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## The SEC Amends Whistleblower Rules in Attempt to Bring Added Efficiency and Transparency to Program

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On September 23, 2020, the Securities and Exchange Commission (SEC) adopted amendments to the rules of its whistleblower program in a 3-2 vote split along political party lines. The agency says that the amendments will bring more clarity for whistleblowers and will make the program more efficient and transparent. The SEC's Office of the Whistleblower (OWB) also issued additional guidance regarding the process for determining award amounts for eligible whistleblowers. The SEC press release announcing the order is available [here](#), the final rule is available [here](#), and the additional guidance from the OWB is available [here](#).

Under the whistleblower program, which was enacted as part of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, a whistleblower is eligible for an award in an amount equal to between 10% and 30% of the fines levied in a covered SEC enforcement action that results from the whistleblower's tip if the fines total more than \$1 million. In determining an award amount, the SEC analyzes certain factors set forth in Exchange Act Rule 21F-6, including positive factors (such as the significance of the information provided by the whistleblower, the level of assistance provided by the whistleblower, and the law-enforcement interest in deterring the specific violation) and negative factors (such as the whistleblower's culpability for the violation and unreasonable delay in reporting).

The SEC says that the amendments clarify the agency's discretion in determining award amounts and increasing efficiencies around the review and processing of whistleblower award claims. One attempt to achieve these efficiencies was an amendment to the rules relating to whistleblower awards of \$5 million or less. Specifically, for awards where the statutory maximum amount of the covered action and any related actions is \$5 million or less, the SEC has added a new rule providing a presumption that a meritorious whistleblower will be paid the statutory maximum amount (30% of total monetary sanctions collected in the enforcement action), provided no negative factors exist. As awards of \$5 million or less constitute 75% of the awards given out in the whistleblower program, the SEC claims this amendment will allow it to process whistleblower claims more efficiently and issue awards at a faster pace.

In contrast, for awards over \$5 million, the SEC will continue to issue awards based on the application of positive and negative award factors. The amendments affirm the SEC's discretion in applying the award factors and setting the award amount, including the discretion to apply the award factors in percentage terms, dollar terms or

some combination of the two. The SEC decided not to adopt a formalized process for the SEC to conduct an enhanced review of certain awards involving penalties in excess of \$100 million, which had been proposed by the SEC in 2018. The SEC stated that the proposed amendment was not necessary because the SEC already had the authority to take into account the award amount in determining award percentage, which would allow it to scrutinize large awards if it desired to do so. Notably, in a footnote in the final order, the SEC stated that “based on the historical application of the award factors, if none of the negative [award factors] are present, the award amount would be expected to be in the top third of the award range,” implicitly confirming that large awards would still be eligible for the top of the 10%-30% award range.

The two Democratic SEC commissioners who dissented from the final rule, Allison Herren Lee and Caroline A. Crenshaw, emphasized their concern with the level of discretion that the final rule gives the agency to take into account the amount of an award in determining award percentage, the underlying concern being that threat of reduction of a large award could create uncertainty and thereby discourage future whistleblowers.

The final rule further states that in order for an individual to obtain whistleblower status that is eligible for an award, and to be accorded confidentiality and retaliation protection, the individual must provide the SEC with information about the possible securities laws violations “in writing”. Commissioner Crenshaw expressed concern over this part of the final rule because by limiting the retaliation protections to whistleblowers who submit information “in writing”, the SEC “fails to do all we can to protect those who cooperate with our exams and investigations,” such as interviews and testimony where the whistleblower provides information to the SEC orally.

Among other changes, the final rule also clarifies that the form of an SEC enforcement action does not affect whether the action may be considered in determining the amount of a whistleblower award. The SEC may award payments to whistleblowers based on money collected as a result of deferred prosecution agreements and non-prosecution agreements entered into by the U.S. Department of Justice, as well as under settlement agreements entered into by the SEC outside of the context of a judicial or administrative proceeding to address violations of securities laws.

The whistleblower program is viewed as being an important tool in the SEC’s protection of investors. According to the SEC, the agency has issued approximately \$523 million in awards to 97 whistleblowers since the program began, and the SEC actions associated with those awards have resulted in financial remedies totaling more than \$2.5 billion, most of which has been, or is scheduled to be, returned to harmed investors. Significantly, the pace at which the SEC has been processing whistleblower cases and making awards has been accelerating in recent years. The amendments to the whistleblower rules will become effective 30 days after publication in the Federal Register.

We invite you to contact us directly if you have any questions regarding the new whistleblower rules or OWB



guidance.