

# **SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Parts 240 and 249**

**[Release No. 34-64545; File No. S7-33-10]**

**RIN 3235-AK78**

## **Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934**

**AGENCY:** Securities and Exchange Commission (“Commission”).

**ACTION:** Final rule.

**SUMMARY:** The Commission is adopting rules and forms to implement Section 21F of the Securities Exchange Act of 1934 (“Exchange Act”) entitled “Securities Whistleblower Incentives and Protection.” 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 who provide the Commission with information about possible securities violations.

**EFFECTIVE DATE:** [INSERT DATE 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]

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whistleblower's contribution to the success of the related action, suggesting instead that the rule include a mechanism for inter-agency coordination to allow the Commission to understand the whistleblower's contribution to the related action.<sup>45</sup> Another commenter challenged paragraph (c) because it would preclude an award for a whistleblower in situations where the Department of Justice or another entity pursues a successful action based on a whistleblower's tip that the Commission forwarded, but the Commission does not bring an enforcement action.<sup>46</sup>

With respect to proposed paragraph (d) and the overlap with CFTC actions, one commenter commended the Commission for clarifying that the Commission will not make an award in a related action if the CFTC has already made an award to the whistleblower on that action,<sup>47</sup> while another acknowledged that there should not be double recoveries, but stated that there should be no automatic rule that would bar rewards because the interaction of the Commission and CFTC programs can be adjudicated on a case-by-case basis.<sup>48</sup>

c. Final Rule

After reviewing the comments, we have decided to adopt Rule 21F-3 substantially as proposed.<sup>49</sup> With respect to related actions, we do not believe that

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<sup>45</sup> See letter from VOICES.

<sup>46</sup> See letter from **Stuart D. Meissner, LLC**.

<sup>47</sup> See letter from Society of Corporate Secretaries.

<sup>48</sup> See letter from the National Whistleblowers Center ("NWC").

<sup>49</sup> In the final rule, we have grouped proposed paragraphs (b)-(d) together under the heading "related actions," and renumbered these paragraphs (b)(1)-(b)(3), respectively. We have also changed the term "appropriate regulatory agency" to "appropriate regulatory authority" to more closely comport with the terms of Section 21F and to clarify that our rules regarding payment for awards in connection with related actions govern actions brought by other agencies, not Commission actions. See discussion below under Rule 21F-4(g).

reactions. Some commenters urged that we eliminate this provision because it could have a sweeping effect in cutting off large numbers of potential whistleblowers, in particular in industry-wide investigations.<sup>59</sup> Other commenters supported the exclusion and suggested that it be expanded in various ways.<sup>60</sup>

Our proposed rule to preclude whistleblowers from acting “voluntarily” if they are under a pre-existing legal or contractual duty to report the violations to the Commission or another authority (Proposed Rule 21F-4(a)(3)) also generated varied comment. Some commenters opposed the exclusion on the grounds that Section 21F(c)(2) of the Exchange Act sets forth a specific list of persons whom Congress deemed to be ineligible for awards, some as a result of their pre-existing duties.<sup>61</sup> These commenters urged that the Commission should not expand these exclusions, as doing so would be inconsistent with Congressional intent and would undermine the purposes of Section 21F.<sup>62</sup> One of these commenters asserted, for example, that the proposed rule could result in barring submissions from individual employees if regulators require companies under their jurisdiction to report violations of law, and could also preclude submissions

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<sup>59</sup> See letters from Section on Corporation, Finance and Securities Law of the District of Columbia Bar (“DC Bar”), Daniel J. Hurson, Continewitty LLC.

<sup>60</sup> See letters from SIFMA (urging elimination of the exception that would permit an employee to make a voluntary submission if the employer did not produce the documents or information in a timely manner), Wells Fargo (same); NCSP (employee should be regarded as having received a request to an employer if there is a reasonable likelihood that the employee would have been contacted by the employer in responding to the request); and the Institute of Internal Auditors (should expand exclusion to other persons within the scope of a request, such as contractors, agents, and service providers).

<sup>61</sup> Section 21F(c)(2), 15 U.S.C. 78u-6(c)(2), sets forth four categories of individuals who are ineligible for whistleblower awards. These include employees of the Commission and of certain other authorities, persons who are convicted of a criminal violation in relation to action for which they would otherwise be eligible for an award, auditors in cases where a submission would be contrary to the requirements of Section 10A of the Exchange Act, and persons who fail to submit information in the form required by the Commission’s rules.

<sup>62</sup> See letters from NWC; Stuart D. Meissner, LLC; NCCMP; DC Bar; and Daniel J. Hurson.

receives information through cooperative arrangements with state and local authorities other than state Attorneys General and state securities regulatory authorities.<sup>74</sup>

As adopted, our rule retains the provision (now placed in a newly-designated paragraph (2)) that a whistleblower who receives a request, inquiry, or demand as described in paragraph (1) first will not be able to make a subsequent “voluntary” submission of information that relates to the subject matter of the request, inquiry, or demand, even if a response is not compelled by subpoena or other applicable law.<sup>75</sup>

We believe that this approach strikes an appropriate balance between, on the one hand, permitting any submission to be considered “voluntary” as long as it is not compelled, and, on the other hand, precluding a submission from being treated as “voluntary” whenever a whistleblower may have become “aware of” an investigation or other inquiry covered by the rule, regardless of whether the relevant authority contacted the whistleblower for information. A standard based on the receipt of a subpoena would go

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<sup>74</sup> We have also determined not to expand the list of authorities in Rule 21F-4(a) to include foreign authorities. Foreign authorities operate under different legal regimes, with different standards. Further, as some commenters pointed out, whether and under what circumstances the Commission may receive information obtained by a foreign authority is more uncertain than is the case of other federal authorities, and state Attorneys General or securities regulators. In addition, we may have limited ability to evaluate the scope of a request from a foreign authority to an individual, and whether it relates to the subject matter of the individual’s whistleblower submission. We note, however, that in cases where we request the assistance of a foreign authority to obtain documents or information through a memorandum of understanding, and the foreign authority sends a corresponding request to one of its country’s residents, we will treat the request as coming from us for purposes of our rule, with the result that a subsequent whistleblower submission on the same subject matter from the foreign resident will not be treated as “voluntary.”

<sup>75</sup> One commenter asked us to clarify that, after a whistleblower makes an initial voluntary submission, if the staff subsequently contacts the whistleblower and requests additional information, any information so provided will be eligible for an award. See letter from **Stuart D. Meissner, LLC**. While we agree that this should ordinarily be the case with respect to routine follow-up communications with most whistleblowers, there may be circumstances where the whistleblower’s additional provision of information would not be deemed voluntary. For example, if the whistleblower only provides us with more detailed information pursuant to a cooperation agreement with the Department of Justice, we would not view the whistleblower as having “voluntarily” provided all of the subsequent information. In addition, potential whistleblowers are cautioned that Rule 21F-8(b) requires, as a condition of award eligibility, that a whistleblower provide the staff with all additional information in the whistleblower’s possession that is related to the subject matter of the whistleblower’s submission in a complete and truthful manner.

other authorities identified in the rule. Thus, the rule would not consider as “voluntary” disclosures made by an individual who has entered into a cooperation or similar agreement with another authority, such as the Department of Justice, which requires the individual to cooperate with or provide information to the Commission, or more generally to government agencies. Further, the requirement that the contractual duty be owed to the Commission or to one of the other authorities means that whistleblowers will not be precluded from award eligibility if they are subject to a contractual duty to report information to the Commission because of an agreement with a third party. In other words, submissions from such whistleblowers will be treated as “voluntary,” assuming that the other requirements of this rule are satisfied. This clarification responds to the concerns of some commenters that employers should not be able to preclude their employees from whistleblower eligibility by generally requiring all employees to enter into agreements that they will report evidence of securities violations directly to the Commission.<sup>86</sup>

The rule also provides that a whistleblower submission will not be treated as “voluntary” if the whistleblower had a duty arising out of a judicial or administrative order to report the information to the Commission. This language covers persons such as independent monitors or consultants who may be appointed or retained as a result of Commission or other proceedings with a requirement that they report their findings, conclusions, or other information to the Commission.

Finally, this rule will not apply to an employee or a third party who has a duty of some kind to report misconduct to a company, as we believe that a wholesale exclusion

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<sup>86</sup> See letters from **Stuart D. Meissner** and Georg Merkl.

of whistleblower submissions in such cases would not effectuate the purposes of Section 21F.

*2. Rule 21F-4(b) – Original Information*

As proposed, Rule 21F-4(b)(1) tracked the definition of “original information” found in Section 21F(a)(3) of the Exchange Act, with the added requirement that the information must be provided to the Commission for the first time after the date of enactment of Dodd-Frank. We are adopting the rule as proposed.

a. Proposed Rule

Our proposed rule defined “original information” to mean information that is: (i) derived from the independent knowledge or independent analysis of the whistleblower; (ii) not already known to the Commission from any other source, unless the whistleblower is the original source of the information; (iii) not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information;<sup>87</sup> and (iv) provided to the Commission for the first time after July 21, 2010 (the date of the enactment of Dodd-Frank). The first three requirements recited the definition of “original information” found in Section 21F(a)(3) of the Exchange

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<sup>87</sup> In our Proposing Release we stated that we will interpret the term “judicial or administrative hearing” to include hearings in arbitration proceedings. See Proposing Release note 19. One commenter expressed concern that this interpretation would prevent a plaintiff in arbitration from making a whistleblower submission on the basis of his allegations and the evidence adduced at the hearing. See letter from **Stuart D. Meissner, LLC**. However, in that instance, the plaintiff would qualify as the source of the allegations, and nothing in the definition of “original information” would preclude the plaintiff from using evidence adduced at the hearing to support his or her submission to the Commission. Rather, our inclusion of arbitration hearings within the scope of the rule would preclude others who are involved with the arbitration – such as the reporter, or an arbitrator – from using the plaintiff’s allegations to make a whistleblower submission for their own benefit.

audit, supervisory, or governance responsibilities for an entity with the reasonable expectation that he or she would cause the entity to respond appropriately (proposed Rule 21F-4(b)(4)(iv)); (4) otherwise obtained through an entity's legal, compliance, audit, or similar functions or processes for identifying, reporting, and addressing potential non-compliance with law (proposed Rule 21F-4(b)(4)(v)); (5) obtained in violation of federal or state criminal law (proposed Rule 21F-4(b)(4)(vi)); and (6) obtained from any of the persons excluded by Rule 21F-4(b)(4). Certain of these exclusions were subject to exceptions that are discussed below in connection with the specific rules.

b. Comments Received

Some commenters generally criticized our approach of defining exclusions from “independent knowledge” and “independent analysis.” These commenters argued that Section 21F does not permit any exclusions from award eligibility other than those expressly provided for in Section 21F(c)(2). They also expressed concern that the proposed exclusions were vague and uncertain, and therefore would discourage potential whistleblowers from taking the personal and professional risks associated with coming forward. These commenters also believed that the exclusions would operate to disqualify broad categories of individuals who are most likely to have information about misconduct.<sup>114</sup>

In our Proposing Release, we requested comment on whether we should extend the exclusions from “independent knowledge” and “independent analysis” to other professionals (in addition to attorneys and independent public accountants) who may

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<sup>114</sup> See letters from TAF and NWC; see also letter from **Stuart D. Meissner, LLC**.

and that instead we should rely upon judicial decisions and state bar opinions to decide on a case-by-case basis whether we could use information that would otherwise be covered by the proposed exclusions.<sup>125</sup>

Many commenters who were generally supportive of the exclusions suggested modifications.<sup>126</sup> Several commenters recommended that the exclusions expressly apply to all information coming from communications subject to the attorney-client privilege, whether or not the whistleblower was an attorney, because non-attorneys are often in possession of information that is subject to the privilege.<sup>127</sup> Other commenters wanted us to modify the rules to ensure that we are not receiving privileged information.<sup>128</sup> For example, one commenter requested that the rule explicitly state that we are not seeking privileged information, and, that if such information is provided to us, we will not argue that the privilege was waived.<sup>129</sup> Other commenters recommended that the rule should exclude all information coming from communications with attorneys, even if the privilege had been waived.<sup>130</sup>

One commenter recommended that we narrow the scope of the exclusions so that, if the privileged information relates to an entity's wrong-doing and the entity does

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<sup>125</sup> See, e.g., letters from TAF; **Stuart D. Meissner, LLC**.

<sup>126</sup> See, e.g., letters from M.J. O'Loughlin; joint letter from Apache, Cardinal Health, Goodyear, HP, Merck, Microsoft, Proctor & Gamble, TRW, United Technologies ("Apache Group"); Financial Services Roundtable; and GE Group; Arent Fox LLP; CCMC.

<sup>127</sup> See letters from Apache Group; Financial Services Roundtable; and GE Group.

<sup>128</sup> See, e.g., letters from Arent Fox LLP; CCMC.

<sup>129</sup> See letter from Apache Group.

<sup>130</sup> See letter from NACD. See *also* letter from Eric Dixon, LLC.



Finally, as noted above, a number of commenters strongly objected in principle to all of our efforts to create exclusions from independent knowledge that are not expressly set forth in Section 21F, including those for independent public accountants.<sup>145</sup>

*(ii) Proposed Rules 21F-4(b)(4)(iv) and (v)*

a. Proposed Rules

Proposed Rule 21F-4(b)(4)(iv) excluded from the definitions of “independent knowledge” and “independent analysis” information obtained by a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity if the information was communicated to that person with the reasonable expectation that he or she would take appropriate steps to cause the entity to respond to the violation. Proposed Rule 21F-4(b)(4)(v) excluded information that was otherwise 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. Each rule was subject to an exception that made the exclusion inapplicable if the entity did not disclose the information to the Commission in a reasonable time, or proceeded in bad faith.

As we explained in our Proposing Release, the rationale for these proposed exclusions was our interest in not implementing Section 21F in a way that created incentives for responsible persons who are informed of wrongdoing, or others who obtain information through an entity’s legal, audit, compliance, and similar functions, to circumvent or undermine the proper operation of the entity’s internal processes for responding to violations of law. We were concerned about creating incentives for

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<sup>145</sup> Letters from NWC; NCCMP; **Stewart D. Meissner, LLC**; TAF.

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, we proposed that these exclusions would no longer apply if the entity did not disclose the information to the Commission within a reasonable time or proceeded in bad faith, thereby making an individual who knew this information eligible to become a whistleblower based upon his or her “independent knowledge” of the violations.

b. Comments Received

We received many comments expressing sharply different views on these rules. Several commenters expressed strong opposition to the proposed rules. Among other things, these commenters said that the proposed rules would preclude submissions from large numbers of individuals who were in the best position to know about misconduct at companies; that such deference to internal compliance processes is not warranted; that compliance and audit officials may be subject to retaliation, in particular in cases where senior management is implicated in wrongdoing; that the proposed rules were overly broad in their potential application to all supervisors and all employees who had any exposure to compliance and related processes even if the employee had other sources of knowledge; and that the exceptions to the proposed rules suffered from a lack of clarity that would make them unworkable in practice and would strongly discourage potential whistleblowers.<sup>146</sup>

Other commenters generally supported these exclusions in concept, but offered numerous and varied suggestions for expanding, clarifying, or modifying the proposed

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<sup>146</sup> See letters from NWC; **Stuart D. Meissner, LLC**; Daniel J. Hurson; TAF; POGO; and Mark Thomas.

Finally, commenters from diverse perspectives shared the view that aspects of the proposed rules were vague and open to subjective interpretations. Some believed that the lack of clarity could have the effect of discouraging potential whistleblowers because they would not want to risk their livelihoods and reputations in the face of uncertainty concerning whether they might be eligible for an award.<sup>152</sup> However, others suggested that vagueness would encourage persons in the categories designated in the proposed rules to make their own subjective determinations (for example, of whether a “reasonable time” had passed), and would therefore prove disruptive to internal compliance mechanisms.<sup>153</sup>

*(iii) Final Rules 21F-4(b)(4)(iii) and (v)*

After considering the comments, we are adopting the proposed rules with substantial modifications. These provisions have been combined and are now set forth in Rules 21F-4(b)(4)(iii) and (v).

As adopted, Rules 21F-4(b)(4)(iii)(A) through (C) address responsible company personnel with compliance-related responsibilities. Rule 21F-4(b)(4)(iii)(D) (in conjunction with Rule 21F-8(c)(4), discussed below) addresses independent public accountants.<sup>154</sup> Rule 21F-4(b)(4)(v) sets forth exceptions that apply to these exclusions. These rules are discussed separately below.

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<sup>152</sup> See letters from TAF, DC Bar, Daniel J. Hurson, **Stuart D. Meissner LLC**.

<sup>153</sup> See letters from ABA, Financial Services Roundtable, Society of Corporate Secretaries, Protiviti, Alcoa Group.

<sup>154</sup> We are addressing independent public accountants through the rules noted above instead of adopting proposed Rule 21F-4(b)(4)(iii). Paragraph (D) of Rule 21F-4(b)(4)(iii), discussed below, excludes from the definition of independent knowledge or analysis information that an accountant learns because of his work on an engagement required under the federal securities laws unless certain enumerated exceptions apply. Rule 21F-8(c)(4) makes a whistleblower ineligible from being considered for an award if the information is gained through an audit of financial statements required under the securities laws and the

whistleblowers about the circumstances in which their submissions will or will not make them eligible to receive an award.

Nor do we intend to suggest that an internal investigation should in all cases be completed before an entity elects to self-report violations, or that 120 days is intended as an implicit “deadline” for such an investigation. Companies frequently elect to contact the staff in the early stages of an internal investigation in order to self-report violations that have been identified. Depending on the facts and circumstances of the particular case, and in the exercise of its discretion, the staff may receive such information and agree to await further results of the internal investigation before deciding its own investigative course. This rule is not intended to alter this practice in the future.

*(c) Rule 21F-4(b)(4)(iv) - Conviction for Violations of Law*

a. Proposed Rule

Proposed Rule 21F-4(b)(4)(iv) excluded from the definition of “independent knowledge” information that a whistleblower obtained by a means or in a manner that violates applicable federal or state criminal law. We explained our preliminary view that a whistleblower should not be rewarded for violating a federal or state criminal law.

b. Comments Received

Comments on this proposal were divided. Several commenters argued that the proposal went too far in excluding information provided by whistleblowers.<sup>167</sup> One commenter explained that the exclusion would raise difficult questions involving state or

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<sup>167</sup> See, e.g., letters from **Stuart D. Meissner, LLC**; False Claims Act Legal Center; NWC; Kurt Schulzke; Patrick Burns.

federal criminal law, including who would decide whether evidence was gathered in violation of State or Federal criminal law and under what standard of proof.”<sup>168</sup>

Another commenter stated that the Government has historically been permitted to use documents without concern for how a whistleblower obtained them as long as the Government did not direct a whistleblower to take documents<sup>169</sup> and there is no reason to bar a whistleblower from obtaining an award if the Government would be permitted to use those documents.

Several commenters were supportive of the exclusion.<sup>170</sup> One, for example, stated that, even if additional securities law violations might be uncovered by illegal acts, the result would be to undermine respect for the rule of law.<sup>171</sup> Another commenter recommended that the exclusion should go beyond domestic criminal law violations to include, among other things, state and federal civil law.<sup>172</sup>

With respect to whether the exclusion should extend to violations of foreign criminal law, comments were divided.<sup>173</sup> One commenter stated that, without such an exclusion, individuals might be encouraged to break the laws of foreign countries by the

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<sup>168</sup> See letter from **Stuart D. Meissner, LLC**.

<sup>169</sup> See letter from False Claims Act Legal Center. See also letter from Patrick Burns.

<sup>170</sup> See, e.g., letters from the NSCP; the American Accounting Association; GE Group. See also letter from Wanda Bond.

<sup>171</sup> See letter from the NSCP.

<sup>172</sup> See letter from Financial Services Roundtable.

<sup>173</sup> Compare letters from Financial Services Roundtable, American Accounting Association, National Society of Corporate Responsibility, TRACE International, Inc. (supporting extending exclusion to violations of foreign law); with letters from VOICES, POGO, and Georg Merkl (opposing extending exclusion to violations of foreign law).

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.

b. Comments Received

Commenters offered competing views on the proposed interpretation of “action.” A number of commenters supported our proposed definition.<sup>234</sup> Several commenters disagreed with the proposal, urging that the Commission should aggregate multiple Commission actions arising out of a whistleblower’s submission for purposes of satisfying the \$1,000,000 threshold<sup>235</sup> because to do otherwise was to put form over substance and not fully reward whistleblowers for the information they provided that led to successful actions.<sup>236</sup>

Two other commenters argued that our definition of “action” should be narrowed so that, in a case involving multiple counts, only the counts resulting from the whistleblower’s information are considered.<sup>237</sup> These commenters were concerned that, without this limitation, the rules would encourage whistleblowers to report even minor violations in the hope that they will be grouped with more serious violations in a single action with the result that all of the sanctions in the action together meet the covered action threshold.

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<sup>234</sup> See letters from Chris Barnard, Auditing Standards Committee, and Institute of Internal Auditors.

<sup>235</sup> See, letters from VOICES, NWC, Stuart D. Meissner, LLC, Georg Merkl, and Wanda Bond.

<sup>236</sup> See letter from the NWC.

<sup>237</sup> See letters from the NSCP and SIFMA.

authority because the whistleblower will have no assurance against the possibility of adverse consequences other than “trust[ing] the [foreign] country’s regulators.”<sup>279</sup>

Another commenter stated that the Commission has no authority to compel an attorney to reveal the identity of an anonymous whistleblower, and that, in cases where we know the whistleblower’s identity, our rules should require that we notify the whistleblower, and provide the whistleblower an opportunity to seek a protective order, any time the whistleblower’s identity may be revealed.<sup>280</sup> A third commenter noted that allowing a whistleblower to remain anonymous could encourage false or overstated claims.<sup>281</sup>

Because an anonymous whistleblower must retain an attorney and because an attorney representing a whistleblower will be deemed to be practicing before the Commission, we requested comments on whether the Commission should adopt rules governing conduct by attorneys representing whistleblowers and in particular rules regarding attorneys’ fees in the representation of whistleblowers. The majority of commenters opposed the adoption of a rule regarding fees.<sup>282</sup> The rationales offered in support of this objection included that such a rule would make it nearly impossible for corporate whistleblowers to obtain attorneys to represent them in Dodd-Frank cases; excessive attorneys’ fees already are governed by state bar rules; and such a rule would interfere with the contractual relationship between a whistleblower and his or her attorney.

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<sup>279</sup> See letter from Eric Dixon, LLC; see also pre-release letter from Ruby Monroe (expressing concern for confidentiality of whistleblowers from foreign jurisdictions).

<sup>280</sup> Letter from NWC.

<sup>281</sup> Letter from Bruce McPheeters.

<sup>282</sup> See, e.g., NWC; Grohovsky Group; American Association for Justice; Continewity; Stuart D. Meissner, LLC.

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.

b. Comments Received

We received several comments on these sections. One commenter opposed the provision under which the Commission could require whistleblowers to enter into confidentiality agreements, stating that the statute does not authorize this requirement and it may violate a whistleblower's free speech rights and interfere with a whistleblower's ability to sue Commission staff.<sup>295</sup> Other commenters stated that the Commission should not add to the list of ineligible persons designated by Congress.<sup>296</sup> One commenter suggested that the provision making ineligible any whistleblower who knowingly uses a false writing or document in a submission should be redrafted to clarify that the exclusion only applies if a whistleblower does so with intent to deceive the Commission. The commenter stated that this change would permit a whistleblower to submit a false document created by someone else as evidence of that other person's or entity's wrongdoing.<sup>297</sup>

Another commenter noted that significant information could come from whistleblowers who are employees of state-owned foreign companies, and that our rule

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<sup>295</sup> Letter from NWC.

<sup>296</sup> Letters from **Stuart D. Meissner, LLC**, Chris Barnard.

<sup>297</sup> Letter from Grohovsky Group.



N. Rule 21F-15 - No Amnesty

a. Proposed Rule

Proposed rule 21F-14 stated that the provisions of Section 21F of the Exchange Act do not provide whistleblowers with amnesty or immunity for their own misconduct. However, the proposed rule noted that the Commission will take whistleblowers' cooperation into consideration in accordance with its Policy Statement Concerning Cooperation by Individuals in [SEC] Investigations and Related Enforcement Actions (17 CFR § 202.12).

b. Comments Received

We received few comments on this proposed rule. All of the commenters urged the Commission to adopt a liberal approach to granting amnesty to whistleblowers.<sup>374</sup> One commenter suggested that there will be a large group of high-quality potential whistleblowers that have concerns about their potential liability and will not come forward to report securities violations without assurances that they will not be civilly or criminally prosecuted.<sup>375</sup> Another commenter stated that there should be no firm rule on amnesty.<sup>376</sup>

c. Final Rule

We are adopting the proposed rule without modification, except that we have redesignated it as Rule 21F-15. The final rule provides notice that whistleblowers will not automatically receive amnesty if they provide information about securities violations

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<sup>374</sup> See, e.g., letters from NWC, John Wahh and Stuart D. Meissner, LLC.

<sup>375</sup> See letter from Stuart D. Meissner, LLC.

<sup>376</sup> See letter from NWC.

c. Final Rule

After reviewing the comments, we are adopting Rule 21F-16 as proposed, except that we have redesignated it as Rule 21F-17.<sup>406</sup>

Rule 21F-17(a) is necessary and appropriate because, as we noted in the proposing release, efforts to impede an individual's direct communications with Commission staff about a possible securities law violation would conflict with the statutory purpose of encouraging individuals to report to the Commission.<sup>407</sup> Thus, an attempt to enforce a confidentiality agreement against an individual to prevent his or her communications with Commission staff about a possible securities law violation could inhibit those communications even when such an agreement would be legally unenforceable,<sup>408</sup> and would undermine the effectiveness of the countervailing incentives that Congress established to encourage individuals to disclose possible violations to the Commission.<sup>409</sup>

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<sup>406</sup> We have modified the rule text to make clear that it applies to any individual seeking to report possible securities law violations to the Commission, and not just those who provide information to us pursuant to the procedures set forth in Rule 21F-9(a).

<sup>407</sup> Based on the suggestion of a commenter, we wish to clarify that confidentiality agreements or protective orders entered in SRO arbitration or adjudicatory proceedings may *not* be used to prevent a party from reporting to us possible securities law violations that he or she discovers during the proceedings. See letter from **Stuart D. Meissner, LLC**. Indeed, given that the SRO's are charged with helping us enforce the federal securities laws, it would be an odd result if one party in an SRO proceeding could use a protective order to prevent another party from reporting a possible securities law violation to us.

<sup>408</sup> 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").

<sup>409</sup> 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. Paragraph (a) of the proposal is not intended to prevent professional or religious

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.

The Commission did not receive any comments that directly addressed its Paperwork Reduction Act analysis or its burden estimates.<sup>417</sup> In comments on the rule proposals, a number of commenters suggested that the three-form process proposed for obtaining information from whistleblowers was burdensome.<sup>418</sup> As we discuss in connection with Rule 21F-9, our final Rules require largely the same information to be collected, but in response to comments we have combined the information collection into only two forms -- Form TCR, which incorporates several questions previously posed on Proposed Form WB-DEC, and Form WB-APP -- to simplify the process for whistleblowers.

A. Summary of Collection of Information

Form TCR, submitted pursuant to Rule 21F-9, requests the following information:

1. Background information regarding each complainant submitting the TCR, including the person's name and contact information. We have added a section for the identification of additional complainants.
2. If the complainant is represented by an attorney, the name and contact information for the complainant's attorney (in cases of anonymous submissions the person must be represented by an attorney);

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<sup>417</sup> We received one comment generally opining that our proposed rules failed to adequately account for the time expended by counsel in representing whistleblowers that extends beyond the completion of our proposed forms. See letter from **Stuart D. Meissner, LLC** at n. 3.

<sup>418</sup> See, e.g., letters from Jane Liu; NWC; Patrick Burns.