of the new section. The Commission subsequently adopted regulations that went into effect on August 12, 2011 to implement these provisions. This Article will discuss one of the crucial mechanisms of the SEC's whistleblower program: the award program. Specifically, this Article will discuss the eligibility requirements for an award, the factors the Commission considers when determining an award amount, and the award review process.

This Article also highlights three matters a potential award applicant should consider before filing for an award: (1) an applicant will only be eligible if the information was provided to the Commission after Dodd-Frank was enacted; (2) there must be a sufficient nexus between the tip provided and the covered enforcement action for an applicant to be eligible for an award; and (3) a whistleblower will generally not be eligible to receive an award if the whistleblower's information was submitted to the Commission after the Commission had requested the information, unless the whistleblower had voluntarily provided the same information to another agency or self-regulatory organization prior to the Commission's request.

**KEYWORDS:** Dodd-Frank, Securities, Whistleblower

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\*\* Senior Counsel, United States Securities and Exchange. The United States Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the authors and do not necessarily reflect the views of the Commission or of the authors' colleagues on the staff of the Commission. \*\* Third-year law student at the Georgetown University Law Center and former intern in the United States Securities and Exchange Commission's Office of the Whistleblower.

## AN OVERVIEW OF THE SEC'S WHISTLEBLOWER AWARD PROGRAM

*Michael H. Hurwitz\** and *Jonathan Kovacs\*\**

### ABSTRACT

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act in response to the stock market collapse and economic downturn as well as the Bernard Madoff scandal and other well-publicized frauds perpetrated against investors. Among its numerous provisions, the Dodd-Frank Act amended the Securities Exchange Act of 1934 to add a new section—Section 21F—entitled “Securities Whistleblower Incentives and Protection.” The Dodd-Frank Act also directed the Securities and Exchange Commission to establish an Office of the Whistleblower to administer the provisions of the new section. The Commission subsequently adopted regulations that went into effect on August 12, 2011 to implement these provisions.

This Article will discuss one of the crucial mechanisms of the SEC’s whistleblower program: the award program. Specifically, this Article will discuss the eligibility requirements for an award, the factors the Commission considers when determining an award amount, and the award review process. This Article also highlights three matters a potential award applicant should consider before filing for an award: (1) an applicant will only be eligible if the information was provided to the Commission after Dodd-Frank was enacted; (2) there must be a sufficient nexus between the tip provided and the covered enforcement action for an applicant to be eligible for an award; and (3) a whistleblower will generally not be eligible to receive an award

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## INTRODUCTION

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) in response to the stock market collapse and economic downturn as well as the Bernard Madoff scandal and other well-publicized frauds perpetrated against investors.<sup>1</sup> Among its numerous provisions, the Dodd-Frank Act amended the Securities Exchange Act of 1934 (the “Exchange Act”) to add a new section—Section 21F—entitled “Securities Whistleblower Incentives and Protection.”<sup>2</sup> The Dodd-Frank Act also directed the Securities and Exchange Commission (the “SEC” or the “Commission”) to establish an Office of the Whistleblower (the “OWB”) to administer the provisions of the new section.<sup>3</sup> The Commission subsequently adopted regulations that went into effect on August 12, 2011 (the “Final Rules”) to implement these provisions.<sup>4</sup>

This Article will discuss one of the crucial mechanisms of the SEC’s whistleblower program: the award program.<sup>5</sup> Part I will discuss

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1. Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, § 922(a), 124 Stat 1376, 1841 (2010).

2. The Securities Exchange Act of 1934 § 21F, 15 U.S.C. § 78u-6 (2012).

3. Section 924(d) of the Dodd-Frank Act directed the Commission to establish a separate office within the Commission to administer and enforce the provisions of Section 21F of the Exchange Act. Dodd-Frank Act § 924(d), 15 U.S.C. § 78u-7.

4. Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-1 (2015).

5. Both Section 21F and the Commission’s implementing rule expand anti-retaliation protections for whistleblowers. 15 U.S.C. § 78u-6(h); 17 C.F.R. § 240.21F-2(b). In addition to administering the whistleblower award program, the OWB’s activities include:

- “Communicating with whistleblowers who have submitted tips” and other information to the agency.
- “Staffing a publicly-available whistleblower hotline for members of the public to call with questions about the program.”
- “Reviewing and entering whistleblower tips received by mail and fax into the Commission’s Tips, Complaints, and Referrals System (the “TCR System”).”
- “Working with Enforcement staff to identify and track enforcement cases potentially involving a whistleblower to assist in the documentation of the whistleblower’s information and cooperation in anticipation of a potential claim for award.”

the statutory requirements to obtain a whistleblower award and the Commission's procedures for receiving and considering claims.<sup>6</sup> Part I will also discuss the factors that the Commission considers in determining the amount awarded to a successful claimant.<sup>7</sup> Part II will then discuss three particular issues concerning the award process based on the Commission's publicly-available releases to date: (1) an applicant will only be eligible if the information was provided to the Commission after the Dodd-Frank Act was enacted; (2) there must be a sufficient nexus between the tip provided and the covered enforcement action for an applicant to be eligible for an award; and (3) a whistleblower will generally not be eligible to receive an award if the whistleblower's information was submitted to the Commission after the Commission had requested the information, unless the whistleblower had voluntarily provided the same information to another agency or self-regulatory organization prior to the Commission's request.<sup>8</sup>

### I. OVERVIEW OF WHISTLEBLOWER AWARD PROCESS

In order to understand the whistleblower award process, a whistleblower must first examine the requirements (including the

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- “Maintaining and updating the OWB website to better inform the public about the whistleblower program . . . .”
  - “Identifying and monitoring whistleblower complaints alleging retaliation by employers or former employers for reporting possible securities law violations internally or to the Commission.”
  - “Providing training on the Dodd-Frank Act and the Commission's implementing rules to Commission staff.”
  - “Providing guidance to Commission staff regarding the handling of confidential whistleblower-identifying information and the handling of potentially privileged information provided by whistleblowers.”
  - “Coordinating with Commission staff in making external referrals to other government agencies consistent with the Dodd-Frank Act's and the Final Rules' confidentiality provisions.”
  - “Actively publicizing the program through participation in webinars, media interviews, presentations, press releases, and other public communications.”

SEC, 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 5-7 (2013).

6. *See infra* Part I.A.

7. *See infra* Part I.B.

8. *See infra* Part II.

various exceptions to these requirements) and legal definitions set out in the Dodd-Frank Act and the Final Rules. We begin with the statutory authorization for the SEC to pay whistleblower awards. Section 21F authorizes the SEC to pay awards to eligible individuals “who voluntarily provide[] original information to the Commission that le[ads] to the successful enforcement” of actions brought by Commission, and even, in certain circumstances, other agencies, and which result in monetary sanctions of more than \$1 million.<sup>9</sup> Section 21F(b)(1) directs that, if the SEC determines that one or more whistleblowers are eligible to receive an award and not otherwise disqualified from receiving an award,<sup>10</sup> the whistleblowers will be paid, in the aggregate, between 10% to 30% of the “monetary sanctions” collected in the enforcement action.<sup>11</sup>

Section 21F further states that the determination of the amount of an award is “in the discretion of the Commission.”<sup>12</sup> In exercising this discretion, Congress mandated that the Commission take into account three considerations when deciding on an appropriate award percentage: (1) “the significance of the information provided by the whistleblower to the success of the” enforcement action; (2) “the degree of assistance provided by the whistleblower” in the enforcement action; and (3) the “programmatic interest of the Commission in deterring violations of the

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9. 15 U.S.C. § 78u-6(b)(1); *see also id.* § 78u-6(a)(1) (defining a “covered judicial and administrative action”). The Dodd-Frank Act also established a fund that allows the Commission to pay awards to qualifying whistleblowers and to fund activities of the SEC’s Inspector General. *Id.* § 78u-6(g)(1)-(2).

10. *Id.* § 78u-6(b), (c)(2). However, if an otherwise eligible whistleblower falls within a number of specific categories delineated in the statute, then the whistleblower will be barred from receiving an award. These categories include: whistleblowers who obtained their original information while employed by certain regulatory or law enforcement agencies or entities, such as the Department of Justice or a self-regulatory organization, whistleblowers who were convicted of a criminal violation related to the enforcement action for which they are seeking an award, whistleblowers who obtained their original information while engaged in performing an audit of financial statements mandated under the federal securities laws, where the whistleblower’s submission would be contrary to the requirements of Section 10A of the Exchange Act, and whistleblowers who fail to submit information to the Commission in such form as the Commission requires. *Id.* § 78u-6(c)(2)(D).

11. *Id.* § 78u-6(b)(1)(A)-(B).

12. *Id.* § 78u-6(c)(1)(A).

securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws.”<sup>13</sup>

Since the program’s inception, the Commission has paid awards to more than a dozen whistleblowers.<sup>14</sup> The largest payment to date was an award that was expected to yield between \$30 million and \$35 million.<sup>15</sup>

#### A. WHISTLEBLOWER AWARD ELIGIBILITY

The Dodd-Frank Act defines a whistleblower as “any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.”<sup>16</sup> The Final Rules provide that this information encompasses a “possible violation . . . that has occurred, is ongoing, or is about to occur.”<sup>17</sup> The Final Rules also provide that a whistleblower must be an individual and that “[a] company or another entity is not eligible to be a whistleblower.”<sup>18</sup> Furthermore, whistleblower status is

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13. *Id.* § 78u-6(c)(1)(B). The statute also grants the Commission discretion to consider “such additional relevant factors as the Commission may establish by rule or regulation.” *Id.* § 78u-6(c)(1)(B)(i)(IV).

14. *Final Orders of the Commission*, SEC, <http://www.sec.gov/about/offices/owb/wb-final-orders.shtml> [<http://perma.cc/F233-55GZ>] (listing the final disposition of applications for awards received by the OWB).

15. Order Determining Whistleblower Award Claim, Exchange Act Release No. 73174, 2014 WL 4678597, at \*1 (Sept. 22, 2014).

16. 15 U.S.C. § 78u-6(a)(6).

17. 17 C.F.R. § 240.21F-2(a)(1) (2015). Section 21F(a)(6) defines a whistleblower as an individual, or 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.” In its adopting release implementing the whistleblower rule, the Commission explained that the reference in the rule to a “possible violation . . . that has occurred, is ongoing, or is about to occur” was intended to “provide[] greater clarity concerning when an individual who provides [the Commission] with information about possible violations, including possible future violations, of the securities laws qualifies as a whistleblower” and that “[a]n individual would meet the definition of whistleblower if he or she provides information about a ‘possible violation’ that ‘is about to occur.’” Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 64545, 2011 WL 2045838, at \*6 (May 25, 2011) [hereinafter Adopting Release].

18. 17 C.F.R. § 240.21F-2(a)(1). This requirement conforms with the statutory language defining a “whistleblower” as “any individual who provides, or 2 or more



contingent on an applicant “provid[ing] the Commission with information pursuant to the procedures set forth in [Rule] 21F-9(a).”<sup>19</sup> Even if an applicant meets the definitional whistleblower requirements, he or she can only become eligible for an award if the information is submitted “in accordance with the procedures and conditions described in §§ 240.21F-4, 240.21F-8, and 240.21F-9 of [Rule 21F].”<sup>20</sup>

If an individual satisfies the definition of a “whistleblower,” the next inquiry is whether the whistleblower has satisfied the rest of the criteria for award eligibility. Rule 21F-3 lists four requirements that a whistleblower must satisfy in order to qualify for an award:<sup>21</sup>

- The whistleblower must have provided information “voluntarily” to the Commission;<sup>22</sup>
- the information provided to the SEC must qualify as “original information;”<sup>23</sup>

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individuals acting jointly who provide” the specified information. 15 U.S.C. § 78u-6(a)(6).

19. 17 C.F.R. § 240.21F-2(a)(1). The Final Rules provide two avenues to submit original information to the Commission: online at [www.sec.gov](http://www.sec.gov) or by mailing or faxing a Form TCR to the Office of the Whistleblower. *Id.* § 240.21F-9(a)(1)-(2). In order to be eligible for an award, a potential whistleblower must also declare that his information is “true and correct to the best of [his] knowledge and belief.” *Id.* § 240.21F-9(b). The Final Rules also provide instructions for potential whistleblowers who wish to provide their information anonymously through an attorney. *See id.* § 240.21F-9(c). The Final Rules also provide an eligibility window for potential whistleblowers who provided original information in writing after the enactment of Dodd-Frank (July 21, 2010) but before the effective date of the rules. *See id.* § 240.21F-9(d); *see also infra* Part II.A (discussing Dodd-Frank’s enactment date as the earliest point when information submitted to the Commission is considered “original”).

20. 17 C.F.R. § 240.21F-2(a)(2).

21. *Id.* § 240.21F-3(a). The four criteria in Rule 21F-3(a) correspond to the four criteria specified in the Dodd-Frank Act. *See* 15 U.S.C. § 78u-6(a)(1) (defining a “covered judicial or administrative action” as one brought by the Commission that results in monetary sanctions exceeding \$1 million); *id.* § 78u-6(b)(1) (authorizing awards to be paid to whistleblowers “who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action”).

22. 17 C.F.R. § 240.21F-3(a)(1).

23. *Id.* § 240.21F-3(a)(2).

- the information must have “le[d] to the successful enforcement by the Commission of a federal court or administrative action;”<sup>24</sup> and
- in its successful enforcement action, the Commission must have obtained monetary sanctions totaling more than \$1 million.<sup>25</sup>

In addition to these four substantive requirements, the whistleblower must comply with the procedural requirements and avoid subsection to the eligibility prohibitions in Rules 21F-8 and 21F-9.<sup>26</sup>

### *I. Voluntariness*

Voluntariness is satisfied when a whistleblower submits information to the Commission “before a request, inquiry, or demand that relates to the subject matter of [the] submission is directed to [the whistleblower] or anyone representing [the whistleblower]” by either the Commission, in connection with an investigation, inspection, or examination by the Public Company Accounting Oversight Board (the “PCAOB”), or any self-regulatory agency, or in connection with an investigation by Congress, another federal authority, or a state Attorney General or securities regulatory authority.<sup>27</sup> Voluntariness will not be satisfied if the whistleblower is required to submit information to the Commission due to a preexisting legal duty, a contractual duty owed to

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24. *Id.* § 240.21F-3(a)(3).

25. *Id.* § 240.21F-3(a)(4).

26. *Id.* § 240.21F-3(a). The Commission is also authorized to pay awards in certain “related actions.” A “related action” is defined as a “judicial or administrative action brought by: (i) the Attorney General of the United States; (ii) an appropriate regulatory authority; (iii) a self-regulatory organization; or (iv) A state attorney general in a criminal case.” *Id.* § 240.21F-3(b)(1). An award will be granted in a related action when one of the above agencies or entities brings its own successful enforcement action based on “the same original information that the whistleblower gave to the Commission” leading to the Commission obtaining monetary sanctions totaling more than \$1 million, and that this original information “led to the successful enforcement of the related action under the same criteria described in these rules for awards made in connection with Commission actions.” *Id.* § 240.21F-3(b)(2).

27. *Id.* § 240.21F-4(a)(1).

the Commission or the other authorities cited above, or as a result of a duty mandated by a judicial or administrative order.<sup>28</sup>

## 2. Original Information

The information provided must also be original, as defined by the following criteria:

- (i) Derived from [the whistleblower's] independent knowledge or independent analysis;
- (ii) Not already known to the Commission from any other source, unless [the whistleblower is] the original source of the information;
- (iii) Not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless [the whistleblower is] a source of the information; and
- (iv) Provided to the Commission for the first time after July 21, 2010.<sup>29</sup>

Independent knowledge consists of any “factual information in [the whistleblower's] possession that is not derived from publically available sources,”<sup>30</sup> while independent analysis may be the whistleblower's “own

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28. *Id.* § 240.21F-4(a)(3).

29. *Id.* § 240.21F-4(b). The only substantive change of this definition from how it appears in the Dodd-Frank Act is the July 21, 2010 cut-off for providing information to the Commission for the first time. *See id.* § 240.21F(a)(3). In a recent Second Circuit decision, the Court rejected a challenge to the July 21, 2010 cut-off date, finding that the SEC's interpretation was consistent with Section 21F and reasonable. *See Stryker v. SEC*, 780 F.3d 163, 166-67 (2d Cir. 2015); *see also infra* Part III.A.

30. 17 C.F.R. § 240.21F-4(b)(2). The Adopting Release states that “independent knowledge must be “derived from a whistleblower's own experiences, observations, or communications, and not from information that is available to the general public; however, the Release makes clear that this knowledge does not have to be direct, first-hand knowledge, since “[s]uch an approach could prevent the Commission from receiving valuable information about possible violations from whistleblowers who are not themselves involved in the conduct at issue, but who learn about it through their observations, relationships, or personal diligence.” Adopting Release, *supra* note 17, at \*22.

analysis, whether done alone or in combination with others . . . which reveals information that is not generally known to the public.” In contrast to “independent knowledge,” “independent analysis” can be derived from publically available information, provided that it “reveals information that is not generally known or available to the public.”<sup>31</sup>

Information will not generally be deemed to have been derived from the whistleblower’s “independent knowledge” or “independent analysis,” and thus will not qualify as “original information” if it was obtained in certain specified circumstances.<sup>32</sup> The Commission explained its rationale for excluding this information by noting:

[t]he exclusions generally apply to narrow categories of individuals whose knowledge does not, in our view, constitute “independent knowledge or analysis of a whistleblower,” because the information or analysis was acquired by an individual: (1) On behalf of a third party operating in a sensitive legal, compliance, or governance role . . . ; or (2) in the performance of an engagement required by the federal securities laws . . . ; or (3) by illegal means.<sup>33</sup>

The Commission further stated that it believed “there are good policy reasons to exclude information from consideration as ‘independent knowledge’ or ‘independent analysis’ in the hands of certain persons, and in certain circumstances, where its use in a whistleblower submission might undermine the proper operation of internal compliance systems.”<sup>34</sup> The Commission emphasized, however, that it did not “serve[] the purposes of Section 21F to apply this principle in a manner that creates expansive new exclusions for broad categories of company personnel (*e.g.*, any supervisor, or any employee involved in control functions or in processes related to required CEO and CFO certifications)” and that its approach here “is to adopt more tailored exclusions for ‘core’ persons and processes related to internal compliance mechanisms, and to enhance the incentives for employees to

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31. 17 C.F.R. § 240.21F-4(b)(3). “[T]his definition was intended to recognize that there are circumstances where individuals can review publicly available information, and, through their additional evaluation and analysis, provide vital assistance to the Commission staff in understanding complex schemes and identifying securities violations.” Adopting Release, *supra* note 17, at \*22.

32. 17 C.F.R. § 240.21F-4(b)(4).

33. Adopting Release, *supra* note 17, at \*24.

34. Adopting Release, *supra* note 17, at \*31.

report wrongdoing through their company's established internal procedures."<sup>35</sup>

The first of these exclusions is for information that was obtained through a communication that was subject to the attorney-client privilege, unless disclosure would be permitted by an attorney pursuant to Part 205.3 of the Commission's attorney conduct rules, or was obtained "in connection with the legal representation of a client on whose behalf [the whistleblower or his] employer or firm are providing services, and [the whistleblower seeks] to use the information to make a whistleblower submission for [his] own benefit."<sup>36</sup> In creating this exclusion, the Commission stated that it "believe[d] this result is consistent with the purpose of promoting effective enforcement of the securities laws . . . [since] [c]onsultation with attorneys can improve compliance on the part of entities and individuals."<sup>37</sup>

There are several additional exclusions under the Final Rules for information obtained by company officials and third parties who assist companies in investigations of possible violations of the law. These exclusions are designed, according to the Commission, to ensure that the persons most responsible for an entity's conduct and compliance with law "are not incentivized to promote their own self-interest at the possible expense of the entity's ability to detect, address, and self-report violations."<sup>38</sup> Specifically, these exclusions apply to information obtained during the course of a company's internal compliance or audit activities in the following circumstances:

- information obtained from an officer, director, trustee, or partner of an entity who learned of it because another person informed that individual of allegations of misconduct or "in connection with the entity's processes for identifying, reporting, and addressing possible violations of law;"<sup>39</sup>

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35. *Id.*

36. 17 C.F.R. § 240.21F-4(b)(4)(i)-(ii).

37. Adopting Release, *supra* note 17, at \*24.

38. *Id.*

39. 17 C.F.R. § 240.21F-4(b)(4)(iii)(A).

- information from an employee whose principal duties involve compliance or internal audit responsibilities, or who was employed by or otherwise associated with a firm retained to perform compliance or internal audit functions for an entity;<sup>40</sup>
- information from an employee or person associated with a firm retained to conduct an inquiry or investigation into possible violations of law;<sup>41</sup>
- an employee or someone associated with a public accounting firm if the information was obtained through a required accountant's engagements under federal securities law;<sup>42</sup> and
- information obtained from a person already subject to one of the exclusions, unless the information is “not excluded from that person's use pursuant to [these exclusions], or [the submitter is] providing the Commission with information about possible violations involving that person.”<sup>43</sup>

Finally, the Final Rules exclude information obtained in a manner that is determined by a court to violate federal or state criminal law.<sup>44</sup> The Commission explained that the purpose of this exclusion is to ensure “that the whistleblower award program not be used to encourage or reward individuals for obtaining information in violation of federal or state criminal law—even if the information might otherwise assist our

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40. *Id.* § 240.21F-4(b)(4)(iii)(B).

41. *Id.* § 240.21F-4(b)(4)(iii)(C).

42. *Id.* § 240.21F-4(b)(4)(iii)(D).

43. *Id.* § 240.21F-4(b)(4)(vi). The Commission explained that this exclusion is intended to “work in tandem with the other exclusions set forth in Rule 21F-4(b)(4) to preclude submissions in a limited set of circumstances,” such as, for example, “if an employee only learns about possible violations because he or she is interviewed in the course of a company internal investigation, Rule 21F-4(b)(4)(vi) will not permit that employee to file a whistleblower submission claiming the information as his or her ‘independent knowledge’ or ‘independent analysis.’” Adopting Release, *supra* note 17, at \*38. Another example cited by the Commission is where “a senior company officer, after receiving a report concerning possible securities violations, gives the information to his or her assistant.” *Id.* In such a case, the assistant “will not be able to seek an award based on the information as long as the officer is barred from doing so.” *Id.*

44. 17 C.F.R. § 240.21F-4(b)(4)(iv).

enforcement of the federal securities laws.”<sup>45</sup> It should be noted, however, that this exclusion does not apply to information obtained in a manner that violates domestic civil or foreign law (civil or criminal), or judicial or administrative protective orders.<sup>46</sup>

The Final Rules also contain several exceptions that may permit individuals subject to the exclusions to qualify as having provided “original information” in certain limited circumstances. As noted, information obtained in the course of a legal representation is generally excluded from the definition of “independent knowledge” and “independent analysis.”<sup>47</sup> There is an exception to this exclusion in cases where “disclosure of that information would otherwise be permitted by an attorney” under certain attorney conduct rules.<sup>48</sup> Similarly,

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45. Adopting Release, *supra* note 17, at \*36.

46. *Id.* In deciding that the exclusion should not apply to information obtained in violation of foreign law, the Commission noted that since other countries’ laws often greatly vary from United States law, it concluded that it was “not in a position to decide as a categorical rule when it is appropriate to deny an award based on foreign law,” recognizing that whistleblowers in foreign jurisdictions “may have obligations to comply with applicable foreign laws,” such as, in some jurisdictions, “criminal penalties for unlawfully obtaining certain information or for unlawfully disclosing certain information to authorities outside their borders.” *Id.* at \*36, \*36 n.181. With regard to information obtained in violation of domestic civil law, the Commission concluded that the exclusion should not apply since it would be “difficult to apply consistently given the patchwork of state and municipal civil laws that might be implicated.” *Id.* at \*36. Finally, the Commission explained that it decided not to include information obtained in violation of protective orders—which, the Commission noted, are “frequently negotiated between parties to private litigation and are generally intended to protect proprietary information against public disclosure or improper use”—since “[i]t would be against public policy for litigants to obtain a protective order, or to seek enforcement of such an order, for the purpose of preventing the disclosure of information regarding violations of law to a law enforcement agency. *Id.* at \*37.

47. *See supra* notes 36-37 and accompanying text.

48. Rules 21F-4(b)(4)(i) and (ii) set out the attorney/legal representation exclusions, and also set out exceptions to the exclusions. Thus, Rules 21F-4(b)(4)(i) and (ii) separately provide that the exclusion for information obtained through a communication that was subject to the attorney-client privilege in connection with the legal representation of a client on whose behalf the whistleblower or his employer or firm are providing services will not apply if the “disclosure of that information would otherwise be permitted by an attorney pursuant to [Part 205 of the Commission’s

information obtained as a result of the whistleblower's status at the company or involvement in a company investigation or audit may also be excluded from being considered "original information."<sup>49</sup> Nevertheless, this otherwise excluded information may, in certain circumstances, fall within the scope of specified exceptions to the exclusion. Specifically, the rules provide for an exception to the exclusion if the whistleblower has a reasonable basis to believe that: (1) disclosure of the information "is necessary to prevent the relevant entity from engaging in conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors;"<sup>50</sup> or (2) the entity is "engaging in conduct that will impede an investigation of the misconduct."<sup>51</sup> Another exception occurs when "[a]t least 120 days have

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attorney conduct rules], the applicable state attorney conduct rules, or otherwise." 17 C.F.R. § 240.21F-4(b)(4)(i)-(ii).

49. Specifically, these exclusions cover the situations where:

(1) a company's senior official is informed by another person of allegations of misconduct, or obtains the information in connection with the company's processes for identifying, reporting, and addressing violations of law;

(2) an employee whose principal duties involve compliance or internal audit responsibilities, or who was employed by or otherwise associated with a firm retained to perform compliance or internal audit functions for an entity obtains the information as a result of serving in these capacities;

(3) a person obtains the information as a result of being employed by or otherwise associated with a firm retained to conduct an inquiry or investigation into possible violations of law; or

(4) a person obtains the information as a result of being employed by or otherwise associated with a public accounting firm in connection with "the performance of an engagement required of an independent public accountant under the federal securities laws (other than an audit subject to §240.21F-8(c)(4) of this chapter)."

17 C.F.R. § 240.21F-4(b)(4)(iii)(A)-(D).

50. *Id.* § 240.21F-4(b)(4)(v)(A). The Commission explained that "[i]n such cases, we believe it is in the public interest to accept whistleblower submissions and to reward whistleblowers—whether they are officers, directors, auditors, or similar responsible personnel—who give us information that allows us to take enforcement action to prevent substantial injury to the entity or to investors." Adopting Release, *supra* note 17, at \*33.

51. 17 C.F.R. § 240.21F-4(b)(4)(v)(B). This exception is designed to cover situations where the whistleblower has a reasonable belief that the entity is acting in "bad faith," by, for example, "destroying documents, improperly influencing witnesses,



elapsed since [the whistleblower] provided the information to the relevant entity's audit committee, chief legal officer, chief compliance officer . . . or [the whistleblower's] supervisor" unless they were "already aware of the information."<sup>52</sup>

The Final Rules also provide guidance as to whether a whistleblower can be considered an original source of information to the Commission if another party previously provided the same information to the Commission. The general rule states that the Commission will consider the whistleblower to be the original source of the information if (1) the information satisfies the definition of original information and (2) the other source—which can include, as the Adopting Release clarifies, the whistleblower's employer<sup>53</sup>—obtained the information from the whistleblower or his representative.<sup>54</sup> Additionally, if the

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or engaging in other improper conduct that may hinder our investigation." Adopting Release, *supra* note 17, at \*34.

52. 17 C.F.R. § 240.21F-4(b)(4)(v)(C). The purpose of this exception is to allow potential whistleblowers to know "that they will have a date certain after which they will no longer be ineligible to make a submission based upon the information in their possession [and] is not intended to suggest to entities that they have a 120-day 'grace period' for determining their response to the violations." Adopting Release, *supra* note 17, at \*34. This exception to the exclusion was invoked by the Commission in a recent award to a company officer on the grounds that the whistleblower "reported the information to other responsible persons at the entity, as provided for under our rules, or such persons knew about it, at least 120 days before [the whistleblower] reported the information to the Commission." Order Determining Whistleblower Award Claim, Exchange Act Release No. 74404, 2015 WL 860712, at \*1 n.1 (Mar. 2, 2015).

53. The Adopting Release explains that an individual would be deemed the original source of information provided to the Commission by her employer if the individual had reported the information in the first instance through the "employer's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law, [and] the company later self-reports the individual's information to the Commission, and the individual thereafter files a whistleblower submission." Adopting Release, *supra* note 17, at \*39.

54. 17 C.F.R. § 240.21F-4(b)(5); *see also* Adopting Release, *supra* note 17, at \*19 (noting that "under Rules 21F-4(b)(5) and (6) an individual can be considered the original source of information provided to the Commission by another source (*including the individual's employer*)" (emphasis added)). The Adopting Release provides an example to illustrate the applicability of the rule:

[I]f B makes a whistleblower submission based upon information obtained from A, and A later makes his or her own submission of

Commission received the information from Congress, federal authorities, a state Attorney General or securities authority, self-regulatory organizations, or the PCAOB, a whistleblower can still be considered its original source if he voluntarily submitted the information and established his status as the original source of the information given by the other agency.<sup>55</sup>

If a whistleblower provides information to one of the designated agencies, entities, or through a company's internal compliance procedures for reporting allegations of possible violations of law, and the whistleblower then submits the same information to the Commission within 120 days of providing it to the agency, entity, or through a company's internal compliance procedures, then the Commission will consider that the whistleblower provided the information as of the date the whistleblower had provided it to the agency, entity, or company in evaluating any later claim for an award submitted by the whistleblower.<sup>56</sup> This provision is designed for the benefit of

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that information, then A will be considered the "original source" of the information (assuming that A establishes his or her status as the original source and that the information otherwise qualifies as "original information").

*Id.* at \*39. The Adopting Release clarifies, however, that A's status as the "original source" of the information would not exclude B from award eligibility in this example because B had obtained the facts underlying his or her submission from A, and those facts were not derived from publicly available sources, and, thus, B would also be deemed to have submitted information derived from his or her "independent knowledge." *Id.* As the Adopting Release explained "both submissions could qualify as 'original information;' B's because he or she was first to bring the Commission information derived from 'independent knowledge,' and A's because he or she was the 'original source' of information that, as of B's submission, was already known to the Commission." *Id.*

55. 17 C.F.R. § 240.21F-4(b)(5).

56. *Id.* § 240.21F-4(b)(7). The Commission had originally proposed a 90-day period for a whistleblower to submit the information to the Commission in order to obtain this "lookback" treatment. Adopting Release, *supra* note 17, at \*40-41. In extending this to 120 days, the Commission explained that it felt that the additional 30 days provided a better balancing of the Commission's "primary goal" to "encourage the submission of high-quality information to facilitate the effectiveness and efficiency of the Commission's enforcement program," which militated against the proposals some commentators made for a lookback period of 180 days or longer, as against the Commission's goal of encouraging companies to establish "effective programs for

whistleblowers by providing them with a reasonable period of time to make their reporting decisions.<sup>57</sup>

If the Commission already possesses some information about the matter that the whistleblower provided information for, and the whistleblower is thus not the original source of the information, a whistleblower can still be considered an original source for “any information [provided] that is derived from [the whistleblower’s] independent knowledge or analysis and that materially adds to the information that the Commission already possesses.”<sup>58</sup>

### 3. Leads to a Successful Enforcement Action

Information is deemed to have led to successful enforcement action in three circumstances. First, when a whistleblower provided information that led Commission staff:

to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning different conduct as part of a current examination or investigation, and the Commission brought a successful judicial or administrative action based in whole or in part on conduct that was the subject of [the whistleblower’s] original information.<sup>59</sup>

Second, when a whistleblower gave information that “significantly contributed” to the success of an action already under examination or investigation “by the Commission, the Congress, any other authority of the federal government, a state Attorney General or other securities

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identifying, correcting, and self-reporting unlawful conduct by company officers or employees” and to “support . . . the effective functioning of company compliance and related systems by allowing employees to take their concerns about possible violations to appropriate company officials first while still preserving their rights under the Commission’s whistleblower program,” which all militated against a too-short lookback period. *Id.* at \*41. The Commission stated that it “believe[d] that the balance struck in the final rule will promote the continued development and maintenance of robust compliance programs.” *Id.*

57. *Id.* at \*42.

58. 17 C.F.R. § 240.21F-4(b)(6).

59. *Id.* § 240.21F-4(c)(1).

regulatory authority, any self-regulatory authority, or the PCAOB.”<sup>60</sup> Third, when a whistleblower gave information through an “entity’s internal whistleblower, legal or compliance procedures” for reporting securities violations “before or at the same time [the whistleblower] reported them to the Commission,” and then “the entity later provided [the] information to the Commission, or provided results of an audit or investigation initiated in whole or in part in response to information [the whistleblower] reported to the entity,” provided that the information satisfies either of the prior two criteria.<sup>61</sup>

#### 4. Application for Award

If a claimant has so far met the requirements to be considered for an award, the next step in the analysis is to determine whether he or she followed the proper procedures for making a claim for award.<sup>62</sup>

### B. DETERMINATION OF AWARD AMOUNT

#### 1. Overview

Under the Dodd-Frank Act, if the SEC determines that one or more whistleblowers are entitled to receive an award for the assistance they provided in a particular covered action, or a related action, then they shall receive, in the aggregate, between 10% to 30% of “what has been collected of the monetary sanctions imposed in the action or related

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60. *Id.* § 240.21F-4(c)(2). In determining what constitutes “significantly contributing” to the success of an enforcement action, the Commission stated that it will “look at factors such as whether the information allowed us to bring: (1) Our successful action in significantly less time or with significantly fewer resources; (2) additional successful claims; or (3) successful claims against additional individuals or entities.” Adopting Release, *supra* note 17, at \*46.

61. 17 C.F.R. § 240.21F-4(c)(3). This latter provision was added by the Commission “to create a significant financial incentive for whistleblowers to report possible violations to internal compliance programs before, or at the same time, they report to us.” Adopting Release, *supra* note 17, at \*46.

62. See *infra* Part I.C.4. (discussing procedures for making an award claim). If a claimant has failed to meet any of the required procedures for making a claim set forth above, he may still be considered for an award upon a showing of “extraordinary circumstances.” 17 C.F.R. § 240.21F-8(a). A determination of extraordinary circumstances rests within the sole discretion of the Commission. *Id.*

actions.”<sup>63</sup> The Dodd-Frank Act placed the actual award percentage determination within the SEC’s discretion, directing that the SEC consider the significance of the whistleblower’s information to the success of the enforcement action, the extent of the assistance provided by the whistleblower, the SEC’s “programmatic interest” in deterring the securities law violations involved in the covered action, and other factors established under the Commission’s rules.<sup>64</sup> The Dodd-Frank Act further bars a disappointed whistleblower from appealing the SEC’s determination of an award amount to the United States Court of Appeals.<sup>65</sup>

As noted, the Dodd-Frank Act provides that the determination of the amount of an award is “in the discretion of the Commission.”<sup>66</sup> In explaining the parameters to be used by the Commission in exercising its discretion, the Adopting Release notes that “[s]ince every enforcement matter is unique, the analytical framework adopted by the Commission in [Rule 21F-6] provides general principles without mandating a particular result” and that “no attempt has been made to list the factors in order of importance, weigh the relative importance of each factor, or suggest how much any factor should increase or decrease the award percentage.”<sup>67</sup> Rather, the Adopting Release concludes that “[i]n

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63. 15 U.S.C. § 78u-6(b)(1)(A)-(B) (2012). Rule 21F-5(c) further provides that “[i]f the Commission makes awards to more than one whistleblower in connection with the same action or related action, the Commission will determine an individual percentage award for each whistleblower, but in no event will the total amount awarded to all whistleblowers in the aggregate be less than 10 percent or greater than 30 percent of the amount the Commission or the other authorities collect.” 17 C.F.R. § 240.21F-5(c). The Adopting Release provides an example to illustrate the point: “Thus, for example, one whistleblower could receive an award of 25 percent of the collected sanctions, and another could receive an award of 5 percent, but they could not each receive an award of 30 percent.” Adopting Release, *supra* note 17, at \*53.

64. 15 U.S.C. § 78u-6(c)(1).

65. *See id.* § 78u-6(f). Subsection (f) provides that “[a]ny such determination, except the determination of the amount of an award if the award was made in accordance with subsection (b), may be appealed to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Commission.” *Id.* (emphasis added).

66. *Id.* § 78u-6(c)(1)(A).

67. Adopting Release, *supra* note 17, at \*56; *see also* Order Determining Whistleblower Award Claim, Exchange Act Release No. 73174, 2014 WL 4678597, at

the end, [the SEC] anticipates that 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 final rule.”<sup>68</sup> In addition, the Adopting Release notes, “the absence of any one of the positive factors does not mean that the award percentage will be lower than 30 percent, nor does the absence of negative factors mean the award percentage will be higher than 10 percent.”<sup>69</sup> To illustrate this principle, the Adopting Release offers the example of a whistleblower who could receive a maximum award even though the whistleblower did not satisfy certain positive factors, “such as participating in internal compliance programs,” so long as the whistleblower satisfied other positive factors, such as “provid[ing] the Commission with significant information about a possible securities violation and provid[ing] substantial assistance in the Commission action or related action.”<sup>70</sup>

The Dodd-Frank Act directs that the award payment be based on the amount the SEC or other agency actually collects from the defendants or respondents, not on the amount that the defendants or respondents are ordered to pay in the covered action or related action.<sup>71</sup> Thus, if the sanctions ordered in the covered action amount to \$100 million, but the SEC is only able to collect \$100,000 from the defendants, then the amount of any whistleblower award paid by the Commission in that action will be calculated by multiplying the award percentage decided upon by the \$100,000 of the collected sanctions. If the Commission collects additional monetary sanctions after an initial award has been paid, the whistleblower will receive additional award payments based on these later collections.<sup>72</sup>

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\*1 n.4 (Sept. 22, 2014) (noting that “every enforcement action is unique and thus each award determination involves a highly individualized review of the facts and circumstances surrounding the particular case”).

68. Adopting Release, *supra* note 17, at \*56.

69. *Id.*

70. *Id.*

71. 15 U.S.C. § 78u-6(b)(1)(A)-(B).

72. *See, e.g.*, Press Release, SEC, SEC Announces Additional \$150,000 Payment to Recipient of First Whistleblower Award (Apr. 4, 2014) (noting that the Commission’s first award recipient under the program received additional payments of approximately \$150,000 since the award was announced on August 21, 2012).

To date, the SEC has awarded eighteen whistleblowers since the whistleblower program began nearly four years ago.<sup>73</sup> Payouts have totaled more than \$50 million out of an investor protection fund established by Congress.<sup>74</sup> The SEC has also issued at least four maximum 30% awards.<sup>75</sup>

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73. See *supra* note 14 and accompanying text.

74. Press Release, SEC, SEC Pays More Than \$3 Million to Whistleblower (July 17, 2015). The investor protection fund was established pursuant to Section 21F(g) of the Dodd-Frank Act to fund the payment of awards to whistleblowers under the whistleblower award program. The fund is financed entirely through monetary sanctions paid to the SEC by securities law violators, and no money is taken or withheld from harmed investors to pay whistleblower awards. *Id.* Four of these whistleblowers received awards for their assistance in both the SEC enforcement actions and related actions by other agencies. See Order Determining Whistleblower Award Claim, Exchange Act Release No. 69749, 106 S.E.C. Docket 2324, 2013 WL 2607652 (June 12, 2013) (approving three whistleblower award claims); Order Determining Related Action Whistleblower Award Claims, Exchange Act Release No. 70293, 107 S.E.C. Docket 351, 2013 WL 4647206 (Aug. 30, 2013) (approving three whistleblower award claims in related actions); Order Determining Whistleblower Award Claim, Exchange Act Release No. 73174, 2014 WL 4678597 (Sept. 22, 2014) (awarding a whistleblower award claim).

75. See Order Determining Whistleblower Award Claim, Exchange Act Release No. 72652, 109 S.E.C. Docket 2170, 2014 WL 3588057, at \*1 (July 22, 2014); Order Determining Whistleblower Award Claim, Exchange Act Release No. 72301, 109 S.E.C. Docket 67, 2014 WL 2466464, at \*1 (June 3, 2014); Order Determining Whistleblower Award Claim, Exchange Act Release No. 70775, 107 S.E.C. Docket 2912, 2013 WL 5819624, \*1 (Oct. 30, 2013); Order Determining Whistleblower Award Claim, Exchange Act Release No. 67698, 104 S.E.C. Docket 1620, 2012 WL 3578897 (Aug. 21, 2012). It should be noted that the Commission has, on occasion, redacted the award percentage and disclosed only the amount of the expected award payment. See, e.g., Order Determining Whistleblower Award Claim, Exchange Act Release No. 73174, 2014 WL 4678597, at \*1 (Sept. 22, 2014) (noting that in light of the redacted award percentage and the amount of sanctions collected as of the date of the order, the whistleblower would be receiving a payment of between \$30 and \$35 million).

The SEC's orders authorizing award payments generally have not detailed the particular information and assistance provided by the successful whistleblowers or the weight given by the agency to the various positive factors in evaluating the whistleblowers' contributions to the success of the enforcement actions. Indeed, as noted, the publicly-issued orders redact the names of the whistleblowers and, in many cases, other significant information such as the names of the parties prosecuted by the SEC. See, e.g., Order Determining Whistleblower Award Claim, Exchange Act Release No. 72947, 109 S.E.C. Docket 3790, 2014 WL 4258232, at \*1 (Aug. 29, 2014).

## 2. Positive and Negative Factors in Determining Award Percentage

Rule 21F-6 sets out the factors the SEC may apply in making its award determinations—factors that are reviewed “in relation to the unique facts and circumstances of each case.”<sup>76</sup> Four of these factors will favor increasing the amount of the award while three other factors favor decreasing the amount.<sup>77</sup> The Commission emphasized that “the absence of any one of the positive factors does not mean that the award percentage will be lower than 30 percent, nor does the absence of negative factors mean the award percentage will be higher than 10 percent.”<sup>78</sup> In the event there are multiple qualifying whistleblowers, the Commission will employ these factors to “determine the relative allocation of awards among the whistleblowers.”<sup>79</sup>

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In addition to redacting the whistleblower’s name and position in the subject company, the order also redacted, among other information, the name and date of the enforcement action, the nature of the violations committed by the defendant(s), and a summary of the information provided by the successful whistleblower. *Id.* This is to protect the confidentiality of whistleblowers, as required by the Dodd-Frank Act, by not disclosing any information that could reasonably be expected to reveal the identity of a whistleblower. As noted above, Section 21F(h)(2) of the Exchange Act requires that, except in certain limited specified circumstances, “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.” 15 U.S.C. § 78u-6(h)(2). The Adopting Release explains that the Commission “will not reveal the identity of a whistleblower or disclose other information that could reasonably be expected to reveal the identity of a whistleblower, except under circumstances described in the statute and the rule.” Adopting Release, *supra* note 17, at \*57.

76. 17 C.F.R. § 240.21F-6 (2015). The Adopting Release emphasizes this point:

Since every enforcement matter is unique, the analytical framework adopted by the Commission in the final rule provides general principles without mandating a particular result. Accordingly, no attempt has been made to list the factors in order of importance, weigh the relative importance of each factor, or suggest how much any factor should increase or decrease the award percentage.

Adopting Release, *supra* note 17, at \*56.

77. 15 U.S.C. § 78u-6.

78. Adopting Release *supra* note 17, at \*56.

79. 15 U.S.C. § 78u-6. The Adopting Release explains that the rule “provide[s] for greater awards for more timely and more useful information, and reduced awards for



## a. Positive Factors

The first three positive factors are set forth in the Dodd-Frank Act. The fourth positive factor, participation in internal compliance systems, is not expressly set out in the Dodd-Frank Act but was added pursuant to the authority granted to the SEC under the Dodd-Frank Act to consider “such additional relevant factors as the Commission may establish by rule or regulation.”<sup>80</sup> The rule does not list the positive factors in order of importance.<sup>81</sup>

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whistleblowers whose dilatory or uncooperative conduct may impair our enforcement efforts.” Adopting Release, *supra* note 17, at \*102.

80. 15 U.S.C. § 78u-6(c)(1)(B)(i)(IV). In explaining its rationale for adding this positive factor, and other related factors discussed below, the Adopting Release stated:

In response to concerns expressed by commenters that the proposed rules could incentivize whistleblowers to bypass corporate compliance programs, delay reporting violations, or otherwise interfere with internal compliance systems in order to enhance their future award, we have taken several steps to address this in the final rule. First, to reflect the important investor protection role that corporate compliance programs can serve and increase the incentive for whistleblowers to participate in these programs, the final rule includes a positive factor that requires the Commission to assess whether the whistleblower participated in his or her company’s internal compliance and reporting systems. Second, to minimize ongoing investor harm, maximize the deterrent impact of our enforcement cases, and to discourage delayed reporting by whistleblowers, the final rule includes a negative factor that requires the Commission to assess whether the whistleblower substantially and unreasonably delayed reporting the securities violations. Lastly, to penalize whistleblowers who attempt to undermine their employer’s internal compliance or reporting systems, the final rule includes a negative factor that requires the Commission to assess whether there is evidence provided to the Commission that the whistleblower intentionally interfered with his or her company’s internal compliance systems. Together, these provisions are designed to give whistleblowers appropriate incentives to report securities violations voluntarily to their corporate compliance programs and not to impair the effectiveness of these important programs.

Adopting Release, *supra* note 17, at \*57.

81. 17 C.F.R. § 240.21F-6(a).

## i. Significance of the Whistleblower's Information

The first positive factor identified by Rule 21F-6(a) provides that the Commission will “assess the significance of the information provided by the whistleblower to the success of the Commission action or related action.”<sup>82</sup> The SEC may examine, among other things, “whether the reliability and completeness of the information . . . resulted in the conservation of Commission resources.”<sup>83</sup> The SEC may also look at “[t]he degree to which the information provided by the whistleblower supported one or more successful claims” in the enforcement action.<sup>84</sup> While all of the positive factors relate in one way or another to encouraging whistleblowers to provide helpful information, this factor focuses on the importance and usefulness of the information to the SEC.

## ii. Assistance Provided by the Whistleblower

The second positive factor identified by Rule 21F-6(a) examines the additional value provided by the whistleblower in assisting the staff in its investigation and enforcement action. The rule states that in considering this factor, the SEC may look at, among other things, the following criteria:

- “Whether the whistleblower provided ongoing, extensive, and timely cooperation and assistance,”<sup>85</sup>
- “timeliness of the whistleblower’s initial report to the [SEC or, if appropriate,] the internal compliance or reporting system of the business organizations,”<sup>86</sup>
- “resources conserved [by the SEC] as a result of the whistleblower’s assistance,”<sup>87</sup>

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82. *Id.* § 240.21F-6(a)(1)(i).

83. *Id.*

84. *Id.* § 240.21F-6(a)(1)(ii).

85. *Id.* § 240.21F-6(a)(2)(i). An example of the sort of value-added ongoing, extensive, and timely cooperation and assistance contemplated by the Rule would be “helping to explain complex transactions, interpreting key evidence, or identifying new and productive lines of inquiry.” *Id.*

86. *Id.* § 240.21F-6(a)(2)(ii).

87. *Id.* § 240.21F-6(a)(2)(iii).

- whether the whistleblower “encouraged or authorized others to assist the staff of the Commission who might otherwise might not have participated in the investigation;”<sup>88</sup>
- “efforts undertaken by the whistleblower to remediate the harm caused by the violations, including assisting the authorities” in recovering investor money lost as a result of the violations,<sup>89</sup> and
- “unique hardships suffered by the whistleblower as a result of . . . reporting and assisting in the enforcement action.”<sup>90</sup>

While neither the rule nor the Adopting Release provide further guidance on what constitutes a “unique hardship,” this factor has been applied where an employer unlawfully retaliated against a whistleblower in violation of Section 21F(h) of the Exchange Act.<sup>91</sup> The Commission’s Order noted that the Claims Review Staff considered the “substantial evidence that the whistleblower suffered unique hardships as a result of reporting, and also found the Commission’s law enforcement interest to be compelling given the Commission’s previous findings of unlawful retaliation against this whistleblower.”<sup>92</sup>

### iii. Law Enforcement Interest

The third positive factor relates to the SEC’s “programmatic interest” in protecting investors and in deterring violations of the securities laws.<sup>93</sup> This factor focuses on “[t]he degree to which an award enhances the Commission’s ability to enforce the federal securities laws and protect investors.”<sup>94</sup> The rule provides several examples of

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88. *Id.* § 240.21F-6(a)(2)(iv).

89. *Id.* § 240.21F-6(a)(2)(v).

90. *Id.* § 240.21F-6(a)(2)(vi).

91. Order Determining Whistleblower Award Claim, Exchange Act Release No. 74826, 2015 WL 1907622 (Apr. 28, 2015); *see also In re Paradigm Capital Mgmt.*, Exchange Act Release No. 72393, 2014 WL 2704311, at \*4-8 (June 16, 2014).

92. Order Determining Whistleblower Award Claim, Exchange Act Release No. 74826, 2015 WL 1907622, at \*1 (Apr. 28, 2015).

93. 17 C.F.R. § 240.21F-6(a)(3).

94. *Id.* § 240.21F-6(a)(3)(i).

circumstances the SEC may take into account in considering its “programmatic interest,” including the type and amount of harm caused by the violation and the number of individuals harmed,<sup>95</sup> whether the subject matter of the violation is an SEC priority, “the reported misconduct involves regulated entities or fiduciaries,” or “the whistleblower exposed an industry-wide practice” or a long-standing ongoing violation;<sup>96</sup> and whether the announcement of an award payment “encourages the submission of high quality information from [other] whistleblowers.”<sup>97</sup>

#### iv. Participation in Internal Compliance Systems

The fourth and final positive factor looks at the extent to which the whistleblower participated in a company’s internal compliance systems.<sup>98</sup> Unlike the three prior positive factors, this positive factor was not set forth in the Dodd-Frank Act. Rather, this factor was one of a number of rules that the SEC adopted in order to “incentivize whistleblowers to utilize their companies’ internal compliance and reporting systems when appropriate.”<sup>99</sup> The Commission expressly stated in the Adopting Release that “in order to encourage whistleblowers to utilize internal reporting processes, we expect to give credit in the calculation of award amounts to whistleblowers who utilize established internal procedures for the receipt and consideration of complaints about misconduct.”<sup>100</sup> As the Commission has recognized in this and other aspects of the whistleblower program, “effective internal compliance programs can in appropriate circumstances provide significant benefits both in terms of reducing the harm that entities and investors experience from securities law violations, and in terms of efficiently assisting our own enforcement efforts.”<sup>101</sup>

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95. *Id.* § 240.21F-6(a)(3)(iv).

96. *Id.* § 240.21F-6(a)(3)(iii).

97. *Id.* § 240.21F-6(a)(3)(ii).

98. *Id.* § 240.21F-6(a)(4).

99. Adopting Release, *supra* note 17, at \*3.

100. *Id.* at \*42 n.197.

101. *Id.* at \*101. In discussing the benefits accruing to the Commission’s enforcement efforts from an effective internal compliance program, the Adopting Release noted:

While this positive factor incentivizes whistleblowers to report internally, “there are circumstances where a whistleblower may have legitimate reasons for not wanting to report the information internally, for example, legitimate concerns about misconduct by the company’s management or within the internal compliance program, or a reasonable basis to fear retaliation or personal harm”<sup>102</sup> However, the Commission has recognized that each case is unique, and some factors may not be applicable or may deserve greater weight than others depending on the facts and circumstances. For this reason, the absence of any one of the

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[I]nternal compliance procedures can complement or otherwise appreciably enhance our enforcement efforts in appropriate circumstances. For instance, the subject company may at times be better able to distinguish between meritorious and frivolous claims, and may make such findings available for the Commission. This would be particularly true in instances where the reported matter entails a high level of institutional or company-specific knowledge and/or the company has a well-functioning internal compliance program in place. Screening allegations through internal compliance programs may limit false and frivolous claims, provide the entity an opportunity to resolve the violation and report the result to the Commission, and allow the Commission to use its resources more efficiently.

*Id.* at \*104 n.450.

102. *Id.* at \*48. While the scope of this article does not cover the anti-retaliation provisions of the Dodd-Frank Act, we note that there is currently a split among the circuit courts as to whether these provisions protect a person who reports a securities law violation *only* to a company’s internal compliance and reporting systems, rather than to the Commission as well. *Compare* *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013) (holding that the Dodd-Frank Act “clearly expresses Congress’s intention to require individuals to report information to the SEC” to receive the protections accorded to whistleblowers by the Act’s anti-retaliation provisions and “reject[ing] the SEC’s expansive interpretation of the term ‘whistleblower’ for purposes of the whistleblower-protection provision”), *with* *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 154-55 (2d Cir. 2015) (finding the Dodd-Frank Act “sufficiently ambiguous” on the question of whether a person must report to the SEC to obtain the protection of the Act’s anti-retaliation protections and, therefore, “defer[ring] to the [SEC’s] reasonable interpretive rule” that accords this protection to persons who report wrongdoing to their employer, despite not having reported to the Commission).

positive factors, including participation in internal compliance systems, will not necessarily preclude a maximum award.<sup>103</sup>

In considering this factor, the SEC may take into account, among other things, whether the whistleblower reported internally “before, or at the same time as, reporting . . . to the Commission,”<sup>104</sup> and whether, and the extent to which, the whistleblower “assisted any internal investigation or inquiry concerning the reported securities violations.”<sup>105</sup>

#### b. Negative Factors

The three negative factors mentioned in the Final Rules are, to some extent, the antithesis of the positive factors discussed above. For example, if instead of utilizing his employer’s internal compliance system to report a concern, a whistleblower interferes with his company’s internal compliance system, the SEC will assess this fact in determining an award calculation. Furthermore, if instead of cooperating and assisting the SEC in its investigation, a whistleblower unreasonably delayed reporting a violation to the SEC, this will also be treated as a negative factor in determining the whistleblower’s award percentage.

##### i. Interference with Internal Compliance and Reporting Systems

While reporting internally is a positive factor in the Commission’s award determination, if the whistleblower’s interaction with his or her company’s internal compliance system had the effect of “undermining the integrity” of the system, this will instead constitute a negative factor in the Commission’s analysis.<sup>106</sup> The rule states that, in considering this factor, the Commission will take into account whether the whistleblower knowingly: (1) interfered with his entity’s established legal, compliance, or audit procedures “to prevent or delay detection of the reported

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103. *See id.* at \*56 (“[a] whistleblower who provides the Commission with significant information about a possible securities violation and provides substantial assistance in the Commission action or related action could receive the maximum award regardless of whether the whistleblower satisfied other factors such as participating in internal compliance programs”).

104. 17 C.F.R. § 240.21F-6(a)(4)(i).

105. *Id.* § 240.21F-6(a)(4)(ii).

106. *Id.* § 240.21F-6(b)(3).

securities violation”;<sup>107</sup> (2) made “materially false, fictitious, or fraudulent statements or representations that hindered the entity’s efforts to detect, investigate, or remediate the reported securities violations”;<sup>108</sup> and (3) “provided any false writing or document knowing the writing or document contained any false, fictitious or fraudulent statements or entries that hindered an [employer’s] efforts to detect, investigate, or remediate the reported securities violations.”<sup>109</sup>

## ii. Whistleblower’s Culpability

If a whistleblower participated in the securities violation, this may count as a negative factor and cause an award to be reduced depending upon the extent of the whistleblower’s culpability or involvement in the violation.<sup>110</sup> The rule lists a number of factors that the SEC may take into account in determining whether to consider the whistleblower’s participation as a negative factor in its award determination. These factors essentially cover two primary areas: (1) the extent of the whistleblower’s participation;<sup>111</sup> and (2) the whistleblower’s background and knowledge.<sup>112</sup>

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107. *Id.* § 240.21F-6(b)(3)(i).

108. *Id.* § 240.21F-6(b)(3)(ii).

109. *Id.* § 240.21F-6(b)(3)(iii).

110. *Id.* § 240.21F-6(b)(1).

111. The factors covered by this category include:

- “The whistleblower’s role in the securities violations.” *Id.* § 240.21F-6(b)(1)(i);
- “Whether the whistleblower acted with scienter . . . .” *Id.* § 240.21F-6(b)(1)(iii);
- “Whether the whistleblower financially benefitted from the violations.” *Id.* § 240.21F-6(b)(1)(iv);
- “The egregiousness of the underlying fraud committed by the whistleblower.” *Id.* § 240.21F-6(b)(1)(vi); and
- “Whether the whistleblower knowingly interfered with the Commission’s investigation of the violations . . . .” *Id.* § 240.21F-6(b)(1)(vii).

112. The factors covered by this category include:

- “The whistleblower’s education, training, experience, and position of responsibility at the time the violations occurred.” *Id.* § 240.21F-6(b)(1)(ii); and

In addition, although culpability does not *per se* bar an individual from receiving a whistleblower award (unless the individual is criminally convicted for his role in the violation),<sup>113</sup> any monetary sanctions imposed on a culpable whistleblower or on an entity the liability of which is attributable largely to the whistleblower's conduct will not count toward either the \$1 million award threshold set out in Rule 21F-10 or the amount of sanctions collected for purposes of paying on an award.<sup>114</sup> The purpose of this rule is to ensure that culpable whistleblowers do not benefit financially from their own misconduct or misconduct for which they are substantially responsible.<sup>115</sup>

While a culpable whistleblower may still be eligible to receive a whistleblower award, this does not mean that the whistleblower cannot be charged in an enforcement action by the SEC for his misconduct.<sup>116</sup>

### iii. Unreasonable Reporting Delay

A whistleblower who unreasonably delays reporting a violation to the SEC could face a reduction in the award percentage he or she

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- “Whether the whistleblower is a recidivist.” *Id.* § 240.21F-6(b)(1)(v).

113. As noted above, otherwise eligible whistleblowers who were convicted of a criminal violation related to the enforcement action for which they are seeking an award will be barred from receiving an award. 15 U.S.C. § 78u-6(c)(2)(B) (2012).

114. 17 C.F.R. § 240.21F-16. The Commission explained in the Adopting Release why it rejected the suggestion of many commentators for barring culpable whistleblowers:

[W]e do not believe that a *per se* exclusion for culpable whistleblowers is consistent with Section 21F of the Exchange Act. By allowing certain less-culpable whistleblowers to receive awards consistent with the limitations set forth in the final rules, we have provided incentives for persons involved in wrongdoing to come forward and disclose illegal conduct involving others while limiting awards to those whistleblowers.

Adopting Release, *supra* note 17, at \*57.

115. *Id.* at \*90.

116. *See id.* at \*90 n.391 (noting that a culpable whistleblower may not only hurt his or her chances of receiving an award but that he or she can also be “prosecuted for his [or her] involvement in the misconduct”).



receives.<sup>117</sup> In deciding whether a whistleblower's delay in reporting was unreasonable, the SEC may take into account, among other things, the reasons for the delay, and whether the whistleblower was aware of the relevant facts but failed to take reasonable steps to report or prevent the violations from occurring or continuing, or only reported them after learning about a related inquiry, investigation, or enforcement action.<sup>118</sup> This rule is meant to incentivize whistleblowers to promptly report violations and to provide a disincentive for tardy reporting.<sup>119</sup>

### C. AWARD REVIEW PROCESS

The whistleblower award process is a multistep review where an applicant informs the SEC why they are entitled to an award, the SEC then examines the application to determine if the claim should be granted, and, if so, the amount that should be paid to the successful claimant. We have previously discussed the requirements for qualifying for an award and the analysis undertaken by the SEC in deciding upon the award percentage for successful applicants. In this section, we will discuss how the SEC conducts its award review process and the rights available for claimants to contest the decisions made by the SEC.

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117. 17 C.F.R. § 240.21F-6(b)(2).

118. *Id.* § 240.21F-6(b)(2)(i)-(ii).

119. The Commission stated in the Adopting Release that the purpose of this negative factor is "to minimize ongoing investor harm, maximize the deterrent impact of our enforcement cases, and to discourage delayed reporting by whistleblowers." Adopting Release, *supra* note 17, at \*57. The Commission further explained that:

Rule 21F-6 allows the Commission to set the award percentage based, among other things, on the significance of the information provided by the whistleblower and any unreasonable delay by the whistleblower in making the submission. Taken together, these rules provide for greater awards for more timely and more useful information, and reduced awards for whistleblowers whose dilatory or uncooperative conduct may impair our enforcement efforts.

*Id.* at \*102.

*I. Posting a Notice of Covered Action*

As discussed above,<sup>120</sup> whenever an SEC enforcement action results in monetary sanctions totaling more than \$1 million, the OWB will post a “Notice of Covered Action” (“NoCa”) on its website.<sup>121</sup> Once the OWB publishes a NoCA, a whistleblower has 90 days from the date of publication to file a claim of award, or else the claim will be barred.<sup>122</sup> All claims must be submitted on Form WB-APP, which must be signed and submitted to the OWB by mail or fax.<sup>123</sup> A claimant can no longer remain anonymous at this stage, and his or her identity must be disclosed on Form WB-APP.<sup>124</sup>

To ensure that all potential whistleblowers who may have contributed to the success of the enforcement action are provided with the opportunity to submit a claim and to make their case for why they are entitled to an award, the SEC provides notice through the NoCA posting procedure.<sup>125</sup> As the Commission recognized, the posting of a NoCA “provides the best mechanism to provide notice to all whistleblower claimants who may have contributed to the action’s success [and] . . . ensure that all potential claimants have a fair

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120. See *supra* Part I.A.4.

121. See *Claim an Award*, SEC, <http://www.sec.gov/about/offices/owb/owb-awards.shtml> [<http://perma.cc/S26Y-L6RQ>].

122. 17 C.F.R. § 240.21F-10(a). The Commission reasoned:

[T]his 90-day period strikes an appropriate balance between competing whistleblower interests—allowing all potential whistleblowers a reasonable opportunity to periodically review the Commission’s website and to file an application, on the one hand, but providing finality to the application period so that the Commission can begin the process of assessing any applications and making a timely award to any qualifying whistleblowers, on the other hand.

Adopting Release, *supra* note 17, at \*79.

123. 17 C.F.R. § 240.21F-10(b). The Form WB-APP can be found at <http://www.sec.gov/about/forms/formtcr.pdf> [<http://perma.cc/99DA-Y5L8>]. Claimants can also submit information through the Commission’s Tips, Complaints, and Referral System, which can be found at <http://denebleo.sec.gov/TCRExternal/index.xhtml> [<http://perma.cc/UY5F-YJAS>].

124. 17 C.F.R. § 240.21F-10(c).

125. *Id.*

opportunity to pursue an award claim.”<sup>126</sup> In addition, to the extent the Enforcement staff has worked closely with a particular whistleblower during the course of the investigation and enforcement action, the OWB will generally contact the whistleblower to ensure that the whistleblower is aware of the posting and the deadline for submitting an award application.<sup>127</sup>

## 2. Claims Review: Staff Review and Preliminary Determination

Beyond this initial intake and preliminary review, the SEC will not begin reviewing award applications until the time for filing any appeals of the underlying enforcement action has expired, or where an appeal has been filed, after all appeals in the action have been concluded.<sup>128</sup> The review is conducted by the Claims Review Staff, which is the staff designated by the Director of the Division of Enforcement to evaluate all timely whistleblower award claims submitted on Form WB-APP in accordance with the criteria set forth in the whistleblower rules.<sup>129</sup> In connection with this process, the OWB may require whistleblowers to “provide additional information relating to their eligibility for an award or [to show] satisfaction of any of the conditions for an award.”<sup>130</sup>

In making its decision, the Claims Review Staff may rely upon the whistleblower’s award application, sworn declarations from the staff that worked on the successful enforcement action, the relevant orders and pleadings, and other appropriate materials.<sup>131</sup> The Claims Review

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126. *Id.*

127. Adopting Release, *supra* note 17, at \*79.

128. 17 C.F.R. § 240.21F-10(d).

129. *Id.* In the Adopting Release, the Commission explained that the Director of Enforcement “may designate staff from the Enforcement Division, the Office of the Whistleblower, or other Commission divisions or offices to serve on the Claims Review Staff, either on a case-by-case basis or for fixed periods, as the Director deems appropriate.” Adopting Release, *supra* note 17, at \*80.

130. 17 C.F.R. § 240.21F-10(d); Adopting Release, *supra* note 17, at \*77.

131. 17 C.F.R. § 240.21F-12(a). In addition to the applicant’s Form WB-APP, the staff’s views (in the form of a sworn declaration), and the orders and pleadings, the Claims Review Staff may also review: (i) transcripts of the enforcement proceedings, including any exhibits; (ii) any appellate decisions or orders; and (iii) any other documents or materials, including sworn declarations, from third-parties that are received by the OWB and can help the Claims Review Staff to resolve the claimant’s

Staff may review the whistleblower's Form TCR including attachments and other related materials provided by the whistleblower to assist the Commission's investigation. In listing these various documents that the Claims Review Staff and Commission may rely upon in making its determination, the Commission explained that "specifying the materials that we may rely upon will promote transparency and consistency in the claims review process."<sup>132</sup>

Following the evaluation of the claim, the Claims Review Staff will issue a Preliminary Determination recommending whether it should be allowed or denied, and, if allowed, the proposed award amount that should be granted.<sup>133</sup> In its Preliminary Determination, the Claims Review Staff will explain the reasons for its decision.<sup>134</sup> The OWB will then send copies of the Preliminary Determination to the claimants,<sup>135</sup> along with a letter outlining the claimants' rights under the whistleblower rules to request the record reviewed by the Claims Review Staff and to contest the Preliminary Determination.

### 3. Contesting a Preliminary Determination

If a whistleblower wishes to contest a Preliminary Determination, he needs to submit a written response to the OWB explaining the grounds for objecting to either the denial of an award or the proposed amount of an award.<sup>136</sup> Before deciding to contest a Preliminary Determination, a whistleblower may request that the OWB provide for his review the materials that formed the basis of the Claims Review

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award application, including information related to the claimant's eligibility. 17 C.F.R. § 240.21F-12(a)(1)(iii), (v), (6).

132. Adopting Release, *supra* note 17, at \*83.

133. 17 C.F.R. § 240.21F-10(d).

134. *See, e.g.*, SEC Claims Review Staff, Preliminary Determination of the Claims Review Staff, Notice of Covered Action 2011-194 (June 16, 2014), <http://www.sec.gov/about/offices/owb/orders/owb-2011-194-final-081514.pdf> [<http://perma.cc/7GA6-XH8F>] (denying the claim because there was no evidence showing that the claimant had provided information to the Commission relating to the Covered Action or any other Commission matter).

135. *Id.*

136. 17 C.F.R. § 240.21F-10(e).

Staff's Preliminary Determination.<sup>137</sup> This request must be submitted to the OWB within 30 days of the date of the Preliminary Determination.<sup>138</sup>

While a whistleblower has the right to review the materials that formed the basis of the Claims Review Staff's Preliminary Determination, this right has certain limitations. First, the whistleblower is not entitled to obtain any materials beyond those that formed the basis of an award determination.<sup>139</sup> Thus, a whistleblower does not have the right to review the investigative files or to interview the Enforcement staff. Second, a whistleblower is not entitled to review "pre-decisional or internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim."<sup>140</sup> Finally, the OWB may make redactions as necessary "to comply with any statutory restrictions, to protect the Commission's law enforcement and regulatory functions, and to comply with requests for confidential treatment from other law enforcement and regulatory authorities."<sup>141</sup> For example, in the case where the Claims Review Staff issues a Preliminary Determination for multiple whistleblowers applying for the same covered action, the OWB will usually redact identifying information about the other whistleblowers from the materials provided to each whistleblower so as not to "out" one claimant to the other co-award claimants.<sup>142</sup>

In forwarding these materials to a whistleblower, the OWB may require the whistleblower to sign a confidentiality agreement before receiving the materials.<sup>143</sup> The confidentiality agreement will cover all

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137. *Id.* § 240.21F-10(e)(1)(i).

138. *Id.*

139. *Id.* § 240.21F-12(b).

140. *Id.*; *see also* Adopting Release, *supra* note 17, at \*84 (pointing out that "[t]hese materials are by their nature pre-decisional work product that may often contain the staff's frank discussion of legal and policy making materials, and the disclosure of these materials would have a chilling effect on our decision-making process" (internal quotation omitted)).

141. 17 C.F.R. § 240.21F-12(b); Adopting Release, *supra* note 17, at \*84.

142. *See* 15 U.S.C. § 78u-6(h)(2)(A) (2012) (providing that, with certain exceptions, "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").

143. 17 C.F.R. § 240.21F-12(b).

non-public information provided to the whistleblower.<sup>144</sup> It will also include a provision that a violation of the agreement may lead to the whistleblower's ineligibility to receive an award.<sup>145</sup>

During the same 30-day period that a whistleblower has to request the materials that formed the basis of the Preliminary Determination, the whistleblower can also request a meeting with the OWB to discuss the Preliminary Determination.<sup>146</sup> The decision on whether to grant a request for a meeting is within the sole discretion of the OWB, and the OWB may choose to decline the request.<sup>147</sup> If the OWB grants a request for a meeting, the OWB will listen to the whistleblower's concerns and answer questions about the claims-review process.<sup>148</sup>

If a whistleblower decides to contest a Preliminary Determination, he or she must submit his or her written response and supporting materials within the later of: (1) 60 days of the date of the Preliminary Determination; or (2) "if a request to review [the Claims Review Staff] materials is made," then within 60 days of when the OWB provided the materials for the whistleblower's review.<sup>149</sup> If a Preliminary Determination recommends denying a whistleblower's claim and the whistleblower chooses not to contest the Preliminary Determination, or fails to submit a timely response contesting the Preliminary Determination, then the Preliminary Determination will become the final order of the Commission, and the whistleblower will be deemed to

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144. "The addition of the reference to 'non-public' information that 'the Commission provides' clarifies that the rule does not limit the whistleblower's use of information that he or she already knows, or learns from other sources, and does not acquire through our investigation." Adopting Release, *supra* note 17, at \*62.

145. 17 C.F.R. § 240.21F-8(b)(4).

146. *Id.* § 240.21F-10(e)(1)(ii).

147. *Id.*

148. The Adopting Release does suggest that the OWB could use these meetings "in appropriate cases as an opportunity to reach a tentative agreement with a meritorious whistleblower on the terms of a Proposed Final Determination, which could then be presented to the Commission for approval." Adopting Release, *supra* note 17, at \*79 n.350. In such a case, the Claims Review Staff would have determined that the whistleblower should receive an award and the only issue would be the amount of the award.

149. 17 C.F.R. § 240.21F-10(e)(2).

have failed to exhaust his or her administrative remedies and will be prohibited from appealing the denial to the courts.<sup>150</sup>

A whistleblower can also contest a Preliminary Determination in which the Claims Review Staff recommended the granting of an award if the whistleblower wishes to dispute the amount of the award recommendation. In such instance, the whistleblower will need to comply with the same deadlines applicable to whistleblowers receiving a denial recommendation.<sup>151</sup> However, if a whistleblower fails to timely protest a Preliminary Determination recommending the granting an award, this will not convert the Preliminary Determination into a Final Order of the Commission, but rather will convert it to a Proposed Final Determination for the Commission's final consideration<sup>152</sup> because, under the whistleblower rules, the Commission has the ultimate authority to authorize award payments.<sup>153</sup>

If a whistleblower submits a timely response contesting a Preliminary Determination, then the Claims Review Staff will reconsider the whistleblower's claim and issue a Proposed Final Determination. In reviewing the whistleblower's request for reconsideration, the Claims Review Staff will examine "the issues and grounds" raised by the whistleblower, "along with any supporting documentation" provided.<sup>154</sup>

When the Claims Review Staff issues a Proposed Final Determination, either in response to a timely request for reconsideration or as a result of a recommendation to pay an award, the OWB will notify the Commission of the Proposed Final Determination.<sup>155</sup> Within 30 days of receiving this notice, any Commissioner can, if he or she chooses, request that the full Commission review the Proposed Final

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150. *Id.* § 240.21F-10(f). As the Adopting Release explains, "a claimant's failure to submit a timely response to a Preliminary Determination where the determination was to deny an award would constitute a failure to exhaust the claimant's administrative remedies, and the claimant would be prohibited from pursuing a judicial appeal." Adopting Release, *supra* note 17, at \*78.

151. 17 C.F.R. § 240.21F-10(f); Adopting Release, *supra* note 17, at \*78.

152. 17 C.F.R. § 240.21F-10(f); Adopting Release, *supra* note 17, at \*78.

153. 17 C.F.R. § 240.21F-10(h).

154. *Id.* § 240.21F-10(g).

155. *Id.* § 240.21F-10(h).

Determination.<sup>156</sup> If no Commissioner requests a review within the 30-day period, then the Proposed Final Determination will become the Final Order of the Commission. “In the event a Commissioner requests a review, the Commission will review the record that the [Claims Review Staff] relied upon in making its determinations . . . and issue its Final Order.”<sup>157</sup> Once the Commission issues its Final Order, the OWB will promptly forward it to the whistleblower(s).<sup>158</sup>

#### 4. *Appealing the SEC’s Final Order*

The Dodd-Frank Act provides that the SEC’s Final Orders on whistleblower award applications “shall be in the discretion of the Commission.”<sup>159</sup> This discretion includes decisions on “whether, to whom, or in what amount to make awards.”<sup>160</sup> With regard to the amount awarded, the Dodd-Frank Act specifically states that “[t]he determination of the amount of an award . . . shall be in the discretion of the Commission.”<sup>161</sup> Indeed, the statute goes further and provides that the determination of the amount of an award is not appealable “if the award was made in accordance with subsection (b).”<sup>162</sup> However, the

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156. *Id.*

157. *Id.*

158. *Id.* § 240.21F-10(i). As noted, the whistleblower rules direct the OWB to send claimants the Preliminary Determination and the Final Order. *See id.* § 240.21F-10(d), (i). There is no requirement for OWB to send claimants the Proposed Final Determination. Thus, there is no provision in the rules for a claimant to contest a Proposed Final Determination (aside from a Preliminary Determination recommending an award, which, as discussed above, will be deemed a Proposed Final Determination for purposes of Rule 21F-10(h)).

159. 15 U.S.C. § 78u-6(c)(1)(A) (2012).

160. *Id.* § 78u-6(f).

161. *Id.* § 78u-6(c)(1)(A).

162. *Id.* § 78u-6(f). As discussed above, Section 21F(b)(1) directs that if the SEC determines to pay a whistleblower award, the award must be at least 10%, and not more than 30%, of the “monetary sanctions” that have been collected in the enforcement action. *See supra* notes 11, 71 and accompanying text. The whistleblower rules clarify that not only are award determinations not appealable if they fall within the Dodd-Frank Act’s 10% to 30% parameters, but so too are “any factual findings, legal conclusions, policy judgments, or discretionary assessments involving the Commission’s consideration of the factors in [Rule] 21F-6.” 17 C.F.R. § 240.21F-13(a). This is further clarified in the Adopting Release where the Commission stated, “when the Commission makes an award between 10 and 30 percent, and that determination is based on the



denial of an award “may be appealed to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Commission.”<sup>163</sup> Under Section 25(a)(1) of the Exchange Act and Rule 21F-13(a), appeals of final orders of the Commission can be made to the United States Court of Appeals for the District of Columbia Circuit, or to the circuit where the aggrieved person resides or has his or her principal place of business.<sup>164</sup>

Under the Final Rules, “the record on appeal shall consist of the Preliminary Determination, the Final Order of the Commission, and any other items from those set forth in [Rule] 21F-12(a) . . . that either the claimant or the Commission identifies for inclusion in the record.”<sup>165</sup> However, “the record on appeal shall not include any pre-decisional or internal deliberative process materials that are prepared exclusively to assist the Commission 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).”<sup>166</sup>

## II. CONSIDERATIONS FOR PROSPECTIVE AWARD APPLICANTS

### A. INFORMATION SUBMITTED PRE-DODD-FRANK DOES NOT QUALIFY FOR AN AWARD: *STRYKER V. SEC*

As noted above, the Dodd-Frank Act defined “original information” as information that is: (1) “derived from the [whistleblower’s] independent knowledge or [independent] analysis;” (2) not already known to the Commission; and (3) not derived from a previous judicial, administrative, or government proceeding.<sup>167</sup> The

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factors set forth in Rule 21F-6, our final order regarding the amount of an award (including the award allocation among multiple whistleblowers) is not appealable.” Adopting Release, *supra* note 17, at \*84.

163. 15 U.S.C. § 78u-6(f).

164. Securities Exchange Act of 1934 § 25(a)(1), 15 U.S.C. § 78y(a)(1); 17 C.F.R. § 240.21F-13(a).

165. 17 C.F.R. § 240.21F-13(b).

166. *Id.* The exclusion of pre-decisional and internal deliberative process materials from the record on appeal mirrors the prohibition in Rule 21F-12(b) against a whistleblower who wishes to review or receive those materials in advance of making a decision on contesting a Preliminary Determination.

167. 15 U.S.C. § 78u-6(a)(3)

Final Rules also made clear that the information must be provided after July 21, 2010, the date of the Dodd-Frank Act's enactment.<sup>168</sup>

As noted in the Adopting Release, the July 21 cut-off reflects the fact that:

Congress enacted Section 21F in order to provide *new* incentives for individuals with knowledge of securities violations to report those violations to the Commission. [The SEC] believe[d] that applying Section 21F prospectively—for new information provided to the Commission after the statute's enactment and not to information previously submitted—is most consistent with Congressional intent and with the language of the statute.<sup>169</sup>

In support of this interpretation, the Commission noted that Section 924(b) of the Dodd-Frank Act expressly states that a whistleblower's written information will not lose the status of original information even if it is submitted prior to the effective date of the Final Rules, i.e., August 12, 2011, so long as it "is provided by the whistleblower *after the effective date of this subtitle*," i.e., July 21, 2010.<sup>170</sup>

The Commission's decision to deny an award application because the whistleblower's information had been submitted before the enactment of the Dodd-Frank Act was recently upheld by the United States Court of Appeals for the Second Circuit. In *Stryker v. SEC*, the whistleblower did not dispute that he had provided information to the Commission prior to July 2010.<sup>171</sup> He contended, however, that the provision of Rule 21F-4(b) requiring that "original information" must have been submitted after that date was "contrary to the statute" because this requirement is not part of the statutory definition of "original information."<sup>172</sup>

The Second Circuit rejected this contention outright. The court noted that the two-step analysis for determining whether an agency's rule is a permissible interpretation of the authorizing statute was set out in the Supreme Court's 1984 decision in *Chevron U.S.A., Inc. v. Natural*

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168. Adopting Release, *supra* note 17, at \*18-19.

169. *Id.* at \*19 (emphasis added).

170. *Id.* at \*19 n.94 (quoting Dodd-Frank Act § 924(b), 15 U.S.C. § 78u-7(b)) (emphasis added).

171. *Stryker v. SEC*, 780 F.3d 163, 165 (2d Cir. 2015).

172. *Id.* at 165.

*Resources Defense Council, Inc.*<sup>173</sup> In describing the familiar analysis prescribed by *Chevron*, the Second Circuit stated that the first step is to see, by reviewing the statute and, if need be, the legislative history, whether “Congress has directly spoken to the precise question at issue.”<sup>174</sup> If it has, “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>175</sup> If, however, the court cannot conclude that Congress has directly spoken on the matter, then, under the *Chevron* analysis, the court is instructed to “defer to an agency’s interpretation of the statute it administers, so long as it is reasonable.”<sup>176</sup>

In applying the first step of the *Chevron* analysis, the Second Circuit noted that, while Section 21F(a)(3) is silent as to whether information submitted prior to the Dodd-Frank Act’s enactment qualifies as “original information,”<sup>177</sup> other provisions in Section 21F are clear that “a putative whistleblower must provide the requisite information in the form and manner required by SEC’s rules and regulations” and that “‘original information’ had to be submitted in conformity with the SEC’s rules and regulations.”<sup>178</sup> The Second Circuit

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173. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

174. *Stryker*, 780 F.3d at 165 (quoting *New York ex rel. N.Y. State Office of Children & Family Servs. v. U.S. Dep’t of Health & Human Servs. Admin. for Children & Families*, 556 F.3d 90, 97 (2d Cir. 2009)).

175. *Id.*

176. *Id.*

177. *Id.* at 166 (characterizing Section 21F(a)(3) as “leav[ing] a number of loose ends”).

178. *Id.* (citing to the statutory definition of whistleblower found in Section 21F(a)(6), and the general statutory authorization in Section 21F(j) granting the Commission “the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section”). The court also noted the statutory prohibition against awarding whistleblowers who “fail[] to submit information to the Commission in such form as the Commission may, by rule, require.” 15 U.S.C. § 78u-6(c)(2)(D).

Recognizing that “[s]uch rules and regulations [were] of necessity promulgated sometime after [the statute] was passed,” the court pointed out that Congress created an express safe-harbor for information that was submitted after the Dodd-Frank Act’s enactment but before the effective date of the Final Rules, provided that the information was submitted in writing. *Stryker*, 780 F.3d at 166 (citing 15 U.S.C. § 78u-7(b)). Rule 21F-9(d) gave effect to this safe-harbor by providing that original information submitted in writing after July 21, 2010, but before the effective date of these rules will

further stated that “if the purpose of the Dodd-Frank Act was to encourage whistleblower activity, already completed actions would arguably not qualify.”<sup>179</sup> While all of this would appear to show a congressional intent to limit awards only to whistleblowers who submitted original information after the enactment of the Dodd-Frank Act, the Second Circuit did not need to reach a definitive finding that Congress clearly intended this result during the first part of the *Chevron* analysis. Even if the Dodd-Frank Act was ambiguous on this point, the Second Circuit ruled that the Commission’s decision to impose a July 21, 2010 cut-off date was a reasonable interpretation of the Dodd-Frank Act’s whistleblower provisions and thus was entitled to deference under the second part of the *Chevron* analysis.<sup>180</sup> In reaching this conclusion, the Court emphasized that Congress clearly “delegated to the SEC rulemaking authority to implement the whistleblower award program and specific authority to determine the ‘form and manner’ in which information had to be submitted in order to qualify as ‘original information.’”<sup>181</sup>

*Stryker*’s holding is clear: under the Final Rules, only information submitted after the July 21, 2010 cut-off will be considered original information. Therefore, whistleblowers that have submitted information around the period of the enactment of the Dodd-Frank Act should ensure that their information was submitted *after* the cut-off. Otherwise, the OWB will refuse to consider the information as basis to make an award.

#### B. NEXUS REQUIRED BETWEEN TIP AND COVERED ACTION

The Final Rules require that, in order to be eligible for an award, a whistleblower’s tip must have led to the success of the enforcement

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be deemed to satisfy the requirements for submitting original information under the Final Rules. *Id.*

179. *Id.*

180. *Id.* at 167.

181. *Id.* at 166. As further support that Rule 21F-4(b)(b)(iv) is consistent with Congress’s intent, the court pointed to the safe-harbor provision of 15 U.S.C. § 78u-7(b), discussed in *supra* note 170, which provides a limited exception from the requirement that “original information” must be submitted pursuant to the SEC’s rules for information submitted after enactment of the Dodd-Frank Act and prior to the effective date of the Final Rules. This limited exclusion, the court stated, “supports an inference that Rule 21F-4(b)(1)(iv) is consistent with legislative intent.” *Id.*

action for which he or she seeks an award.<sup>182</sup> This means that the whistleblower's information must be "sufficiently specific, credible, and timely" to have caused the Commission to open an investigation and bring an action based in whole or in part on the conduct the whistleblower described, or must have otherwise significantly contributed to the success of the action.<sup>183</sup> As the Commission stated in the Adopting Release:

[I]n assessing whether information 'led to' a successful enforcement action, we will examine the relationship between the information in a submission and the allegations in the Commission's complaint filed in the civil action or order filed in the administrative proceeding. Our inquiry will focus on whether the submission identifies persons, entities, places, times and/or conduct that correspond to those alleged by the Commission in the judicial or administrative action. . . . In applying [the significantly contributed] standard, among other things we will look at factors such as whether the information allowed us to bring: (1) our successful action in significantly less time or with significantly fewer resources, additional successful claims; (2) additional successful claims; or (3) successful claims against additional individuals or entities.<sup>184</sup>

In deciding whether to submit an award application, whistleblowers should carefully read the description of the Covered Actions posted on the OWB's website and examine the extent to which their information is related to the subject matter of the covered action.<sup>185</sup> Whistleblowers are also encouraged to review the public pleadings in a judicial covered action, particularly the complaint, injunctive orders, and final judgment(s).<sup>186</sup>

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182. See *supra* Part I.A.3.

183. 17 C.F.R. § 240.21F-4(c)(1) (2015).

184. Adopting Release, *supra* note 17, at \*45-46.

185. See *Claim an Award*, *supra* note 121.

186. See Public Access to Court Electronic Records (PACER), <http://www.pacer.gov/> (offering case and docket information from federal appellate, district, and bankruptcy courts). The whistleblower can also find the pleadings at other websites. See, e.g., LexisNexis CourtLink, <http://courtlink.lexisnexis.com/>; Westlaw CourtExpress, <http://courtexpress.westlaw.com/>; Justia Dockets & Filings, <http://dockets.justia.com/>. The Adopting Release advised that, as part of its analysis, the Commission

Repeated failure to establish this nexus can result in sanctions against a claimant. In one extreme example, the OWB determined that a claimant had failed to establish a factual nexus between the claimant's tips and 143 separate covered actions for which the claimant had submitted award applications.<sup>187</sup> In the Final Order, the OWB noted that

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may consider whether, and the extent to which, the information included: (1) Allegations that formed the basis for any of the Commission's claims in the judicial or administrative action; (2) provisions of the securities laws that the Commission alleged as having been violated in the judicial or administrative action; (3) culpable persons or entities (as well as offices, divisions, subsidiaries or other subparts of entities) that the Commission named as defendants, respondents or uncharged wrongdoers in the judicial or administrative action; or (4) investors or a defined group of investors that the Commission named as victims or injured parties in the judicial or administrative action.

Adopting Release, *supra* note 17, at \*45.

187. See SEC Claims Review Staff, Preliminary Determination of the Claims Review Staff 2 (May 12, 2014) [hereinafter SEC Claims Review Staff Order on May 12, 2014], <http://www.sec.gov/about/offices/owb/orders/owb-multiple-final-051214.pdf> [<http://perma.cc/U2VB-JDDW>] (noting that the claimant had, in fact, submitted award applications for 196 covered actions, of which 143 were specifically reviewed in the Final Order); see also SEC Claims Review Staff, Preliminary Determination of the Claims Review Staff (Mar. 19, 2013), <http://www.sec.gov/about/offices/owb/orders/owb-final-031913.pdf> [<http://perma.cc/5L45-5EYX>] (noting that of the fifty-three applications reviewed in the Final Order, the Commission had previously denied fifty-one of these in March 2013 finding that the claimant's tip did not lead to the successful enforcement of any of the covered actions); SEC Claims Review Staff, Preliminary Determination of the Claims Review Staff (Aug. 5, 2015), <http://www.sec.gov/rules/other/2015/owb-order-final-080515-2.pdf> [<http://perma.cc/A8K6-7PT3>] (determining that a claimant who failed to object had similarly failed to establish a factual nexus between the claimant's tips and twenty-five separate covered actions for which the claimant had submitted award applications). The Final Order of August 5, 2015 found that certain statements made in the claimant's Form TCRs, emails to Commission officials, and applications for awards were "patently false or fictitious" and that "Claimant's submission of whistleblower award applications on Form WB-APP in which Claimant declares that Claimant is entitled to an award are patently false given that the WB-APPs Claimant has filed to date lack even a remote factual nexus to the covered actions for which Claimant is seeking an award." SEC Claims Review Staff, Preliminary Determination of the Claims Review Staff, at 1 (Aug. 5, 2015), <http://www.sec.gov/rules/other/2015/owb-order-final-080515-2.pdf> [<http://perma.cc/A8>

the vast majority of the claimant's award applications "lack[ed] even a superficial factual nexus to the covered actions for which [the whistleblower was] seeking an award."<sup>188</sup> The Final Order found that the whistleblower had repeatedly submitted "vague, unsupported, and utterly incredible" information in the whistleblower's Form TCRs, Form WB-APPs, and other various communications with the OWB, and that the whistleblower's continued submission of Form WB-APPs lacked "any factual nexus to the covered actions."<sup>189</sup> The Final Order further stressed that the whistleblower had "persistent[ly] refus[ed] to withdraw numerous unsupported claims or to change . . . behavior in spite of repeated requests" by the OWB.<sup>190</sup> Accordingly, the Final Order determined that not only were the claimant's 143 award applications to be denied, but also, invoking the Commission's authority under Exchange Act Rule 21F-8(c)(7),<sup>191</sup> declared that the claimant would no longer be eligible to be considered for a whistleblower award "in any future covered or related actions," and the OWB was directed to

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K6-7PT3]. The Final Order also determined that "Claimant's knowing and willful state of mind in making these statements is evidenced by the following: (i) the vague, unsupported, and utterly incredible nature of Claimant's statements in Appendix B [of the Final Order]; (ii) Claimant's submission of the WB-APPs that lack any factual nexus to the covered actions; and (iii) Claimant's refusal to withdraw numerous unsupported claims in spite of repeated requests and explanations by the Office of the Whistleblower." *Id.* at 1-2.

188. SEC Claims Review Staff Order on May 12, 2014, *supra* note 187, at 2 (including a six-page Appendix B that contained a list of numerous "vague, unsupported, and utterly incredible" statements made by the claimant in the claimant's TCRs, emails to Commission officials, and Form WB-APP submissions).

189. *Id.*

190. *Id.* (detailing the numerous attempts the OWB made to explain to claimant the basic premise of the whistleblower award program and the necessity for their being a factual nexus between a whistleblower's tip and covered action for which the whistleblower requests an award. The Final Order noted that the OWB had repeatedly warned the claimant that repeatedly filing claims for whistleblower awards that have no relation to the facts in the underlying matter will not result in an award under the whistleblower program).

191. 17 C.F.R. § 240.21F-8(c)(7) (2015) (providing that a whistleblower is not eligible to be considered for an award if the whistleblower "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").

“summarily reject all pending and future whistleblower award claims” submitted by the whistleblower.<sup>192</sup> The Final Order explained that the whistleblower’s “unceasing submission of baseless claims has harmed the rights of legitimate whistleblowers and hindered the Commission’s implementation of the whistleblower program by, among other things, delaying the Commission’s ability to finalize meritorious awards to other claimants and consuming significant staff resources.”<sup>193</sup>

As the Director of the SEC’s Division of Enforcement recognized when the Commission adopted the Final Rules, “the whistleblower program is designed to incentivize insiders and others who possess useful information regarding unlawful conduct to come forward early and assist the SEC with identifying and bringing enforcement actions against companies and individuals that have violated the securities laws.”<sup>194</sup> This case illustrates the importance for the whistleblower of taking the time to ensure that there is a factual connection between the information furnished to the Commission and the subject matter of the covered action before deciding whether to apply for a whistleblower award.

#### C. AWARD ISSUES IN CONNECTION WITH TIPS SUBMITTED TO OTHER AGENCIES OR SELF-REGULATORY ORGANIZATIONS OR AT SEC’S PRIOR REQUEST

Not infrequently, a whistleblower decides to submit a tip to both the SEC and one or more other agencies or self-regulatory organizations such as FINRA. Indeed, the whistleblower rules incentivize whistleblowers to provide information to other agencies or self-regulatory organizations by authorizing the SEC to pay additional awards for assistance provided in related actions of certain other

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192. SEC Claims Review Staff Order on May 12, 2014, *supra* note 187, at 3.

193. *Id.* at 2-3.

194. Robert S. Khuzami, Dir. of Enf’t, SEC, Remarks at Open Meeting – Whistleblower Program (May 25, 2011), <http://www.sec.gov/news/speech/2011/spch052511rk.htm> [<http://perma.cc/FG6E-H2CK>]; *see also* Order Determining Whistleblower Award Claim, Exchange Act Release No. 72947, 2014 WL 4258232, 109 S.E.C. Docket 3790, at \*3 (Aug. 29, 2014) (denying an award claim where, in part, the Commission was unable to discern “how [the claimant’s] information could have led to the successful enforcement of the Covered Action given the absence of any relevant factual connections between the two”).



agencies.<sup>195</sup> However, despite this incentive for multiple-agency reporting, the rules contain some potential pitfalls for whistleblowers that wish to be rewarded for such conduct. In this section, we will highlight some of these pitfalls and discuss the options open to whistleblowers in such instances.

As discussed above, the Commission is authorized to pay an award to a whistleblower who voluntarily provides the agency with original information that leads to its bringing a successful enforcement action in which it obtains monetary sanctions totaling more than \$1 million.<sup>196</sup> When information is provided to the SEC after the SEC requested the information or after it was provided to another agency, the question may arise as to whether it was provided “voluntarily” to the SEC. Rule 21F-4(a)(1) states that information will be deemed to have been provided “voluntarily” to the SEC if it was provided:

before a request, inquiry, or demand that relates to the subject matter of your submission is directed to you or anyone representing you (such as an attorney): (i) By the Commission; (ii) In connection with an investigation, inspection, or examination by the Public Company Accounting Oversight Board, or any self-regulatory organization; or (iii) In connection with an investigation by the Congress, any other authority of the federal government, or a state Attorney General or securities regulatory authority.<sup>197</sup>

Rule 21F-4(a)(2) clarifies that, in determining whether a “request, inquiry, or demand” was received, it does not matter whether the whistleblower was compelled to provide the information by a subpoena or other applicable law. Thus a simple informal request will suffice.<sup>198</sup> In the Adopting Release, the Commission explained that the reason for this was “to create a strong incentive for whistleblowers to come forward

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195. See *supra* Part II.B. Section 21F(a)(5) requires that a related action must be “based upon the original information . . . that led to the successful enforcement of the Commission action.” 15 U.S.C. § 78u-6(a)(5) (2012). As the Adopting Release makes clear, this means that a whistleblower cannot recover in a related action absent a successful Commission action. Adopting Release, *supra* note 17, at \*10.

196. See *supra* notes 21-26 and accompanying text.

197. 17 C.F.R. § 240.21F-4(a)(1) (2015).

198. Adopting Release, *supra* note 17, at \*11-12.

early with information about possible violations of the federal securities laws, rather than wait to be approached by investigators.”<sup>199</sup>

With one exception, *any* prior request from the SEC will cause a whistleblower’s information submission to be deemed not voluntary. The one exception applies if the whistleblower “voluntarily provided the same information to one of the other authorities identified above [i.e., the PCAOB, other self-regulatory organizations, Congress, other federal agencies, state Attorneys General or securities regulatory authorities] prior to receiving a request, inquiry, or demand from the Commission.”<sup>200</sup> In the Adopting Release, the Commission explained that this exception:

is intended to respond to comments that, as proposed, our rule could have had the unintended consequence of precluding a submission from being considered as ‘voluntary’ in circumstances where the whistleblower provided the information to another authority, the other authority referred the matter to the Commission, and our staff contacted the whistleblower before he or she had the opportunity to file a whistleblower submission with us.<sup>201</sup>

With regard to all other SEC prior requests, the Adopting Release explained that the Commission decided to count all of these as not voluntary, regardless of whether the request was made in connection with an investigation, inspection or examination, because it “believe[d] that a whistleblower award should not be available to an individual who makes a submission after first being questioned about a matter (or otherwise requested to provide information) by the Commission staff acting pursuant to any of our investigative or regulatory authorities.”<sup>202</sup> Thus, for example, even a request for information from a non-enforcement division at the SEC will prevent the whistleblower’s

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199. *Id.* at \*11.

200. 17 C.F.R. § 240.21F-4(a)(2).

201. Adopting Release, *supra* note 17, at \*16 n.81. It should be noted that the example provided in the Adopting Release covers a situation where “the other authority referred the matter to the Commission.” *Id.* (emphasis added). The Adopting Release did not discuss the situation where a whistleblower provides information to another agency in response to a routine regulatory inquiry and then, without any contact from the other agency, the SEC staff reaches out to the person for the same information in connection with its own inquiry.

202. *Id.* at \*14.

subsequent submission from being deemed voluntary, provided, of course, that the request “relates to the subject matter of [the whistleblower’s] submission.”<sup>203</sup>

The rule makes an important distinction between requests from the SEC and requests from other agencies/entities. While prior requests from the SEC, with the one exception noted above, will cause a whistleblower’s information submission to be deemed not voluntary, when it comes to prior requests from other agencies/entities, prior requests of certain types will cause the whistleblower’s submission to be deemed not voluntary. As the Commission explained in its Adopting Release:

Only an investigative request made by one of the other designated authorities will trigger application of the rule, except that a request made in connection with an examination or inspection, as well as an investigative request, by staff of the PCAOB or a self-regulatory organization will also render a whistleblower’s subsequent submission relating to the same subject matter not “voluntary.” This provision recognizes the important relationship that frequently exists between examinations and enforcement investigations, as well as our regulatory oversight of the PCAOB and self-regulatory organizations.<sup>204</sup>

Thus, in certain circumstances information is considered as provided voluntarily even though it was submitted in response to an SEC request, as when the whistleblower first voluntarily reported to another agency and that agency referred the matter to the Commission. On the other hand, information that was submitted to the SEC without a prior Commission request may be considered voluntarily. An example would be when another federal agency had requested the same information in connection with that agency’s investigation before the whistleblower submitted it to the SEC.<sup>205</sup>

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203. 17 C.F.R. § 240.21F-4(a)(1).

204. Adopting Release, *supra* note 17, at \*14.

205. A claimant who cannot satisfy the “voluntary” requirement will not be able to obtain relief through the extraordinary circumstances exception found in Rule 21F-8(a). The extraordinary circumstances exception only applies to failures to comply with the procedural requirements “for submitting information and making a claim for an award”

## CONCLUSION

With this Article, it is our goal to provide an overview of the SEC's whistleblower award program to help future claimants and their counsel better understand the award eligibility requirements and the criteria for determining the amount of any award paid by the Commission. With this goal in mind, we wish to emphasize a few key points. First, whistleblowers should make all possible efforts to understand and comply with the procedural requirements, including the deadlines for submitting a claim, so as not to be deemed ineligible for award consideration. For example, as upheld by *Stryker*, a claimant cannot be considered for an award if he or she only provided information to the SEC prior to the enactment of the Dodd-Frank Act. Furthermore, whistleblowers who seek an award should review any NoCa posted to the SEC website and their corresponding judicial proceedings to ensure that there is a sufficient nexus between their tip and the success of the action. Finally, while whistleblowers are incentivized to report evidence of wrongdoing to other regulatory authorities as well as, if appropriate, the internal compliance personnel at their company, they should be cognizant of the rules relating to the voluntariness of tips provided to the SEC so that they do not inadvertently run afoul of this requirement and thereby be deemed ineligible for award consideration. It is our hope that this Article will provide rightful claimants with helpful guidance as they prepare their whistleblower award applications so as to maximize their chance of receiving a favorable award determination and further encourage potential whistleblowers to come forward with the vital information that is crucial to the success of SEC enforcement actions and the Dodd-Frank Act's whistleblower program.

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specified in Rules 21F-9 through 21F-11, and does not apply to substantive requirements such as those found in Rule 21F-4.