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SEC Proposes Rules to Incentive and Reward Whistleblowers

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On February 10, 2022, the Securities and Exchange Commission ("SEC") proposed two amendments to Rules 21F-3 and 6 under the Securities Exchange Act of 1934 ("Exchange Act"), which govern how the SEC issues rewards to whistleblowers under its whistleblower program, to account for potential disparate treatment.¹

The first proposed amendment to Rule 21F-3 would allow the SEC to make an award for a related action that might otherwise be covered by an alternative whistleblower program even where the alternative whistleblower program has the "more direct or relevant connection" to the related action in certain circumstances. Under Exchange Act Section 21F(b) and Rule 21F-11, a whistleblower who obtains an award based on an SEC covered action also may be eligible for an award based on monetary sanctions that are collected in an action brought by certain other enumerated governmental authorities.² However, under the current rules, if the SEC determines that the other whistleblower program has the more direct or relevant connection to the action, the SEC will not deem the action a related action and any award to be made on the action must come from the other whistleblower program. Should the SEC decide that its own whistleblower program has a more direct or relevant connection to the action, then the so called "Multiple-Recovery Rule" would not allow payment unless the whistleblower waives any claim to other awards. The Multiple Recovery Rule also provides that if a whistleblower has already received an award from another program, it cannot receive an award from the SEC, and if the whistleblower has been denied an award from another whistleblower program, it cannot re-adjudicate any facts relating to the decision. The SEC proposed the amendment to Rule 21F-3 to incentivize whistleblowers to report matters to the SEC because of the potential risk that two otherwise similarly situated whistleblowers whose tips lead to successful actions could receive largely different awards based on the award program to which the actions were more direct or relevant.

The proposed rule offers four potential approaches:

The Comparability Approach

The first proposal, the Comparability Approach, would expand the circumstances under which the SEC may pay awards to whistleblowers. Specifically, if the SEC finds that another non-SEC whistleblower award program is incomparable to its own whistleblower reward program, either because of certain limitations or caps on the awards or because the award is discretionary, it may pay awards under its own whistleblower reward program. The Comparability Approach will also address situations where the maximum potential award that the non-SEC program would provide would be meaningfully lower than

the SEC-program either because the program involves a range or because it imposes a statutory cap. Accordingly, under the proposed amendment to Rule 21F-3(b)(3), if the maximum award would be less than \$5 million, the SEC would have the authority to determine whether such award is appropriate regardless of whether another program has a more direct or relevant connection to the action. Stated differently, assuming the maximum award the SEC could grant on the action is less than \$5 million, the proposed amendment would grant the SEC authority to consider the extent to which a whistleblower who obtains an award based on an SEC related action may receive an award based on monetary sanctions that are collected in a related action, without assessing which of the two comparable whistleblower programs had the more direct and relevant connection.

The Whistleblower's Choice Option

The second proposal, the Whistleblowers Choice Approach, would narrow the circumstances under which the SEC could examine the dollar amount of a potential award when making an award determination. In particular, the SEC would have the authority to examine the dollar amount of a whistleblower award for the sole purpose of increasing the dollar amount of such award, but not for the purpose of lowering the dollar amount. The Whistleblower's Choice Option would not permit the claimant to receive more than one award if they are granted awards under both the SEC's whistleblower program and another whistleblower program. Unlike the Comparability Approach, which would modify Rule 21F-3(b)(3), the whistleblower's choice option would repeal current Rule 21-F(3)(b)(3) and grant the claimant, rather than the SEC, the authority to determine which award to accept without the SEC needing to make the time-consuming determination of which award has a "direct or relevant connection" to the action.

The Offset Approach and Topping Off Approach

In addition to the Comparability Approach and the Whistleblower's Approach, the SEC is considering two other potential alternatives - the Offset Approach and the Topping Off Approach. Under both of these two approaches, a whistleblower could receive multiple whistleblower awards and the SEC would not require the whistleblower to waive their claims to a non-SEC program in order to receive an SEC reward. The difference is that under the Offset Approach, the SEC could reduce the dollar amount of its award by the dollar amount granted under another agency's program. Importantly, the SEC would only determine the amount by which it *off-sets* its award at the time of payment to whistleblowers. In other words, the SEC would not consider the fact that the whistleblower might receive an award from another program until it "offsets the award amount at the time of payment." Unlike the Offset Approach, the Topping Off Approach would maintain the construction of Rule 21F-3(b)(3), but it would grant the SEC the authority to increase its own whistleblower award if it determines another whistleblower program's award is inadequate.

Amendments Relating to Size of the Award

Pursuant to Rule 21F-6 under the Exchange Act, the SEC has the ability to consider "the dollar amount of a potential award when making an award determination." The SEC's proposed amendment to Rule 21F-6 would (i) eliminate the consideration of the dollar amount when considering whether to decrease an award but (ii) be given authority to consider the dollar amount when increasing an award. Historically, the SEC has found that when it has considered the dollar amount of the reward, more often than not it has increased the award, not decreased it. Therefore, in putting forth these proposals, the SEC is attempting to mitigate the risk that its current rules might deter a whistleblower from coming forward and to maintain confidence in its own whistleblower program.

The SEC comment period for the proposed amendments closed on April 11, 2022. If adopted, all of the proposed rule changes would apply to all new whistleblower award applications filed after the effective date of the amended final rules, as well as all whistleblower award applications that are pending and have not been the subject of a final order of the SEC by the effective date.

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¹ [Proposed rule: The Commission's Whistleblower Program Rules \(sec.gov\)](#).

² The SEC rules cover whistleblower awards in related actions brought by DOJ, an appropriate regulatory authority (as defined in Exchange Act Rule 21F-4(g)), a self-regulatory organization (as defined in Exchange Act Rule 21F-4(h)), or a state attorney general in a criminal case.

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