Rules and Regulations

Federal Register

Vol. 80, No. 153

Monday, August 10, 2015

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 241

[Release No. 34–75592]

Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation.

SUMMARY: The Securities and Exchange Commission (Commission or SEC) is issuing this interpretive rule to clarify that, for purposes of the employment retaliation protections provided by Section 21F of the Securities Exchange Act of 1934 (''Exchange Act''), an individual's status as a whistleblower does not depend on adherence to the reporting procedures specified in Exchange Act Rule 21F–9(a), but is determined solely by the terms of Exchange Act Rule 21F–2(b)(1).

DATES: Effective August 10, 2015.

FOR FURTHER INFORMATION CONTACT: Jane Norberg, Deputy Chief of the Office of the Whistleblower, Division of Enforcement, at (202) 551–4790; Brian A. Ochs, Senior Special Counsel, Office of the General Counsel, at (202) 551–5067; Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION:

I. Background

In Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 12 4 Stat. 1376, 1841–49 (2010), Congress amended the Exchange Act to add Section 21F, 15 U.S.C. 78u-6(h)(1), entitled ''Securities Whistleblower Incentives and Protection.'' Section 21F established a series of new incentives and protections for individuals to report possible violations of the federal securities laws. Generally speaking, these incentives and protections take three forms—monetary awards for providing information, heightened confidentiality assurances, and enhanced employment retaliation protections.

In May 2011, the Commission issued legislative rules (''whistleblower rules'') after notice-and-comment rulemaking to implement the provisions of Section 21F. The Commission is now issuing this interpretive rule to clarify the meaning and application of certain of those rules. As explained below, an individual may qualify as a whistleblower for purposes of Section 21F's employment retaliation protections irrespective of whether he or she has adhered to the reporting procedures specified in Rule 21F–9(a). Rule 21F–2(b)(1) alone governs the procedures that an individual must follow to qualify as a whistleblower eligible for Section 21F's employment retaliation protections.

II. Interpretation

When we promulgated our legislative rules to implement the whistleblower program, we recognized that Section 21F is ambiguous on the issue of the scope of the employment retaliation protections afforded thereunder. On the one hand, Section 21F(h)(1)(A) includes a broad catchall provision that prohibits an employer from, among other things, retaliating against a whistleblower for ''making disclosures that are required or protected under'' the Sarbanes-Oxley Act of 2002, the Exchange Act, 18 U.S.C. 1513(e), ''and any other law, rule, or regulation subject to the jurisdiction of the Commission.'' [1] As the Commission explained in the adopting release that accompanied the whistleblower rules, the reporting covered by this provision includes ''report[s] to persons or governmental authorities *other than the Commission*.'' [2] But on the other hand, the employment retaliation protections afforded to whistleblowers under Section 21F could be read as limited to only those individuals who provide the Commission with information; this is because under Section 21F(a)(6) the ''term 'whistleblower' means any individual who provides . . . information relating to a violation of the securities laws *to the Commission,* in a manner established, by rule or regulation, by the Commission.'' (Emphasis added).

To resolve this ambiguity, the Commission in Rule 21F–2 promulgated two separate definitions of ''whistleblower.'' These two definitions apply in different circumstances and each involves its own specified reporting procedures that must be satisfied in order for an individual to qualify under the particular definition. The first definition, which is set forth in Rule 21F–2(a), mirrors the statutory definition of whistleblower. It provides in pertinent part that an individual is ''a whistleblower if, alone or jointly with others, [the individual] provide[s] the Commission with information pursuant to the procedures set forth in [Rule] 21F–9(a).'' This definition of whistleblower applies *only* to the award and confidentiality provisions of Section 21F.

The second whistleblower definition, which is set forth in Rule 21F–2(b)(1), provides in pertinent part that, ''*[f]or purposes of the anti-retaliation protections* afforded by Section 21F(h)(1) of the Exchange Act . . . , [an

[1] Section 21F(h)(1)(A) provides as follows: ''(A) In General. No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—(i) in providing information to the Commission in accordance with this section; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*), this chapter [*i.e.,* the Exchange Act], including section 78j–1(m) of this title [*i.e.,* Section 10A(m) of the Exchange Act], section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.''

Clause (iii), which is a catchall provision, provides employment retaliation protection for certain internal reporting at public companies and for certain disclosures to the U.S. Department of Justice by expressly incorporating the ''disclosures that are required or protected under the Sarbanes-Oxley Act,'' which includes Sarbanes-Oxley Section 806. Section 806, in turn, prohibits employment retaliation against an employee of a public company (or a subsidiary thereof) based on certain disclosures of securities law violations to ''a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discovery, or terminate misconduct)'' or to a ''Federal regulatory or law enforcement agency.'' 15 U.S.C. 1514A(1).

[2] Securities Whistleblower Incentives and Protections, 76 FR 34300, 34304 (June 13, 2011) (emphasis in original).

individual is] a whistleblower if . . . [the individual] provide[d] that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act[.]'' Rule 21F–2(b)(1)(ii). This definition—unlike the whistleblower definition in Rule 21F–2(a) that applies to the award and confidentiality provisions—does not require reporting in accordance with Rule 21F–9(a)'s procedures.

We also adopted Rule 21F–9(a) to specify the reporting procedures that must be followed by an individual who seeks to qualify as a whistleblower under Rule 21F–2(a) and thus to be eligible for an award and the heightened confidentiality protections. Rule 21F–9(a) provides in pertinent part that, ''[t]o be considered a whistleblower under Section 21F . . . , [an individual] must submit [his or her] information . . . by either of these methods: (1) Online, through the Commission's Web site . . . ; or (2) By mailing or faxing a Form TCR . . . to the SEC Office of the Whistleblower . . . .''

Since our adoption of the whistleblower rules, we have consistently understood Rule 21F–9(a) as a procedural rule that applies *only* to help determine an individual's status as a whistleblower for purposes of Section 21F's award and confidentiality provisions.[3] Similarly, it has been our consistent view that Rule 21F–2(b)(1) alone controls the reporting methods that will qualify an individual as a whistleblower for the retaliation protections.

Notwithstanding our view that Rule 21F–2(b)(1) alone controls in the context of determining the relevant reporting procedures for an individual to qualify as a whistleblower eligible for Section 21F's employment retaliation protections, the Court of Appeals for the Fifth Circuit expressed some uncertainty about this reading in a recent decision.[4] Although we appreciate that if read in isolation Rule 21F–9(a) could be construed to require that an individual must report to the Commission before he or she will qualify as a whistleblower eligible for the employment retaliation protections provided by Section 21F, that construction is not consistent with Rule 21F–2 and would undermine our overall goals in implementing the whistleblower program. We reach this conclusion for several reasons.

First, as the text of Rule 21F–2(b)(1) states, ''for purposes of Section 21F's employment retaliation protections,'' an individual qualifies as a whistleblower entitled to the employment retaliation protection whenever he or she makes any of the broader array of disclosures specified in Section 21F(h)(1)(A).[5] The fact that Rule 21F–2(b)(1) expressly and specifically applies in the employment retaliation context demonstrates that it should control over Rule 21F–9(a).[6]

Second, Rule 21F–2(b)(1)(iii) expressly provides that ''[t]he anti-retaliation protections apply whether or not [an individual] satisf[ies] the requirements, procedures and conditions to qualify for an award.'' As Rule 21F–2(a)(2) makes plain, the reporting procedures specified in Rule 21F–9(a) are among the procedures that an individual must follow to recover an award. The contrast between these provisions further supports our interpretation that the availability of employment retaliation protection is not conditioned on an individual's adherence to the Rule 21F–9(a) procedures.[7]

Finally, our interpretation best comports with our overall goals in implementing the whistleblower program. Specifically, by providing employment retaliation protections for individuals who report internally first to a supervisor, compliance official, or other person working for the company that has authority to investigate, discover, or terminate misconduct, our interpretive rule avoids a two-tiered structure of employment retaliation protection that might discourage some individuals from first reporting internally in appropriate circumstances and, thus, jeopardize the investor-protection and law-enforcement benefits that can result from internal reporting.[8] Under our interpretation, an individual who reports internally and suffers employment retaliation will be no less protected than an individual who comes immediately to the Commission. Providing equivalent employment retaliation protection for both situations removes a potentially serious disincentive to internal reporting by employees in appropriate circumstances. A contrary interpretation would undermine the other incentives that were put in place through the Commission's whistleblower rules in order to encourage internal reporting.[9]

For the foregoing reasons, we are issuing this interpretation to clarify that, for purposes of Section 21F's employment retaliation protections, an individual's status as a whistleblower does not depend on adherence to the reporting procedures specified in Rule 21F–9(a).

List of Subjects in 17 CFR Part 241

Securities.

Amendments to the Code of Federal Regulations

For the reasons set out above, the Commission is amending title 17, chapter II of the Code of Federal Regulations as set forth below:

[3] *See generally* SEC Staff Report, 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program, 19 (available at: *http://www.sec.gov/about/offices/owb/annual-report-2014.pdf*) (explaining that from the time it promulgated the whistleblower rules, the Commission has taken the view that the employment retaliation protections ''apply not just to individuals who report to the SEC but also to individuals when they, among other things, report potential securities law violations internally at public companies''; also explaining that the Commission has ''consistently'' opposed the contrary interpretation).

[4] *Asadi* v. *G.E. Energy (U.S.A.), L.L.C.,* 720 F.3d 620, 630 (5th Cir. 2013).

[5] In contrast, Rule 21F–2(a)(2) states that ''[t]o be eligible for an award,'' an individual must submit original information ''to the Commission in accordance with the procedures and conditions described in Rules 21F–4, 21F–8, *and 21F–9.*'' (Emphasis added). In addition, Rule 21F–2(a)(1) specifically cross-references the procedures set forth in Rule 21F–9(a), whereas Rule 21F–2(b)(1) does not contain a similar cross-reference.

[6] *See, e.g., In re Gulevsky,* 362 F.3d 961, 963 (7th Cir. 2004) (''[W]hen both a specific and a general provision govern a situation, the specific one controls.'') (quoting *Morales* v. *Trans World Airlines, Inc.,* 504 U.S. 374, 384–85, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992)).

[7] We note that, other than Rule 21F–2(b), all of the other rules that the Commission adopted to implement the whistleblower program deal exclusively with the award and confidentiality provisions.

[8] We note that a contrary interpretation would also create a two-tiered scheme of employment retaliation protection even as between individuals who report possible securities fraud violations or violations of SEC rules or regulations to the Commission; specifically, if an individual comes forward to report information to the Commission in a manner *other than those specified in Rule 21F–9(a),* that individual would not qualify for the employment retaliation protections of Section 21F. *See* Section 21F(h)(1)(A)(i) & (ii). But under our reading of Section 21F and the whistleblower rules, such individuals would be afforded employment retaliation protection under the catchall language of Section 21F(h)(1)(A)(iii)—which incorporates the protections of Section 806 of the Sarbanes-Oxley Act—irrespective of the fact that they did not comply with the technical reporting requirements of Rule 21F–9(a).

[9] *See, e.g.,* Exchange Act Rule 21F–4(c)(3) (providing that an individual who reports internally can collect a whistleblower award from the Commission if his internal report to the company or entity results in a successful covered action); Exchange Act Rule 21F–4(b)(7) (providing that an individual who first reports pursuant to an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law and within 120 days reports to the Commission will be treated for purposes of an award as if the submission to the Commission had been made at the earlier internal reporting date); Exchange Act Rule 21F–6(a)(4) (providing that when determining the amount of an award, the Commission will consider as a plus-factor the whistleblower's participation in an entity's internal compliance procedures).

PART 241—INTERPRETATIVE RELEASES RELATING TO THE SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND REGULATIONS THEREUNDER

■ 1. Part 241 is amended by adding Release No. 34–75592 to the list of interpretive releases to read as follows:

Subject	Release No.	Date	Federal Register Vol. and page
* * *	*	*	* * *
Interpretation of the SEC's Whistleblower Rules under Section 21F of the Securities Exchange Act of 1934.	34–75592	Aug. 4, 2015	[Insert FR Volume Number] FR [Insert FR Page Number].

By the Commission.

Dated: August 4, 2015.

Brent J. Fields,

Secretary.

[FR Doc. 2015–19508 Filed 8–7–15; 8:45 am]

BILLING CODE 8011–01–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 422

[Docket No. SSA–2014–0042]

RIN 0960–AH68

Social Security Number Card Applications

AGENCY: Social Security Administration.

ACTION: Final rule.

SUMMARY: This final rule adopts the notice of proposed rulemaking (NPRM) we published in the **Federal Register** on February 26, 2015. This rule revises our regulations to allow applicants for a Social Security number (SSN) card to apply by completing a prescribed application and submitting the required evidence. We are also removing the word ''documentary'' from our description of certain evidence requirements and replacing ''Immigration and Naturalization Service'' with ''Department of Homeland Security'' to reflect that agency's creation. These changes will provide more flexibility in the ways in which the public may request SSN cards and allow us to implement an online SSN replacement card application system.

DATES: This rule is effective September 9, 2015.

FOR FURTHER INFORMATION CONTACT: Arthur LaVeck, Office of Retirement and Disability Policy, Office of Income Security Programs, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 966–5665. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION: The use of the SSN is widespread in today's society. It is necessary for employment, to record properly a person's wages and the taxes paid on those wages, to collect Social Security benefits, and to receive many other government services. Commercial organizations, such as banks and credit companies, also ask individuals for their SSNs for many business transactions. Because of this widespread use, the issuance of original and replacement SSN cards is one of our most requested services.

Currently, a person can apply for an SSN by completing Form SS–5 and submitting it, in person or via mail, to his or her local field office (FO) or a Social Security Card Center, or by having one of our representatives file an application electronically through the Social Security Number Application Process during an in-office interview. The applicant must also present, or mail in, supporting documentary evidence.

To ensure that our regulations support the development of convenient and efficient electronic service delivery options, we are updating 20 CFR 422.103 and 422.110 to remove the requirement that an individual who seeks a replacement SSN card must file an application at any Social Security office. We are also removing references to Form SS–5 and replacing it with the term ''prescribed application.'' A prescribed application would simply be the application form—whether a paper form, an online application, or some other method—that we determine to be most efficient and user-friendly at any given time. Information about application procedures is easily available to applicants on our Internet site and at our offices nationwide.

We are also revising 20 CFR 422.107 to remove the word ''documentary'' from our description of evidence required to obtain an original or replacement SSN card. In order to obtain a new or replacement card, applicants may provide or we may obtain evidence to establish eligibility and identity through data matches or other agreements with government agencies or other entities that we determine can provide us with appropriate and secure verification of the applicant's true identity and other eligibility factors. These changes will provide us the flexibility to adapt our SSN application process as necessity and technology allow.

We are developing and will release—via a gradual, state-by-state rollout—a new online application that will allow adult U.S. citizens who are not reporting any changes to their record (for example, name or date of birth) to apply for replacement SSN cards electronically online after registering through the *my* Social Security portal. Eligible individuals would also be required to have a U.S. mailing address, (including Air/Army Post Office and Fleet Post Office) and a valid U.S. state-issued driver's license or U.S. state-issued identity card.

Our new electronic SSN replacement card application will expand our service options to meet the varied needs of the public in a cost-efficient and environmentally responsible way, while maintaining the security and integrity of the SSN replacement card issuance process. The application will allow customers to complete a request for a replacement SSN card at any time, without the need to travel, sometimes long distances, to apply in person. We also anticipate that this initiative will