

SEC Whistleblower Program Rules Changed Without Formal Rulemaking

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On September 23, 2020, the U.S. Securities and Exchange Commission (SEC) issued its [final rules](#) adopting several amendments to its [whistleblower program rules](#), which were part of its 2018 notice of proposed rulemaking.

However, in the final version of the rules, Rule 21F-10(d) and Rule 21F-11(d) were modified without any notice to the public and without the notice and comment obligations required by law.

The regulations as changed in September 2020 permit a commissioner to review a preliminary determination *before* it is submitted to the whistleblower. However, the rules do not detail the actions a commissioner may take after reviewing the preliminary determination.

The SEC should conduct a formal rulemaking to address the modification of Rule 21F-10(d) and Rule 21F-11(d) of the whistleblower program made in the 2020 rulemaking, as the amendments were not subject to public notice and comment, as required by law.

History of Rules 21F-10(d) and 21F-11(d)

On November 17, 2010, the SEC published a notice of proposed rules governing the [Dodd-Frank whistleblower program](#) in the Federal Register. The Proposed Rules required the CRS to issue a preliminary determination and thereafter provide the whistleblower with a copy for review and comment. There was no provision for a commissioner to be provided with a copy of the initial preliminary determination prior to the opportunity for the whistleblower to review and comment on it.

In 2011, the Commission established the process for receiving a whistleblower award. Upon receipt of the whistleblower's application, the Claims Review Staff would: (1) make a preliminary determination, (2) provide that preliminary determination to the whistleblower for comment, and (3) revise the preliminary determination and submit it to the Commissioners for final review.

The 2020 changes to Rules 21F-10(d) and 11(d) allow a preliminary determination drafted by the Claims Review Staff (CRS) to be reviewed by one or more of the SEC Commissioners before it is

provided to the whistleblower. The actions a commissioner may take after reviewing the preliminary determination are not discussed, and there are no rules or deadlines governing this review process.

Under the regulations from 2011 to 2020, the CRS's preliminary determination was provided directly to the whistleblower for comment.

Specifically, the key language of Rule 21F-10(d), *supra* II.3, was modified by inserting a parenthetical, allowing the Commission to review a preliminary determination of the CRS. No rulemaking was ever issued regarding this modification to Rule 21F-10(d). No regulations or procedures identify the time and manner in which a commissioner should review a preliminary determination. There was no notice or opportunity for public comment regarding this change.

A Formal Rulemaking is Needed

The Commission should issue a rulemaking regarding the 2020 modification to Rule 21F-10(d) as required by the Exchange Act of 1934 § 4A(b). The Commission must prescribe the time and manner of review that Commissioners may exercise over the initial preliminary determination of the Claims Review Staff (i.e., the preliminary determination drafted by the CRS that would be shown to the Commissioners before that determination is provided to the whistleblower, with an opportunity for the whistleblower to comment on the preliminary determination).

Because the Commission has the right to issue the Final Determination, Commissioners can fully participate in the decision-making process *de novo*, even if they do not review the initial preliminary determination.

In the meantime, this provision should be suspended until the Commission publishes regulations and procedures, interim or otherwise, setting forth the time and manner in which a commissioner should review a preliminary determination.

The [press release](#), which announced the final 2020 amendments to the whistleblower program rules, emphasized the importance of “clarity, efficiency, and transparency” in the program’s success. Instituting a rulemaking proceeding regarding the changes to Rules 21F-10(d) and 11(d) is consistent with these goals.

Changing the amendment would promote the efficiency and expediency of the whistleblower process. The insertion of the Commission’s right to review the initial preliminary determination without limitations on the time and manner of review runs counter to these program objectives. Instituting a rulemaking proceeding regarding the changes to Rule 21F-10(d) is consistent with combating undue delay and promoting whistleblower due process.

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