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Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249

[Release No. 34–63237; File No. S7–33–10]

RIN 3235–AK78

Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Proposed rule.

SUMMARY: The Commission is proposing rules and forms to implement Section 21F of the Securities Exchange Act of 1934 ("Exchange Act") entitled "Securities Whistleblower Incentives and Protection" and seeking comment thereon. The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010 ("Dodd-Frank"), established a whistleblower program that requires the Commission to pay an award, under regulations prescribed by the Commission and subject to certain limitations, to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the Federal securities laws that leads to the successful enforcement of a covered judicial or administrative action, or a related action. Dodd-Frank also prohibits retaliation by employers against individuals that provide the Commission with information about potential securities violations.

DATES: Comments should be submitted on or before December 17, 2010.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–33–10 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–33–10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: In the Division of Enforcement: Sarit Klein (202) 551–4577. In the Office of the General Counsel: Brian A. Ochs (202) 551–5067, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Background

Section 922 of Dodd-Frank added new Section 21F to the Exchange Act, entitled "Securities Whistleblower Incentives and Protection." [1] Section 21F directs that the Commission pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about a violation of the securities laws that leads to a successful enforcement of an action brought by the Commission that results in monetary sanctions exceeding $1,000,000, and of certain related actions.

We are proposing Regulation 21F to implement Section 21F of the Exchange Act. As described in detail below, the rules contained in proposed Regulation 21F define certain terms critical to the operation of the Whistleblower Program, outline the procedures for applying for awards and the Commission's procedures for making decisions on claims, and generally explain the scope of the whistleblower program to the public and to potential whistleblowers. In this proposal, we have taken several steps to address Congress's suggestion that the Commission's whistleblower rules be clearly defined and user-friendly.[2] First, to the extent possible, we have tried to adopt a plain English approach in writing the rules contained in Regulation 21F. Second, Regulation 21F as proposed would provide a complete and self-contained set of rules relating to the whistleblower program. This means that in some places, we have proposed rules within the Regulation that largely restate key provisions of the statute. Although we recognize that this approach leads to some duplication between the statue and the rules, we believe that overall it will assist potential whistleblowers and add clarity, by providing in one place all the relevant provisions applicable to whistleblower claims.

In fashioning these proposed rules, the Commission has considered and weighed a number of potentially competing interests that are presented in implementing the statute. Among them was the potential for the monetary incentives provided to whistleblowers by Section 21F of the Exchange Act to reduce the effectiveness of a company's existing compliance, legal, audit and similar internal processes for investigating and responding to potential violations of the Federal securities laws. With this possible tension in mind, we have included provisions in the proposed rules intended not to discourage whistleblowers who work for companies that have robust compliance programs to first report the violation to appropriate company personnel, while at the same time preserving the whistleblower's status as an original source of the information and eligibility for an award. At the same time, the proposed rules would not prohibit a whistleblower in a compliance function from reporting information to the Commission where the company did not provide the information to the Commission within a reasonable time or acted in bad faith.

Another important policy issue raised by the statute is the potential for the monetary incentives provided by Section 21F to invite submissions from attorneys, independent auditors, and compliance personnel who may attempt to use information they obtain through their positions to make whistleblower claims. This exclusion focuses on those groups with established professional obligations that play a critical role in achieving compliance with the Federal securities laws. Our proposed rules include certain exclusions for these professionals and others under the definition of "independent knowledge," and we seek comment on whether the proposed exclusions are appropriate and whether they should be extended to other types of privileged communications or other types of professionals who frequently have

[1] Pub. L. 111–203, § 922(a), 124 Stat 1841 (2010).

[2] *See* Dodd Frank sec. 922(d)(1), which specifies that a study of the whistleblower program by the Inspector General of the Commission shall consider whether the final rules and regulations have made the program "clearly defined and user-friendly."

access to confidential client information.

Finally, we have attempted to maximize the submission of high-quality tips and to enhance the utility of the information reported to the Commission. More frequent reporting of high-quality information promotes greater deterrence by enhancing the efficiency and effectiveness of the Commission's enforcement program. To achieve this goal, the proposed rules would impose certain procedural requirements designed to deter false submissions, including a requirement that the information be submitted under penalty of perjury, and requiring an anonymous whistleblower to be represented by counsel who must certify to the Commission that he or she has verified the whistleblower's identity.

II. Description of the Proposed Rules

A. Proposed Rule 21F–1—General

Proposed Rule 21F–1 provides a general, plain English description of Section 21F of the Exchange Act. It sets forth the purposes of the rules and states that the Commission's Whistleblower Office administers the whistleblower program. In addition, the proposed rule states that, unless expressly provided for in the rules, no person is authorized to make any offer or promise, or otherwise to bind the Commission with respect to the payment of an award or the amount thereof.

B. Proposed Rule 21F–2—Definition of a Whistleblower

The term "whistleblower" is defined in Section 21F(a)(6) of the Exchange Act.[3] Consistent with this language, Proposed Rule 21F–2(a) would define a whistleblower as an individual who, alone or jointly with others, provides information to the Commission relating to a potential violation of the securities laws. A whistleblower must be a natural person; a company or another entity is not eligible to receive a whistleblower award. This definition tracks the statutory definition of a "whistleblower," except that the proposed rule uses the term "potential violation." Because the statute requires the Commission to afford confidential treatment to information "which could reasonably be expected to reveal the identity of a whistleblower,"[4] it is important to be able to determine whether a person is a "whistleblower" at the time he or she submits information to the Commission. If the term "whistleblower" were defined to include only individuals who provide the Commission with information about actual, proven securities violations, then either the Commission would be required to determine at the time information is submitted whether the alleged conduct constitutes a violation of the securities laws, or the status of the person as a "whistleblower" would be unknown. We do not believe that this is the intended result.

In addition, use of the term "potential violation" makes clear that the whistleblower anti-retaliation protections set forth in Section 21F(h)(1) of the Exchange Act do not depend on an ultimate adjudication, finding or conclusion that conduct identified by the whistleblower constituted a violation of the securities laws. As noted in the Senate Report accompanying the legislation, "[t]he Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government;"[5] affording broad anti-retaliation protections to whistleblowers furthers this legislative purpose.

Paragraph (b) of Proposed Rule 21F–2 would further make clear that the anti-retaliation protections set forth in Section 21F(h)(1) of the Exchange Act apply irrespective of whether a whistleblower satisfies all the procedures and conditions to qualify for an award under the Commission's whistleblower program. We believe the statute extends the protections against employment retaliation in Section 21F(h)(1) to any individual who provides information to the Commission about potential violations of the securities laws regardless of whether the whistleblower fails to satisfy all of the requirements for award consideration set forth in the Commission's rules.

Proposed Rule 21F–2(c) makes clear, however, that, in order to be eligible to be considered for an award, a whistleblower must submit original information to the Commission in accordance with all the procedures and conditions described in Proposed Rules 21F–4, 21F–8, and 21F–9.

Request for Comment:

1. In other provisions of these Proposed Rules—*e.g.,* Proposed Rule 21F–15—we propose that whistleblowers not be paid awards based on monetary sanctions arising from their own misconduct, based on the notion that the statue is not intended to reward persons for blowing the whistle on their own misconduct. Consistent with this approach, should we define the term "whistleblower" to expressly state that it is an individual who provides information about potential violations of the securities laws "by another person"?

C. Proposed Rule 21F–3—Payment of Award

Proposed Rule 21F–3 summarizes the general requirements for the payment of awards set forth in Section 21F(b)(1) of the Exchange Act.[6] As set forth in the statute, paragraph (a) states that, subject to the eligibility requirements in the Regulations, the Commission will pay an award or awards to one or more whistleblowers who voluntarily provide the Commission with original information that leads to the successful enforcement by the Commission of a Federal court or administrative action in which the Commission obtains monetary sanctions totaling more than $1,000,000. Paragraph (b) of this proposed rule describes the circumstances under which the Commission will also pay an award to the whistleblower based upon monetary sanctions that are collected from a "related action." Payment based on the "related action" will occur if the whistleblower's original information led the Commission to obtain monetary sanctions totaling more than $1,000,000, the related action is based upon the same original information that led to the successful enforcement of the Commission action, and the related action is brought by the Attorney General of the United States, an appropriate regulatory agency, a self-regulatory organization, or a state attorney general in a criminal case.

Paragraph (c) of Proposed Rule 21F–3 explains that the Commission must determine whether the original information that the whistleblower gave to the Commission also led to the successful enforcement of a related action using the same criteria used to evaluate awards for Commission actions. To help make this determination, the Commission may seek confirmation of the relevant facts regarding the whistleblower's assistance from the authority that brought the related action. However, the proposed rule states that the Commission will deny an award to a whistleblower if the Commission determines that the criteria for an award are not satisfied or if the Commission is unable to obtain sufficient and reliable information about the related action.

Paragraph (d) provides that the Commission will not make an award in a related action if an award already has been granted to the whistleblower by the Commodity Futures Trading Commission ("CFTC") for that same

[3] 15 U.S.C. 78u–6(a)(6).

[4] 15 U.S.C. 78u–6(h)(2).

[5] S. Rep. No. 111–176 at 110 (2010).

[6] 15 U.S.C. 78u–6(b)(1).

action pursuant to its whistleblower award program under section 23 of the Commodity Exchange Act.[7] Rule 21F–3(d) also provides that, if the CFTC has previously denied an award in a related action, the whistleblower will be collaterally estopped from relitigating any issues before the Commission that were necessary to the CFTC's denial.

This provision serves two purposes. First, it would ensure that a whistleblower will not obtain a double recovery on the same related action. For example, if the CFTC makes an award of 10 percent to 30 percent on a criminal action brought by the U.S. Department of Justice, the whistleblower would be precluded from obtaining a second recovery of 10 percent to 30 percent from the SEC on the same action. Any other reading of the interplay of the SEC and CFTC whistleblower award provisions—which were both established by Dodd-Frank and which are substantially identical in their substantive terms—would produce the highly anomalous result of allowing the whistleblower to effectively receive a 20 percent minimum to 60 percent maximum recovery on the same related action. The SEC and CFTC whistleblower provisions, however, embody a clear Congressional determination that a whistleblower award on a successful action should lie within the 10 percent to 30 percent range.

Second, this provision would ensure that once the CFTC decides an issue of fact or law necessary to its determination to deny a whistleblower an award on a related action, the whistleblower will be precluded from relitigating the same issue before the Commission. For example, if the CFTC determines that the whistleblower's information did not lead to the successful enforcement of a related action, the whistleblower may not attempt to circumvent this adverse determination by relitigating the same issue before the Commission. The application of collateral estoppel principles in these circumstances would promote the orderly and consistent resolution of a whistleblower's claims, and would ensure that the subset of whistleblowers who can pursue both SEC and CFTC award claims on a related action are not unfairly afforded "two bites at the apple" relative to the majority of whistleblowers who would not have this dual opportunity.[8]

D. Proposed Rule 21F–4—Other Definitions

Although the statute defines several relevant terms, Proposed Rule 21F–4 would define some additional terms that are important to understanding the scope of the whistleblower award program, in order to provide greater clarity and certainty about the operation and scope of the program.

Proposed Rule 21F–4(a)—Voluntary submission of information.

Under Section 21F(b)(1) of the Exchange Act,[9] whistleblowers are eligible for awards only when they provide original information to the Commission "voluntarily." Proposed Rule 21F–4(a)(1) would define a submission as voluntary if a whistleblower provides the Commission with information before receiving any formal or informal request, inquiry, or demand from the Commission, Congress, any other Federal, State or local authority, any self-regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information in the whistleblower's submission is relevant.

The first step in most Commission enforcement investigations is the opening of an informal inquiry. At this stage, because the staff has not yet been granted the authority to issue subpoenas, information is frequently requested from companies and members of the public on a "voluntary" basis in the sense that there is generally no legal requirement that the recipient of the request provide the information or even respond to the request. After a formal investigation is opened and the staff obtains subpoena authority, the staff retains discretion to seek documents or other information without legal compulsion, and often does so.

Proposed Rule 21F–4(a)(1) would make clear that, in order to have acted "voluntarily" under the statute, a whistleblower must do more than merely provide the Commission with information that is not compelled by subpoena (or by a court order following a Commission action to enforce a subpoena) or by other applicable law.[10] Rather, the whistleblower or his representative (such as an attorney) must come forward with the information *before* receiving any formal or informal request, inquiry, or demand from the Commission staff or from any other authority described in the proposed rule about a matter to which the whistleblower's information is relevant.[11]

A request, inquiry, or demand that is directed to an employer is also considered to be directed to employees who possess the documents or other information that is within the scope of the request to the employer. Accordingly, a subsequent whistleblower submission from any such employee will not be considered "voluntary" for purposes of the rule, and the employee will not be eligible for award consideration, unless the employer fails to provide the employee's documents or information to the requesting authority in a timely manner.[12]

This approach is consistent with the statutory purpose of creating a strong incentive for whistleblowers to come forward early with information about possible violations of the securities laws rather than wait until Government or other official investigators "come knocking on the door."[13] This approach is also consistent with the approach

[7] 7 U.S.C. 26.

[8] *See* Restatement Second of Judgments, Sec. 29 cmt. b (explaining that "[a] party who has had a full and fair opportunity to litigate an issue has been accorded the elements of due process" and "there is no good reason for refusing to treat the issue as settled so far as he is concerned" in subsequent actions).

[9] 15 U.S.C. 78u–6(b)(1).

[10] Various books and records provisions of the Federal securities laws and rules generally require regulated entities to furnish records to the Commission upon request. *See, e.g.,* Section 17(a) and Rule 17a–4(j) under the Exchange Act (15 U.S.C. 78q(a) and 17 CFR 240.17a–4(j)).

[11] The list of authorities set forth in the proposed rule does not include an employer's personnel (such as legal counsel, compliance, or audit staff) conducting an internal investigation, compliance review, audit, or similar function. Thus, Proposed Rule 21F–4(a)(1) would credit a whistleblower with "voluntarily" providing information if the individual were to approach the Commission staff after being questioned about possible violations by such persons, unless, as noted, the individual's information is within the scope of a request, inquiry, or demand directed to the employer by one of the designated authorities . The objective of this approach is to implement Section 21F in a way that encourages and permits persons with knowledge of securities violations to come forward to the Commission, other responsible Government authorities, and other bodies of an official nature. We have included other provisions in these proposed rules that are intended to facilitate the operation of company compliance processes, audits, and internal investigations. *See* Proposed Rules 21F–4(b)(4) and (b)(7). Further, because there is no assurance that an employer will ultimately disclose to the Commission potential violations uncovered in the course of an internal investigation or similar process, a rule that precluded employees with knowledge of unlawful conduct from coming forward as whistleblowers merely because they were questioned about the conduct by company personnel could undermine the purposes of Section 21F.

[12] Production of documents or information in a timely manner turns on the production schedule required, or otherwise agreed to, by the requesting authority. Further, employees will not be permitted to thwart the aim of Section 21F by causing an employer to fail to respond to a request in a timely manner, and then claiming that their whistleblower submission was therefore made "voluntarily" within the meaning of the proposed rule.

[13] *See* S. Rep. No. 111–176 at 110 (2010) ("The Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws * * *.").

Federal courts have taken in determining whether a private plaintiff, suing on behalf of the Government under the qui tam provisions of the False Claims Act, "voluntarily" provided information about the false or fraudulent claims to the Government before filing suit.[14]

Disclosure to the Government should also not be considered voluntary if the individual has a clear duty to report violations of the type at issue.[15] Thus, for example, Section 21F(c)(2) of the statute [16] prohibits awards to members, officers, or employees of an appropriate regulatory agency, the Department of Justice, a self-regulatory organization, the Public Company Accounting Oversight Board, a law enforcement organization, or to persons who obtain their information as a result of an audit of financial statements and who would be subject to the requirements of Section 10A of the Exchange Act. The Commission anticipates that there may be other similarly-situated persons who are under a pre-existing legal duty to report information about violations to the Commission or to any of the other authorities described in subsection (a)(1) of the proposed rule. Proposed Rule 21F–4(a)(2) provides that submissions from such individuals will not be considered voluntary for purposes of Section 21F. For example, a Government contracting officer would not be considered for a whistleblower award if the officer discovered and reported fraud on a Government contract that was material to the contractor's earnings.[17] Depending on the particular regulations or other authorities that governed, a city officer or employee with responsibility for the city's pension fund might have a pre-existing legal duty to report fraud in connection with the fund's management or financial reporting to appropriate city authorities. Proposed Rule 21F–4(a)(2) also includes a similar exclusion for information that the whistleblower is contractually obligated to report to the Commission or to other authorities. This exclusion is intended to preclude awards to persons who provide information pursuant to preexisting agreements that obligate them to assist Commission staff or other investigative authorities.

Request for Comment:

2. Does Proposed Rule 21F–4(a)(1) appropriately define the circumstances when a whistleblower should be considered to have acted "voluntarily" in providing information about securities law violations to the Commission? Are there other circumstances not clearly included that should be in the rule?

3. Should the Commission exclude from the definition of "voluntarily" situations where the information was received from a whistleblower *after* he received a request, inquiry, or demand from a foreign regulatory authority, law enforcement organization or self-regulatory organization? Similarly, should the Commission exclude from the definition of "voluntarily" situations where the information was received from a whistleblower where the individual was under a pre-existing legal duty to report the information to a foreign regulatory authority, law enforcement organization or self-regulatory organization?

4. Is it appropriate for the proposed rule to consider a request or inquiry directed to an employer to be directed at individual employees who possess the documents or other information that is within the scope of the request? Should the class of persons who are covered by this rule be narrowed or expanded? Will the carve-out that permits such an employee to become a whistleblower if the employer fails to disclose the information the employee provided in a timely manner promote compliance with the law and the effective operation of Section 21F?

5. The standard described in Proposed Rule 21F–4(a)(1) would credit an individual with acting "voluntarily" in certain circumstances where the individual was aware of fraudulent conduct for an extended period of time, but chose not to come forward as a whistleblower until after he became aware of a governmental investigation or examination (such as by observing document requests being served on his employer or colleagues, but before he received an inquiry, request, or demand himself, assuming that he was not within the scope of an inquiry directed to his employer). Is this an appropriate result, and, if not, how should the proposed rule be modified to account for it?

6. Is the exclusion set forth in Proposed Rule 21F–4(a)(2) for information provided pursuant to a pre-existing legal or contractual duty to report violations appropriate? Should specific circumstances where there are pre-existing duties to report violations to investigating authorities be set forth in the rule, and if so, what are they? For example, should the rule preclude submissions from all Government employees?

Proposed Rule 21F–4(b)—Original Information.

Paragraph (1) of Proposed Rule 21F–4(b) begins with the definition of "original information" set forth in Section 21F(a)(3) of the Exchange Act.[18] "Original information" means information that is derived from the whistleblower's independent knowledge or analysis; is not already known to the Commission from any other source, unless the whistleblower is the original source of the information; and is not exclusively derived from an allegation made in a judicial or administrative hearing,[19] in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information. Paragraph (1) also requires that "original information" be provided to the Commission for the first time after July 21, 2010 (the date of enactment of Dodd-Frank). Although Dodd-Frank authorizes the Commission to pay whistleblower awards on the basis of original information that is submitted in writing prior to the effective date of final rules implementing Section 21F

[14] *See United States ex rel. Barth* v. *Ridgedale Electric, Inc.,* 44 F.3d 699 (8th Cir. 1994); *United States ex rel. Paranich* v. *Sorgnard,* 396 F.3d 326 (3d Cir. 2005); *United States ex rel. Fine* v. *Chevron, USA, Inc.,* 72 F.3d 740 (9th Cir. 1995), *cert. denied,* 517 U.S.1233 (1996) (rejecting argument that provision of information to the Government is always voluntary unless compelled by subpoena) . The qui tam provisions of the False Claims Act include a "public disclosure bar," which, as recently amended, requires a court to dismiss a private action or claim if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed in certain fora, unless the Government opposes dismissal or the plaintiff is an "original source" of the information. 31 U.S.C. 3730(e)(4). An "original source" is further defined, in part, with reference to whether the plaintiff "voluntarily" disclosed the information to the Government before filing suit. *Id.* Because the qui tam provisions of the False Claims Act have played a significant role in the development of whistleblower law generally, and because some of the terminology used by Congress in Section 21F has antecedents in the False Claims Act, precedent under the False Claims Act can provide helpful guidance in the interpretation of Section 21F of the Exchange Act. At the same time, because the False Claims Act and Section 21F serve different purposes are structured differently, and the two statutes may use the same words in different contexts, we do not view False Claims Act precedent as necessarily controlling or authoritative in all circumstances for purposes of Section 21F.

[15] *See United States ex rel. Biddle* v. *Board of Trustees of The Leland Stanford, Jr. University,* 161 F.3d 533 (9th Cir. 1998), *cert. denied,* 526 U.S. 1066 (1999) (government employee whose duties required that he report knowledge of contract fraud to superiors could not "voluntarily" supply information to government for purposes of False Claims Act because employee was obligated to alert superiors to contractor wrongdoing); *United States ex rel. Schwedt* v. *Planning Research Corp.,* 39 F. Supp. 2d 28 (D.D.C. 1999) (same).

[16] 15 U.S.C. 78u–6(c)(2).

[17] *See Biddle,* 161 F.3d 533; *Schwedt,* 39 F. Supp. 2d 28.

[18] 15 U.S.C. 78u–6(a)(3).

[19] We would interpret the term "judicial or administrative hearing" as used in Section 21F(a)(3) to include hearings in arbitration proceedings.

(assuming that all of the other requirements for an award are met), Dodd-Frank does not authorize the Commission to apply Section 21F retroactively to pay awards based upon information submitted before the effective date of the statute.[20]

Paragraphs (2) through (7) of Proposed Rule 21F–4(b) define some of the constituent terms in the definition of "original information," so as to further describe when a whistleblower provides "original information."

Paragraph (2) of Proposed Rule 21F–4(b) defines "independent knowledge" as factual information in the whistleblower's possession that is not obtained from publicly available sources. Publicly available sources may include both sources that are widely disseminated (such as corporate press releases and filings, media reports, and information on the Internet), and sources that, though not widely disseminated, are generally available to the public (such as court filings and documents obtained through Freedom of Information Act requests). Importantly, the proposed definition of "independent knowledge" does not require that a whistleblower have direct, first-hand knowledge of potential violations. Instead, knowledge may be obtained from any of the whistleblower's experiences, observations, or communications (subject to the exclusion for knowledge obtained from public sources). Thus, for example, under Proposed Rule 21F–4(b)(2), a whistleblower would have "independent knowledge" of information even if that knowledge derives from facts or other information that has been conveyed to the whistleblower by third parties.[21]

The Commission preliminarily believes that defining "independent knowledge" in this manner best effectuates the purposes of Section 21F. An individual may learn about potential violations of the securities laws without being personally involved in the conduct. If an individual voluntarily comes forward with such information, and the information leads the Commission to a successful enforcement action (as defined in Proposed Rule 21F–4(c)), that individual should be eligible to receive a whistleblower award.

Under Section 21F(a)(3)(A) of the Exchange Act,[22] the original information provided by a whistleblower can include information that is derived from independent knowledge and also from independent "analysis." Proposed Rule 21F–4(b)(3) would define "independent analysis" to mean the whistleblower's own analysis, whether done alone or in combination with others. The proposed rule thus recognizes that analysis—which may include academic or professional studies—can be the product of collaboration among two or more individuals. "Analysis" would mean the whistleblower's examination and evaluation of information that may be generally available, but which reveals information that is not generally known or available to the public. This definition recognizes 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.

Proposed Rule 21F–4(b)(4) provides that information will not be considered to derive from an individual's "independent knowledge" or "independent analysis" in seven circumstances. The first two exclusions apply to attorneys and to persons such as accountants and experts when they assist attorneys on client matters, because of the prominent role that attorneys play in all aspects of practice before the Commission and the special duties they owe to clients. The first proposed exclusion is for information that was obtained through a communication that is subject to the attorney-client privilege.[23] Compliance with the Federal securities laws is promoted when individuals, corporate officers, and others consult with counsel about potential violations, and the attorney-client privilege furthers such consultation. This important benefit could be undermined if the whistleblower award program created monetary incentives for counsel to disclose information about potential securities violations that they learned of through privileged communications.

The exception for information obtained through privileged attorney-client communications would not apply in circumstances where the attorney is permitted to disclose the substance of a communication that would otherwise be privileged. This would include, for example, circumstances where the privilege has been waived, or where disclosure of confidential information to the Commission without the client's consent is permitted pursuant to either 17 CFR 205.3(d)(2) or the applicable state bar ethical rules.[24]

This exclusion is not intended to preclude an individual who has independent knowledge of facts indicating potential securities violations from becoming a whistleblower if that individual chooses to consult with an attorney. Facts in the possession of such an individual do not become privileged simply because he or she consulted with an attorney. Rather, this exclusion from independent knowledge or analysis only means that an attorney cannot make a whistleblower submission on his or her own behalf that is based upon information the attorney obtained through a privileged communication with a client.

The second exclusion applies when a would-be whistleblower obtains information as a result of the legal representation of a client on whose behalf the whistleblower's services, or the services of the whistleblower's employer or firm, have been retained, and the person seeks to make a whistleblower submission for his or her own benefit. The second exclusion would, for example, preclude an attorney from using information obtained in connection with the attorney's representation of a client to make a whistleblower submission for the attorney's own benefit. This exclusion would not be limited to information obtained through privileged

[20] Section 924(b) of Dodd-Frank directs that "Information provided to the Commission in writing by a whistleblower shall not lose the status of original information * * * solely because the whistleblower provided the information prior to the effective date of the regulations, if the information is provided by the whistleblower after the effective date of this subtitle."

[21] Until this year, the "public disclosure bar" provisions of the False Claims Act defined an "original source" of information, in part, as "an individual who [had] direct and independent knowledge of the allegations of the information on which the allegations [were] based * * *." 31 U.S.C. 3130(e)(4) (prior to 2010 amendments). Courts interpreting these terms generally defined "direct knowledge" to mean first-hand knowledge from the relator's own work and experience, with no intervening agency. *E.g., United States ex rel. Fried* v. *West Independent School District,* 527 F.3d 439 (5th Cir. 2008); *United States ex rel. Paranich* v. *Sorgnard,* 396 F.3d 326 (3d Cir. 2005). *See generally* John T. Boese, *Civil False Claims and Qui Tam Actions* sec. 4.02[D][2] (citing cases). Earlier this year, Congress amended the "public disclosure bar" to, among other things, remove the requirement that a relator have "direct and independent knowledge" of information, replacing that standard with one that instead requires only "knowledge that is independent and materially adds to the publicly-disclosed allegations or transactions * * *" 31 U.S.C. 3130(e)(4), Pub. L. 111–148 § 10104(h)(2), 124 Stat. 901 (Mar. 23, 2010). Many practitioners have observed that, with this amendment, the False Claims Act now permits qui tam actions based upon "second-hand knowledge." *E.g.,* Robert T. Rhoad and Matthew T. Fornataro, *Whistling While They Work: Limiting Exposure in the Face of PPACA's Invitation to Employee Whistleblower Lawsuits,* 22 Health Lawyer 19 (Aug. 2010).

[22] 15 U.S.C. 78u–6(a)(3)(A).

[23] *See* Proposed Rule 21F–4(b)(4)(i).

[24] *See* Model Rules of Professional Conduct 1.6(b), 1.13(c).

communications, but would instead extend to any information obtained by the attorney in the course and as a result of representation of the client. For example, under the proposed rule, an attorney who obtained evidence of securities violations through document discovery from an opposing party in litigation could not use that information to make a whistleblower submission on his or her own behalf. However, the attorney could use the information to make a submission on behalf of the client in whose litigation the discovery was obtained. The Commission believes that this limitation is generally consistent with attorneys' ethical obligations,[25] and is a reasonable measure to prevent creating financial incentives for attorneys to take undue advantage of clients. The language of the exclusion is also intended to apply to other members or employees of a firm in which the attorney works, as well as to other persons who are retained, or whose company or firm is retained, to perform services in relation to, or to assist, an attorney's representation of a client (*e.g.,* accountants and experts). As with the previous exclusion, this exclusion would not apply where the attorney is permitted to make a disclosure pursuant to 17 CFR 205.3(d)(2), the applicable state bar ethical rules, or otherwise.

The third proposed exclusion applies to persons who obtain information through the performance of an engagement required under the securities laws by an independent public accountant, if that information relates to a violation by the engagement client or the client's directors, officers or other employees.[26] Section 21F(c)(2)(C) of the Exchange Act excludes from award eligibility "any person who obtained the information provided to the Commission through an audit of a company's financial statements, and making a whistleblower submission would be contrary to the requirements of Section 10A of the Exchange Act."[27] Section 10A requires registered public accounting firms with respect to an audit of the issuer to include audit procedures to detect illegal acts.[28] It also prescribes requirements for the auditor if the auditor detects or otherwise becomes aware of information indicating an illegal act, which in certain circumstances can include reporting directly to the Commission. In addition to these requirements, there are other Commission-required engagements by an independent public accountant, such as audits of broker-dealers[29] and custody exams of investment advisers,[30] that require the external accountant to report instances of noncompliance. Professional standards for independent public accountants also prescribe responsibilities when a possible illegal act is detected.[31]

In light of these pre-existing requirements, and consistent with the role of an independent public accountant, we are proposing to exclude from the definitions of "independent knowledge and "independent analysis" any would-be whistleblowers whose information was gained through the performance of an engagement required under the securities laws by an independent public accountant.[32] This proposed exclusion applies to the employees of the independent public accountant and would not apply to the client's employees who perform an accounting function, even if they were interacting with the company's outside auditor. This proposed exclusion only would apply if the information relates to a violation by the engagement client or the client's directors, officers or other employees. It would not exclude information with respect to the independent public accountant's performance of the engagement itself, such as a violation of the accountant's requirements with respect to the engagement.

The fourth proposed exclusion applies when a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity receives information about potential violations, and the information was communicated to the person with the reasonable expectation that the person would take appropriate steps to cause the entity to respond to the violation.[33] The fifth proposed exclusion is closely related, and applies any other time that information is obtained from or through an entity's legal, compliance, audit, or similar functions or processes for identifying, reporting, and addressing potential non-compliance with applicable law.[34] However, each of these two exclusions ceases to be applicable, with the result that an individual may be deemed to have "independent knowledge," and therefore may become a whistleblower, if the entity does not disclose the information to the Commission within a reasonable time or if the entity proceeds in bad faith.

Compliance with the Federal securities laws is promoted when companies implement effective legal, audit, compliance, and similar functions. The rationale for these proposed exclusions is the concern that Section 21F not be implemented in a way that would create incentives for persons who obtain information through such functions, as well as other responsible persons who are informed of wrongdoing, to circumvent or undermine the proper operation of the entity's internal processes for responding to violations of law. Accordingly, the proposed rule would limit the circumstances in which such persons may use that knowledge to become whistleblowers. This would include officers, directors, employees, and consultants who learn of potential violations as part of their corporate responsibilities in the expectation that they will take steps to address the violations, as well as persons who gain knowledge about misconduct otherwise from or through the various processes that companies employ to identify problems and advance compliance with legal standards. The latter group would include not only persons directly responsible for compliance-related processes, but other persons as well. For

[25] *See* Model Rule of Professional Conduct 1.6, comment 3 ("The confidentiality rule * * * applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.).

[26] Proposed Rule 21F–4(b)(4)(iii).

[27] 15 U.S.C. 78u–6(c)(2)(C).

[28] *See* 15 U.S.C. 78j–1.

[29] *See* 17 CFR 240.17a–5(h)(2).

[30] *See* 17 CFR 275.206(4)–2(a)(3)(ii)(C).

[31] *See* AU Section 317, *Illegal Acts by Clients.*

[32] This would include reviews performed by an independent public accountant of interim financial statements included in quarterly reports on Form 10–Q (17 CFR 249.308(a)) pursuant to Rule 10–01(d) of Regulation S–X (17 CFR 210.10–01(d)). The Commission anticipates this exclusion would also apply to information gained through another engagement by the independent public accountant for the same client, given that the independent public accountant would generally already have an obligation to consider the information gained in the separate engagement in connection with the Commission-required engagement.

[33] Proposed Rule 21F–4(b)(4)(iv). Under the Federal Whistleblower Protection Act, 5 U.S.C. 2302(b)(8), a disclosure to a supervisor who is in a position to remedy the wrongdoing, is treated as a protected disclosure for purposes of the Federal Whistleblower Protection Act, 5 U.S.C. 2302(b)(8). *E.g., Reid* v. *Merit Systems Protection Board,* 508 F.3d 674 (Fed. Cir. 2007); *Hooven-Lewis* v. *Caldera,* 249 F.3d 259 (4th Cir. 2001). Borrowing and building upon this concept, the proposed rule would preclude such supervisors and similarly-situated others from seeking whistleblower awards based upon information they obtain when persons with knowledge of potential wrongdoing come to them in an effort to redress the violations.

[34] Persons excluded under this provision would include those retained to assist in such processes; *e.g.,* forensic accountants retained by outside counsel responsible for conducting an internal investigation.

example, an employee who learns about potential violations only because a compliance officer questions him about the conduct, and not from any other source, would not be considered to have "independent knowledge" for purposes of the proposed rule, and therefore could not become a whistleblower (unless, as is explained below, the company does not disclose the conduct to the Commission within a reasonable time or proceeds in bad faith).[35]

Internal compliance and similar functions, when effective, can constrain the opportunities for unlawful activity. In some cases, an entity's compliance program will fail to lead the entity to respond appropriately to violations. Under the proposed rule, if the entity did not disclose the information to the Commission within a reasonable time or proceeded in bad faith, these exclusions would no longer apply, thereby making an individual who knows this undisclosed information eligible to become a whistleblower by providing "independent knowledge" of the violations.

This approach is intended to strike a balance between two competing goals. On the one hand, it is designed to facilitate the operation of effective internal compliance programs by not creating incentives for company personnel to seek a personal financial benefit by "front running" internal investigations and similar processes that are important components of effective company compliance programs. On the other hand, it would permit such persons to act as whistleblowers in circumstances where the company knows about material misconduct but has not taken appropriate steps to respond. Accordingly, in determining whether these persons would be considered to have provided "independent knowledge" and would be eligible for whistleblower awards, the proposed rule focuses on whether the entity proceeded in bad faith or did not disclose the information to the Commission within a reasonable time.[36]

In determining whether an entity acted in bad faith, the Commission will, among other things, consider whether the entity or any personnel who were responsible for responding to allegations of misconduct took affirmative steps to hinder the preservation of evidence or a timely and appropriate investigation. For example, an effort by company officials to destroy documents or to interfere with witnesses would constitute bad faith conduct. Similarly, if a company engaged in a sham investigation of allegations, then the company's response would constitute bad faith.

The determination of what is a "reasonable time" in this context will necessarily be a flexible concept that will depend on all of the facts and circumstances of the particular case. In some cases—for example, an ongoing fraud that poses substantial risk of harm to investors—a "reasonable time" for disclosing violations to the Commission may be almost immediate. Nonetheless, given the competing concerns just described, the Commission preliminarily believes that the proposed rule should not define one fixed period that would represent a "reasonable time" in all cases. We anticipate that in evaluating any whistleblower submissions by personnel covered by these exclusions, we will review all of the circumstances of the case after the fact in order to determine whether the company disclosed the misconduct to the Commission within a reasonable time or proceeded in bad faith.

Further, if we determine that the whistleblower played a role in causing the company not to disclose the violations, or to delay in disclosing them, we will take this fact into consideration in our determination of whether to consider the whistleblower eligible for an award. A whistleblower will not be permitted to claim that the company did not disclose information to the Commission in a reasonable time if the whistleblower bears some responsibility for that failure.

The following chart illustrates the fourth and fifth exclusions from "independent knowledge:"

Source of employee's knowledge	Does it qualify as "independent knowledge"?
Employee receives information because he/she is reasonably expected to take appropriate steps to respond to the violation because of his/her legal, compliance, audit or supervisory responsibilities.	Employee will *not* be deemed to have independent knowledge of the information *unless* (1) the entity did not disclose the violation to the Commission within a reasonable period of time, or (2) acts in bad faith.
Employee learns of information through company's legal, compliance, audit or similar functions or processes for identifying or addressing potential non-compliance with laws.	Same as above.
Employee otherwise lawfully learns of information through his/her work-related functions.	Employee will generally be deemed to have independent knowledge of the information [NOTE: if employee elects to report internally first, he/she will receive the benefit of a "90-day look-back" for subsequent submission of information to SEC (*See* Proposed Rule 21F–4(b)(7))].

The sixth exclusion from "independent knowledge" is for information that was obtained by a means or in a manner that violates applicable Federal or state criminal law. The policy rationale for this proposed exclusion is that a whistleblower should not be rewarded for violating a Federal or State criminal law. While Congress clearly intended through Section 21F to provide greater incentives for whistleblowers to come forward with information about wrongdoing, we think it is questionable that Congress intended to encourage whistleblower assistance to a law enforcement authority where the assistance itself is undertaken in violation of Federal or State criminal law.

Finally. in order to prevent evasion of the rules, the seventh proposed exclusion would apply to anyone who obtained their information from persons subject to the first six exclusions.

Request for Comment:

7. Is it appropriate to include knowledge that is not direct, first-hand knowledge, but is instead learned from others, as "independent knowledge," subject only to an exclusion for knowledge learned from publicly-available sources?

[35] This proposed exclusion would not, however, apply to individuals with knowledge of potential violations who report their knowledge to supervisors, compliance or legal personnel. In fact, as is further explained below, such individuals would be given a 90-day grace period after reporting their information internally to make a whistleblower submission to the Commission and have their submission deemed effective as of the date of their internal report.

[36] This provision does not impose new reporting requirements in addition to those already existing under the Federal securities laws.

8. Is there a different or more specific definition of "analysis" that would better effectuate the purposes of Section 21F?

9. Is it appropriate to exclude from the definition of "independent knowledge" or "independent analysis" information that is obtained through a communication that is protected by the attorney-client privilege? Are there other ways these rules should address privileged communications? For example, should other specific privileges be identified (spousal privilege, physician-patient privilege, clergy-congregant privilege, or others)? Should the exclusion apply broadly to information that is obtained through communications that are subject to any common law evidentiary privileges recognized under the laws of any state?

10. Is it appropriate to exclude from the definition of independent knowledge" or "independent analysis" information that is obtained through the performance of an engagement required under the securities laws by an independent public accountant, if that information relates to a violation by the engagement client or the client's directors, officers or other employees? Are there other ways that our rules should address the roles of accountants and auditors?

11. Should the exclusion for "independent knowledge" or "independent analysis" go beyond attorneys and auditors, and include other professionals who may obtain information about potential securities violations in the course of their work for clients? If so, are there appropriate ways to limit the nature or extent of the exclusion so that any recognition of relationships of professional trust does not undermine the purposes of Section 21F?

12. Apart from persons who obtain information through privileged communications, and professionals who have access to client information, are there still other categories of persons who should not be considered for whistleblower awards based upon their professional duties or the manner in which they may acquire information about potential securities violations? If such exclusions are appropriate, what limits, if any, should be placed on them in order not to undermine the purposes of Section 21F? Is the exclusion for knowledge obtained through violations of criminal law appropriate?

13. Do the proposed exclusions for information obtained by a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity under an expectation that the person would cause the entity to take steps to respond to the violation, and for information otherwise obtained from or through an entity's legal, compliance, audit, or similar functions strike the proper balance? Will the carve-out for situations where the entity does not disclose the information within a reasonable time promote effective self-policing functions and compliance with the law without undermining the operation of Section 21F? Should a "reasonable time" be defined in the rule and, if so, what period should be specified (*e.g.,* three months, six months, one year)? Does this provide sufficient incentives for people to continue to utilize internal compliance processes? Are there alternative or additional provisions the Commission should consider that would promote effective self-policing and self-reporting while still being consistent with the goals and text of Section 21F?

14. Is the proposed exclusion for information obtained by a violation of Federal or State criminal law appropriate? Should the exclusion extend to violations of the criminal laws of foreign countries? What would be the policy reasons for either extending the exclusion to violations of foreign criminal law or not? Are there any other types of criminal violations that should be included? If so, on what basis?

15. How should our rules treat information that may be provided to us in violation of judicial or administrative orders such as protective orders in private litigation? Should we exclude from whistleblower awards persons who provide information in violation of such orders? What would be the policy reason for this proposed exclusion?

Under the statutory definition of "original information," a whistleblower who provides information that the Commission already knows from another source has not provided original information, unless the whistleblower is the "original source" of that information. Paragraphs (5) and (6) of Proposed Rule 21F–4(b) describe how the Commission proposes to interpret and apply the term "original source" as used in the definition of "original information." Under the proposed rule, a whistleblower is an "original source" of the same information that the Commission obtains from another source if the other source obtained the information from the whistleblower or his representative. The whistleblower bears the burden of establishing that he is the original source of information.

In Commission investigations, one way that this situation may arise is if the staff receives a referral from another authority such as the Department of Justice, a self-regulatory organization, or another organization that is identified in the proposed rule. In these circumstances, the proposed rule would credit the whistleblower with being the "original source" of information on which the referral was based as long as the whistleblower "voluntarily" provided the information to the other authority within the meaning of these rules; *i.e.,* the whistleblower or his representative must have come forward and given the other authority the information before receiving any request, inquiry, or demand to which the information was relevant. If a whistleblower claims to be the original source of information provided to the Commission by one of these authorities or another entity such as the whistleblower's employer, the Commission may seek assistance and confirmation from the other authority or entity in determining whether the whistleblower is the original source of the information.

Paragraph (6) of Proposed Rule 21F–4(b) addresses circumstances where the Commission already possesses some information about a matter at the time that a whistleblower provides additional information about the same matter. The whistleblower will be considered the "original source" of any information that is derived from his independent knowledge or independent analysis and that materially adds to the information that the Commission already possesses. The standard is modeled after the definition of "original source" that Congress included in the False Claims Act through amendments earlier this year.[37]

As is described elsewhere in these proposed rules, a whistleblower will need to submit his information as well as a Form WB–DEC in order to start the process and establish the whistleblower's eligibility for award consideration.[38] A whistleblower who provides information to another authority first will need to follow these same procedures and submit the necessary forms to the Commission in order to perfect his status as a whistleblower under the Commission's whistleblower program. However, under paragraph (7) of Proposed Rule 21F–4(b), as long as the whistleblower submits the necessary forms to the Commission within 90 days after he provided the same information to the other authority, the Commission will consider the whistleblower's submission to be effective as of that earlier date. As noted above, the

[37] 31 U.S.C. 3730(e)(4)(B), Pub. L. 111–148 sec. 10104(h)(2), 124 Stat. 901 (Mar. 23. 2010).

[38] *See* Proposed Rule 21F–9.

whistleblower must establish that he is the original source of the information provided to the other authority as well as the date of his submission, but the Commission may seek confirmation from the other authority in making this determination. The objective of this procedure is to provide further incentive for persons with knowledge of securities violations to come forward (consistent with the purposes of Section 21F) by assuring potential whistleblowers that they can provide information to appropriate Government or regulatory authorities, and their "place in line" will be protected in the event that other whistleblowers later provide the same information directly to the Commission.

For similar reasons, proposed rule 21F–4(b)(7) extends the same protection to whistleblowers who provide information about potential violations to the persons specified in Rules 21F–4(b)(4)(iv) and (v) (*i.e.,* personnel involved in compliance or similar functions, or who are informed about potential violations with the expectation that they will take steps to address them), and who, within 90 days, submit the necessary whistleblower forms to the Commission. Compliance with the Federal securities laws is promoted when companies have effective programs for identifying, correcting, and self-reporting unlawful conduct by company officers or employees. The objective of this provision is to support, not undermine, the effective functioning of company compliance and related systems by allowing employees to take their concerns about potential violations to appropriate company officials first while still preserving their rights under the Commission's whistleblower program. This objective is also important because internal compliance and reporting systems are essential sources of information for companies about misconduct that may not be securities-related (*e.g.,* employment discrimination or harassment complaints), as well as for securities-related complaints. The Commission does not intend for its rules to undermine effective company processes for receiving reports on potential violations that may be outside of the Commission's enforcement interest, but are nonetheless important for companies to address.

Given the policy interest in fostering robust corporate compliance programs, we considered the possible approach of requiring potential whistleblowers to utilize in-house complaint and reporting procedures, thereby giving employers an opportunity to address misconduct, before they make a whistleblower submission to the Commission. Among our concerns was the fact that, while many employers have compliance processes that are well-documented, thorough, and robust, and offer whistleblowers appropriate assurances of confidentiality, others lack such established procedures and protections.

We emphasize, however, that our proposal not to require a whistleblower to utilize internal compliance processes does not mean that our receipt of a whistleblower complaint will lead to internal processes being bypassed. We expect that in appropriate cases, consistent with the public interest and our obligation to preserve the confidentiality of a whistleblower, our staff will, upon receiving a whistleblower complaint, contact a company, describe the nature of the allegations, and give the company an opportunity to investigate the matter and report back. The company's actions in these circumstances will be considered in accordance with the Commission's Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions.[39] This has been the approach of the Enforcement staff in the past, and the Commission expects that it will continue in the future. Thus, in this respect, we do not expect our receipt of whistleblower complaints to minimize the importance of effective company processes for addressing allegations of wrongful conduct.[40]

The Commission's primary goal, consistent with the congressional intent behind Section 21F, is to encourage the submission of high-quality information to facilitate the effectiveness and efficiency of the Commission's enforcement program. At the same time, we also want to implement Section 21F in a way that encourages strong company compliance programs. Therefore, we request comment on all aspects of the intersection between Section 21F and established internal systems for the receipt, handling, and response to complaints about potential violations of law. We particularly seek recommendations on structures, processes, and incentives that we should consider implementing in order to strike the right balance between the Commission's need for a strong and effective whistleblower awards program, and the importance of preserving robust corporate structures for self-policing and self-reporting.

Request for Comment. The Commission requests comment on all aspects of the definition of "original source" set forth in Proposed Rule 21F–4(b)(4) and (5).

16. Is the provision that would credit individuals with providing original information to the Commission as of the date of their submission to another Governmental or regulatory authority, or to company legal, compliance, or audit personnel, appropriate? In particular, does the provision regarding the providing of information to a company's legal, compliance, or audit personnel appropriately accommodate the internal compliance process?

17. Is the 90-day deadline for submitting Forms TCR and WB–DEC to the Commission (after initially providing information about violations or potential violations to another authority or the employer's legal, compliance, or audit personnel) the appropriate timeframe? Should a longer time period apply in instances where a whistleblower believes that the company has or will proceed in bad faith? Would a 90-day deadline for submitting the TCR and WB–DEC also be appropriate in circumstances where an individual provides information to an SEC staff member? Would a shorter time frame be appropriate? Should there be different time frames for disclosures to other authorities and disclosures to an employer's legal, compliance or audit personnel?

18. Should the Commission consider other ways to promote continued robust corporate compliance processes consistent with the requirements of Section 21F? If so, what alternative requirements should be adopted? Should the Commission consider a rule that, in some fashion, would require whistleblowers to utilize employer-sponsored complaint and reporting procedures? What would be the appropriate contours of such a rule, and how could it be implemented without undermining the purposes of Section 21F? Are there other incentives or processes the Commission could adopt that would promote the purposes of Section 21F while still preserving a critical role for corporate self-policing and self-reporting?

19. Would the proposed rules frustrate internal compliance structures and systems that many companies have established in response to Section 10A(m) of the Exchange Act, as added by Section 301 of the Sarbanes-Oxley

[39] Exchange Act Release No. 44969 (October 23, 2001).

[40] *See* Rule 21F–6. In addition, as discussed below, 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.

Act of 2002, and related exchange listing standards? If so, consistent with Section 21F, how can the potential negative impact on compliance programs be minimized?

Proposed Rule 21F–4(c)—Information that Leads to Successful Enforcement. Under Section 21F, a whistleblower's eligibility for an award depends in part on whether the whistleblower's original information "led to the successful enforcement" of the Commission's action or a related action. Proposed Rule 21F–4(c) defines when original information "led to successful enforcement."

The Commission's enforcement practice generally proceeds in several stages. First, the staff opens an investigation based upon some indication of potential violations of the Federal securities laws. Second, the staff conducts its investigation to gather additional facts in order to determine whether there is sufficient basis to recommend enforcement action. If so, the staff may recommend, and the Commission may authorize, the filing of an action. The definition in Proposed Rule 21F–4(c) would consider the significance of the whistleblower's information to both the decision to open an investigation and the success of any resulting enforcement action. The proposed rule would distinguish between situations where the whistleblower's information causes the staff to begin an investigation, and situations where the whistleblower provides information about conduct that is already under investigation. In the latter case, awards would be limited to the rare circumstances where the whistleblower provided essential information that the staff would not have otherwise obtained in the normal course of the investigation. Paragraphs (1) and (2) of Proposed Rule 21F–4(c) reflect these considerations.

Paragraph (1) of Proposed Rule 21F–4(c) applies to situations where the staff is not already reviewing the conduct in question, and establishes a two-part test for determining whether original information voluntarily provided by a whistleblower led to successful enforcement of a Commission action. First, the information must have caused the staff to commence an examination, open an investigation, reopen an investigation that had been closed, or to inquire concerning new and different conduct as part of an open examination or investigation.[41] This does not necessarily contemplate that the whistleblower's information will be the only information that the staff obtains before deciding to proceed. However, the proposed rule would apply when the whistleblower gave the staff information about conduct that the staff is not already investigating or examining, and that information was a principal motivating factor behind the staff's decision to begin looking into the whistleblower's allegations.

Second, if the whistleblower's information caused the Commission staff to start looking at the conduct for the first time, the proposed rule would require that the information "significantly contributed" to the success of an enforcement action filed by the Commission. The proposed rule includes this requirement because the Commission believes that it is not the intent of Section 21F to authorize whistleblower awards for any and all tips about conduct that led to the opening of an investigation if the resulting investigation concludes in a successful enforcement action. Rather, implicit in the requirement that a whistleblower's information "led to * * * successful enforcement" is the further expectation that the information, because of its high quality, reliability, and specificity, had a meaningful connection to the Commission's ability to *successfully* complete its investigation and to either obtain a settlement or prevail in a litigated proceeding.

Ultimately, successful enforcement of a judicial or administrative action depends on the staff's ability to establish unlawful conduct by a preponderance of evidence. Thus, in order to "lead to successful enforcement," the "original information" provided by a whistleblower should be connected to evidence that plays a significant role in successfully establishing the Commission's claim. For example, the "led to" standard of Proposed Rule 21F–4(c)(1) would be met if a whistleblower were to provide the Commission staff with strong, direct evidence of violations that supported one or more claims in a successful enforcement action. To give another example, a whistleblower whose information did not provide this degree of evidence in itself, but who played a critical role in advancing the investigation by leading the staff directly to evidence that provided important support for one or more of the Commission's claims could also receive an award, in particular if the evidence the whistleblower pointed to might have otherwise been difficult to obtain. A whistleblower who only provided vague information, or an unsupported tip, or evidence that was tangential and did not significantly help the Commission successfully establish its claims, would not meet the standard of this proposed rule.

If information that a whistleblower provides to the Commission consists of "independent analysis" rather than "independent knowledge," the evaluation of whether this analysis "led to successful enforcement" similarly would turn on whether it significantly contributed to the success of the action. This would involve, for example, considering the degree to which the analysis, by itself and without further investigation, indicated a high likelihood of unlawful conduct that was the basis, or was substantially the basis, for one or more claims in the Commission's enforcement action. The purpose of this provision is to ensure that the analysis provided to the Commission results in the efficiency and effectiveness benefits to the enforcement program that were intended by Congress.

Paragraph (2) of Proposed Rule 21F–4(c) sets forth a separate, higher standard for cases in which a whistleblower provides original information to the Commission about conduct that is already under examination or investigation by the Commission, Congress, any other Federal, state, or local authority, any self-regulatory organization, or the Public Company Accounting Oversight Board. In this situation, the information will be considered to have led to the successful enforcement of a judicial or administrative action if the information would not have otherwise been obtained and was essential to the success of the action.[42] Although the Commission believes that awards under Section 21F generally should be limited to cases where whistleblowers provide original information about violations that are not already under investigation,[43] there may

[41] The proposed rule includes examinations within its scope in recognition of the fact that, in some cases involving regulated entities, tips about potentially unlawful conduct are directed in the first instance to staff of the Commission's Office of Compliance Inspections and Examinations, and after some additional consideration by examination staff may then lead to an investigation.

[42] The proposed rule also makes clear that paragraph (2) of Proposed Rule 21F–4(c) does not apply when a whistleblower provides information to the Commission about a matter that is already under investigation by another authority if the whistleblower is the "original source" for that investigation under Proposed Rule 21F–4(b)(4). In those circumstances, paragraph (1) of Proposed Rule 21F–4(c) would govern the Commission's analysis.

[43] *See Lacy* v. *United States,* 221 Ct. Cl. 526 (1979); *cf. United States ex rel. Merena* v. *Smith-Kline Beecham Corp.,* 205 F.3d 97 (3d Cir 2000).

be rare circumstances where information received from a whistleblower in relation to an ongoing investigation is so significant to the success of a Commission action that a whistleblower award should be considered. For example, a whistleblower who has not been questioned by the staff in an investigation, but who nonetheless has access to, and comes forward with a document that had been concealed from the staff, and that establishes proof of wrongdoing that is critical to the Commission's ability to sustain its burden of proof, provides the type of assistance that should be considered for an award without regard to whether the staff was already investigating the conduct at the time the document was provided. We anticipate applying Proposed Rule 21F–4(c)(2) in a strict fashion, however, such that awards under this standard would be rare.

In considering the relationship between information obtained from a whistleblower and the success of an enforcement action, the Commission will apply the same standards in both settled and litigated actions. Specifically, in a litigated action the whistleblower's information must significantly contribute, or, in the case of conduct that is already under investigation, be essential, to the success of a claim on which the Commission prevails in litigation. For example, if a court finds in favor of the Commission on a number of claims in an enforcement action, but rejects the claims that are based upon the information the whistleblower provided, the whistleblower would not be considered eligible to receive an award.[44] Similarly, in a settled action the Commission would consider whether the whistleblower's information significantly contributed, or was essential, to allegations included in the Commission's Federal court complaint, or to factual findings in the Commission's administrative order.

Request for Comment:

20. Is the proposed standard for when original information voluntarily provided by a whistleblower "led to" successful enforcement action appropriate?

21. In cases where the original information provided by the whistleblower caused the staff to begin looking at conduct for the first time, should the standard also require that the whistleblower's information "significantly contributed" to a successful enforcement action?

a. If not, what standards should be used in the evaluation?

b. If yes, should the proposed rule define with greater specificity when information "significantly contributed" to enforcement action? In what way should the phrase be defined?

22. Is the proposal in Paragraph (c)(2), which would consider that a whistleblower's information "led to" successful enforcement even in cases where the whistleblower gave the Commission original information about conduct that was already under investigation, appropriate? Should the Commission's evaluation turn on whether the whistleblower's information would not otherwise have been obtained and was essential to the success of the action? If not, what other standard(s) should apply?

Proposed Rule 21F–4(d)—Action

Proposed Rule 21F–4(d) defines the term "action." For purposes of calculating whether monetary sanctions in a Commission action exceed the $1,000,000 threshold required for an award payment pursuant to Section 21F of the Exchange Act, as well as determining the monetary sanctions on which awards are based,[45] the Commission proposes to interpret the term "action" to mean a single captioned civil or administrative proceeding. This approach to determining the scope of an "action" is consistent with the most common meaning of the term,[46] and is driven by the plain text of Section 21F. Section 21F(a)(1) defines a "covered judicial or administrative action" as "any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000."[47] When the conditions for an award are satisfied in connection with a "covered judicial or administrative action," the Commission must pay an award or awards in an aggregate amount equal to not less than 10 percent and not more than 30 percent "in total, of what has been collected of the monetary sanctions imposed in the action * * *."[48]

Two implications follow from this interpretation. First, the "action" would include all defendants or respondents, and all claims, that are brought within that proceeding without regard to which specific defendants or respondents, or which specific claims, were included in the action as a result of the information that the whistleblower provided. For example, if a whistleblower provided information concerning insider trading by a single individual, and, after an investigation, the Commission brought an action against that individual and others in a single captioned proceeding in Federal court, then the sanctions collected from all the defendants in the action would be added up to determine whether the $1,000,000 threshold has been met. Similarly, if a corporate accounting employee provided the Commission with information about a fraudulent accounting practice, and, after investigation, the Commission brought an action that also included unrelated claims discovered during the investigation, the $1,000,000 threshold amount for an award would be determined based upon the total monetary sanctions obtained in the action. This approach would effectuate the purposes of Section 21F by enhancing the incentives for individuals to come forward and report potential securities law violations to the Commission,[49] and would avoid the challenges associated with attempting to allocate monetary sanctions involving multiple individuals and claims based upon the select individuals and claims reported by whistleblowers.

Second, this proposed approach to interpreting the term "action" also would mean that the Commission would not aggregate sanctions that are imposed in separate judicial or administrative actions for purposes of determining whether the $1,000,000 threshold is satisfied, even if the actions arise out of a single investigation. For example, if a whistleblower's submission leads to two separate enforcement actions, each with total sanctions of $600,000, then no whistleblower award would be authorized because no single action will have obtained sanctions exceeding $1,000,000.

Request for Comment:

[44] As discussed below, however, if the Commission prevails on a claim that is based upon the information the whistleblower provided, and if all the conditions for an award are otherwise satisfied, the award to the whistleblower would be based upon all of the monetary sanctions obtained as a result of the action. *See* Proposed Rule 21F–4(d).

[45] *See* Proposed Rule 21F–5.

[46] *E.g., SEC* v. *McCarthy,* 322 F.3d 650, 656 (9th Cir. 2003) ("An 'action' is defined as 'a civil or criminal judicial proceeding.'").

[47] 15 U.S.C. 78u–6(a)(1).

[48] 15 U.S.C. 78u–6(b).

[49] This approach offers enhanced potential incentives for whistleblowers when compared to other similar programs because those programs have typically limited awards to successful claims that the whistleblower actually identified. *See Rockwell International Corp.* v. *United States,* 549 U.S. 457 (2007) (False Claims Act); *John Doe* v. *United States,* 65 Fed. Cl. 184 (2005) (Customs moiety statute, 19 U.S.C. 1619); Internal Revenue Manual 25.2.2.2.8.A (under IRS whistleblower program, collected proceeds only include proceeds from the single issue identified by the whistleblower, or substantially similar improper activity).

23. The Commission requests comment on the proposed definition of the word "action." Are there other ways to define an "action" that are consistent with the text of Section 21F and that will better effectuate the purposes of the statute?

Proposed Rules 21F–4(e)—Monetary Sanctions. Proposed Rule 21F–4(e) defines "monetary sanctions" to mean any money, including penalties, disgorgement, and interest, ordered to be paid and any money deposited into a disgorgement fund or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002 as a result of a Commission action or a related action. This definition tracks the definition of the same term found in Section 21F of the Exchange Act.[50] The Commission interprets the reference in the statute to "penalties, disgorgement, and interest" to be examples of monetary sanctions, and not exclusive. Thus, regardless of how designated, the Commission will consider all amounts that are "ordered to be paid" in an action as "monetary sanctions" for purposes of Section 21F.

Proposed Rule 21F–4(f)—Appropriate Regulatory Agency.

Section 3(a)(34) of the Exchange Act[51] designates the Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision as "appropriate regulatory agencies" for specified entities and functions.[52] For example, when a national bank is a municipal securities dealer, the Comptroller of the Currency is designated as the appropriate regulatory agency; when a state member bank of the Federal Reserve System is a municipal securities dealer, the Federal Reserve Board is designated as the appropriate regulatory agency.

Proposed Rule 21F–4(f) would make clear that the Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision (as well as any other agencies that may be added to Section 3(a)(34) of the Exchange Act by future amendment) are deemed to be "appropriate regulatory agencies" for all purposes under Section 21F of the Exchange Act.[53] This means, in particular, that the Commission would consider a member, officer, or employee of one of the designated agencies to be ineligible to receive a whistleblower award under any circumstances, even if the information that the person possesses is unrelated to the agency's regulatory function. This interpretation would place members, officers, and employees of appropriate regulatory agencies on equal footing with those of other organizations, such as the Public Company Accounting Oversight Board and law enforcement organizations, who are also statutorily ineligible to receive whistleblower awards.[54]

Request for Comment:

24. Is the proposed definition of "appropriate regulatory agency" appropriate? Are there other definitions that that should be adopted instead?

Proposed Rule 21F–4(g)—Self-Regulatory Organization. Section 3(a)(26) of the Exchange Act[55] designates national securities exchanges, registered securities associations, and registered clearing agencies as self-regulatory organizations, and the Municipal Securities Rulemaking Board as a self-regulatory organization solely for purposes of Sections 19(b) and (c) of the Exchange Act (relating to rulemaking).[56] Consistent with the approach taken with regard to the definition of "appropriate regulatory agency" (*see* discussion above), Proposed Rule 21F–4(g) would make clear that the Municipal Securities Rulemaking Board is considered to be a "self-regulatory organization" for all purposes under Section 21F.

Request for Comment:

25. Is the proposed definition of "self-regulatory organization" appropriate? Are there other definitions that that should be adopted instead?

E. Proposed Rule 21F–5—Amount of Award

Proposed Rule 21F–5 states that, if all conditions are met, the Commission will pay an award of at least 10 percent and no more than 30 percent of the total monetary sanctions collected in successful Commission and related actions. This range is specified in Section 21F(b)(1) of the Exchange Act. Where multiple whistleblowers are entitled to an award, paragraph (b) states that the Commission will independently determine the appropriate award percentage for each whistleblower, but total award payments, in the aggregate, will equal between 10 and 30 percent of the monetary sanctions collected in the Commission's action and the related action. 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. Since the Commission anticipates that the timing of award determinations and the value of a whistleblower's contribution could be different for the Commission's action and for related actions, the proposed rule would provide that the percentage awarded in connection with a Commission action may differ from the percentage awarded in related actions.

Request for Comment:

24. Is the provision stating that the percentage amount of an award in a Commission action may differ from the percentage awarded in a related action appropriate?

F. Proposed Rule 21F–6—Criteria for Determining Amount of Award

Assuming that all of the conditions for making an award to a whistleblower have been satisfied, Proposed Rule 21F–6 sets forth the criteria that the Commission would take into consideration in determining the amount of the award. Paragraphs (a) through (c) of the proposed rule recite three criteria that Section 21F of the Exchange Act requires the Commission to consider, and paragraph (d) adds a fourth criterion.

Paragraph (a) requires the Commission to consider the significance of the information provided by a whistleblower to the success of the Commission action or related action. Paragraph (b) requires the Commission to consider the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action. Paragraph (c) requires the Commission to consider its programmatic interest in deterring violations of the securities laws by making awards to whistleblowers that provide information that leads to successful enforcement actions. Paragraph (d) would permit the Commission to consider whether an award otherwise enhances its ability to enforce the Federal securities laws, protect investors, and encourage the

[50] 15 U.S.C. 78u–6(a)(4).

[51] 15 U.S.C. 78c(a)(34).

[52] Title III of Dodd-Frank abolishes the Office of Thrift Supervision and transfers its functions to other agencies one year after the date of enactment, unless the transfer date is extended.

[53] Section 21F alternately uses the terms "appropriate regulatory agency" and "appropriate regulatory authority." *Compare* Section 21F(c)(2)(A)(i) (15 U.S.C. 78u–6(c)(2)(A)(i)) *with* Section 21F(h)(2)(D)(i)((II) (15 U.S.C. 78u–6(h)(2)(D)(i)((II)). Because we do not believe that Congress intended this differing terminology to reflect substantive distinctions, the proposed rules use the term "appropriate regulatory agency" in all instances.

[54] *See* Section 21F(c)(2)(A), 15 U.S.C. 78u–6(c)(2)(A).

[55] 15 U.S.C. 78c(a)(26).

[56] 15 U.S.C. 78s(b) and (c).

submission of high quality information from whistleblowers.

The Commission anticipates that the determination of awards amounts pursuant to paragraphs (a)–(d) will involve highly individualized review of the circumstances surrounding each award. To allow for this, the Commission preliminarily believes that the four criteria afford the Commission broad discretion to weigh a multitude of considerations in determining the amount of any particular award. Depending upon the facts and circumstances of each case, some of the considerations may not be applicable or may deserve greater weight than others.

The permissible considerations include, but are not limited to, those set forth below. These considerations are not listed in order of importance nor are they intended to be all-inclusive or to require a specific determination in any particular case:

- The character of the enforcement action, including whether its subject matter is a Commission priority, whether the reported misconduct involves regulated entities or fiduciaries, the type and severity of the securities violations, the age and duration of misconduct, the number of violations, and the isolated, repetitive, or ongoing nature of the violations;
- The dangers to investors or others presented by the underlying violations involved in the enforcement action, including the amount of harm or potential harm caused by the underlying violations, the type of harm resulting from or threatened by the underlying violations, and the number of individuals or entities harmed;
- The timeliness, degree, reliability, and effectiveness of the whistleblower's assistance;
- The time and resources conserved as a result of the whistleblower's assistance;
- Whether the whistleblower encouraged or authorized others to assist the staff who might otherwise not have participated in the investigation or related action;
- Any unique hardships experienced by the whistleblower as a result of his or her reporting and assisting in the enforcement action;
- The degree to which the whistleblower took steps to prevent the violations from occurring or continuing;
- The efforts undertaken by the whistleblower to remediate the harm caused by the violations, including assisting the authorities in the recovery of the fruits and instrumentalities of the violations;
- Whether the information provided by the whistleblower related to only a portion of the successful claims brought in the Commission or related action;[57]
- The culpability of the whistleblower including whether the whistleblower acted with scienter, both generally and in relation to others who participated in the misconduct; and
- Whether, and the extent to which, a whistleblower reported the potential violation through effective internal whistleblower, legal or compliance procedures before reporting the violation to the Commission.

This last consideration is not a requirement for an award above the 10 percent statutory minimum and whistleblowers will not be penalized if they do not avail themselves of this opportunity for fear of retaliation or other legitimate reasons. The Commission will consider higher percentage awards for whistleblowers who first report violations through their compliance programs. Corporate compliance programs play a role in preventing and detecting securities violations that could harm investors. If these programs are not utilized or working, our system of securities regulation will be less effective. Accordingly, the Commission believes that encouraging whistleblowers to report securities violations to their corporate compliance programs is consistent with the Commission's investor protection mission.

Request for Comment:

27. Should the Commission identify, by rule, additional criteria that it will consider in determining the amount of an award? If so, what criteria should be included? Should we include as a criterion the consideration of whether, and the extent to which, a whistleblower reported the potential violation through effective internal whistleblower, legal or compliance procedures before reporting the violation to the Commission? Should we include any of the other considerations described above?

28. Should we include the role and culpability of the whistleblower in the unlawful conduct as an express criterion that would result in reducing the amount of an award within the statutorily-required range? Should culpable whistleblowers be excluded from eligibility for awards? Would such an exclusion be consistent with the purposes of Section 21F?

G. Proposed Rule 21F–7—Confidentiality of Submissions

Proposed Rule 21F–7 reflects the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act[58] with respect to information that could reasonably be expected to reveal the identity of a whistleblower. As a general matter, it is the Commission's policy and practice to treat all information obtained during its investigations as confidential and nonpublic. Disclosures of enforcement-related information to any person outside the Commission may only be made as authorized by the Commission and in accordance with applicable laws and regulations. Consistent with Section 21F(h)(2), the proposed rule 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.[59] As is further explained below, there may be circumstances in which disclosure of information that identifies a whistleblower will be legally required or will be necessary for the protection of investors.

Paragraph (a)(1) of the proposed rule would authorize disclosure of information that could reasonably be expected to reveal the identity of a whistleblower when disclosure is required to a defendant or respondent in a Federal court or administrative action that the Commission files or in another public action or proceeding filed by an authority to which the Commission may provide the information. For example, in a related action brought as a criminal prosecution by the Department of Justice, disclosure of a whistleblower's identity may be required, in light of the requirement of the Sixth Amendment of the Constitution that a criminal defendant have the right to be confronted with witnesses against him.[60] Paragraph (a)(2) would authorize disclosure to the Department of Justice, an appropriate regulatory agency, a self regulatory organization, a state attorney

[57] As described elsewhere in these rules, if the information provided by a whistleblower relates to only a portion of a successful enforcement action, the Commission proposes to look to the entirety of the action (including all defendants or respondents, all claims, and all monetary sanctions obtained) in determining whether the action is eligible for an award (because it meets the $1,000,000 threshold) and the total dollar amount of sanctions on which the whistleblower's award will be based. However, under paragraph (a) of Proposed Rule 21F–6, the fact that the whistleblower's information related to only a portion of the overall action would be a factor in determining the amount of the whistleblower's award. Thus, if the whistleblower's information supported only a small part of a larger case, that would be a reason for making an award based upon a smaller percentage amount than otherwise would have been awarded.

[58] 15 U.S.C. 78u–6(h)(2).

[59] Under Section 21F(h)(2), whistleblower-identifying information is also expressly exempted from the provisions of the Freedom of Information Act, 5 U.S.C. 552.

[60] *See* U.S. Const. Amend. VI.

general in connection with a criminal investigation, any appropriate state regulatory authority, the Public Company Accounting Oversight Board, or foreign securities and law enforcement authorities when it is necessary to achieve the purposes of the Exchange Act and to protect investors. With the exception of foreign securities and law enforcement authorities, each of these entities is subject to the confidentiality requirements set forth in Section 21F(h) of the Exchange Act. Since foreign securities and law enforcement authorities are not bound by these confidentiality requirements, the proposed rule states that the Commission may determine what assurances of confidentiality are appropriate prior to disclosing such information. Paragraph (a)(3) would authorize disclosure in accordance with the Privacy Act of 1974.

Because many whistleblowers may wish to provide information anonymously, paragraph (b) of the proposed rule states that anonymous submissions are permitted with certain specified conditions. Paragraph (b)(1) would require that anonymous whistleblowers be represented by an attorney and that the attorney's contact information be provided to the Commission at the time of the whistleblower's initial submission. The purpose of this requirement is to prevent fraudulent submissions and to facilitate communication and assistance between the whistleblower and the Commission's staff. Any whistleblower may be represented by counsel—whether submitting information anonymously or not.[61] Paragraph (b)(2) would require that anonymous whistleblowers and their counsel follow the required procedures outlined in Proposed Rule 21F–9. Paragraph (b)(3) would require that anonymous whistleblowers disclose their identity, pursuant to the procedures outlined in Proposed Rule 21F–10, before the Commission will pay any award. We emphasize that anonymous whistleblowers have the same rights and responsibilities as other whistleblowers under Section 21F of the Exchange Act and these proposed rules, unless expressly exempted.

Pursuant to Rule 102(e) of the Commission's Rules of Practice,[62] the Commission may deny the privilege of practicing before the Commission to any person who, after notice and opportunity for hearing, is found not to possess the requisite qualifications to represent others, to be lacking in character or integrity, to have engaged in unethical or improper professional conduct, or to have willfully violated or willfully aided and abetted the violation of any provision of the Federal securities laws or rules. Practice before the Commission is defined to include transacting any business with the Commission.[63] The Commission cautions attorneys that representation of whistleblowers will constitute practice before the Commission. Accordingly, misconduct by an attorney representing a whistleblower can result in the attorney being subject to disciplinary sanctions under any of the conditions set forth in Rule 102(e).

Request for Comment:

29. Because representation of whistleblowers constitutes practice before the Commission by an attorney, should the Commission consider adopting rules governing conduct by attorneys engaged in this type of practice? In some contexts, courts have disallowed excessive fee requests to attorneys for whistleblowers.[64] Should we adopt a rule regarding fees in the representation of whistleblower clients? Would such a rule encourage or discourage whistleblower submissions?

H. Proposed Rule 21F–8—Eligibility

Paragraph (a) of Proposed Rule 21F–8 makes clear that providing information in the form and manner required by these rules is a fundamental criterion of eligibility for a whistleblower award.[65] However, in order to prevent undue hardship, the Commission, in its sole discretion, may waive any of these procedural requirements based upon a showing of extraordinary circumstances.

The specific procedures required for submitting original information and making a claim for a whistleblower award are described in Proposed Rules 21F–9 through 21F–11. Proposed Rule 21F–8(b) contains several additional procedural requirements, which are designed to assist the Commission in evaluating and using the information provided. These include that the whistleblower, upon request, agree to provide explanations and other assistance including, but not limited to, providing all additional information in the whistleblower's possession that is related to the subject matter of his submission. In order to accommodate whistleblowers who elect to submit information anonymously, the staff will have discretion to make special arrangements to meet these procedural requirements.

Paragraph (b) of the proposed rule also would require whistleblowers, if requested by the staff, to provide testimony or other acceptable evidence relating to whether they are eligible for or otherwise satisfy any of the conditions for an award. Because Section 21F(c)(2) of the Exchange Act statutorily excludes certain persons from receiving whistleblower awards,[66] and Section 21F further conditions the grant of an award on factors that are unique to each individual whistleblower (*e.g.,* that the individual act "voluntarily" and provide information that meets all the criteria of "original information"), this provision is designed to ensure that the staff has authority to confirm that whistleblowers meet all of the necessary eligibility criteria and conditions. It is anticipated that the staff may seek such confirming evidence at any point after a whistleblower files Form WB–DEC (as set forth in Proposed Rule 21F–9), including, without limitation, in connection with the claims review process described in Proposed Rules 21F–10 and 21F–11.

Finally, paragraph (b) of proposed rule 21F–8 would authorize the staff to require that a whistleblower enter into a confidentiality agreement in a form acceptable to the Whistleblower Office, including a provision that a violation may result in the whistleblower being ineligible for an award.[67] In some cases, a confidentiality agreement may be required if it becomes necessary or advisable for the staff to share non-public information with a whistleblower either during the course of the investigation (for example, to obtain the whistleblower's assistance in interpreting documents), or as part of

[61] *See* Section 21F(d)(1), 15 U.S.C. 78u–6(d)(1). Under the statute, however, an anonymous whistleblower seeking an award is required to be represented by counsel. Section 21F(d)(2), 15 U.S.C. 78u–6(d)(2).

[62] 17 CFR 201.102(e).

[63] 17 CFR 102(f).

[64] *United States* v. *Overseas Shipholding Group, Inc.,* 2010 WL 4104663 at *7 (1st Cir. 2010) (limitations on fees "are particularly appropriate in situations such as this where awarding an excessive fee to the attorney would itself undermine the objectives of the Federal statutory scheme. The whole purpose of the discretionary award to whistleblowers under this statute is to create incentives for the whistleblower to take risks that may disadvantage the whistleblower in his relationship to his employer. The amount of the fee that will be siphoned off by the lawyer significantly affects the size of that award and the power of the incentive. The court in administering this statute is obligated to ensure his excessive legal fees will not diminish the statutory incentive.").

[65] *See* Section 21F(c)(2)(D), which prohibits the Commission from paying an award to any whistleblower "who fails 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).

[66] 15 U.S.C. 78u–6(c)(2).

[67] Section 21F(e) of the Exchange Act authorizes the Commission to require that a whistleblower enter into a contract. 15 U.S.C. 78u–6(e).

the claims process set forth in Proposed Rules 21F–10 and 21F–11.

Paragraph (c) of Proposed Rule 21F–8 recites the categories of individuals who are ineligible for an award, many of which are set forth in Section 21F(c)(2). These include persons who are, or were at the time they acquired the original information, a member, officer, or employee of the Department of Justice, an appropriate regulatory agency, a self-regulatory organization, the Public Company Accounting Oversight Board, or any law enforcement organization; anyone who is convicted of a criminal violation that is related to the Commission action or to a related action for which the person otherwise could receive an award; any person who obtained the information provided to the Commission through an audit of a company's financial statements, and making a whistleblower submission would be contrary to the requirements of Section 10A of the Exchange Act, 15 U.S.C. 78j–1);[68] and any person who in his whistleblower submission, his other dealings with the Commission, or his dealings with another authority in connection with a related action, knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or uses any false writing or document, knowing that it contains any false, fictitious, or fraudulent statement or entry. Paragraph (c)(2) of Proposed Rule 21F–8 also would make foreign officials ineligible to receive a whistleblower award. The payment of awards to foreign officials could have negative repercussions for United States foreign relations, including creating a perception that the United States is interfering with foreign sovereignty, potentially undermining foreign government cooperation under existing treaties (including multilateral and bilateral mutual legal assistance treaties),[69] encouraging corruption, and raising concerns about protection of foreign officials who become whistleblowers. In order to prevent evasion of these exclusions, paragraph (c)(5) of the proposed rule also provides that persons who acquire information from ineligible individuals are ineligible for an award. In addition, paragraph (c)(6) would make any person ineligible who is the spouse, parent, child, or sibling of a member or employee of the Commission, or who resides in the same household as a member or employee of the Commission, in order to prevent the appearance of improper conduct by Commission employees.

Paragraph (d) of Proposed Rule 21F–8 reiterates that a determination that a whistleblower is ineligible to receive an award for any reason does not deprive the individual of the anti-retaliation protections set forth in Section 21F(h)(1) of the Exchange Act.[70]

Request for Comment.

30. We request comment on the manner of submission requirements set forth in Proposed Rule 21F–8(b). Are these requirements appropriate? Should there be different or additional requirements to supplement the submission of information as set forth in Proposed Rule 21F–9?

31. We also request comment on the ineligibility criteria set forth in Proposed Rule 21F–8(c). Are there other statuses or activities that should render an individual ineligible for a whistleblower award?

I. Proposed Rule 21F–9—Procedures for Submitting Original Information

The Commission proposes a two-step process for the submission of original information under the whistleblower award program. In general, the first step would require the submission of information either on a standard form or through the Commission's online database for receiving tips, complaints and referrals. The second step would require the whistleblower to complete a Whistleblower Office form, signed under penalties of perjury, in which the whistleblower would be required to make certain representations concerning the veracity of the information provided and the whistleblower's eligibility for a potential award. The use of standardized forms and the electronic database will greatly assist the Commission in managing and tracking the thousands of tips that it receives annually. This will also better enable the Commission to connect tips to each other so as to make better use of the information provided, and to connect tips to requests for payment under the whistleblower provisions. The purpose of requiring a sworn declaration is to help deter the submission of false and misleading tips and the resulting inefficient use of the Commission's resources. The requirement should also mitigate the potential harm to companies and individuals that may be caused by false or spurious allegations of wrongdoing.

1. Form TCR and Instructions

Paragraph (a) of Proposed Rule 21F–9 requires the submission of information in one of two ways. A whistleblower may submit the information electronically through the Commission's Electronic Data Collection System available on the Commission's Web site or by completing and submitting proposed Form TCR—*Tip, Complaint or Referral.*[71] Form TCR, and the instructions thereto, are designed to capture basic identifying information about a complainant and to elicit sufficient information to determine whether the conduct alleged suggests a violation of the Federal securities laws. Proposed items A1 through A3 of Form TCR would request the whistleblower's name and contact information, including a physical address, email address and telephone number. Proposed item A4 would ask the whistleblower to indicate his occupation. In instances where a whistleblower submits information anonymously, the identifying information for the whistleblower would not be required, but proposed Items B1 through B4 of the form would require the name and contact information of the whistleblower's attorney. This information may also be included in the case of whistleblowers whose identities are known and who are represented by counsel in the matter. Proposed Items C1 through C4 would request basic identifying information for

[68] As noted above, Section 10A of the Exchange Act requires that a registered public accounting firm engaged in an audit of financial statements of an issuer required under the Exchange Act take certain steps if the auditor detects or otherwise becomes aware of information indicating an illegal act, which in certain circumstances can include reporting directly to the Commission. The Commission interprets the exclusion in Section 21F(c)(2)(C) to apply to persons who obtain information through the performance of an audit that is subject to the requirements of Section 10A, whether or not the audit results in the accounting firm making a report to the Commission. In addition to this statutory exclusion, the Commission is proposing, through the definition of "original information," a broader exclusion for persons who obtain information through the performance of an engagement required under the securities laws by an independent public accountant. *See* Proposed Rule 21F–4(b)(4)(iii).

[69] For example, Article 8(4) of the United Nations Convention Against Corruption requires that party states consider establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.

[70] *See* Proposed Rule 21F–2.

[71] The Commission anticipates that, by the time final rules are adopted to implement Section 21F, potential whistleblowers will be able to submit information to the Commission online through the Electronic Data Collection System, an interactive, web-based database for submission of tips, complaints and referrals. Whistleblowers who wish to submit their information in paper format would be required to use proposed Form TCR. Both methods of submission are designed to elicit substantially similar information concerning the individual submitting the information and the violation alleged. For purposes of these rules, the Commission is only discussing proposed Form TCR. The Commission will be separately submitting a request to the Office of Management and Budget for Paperwork Reduction Act approval of the Electronic Data Collection System.

the individual(s) or entity(ies) to which the complaint relates. Proposed Items D1 through D9 are designed to elicit details concerning the alleged securities violation. Proposed Items D1 and D2 would ask the whistleblower to provide the date of the occurrence and describe the nature of the complaint. Proposed Items D3 and D4 would ask whether the complaint relates to an entity of which the whistleblower is or was an officer, director, employee, consultant or contractor and, if so, whether the whistleblower has taken any prior action regarding the complaint, what actions were taken and the date on which the action(s) were taken. Proposed Item D5 would ask about the type of security or investment involved, the name of the issuer and the ticker symbol or CUSIP number, if applicable. Proposed Item D6 would ask the whistleblower to state in detail all facts pertinent to the alleged violation. Proposed Item D7 would ask for a description of all supporting materials in the whistleblower's possession and the availability and location of any additional supporting materials not in the whistleblower's possession. Item D8 would ask for an explanation of how the whistleblower obtained the information that supports the claim. Proposed Item D9 would provide the whistleblower with an opportunity to provide any additional information the whistleblower thinks may be relevant to his submission. The questions posed on proposed Form TCR are designed to elicit the minimum information required for the Commission to make a preliminary assessment concerning the likelihood that the alleged conduct suggests a violation of the securities laws. Moreover, the proposed instructions to Form TCR are designed to assist the whistleblower and facilitate the completion of the form.

2. Form WB–DEC and Instructions

In addition to submitting information in the form and manner required by paragraph (a), the Commission proposes in paragraph (b) of Proposed Rule 21F–9 to require that whistleblowers who wish to be considered for an award in connection with the information they provide to the Commission also complete and provide the Commission with proposed Form WB–DEC, *Declaration Concerning Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934.* Proposed Form WB–DEC would require a whistleblower to answer certain threshold questions concerning the whistleblower's eligibility to receive an award. The form also would contain a statement from the whistleblower acknowledging that the information contained in the Form WB–DEC, as well as all information contained in the whistleblower's submission, is true, correct and complete to the best of the whistleblower's knowledge, information and belief. Moreover, the statement would acknowledge the whistleblower's understanding that the whistleblower may be subject to prosecution and ineligible for an award if, in the whistleblower's submission of information, other dealings with the Commission, or dealings with another authority in connection with a related action, the whistleblower knowingly and willfully makes any false, fictitious, or fraudulent statements or representations, or uses any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

In instances where information is provided by an anonymous whistleblower, proposed paragraph (c) of Proposed Rule 21F–9 would require the attorney representing the whistleblower to provide the Commission with a separate Form WB–DEC certifying that the attorney has verified the identity of the whistleblower, and will retain the whistleblower's original, signed Form WB–DEC in the attorney's files. The proposed certification from counsel is an important element of the whistleblower program to help ensure that the Commission is working with whistleblowers whose identities have been verified by their counsel. The proposed certification process also would provide a mechanism for anonymous whistleblowers to be advised by their counsel regarding their preliminary eligibility for an award.

Proposed Items A1 through A3 of Form WB–DEC would request the whistleblower's name and contact information. In the case of submissions by an anonymous whistleblower, the form would require the name and contact information of the whistleblower's attorney instead of the whistleblower's identifying information in proposed Items B1 though B4. This section could also be completed in cases where a whistleblower's identity is known but the whistleblower is represented by an attorney in the matter. Proposed Items C1 through C3 would request information concerning the information submitted by the whistleblower to the SEC. Item C1 would require the whistleblower to indicate the manner in which the information was submitted to the Commission. Proposed Item C2 would ask for the Tip, Complaint or Referral ("TCR") number assigned to the whistleblower's submission. The Commission expects that the TCR number would be generated automatically in cases where the whistleblower submits his information online through the Commission's Electronic Data Collection System or, in the case of hard copy submissions, would be provided to the whistleblower in a written confirmation sent by the Commission staff. In instances where a whistleblower submits both forms in hard copy and thus does not have access to the TCR number at the time of submission, the forms would be linked together by virtue of having been included in the same mailing. Proposed Items C3 would ask a whistleblower to identify any communications the whistleblower or his counsel may have had with the Commission concerning the matter since submitting the information. Proposed Item C4 asks whether the whistleblower has provided the same information being provided to the Commission to any other agency or organization and, if so, requests details concerning the submission, including the name and contact information for the point of contact at the agency or organization, if known. Proposed Items D1 through D9 would require the whistleblower to make certain representations concerning the whistleblower's eligibility for an award. Finally, the form would require the sworn declarations from the whistleblower and the whistleblower's counsel discussed above. In proposed Item E, the whistleblower would be required to declare under penalty of perjury that the information contained on Form WB–DEC, and all information submitted to the SEC is true, correct and complete to the best of the whistleblower's knowledge, information and belief. In addition, the whistleblower would acknowledge his understanding that he may be subject to prosecution and ineligible for a whistleblower award if, in the whistleblower's submission of information, other dealings with the SEC, or dealings with another authority in connection with a related action, the whistleblower knowingly and willfully makes any false, fictitious, or fraudulent statements or representations, or uses any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

The counsel certification in proposed Item F would require an attorney for an anonymous whistleblower to certify that the attorney has verified the identity of the whistleblower who completed Form

WB–DEC in connection with the information submitted to the SEC by viewing the whistleblower's valid, unexpired government issued identification, that the attorney has reviewed the whistleblower's Form WB–DEC for completeness and accuracy, and that the attorney will retain an original, signed copy of the Form WB–DEC completed by the whistleblower in his or her records.

As explained above, the Commission proposes to allow two alternative methods of submission of a whistleblower's information. A whistleblower would have the option of submitting the information electronically through the Commission's Electronic Data Collection System or by sending or faxing Form TCR to the Whistleblower Office.

Form WB–DEC could be submitted electronically, in accordance with instructions set forth on the Commission's Web site or, alternatively, by mailing or faxing the form to the Whistleblower Office.

3. Perfecting Whistleblower Status for Submissions Made Before Effectiveness of the Rules

As previously discussed, Section 924(b) of Dodd-Frank states that information provided to the Commission in writing by a whistleblower after the date of enactment but before the effective date of these proposed rules retains the status of original information. The Commission has already received numerous tips from potential whistleblowers after the date of enactment of Dodd-Frank. Proposed Rule 21F–9(d) would provide a mechanism by which whistleblowers who fall into this category could perfect their status as whistleblowers under the Commission's award program once final rules are adopted. Paragraph (d)(1) requires a whistleblower who provided original information to the Commission in a format or manner other than that required by paragraph (a) of Rule 21F–9 to either submit the information electronically through the Commission's Electronic Data Collection System or to submit a completed Form TCR within one hundred twenty (120) days of the effective date of the proposed rules and to otherwise follow the procedures set forth in paragraph (b) of Proposed Rule 21F–9. If the whistleblower provided the original information to the Commission in the format or manner required by paragraph (a) of Rule 21F–9, paragraph (d)(2) would require the whistleblower to submit Form WB–DEC within one hundred twenty (120) days of the effective date of the proposed rules in the manner set forth in paragraph (b) of Proposed Rule 21F–9.

Request for Comment:

32. Although the Commission is proposing alternative methods of submission, we expect that electronic submissions would dramatically reduce our administrative costs, enhance our ability to evaluate tips (generally and using automated tools), and improve our efficiency in processing whistleblower submissions. Accordingly, we solicit comment on whether it would be appropriate to eliminate the fax and mail option and require that all submissions be made electronically. Would the elimination of submissions by fax and mail create an undue burden for some potential whistleblowers?

33. Is there other information that the Commission should elicit from whistleblowers on Proposed Forms TCR and WB–DEC? Are there categories of information included on these forms that are unnecessary, or should be modified?

34. Is the requirement that an attorney for an anonymous whistleblower certify that the attorney has verified the whistleblower's identity and eligibility for an award appropriate? Is there an alternative process the Commission should consider that would accomplish its goal of ensuring that it is communicating with a legitimate whistleblower?

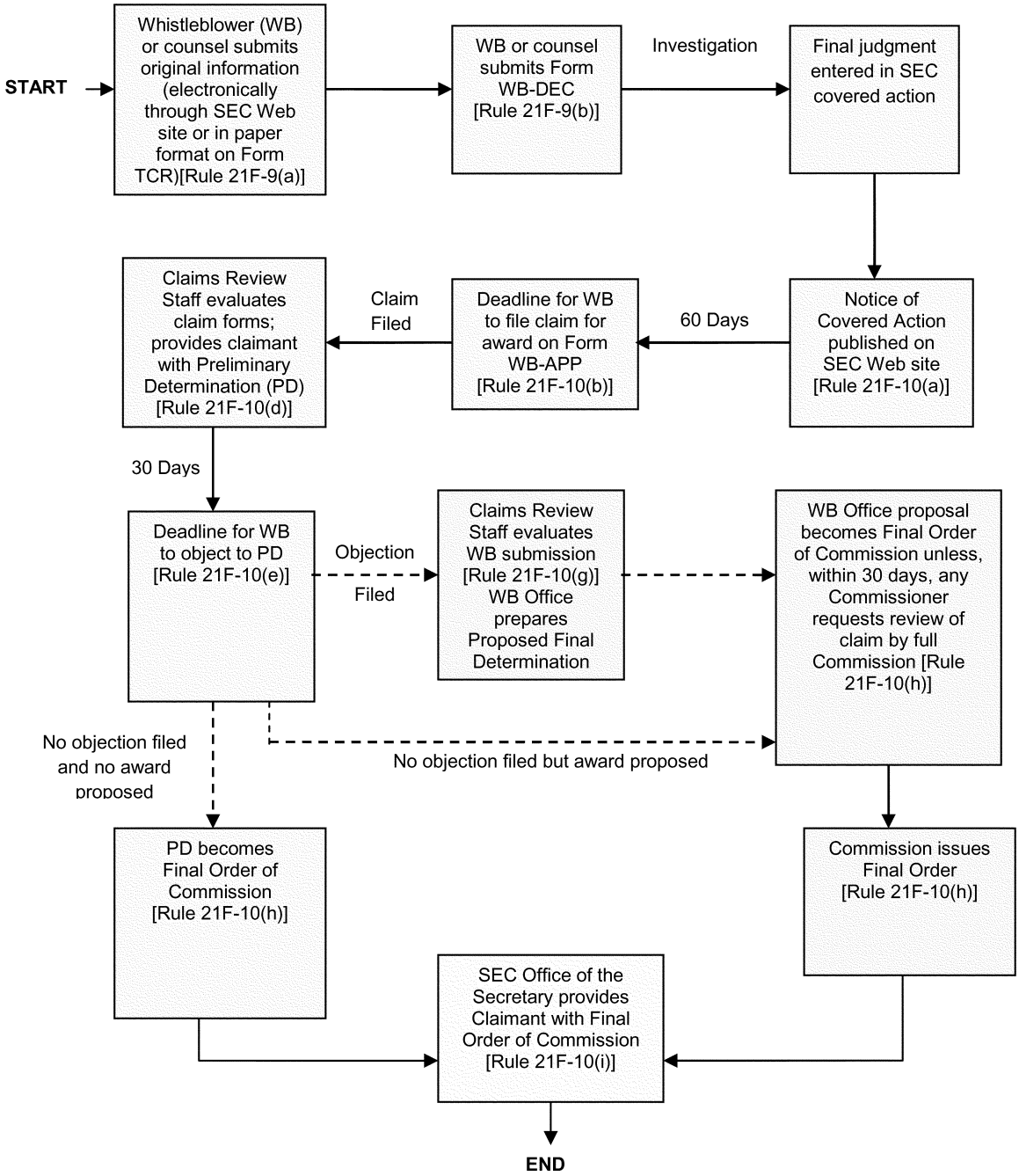
35. Is the Commission's proposed process for allowing whistleblowers 120 days to perfect their status in cases where the whistleblower provided original information to the Commission in writing after the date of enactment of Dodd-Frank but before adoption of the proposed rules reasonable? Should the period be made shorter (*e.g.,* 30 or 60 days) or longer (*e.g.,* 180 days)?

36. Are there any ways we can streamline and make the required procedures more user-friendly?

J. Proposed Rule 21F–10—Procedures for Making a Claim for a Whistleblower Award in SEC Actions That Result in Monetary Sanctions in Excess of $1,000,000

Proposed Rule 21F–10 describes the steps a whistleblower would be required to follow in order to make a claim for an award in relation to a Commission action. In addition, the rule describes the Commission's proposed claims review process, which includes the proposed administrative appeals process.

The following flow chart represents a general overview of the proposed process:



The proposed process would begin with the publication of a "Notice of a Covered Action" ("Notice") on the Commission's Web site. Whenever a judicial or administrative action brought by the Commission results in the imposition of monetary sanctions exceeding $1,000,000, the Whistleblower Office will cause this Notice to be published on the Commission's Web site subsequent to the entry of a final judgment or order in the action that by itself, or collectively with other judgments or orders previously entered in the action, exceeds the $1,000,000 threshold. If the monetary sanctions are obtained without a judgment or order—as in the case of a contribution made pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002—the Notice would be published within thirty (30) days of the deposit of monetary sanctions into a disgorgement or other fund pursuant to Section 308(b) that causes total monetary sanctions in the action to exceed $1,000,000. The Commission's proposed rule requires claimants to file their claim for an award within sixty (60) days of the date of the Notice.[72] A claimant's failure to timely file a request for a whistleblower award would bar that individual later seeking a recovery.[73] The Commission anticipates that, at the time a Notice of Covered Action is posted, the staff will also attempt to contact persons who have filed a Form WB DEC in relation to the case, in order to give them additional notice of the opportunity to submit a claim for award.

Paragraph (b) of Proposed Rule 21F–10 describes the procedure for making a

[72] All references to "days" refer to calendar days.

[73] *See, e.g., Yuen* v. *U.S.,* 825 F.2d 244 (9th Cir. 1987) (taxpayer barred from recovery due to failure to timely file a written request for refund).

claim for an award. Specifically, a claimant would be required to submit a claim for an award on proposed Form WB–APP, *Application for Award for Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934.* Proposed Form WB–APP, and the instructions thereto, will elicit information concerning a whistleblower's eligibility to receive an award at the time the whistleblower files his claim. The purpose of the form is, among other things, to provide an opportunity for the whistleblower to "make his case" for why he is entitled to an award by describing the information and assistance he has provided and its significance to the Commission's successful action. Proposed Items A1 through A3 require the claimant to provide basic identifying information, including first and last name and contact information. Proposed Items B1 through B4 would request the name and contact information for the whistleblower's attorney, if applicable. Proposed Items C1 and C2 would request information concerning the original tip or complaint underlying the claim, including the TCR number, the date the information was submitted and the subject of the tip, complaint or referral. Proposed Items D1 through D3 would request information concerning the Notice of Covered Action to which the claim relates, including the date of the notice, notice number, and the name and case number of the matter to which the notice relates. Proposed Items E1 through E3 would request information concerning related actions. A whistleblower would be required to complete Section D in cases where the whistleblower's claim was submitted in connection with information submitted to another agency or organization in a related action (the questions pertaining to related actions are explained in the discussion of proposed Rule 21F–11, below). Proposed Items F1 through F9 would require the claimant to make certain representations concerning the claimant's eligibility to receive an award at the time the claim is made. In Item G, a claimant may set forth the grounds for the claimant's belief that he is entitled to an award in connection with the information submitted to the Commission, or to another agency or organization in a related action. Finally, item H would contain a declaration, to be signed by the claimant, certifying that the information contained on the form is true, correct and complete to the best of the claimant's knowledge, information and belief. The declaration would further acknowledge the claimant's understanding that he may be subject to prosecution and ineligible for a whistleblower award for knowingly and willfully making any false, fictitious, or fraudulent statements or representations in his or her submission or dealings with the SEC or other authority.

Paragraph (b) of Proposed Rule 21F–10 provides that a claim on Form WB–APP, including any attachments, must be received by the Whistleblower Office within sixty (60) days of the date of the Notice of Covered Action in order to be considered for an award.

Paragraph (c) requires a whistleblower who submitted information to the Commission anonymously to disclose his identity to the Commission on proposed Form WB–APP and to verify his identity in a form and manner that is acceptable to the Whistleblower Office prior to the payment of an award. This requirement is derived from Subsection 21F(d)(2)(B) of the Exchange Act.[74]

Paragraph (d) of Proposed Rule 21F–10 describes the Commission's claims review process. The claims review process would begin once the time for filing any appeals of the Commission's judicial or administrative action has expired, or where an appeal has been filed, after all appeals in the action have been concluded.

Under the proposed process, the Whistleblower Office and designated Commission staff (defined in Proposed Rule 21F–10 as the "Claims Review Staff") [75] would evaluate all timely whistleblower award claims submitted on Form WB–APP. In connection with this process, the Whistleblower Office could require that claimants provide additional information relating to their eligibility for an award or satisfaction of any of the conditions for an award, as set forth in Proposed Rule 21F–8(b).[76] Following that evaluation, the Whistleblower Office would send any claimant a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award percentage amount.

The proposed rule would allow a claimant the opportunity to contest the Preliminary Determination made by the Claims Review Staff. Under paragraph (e) of Proposed Rule 21F–10, the claimant could take any of the following steps:

- Within thirty (30) days of the date of the Preliminary Determination, the claimant may request that the Whistleblower Office make available for the claimant's review the materials that formed the basis of the Claims Review Staff's Preliminary Determination. The Whistleblower Office would make these materials available to the claimant subject to any redactions necessary to comply with any statutory restrictions or protect the Commission's law enforcement and regulatory functions. The Whistleblower Office also could require the claimant to sign a confidentiality agreement (as described in Rule 21F–8) prior to providing these materials.
- Within thirty (30) days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (1) above, then within thirty (30) days of the Whistleblower Office making those materials available for the claimant's review, a claimant may submit a written response to the Whistleblower Office setting forth the grounds for the claimant's objection to either the denial of an award or the proposed amount of an award. The claimant may also include documentation or other evidentiary support for the grounds advanced in his response.
- Within thirty (30) days of the date of the Preliminary Determination, the claimant may request a meeting with the Whistleblower Office. However, such meetings are not required and the Whistleblower Office may in its sole discretion decline the request.

Paragraph (f) of Proposed Rule 21F–10 makes clear that if a claimant fails to submit a timely response pursuant to paragraph (e), then the Preliminary Determination of the Claims Review Staff would be deemed the Final Order of the Commission (except where the Preliminary Determination recommended an award, in which case the Preliminary Determination will be deemed a Proposed Final Determination, which would make it subject to review by the Commission under paragraph (h). In addition, 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.[77]

[74] 15 U.S.C. 78u–6(d)(2)(B).

[75] Designated staff would likely include, but need not be limited to, Commission staff members who were responsible for investigating and prosecuting the covered action.

[76] This is not intended to limit the authority of the staff to require confirmation of eligibility or the satisfaction of other conditions at any earlier time. *See* discussion of Proposed Rule 21F–8(d).

[77] *See, e.g., Benoit* v. *U.S. Dept. of Agriculture,* 608 F.3d 17, 21–24 (DC Cir. 2010) (dismissing appeal because petitioners failed to exhaust

Paragraph (g) of Proposed Rule 21F–10 describes the procedure in cases where a claimant submits a timely response pursuant to Paragraph (f). In such cases, the Claims Review Staff would consider the issues and grounds advanced in the claimant's response, along with any supporting documentation provided by the claimant, and would prepare a Proposed Final Determination. Paragraph (h) provides that the Whistleblower Office would notify the Commission of the Proposed Final Determination, but would not make the Proposed Final Determination public. Within thirty (30) days thereafter, any Commissioner would be able to request that the Proposed Final Determination be reviewed by the Commission. If no Commissioner requests such a review within the 30-day period, then the Proposed Final Determination would become the Final Order of the Commission. In the event a Commissioner requests a review, the Commission would review the record that the staff relied upon in making its determination, including the claimant's previous submissions to the Whistleblower Office. On the basis of its review of the record, the Commission would issue its Final Order, which the Commission's Secretary will provide to the claimant.

The objective of this administrative appeals process is to provide a transparent award determination process and provide whistleblowers full opportunity to make a written statement to the Commission for its consideration when it makes eligibility and award determinations. The proposed administrative process would enable a whistleblower to appeal to the Commission a preliminary determination by the Whistleblower Office concerning the percentage amount of an award; however, this process would in no way limit the Commission's discretion to make a determination with respect to the amount of an award. Under Section 21F(f) of the Exchange Act, determinations of the amount of an award are not appealable to the courts when the Commission has followed the statutory requirement to award between 10 and 30 percent of the monetary sanctions collected.

K. Proposed Rule 21F–11—Procedures for Determining Awards Based Upon a Related Action

Proposed Rule 21F–3(b) discussed above explains that the Commission is required to pay an award on amounts collected in certain related actions. Proposed Rule 21F–11 sets forth the procedures for determining awards based upon related actions. Paragraph (a) informs a whistleblower who is eligible to receive an award following a Commission action that results in monetary sanctions totaling more than $1,000,000 that the whistleblower may also be eligible to receive an award based on the monetary sanctions that are collected from a related action.

Paragraph (b) of Proposed Rule 21F–11 describes the procedures for making a claim for an award in a related action. The process essentially mirrors the procedure for making a claim in connection with a Commission action and requires the claimant to submit the claim on Form WB–APP. In addition to the questions previously described in our discussion of proposed Rule 21F–10, the claimant in a related action would be required to complete Section D of proposed form WB–APP. Proposed Items D1 through D4 request the name of the agency or organization to which the whistleblower provided the information and the date the information was provided, the name and telephone number for a contact at the agency or organization, if available, and the case name, action number and date the related action was filed.

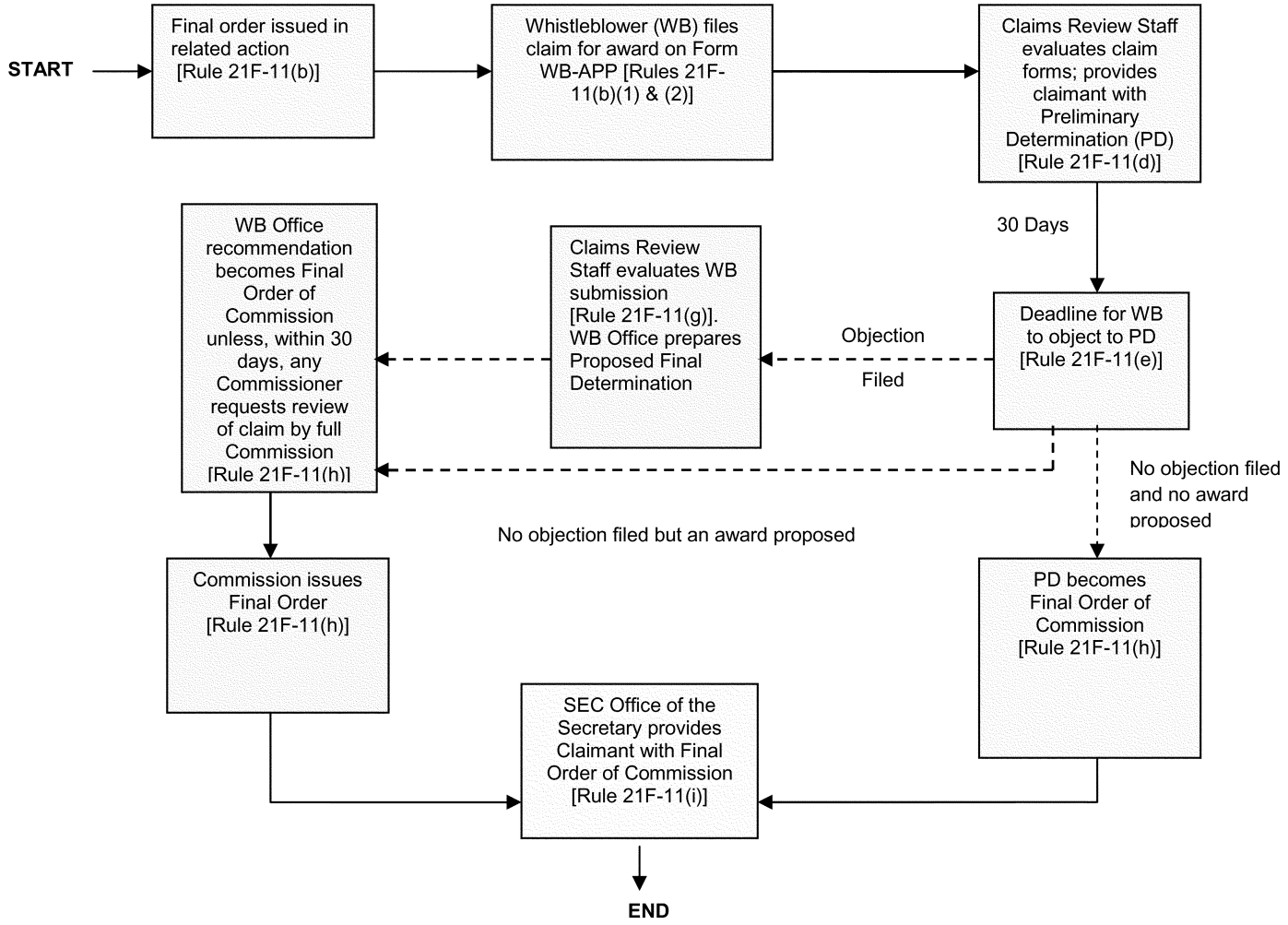
Paragraph (b) of Proposed Rule 21F–11 sets forth the deadline by which a claimant must file his or her Form WB–APP in a related action. Specifically, under proposed paragraph (b)(1), if a final order imposing monetary sanctions has been entered in a related action at the time the claimant submits the claim for an award in connection with a Commission action, the claimant would be required to submit the claim for an award in that related action on the same Form WB–APP used for the Commission action. Under proposed paragraph (b)(2), if a final order imposing monetary sanctions in a related action has not been entered at the time the claimant submits a claim for an award in connection with a Commission action, then the claimant would be required to submit the claim on Form WB–APP within sixty (60) days of the issuance of a final order imposing sanctions in the related action.

The Whistleblower Office may request additional information from the claimant in connection with the claim for an award in a related action to demonstrate that the claimant directly (or through the Commission) voluntarily provided the governmental agency, regulatory authority or self-regulatory organization the same original information that led to the Commission's successful covered action, and that this information led to the successful enforcement of the related action. In addition, the Whistleblower Office may, in its discretion, seek assistance and confirmation from the other agency in making this determination.

Paragraphs (d) through (i) of Proposed Rule 21F–11 describe the Commission's claims review process in related actions. The Commission proposes to utilize the same claims review process in related actions that it will utilize in connection with claims submitted in connection with a covered Commission action.

The following represents an overview of the proposed process:

administrative remedies with respect to their monetary claims against the government).



L. Proposed Rule 21F–12—Appeals

Section 21F of the Exchange Act provides for certain rights of appeal of orders of the Commission with respect to whistleblower awards.[78] Paragraph (a) of Proposed Rule 21F–12 tracks this provision and describes claimants' appeal rights. A decision of the Commission regarding the amount of an award is not appealable when the Commission has followed the statutory mandate to award between 10 and 30 percent of the monetary sanctions collected. A decision regarding whether or to whom to make an award may be appealed to an appropriate court of appeals within 30 days after the Commission issues its final decision. Under Section 25(a)(1) of the Exchange Act,[79] appeals of final orders of the Commission entered pursuant to the Exchange Act may 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 principal place of business.

Paragraph (b) of Proposed Rule 21F–12 designates the materials that shall be included in the record on any appeal. They include the Whistleblower Office's Preliminary Determination, any materials submitted by the claimant or claimants (including the claimant's Forms TCR, WB–DEC, WB–APP, and materials filed in response to the Preliminary Determination), and any other materials that supported the Final Order of the Commission, with the exception of any internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim, such as the staff's Proposed Final Determination in the event it does not become the Final Order.

M. Proposed Rule 21F–13—Procedures Applicable to Payment of Awards

Proposed Rule 21F–13 (a) addresses the timing for payment of an award to a whistleblower. Any award made pursuant to the rules would be paid from the Securities and Exchange Commission Investor Protection Fund (the "Fund") established by Section 21F(g) of the Exchange Act.[80] Paragraph (b) provides that a recipient of a whistleblower award would be entitled to payment on the award only to the extent that a monetary sanction is collected in the Commission action or in a related action upon which the award is based. This requirement is derived from Section 21F(b)(1) of the Exchange Act,[81] which provides that an award is based upon the monetary sanctions collected in the Commission action or related action.

Paragraph (c) states that any payment of an award for a monetary sanction collected in a Commission action would be made following the later of either the completion of the appeals process for all whistleblower award claims arising from the Notice of Covered Action for that action, or the date on which the monetary sanction is collected. Likewise, the payment of an award for a monetary sanction collected in a

[78] 15 U.S.C. 78u–6(f).
[79] 15 U.S.C. 78y(a)(1).
[80] 15 U.S.C. 78u–6(g).
[81] 15 U.S.C. 78u–6(b)(1).

related action would be made following the later of either the completion of the appeals process for all whistleblower award claims arising from the related action, or the date on which the monetary sanction is collected. This provision is intended to cover situations where a single action results in multiple whistleblowers claims. Under this scenario, if one whistleblower appeals a Final Determination of the Commission denying the whistleblower's claim for an award, the Commission would not pay any awards in the action until that whistleblower's appeal has been concluded, because the disposition of that appeal could require the Commission to reconsider its determination and thereby could affect all payments for that action.

Paragraph (d) of Proposed Rule 21F–13 describes how the Commission would address situations where there are insufficient amounts available in the Fund to pay an award to a whistleblower or whistleblowers within a reasonable period of time of when payment should otherwise be made. In this situation, the whistleblower or whistleblowers would be paid when amounts become available in the Fund, subject to the terms set forth in proposed paragraphs (d)(1) and (d)(2). Under proposed paragraph (d)(1), where multiple whistleblowers are owed payments from the Fund based on awards that do not arise from the same Notice of Covered Action or related action, priority in making payment on these awards would be determined based upon the date that the collections for which the whistleblowers are owed payments occurred. If two or more of these collections occur on the same date, those whistleblowers owed payments based on these collections would be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments. Under proposed paragraph (d)(2), where multiple whistleblowers are owed payments from the Fund based on awards that arise from the same Notice of Covered Action or related action, they would share the same payment priority and would be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

As noted above, whistleblower awards will be paid solely from the Fund. Section 21F(g)(3) of the Exchange Act establishes the mechanism for funding the Fund. In most circumstances, the Fund will be funded with monetary sanctions that are collected by the Commission in its judicial and administrative actions and that are not distributed to victims of a violation of the securities laws underlying such actions. However, if the balance of the Fund is not sufficient to satisfy a whistleblower award, the law requires that there be deposited into or credited to the Fund an amount equal to the unsatisfied portion of the award from any monetary sanction collected by the Commission in the Commission action on which the award is based. Therefore, it is possible for there to be circumstances in which monies that otherwise might have been distributed to victims pursuant to a Commission action could be required to be deposited into or credited to the Fund to pay a whistleblower award. In this situation, there would be a tension between the competing interests of paying an award to a whistleblower (as provided for in Section 21F) and compensating victims with monies collected from wrongdoers (as recognized in Section 308 of the Sarbanes-Oxley Act).

Request for Comment:

37. We request comment on the significance of the tension between the interests of whistleblowers and victims in this circumstance, the likelihood that this situation would arise, and whether there is anything that the Commission can or should do to mitigate this tension.

N. Proposed Rule 21F–14—No Amnesty

Proposed Rule 21F–14 provides notice that the provisions of Section 21F of the Exchange Act do not provide amnesty to individuals who provide information to the Commission relating to a violation of the securities laws. Whistleblowers who have not participated in misconduct will of course not need amnesty. However, some whistleblowers who provide original information that significantly aids in detecting and prosecuting sophisticated securities fraud schemes may themselves be participants in the scheme who could be subject to Commission enforcement actions. These individuals will not be immune from prosecution. Rather, the Commission will analyze the unique facts and circumstances of each case in accordance with its Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions, 17 CFR 202.12, to determine whether, how much, and in what manner to credit cooperation by whistleblowers who have participated in misconduct. This Policy Statement provides an incentive to report information to the Commission notwithstanding that the whistleblower program does not provide amnesty.

O. Proposed Rule 21F–15—Awards to Whistleblowers Who Engage in Culpable Conduct

Proposed Rule 21F–15 states that in determining whether the required $1,000,000 threshold has been satisfied for purposes of making an award to a whistleblower, the Commission will not count any monetary sanctions that the whistleblower is ordered to pay, or that are ordered against any entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated. The Commission also will not add those amounts to the total monetary sanctions collected in the action for purposes of calculating any payment to the culpable individual. The rationale for this limitation is to prevent wrongdoers from financially benefiting by, in essence, blowing the whistle on their own misconduct. Because the common understanding of a whistleblower is one who reports misconduct by another person, we are preliminarily of the view that it would not be consistent with the purposes of the statute to pay awards to persons based on monetary sanctions arising from their own misconduct. A logical corollary to this principle is that a whistleblower also should not be paid an award based on monetary sanctions paid by an entity whose liability resulted from the whistleblower's conduct.

Request for Comment: We request comment on whether the limitations provided in Proposed Rule 21F–15 are appropriate.

38. For example, in determining whether the $1,000,000 threshold for a covered action has been met, should we exclude monetary sanctions ordered against an entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated? Should we exclude those amounts from monetary sanctions collected for purposes of making payments to whistleblowers?

39. Is the proposed exclusion of monetary sanctions ordered against an entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated appropriate? Is the proposed exclusion sufficient to permit the Commission to deny awards in cases where the payment of an award would be against public policy? Should we instead exclude any wrongdoer from being eligible to receive an award categorically, or in particular circumstances? Should an individual's level of culpability be considered as a factor in determining whether the person is eligible for an award? Are

there other ways in which we should limit the payment of awards to culpable individuals?

P. Proposed Rule 21F–16—Staff Communications With Whistleblowers

Proposed Rule 21F–16(a) provides that no person may take any action to impede a whistleblower from communicating directly with the Commission staff about a potential securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by § 240.21F–4(b)(4)(i) & (ii) of this chapter related to the legal representation of a client) with respect to such communications. As noted, the Congressional purpose underlying Section 21F of the Exchange Act is to encourage whistleblowers to report potential violations of the securities laws by providing financial incentives, prohibiting employment-related retaliation, and providing various confidentiality guarantees. Efforts to impede a whistleblower's direct communications with Commission staff about a potential securities law violation, however, would appear to conflict with this purpose. For example, an attempt to enforce a confidentiality agreement against a whistleblower to prevent his or her communications with Commission staff about a potential securities law violation could inhibit those communications even when such an agreement would be legally unenforceable,[82] and would undermine the effectiveness of the countervailing incentives that Congress established to encourage whistleblowers to disclose potential violations to the Commission. Proposed Rule 21F–16(a) is designed to prevent this result. The proposed rule would not, however, address the effectiveness or enforceability of confidentiality agreements in situations other than communications with the Commission about potential securities law violations. Proposed Rule 21F–16(a) is not intended to prevent a professional or religious organization from responding to a breach of a recognized common-law or statutory privilege (*e.g.,* psychiatrist-patient, priest-penitent) by one of its members.

Proposed Rule 21F–16(b) would clarify the staff's authority to communicate directly with whistleblowers who are directors, officers, members, agents, or employees of an entity that has counsel, and who have initiated communication with the Commission related to a potential securities law violation. The proposed rule would make clear that the staff is authorized to communicate directly with these individuals without first seeking the consent of the entity's counsel. The objective of proposed Rule 21F–16 is to implement several important policies inherent in Section 21F in a manner consistent with the state bar ethics rules governing the professional responsibilities of lawyers.

Every jurisdiction that regulates the professional responsibility of lawyers has adopted some variation of ABA Model Rule 4.2, which provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." [83]

In the context of organizational entities represented by lawyers,[84] a difficulty in applying the various state versions of ABA Model Rule 4.2 is identifying those actors within the entity—such as directors or officers—that are the embodiment of the represented entity such that the proscription against contact applies.[85] This is so in part because the various state bar ethics rules have differing definitions of which organizational constituents are covered by Rule 4.2.[86]

As explained above, however, Section 21F of the Exchange Act evinces a Congressional purpose to facilitate the disclosure of information to the Commission relating to potential securities law violations and to preserve the confidentiality of those who do so.[87] This Congressional policy would be significantly impaired were the Commission required to seek the consent of an entity's counsel before speaking with a whistleblower who contacts us and who is a director, officer, member, agent, or employee of the entity. Similarly, whistleblowers falling within these categories could be less inclined to report possible securities law violations if they believed there was a risk that the Commission staff might be required to request consent of the entity's counsel—thus disclosing the whistleblower's identity—before speaking to him or her.

For this reason, Section 21F necessarily authorizes the Commission to communicate directly with these individuals without first obtaining the consent of the entity's counsel. Proposed Rule 21F–16(b) would clarify this authority by providing that, in the context of whistleblower-initiated contacts with the Commission, all discussions with a director, officer, member, agent, or employee of an entity that has counsel are "authorized by law" [88] and, will therefore not require consent of the entity's counsel as might otherwise be required by rules of professional conduct.[89]

Request for Comment: We request comment on whether the provisions dealing with whistleblowers' communications with the Commission

[82] *See, e.g., In re JDS Uniphase Corp. Sec. Litig.,* 238 F.Supp.2d 1127, 1137 (N.D.Cal.2002) ("To the extent that [the confidentiality] agreements preclude former employees from assisting in investigations of wrongdoing that have nothing to do with trade secrets or other confidential business information, they conflict with public policy in favor of allowing even current employees to assist in securities fraud investigations."); *Chambers* v. *Capital Cities/ABC,* 159 F.R.D. 441, 444 (S.D.N.Y.1995) (holding that "it is against public policy for parties to agree not to reveal * * * facts relating to alleged or potential violations of [Federal] law").

[83] Model Rules of Prof'l Conduct R. 4.2. The primary purpose of ABA Model Rule 4.2 is to protect the attorney-client relationship and to protect represented persons, in the absence of their lawyers, from being taken advantage of by lawyers who are not representing their interests.

[84] *See generally Upjohn Co.* v. *United States,* 449 U.S. 383 (1981).

[85] Comment 7 to ABA Model Rule 4.2 addresses this issue:

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.

[86] Comment 5 to the ABA Model Rule 4.2 specifically carves out a potential exception for "investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings." The commentary, and most state professional responsibility rules, do not specify which governmental investigative activities are exempt.

[87] *See, e.g.,* Exchange Act Section 21F (b)–(d) and (h), 15 U.S.C. 78u–6 (b)–(d) and (h).

[88] As noted, ABA Model Rule 4.2 allows for contacts with represented persons without the consent of the person's lawyer if such contacts are "authorized by law." Every state bar ethics rules, in accordance with ABA Model Rule 4.2, has some variation of an authorized by law exception. Thus, in the context of communications initiated by a whistleblower who is also the director, officer, member, agent, or employee of an entity that has counsel, the proposed rule would make clear that contacts and communications between these individuals and the staff are "authorized by law."

[89] The proposed rule is not intended, and will not be used, to obtain otherwise privileged information about the entity. *See* SEC Division of Enforcement Manual sec. 3.3.1.

staff provided in Proposed Rule 21F–16 are appropriate.

40. Should these provisions be narrowed and, if so, why and in what manner? Would these provisions encourage whistleblowers to provide information to the Commission regarding potential securities law violations? Are there additional measures that the Commission could consider to encourage and facilitate whistleblowers' communications with Commission staff?

41. Should the Commission consider rules to address other potential issues that may arise from state bar professional responsibility rules when the Commission staff receives information about potential securities law violations from whistleblowers? For example, are there circumstances where the staff's receipt of information from whistleblowers potentially conflicts with the state bar professional responsibility rules that are modeled on ABA Model Rules of Professional Responsibility 4.4(a) and 8.4(a)? If so, should the Commission consider promulgating rules to address these potential conflicts?

III. General Request for Comment

We request and encourage any interested person to submit comments on any aspect of our Proposed Rules. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

In addition, the Commission is seeking comment on whether it should promulgate rules regarding the interpretation or implementation of the anti-retaliation provisions of Section 21(h) of the Exchange Act. If so, what specific rules should the Commission consider promulgating?

42. Should the anti-retaliation protections set forth in Section 21F(h)(1) of the Exchange Act be applied broadly to any person who provides information to the Commission concerning a potential violation of the securities laws, or should they be limited by the various procedural or substantive prerequisites to consideration for a whistleblower award? Should the application of the anti-retaliation provisions be limited or broadened in any other ways? For example, should the Commission consider promulgating a rule to exclude frivolous or bad faith whistleblower claims from the protections afforded by the anti-retaliation provisions? If so, what rules should be adopted to address these problems?

43. Are there rule proposals that the Commission should consider promulgating to ensure that the anti-retaliation provisions are not used to protect employees from otherwise appropriate employment actions (*i.e.,* employment actions that are not based on reporting potential securities law violations)?

IV. Paperwork Reduction Act

Certain provisions of the proposed rule contain "collection of information" requirements within the meaning of the Paperwork Reduction Act ("PRA") of 1995.[90] An agency may not sponsor, conduct, or require a response to an information collection unless a currently valid Office of Management and Budget ("OMB") control number is displayed. The Commission is submitting the proposed collections of information to OMB for review in accordance with the PRA.[91] The titles for the collections of information are: (1) Form TCR (Tip, Complaint or Referral), (2) Form WB–DEC (Declaration Concerning Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934), and (3) Form WB–APP (Application for Award for Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934). Under Proposed Rules 21F–9, 10, and 11, all three proposed forms would be necessary to implement Section 21F of the Exchange Act; the forms allow a whistleblower to provide information to the Commission and its staff regarding (i) potential violations of the securities laws and (ii) the whistleblower's eligibility for and entitlement to an award.

A. Summary of Collection of Information

Proposed Form TCR, submitted pursuant to Proposed Rule 21F–9, would request the following information:

(1) Background information regarding the person submitting the TCR, including the person's name contact information, and occupation;

(2) If the person is represented by an attorney, the name and contact information for the person's attorney (in cases of anonymous submissions the person must be represented by an attorney);

(3) Information regarding the person or entity that is the subject of the tip, complaint or referral, including contact information;

(4) Information regarding the tip, complaint or referral, including the date of occurrence of the event being described, whether the person is complaining about an entity with which he is or was associated as an officer, director, employee, consultant or contractor, whether the person has taken any prior actions regarding his complaint, facts in support of the allegations, any additional relevant information, a description of all supporting materials, an explanation of why the allegations described constitute a violation of the Federal securities laws, and, if relevant, the name of the issuer, and the name and type of security or investment involved;

(5) A description of how the person submitting the original information learned about and/or obtained the information submitted and, if any information was obtained from a public source, a description of such source.

Proposed Form WB–DEC, submitted pursuant to Proposed Rule 21F–9, would require the following information:

(1) Background information regarding the person submitting the TCR, including the person's name and contact information;

(2) If the person is represented by an attorney, the name and contact information for the attorney (in cases of anonymous submissions the person must be represented by an attorney);

(3) Details concerning the tip or complaint, including (A) the manner in which the information was submitted to the SEC, (B) the TCR number (required if the person submitted his information through the SEC Web site) and date submitted to the SEC, (C) the individual or entity to which the tip, complaint or referral relates, (D) whether the person or his counsel has had communications with the SEC concerning his matter, (E) the relevant SEC staff member with whom they communicated, and (F) if the person or his counsel provided the information to another agency or organization, the details of that communication, and the name and contact information for the point of contact at the agency or organization, if known;

(4) A certification that the person submitting the original information: (A) Is not, or was not at the time the person acquired the original information submitted to the Commission, a member, officer or employee of (i) the Securities and Exchange Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit

[90] 44 U.S.C. 3501 *et seq.*

[91] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

Insurance Corporation, the Office of Thrift Supervision; (ii) the Department of Justice; (iii) the Public Company Accounting Oversight Board; (iv) any law enforcement organization; (v) any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board; or (vi) a member, officer, or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Exchange Act of 1934, 15 U.S.C. 78c(a)(52); (B) did not gain the information through the performance of an engagement required under the securities by an independent public accountant; (C) did not provided the information pursuant to a cooperation agreement with the SEC or another agency or organization; (D) is not a spouse, parent, child, or sibling of a member or employee of the Commission, and does not reside in the same household as a member or employee of the Commission; (E) did not acquire the information from any person described in Subsection (4)(A) through (D) above; (F) is not currently a subject or target of a criminal investigation, or has not been convicted of a criminal violation in connection with the information upon which the application for the award is based; and (G) provided the information before he (or anyone representing him) received any request, inquiry or demand from the SEC, Congress, or any other Federal, State or local authority, or any self regulatory organization, or the Public Company Accounting Oversight Board;

(5) A declaration, signed under penalty of perjury under the laws of the United States, that the information provided to the Commission pursuant to Proposed Rule 21F–9 of this Subpart is true, correct and complete to the best of the person's knowledge, information and belief; and

(6) A counsel certification, certifying that the attorney has verified the identity of the whistleblower who completed Form WB–DEC by viewing the whistleblower's valid, unexpired government issued identification, reviewed the whistleblower's Form WB–DEC for completeness and accuracy, and will retain for his records an original, signed copy of the Form WB–DEC completed by the whistleblower.

Proposed Form WB–APP, submitted pursuant to Proposed Rule 21F–10, would require the following information:

(1) The applicant's name, address and contact information;

(2) The applicant's social security number, if any;

(3) If the person is represented by an attorney, the name and contact information for the attorney (in cases of anonymous submissions the person must be represented by an attorney);

(4) Details concerning the tip or complaint, including (A) the manner in which the information was submitted to the SEC, (B) the subject of the tip, complaint or referral, (C) the TCR number, and (D) the date the TCR was submitted to the SEC;

(5) Information concerning the Notice of Covered Action to which the claim relates, including (A) the date of the Notice, (B) the Notice number, and (C) the Case name and number;

(6) For related actions, (A) the name and contact information for the agency or organization to which the person provided the original information; (B) the date the person provided his information, (C) the date the agency or organization filed the related action, (D) the case name and number of the related action, and (E) the name and contact information for the point of contact at the agency or organization, if known;

(7) A certification of the person's eligibility to receive an award as described in Subsection (4) concerning Form WB–DEC above;

(8) An explanation of the reasons that the person believes he is entitled to an award in connection with his submission of information to the Commission, or to another agency in a related action including any additional information and supporting documents that may be relevant in light of the criteria for determining the amount of an award set forth in Proposed Rule 21F–6 of this subpart, and any supporting documents; and

(9) A declaration under penalty of perjury under the laws of the United States that the information provided in Form WB–APP is true, correct and complete to the best of the person's knowledge, information and belief.

B. Proposed Use of Information

The collection of information on proposed Forms TCR, WB–DEC and WB–APP would be used to permit the Commission and its staff to collect information from whistleblowers regarding alleged violations of the Federal securities laws and to determine claims for whistleblower awards.

C. Respondents

The likely respondents to proposed Forms TCR and WB–DEC would be those individuals who alone, or jointly with others, have provided the Commission staff with information relating to a potential violation of the securities laws, and those who wish to be eligible for whistleblower awards under this Subpart, respectively.

The likely respondents to proposed Form WB–APP would be those individuals who have provided the Commission staff with information relating to a potential violation of the securities laws by filing Forms TCR and WB–DEC signed under penalty of perjury, and who believe they are entitled to an award under this Subpart.

D. Total Annual Reporting and Recordkeeping Burden

i. Proposed Form TCR

The Commission estimates that it would receive approximately 30,000 completed Forms TCR and electronic submissions through the Electronic Data Collection System each year.[92] Of those 30,000 submissions, the Commission estimates that it would receive approximately 3,000 Forms TCR each year.[93] Each respondent would submit only one Form TCR and would not have a recurring obligation. The Commission also estimates that it will take a whistleblower, on average, one hour to complete Form TCR. The completion time will depend largely on the complexity of the alleged violation and the amount of information the whistleblower possesses in support of the allegations. As a result, the Commission estimates that the estimated annual PRA burden of Form TCR is 3,000 hours.

ii. Proposed Form WB–DEC

Each whistleblower who has completed a Form TCR or made an electronic submission of information

[92] This number is a staff estimate based upon the volume of tips, complaints or referrals received by the Commission on a monthly basis during the past year. The staff believes that the volume of tips, complaints and referrals the Commission has received more recently, and particularly in the months since the passage of Dodd-Frank, provides a more accurate basis for estimating future volumes.

[93] This number is a staff estimate based upon the expectation that roughly 10 percent of all tips received by the Commission would be submitted in hard copy on proposed Form TCR. The staff anticipates that most whistleblowers would elect to submit their information electronically. The electronic submission of information would provide whistleblowers with increased ease of use and will allow whistleblowers to submit more detailed information in roughly the same amount of time it would take them to complete a hard copy Form TCR. Moreover, the Commission should be able to use the information submitted electronically more effectively and efficiently. For example, the Commission will be able to conduct electronic searches of information without first having to convert the data into an electronic format.

through the Electronic Data Collection System and wishes to be eligible for an award under the Program would be required to provide a Form WB–DEC to the Commission. The Commission estimates that it would receive a Form WB–DEC in roughly 50 percent of the cases in which the Commission receives a Form TCR or an electronic submission of information.[94] As noted above, the Commission estimates that it would receive approximately 30,000 combined electronic submissions and submission on Form TCR each year. Thus, the Commission estimates that it would receive approximately 15,000 Forms WB–DEC each year. Each respondent would submit only one Form WB–DEC and would not have a recurring obligation. The Commission also estimates that it would take a whistleblower, on average, 0.5 hours to complete Form WB–DEC. As a result, the Commission estimates that the annual PRA burden of Form WB–DEC is 7,500 hours.

iii. Proposed Form WB–APP

Each whistleblower who believes that he is entitled to an award because he provided original information to the Commission that led to successful enforcement of a covered judicial or administrative action, or a related action, would be required to submit a Form WB–APP to be considered for an award. A whistleblower could only submit a Form WB–APP after there has been a "Notice of Covered Action" published on the Commission's Web site pursuant to Proposed Rule 21F–10. The Commission estimates that it would post approximately 130 such Notices each year.[95] The Commission then estimates that it would receive approximately 117 Forms WB–APP each year.[96] The Commission also estimates that it would take a whistleblower, on average, two hours to complete Form WB–APP. The completion time would depend largely on the complexity of the alleged violation and the amount of information the whistleblower possesses in support of his application for an award. As a result, the Commission estimates that the annual PRA burden of Form WB–APP is 234 hours.

iv. Involvement and Cost of Attorneys

Under the Proposed Rules, a whistleblower who discloses his identity may elect, and an anonymous whistleblower is required, to retain counsel to represent the whistleblower in the Whistleblower Program. The Commission expects that in most of those instances the whistleblower's counsel will complete, or assist in the completion, of some or all of the required forms on behalf of the whistleblower. The Commission also expects that in the vast majority of cases in which a whistleblower is represented by counsel, the whistleblower will enter into a contingency fee arrangement with counsel, providing that counsel will be paid for the representation through a fixed percentage of any recovery by the whistleblower under the Program. Thus, most whistleblowers will not incur any direct, quantifiable expenses for attorneys' fees for the completion of the required forms.

The Commission anticipates that a small number of whistleblowers (no more than five percent of all whistleblowers) will enter into hourly fee arrangements with counsel.[97] In those cases, a whistleblower will incur direct expenses for attorneys' fees for the completion of the required forms. To estimate those expenses, the Commission makes the following assumptions:

(i) The Commission will receive approximately 3,000 Forms TCR, 15,000 Forms WB–DEC, and 117 Forms WB–APP annually;[98]

(ii) Whistleblowers will pay hourly fees to counsel for the submission of approximately 150 Forms TCR, 750 Forms WB–DEC, and 6 Forms WB–APP annually;[99]

(iii) Counsel retained by whistleblowers pursuant to an hourly fee arrangement will charge on average $400 per hour;[100] and

(iv) Counsel will bill on average: (i) 2 hours to complete a Form TCR, (ii) .5 hours to complete a Form WB–DEC, and (iii) 10 hours to complete a Form WB–APP.[101]

Based on those assumptions, the Commission estimates that each year whistleblowers will incur the following total amounts of attorneys' fees for completion of the Whistleblower Program forms: (i) $120,000 for the completion of Form TCR; (ii) $150,000 for the completion of Form WB–DEC; and (iii) $24,000 for the completion of Form WB–APP.

E. Mandatory Collection of Information

A whistleblower would be required to complete either a Form TCR or submit his information electronically and to complete both Forms WB–DEC and WB–APP to qualify for a whistleblower award.

F. Confidentiality

As explained above, the statute provides that the Commission must maintain the confidentiality of the identity of each whistleblower, subject to certain exceptions. Section 21F(h)(2) states that, except as expressly provided:

- [T]he 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, except in accordance with the provisions of section 552a of title 5, United States Code, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission [or certain specific entities listed in paragraph (C) of Section 21F(h)(2)].

[94] This number is a staff estimate. Because this is a new program, the staff does not have prior relevant data on which it can base its estimate.

[95] This number is a staff estimate based upon the average number of actions during the past five years in which the Commission recovered monetary amounts, including penalties, disgorgement or prejudgment interest, in excess of $1,000,000 and the assumption that there should be an increase (roughly 30 percent) in the number of such actions as a result of the whistleblower program.

[96] This number is a staff estimate based upon several expectations: first, that the Commission would receive Forms WB–APP in approximately 30 percent of cases in which it posts a Notice of Covered Action because we expect that we will continue to bring a substantial number of enforcement cases that are not based on whistleblower information; and second, that we will receive approximately 3 Forms WB–APP in each of those cases. Because this is a new program, the staff does not have prior relevant data on which it can base these estimates.

[97] This estimate is based, in part, on the Commission's belief that most whistleblowers likely will not retain counsel to assist them in preparing the forms.

[98] The bases for these assumed amounts are explained in Sections V.D.i., V.D.ii. and V.D.iii. above.

[99] These amounts are based on the assumption, as noted above, that no more than 5 percent of all whistleblowers will be represented by counsel pursuant to an hourly fee arrangement. The estimate of the number of Forms TCR submitted by attorneys on behalf of whistleblowers may turn out to be high because it is likely that most attorneys will submit tips electronically, rather than use the hard-copy Form TCR. However, in the absence of any historical data to rely upon, the Commission assumes that attorneys will submit hard-copy Forms TCR in the same percentages as all whistleblowers.

[100] The Commission uses this hourly rate for estimating the billing rates of securities lawyers for purposes of other rules. Absent historical data for the Commission to rely upon in connection with the whistleblower program, the Commission believes that this billing rate estimate is appropriate, recognizing that some attorneys representing whistleblowers may not be securities lawyers and may charge different average hourly rates.

[101] The Commission expects that counsel will likely charge a whistleblower for additional time required to gather from the whistleblower or other sources relevant information needed to complete Forms TCR and WB–APP. Accordingly, the Commission estimates that on average counsel will bill a whistleblower two hours for the completion of Form TCR and ten hours for completion of Form WB–APP (even though the Commission estimates that a whistleblower will be able to complete Form TCR in one hour and Form WB–APP it two hours).

Section 21F(h)(2) also allows the Commission to share information received from whistleblowers with certain domestic and foreign regulatory and law enforcement agencies. However, the statute requires the domestic entities to maintain such information as confidential, and requires foreign entities to maintain such information in accordance with such assurances of confidentiality as the Commission deems appropriate.

In addition, Section 21F(d)(2) provides that a whistleblower may submit information to the Commission anonymously, so long as the whistleblower is represented by counsel. However, the statute also provides that a whistleblower must disclose his or her identity prior to receiving payment of an award.

Request for Comment: Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comments to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the Commission's estimate of burden of the proposed collections of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and
- Evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

The Commission requests comment and supporting empirical data on the burden and cost estimates for the proposed rule, including the costs that potential whistleblowers may incur.

Persons wishing to submit comments on the collection of information requirements of the proposed rule should direct them to the Office of Management and Budget, Attention Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503 and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–33–10. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–33–10, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE., Washington, DC 20549–0213. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication.

V. Cost-Benefit Analysis

A. Introduction

The Commission is proposing rulemaking to implement the provisions of new Section 21F of the Exchange Act, added by Section 922 of Dodd-Frank to provide additional incentives and protections to whistleblowers who provide information relating to violations of the securities laws. Before Dodd-Frank, the Commission regularly received tips, complaints and referrals concerning securities law violations. Tips have provided, and continue to provide, the Commission with valuable information regarding potential violations of the Federal securities laws, as well as information about new market trends, products or practices that may help the agency in support of its mission.

In establishing the new whistleblower program in Section 21F, Congress sought to create and enhance incentives and protections for whistleblowers providing information leading to successful Commission enforcement actions.[102] Although whistleblowers can be motivated by other factors,[103] the statute creates new and substantial financial incentives for individuals to provide the Commission with information regarding potential violations of the Federal securities laws. The statutory requirements for an award—that whistleblowers are entitled to an award only if they voluntarily provide original information, and then only if that information leads to a successful enforcement action—are designed to encourage whistleblowers to provide high-quality tips and continuing cooperation. Moreover, the statutory provisions permitting anonymous submissions and prohibiting retaliation against whistleblowers should encourage submissions from employees of companies possibly engaged in misconduct.[104] Overall, enhanced whistleblower incentives should likely result in more frequent reporting of misconduct, which will result in greater deterrence of securities law violations and more effective and efficient enforcement on the part of the Commission.[105]

The incentives created by the statute also present some significant challenges. First, the statute could provide financial incentives for attorneys and others to breach the attorney-client privilege in order to seek an award. This would interfere with the ability of companies and individuals to share information with an attorney while seeking legal advice. Second, the statute could provide financial incentives for employees to report violations to the Commission rather than follow their employers' internal compliance procedures. This could undermine the effectiveness of internal compliance programs. Third, the statute could result in an increase in spurious allegations, forcing innocent companies and individuals to incur substantial cost to investigate into and defend against the false allegations. Finally, the statute could result in award payments to individuals who have violated the Federal securities laws. This could result in perverse incentives by potentially encouraging violations of the law.

Although many of the requirements of the whistleblower award program are established by the statute, Congress required the Commission to issue rules and regulations necessary or appropriate to implement the Program. In that regard, the Commission has exercised its discretion in this rulemaking to propose rules that contain several key definitional or interpretive provisions that help define the scope of the program, and procedures that whistleblowers will be required to follow to submit information to the

[102] *See* S. Rep. No. 111–176 at 110 (2010) ("The Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated the securities laws * * *").

[103] The incentives to whistleblowers include not only the monetary award, but also a desire to cleanse the conscience or prevent harm to others. *See* Anthony Heyes and Sandeep Kapur, An Economic Model of Whistleblower Policy, 25 J.L. ECON. & ORG. 157 at 159, 164, 171.

[104] Specifically, Dodd-Frank makes it unlawful for any employer to "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment." The statute also provides that any individual who alleges retaliation under the Act may bring an action in the appropriate Federal district court. Moreover, the statute allows any individual to submit information anonymously through a lawyer. As a result, in many cases, employers will be unaware when their employees submit tips to the Commission.

[105] *See* Alexander Dyck *et al.,* "Who Blows the Whistle on Corporate Fraud?" working paper (2009) (reporting that "having access to * * * monetary rewards has a significant impact on the probability a stakeholder becomes a whistleblower."), available at *http://faculty.chicagobooth.edu/luigi.zingales/research/papers/whistle.pdf.*

Commission and to apply for awards under the Program, as described below.

Proposed Rule 21F–4 defines three terms—(i) "Voluntary Submission of Information," (ii) "Independent Knowledge," and (iii) "Information that Leads to Successful Enforcement"—that together play a significant role in determining whether a whistleblower is eligible for an award. Proposed Rule 21F–4(a) defines "Voluntary Submission of Information" to state that a whistleblower must provide information to the Commission prior to receiving a request from the Commission or other relevant authority. The proposed definition also provides that a whistleblower "will be considered to have received a request, inquiry or demand if documents or information from [the whistleblower] are within the scope of a request, inquiry, or demand that [the whistleblower's] employer receives unless, after receiving the documents or information from [the whistleblower, the] employer fails to provide [the whistleblower's] documents or information to the requesting authority in a timely manner." This proposed definition requires that, to be eligible for an award, a whistleblower or his representative provide his information regarding a potential violation before he or his company receives a request, inquiry or demand from the Commission or other investigatory authority.

Proposed Rule 21F–4(b)(4) states that a whistleblower will not be considered to have provided "independent knowledge" if "[the whistleblower] obtained the knowledge or the information upon which [his] analysis is based: (i) Through a communication that was subject to the attorney-client privilege, unless the disclosure of that information is otherwise permitted by § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise; (ii) as a result of the legal representation of a client on whose behalf [the whistleblower's] services, or the services of [the whistleblower's] employer or firm, have been retained, and [the whistleblower] seek[s] to use the information to make a whistleblower submission for [his] own benefit unless disclosure is authorized by § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise; (iii) through the performance of an engagement required under the securities laws by an independent public accountant, if that information relates to a violation by the engagement client or the client's directors, officers or other employees; (iv) because [the whistleblower was] a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity, and the information was communicated to [the whistleblower] with the reasonable expectation that [he] would take steps to cause the entity to respond appropriately to the violation, unless the entity did not disclose the information to the Commission within a reasonable time or proceeded in bad faith; or (v) otherwise from or through an entity's legal, compliance, audit or other similar functions or processes for identifying, reporting and addressing potential non-compliance with law, unless the entity did not disclose the information to the Commission within a reasonable time or proceeded in bad faith; (vi) [b]y a means or in a manner that violates applicable Federal or State criminal law."

Proposed Rule 21F–4(c) defines "Information that Leads to Successful Enforcement" such that a whistleblower is only entitled to an award if (i) the whistleblower provides information that causes the staff "to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning new or different conduct as part of a current examination or investigation" and the information "significantly contributed to the success of the action" or (ii) the whistleblower provides information regarding "conduct that was already under examination or investigation" and the information "would not otherwise have been obtained and was essential to the success of the action."

Proposed Rule 21F–6 sets forth the criteria for determining the amount of the award to be made to a whistleblower. Three of the stated criteria are derived from the statute, but the proposed rule also includes a fourth factor: whether the award otherwise enhances the Commission's ability to enforce the Federal securities laws, protect investors, and encourage the submission of high quality information from whistleblowers.

Proposed Rule 21F–8 states additional criteria for eligibility for an award. A number of these are derived from the statute, but the proposed rule also provides that a whistleblower may be required to provide various types of cooperation to the staff or enter a confidentiality agreement. In addition to certain statutory exclusions from eligibility, the proposed rule also excludes any person who is, or was at the time of acquiring information, a member, officer, or employee of a foreign government or certain other foreign entities.

Proposed rules 21F–9, 10, and 11 set forth the procedures for submitting original information and making a claim for an award. First, pursuant to Proposed Rule 21F–9(a), a whistleblower must complete either Form TCR or submit information electronically through the Electronic Data Collection System. Second, pursuant to Proposed Rule 21F–9(b), a whistleblower must complete and submit Form WB–DEC, sworn under penalty of perjury. A whistleblower wishing to submit a hard-copy Form TCR would be required to submit Form WB–DEC at the same time as he or she submits a Form TCR. A whistleblower wishing to submit information electronically could submit Form WB–DEC electronically or in hard copy within 30 days of the Commission's receipt of the whistleblower's electronic submission of information.

The proposed rules also require potential whistleblowers to complete a third form in the claims phase to establish potential eligibility for an award under the Program. Pursuant to Proposed Rules 21F–10 and 21F–11, a whistleblower must complete Form WB–APP to apply for an award for a covered judicial or administrative action by the Commission or a related action.

Proposed Rule 21F–15 would provide, that "[i]n determining whether the required $1,000,000 threshold has been satisfied * * * for purposes of making any award [to a whistleblower], the Commission will not take into account any monetary sanctions that the whistleblower is ordered to pay." Likewise, Proposed Rule 21F–15 would provide that the Commission will not take into account any monetary sanctions "that are ordered against any entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated." Proposed Rule 21F–15 further would provide that "if the Commission determines that a whistleblower is eligible for an award, any amounts that the whistleblower or such an entity pay in sanctions as a result of the action or related actions will not be included within the calculation of the amounts collected for purposes of making payments [to the whistleblower]."

Proposed Rule 21F–16(b) states that if a whistleblower who is a director, officer, member, agent, or employee of an entity that has counsel has initiated communications with the Commission relating to a potential securities law violation, the staff is authorized to communicate directly with the whistleblower regarding the subject of the communication without seeking the consent of the entity's counsel.

We are sensitive to the costs and benefits of our rules. As discussed

above, many of the key elements of the whistleblower program have been established by the statute, and our proposed rules implementing the statute in some respects largely track statutory provisions. The cost-benefit analysis that follows focuses on the benefits and costs related to those rules on which we exercised discretion, and not on the overall benefits and costs of the statutory regime for whistleblower incentives and protections.

B. Benefits

We have sought to structure the definitions in Proposed Rule 21F–4 so as to encourage whistleblowers to provide the Commission with high-quality information—tips indicating a high likelihood of a substantial securities violation—that we might not otherwise have received in a timely manner.

We have also sought to strike the right balance in defining terms so as not to be overly restrictive or overly broad. Overly restrictive definitions could render the program ineffective as only a small fraction of potential tippers and complainants would qualify for monetary rewards. By contrast, overly broad definitions could result in inefficient use of the Investor Protection Fund—especially in cases in which the Commission already possesses information sufficient to bring a successful enforcement action. From an economic perspective of enforcement, the primary value of the Whistleblower Program is reduced economic cost of collecting necessary information early on and before the Commission can obtain the information on its own. The primary economic cost of the Program includes the out-of-pocket costs as well as opportunity costs, which include losses due to fraud and costs of enforcement. Consequently, the proposed definitions together should provide benefits in that they create strong incentives, in the form of eligibility for a monetary award, for whistleblowers to provide information to the Commission or other authorities and to provide the information early, rather than waiting to receive a request or inquiry from a relevant authority.[106] This may be a particular result of the definition of "voluntary submission of information" in Proposed Rule 21F–4; that rule would deny eligibility for an award to a whistleblower who has valuable information regarding potential violations of the Federal securities laws if he has received a subpoena or other request relating to the alleged violations in question—even if the subpoena or request does not call for the production of the valuable information.

The definition of "information that leads to successful enforcement" in Proposed Rule 21F–4(c) may also have the benefit of encouraging submission of high-quality information that is particularly useful to successful enforcement actions. By requiring that the whistleblower provide information that either "significantly contributed" to the success of an action (if the whistleblower has provided information that has led the Commission to begin investigating that matter), or that "would not otherwise have been obtained and was essential to the success of the action" (if the information related to a matter already under examination or investigation), this proposed definition should help to screen out less significant tips from eligibility for awards, and as a result, lead to a more efficient use of Commission resources and the Investor Protection Fund. Further, by requiring this level of connection to the success of an action, the proposed rule may have the benefit of encouraging whistleblowers to provide more and better information. Similarly, the criterion contained in Proposed Rule 21F–6(d), which allows the Commission to consider its ability to enforce the securities laws, protect investors and encourage high quality information as a criterion in determining the amount of an award to be paid, may have the benefit of encouraging better quality information, thus furthering effective enforcement and investor protection.

As noted, the Commission recognizes that whistleblower awards, as provided for by the statute, could potentially create incentives for employees of companies to submit information regarding potential violations to the Commission rather than to compliance personnel or through compliance procedures.[107] This in turn could undermine the effectiveness of internal company compliance processes. We have sought to address and mitigate that concern, in part, through the proposed definition of "Independent Knowledge" in Proposed Rule 21F–4(b)(2). While the restrictions in this definition would limit the pool of eligible whistleblowers and thereby reduce the number of potentially useful informants, the definition could have the benefit of limiting potential interference with the integrity of corporate compliance programs of companies, which could reduce the overall efficiency of day-to-day compliance operations.

As with the proposed definition of "Independent Knowledge" addressed above, the Commission believes that the procedures relating to the timing of the submission of "original information" could mitigate costs that the Whistleblower Program might impose on companies and their compliance programs and procedures. Importantly, the proposed procedures will allow a potential whistleblower to provide information to legal or compliance personnel within his or her company, and wait for up to 90 days, without compromising his or her eligibility for an award under the Program. This would also allow a company a reasonable period of time to investigate and respond to potential securities laws violations (or at least begin an investigation) prior to reporting them to the Commission or an appropriate regulator. Therefore, this approach is consistent with the Commission's efforts to encourage companies to create and implement strong corporate compliance programs.

One economic benefit of providing this grace period is that the individual could be mistaken about securities laws, and the compliance personnel would likely be better informed about whether certain conduct constitutes a violation of securities laws. Without this grace period, individuals, regardless of whether their judgments regarding certain violations were correct, could be motivated to report a suspicious finding as soon as possible. The overall effect could be an overflow of noisy signals—that is, a large number of tips of varying quality—causing the Commission to incur costs to process and validate the information. Allowing for this proposed grace period, we believe, provides a mechanism by which some of those erroneous cases may be eliminated before reaching the Commission, without otherwise adversely affecting the incentives on the part of potential whistleblowers.

The Commission also recognizes that whistleblower awards could create incentives for attorneys or others to breach the attorney-client privilege by submitting tips disclosing privileged communications. The Commission has attempted to address this concern through the proposed definition of "Independent Knowledge," which excludes information obtained through communications protected by the

[106] As also noted above, the proposed definitions are consistent with the legislative intent behind the Act. *See* S. Rep. No. 111–176 at 110 (2010) ("The Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated the securities laws * * *").

[107] *See* Rewarding Whistleblowers: The Costs and Benefits of an Incentive-Based Compliance Strategy, Robert Howse and Ronald J. Daniels, University of Pennsylvania Departmental Papers (School of Law), 1995, page 527.

attorney-client privilege. Thus, a whistleblower who submits such information would not have provided the Commission with "Original Information" and thus would not be eligible for an award. The benefit of this proposed definition is that it helps preserve and protect the integrity of the attorney-client privilege and removes financial incentive encouraging individuals to breach the privilege.

Proposed Rule 21F–8 may have the benefit of encouraging cooperation by whistleblowers, which should help the effectiveness and efficiency of Commission enforcement. Similarly, we believe that Proposed Rule 21F–15, on balance, will have the same result. We recognize that there is a cost associated with providing monetary awards to individuals who have engaged in securities violations. Yet, these individuals frequently have the most significant and relevant information that will aid in detecting and prosecuting sophisticated securities fraud schemes. By excluding from the award calculation any monetary sanctions that the whistleblower is ordered to pay or that are ordered against the entity whose liability is substantially derived from the whistleblower's conduct, the proposed rules limit the awards to highly culpable whistleblowers more than the awards to less culpable whistleblowers.

Likewise, Proposed Rule 21F–16(b), by authorizing communications between the Commission staff and a whistleblower without seeking consent of the counsel of an entity with whom the whistleblower is employed, is intended to have the benefit of encouraging whistleblowers to communicate with the Commission without the fear that their communications will lead to disclosure of their identity to their employer.

The procedures contained in the Proposed Rules should result in certain benefits. The Commission's objective in proposing these rules is to devise an efficient mechanism to implement the statutory whistleblower program that will allow the Commission to receive high-quality information regarding securities law violation in a timely, organized, useful manner. As an initial matter, the proposed procedures regarding the submission of information and the required Forms are designed to elicit from whistleblowers critical information regarding the potential violations at issue. The proposed Forms that would be required to provide clear and uniform guidance to whistleblowers regarding the information that the Commission deems necessary to investigate the potential violations and to determine eligibility for awards under the program.

In addition, the proposed requirement that whistleblowers must complete Form WB–DEC, under penalty of perjury, will encourage whistleblowers who wish to participate in the Whistleblower Program to submit truthful information and discourage them from submitting false information. As such, this procedure will allow the Commission to place greater reliance on the accuracy of information it receives from whistleblowers, which should allow the Commission to prioritize the review and investigation of that information more effectively and efficiently. The requirement should also mitigate the potential harm to companies and individuals that may be caused by false or spurious allegations of wrongdoing. In addition, the requirement that Form WB–DEC be submitted within 30 days of submission of the Form TCR is designed to provide staff with the opportunity to better evaluate the TCR in light of the fact that it is joined by a sworn statement regarding its accuracy. Accordingly, the Proposed Rules should result in a decrease in the amount of Commission resources devoted to false or unsubstantiated leads.[108]

Moreover, proposed Form WB–APP requires the submission of information that is necessary for the Commission to determine award eligibility. While requiring an additional form imposes a cost on potential whistleblowers, determining the appropriate level of award for each instance of qualified whistleblower is critical to successful implementation of the whistleblower rule. The Commission needs to collect pertinent information from the whistleblower to determine the strength of his case. This information will need to be evaluated in conjunction with the Commission's enforcement action to determine the significance of the whistleblower's contribution.

In addition, the Commission has included procedural elements in the proposed rules to provide a fair process for consideration of whistleblower award claims, and, given the possibility of judicial review, to provide a clearly defined record on appeal. These procedures should also encourage greater participation in the program. While a monetary reward is typically not the sole motivation for potential whistleblowers, having a robust clearly described process for determining grants of monetary rewards should help incentivize those individuals who seek to benefit economically from providing information to the Commission.

C. Costs

The Proposed Rules may impose certain costs on prospective whistleblowers. As an initial matter, the procedures would require potential whistleblowers to complete certain forms to establish eligibility for an award under the Program. As noted above, the Commission recognizes that it will take time and effort on the part of whistleblowers to complete and submit the proposed forms. In addition, any whistleblower wishing to submit one of the required forms in hard copy would need to arrange for delivery and pay the postage or other delivery costs.

It is also possible that the proposed procedures could discourage some whistleblowers with valuable information from submitting their information to the Commission. Some prospective whistleblowers could find the procedures burdensome or confusing, and as a result, they might elect not to provide information to the Commission. In these Proposed Rules, the Commission has attempted to mitigate the potential for burden or confusion in the procedures, but such costs cannot be eliminated.

The 30-day time limit proposed for submitting a Form WB–DEC also imposes costs on whistleblowers in that it would require them to act within a certain period of time if they wish to be eligible for an award under the Program. The Commission has proposed the 30-day time limit based on a balance of those costs against the need to have the WB–DEC submitted close enough in time with the submission through the Electronic Data Collection System so that: (i) The Commission can track and tie together each submission through the electronic system with the related Form WB–DEC and (ii) the Commission will receive notice that a submission through the electronic system is a submission under the whistleblower program.

The proposed 90-day limit on submission of Form WB–DEC also would impose costs on whistleblowers in that it requires them to act within a certain period of time if they wish certain benefits under the Program. The Commission has proposed the 90-day time limit based on a balance of those costs against the concern that companies investigating allegations of potential securities law violations will

[108] Dyck *et al.* (2009). The staff reviews and evaluates all TCRs, regardless of whether they are accompanied by a whistleblower declaration. However, because the declaration would aid in assessing reliability, the staff may consider whether a whistleblower has submitted a declaration in prioritizing the investigation of TCRs and the allocation of the Division of Enforcement's limited resources.

view the time limit as the time they may wait before reporting violations to the Commission. To be clear, the Commission does not intend any time period in these Proposed Rules to inform companies on time limits for reporting violations to the Commission.

In addition, the definitional and scope provisions described above may also result in costs if they discourage potential whistleblowers from coming forward. As discussed above, the proposed definitions of "voluntary submission of information," "independent knowledge," and "information that leads to successful enforcement" together would result in heightening the standards for eligibility for an award. It is possible that restrictions from eligibility could in some cases discourage some whistleblowers from submitting potentially useful information.

In particular, the proposed definition of "voluntary submission of information" excludes from eligibility any whistleblower who has a legal obligation to provide the information regarding potential violations to the Commission. This element of the definition could result in instances in which the Commission does not receive important information regarding potential violations from a potential whistleblower—that is, situations where a potential whistleblower has a legal obligation to provide the information and does not, but he would have if eligible for an award.

Similarly, other types of ineligibility created by our proposed rules—for example, the provisions in Proposed Rule 21F–8 that exclude from eligibility certain foreign officials or individuals who obtain information from other categories of ineligible persons—may also cause those persons not to come forward with information in their possession about securities law violations. Although we have attempted to craft these rules to strike a balance that is consistent with the purposes of the statute, these provisions may result in some foregone opportunities for effective enforcement action.

Request for Comments: We request comments and empirical data on all aspects of this cost-benefit analysis, including identification and quantification of any additional costs or benefits of, or suggested alternatives to, the proposed rule.

VI. Consideration of Burden on Competition and Promotion of Competition and Capital Formation

Section 23(a)(2) [109] of the Securities Exchange Act of 1934 requires the Commission, in promulgating rules under the Exchange Act, to consider the impact that any rule may have on competition and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Further, Section 3(f) of the Exchange Act [110] requires the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

As with the cost-benefit analysis, we focus our consideration of burden on competition and promotion of competition and capital formation to the areas of these Proposed Rules over which the Commission has exercised discretion and do not consider the elements of the Whistleblower Program established by Congress.

In considering the impact on capital formation of our proposed rules, we consider the extent to which they affect allocation of capital and secondarily how they affect investors' choices of investments and portfolio allocations. For issuers, this includes considering the extent to which the rules foster an information environment and market structures that lead to securities prices based upon efficient allocation of capital. From this perspective, one of the issues that may affect capital formation in the economy is investor confidence in the sense of investors trusting in the fairness of financial markets, of which their perception of the effectiveness and comprehensiveness of the regulatory regime is an important part. If investors fear theft, fraud, manipulation, insider trading, or conflicted investment advice, their trust in the markets will be low, both in the primary market for issuance or in the secondary market for trading. This would increase the cost of raising capital, which would impair capital formation—in the sense that it will be less than it would or should be if rules against such abuses were in effect and properly enforced and obeyed.

For reasons stated in the cost-benefit analysis, we believe the Proposed Rules would result in an efficient and effective implementation of the statutory whistleblower program. As such, we believe the Proposed Rules would serve to reduce potential securities law violations. As a result, investor reliance on the veracity of issuer filings with the Commission may increase incrementally, which would contribute to lowering the cost of raising capital generally. Those provisions in the Proposed Rules that are designed to promote and protect the use of corporate compliance programs would further the requirements of the Sarbanes-Oxley Act of 2002 and other statutory provisions that encourage or mandate such programs. Thus, we believe that we have structured the Proposed Rules so as to improve investor confidence in the market and therefore expect that the impact of the Proposed Rules on the efficiency of capital formation will be positive.

The Commission does not believe the elements of the proposed rules over which the Commission exercised discretion would impose any undue burdens on competition. The relevant market for competition analysis here is the market for securities issuers competing to raise capital from investors. Because the proposed rules are expected to further deterrence of financial fraud, there may be a general improvement in the fairness of competition for capital from investors—and consequently improvement in the ability of companies that abide by the law to compete with companies that do not. To the extent that the Proposed Rules impose costs on companies, many of these follow from the statutory mandate to implement the Whistleblower Program generally and are imposed on all companies. The Commission believes any costs associated with compliance with the proposed rules, as structured, would be limited and, therefore, would not impose undue burden on competition.

Furthermore, the Proposed Rules are structured to encourage the submission of high quality information regarding securities law violations in a manner that is effective and efficient. As a result of expected improvement in competition and expected increase in capital formation, we believe the Proposed Rules should generally increase the efficiency of the economy. In addition, the proposed rules should increase the efficiency by which the Commission's Enforcement program obtains information about potential securities law violations.

We request comment (including empirical data and other factual support) on whether the Proposed

[109] 15 U.S.C. 78w(a)(2).

[110] 15 U.S.C. 78c(f).

Rules, if adopted, would affect efficiency, competition, and capital formation.

VII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[111] the Commission solicits data to determine whether the proposed rule constitutes a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

Commentators should provide empirical data on (a) the potential annual effect on the economy; (b) any increase in costs or prices for consumers or individual industries; and (c) any potential effect on competition, investment or innovation.

VIII. Regulatory Flexibility Act Certification

Section 603(a) of the Regulatory Flexibility Act[112] requires the Commission to undertake an initial regulatory flexibility analysis of the proposed rule on small entities unless the Commission certifies that the rule, if adopted, would not have a significant economic impact on a substantial number of small entities.[113]

Small entity is defined in 5 U.S.C. 601(6) to mean "small business," "small organization," and "small governmental jurisdiction" as defined in 5 U.S.C. 601(3)—(5). The definition of "small entity" does not include individuals. The Proposed Rules apply only to an individual, or individuals acting jointly, who provide information to the Commission relating to the violation of the securities laws. Companies and other entities are not eligible to participate in the Program as whistleblowers. Consequently, the persons that would be subject to the proposed rule are not "small entities" for purposes of the Regulatory Flexibility Act.

For the reasons stated above, the Commission certifies, pursuant to 5 U.S.C. 605(b), that the proposed rules and forms to implement the whistleblower provisions of Section 21F of the Exchange Act would not have a significant economic impact on a substantial number of small entities.

IX. Statutory Authority

The Commission proposes the new rules and forms contained in this document under the authority set forth in Sections 3(b), 21F and 23(a) of the Exchange Act.

List of Subjects in 17 CFR Parts 240 and 249

Securities.

Text of the Proposed Rules

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations, is proposed to be amended as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 is amended by adding the following citation in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78–i, 78j, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78o, 78o–4, 78p, 78q, 78s, 78u–5, 78w, 78x, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; 18 U.S.C. 1350; and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

Section 240.21F is also issued under Pub. L. 111–203, § 922(a), 124 Stat. 1841 (2010).

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2. Add §§ 240.21F–1 through 240.21F–16 to read as follows:

Sec.

* * * * *

240.21F 1–General.
240.21F 2–Definition of a Whistleblower.
240.21F 3–Payment of awards.
240.21F 4–Other Definitions.
240.21F 5–Amount of award.
240.21F 6–Criteria for determining amount of award.
240.21F 7–Confidentiality of submissions.
240.21F 8–Eligibility.
240.21F 9–Procedures for submitting original information.
240.21F 10–Procedures for making a claim for a whistleblower award in SEC actions that result in monetary sanctions in excess of $1,000,000.
240.21F 11–Procedures for determining awards based upon a related action.
240.21F 12–Appeals.
240.21F 13–Procedures applicable to the payment of awards.
240.21F 14–No amnesty.
240.21F 15–Awards to whistleblowers who engage in culpable conduct.
240.21F 16–Staff communications with whistleblowers.

* * * * *

§ 240.21F–1 General.

Section 21F of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78u-6), entitled "Securities Whistleblower Incentives and Protection," requires the Securities and Exchange Commission ("Commission") to pay awards, subject to certain limitations and conditions, to whistleblowers who provide the Commission with original information about violations of the Federal securities laws. These rules describe the whistleblower program that the Commission has established to implement the provisions of Section 21F, and explain the procedures you will need to follow in order to be eligible for an award. You should read these procedures carefully because the failure to take certain required steps within the time frames described in these rules may disqualify you from receiving an award for which you otherwise may be eligible. Unless expressly provided for in these rules, no person is authorized to make any offer or promise, or otherwise to bind the Commission with respect to the payment of any award or the amount thereof. The Securities and Exchange Commission's Whistleblower Office administers our whistleblower program. Questions about the program or these rules should be directed to the SEC Whistleblower Office, 100 F Street, NE., Washington, DC 20549.

§ 240.21F–2 Definition of a Whistleblower.

(a) You are a whistleblower if, alone or jointly with others, you provide the Commission with information relating to a potential violation of the securities laws. A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower.

(b) The retaliation protections afforded to whistleblowers by the provisions of paragraph (h)(1) of Section 21F of the Exchange Act (15 U.S.C. 78u–6(h)(1)) apply irrespective of whether a whistleblower satisfies the procedures and conditions to qualify for an award. Moreover, for purposes of the anti-retaliation provision of paragraph (h)(1)(A)(i) of Section 21F, 15 U.S.C. 78u–6(h)(1)(A)(i), the requirement that a whistleblower provide "information to the Commission in accordance" with Section 21F (15 U.S.C. 78u–6) is satisfied if an individual provides information to the Commission that relates to a potential violation of the securities laws.

(c) To be eligible for an award, however, a whistleblower must submit original information to the Commission in accordance with the procedures and conditions described in §§ 240.21F–4,

[111] Pub. L. 104–121, tit.II, 110 Stat. 857 (1996).
[112] 5 U.S.C. 603(a).
[113] 5 U.S.C. 605(b).

240.21F–8, and 240.21F–9 of this chapter.

§ 240.21F–3 Payment of awards.

(a) Subject to the eligibility requirements described in §§ 240.21F–2 and 240.21F–8 of this chapter, and to § 240.21F–14 of this chapter, the Commission will pay an award or awards to one or more whistleblowers who:

(1) Voluntarily provide the Commission

(2) With original information

(3) That leads to the successful enforcement by the Commission of a Federal court or administrative action

(4) In which the Commission obtains monetary sanctions totaling more than $1,000,000.

Note to paragraph (a): The terms *voluntarily, original information, leads to successful enforcement, action*, and *monetary sanctions* are defined in § 240.21F–4 of this chapter.

(b) The Commission will also pay an award based on amounts collected in certain "related actions." A *related action* is a judicial or administrative action that is brought by:

(1) The Attorney General of the United States;

(2) An appropriate regulatory agency;

(3) A self-regulatory organization; or

(4) A state attorney general in a criminal case, and is based on the same original information that the whistleblower voluntarily provided to the Commission, and that led the Commission to obtain monetary sanctions totaling more than $1,000,000. The terms *appropriate regulatory agency* and *self-regulatory organization* are defined in § 240.21F–4 of this chapter.

(c) In order for the Commission to make an award in connection with a related action, the Commission must determine that the same original information that the whistleblower gave to the Commission also 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. The Commission may seek assistance and confirmation from the authority bringing the related action in making this determination. If the Commission determines that the criteria for an award are not satisfied, or if the Commission is unable to obtain sufficient and reliable information about the related action to make a conclusive determination, the Commission will deny an award in connection with the related action. Additional procedures apply to the payment of awards in related actions. These are described in § 240.21F–11 and § 240.21F–13.

(d) The Commission will not make an award to you for a related action if you have already been granted an award by the Commodity Futures Trading Commission ("CFTC") for that same action pursuant to its whistleblower award program under section 23 of the Commodity Exchange Act, 7 U.S.C. 26. Similarly, if the CFTC has previously denied an award to you in a related action, you will be collaterally estopped from relitigating any issues before the Commission that were necessary to the CFTC's denial.

§ 240.21F–4 Other Definitions.

(a) *Voluntary submission of information.* (1) Your submission of information is made *voluntarily* within the meaning of § 240.21F of this chapter if you provide the Commission with the information before you or anyone representing you (such as an attorney) receives any request, inquiry, or demand from the Commission, the Congress, any other Federal, State, or local authority, any self-regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information in your submission is relevant. If the Commission or any of these other authorities make a request, inquiry, or demand to you or your representative first, your submission will not be considered voluntary, and you will not be eligible for an award, even if your response is not compelled by subpoena or other applicable law.

(2) For purposes of this paragraph, you will be considered to have received a request, inquiry or demand if documents or information from you are within the scope of a request, inquiry, or demand that your employer receives unless, after receiving the documents or information from you, your employer fails to provide your documents or information to the requesting authority in a timely manner.

(3) In addition, your submission will not be considered voluntary if you are under a pre-existing legal or contractual duty to report the securities violations that are the subject of your original information to the Commission or to any of the other authorities described in paragraph (1) of this section.

(b) *Original information.* (1) In order for your whistleblower submission to be considered *original information,* it must be:

(i) Derived from your independent knowledge or independent analysis;

(ii) Not already known to the Commission from any other source, unless you are 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 you are a source of the information; and

(iv) Provided to the Commission for the first time after July 21, 2010 (the date of enactment of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*).

(2) *Independent knowledge* means factual information in your possession that is not derived from publicly available sources. You may gain independent knowledge from your experiences, communications and observations in your business or social interactions.

(3) *Independent analysis* means your own analysis, whether done alone or in combination with others. *Analysis* means your examination and evaluation of information that may be generally available, but which reveals information that is not generally known or available to the public.

(4) The Commission will not consider information to be derived from your independent knowledge or independent analysis if you obtained the knowledge or the information upon which your analysis is based:

(i) Through a communication that was subject to the attorney-client privilege, unless disclosure of that information is otherwise permitted by § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise;

(ii) As a result of the legal representation of a client on whose behalf your services, or the services of your employer or firm, have been retained, and you seek to use the information to make a whistleblower submission for your own benefit, unless disclosure is authorized by § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise;

(iii) Through the performance of an engagement required under the securities laws by an independent public accountant, if that information relates to a violation by the engagement client or the client's directors, officers or other employees;

(iv) Because you were a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity, and the information was communicated to you with the reasonable expectation that you would take steps to cause the entity to respond appropriately to the violation, unless the entity did not disclose the information to the Commission within a

reasonable time or proceeded in bad faith; or

(v) Otherwise from or through an entity's legal, compliance, audit or other similar functions or processes for identifying, reporting and addressing potential non-compliance with law, unless the entity did not disclose the information to the Commission within a reasonable time or proceeded in bad faith;

(vi) By a means or in a manner that violates applicable Federal or State criminal law; or

(vii) From any of the individuals described in paragraphs (b)(4)(i)–(vi) of this section.

(5) The Commission will consider you to be an *original source* of the same information that we obtain from another source if the information satisfies the definition of original information and the other source obtained the information from you or your representative. In order to be considered an original source of information that the Commission receives from Congress, any other Federal, State, or local authority, any self-regulatory organization, or the Public Company Accounting Oversight Board, you must have voluntarily given such authorities the information within the meaning of these rules. You must establish your status as the original source of information to the Commission's satisfaction. In determining whether you are the original source of information, the Commission may seek assistance and confirmation, from one of the other authorities described above, or from another entity (including your employer), in the event that you claim to be the original source of information that an authority or another entity provided to the Commission.

(6) If the Commission already knows some information about a matter from other sources at the time you make your submission, and you are not an original source of that information under paragraph (b)(5) of this section, the Commission will consider you an original source of any information you provide that is derived from your independent knowledge or analysis and that materially adds to the information that the Commission already possesses.

(7) If you provide information to Congress, any other Federal, State, or local authority, any self-regulatory organization, the Public Company Accounting Oversight Board, or to any of the persons described in paragraphs (b)(4)(iv) and (v) of this section, and you, within 90 days, submit the same information to the Commission pursuant to § 240.21F–9 of this chapter, as you must do in order for you to be eligible to be considered for an award, then, for purposes of evaluating your claim to an award under §§ 240.21F–10 and 240.21F–11 of this chapter, the Commission will consider that you provided information as of the date of your original disclosure, report or submission to one of these other authorities or persons. You must establish the effective date of any prior disclosure, report, or submission, to the Commission's satisfaction. The Commission may seek assistance and confirmation from the other authority or person in making this determination.

(c) *Information that leads to successful enforcement.* The Commission will consider that you provided original information that led to the successful enforcement of a judicial or administrative action in the following circumstances:

(1) If you gave the Commission original information that caused the staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning new or different conduct as part of a current examination or investigation, and your information significantly contributed to the success of the action; or

(2) If you gave the Commission original information about conduct that was already under examination or investigation by the Commission, Congress, any other Federal, State, or local authority, any self-regulatory organization, or the Public Company Accounting Oversight Board (except in cases where you were an original source of this information as defined in paragraph (b)(4) of this section), and your information would not otherwise have been obtained and was essential to the success of the action.

(d) *Action* means a single captioned judicial or administrative proceeding.

(e) *Monetary sanctions* means any money, including penalties, disgorgement, and interest, ordered to be paid and any money deposited into a disgorgement fund or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7246(b), as a result of a Commission action or a related action.

(f) *Appropriate regulatory agency* means the Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and any other agencies that may be defined as appropriate regulatory agencies under Section 3(a)(34) of the Exchange Act (15 U.S.C. 78c(a)(34)).

(g) *Self-regulatory organization* means any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board, and any other organizations that may be defined as self-regulatory organizations under Section 3(a)(26) of the Exchange Act (15 U.S.C. 78c(a)(26)).

§ 240.21F–5 Amount of award.

(a) If all of the conditions are met for a whistleblower award in connection with a Commission action or a related action, the Commission will then decide the amount of the award pursuant to the procedures set forth in §§ 240.21F–10 and 240.21F–11 of this chapter. The amount will be at least 10 percent and no more than 30 percent of the monetary sanctions that the Commission and the other authorities are able to collect. The percentage awarded in connection with a Commission action may differ from the percentage awarded in connection with a related action.

(b) If 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 as a group be less than 10 percent or greater than 30 percent of the amount the Commission or the other authorities collect.

§ 240.21F–6 Criteria for determining amount of award.

In determining the amount of an award, the Commission will take into consideration:

(a) The significance of the information provided by a whistleblower to the success of the Commission action or related action;

(b) The degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action;

(c) The programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and

(d) Whether the award otherwise enhances the Commission's ability to enforce the Federal securities laws, protect investors, and encourage the submission of high quality information from whistleblowers.

§ 240.21F–7 Confidentiality of submissions.

(a) The law requires that the Commission not disclose information that could reasonably be expected to reveal the identity of a whistleblower,

except that the Commission may disclose such information in the following circumstances:

(1) When disclosure is required to a defendant or respondent in connection with a Federal court or administrative action that the Commission files or in another public action or proceeding that is filed by an authority to which we provide the information, as described below;

(2) When the Commission determines that it is necessary to accomplish the purposes of the Exchange Act and to protect investors, it may provide your information to the Department of Justice, an appropriate regulatory agency, a self regulatory organization, a state attorney general in connection with a criminal investigation, any appropriate state regulatory authority, the Public Company Accounting Oversight Board, or foreign securities and law enforcement authorities. Each of these entities other than foreign securities and law enforcement authorities is subject to the confidentiality requirements set forth in Section 21F(h) of the Exchange Act, 15 U.S.C. 78u–6(h). The Commission may determine what assurances of confidentiality it deems appropriate in providing such information to foreign securities and law enforcement authorities.

(3) The Commission may make disclosures in accordance with the Privacy Act of 1974 (5 U.S.C. 552a).

(b) You may submit information to the Commission anonymously. If you do so, however, you must also do the following:

(1) You must have an attorney represent you in connection with both your submission of information and your claim for an award, and your attorney's name and contact information must be provided to the Commission at the time you submit your information;

(2) You and your attorney must follow the procedures set forth in § 240.21F–9 of this chapter for submitting original information anonymously; and

(3) Before the Commission will pay any award to you, you must disclose your identity and your identity must be verified as set forth in § 240.21F–10 of this chapter.

§ 240.21F–8 Eligibility.

(a) To be eligible for a whistleblower award, you must give the Commission information in the form and manner that the Commission requires. The procedures for submitting information and making a claim for an award are described in § 240.21F–9 to § 240.21F–11 of this chapter. You should read these procedures carefully because you need to follow them in order to be eligible for an award, except that the Commission may, in its sole discretion, waive any of these procedures based upon a showing of extraordinary circumstances.

(b) In addition to any forms required by these rules, the Commission may also require that you provide certain additional information. If requested by Commission staff, you may be required to:

(1) Provide explanations and other assistance in order that the staff may evaluate and use the information that you submitted;

(2) Provide all additional information in your possession that is related to the subject matter of your submission in a complete and truthful manner, through follow-up meetings, or in other forms that our staff may agree to;

(3) Provide testimony or other evidence acceptable to the staff relating to whether you are eligible, or otherwise satisfy any of the conditions, for an award; and

(4) Enter into a confidentiality agreement in a form acceptable to the Whistleblower Office, including a provision that a violation may lead to your ineligibility to receive an award.

(c) You are not eligible to be considered for an award if you do not satisfy the requirements of paragraphs (a) and (b) of this section. In addition, you are not eligible if:

(1) You are, or were at the time you acquired original information, a member, officer, or employee of the Department of Justice, an appropriate regulatory agency, a self-regulatory organization, the Public Company Accounting Oversight Board, or any law enforcement organization;

(2) You are, or were at the time you acquired original information, a member, officer, or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Exchange Act (15 U.S.C. 78c(a)(52));

(3) You are convicted of a criminal violation that is related to the Commission action or to a related action (as defined in § 240.21F–4 of this chapter) for which you otherwise could receive an award;

(4) You obtained the information that you gave the Commission through an audit of a company's financial statements, and making a whistleblower submission would be contrary to the requirements of Section 10A of the Exchange Act (15 U.S,C. 78j–1)); or

(5) You acquired the information you gave the Commission from any of the individuals described in paragraphs (c)(1), (2), (3), or (4) of this section;

(6) You are the spouse, parent, child, or sibling of a member or employee of the Commission, or you reside in the same household as a member or employee of the Commission; or

(7) In your whistleblower submission, your other dealings with the Commission, or your dealings with another authority in connection with a related action, you 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.

§ 240.21F–9 Procedures for submitting original information.

The submission of original information to the Commission is a two-step process:

(a) First, you will need to submit your information to us. You may submit your information:

(1) Online, through the Commission's Electronic Data Collection System, or;

(2) By completing Form TCR (*Tip, Complaint or Referral*) (referenced in § 249.1800 of this chapter) and mailing or faxing the form to the SEC Whistleblower Office, 100 F Street, NE., Washington, DC 20549–XXXX, Fax (202) XXX–XXXX.

(b) Second, in addition to submitting your information pursuant to paragraph (a) of this section, you will also need to complete and provide to the Commission a *Form WB–DEC, Declaration Concerning Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934,* signed under penalty of perjury. Your Form WB–DEC must be submitted as follows:

(1) If you submit your information online, your FORM WB–DEC (referenced in § 249.1801 of this chapter) must be submitted either:

(i) Electronically (in accordance with the instructions set forth on the Commission's Web site); or

(ii) By mailing or faxing the signed form to the SEC Whistleblower Office. Your Form WB–DEC (referenced in § 249.1801 of this chapter) must be received within thirty (30) days of the Commission's receipt of your information in the Electronic Data Collection System.

(2) If you submit a Form TCR (referenced in § 249.1800 of this chapter), your Form WB–DEC (referenced in § 249.1801 of this

chapter) must be submitted by mail or fax at the same time as the Form TCR.

(c) Notwithstanding paragraph (b) of this section, if you submitted your original information to the Commission anonymously, then you must provide your attorney with the completed and signed Form WB–DEC (referenced in § 249.1801 of this chapter). In addition, your attorney must also provide the Commission with a separate Form WB–DEC certifying that he or she has verified your identity, has reviewed the form for completeness and accuracy, and will retain the signed original of your Form WB–DEC in his or her records. Such certification must be submitted in the manner described in paragraph (b) of this section.

(d) If you submitted original information in writing to the Commission after July 21, 2010 (the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act) but before the effective date of these rules, you will be eligible for an award only if:

(1) In the event that you provided the original information to the Commission in a format or manner other than that described in paragraph (a) of this section, you either submit your information online through the Commission's Electronic Data Collection System or complete Form TCR (referenced in § 249.1800 of this chapter) within one hundred twenty (120) days of the effective date of these rules and otherwise follow the procedures set forth in paragraph (b) of this section; or

(2) In the event that you provided the original information to the Commission in the format or manner described in paragraph (a) of this section you submit a Form WB–DEC (referenced in § 249.1801 of this chapter) within one hundred twenty (120) days of the effective date of this section in the manner set forth in paragraph (b) of this section.

§ 240.21F–10 Procedures for making a claim for a whistleblower award in SEC actions that result in monetary sanctions in excess of $1,000,000.

(a) Whenever a Commission action results in monetary sanctions totaling more than $1,000,000, the Whistleblower Office will cause to be published on the Commission's Web site a "Notice of Covered Action." Such Notice will be published subsequent to the entry of a final judgment or order that alone, or collectively with other judgments or orders previously entered in the Commission action, exceeds $1,000,000; or, in the absence of such judgment or order, within thirty (30) days of the deposit of monetary sanctions exceeding $1,000,000 into a disgorgement or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002. A claimant will have sixty (60) days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred.

(b) To file a claim for a whistleblower award, you must file Form WB–APP, *Application for Award for Original Information Provided Pursuant to § 21F of the Securities Exchange Act of 1934* (referenced in § 249.1802 of this chapter). You must sign this form as the claimant and submit it to the Whistleblower Office by mail or fax. All claim forms, including any attachments, must be received by the Whistleblower Office within sixty (60) calendar days of the date of the Notice of Covered Action in order to be considered for an award.

(c) If you provided your original information to the Commission anonymously, you must disclose your identity on the Form WB–APP (referenced in § 249.1802 of this chapter), and your identity must be verified in a form and manner that is acceptable to the Whistleblower Office prior to the payment of any award.

(d) Once the time for filing any appeals of the Commission's judicial or administrative action has expired, or where an appeal has been filed, after all appeals in the action have been concluded, the Whistleblower Office and designated staff ("Claims Review Staff") will evaluate all timely whistleblower award claims submitted on Form WB–APP (referenced in § 249.1802 of this chapter) in accordance with the criteria set forth in these rules. In connection with this process, the Whistleblower Office may require that you provide additional information relating to your eligibility for an award or satisfaction of any of the conditions for an award, as set forth in § 240.21F–(8)(b) of this chapter. Following that evaluation, the Whistleblower Office will send you a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award percentage amount.

(e) You may contest the Preliminary Determination made by the Claims Review Staff by submitting a written response to the Whistleblower Office setting forth the grounds for your objection to either the denial of an award or the proposed amount of an award. You may also include documentation or other evidentiary support for the grounds advanced in your response.

(1) Before determining whether to contest a Preliminary Determination, you may:

(i) Within thirty (30) days of the date of the Preliminary Determination, request that the Whistleblower Office make available for your review the materials that formed the basis of the Claims Review Staff's Preliminary Determination. The Whistleblower Office will make these materials available to you subject to any redactions necessary to comply with any statutory restrictions or protect the Commission's law enforcement and regulatory functions. The Whistleblower Office may also require you to sign a confidentiality agreement, as set forth in § 240.21F–(8)(b) of this chapter, prior to providing these materials.

(ii) Within thirty (30) calendar days of the date of the Preliminary Determination, request a meeting with the Whistleblower Office; however, such meetings are not required and the office may in its sole discretion decline the request.

(2) If you decide to contest the Preliminary Determination, you must submit your written response and supporting materials within thirty (30) calendar days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (e)(1) of this section, then within thirty (30) calendar days of the Whistleblower Office making those materials available for your review.

(f) If you fail to submit a timely response pursuant to paragraph (e) of this section, then the Preliminary Determination will become the Final Order of the Commission (except where the Preliminary Determination recommended an award, in which case the Preliminary Determination will be deemed a Proposed Final Determination for purposes of paragraph (h) of this section). Your failure to submit a timely response contesting a Preliminary Determination will constitute a failure to exhaust administrative remedies, and you will be prohibited from pursuing an appeal pursuant to § 240.21F–12 of this chapter.

(g) If you submit a timely response pursuant to paragraph (e) of this section, then the Claims Review Staff will consider the issues and grounds advanced in your response, along with any supporting documentation you provided, and will make its Proposed Final Determination.

(h) The Whistleblower Office will then notify the Commission of each Proposed Final Determination. Within thirty 30 days thereafter, any Commissioner may request that the

Proposed Final Determination be reviewed by the Commission. If no Commissioner requests such 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 staff relied upon in making its determinations, including your previous submissions to the Whistleblower Office, and issue its Final Order.

(i) The Office of the Secretary of the SEC will provide you with the Final Order of the Commission.

§ 240.21F–11 Procedures for determining awards based upon a related action.

(a) If you are eligible to receive an award following a Commission action that results in monetary sanctions totaling more than $1,000,000, you also may be eligible to receive an award based on the monetary sanctions that are collected from a related action (as defined in § 240.21F–3 of this chapter).

(b) You must also use Form WB–APP (referenced in § 249.1802 of this chapter) to submit a claim for an award in a related action. You must sign this form as the claimant and submit it to the Whistleblower Office by mail or fax as follows:

(1) If a final order imposing monetary sanctions has been entered in a related action at the time you submit your claim for an award in connection with a Commission action, you must submit your claim for an award in that related action on the same Form WB–APP (referenced in § 249.1802 of this chapter) that you use for the Commission action.

(2) If a final order imposing monetary sanctions in a related action has not been entered at the time you submit your claim for an award in connection with a Commission action, you must submit your claim on Form WB–APP (referenced in § 249.1802 of this chapter) within sixty (60) days of the issuance of a final order imposing sanctions in the related action.

(c) The Whistleblower Office may request additional information from you in connection with your claim for an award in a related action to demonstrate that you directly (or through the Commission) voluntarily provided the governmental agency, regulatory authority or self-regulatory organization the same original information that led to the Commission's successful covered action, and that this information led to the successful enforcement of the related action. The Whistleblower Office may, in its discretion, seek assistance and confirmation from the other agency in making this determination.

(d) Once the time for filing any appeals of the final judgment or order in a related action has expired, or if an appeal has been filed, after all appeals in the action have been concluded, the Claims Review Staff will evaluate all timely whistleblower award claims submitted on Form WB–APP (referenced in § 249.1802 of this chapter) in connection with the related action. The evaluation will be undertaken pursuant to the criteria set forth in these rules. In connection with this process, the Whistleblower Office may require that you provide additional information relating to your eligibility for an award or satisfaction of any of the conditions for an award, as set forth in § 240.21F–(8)(b) of this chapter. Following this evaluation, the Whistleblower Office will send you a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award percentage amount.

(e) You may contest the Preliminary Determination made by the Claims Review Staff by submitting a written response to the Whistleblower Office setting forth the grounds for your objection to either the denial of an award or the proposed amount of an award. You may also include documentation or other evidentiary support for the grounds advanced in your response.

(1) Before determining whether to contest a Preliminary Determination, you may:

(i) Within thirty (30) days of the date of the Preliminary Determination, request that the Whistleblower Office make available for your review the materials that formed the basis of the Claims Review Staff's Preliminary Determination. The Whistleblower Office will make these materials available to you subject to any redactions necessary to comply with any statutory restrictions or protect the Commission's law enforcement and regulatory functions. The Whistleblower Office may also require you to sign a confidentiality agreement, as set forth in § 240.21F–(8)(b) of this chapter, prior to providing these materials.

(ii) Within thirty (30) calendar days of the date of the Preliminary Determination, request a meeting with the Whistleblower Office; however, such meetings are not required and the office may in its sole discretion decline the request.

(2) If you decide to contest the Preliminary Determination, you must submit your written response and supporting materials within thirty (30) calendar days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (e)(1)(i) of this section, then within thirty (30) calendar days of the Whistleblower Office making those materials available for your review.

(f) If you fail to submit a timely response pursuant to paragraph (e) of this section, then the Preliminary Determination will become the Final Order of the Commission (except where the Preliminary Determination recommended an award, in which case the Preliminary Determination will be deemed a Proposed Final Determination for purposes of paragraph (h) of this section). Your failure to submit a timely response contesting a Preliminary Determination will constitute a failure to exhaust administrative remedies, and you will be prohibited from pursuing an appeal pursuant to § 240.21F–12 of this chapter.

(g) If you submit a timely response pursuant to paragraph (e) of this section, then the Claims Review Staff will consider the issues and grounds that you advanced in your response, along with any supporting documentation you provided, and will make its Proposed Final Determination.

(h) The Whistleblower Office will then notify the Commission of each Proposed Final Determination. Within thirty (30) days thereafter, any Commissioner may request that the Proposed Final Determination be reviewed by the Commission. If no Commissioner requests such 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 staff relied upon in making its determinations, including your previous submissions to the Whistleblower Office, and issue its Final Order.

(i) The Office of the Secretary of the SEC will provide you with the Final Order of the Commission.

§ 240.21F–12 Appeals.

(a) Section 21F of the Exchange Act, 15 U.S.C. 78u–6, commits determinations of whether, to whom, and in what amount to make awards to the Commission's discretion. A determination of whether or to whom to make an award may be appealed within 30 days after the Commission issues its final decision 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

principal place of business. Where the Commission followed the statutory mandate that it award not less than 10 percent and not more than 30 percent of the monetary sanctions collected in the Commission or related action, the Commission's determination regarding the amount of an award (including the allocation of an award as between multiple whistleblowers) is not appealable.

(b) The record on appeal shall consist of the Whistleblower Office's Preliminary Determination, any materials submitted by the claimant or claimants (including the claimant's Form TCR (referenced in § 249.1800 of this chapter) or any electronic submission made by the whistleblower, the Forms WB–DEC (referenced in § 249.1801 of this chapter) and WB–APP (referenced in § 249.1802 of this chapter), and materials filed in response to the Preliminary Determination), and any other materials that supported the Final Order of the Commission, with the exception of 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).

§ 240.21F–13 Procedures applicable to the payment of awards.

(a) Any award made pursuant to these rules will be paid from the Securities and Exchange Commission Investor Protection Fund (the "Fund").

(b) A recipient of a whistleblower award is entitled to payment on the award only to the extent that a monetary sanction is collected in the Commission action or in a related action upon which the award is based.

(c) Payment of a whistleblower award for a monetary sanction collected in a Commission action or related action shall be made following the later of:

(1) The date on which the monetary sanction is collected; or

(2) The completion of the appeals process for all whistleblower award claims arising from:

(i) The Notice of Covered Action, in the case of any payment of an award for a monetary sanction collected in a Commission action; or

(ii) The related action, in the case of any payment of an award for a monetary sanction collected in a related action.

(d) If there are insufficient amounts available in the Fund to pay the entire amount of an award payment within a reasonable period of time from the time for payment specified by paragraph (c) of this section, then subject to the following terms, the balance of the payment shall be paid when amounts become available in the Fund, as follows:

(1) Where multiple whistleblowers are owed payments from the Fund based on awards that do not arise from the same Notice of Covered Action (or related action), priority in making these payments will be determined based upon the date that the collections for which the whistleblowers are owed payments occurred. If two or more of these collections occur on the same date, those whistleblowers owed payments based on these collections will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

(2) Where multiple whistleblowers are owed payments from the Fund based on awards that arise from the same Notice of Covered Action (or related action), they will share the same payment priority and will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

§ 240.21F–14 No amnesty.

The Securities Whistleblower Incentives and Protection provisions do not provide amnesty to individuals who provide information to the Commission. The fact that you may become a whistleblower and assist in Commission investigations and enforcement actions does not preclude the Commission from bringing an action against you based upon your own conduct in connection with violations of the Federal securities laws. If such an action is determined to be appropriate, however, the Commission will take your cooperation into consideration in accordance with its Policy Statement Concerning Cooperation by Individuals in [SEC] Investigations and Related Enforcement Actions (17 CFR 202.12).

§ 240.21F–15 Awards to whistleblowers who engage in culpable conduct.

In determining whether the required $1,000,000 threshold has been satisfied (this threshold is further explained in § 240.21F–10 of this chapter) for purposes of making any award, the Commission will not take into account any monetary sanctions that the whistleblower is ordered to pay, or that are ordered against any entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated. Similarly, if the Commission determines that a whistleblower is eligible for an award, any amounts that the whistleblower or such an entity pay in sanctions as a result of the action or related actions will not be included within the calculation of the amounts collected for purposes of making payments.

§ 240.21F–16 Staff communications with whistleblowers.

(a) No person may take any action to impede a whistleblower from communicating directly with the Commission staff about a potential securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by § 240.21F–4(b)(4)(i) and (ii) of this chapter related to the legal representation of a client) with respect to such communications.

(b) If you are a whistleblower who is a director, officer, member, agent, or employee of an entity that has counsel, and you have initiated communication with the Commission relating to a potential securities law violation, the staff is authorized to communicate directly with you regarding the subject of your communication without seeking the consent of the entity's counsel.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for Part 249 is amended by adding the following citations in numerical order to read as follows:

Authority: 15 U.S.C. 78a, *et seq.* and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

Section 249.1800 is also issued under Pub. L. 111.203, § 922(a), 124 Stat 1841 (2010).

Section 249.1801 is also issued under Pub. L. 111.203, § 922(a), 124 Stat 1841 (2010).

Section 249.1802 is also issued under Pub. L. 111.203, § 922(a), 124 Stat 1841 (2010).

* * * * *

4. Add Subpart S to read as follows:

Subpart S—Whistleblower Forms

Sec.

249.1800 Form TCR, Tip, Complaint or Referral

249.1801 Form WB–DEC, Declaration of Original Information Submitted Pursuant to Section 21F of the Securities Exchange Act of 1934

249.1802 Form WB–APP, Application for Award for Original Information Submitted Pursuant to Section 21F of the Securities Exchange Act of 1934.

§ 249.1800 Form TCR, Tip, Complaint or Referral.

This form may be used by anyone wishing to provide the SEC with information concerning a violation of the Federal securities laws. The information provided may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing

the Federal securities laws, rules, or regulations consistent with the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act, 15 U.S.C. 78u–6(h)(2), and § 240.21F–7 of this chapter.

§ 249.1801 Form WB–DEC, Declaration of Original Information Submitted Pursuant to Section 21F of the Securities Exchange Act of 1934.

This form must be used by persons who provide the SEC with information concerning a violation of the Federal securities laws and who wish to be considered for a whistleblower award pursuant to the SEC's whistleblower program. The information provided will enable the Commission to determine your eligibility for payment of an award pursuant to Section 21F of the Securities Exchange Act of 1934, 15 U.S.C. 78u–6. This information may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing the Federal securities laws, rules, or regulations consistent with the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act, 15 U.S.C. 78u–6(h)(2), and § 240.21F–7 of this chapter. Furnishing the information is voluntary, but a decision not to do so may result in you not being eligible for award consideration.

§ 249.1802 Form WB–APP, Application for Award for Original Information Submitted Pursuant to Section 21F of the Securities Exchange Act of 1934.

This form must be used by persons making a claim for a whistleblower award in connection with information provided to the SEC or to another agency in a related action. The information provided will enable the Commission to determine your eligibility for payment of an award pursuant to Section 21F of the Securities Exchange Act of 1934, 15 U.S.C. 78u–6. This information may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing the Federal securities laws, rules, or regulations consistent with the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act, 15 U.S.C. 78u–6(h)(2) and § 240.21F–7 of this chapter. Furnishing the information is voluntary, but a decision not to do so may result in you not being eligible for award consideration.

Note: The following Forms will not appear in the Code of Federal Regulations.

BILLING CODE 8011–01–P

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM TCR
TIP, COMPLAINT OR REFERRAL

A. INFORMATION ABOUT YOU			
1. Last Name		First	M.I.
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
3. Telephone	Alt. Phone	E-mail Address	Preferred method of communication:
4. Your Occupation			

B. ATTORNEY'S INFORMATION (If Applicable - See Instructions)			
1. Attorney's Name			
2. Firm Name			
3. Street Address			
City	State/ Province	ZIP/ Postal Code	Country
4. Telephone	Fax	E-mail Address	

C. TELL US ABOUT THE INDIVIDUAL OR ENTITY YOU HAVE A COMPLAINT AGAINST			
Individual/Entity 1: 1. Type: ☐ Individual ☐ Entity	If an individual, specify profession: If an entity, specify type:		
2. Name			
3. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
4. Phone	E-mail Address	Internet address	

Individual/Entity 2: 1. Type: ☐ Individual ☐ Entity	If an individual, specify profession: If an entity, specify type:		
2. Name			
3. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
4. Phone	E-mail Address	Internet Address	

D. TELL US ABOUT YOUR COMPLAINT

1. Occurrence Date (mm/dd/yyyy): / /	2. Nature of complaint:

3. Are you complaining about an entity of which you are or were an officer, director, employee, consultant or contractor? YES ☐ NO ☐

4a. Have you taken any prior action regarding your complaint? YES ☐ NO ☐

4b. If you answered "yes" to question 4a, please provide details. Use additional sheets if necessary.

4c. Date on which you took the action(s) described in question 4b (mm/dd/yyyy): / /

5a. Type of security or investment, if relevant

5b. Name of issuer or security, if relevant	5c. Security/ Ticker Symbol or CUSIP no.

6. State in detail all facts pertinent to the alleged violation. Explain why you believe the acts described constitute a violation of the federal securities laws. Use additional sheets if necessary.

7. Describe all supporting materials in your possession and the availability and location of any additional supporting materials not in your possession. Use additional sheets, if necessary.
8. Describe how you obtained the information that supports this claim. If any information was obtained from a public source, identify the source with as much particularity as possible. Attach additional sheets if necessary.
9. Provide any additional information you think may be relevant.

Privacy Act Statement

This notice is given under the Privacy Act of 1974. The Privacy Act requires that the Securities and Exchange Commission (SEC) inform individuals of the following when asking for information. This form may be used by anyone wishing to provide the SEC with information concerning a violation of the federal securities laws. If you are submitting information for the SEC's whistleblower award program pursuant to Section 21F of the Securities Exchange Act of 1934 (Exchange Act), the information provided will enable the Commission to determine your eligibility for payment of an award. The information provided may be disclosed to federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing the federal securities laws, rules, or regulations consistent with the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act and Rule 21F-7 thereunder.
If you are submitting information for the SEC's whistleblower award program anonymously, you must be represented by an attorney and you must provide the information requested about your attorney on this form. Otherwise, furnishing the information requested herein is voluntary.

Questions concerning this form may be directed to the SEC Whistleblower Office, 100 F Street, NE, Washington, D.C. 20549-XXXX, Tel. (800) XXX-XXXX, Fax (202) XXX-XXXX

Submission Procedures

- After manually completing this Form TCR, please send it by mail or delivery to the SEC Whistleblower Office, 100 F. Street, NE, Washington, D.C. 20549-XXXX, or by facsimile to (202) XXX-XXXX.

- You have the right to submit information anonymously. If you are submitting anonymously and you want to be considered for a whistleblower award, however, you *must* be represented by an attorney in this matter and Section B of this form must be completed. Otherwise, you may, but are not required, to have an attorney. If you are not represented by an attorney in this matter, you may leave Section B blank.

- **If you are submitting information for the SEC's whistleblower award program, you *must* submit your information either using this Form TCR or electronically through the SEC's**

Electronic Data Collection System, available on the SEC web site at [insert link]. In addition to submitting your information by either of these methods, you must also submit a declaration on Form WB-DEC. The Form WB-DEC can be printed out from our web site or obtained from the SEC Whistleblower Office, and it must be manually signed by you under penalty of perjury. To learn more about this program and its special requirements, please visit the Whistleblower Office's website at [INSERT LINK].

Instructions for Completing Form TCR:

Section A: Information about You

Questions 1-3: Please provide the following information about yourself:

- Last name, first name, and middle initial
- Complete address, including city, state and zip code
- Telephone number and, if available, an alternate number where you can be reached
- Your e-mail address (to facilitate communications, we strongly encourage you to provide your email address), and
- Your preferred method of communication.

Question 4: State which of the following best describes your occupation:

- accountant, attorney, auditor, broker-dealer, compliance officer, financial representative, foreign officer, fund manager, investment advisor, investor, other company officer or senior manager, registered representative, trader, transfer agent, underwriter, government official (federal, state, or local), law enforcement personnel (federal, state, or local), or other (specify).

Section B: Information about Your Attorney. Complete this section only if you are represented by an attorney in this matter. You must be represented by an attorney, and this section must be

completed, if you are submitting your information anonymously and you want to be considered for the SEC's whistleblower award program.

Questions 1-4: Provide the following information about the attorney representing you in this matter:

- Attorney's name
- Firm name
- Complete address, including city, state and zip code
- Telephone number and fax number, and
- E-mail address

Section C: Tell Us about the Individual and/or Entity You Have a Complaint Against. If your complaint relates to more than two individuals and/or entities, you may attach additional sheets.

Question 1: Choose one of the following that best describes the individual or entity to which your complaint relates:

- **For Individuals**: accountant, analyst, attorney, auditor, broker, compliance officer, employee, executive officer or director, financial planner, fund manager, investment advisor, stock promoter, trustee, unknown, or other (specify).
- **For Entity**: bank, broker-dealer, clearing agency, day trading firm, exchange, Financial Industry Regulatory Authority, insurance company, investment company, Individual Retirement Account or 401(k) custodian/administrator, market maker, municipal securities dealers, mutual fund, newsletter company/investment publication companies, on-line trading firm, private fund company (including hedge fund, private equity fund, venture capital fund, or real estate fund), private/closely held company, SEC or other federal agency, transfer agent/paying agent/registrar, underwriter, unknown, or other (specify).

Questions 2-4: For each subject, provide the following information, if known:

- Full name

- Complete address, including city, state and zip code
- Telephone number,
- E-mail address, and
- Internet address, if applicable

Section D: Tell Us about Your Complaint

Question 1: State the date (mm/dd/yyyy) that the alleged conduct began.

Question 2: Choose the option that you believe best describes the nature of your complaint. If you are alleging more than one violation, please list all that you believe may apply. Use additional sheets if necessary.

- Theft/misappropriation (advance fee fraud; lost or stolen securities; hacking of account)
- Misrepresentation/omission (false/misleading marketing/sales literature; inaccurate, misleading or non-disclosure by Broker-Dealer, Investment Adviser and Associated Person; false/material misstatements in firm research that were basis of transaction)
- Offering fraud (Ponzi/pyramid scheme; other offering fraud)
- Registration violations (unregistered securities offering)
- Trading (after hours trading; algorithmic trading; front-running; insider trading, manipulation of securities/prices; market timing; inaccurate quotes/pricing information; program trading; short selling; trading suspensions; volatility)
- Fees/mark-ups/commissions (excessive or unnecessary administrative fees; excessive commissions or sales fees; failure to disclose fees; insufficient notice of change in fees; negotiated fee problems; excessive mark-ups/markdowns; excessive or otherwise improper spreads)
- Corporate disclosure/reporting/other issuer matter (audit; corporate governance; conflicts of interest by management; executive compensation; failure to notify shareholders of corporate events; false/misleading financial statements, offering documents, press releases, proxy materials; failure to file reports; financial fraud; Foreign Corrupt Practices Act violations; going private transactions; mergers and acquisitions; restrictive legends,

including 144 issues; reverse stock splits; selective disclosure – Regulation FD, 17 CFR 243; shareholder proposals; stock options for employees; stock splits; tender offers)

- Sales and advisory practices (background information on past violations/integrity; breach of fiduciary duty/responsibility (IA); failure to disclose breakpoints; churning/excessive trading; cold calling; conflict of interest; abuse of authority in discretionary trading; failure to respond to investor; guarantee against loss/promise to buy back shares; high pressure sales techniques; instructions by client not followed; investment objectives not followed; margin; poor investment advice; Regulation E (Electronic Transfer Act); Regulation S-P, 17 CFR 248, (privacy issues); solicitation methods (non-cold calling; seminars); suitability; unauthorized transactions)
- Operational (bond call; bond default; difficulty buying/selling securities; confirmations/statements; proxy materials/prospectus; delivery of funds/proceeds; dividend and interest problems; exchanges/switches of mutual funds with fund family; margin (illegal extension of margin credit, Regulation T restrictions, unauthorized margin transactions); online issues (trading system operation); settlement (including T+1 or T=3 concerns); stock certificates; spam; tax reporting problems; titling securities (difficulty titling ownership); trade execution.
- Customer accounts (abandoned or inactive accounts; account administration and processing; identity theft affecting account; IPOs: problems with IPO allocation or eligibility; inaccurate valuation of Net Asset Value; transfer of account)
- Comments/complaints about SEC, Self-Regulatory Organization, and Securities Investor Protection Corporation processes & programs (arbitration: bias by arbitrators/forum, failure to pay/comply with award, mandatory arbitration requirements, procedural problems or delays; SEC: complaints about enforcement actions, complaints about rulemaking, failure to act; Self-Regulatory Organization: failure to act; Investor Protection: inadequacy of laws or rules; SIPC: customer protection, proceedings and Broker-Dealer liquidations;

- Other (analyst complaints; market maker activities; employer/employee disputes; specify other).

Question 3: Indicate whether you were in the past, or are currently, an officer, director, employee, consultant, or contractor of the entity to which your complaint relates.

Question 4a: Indicate whether you have taken any prior action regarding your complaint, including whether you reported the violation to the entity, including the compliance office, whistleblower hotline or ombudsman; complained to the SEC, another regulator, a law enforcement agency, or any other agency or organization; initiated legal action, mediation or arbitration, or initiated any other action.

Question 4b: If you answered "yes" to question 4a, provide details, including the date on which you took the action(s) described, the name of the person or entity to whom you directed any report or complaint and contact information for the person or entity, if known, and the complete case name, case number, and forum of any legal action you have taken. Use additional sheets if necessary.

Question 5a: Choose from the following the option that you believe best describes the type of security or investment at issue, if applicable:

- 1031 exchanges
- 529 plans
- American Depositary Receipts
- Annuities (equity-indexed annuities, fixed annuities, variable annuities)
- Asset-backed securities
- Auction rate securities
- Banking products (including credit cards)
- Certificates of deposit (CDs)
- Closed-end funds
- Coins and precious metals (gold, silver, etc.)
- Collateralized mortgage obligations (CMOs)
- Commercial paper

- Commodities (currency transactions, futures, stock index options)
- Convertible securities
- Debt (corporate, lower-rated or “junk”, municipal)
- Equities (exchange-traded, foreign, Over-the-Counter, unregistered, linked notes)
- Exchange Traded Funds
- Franchises or business ventures
- Hedge funds
- Insurance contracts (not annuities)
- Money-market funds
- Mortgage-backed securities (mortgages, reverse mortgages)
- Mutual funds
- Options (commodity options, index options)
- Partnerships
- Preferred shares
- Prime bank securities/high yield programs
- Promissory notes
- Real estate (real estate investment trusts (REITs))
- Retirement plans (401(k), IRAs)
- Rights and warrants
- Structured note products
- Subprime issues
- Treasury securities
- U.S. government agency securities
- Unit investment trusts (UIT)
- Viaticals and life settlements
- Wrap accounts
- Separately Managed Accounts (SMAs)
- Unknown

- Other (specify)

Question 5b: Provide the name of the issuer or security, if applicable.

Question 5c: Provide the ticker symbol or CUSIP number of the security, if applicable.

Question 6: State in detail all the facts pertinent to the alleged violation. Explain why you believe the facts described constitute a violation of the federal securities laws. Attach additional sheets if necessary.

Question 7: Describe all supporting materials in your possession and the availability and location of additional supporting materials not in your possession. Attach additional sheets if necessary.

Question 8: Describe how you obtained the information that supports your allegation. If any information was obtained from a public source, identify the source with as much particularity as possible. Attach additional sheets if necessary.

Question 9: Please provide any additional information you think may be relevant.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM WB-DEC

DECLARATION OF ORIGINAL INFORMATION SUBMITTED PURSUANT TO SECTION 21F OF THE SECURITIES EXCHANGE ACT OF 1934

A. SUBMITTER'S INFORMATION

1. Last Name		First	M.I.
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP Code	Country
3. Telephone	Alt. Phone	E-mail Address	

B. ATTORNEY INFORMATION (If Applicable - See Instructions)

1. Attorney's name			
2. Firm Name			
3. Street Address			
City	State/ Province	ZIP Code	Country
4. Telephone	Fax	E-mail Address	

C. TIP/COMPLAINT DETAILS

1. Manner in which information was submitted to SEC: SEC website ☐ Mail ☐ Fax ☐ Other ☐ _____

2a. Tip, Complaint or Referral (TCR) number:
(Required if you submitted your information through SEC website)

2b. Date TCR referenced in 2a submitted to SEC / /

2c. Individual or entity to which Tip, Complaint or Referral relates:

3a. Has the submitter or counsel had any communication(s) with the SEC concerning this matter? YES ☐ NO ☐

3b. If the answer to 3a is "Yes," name of SEC staff member with whom the submitter or counsel communicated

4a. Has the submitter or counsel provided the information to any other agency or organization? YES ☐ NO ☐

4b. If the answer to 4a is "Yes," please provide details. Use additional sheets if necessary

4c. Name and contact information for point of contact at agency or organization, if known

D. ELIGIBILITY REQUIREMENTS

1. Are you, or were you at the time you acquired the original information you submitted to us, a member, officer or employee of the Department of Justice, the Securities and Exchange Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board? YES ☐ NO ☐

2. Are you, or were you at the time you acquired the original information you submitted to us, a member, officer or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Securities Exchange Act of 1934 (15 U.S.C. §78c(a)(52))? YES ☐ NO ☐

3. Did you obtain the information you are providing to us through the performance of an engagement required under the federal securities laws by an independent public accountant ? YES ☐ NO ☐

4. Did you provide the information identified in Section C above pursuant to a cooperation agreement with the SEC or another agency or organization? YES ☐ NO ☐

5. Are you a spouse, parent, child, or sibling of a member or employee of the Commission, or do you reside in the same household as a member or employee of the Commission? YES ☐ NO ☐

6. Did you acquire the information you are providing to us from any person described in questions D1 through D5? YES ☐ NO ☐

7. If you answered "yes" to any of questions 1 through 6 above, please provide details. Use additional sheets if necessary.

8a. Did you provide the information identified in Section C above before you (or anyone representing you) received any request, inquiry or demand from the SEC, Congress, or any other federal, state or local authority, or any self regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information your submission was relevant? YES ☐ NO ☐

8b. If you answered "no" to question 8a, please provide details. Use additional sheets if necessary.

9a. Are you currently a subject or target of a criminal investigation, or have you been convicted of a criminal violation, in connection with the information upon which your application for an award is based? YES ☐ NO ☐

9b. If you answered "Yes" to question 9a, please provide details. Use additional sheets if necessary.

E. DECLARATION

I declare under penalty of perjury under the laws of the United States that the information contained herein, and all information submitted to the SEC – either in the TCR referenced in Section C of this form or in the Form TCR accompanying this Form WB-DEC - is true, correct and complete to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if, in my submission of information, my other dealings with the SEC, or my dealings with another authority in connection with a related action, I knowingly and willfully make any false, fictitious, or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

Signature	Date

F. COUNSEL CERTIFICATION

I certify that I have verified the identity of the whistleblower who completed Form WB-DEC in connection with the information referenced in Section C of this form by viewing the whistleblower's valid, unexpired government issued identification (e.g., driver's license, passport), that I have reviewed the whistleblower's Form WB-DEC for completeness and accuracy, and that I will retain an original, signed copy of the Form WB-DEC completed by the whistleblower in my records.

Signature	Date

Privacy Act Statement

This notice is given under the Privacy Act of 1974. The Privacy Act requires that the Securities and Exchange Commission (SEC) inform individuals of the following when asking for information. The information provided will enable the Commission to determine your eligibility for payment of an award pursuant to Section 21F of the Securities Exchange Act of 1934. This information may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing the federal securities laws, rules, or regulations consistent with the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act and 21F-7 of this chapter. Furnishing the information is voluntary, but a decision not to do so may result in you not being eligible for award consideration.

Questions concerning this form may be directed to the SEC Whistleblower Office, 100 F Street, NE, Washington, D.C. 20549-XXXX, Tel. (800) XXX-XXXX, Fax (202) XXX-XXXX.

General Information

- Submitting information for the SEC's whistleblower award program is a two-step process. First, you must provide us with your information, which you may do in either of two ways. You may submit information electronically through the SEC's Electronic Data Collection System available on the SEC web site at [insert link]. Utilizing the SEC's online database is quick and easy and will enable you to print and retain a date and time-stamped confirmation of the information you provided to us. If you prefer, you may compete Form TCR ("Tip, Complaint, or Referral") manually, and mail or deliver it to us in hard copy following the instructions set forth on the form.

- **Submitting your information to us is the first step. If you want to be considered for a whistleblower award, you must also submit this Form WB-DEC and it must be manually signed under penalty of perjury.**

- ***If you submitted your information electronically through our web site, we must receive your completed Form WB-DEC within 30 days of your submission. If you did not submit your information electronically but instead are submitting your information on Form TCR,***

you must submit your declaration on Form WB-DEC at the same time that you submit your Form TCR. Follow the instructions set forth below for submitting this Form WB-DEC.

- If you follow these steps, and the information you submit leads to the successful enforcement of an SEC judicial or administrative action, or a related action, you will have an opportunity at a later date to submit a claim for an award. That is a separate process and is described in our whistleblower rules, which are available at [insert link for WBO website].

- You have the right to submit information anonymously. If you are doing so, please skip Part I of these instructions and proceed directly to Part II. Otherwise, please begin by following the instructions in Part I.

Part I: Instructions for filers who are disclosing their identity

- You are required to complete Sections A, C, D, and E of this form. If you are represented by an attorney in this matter, you must also complete Section B. Specific instructions for answering these questions can be found in Part IV below.

- If you previously submitted your complaint electronically through the SEC's web site, you may submit this Form WB-DEC to us in any of the following ways:
    - By mailing or delivering the signed form to the SEC Whistleblower Office, 100 F Street NE, Washington, D.C. 20549-XXXX; or
    - By faxing the signed form to (202) XXX-XXXX; or
    - By scanning and emailing the form in PDF format to [insert email address].

  Please note that we must receive your Form WB-DEC within thirty (30) days of when you submitted your information to us through our web site.

- If you did *not* previously submit your complaint electronically through the SEC's web site, but instead intend to send us a Form TCR, then you must submit your completed Form TCR and your declaration on this Form WB-DEC together. You may do so in one of two ways:

- By mailing or delivering the form TCR and the signed form WB-DEC to the SEC Whistleblower Office, 100 F Street NE, Washington, D.C. 20549-XXXX; or
- By faxing the form TCR and the signed form WB-DEC form to (202) XXX-XXXX.

Part II: Instructions for anonymous filers

- If you are submitting information anonymously, you *must* be represented by an attorney in this matter.
- If you previously submitted your complaint anonymously through the SEC's web site, make sure your attorney knows this.
- If you or your attorney did *not* previously submit your complaint electronically through the SEC's web site, but instead sent a Form TCR to us, then complete your Form TCR and give it to your attorney.
- You are also required to complete Sections B, C, D, and E of this form, and give the signed original to your attorney. Specific instructions for answering these questions can be found in Part IV below.
- In order for you to be eligible for a whistleblower award, your attorney must retain your signed original of Form WB-DEC in his or her records, and submit both your Form TCR (if you filled one out instead of submitting your complaint to us electronically) and an attorney declaration to us. You are encouraged to confirm that your attorney followed these steps.

Part III: Instructions for attorneys representing anonymous whistleblowers

- Obtain a completed and signed original of Form WB-DEC from your client. You must retain this signed original in your records because it may be required at a later date if your client files a claim for a whistleblower award.
- You must prepare your own Form WB-DEC, completing only Sections B, C and F. Specific instructions for answering these questions can be found in Part IV below.
- If your client previously submitted his or her complaint electronically through the SEC's web site, you may submit your attorney Form WB-DEC to us in any of the following ways:
  - By mailing or delivering the signed form to the SEC Whistleblower Office, 100 F Street NE, Washington, D.C. 20549-XXXX; or
  - By faxing the signed form to (202) XXX-XXXX; or

- By scanning and emailing the form in PDF format to [insert email address].

Please note that we must receive your Form WB-DEC within thirty (30) days of when your client submitted the information to us through our web site.

- If your client did *not* previously submit his or her complaint electronically through the SEC's web site, but instead intends to submit a Form TCR to us, then you must submit your client's complaint on Form TCR and your attorney declaration on this Form WB-DEC together. You may do so in one of two ways*:*
  - By mailing or delivering the Form TCR and the signed Form WB-DEC to the SEC Whistleblower Office, 100 F Street NE, Washington, D.C. 20549-XXXX; or
  - By faxing the Form TCR and the signed Form WB-DEC to (202) XXX-XXXX.

Part IV: Instructions for Completing Form WB-DEC:

Section A: Submitter's Information

Questions 1-3: Provide the following information about yourself:

- First and last name, and middle initial
- Complete address, including city, state and zip code
- Telephone number and, if available, an alternate number where you can be reached
- E-mail address

Section B: Information about Your Attorney. Complete this section only if you are represented by an attorney in this matter. You must be represented by an attorney, and this section must be completed, if you submitted your information anonymously.

Questions 1-4: Provide the following information about the attorney representing you in this matter:

- Attorney's name
- Firm name
- Complete address, including city, state and zip code
- Telephone number and fax number, and

- E-mail address

Section C: Tip/Complaint Details

Question 1: Indicate the manner in which the information was submitted to the SEC.

Question 2a: Include the TCR (Tip, Complaint or Referral) number, if available. **THE TCR NUMBER MUST BE INCLUDED ON FORM WB-DEC IN CASES WHERE THE ORIGINAL INFORMATION WAS SUBMITTED THROUGH THE SEC WEBSITE**

Question 2b: Provide the date on which the TCR referenced in 2a was submitted to the SEC.

Question 2c: Provide the name of the individual or entity to which your complaint relates.

Question 3a: Indicate whether the submitter or counsel have had any communication(s) with the SEC concerning this manner.

Question 3b: If you answered "yes" to question 3a, provide the name of the SEC staff member with whom the submitter or counsel communicated.

Question 4a: Indicate whether the submitted or counsel have provided the information being submitted to the SEC to any other agency or organization.

Question 4b: If you answered "yes" to question 4a, provide details, including the name of the agency or organization, the date on which you provided your information to the agency or organization and any other relevant details.

Question 4c: Provide a name and contact information for your point of contact at the other agency or organization, if known.

Section D: Eligibility Requirements

Question 1: State whether you are currently, or were at the time you acquired the original information that you submitted to the SEC a member, officer, or employee of the Department of Justice; the Securities and Exchange Commission; the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, or the Office of Thrift Supervision; the Public Company Accounting

Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board

Question 2: State whether you are, or were you at the time you acquired the original information you submitted to the SEC, a member, officer or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Securities Exchange Act of 1934.

- Section 3(a)(52) of the Exchange Act (15 U.S.C. §78c(a)(52)) currently defines ''foreign financial regulatory authority'' as "any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above."

Question 3: Indicate whether you acquired the information you provided to the SEC through the performance of an engagement required under the securities laws by an independent public accountant.

Question 4: State whether you provided the information submitted to the SEC pursuant to a cooperation agreement with the SEC or with any other agency or organization.

Question 5: State whether you are a spouse, parent, child or sibling of a member or employee of the Commission, or whether you reside in the same household as a member or employee of the Commission.

Question 6: State whether you acquired the information you are providing to the SEC from any individual described in Question 1 through 5 of this Section.

Question 7: If you answered "yes" to questions 1 though 6, please provide details.

Question 8a: State whether you provided the information identified submitted to the SEC before you (or anyone representing you) received any request, inquiry or demand from the SEC, Congress, or any other federal, state or local authority, or any self regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information your submission was relevant.

Question 8b: If you answered "no" to questions 8a, please provide details. Use additional sheets if necessary.

Question 9a: State whether you are the subject or target of a criminal investigation or have been convicted of a criminal violation in connection with the information upon which your application for award is based.

Question 9b: If you answered "yes" to question 7a, please provide details, including the name of the agency or organization that conducted the investigation or initiated the action against you, the name and telephone number of your point of contact at the agency or organization, if available and the investigation/case name and number, if applicable. Use additional sheets, if necessary.

Section E: Declaration

To be completed and signed by person submitting the information

Section F: Counsel Certification

To be completed and signed by attorney for an anonymous person submitting information

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM WB-APP

APPLICATION FOR AWARD FOR ORIGINAL INFORMATION SUBMITTED PURSUANT TO SECTION 21F OF THE SECURITIES EXCHANGE ACT OF 1934

A. APPLICANT'S INFORMATION (REQUIRED FOR ALL SUBMISSIONS)			
1. Last Name	First	M.I.	Social Security No.
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP Code	Country
3. Telephone	Alt. Phone	E-mail Address	

B. ATTORNEY'S INFORMATION (IF APPLICABLE – SEE INSTRUCTIONS)			
1. Attorney's name			
2. Firm Name			
3. Street Address			
City	State/ Province	ZIP Code	Country
4. Telephone	Fax	E-mail Address	

C. TIP/COMPLAINT DETAILS	
1. Manner in which original information was submitted to SEC: SEC website ☐ Mail ☐ Fax ☐ Other ☐ _____	
2a. Tip, Complaint or Referral number	2b. Date TCR referred to in 2a submitted to SEC / /
2c. Subject(s) of the Tip, Complaint or Referral:	

D. NOTICE OF COVERED ACTION	
1. Date of Notice of Covered Action to which claim relates: / /	2. Notice Number:
3a. Case Name	3b. Case Number

E. CLAIMS PERTAINING TO RELATED ACTIONS	
1. Name of agency or organization to which you provided your information	
2. Name and contact information for point of contact at agency or organization, if known.	
3a. Date you provided your information / /	3b. Date action filed by agency/organization / /
4a. Case Name	4b. Case number

F. ELIGIBILITY REQUIREMENTS
1. Are you, or were you at the time you acquired the original information you submitted to us, a member, officer or employee of the Department of Justice, the Securities and Exchange Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board? YES ☐ NO ☐

2. Are you, or were you at the time you acquired the original information you submitted to us, a member, officer or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Securities Exchange Act of 1934 (15 U.S.C. §78c(a)(52))? YES ☐ NO ☐

3. Did you obtain the information you are providing to us through the performance of an engagement required under the federal securities laws by an independent public accountant? YES ☐ NO ☐

4. Did you provide the information identified in Section C above pursuant to a cooperation agreement with the SEC or another agency or organization? YES ☐ NO ☐

5. Are you a spouse, parent, child, or sibling of a member or employee of the Commission, or do you reside in the same household as a member or employee of the Commission? YES ☐ NO ☐

6. Did you acquire the information you are providing to us from any person described in questions F1 through F5? YES ☐ NO ☐

7. If you answered "yes" to any of questions 1 through 6 above, please provide details. Use additional sheets if necessary.

8a. Did you provide the information identified in Section C above before you (or anyone representing you) received any request, inquiry or demand from the SEC, Congress, or any other federal, state or local authority, or any self regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information your submission was relevant? YES ☐ NO ☐

8b. If you answered "yes" to question 8a, please provide details. Use additional sheets if necessary.

9a. Are you currently a subject or target of a criminal investigation, or have you been convicted of a criminal violation, in connection with the information upon which your application for an award is based? YES ☐ NO ☐

9b. If you answered "Yes" to question 9a, please provide details. Use additional sheets if necessary.

G. ENTITLEMENT TO AWARD

Explain the basis for your belief that you are entitled to an award in connection with your submission of information to us, or to another agency in a related action. Provide any additional information you think may be relevant in light of the criteria for determining the amount of an award set forth in Rule 21F-6 under the Securities Exchange Act of 1934. Include any supporting documents in your possession or control, and attach additional sheets, if necessary.

H. DECLARATION

I declare under penalty of perjury under the laws of the United States that the information contained herein is true, correct and complete to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if, in my submission of information, my other dealings with the SEC, or my dealings with another authority in connection with a related action, I knowingly and willfully make any false, fictitious, or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

Signature	Date

Privacy Act Statement

This notice is given under the Privacy Act of 1974. The Privacy Act requires that the Securities and Exchange Commission (SEC) inform individuals of the following when asking for information. The information provided will enable the Commission to determine your eligibility for payment of an award pursuant to Section 21F of the Securities Exchange Act of 1934. This information may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing the federal securities laws, rules, or regulations consistent with the confidentiality requirements set forth in Section 21F(h)(2) of the Exchange Act and Rule 21F-7 thereunder. Furnishing the information is voluntary, but a decision not to do so may result in you not being eligible for award consideration.

Questions concerning this form may be directed to the SEC Whistleblower Office, 100 F Street, NE, Washington, D.C. 20549-XXXX, Tel. (800) XXX-XXXX, Fax (202) XXX-XXXX.

General

- This form should be used by persons making a claim for a whistleblower award in connection with information provided to the SEC or to another agency in a related action. In order to be deemed eligible for an award, you must meet all the requirements set forth in Section 21F of the Securities Exchange Act of 1934 and the rules thereunder.

- You must sign the Form WB-APP as the claimant. If you provided your information to the SEC anonymously, you must now disclose your identity on this form and your identity must be verified in a form and manner that is acceptable to the Whistleblower Office prior to the payment of any award.

    - If you are filing your claim in connection with information that you provided to the SEC, then your Form WB-APP, and any attachments thereto, **must be received by the SEC Whistleblower Office within sixty (60) days of the date of the Notice of Covered Action to which the claim relates.**

- If you are filing your claim in connection with information you provided to another agency in a related action, then your Form WB-APP, and any attachments there to, must be received by the SEC Whistleblower Office as follows:
  - If a final order imposing monetary sanctions has been entered in a related action at the time you submit your claim for an award in connection with a Commission action, **you must submit your claim for an award in that related action on the same Form WB-APP that you use for the Commission action.**
  - If a final order imposing monetary sanctions in a related action has not been entered at the time you submit your claim for an award in connection with a Commission action, **you must submit your claim on Form WB-APP within sixty (60) days of the issuance of a final order imposing sanctions in the related action.**

- You must submit your Form WB-APP to us in one of the following two ways:
  - By mailing or delivering the signed form to the SEC Whistleblower Office, 100 F Street NE, Washington, D.C. 20549-XXXX; or
  - By faxing the signed form to (202) XXX-XXXX.

Instructions for Completing Form WB-APP

Section A: Applicant's Information

Questions 1-3: Provide the following information about yourself:

- First and last name, and middle initial
- Complete address, including city, state and zip code
- Telephone number and, if available, an alternate number where you can be reached
- E-mail address

Section B: Attorney's Information. If you are represented by an attorney in this matter, provide the information requested. If you are not representing an attorney in this matter, leave this Section blank.

Questions 1-4: Provide the following information about the attorney representing you in this matter:

- Attorney's name
- Firm name
- Complete address, including city, state and zip code
- Telephone number and fax number, and
- E-mail address.

Section C: Tip/Complaint Details

Question 1: Indicate the manner in which your original information was submitted to the SEC.

Question 2a: Include the TCR (Tip, Complaint or Referral) number to which this claim relates.

Question 2b: Provide the date on which you submitted your information to the SEC.

Question 2c: Provide the name of the individual(s) or entity(s) to which your complaint related.

Section D: Notice of Covered Action

The process for making a claim for a whistleblower award begins with the publication of a "Notice of a Covered Action" on the Commission's website. This notice is published whenever a judicial or administrative action brought by the Commission results in the imposition of monetary sanctions exceeding $1,000,000. The Notice is published on the Commission's website subsequent to the entry of a final judgment or order in the action that by itself, or collectively with other judgments or orders previously entered in the action, exceeds the $1,000,000 threshold.

Question 1: Provide the date of the Notice of Covered Action to which this claim relates.

Question 2: Provide the notice number of the Notice of Covered Action.

Question 3a: Provide the case name referenced in Notice of Covered Action.

Question 3b: Provide the case number referenced in Notice of Covered Action.

Section E: Claims Pertaining to Related Actions

Question 1: Provide the name of the agency or organization to which you provided your information.

Question 2: Provide the name and contact information for your point of contact at the agency or organization, if known.

Question 3a: Provide the date on which that you provided your information to the agency or organization referenced in question E1.

Question 3b: Provide the date on which the agency or organization referenced in question E1 filed the related action that was based upon the information you provided.

Question 4a: Provide the case name of the related action.

Question 4b: Provide the case number of the related action.

Section F: Eligibility Requirements

Question 1: State whether you are currently, or were at the time you acquired the original information that you submitted to the SEC a member, officer, or employee of the Department of Justice; the Securities and Exchange Commission; the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board

Question 2: State whether you are, or were you at the time you acquired the original information you submitted to the SEC, a member, officer or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Securities Exchange Act of 1934.

- Section 3(a)(52) of the Exchange Act (15 U.S.C. §78c(a)(52)) currently defines ''foreign financial regulatory authority'' as "any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above."

Question 3: Indicate whether you acquired the information you provided to the SEC through the performance of an engagement required under the securities laws by an independent public accountant.

Question 4: State whether you provided the information submitted to the SEC pursuant to a cooperation agreement with the SEC or with any other agency or organization.

Question 5: State whether you are a spouse, parent, child or sibling of a member or employee of the Commission, or whether you reside in the same household as a member or employee of the Commission.

Question 6: State whether you acquired the information you are providing to the SEC from any individual described in Question 1 through 5 of this Section.

Question 7: If you answered "yes" to questions 1 though 6, please provide details.

Question 8a: State whether you provided the information identified submitted to the SEC before you (or anyone representing you) received any request, inquiry or demand from the SEC, Congress, or any other federal, state or local authority, or any self regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information your submission was relevant.

Question 8b: If you answered "no" to questions 8a, please provide details. Use additional sheets if necessary.

Question 9a: State whether you are the subject or target of a criminal investigation or have been convicted of a criminal violation in connection with the information upon which your application for award is based.

Question 9b: If you answered "yes" to question 9a, please provide details, including the name of the agency or organization that conducted the investigation or initiated the action against you, the name and telephone number of your point of contact at the agency or organization, if available and the investigation/case name and number, if applicable. Use additional sheets, if necessary. If you previously provided this information on Form WB-DEC, you may leave this question blank, unless your response has changed since the time you submitted your Form WB-DEC.

Section G: Entitlement to Award

Use this section to explain the basis for your belief that you are entitled to an award in connection with your submission of information to us or to another agency in connection with a related action. Specifically address how you believe you voluntarily provided the Commission with original information that led to the successful enforcement of a judicial or administrative action filed by the Commission, or a related action. Refer to Rules 21F-3 and 21F-4 under the Exchange Act for further information concerning the relevant award criteria. You may attach additional sheets, if necessary.

Rule 21F-6 under the Exchange Act provides that in determining the amount of an award, the Commission will evaluate the following factors: (a) the significance of the information provided by a whistleblower to the success of the Commission action or related action; (b) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action; (c) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and (d) whether the award otherwise enhances the Commission's ability to enforce the federal securities laws, protect investors, and encourage

the submission of high quality information from whistleblowers. Address these factors in your response as well.

Additional information about the criteria the Commission may consider in determining the amount of an award is available on the Commission's website at [insert WBO web page address]

Section G: Declaration

This section must be signed by the claimant.

By the Commission.

Dated: November 3, 2010.

Elizabeth M. Murphy,

Secretary.

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