

Whistleblower Protection Reform Act of 2021 Amendments to
Section 21F of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-6

New text underlined

(a) Definitions

In this section the following definitions shall apply:

(1) Covered judicial or administrative action

The term “covered judicial or administrative action” means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding \$1,000,000.

(2) Fund

The term “Fund” means the Securities and Exchange Commission Investor Protection Fund.

(3) Original information

The term “original information” means information that--

(A) is derived from the independent knowledge or analysis of a whistleblower;

(B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and

(C) is 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.

(4) Monetary sanctions

The term “monetary sanctions”, when used with respect to any judicial or administrative action, means--

~~**(A)** any monies, including penalties, disgorgement, and interest, ordered to be paid; and~~

(A) any monies, including penalties, disgorgement, and interest, ordered to be paid or otherwise ordered as relief, including in—

(i) a non-prosecution agreement entered by the Attorney General;

(ii) a deferred prosecution agreement entered by the Attorney General; and

(iii) a agreement entered by the Commission to settle a covered judicial or administrative proceeding; and

(B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action; and

(C) any monies recovered by a bankruptcy trustee as a result of the original information provided by a whistleblower.

(5) Related action

The term “related action”, when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

~~**(6) Whistleblower**~~

The term **(6) Whistleblower**

(A) In general the term “whistleblower” means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.

(B) Special rule

Solely for the purposes of subsection (h)(1), the term ‘whistleblower’ shall also include any individual who takes an action described in subsection (h)(1)(A), or two or more individuals acting jointly who take an action described in sub-section (h)(1)(A), including as part of the job duties of such individual or individuals.

(b) Awards

(1) In general

In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to--

(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

(2) Payment of awards

Any amount paid under paragraph (1) shall be paid from the Fund.

(3) Related actions

When determining whether to pay an award to a whistleblower in a related action, the Commission may not consider whether another whistleblower reward program has a more direct or relevant connection to such related action based on information provided by such whistleblower.

(3) Timely processing of claims

(A) Initial disposition

(i) In general

Except as pro-vided in subparagraph (B), the Commission shall make an initial disposition with respect to any claim timely submitted by a whistleblower for an award under this section not later than 1 year after the submission deadline established by the Commission, by rule, for a whistleblower to file a claim.

(ii) Multiple actions

If a claim submitted by a whistleblower for an award under this section involves 1 or more related actions, the requirement described in clause (i) shall apply with respect to the latest of the submission deadlines applying to such claims.

(B) Exceptions

(i) Initial extension

If the Director of the Division of Enforcement of the Commission (in this paragraph referred to as the ‘Director’), determines that a claim is sufficiently complex or involves more than one whistleblower, or if other good cause exists such that, as determined by the Director, the Commission cannot reasonably satisfy the requirements described in subparagraph (A), the Director may, after providing notice to the Commission, extend the submission deadline established by the Commission for a whistleblower to file a claim as it applies to such by not more than 180 days.

(ii) Additional extensions

If, after providing an extension under clause (i), the Director determines that the Commission cannot reasonably satisfy the requirements under subparagraph (A) with respect to an award claim, as extended under clause (i), the Director may, after providing notice to the Commission, extend the period in which the Commission may satisfy subparagraph (A) by 1 additional 180 days.

(iii) Notice to whistleblower

If the Director exercises the extension authority described under clause (i) or clause (ii), the Director shall submit to the whistleblower that filed the award claim that is subject to that extension action by the Director with a written notification of such extension action by the Director or the designee.

(c) Determination of amount of award; denial of award

(1) Determination of amount of award

(A) Discretion

The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.

(B) Criteria

In determining the amount of an award made under subsection (b), the Commission--

(i) shall take into consideration--

(I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;

(II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;

(III) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and

(IV) such additional relevant factors as the Commission may establish by rule or regulation; and

(ii) shall not take into consideration ~~the balance of the Fund;~~ the balance of the Investor Protection Fund or the amount of the potential award.

(2) Denial of award

No award under subsection (b) shall be made--

(A) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of--

(i) an appropriate regulatory agency;

(ii) the Department of Justice;

(iii) a self-regulatory organization;

(iv) the Public Company Accounting Oversight Board; or

(v) a law enforcement organization;

(B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;

(C) to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of section 78j-1 of this title; or

(D) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.

(d) Representation

(1) Permitted representation

Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.

(2) Required representation

(A) In general

Any whistleblower who anonymously makes a claim for an award under subsection (b) shall be represented by counsel if the whistleblower anonymously submits the information upon which the claim is based.

(B) Disclosure of identity

Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information as the Commission may require, directly or through counsel for the whistleblower.

(e) No contract necessary

No contract with the Commission is necessary for any whistleblower to receive an award under subsection (b), unless otherwise required by the Commission by rule or regulation.

(f) Appeals

Any determination made under this section, including whether, to whom, or in what amount to make awards, shall be in the discretion of the Commission. Any such determination, except the determination of the amount of an award if the award was made in accordance with subsection (b), may be appealed to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Commission. The court shall review the determination made by the Commission in accordance with section 706 of Title 5.

(g) Investor Protection Fund

(1) Fund established

There is established in the Treasury of the United States a fund to be known as the “Securities and Exchange Commission Investor Protection Fund”.

(2) Use of Fund

The Fund shall be available to the Commission, without further appropriation or fiscal year limitation, for--

(A) paying awards to whistleblowers as provided in subsection (b); ~~and~~

(B) funding the activities of the Inspector General of the Commission under section 78d(i) of this title-; ~~and~~

(C) funding the operations of the Securities Exchange Commission Office of the Whistleblower.

(3) Deposits and credits

(A) In general

There shall be deposited into or credited to the Fund an amount equal to--

(i) any monetary sanction collected by the Commission in any judicial or administrative action brought by the Commission under the securities laws that is not added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) or otherwise distributed to victims of a violation of the securities laws, or the rules and regulations thereunder, underlying such action, unless the balance of the Fund at the time the monetary sanction is collected exceeds \$300,000,000;

(ii) any monetary sanction added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) that is not distributed to the victims for whom the

Fund was established, unless the balance of the disgorgement fund at the time the determination is made not to distribute the monetary sanction to such victims exceeds \$200,000,000; and
(iii) all income from investments made under paragraph (4).

(B) Additional amounts

If the amounts deposited into or credited to the Fund under subparagraph (A) are not sufficient to satisfy an award made under subsection (b), there shall be deposited into or credited to the Fund an amount equal to the unsatisfied portion of the award from any monetary sanction collected by the Commission in the covered judicial or administrative action on which the award is based.

(4) Investments

(A) Amounts in Fund may be invested

The Commission may request the Secretary of the Treasury to invest the portion of the Fund that is not, in the discretion of the Commission, required to meet the current needs of the Fund.

(B) Eligible investments

Investments shall be made by the Secretary of the Treasury in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Fund as determined by the Commission on the record.

(C) Interest and proceeds credited

The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to the Fund.

(5) Reports to Congress

Not later than October 30 of each fiscal year beginning after July 21, 2010, the Commission shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives a report on--

(A) the whistleblower award program, established under this section, including--

(i) a description of the number of awards granted; and

(ii) the types of cases in which awards were granted during the preceding fiscal year;

(B) the balance of the Fund at the beginning of the preceding fiscal year;

(C) the amounts deposited into or credited to the Fund during the preceding fiscal year;

(D) the amount of earnings on investments made under paragraph (4) during the preceding fiscal year;

(E) the amount paid from the Fund during the preceding fiscal year to whistleblowers pursuant to subsection (b);

(F) the balance of the Fund at the end of the preceding fiscal year; and

(G) a complete set of audited financial statements, including--

(i) a balance sheet;

(ii) income statement; and

(iii) cash flow analysis.

(h) Protection of whistleblowers

(1) Prohibition against retaliation

(A) In general

No employer may ~~directly or indirectly discharge~~ ~~discharge~~, demote, suspend, threaten, harass, ~~directly or indirectly~~, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment or post-employment employment because of any lawful act done by the whistleblower--

(i) in providing information ~~to the Commission~~ to the Commission orally or in writing 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~~ with respect to any conduct that the whistleblower reasonably believes evidences a violation of or is protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission;~~or~~

(iv) in providing information regarding any conduct that has occurred, is ongoing, or is about to occur that the whistleblower reasonably believes constitutes a violation of any law, rule, or regulation subject to the jurisdiction of the Commission [to]

(I) a person with supervisory authority over the whistleblower at the whistleblower's employer, where such employer is an entity registered with or required to be registered with the Commission, a self-regulatory organization, or a State securities commission or office performing like functions; or

(II) such other person working for the employer described under subclause (I) who has the authority to investigate, discover, or terminate misconduct.

(B) Enforcement

(i) Cause of action

An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).

(ii) Subpoenas

A subpoena requiring the attendance of a witness at a trial or hearing conducted under this section may be served at any place in the United States.

(iii) Statute of limitations

(iv) Jury

Each party to an action brought under subsection (h) of this section shall be entitled to a trial by jury.

(v) Burdens of proof

(I) In general

With respect to any complaint filed under this paragraph by a whistleblower against an employer, a whistleblower shall prevail in the action upon a showing that protected conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.

(II) Establishment of contribution factor

A whistleblower may establish that the protected conduct was a contributing factor in the personnel action through circumstantial evidence, including evidence that

(aa) the official that took the personnel action knew of the protected conduct engaged in by the whistleblower; and

(bb) the official that took the personnel action did so within a period of time such that a reasonable person could conclude that the protected conduct engaged in by the whistleblower was a contributing factor in the personnel action.

(I) In general

An action under this subsection may not be brought--

(aa) more than 6 years after the date on which the violation of subparagraph (A) occurred; or

(bb) more than 36 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subparagraph (A).

(II) Required action within 10 years

Notwithstanding subclause (I), an action under this subsection may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

(C) Relief

Relief for an individual prevailing in an action brought under subparagraph (B) shall include--

(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;

(ii) 2 times the amount of back pay otherwise owed to the individual, with interest; ~~and~~

~~(iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.~~ the payment of compensatory damages, including compensation for litigation costs, expert witness fees, and reason-able attorneys' fees; and

(iv) any other appropriate remedy as determined by the Board with respect to the conduct that is the subject of the complaint.

(2) Confidentiality

(A) In general

Except as provided in subparagraphs (B) and (C), the Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of Title 5, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C). For purposes of section 552 of Title 5, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section.

(B) Exempted statute

For purposes of section 552 of Title 5, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(C) Rule of construction

Nothing in this section is intended to limit, or shall be construed to limit, the ability of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

(D) Availability to government agencies

(i) In general

Without the loss of its status as confidential in the hands of the Commission, all information referred to in subparagraph (A) may, in the discretion of the Commission, when determined by the Commission to be necessary to accomplish the purposes of this chapter and to protect investors, be made available to--

(I) the Attorney General of the United States;

(II) an appropriate regulatory authority;

(III) a self-regulatory organization;

(IV) a State attorney general in connection with any criminal investigation;

(V) any appropriate State regulatory authority;

(VI) the Public Company Accounting Oversight Board;

(VII) a foreign securities authority; and

(VIII) a foreign law enforcement authority.

(ii) Confidentiality

(I) In general

Each of the entities described in subclauses (I) through (VI) of clause (i) shall maintain such information as confidential in accordance with the requirements established under subparagraph (A).

(II) Foreign authorities

Each of the entities described in subclauses (VII) and (VIII) of clause (i) shall maintain such information in accordance with such assurances of confidentiality as the Commission determines appropriate.

(3) Rights retained

Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement.

(i) Provision of false information

A whistleblower shall not be entitled to an award under this section if the whistleblower--

(1) knowingly and willfully makes any false, fictitious, or fraudulent statement or representation;

or

(2) uses any false writing or document knowing the writing or document contains any false, fictitious, or fraudulent statement or entry.

(j) Rulemaking authority

The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.

(k) Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration

(1) In general

The rights and remedies provided under this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.

(2) Predispute arbitration agreement

If a predispute arbitration agreement requires arbitration of a dispute arising under this section such predispute arbitration agreement is not valid or enforceable.

(3) Effective date

This subsection shall be effective with respect to any action or agreement that is filed on or after, or that is pending as of, the date of enactment of this Act.