

OFFICE OF THE WHISTLEBLOWER GUIDANCE FOR WHISTLEBLOWER AWARD DETERMINATIONS

Introduction

The Securities and Exchange Commission’s (“Commission”) Whistleblower Program was established pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act to incentivize individuals to report possible securities laws violations to the Commission. Section 21F of the Securities Exchange Act of 1934 provides that the Commission shall pay to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the federal securities laws that leads to the successful enforcement of a covered judicial or administrative action, and any related action, an aggregate amount, determined in the Commission’s discretion, that is equal to not less than 10 percent, and not more than 30 percent, of monetary sanctions that have been collected in the actions.

The program has proven to be a valuable tool to the Commission in the enforcement of the federal securities laws and in returning money to harmed investors. Enforcement actions from whistleblower tips have resulted in more than \$2.5 billion in ordered financial remedies. Whistleblowers have received from the Commission awards totaling approximately \$523 million, and from fiscal year 2012, the first year for which we have full-year data, the annual number of whistleblower tips received by the Commission has grown by approximately 74 percent.

For most whistleblowers who have received awards under the program, the Commission has determined that the statutory maximum 30% of monetary sanctions collected or close to the maximum is appropriate. The Commission has issued awards in connection with 80 enforcement actions, of which approximately two-thirds have been in total aggregate amounts at or near the statutory maximum.

Experience with the program has demonstrated that clarity, efficiency, fairness, and certainty in the assessment of potential awards are important to whistleblowers. Over the past several years, the Office of the Whistleblower (“OWB”) and the Division of Enforcement have worked to streamline and substantially accelerate the evaluation of claims for whistleblower awards and we have seen substantial improvement in this regard in Fiscal Year 2020.¹ To provide additional efficiencies, as well as clarity and transparency in the award determination process, OWB is providing the following guidance regarding the process for determining award amounts for eligible whistleblowers.²

Determining the Recommended Award Amount

Pursuant to Exchange Act Rules 21F-10 and 21F-11, OWB makes recommendations to the Claims Review Staff, which is currently composed of the Director of the Enforcement Division and additional

¹ For example, to date in Fiscal Year 2020, the Commission has issued more awards (26) than in any previous year – the next highest years for awards were Fiscal Year 2016 (11), Fiscal Year 2017 (11) and Fiscal Year 2018 (12). In addition, to date in Fiscal Year 2020, the Commission has processed more claims (153) than in any previous year. The next highest year (adjusting for two serial submitters) were Fiscal Year 2019 (81) and Fiscal Year 2015 (67).

² The statement represents the views of the staff of the Commission. It is not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved its content. This statement, like all staff statements, has no legal force or effect; it does not alter or amend applicable law, and it creates no new or additional obligations for any person.

Enforcement senior officers, for preliminary determinations of whether an individual meets the eligibility requirements, and if so, the award amounts (“Preliminary Determinations”). The Claims Review Staff considers the recommendation and issues a Preliminary Determination, which is subject to Commission review.³ OWB makes recommendations to the Claims Review Staff based on the guiding principles set forth below and the rules of the SEC’s whistleblower program, including the amendments to the Commission’s rules, which were adopted on September 23, 2020, and taking into account the unique facts and circumstances of each claim.⁴ The discretion to apply the award factors and set the award amount remains with the Commission, and staff action, including this guidance, does not limit that discretion.

Statutory maximum aggregate award amount is \$5 million or less:

Pursuant to Section 21F of the Exchange Act, the Commission makes awards to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the federal securities laws that leads to the successful enforcement of a covered judicial or administrative action, and any related action. To date, awards for which the statutory maximum aggregate award amount is \$5 million or less have comprised the vast majority (approximately 75%) of awards. OWB will assess the award amount pursuant to the criteria set forth in Rule 21F-6, and propose an award amount to the Claims Review Staff, as follows:

- If none of the negative factors identified in Rule 21F-6(b) apply, the proposed award amount generally will be presumed to be the statutory maximum.⁵
- If one or more of the negative factors apply, the proposed award amount may still, but is not presumed to be at or near the statutory maximum depending on the specific facts and circumstances of the case. OWB will analyze the positive and negative factors identified in Rule 21F-6(a) and (b) and propose an award amount to the Claims Review Staff.

³ The Commission will be provided the opportunity to review any award Preliminary Determination before it is provided to a claimant. Upon receipt of the Preliminary Determination, the claimant has the right to accept the Preliminary Determination or request reconsideration of the Preliminary Determination. Following that process, the Commission makes a final determination for all awards and any denials where reconsideration has been requested by the claimant. For a fuller explanation of the process, including information about deadlines, please see Exchange Act Rule 21F-10(e)-(i) and Rule 21F-11(e)-(i).

⁴ In communicating the proposed award amount to eligible whistleblowers, OWB will provide an estimated dollar amount based on amounts currently collected whenever reasonably practicable, as well as the percentage of the proposed award within the statutory band of 10% to 30% of monetary sanctions collected.

⁵ The presumption may be overcome in circumstances, consistent with past practice, where (i) the whistleblower’s assistance was, under the relevant facts and circumstances, limited, with the degree of assistance provided by the whistleblower in the Commission action or related action to be assessed by OWB in accordance with Rule 21F-6(a), or (ii) providing the statutory maximum would be inconsistent with the public interest, the promotion of investor protection or the objectives of the Whistleblower Program. When OWB recommends that the presumption should be overcome, OWB will continue to apply the award factors based on the particular facts and circumstances of the award application and recommend an award amount. This approach is consistent with past practice. Based on our experience with the program, including the award amounts determined by the Commission to date, OWB does not expect to recommend that the presumption be overcome in the vast majority of circumstances.

- In determining whether, and the extent to which, the presence of negative factors should result in a proposed award below the statutory maximum, OWB will consider, for example, whether and to what extent the whistleblower actively and knowingly participated in the underlying violations, the whistleblower's conduct and delay caused investor harm, or the whistleblower engaged in an unreasonable reporting delay (the factors for such a determination are discussed further below). In certain circumstances (expected to be infrequent), OWB may recommend a proposed award amount at or near the statutory maximum notwithstanding a whistleblower's delay where it is consistent with the public interest, the promotion of investor protection, and the objectives of the Commission's Whistleblower Program.
- In cases that involve multiple whistleblowers, where at least one of the multiple meritorious whistleblowers would qualify for the presumption if that individual were the sole meritorious whistleblower, the total aggregate proposed award to all meritorious whistleblowers will be the statutory maximum. OWB will consider all of the relevant facts and circumstances when recommending how to apportion the award.

Statutory maximum aggregate award amount is greater than \$5 million:

- If no negative factors apply, OWB will analyze the positive factors identified in Rule 21F-6(a) and propose an award amount to the Claims Review Staff. Historically, the majority of awards for which the statutory maximum aggregate award amount is \$5 million or more have been in the top third of the award range.
- If negative factors apply, OWB will analyze the positive and negative factors identified in Rule 21F-6(a) and (b) based on the facts and circumstances of the case and propose an award amount to the Claims Review Staff.

General Observations

- Based on our experience with the program, reductions in award amounts where one or more of the negative award factors (i.e., unreasonable delay, culpability, and interference with a compliance and reporting system) are present has helped to align the program's award determinations with the Commission's enforcement goals. For example, the Whistleblower Program is designed to encourage whistleblowers to report potential violations of federal securities laws promptly to the Commission, which in turn, helps the Commission act quickly on the information to better protect investors and the marketplace.
- The most common negative factor is unreasonable delay. Staff considers, for example, whether the violations identified by the whistleblower were continuing during the period of delay, whether investors were being harmed during that time, and whether the whistleblower might profit from the delay by ultimately obtaining a larger award because the failure to report permitted the misconduct to continue, resulting in larger monetary sanctions. One or more of these circumstances, in the absence of significant mitigating factors, would likely cause OWB to recommend a substantially lower award amount. In determining the reasonableness of any delay, staff considers all relevant facts and circumstances. Common reasons that weigh against

determining that a delay was unreasonable include: the whistleblower engaging for a reasonable period of time in an internal reporting process, the delay being reasonably attributable to an illness or other personal or family circumstance, and the whistleblower spending a reasonable amount of time attempting to ascertain relevant facts or obtain an attorney in order to remain anonymous. In certain circumstances, a delay may warrant no reduction in the proposed award amount or only a smaller reduction where it is consistent with the public interest, promoting investor protection and the objectives of the Commission's Whistleblower Program.

- Regarding the determination of a recommended award amount in circumstances of culpability or interference with internal reporting, the staff applies a similar facts and circumstances approach. For example, the staff considers whether the whistleblower was involved in or participated in the underlying, violative conduct. If the staff determines that the whistleblower was involved, then consideration will be given to other factors such as the capacity and extent of the whistleblower's role, and a lower proposed award amount may be appropriate.