

# New SEC Presumption in Favor of Granting Maximum Award to Meritorious Whistleblowers

By [Marilyn Gabriela Robb](#)

July 2, 2021

Under the [Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010](#), the Securities and Exchange Commission (SEC or the Commission) rewards eligible whistleblowers who voluntarily provide the Commission with original, timely, and credible information that leads to a successful enforcement action. When the monetary sanctions exceed \$1 million, the whistleblower award amount may be between 10% and 30% of the total monetary sanctions collected in the Commission's action or any related action.

Since 2012, the SEC has awarded approximately \$938 million to 179 individuals. Payments are made out of an investor protection fund established by Congress that is financed through monetary sanctions paid to the SEC by securities law violators.

In September of 2020, the SEC voted to amend the rules governing its whistleblower program. One such amendment added subsection (c) to Exchange Act Rule 21F-6, the rule establishing the criteria that the Commission applies when determining the amount of a whistleblower's award. The amendment created a presumption in favor of awarding the maximum statutory award of close to 30% to whistleblowers who are eligible for a maximum potential award of \$5 million or less. The factors applied to decide the appropriate award are still used and are reviewed below.

## Factors that May Lead to a Greater Award

The Commission has the discretion to determine the appropriate award amount in each case, and the rules list certain positive factors that weigh in favor of a higher award amount:

**Significance of the information provided by the whistleblower.** The Commission is likely to issue a higher award to whistleblowers who provide information that is reliable, complete, and significantly supports one or more of the successful claims brought by the Commission. In those cases, the Commission makes higher awards because with better information from whistleblowers, the Commission has to use fewer resources and less time to investigate the claims and bring a successful action.

**Assistance provided by the whistleblower.** Whistleblowers who provide more assistance to the Commission are more likely to obtain a higher award. Whistleblowers can greatly assist SEC investigations by providing ongoing, extensive, and timely assistance. This may include helping to explain complex transactions, interpreting key evidence, or identifying new and productive lines of inquiry. Other factors here include the timeliness of the whistleblower's initial report, the resources conserved as a result of the whistleblower's assistance, whether the whistleblower connected the Commission with others who assisted in the investigation, and the efforts undertaken by the whistleblower to remediate the harm caused by the violations. This last factor could include assisting the authorities in the recovery of the fruits and instrumentalities of the violations. Lastly, under this prong, the Commission also considers any hardships that whistleblowers experience as a result of their reporting and assisting in the enforcement action.

**Law enforcement interest.** The Commission may issue a higher award when doing so advances the SEC's law enforcement interests, such as by enhancing the Commission's ability to enforce the Federal securities laws and protect investors, or encouraging the submission of high quality information from whistleblowers. This factor may support a higher award where the subject matter of the action is a Commission priority, where the reported misconduct involves regulated entities or fiduciaries, where the whistleblower exposed an industry-wide practice, or when the reported securities violations are particularly severe, widespread, or have persisted undetected for a significant period of time. The Commission may also consider the dangers to investors or others presented by the reported violations.

**Participation in internal compliance systems.** Whistleblowers who participate in internal compliance systems before, or at the same time as, they report violations to the Commission, may be eligible for higher awards. Accordingly, while internal reporting is not required to be considered for an award, the SEC whistleblower award program incentivizes whistleblowers to report internally to their companies' compliance personnel before going to the SEC.

If whistleblowers report internally, and also to the SEC within 120 days, then the SEC will consider the date of the internal report, rather than the date that the whistleblower reported to the SEC, when evaluating a potential award. Furthermore, if the company conducts an investigation based on a whistleblower's internal report and then reports the results to the SEC, a whistleblower may benefit from all the information the company's investigation uncovers.

While compliance and internal audit professionals generally are not considered eligible for SEC whistleblower awards, such personnel may become eligible whistleblowers if the whistleblower reasonably believes that the disclosure may prevent substantial injury to the financial interest or property of the entity or investors; if the whistleblower reasonably believes that the entity is engaging in conduct that will impede an investigation, or; at least 120 days have elapsed since the whistleblower reported the information to his or her supervisor or the entity's audit committee, chief legal officer, chief compliance officer, or since the whistleblower received the information, if the whistleblower received it under circumstances indicating that these people were already aware of the information.

## Factors that May Lead to a Reduced Award

Other factors may lead the Commission to reduce the award to an eligible whistleblower:

**Culpability.** Whistleblowers who were a participant in, or culpable for, the reported securities law violation(s), may receive a reduced award. Notably, such individuals are not ineligible for an award. In assessing an award reduction on these grounds, the SEC may consider the whistleblower's education, training, experience, and position of responsibility at the time the violations occurred; whether the whistleblower acted with scienter; whether the whistleblower benefitted from the violation(s); whether the whistleblower has previously contributed to similar violations; the egregiousness of the underlying fraud; and whether the whistleblower knowingly interfered with the SEC's investigation of the violations or related enforcement actions.

**Unreasonable reporting delay.** The Commission may reduce an award where the whistleblower was aware of the relevant facts but failed to take reasonable steps to report or prevent the violations from occurring or continuing. The Commission will consider whether there was a legitimate reason for the whistleblower to delay reporting.

**Interference with internal compliance and reporting systems.** The Commission may issue a reduced award to whistleblowers who interfere with their company's internal compliance and reporting systems, by, for example, making false statements to the compliance department that hindered its efforts to investigate possible wrongdoing.

## New Presumption in Favor of Maximum Award

The new section (c) added to Rule 21F-6 in September 2020 establishes a maximum award of 30% of the total monetary sanctions collected but caps the maximum award at \$5 million. Though this \$5 million cutoff restricts the application of the presumption, nearly 75% of all whistleblower awards to date have been less than \$5 million. Therefore, nearly 75% of all whistleblower awards going forward are likely to be eligible for the presumed statutory maximum award under Rule 21F-6(c).

This presumption does not apply if any of the negative award criteria specified in Rule 21F-6(b), and discussed above, are present. In other words, a whistleblower who bears some culpability in the underlying securities violations, who unreasonably delays reporting, or who interferes with a company's internal compliance processes or reporting program, will not benefit from the presumption in favor of the maximum award amount. Nor does the presumption apply where the award claim triggers Rule 21F-16, which concerns whistleblowers who engage in culpable conduct.

Even absent the negative award factors, the Commission retains discretion to deny a maximum award. The Commission may make such a determination if the whistleblower provided only limited

assistance, or if applying the presumption would be otherwise “inconsistent with the public interest, the promotion of investor protection, or the objectives of the whistleblower program.” For example, if a whistleblower engaged in securities law violations that were unrelated to the present action, the Commission could in its discretion ignore the presumption and award less than the statutory maximum award.

Where more than one whistleblower contributes to a successful enforcement action, and at least one of the multiple meritorious whistleblowers would qualify for the presumption if that individual were the sole meritorious whistleblower, then the total aggregate award paid to all meritorious whistleblowers will be the statutory maximum.

## Conclusion

Prior to the adoption of Exchange Act Rule 21F-6(c), the Commission would consider the positive factors of Rule 21F-6(a), together with the negative factors of Rule 21F-6(b), to arrive at an award between 10% and 30% of the total monetary sanctions collected in the covered action. Now, except when the maximum award would exceed \$5 million, the Commission begins with the presumption that the whistleblower is entitled to the maximum award. This new presumption furthers the goals of the SEC Whistleblower Program to incentivize individuals to report possible securities laws violations to the Commission. It also adds some predictability and transparency to the determination of award amounts.

In an [order from March 29, 2021](#), the Commission applied the new presumption to award the statutory maximum to two whistleblowers who both contributed to a successful enforcement action. In awarding a higher allocation to one of the claimants, the Commission noted that that claimant reported information that was more significant to the SEC’s investigation, so it is clear that the positive factors in Rule 21F-6(a) —the significance of the information and the participation in internal compliance systems—remain relevant to the Commission’s discretionary determinations, and also to the determination of award allocations among multiple whistleblowers.

Those with original information about potential securities violations should retain experienced counsel to help them navigate the laws regarding when a whistleblower may be eligible for an award, how a whistleblower can maximize his or her potential award, and when a whistleblower is protected from [employment retaliation](#) for reporting violations.