

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 97449 / May 8, 2023

WHISTLEBLOWER AWARD PROCEEDING
File No. 2023-56

In the Matter of the Claim for Award

in connection with

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Notice of Covered Action ^{Redacted}

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

The Claims Review Staff (“CRS”) issued a Preliminary Determination recommending the denial of the whistleblower award claim submitted by ^{Redacted} Claimant”) in connection with ^{Redacted} (“Covered Action”) and ^{Redacted} (“Other Action”). Claimant filed a timely response contesting the preliminary denial.¹ For the reasons discussed below, Claimant’s award claim is denied.

I. Background

A. The Covered Action

On ^{Redacted} the Commission filed the Covered Action in the ^{Redacted} ^{Redacted} (“Court”) against ^{Redacted} ^{Redacted} (“Defendants”) for their roles in ^{Redacted} Defendants included ^{Redacted}

¹ See Exchange Act Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e).

Redacted
Redacted The Commission charged Defendants Redacted
Redacted In particular, the Covered Action alleged Redacted
Redacted (“Entity”) and Redacted
Redacted (“Individual”) Redacted
Redacted The Covered Action alleged that the Entity and certain of its
employees Redacted

On Redacted the Court entered a final judgment against the Entity which
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Court also imposed Redacted in monetary sanctions against the Entity, which the Court
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Redacted (“Agency 1”) Redacted

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On Redacted the Office of the Whistleblower (“OWB”) posted the Notice of
Covered Action on the Commission’s public website inviting claimants to submit whistleblower
award applications within 90 days.³ Claimant filed a timely whistleblower award claim.

B. The Preliminary Determination

On Redacted the CRS issued a Preliminary Determination⁴ recommending that
Claimant’s claim be denied.⁵ The Preliminary Determination recommended a denial because
Claimant was not a “whistleblower” within the meaning of Rule 21F-2(a)(1) with respect to the
Covered Action. To qualify as a whistleblower, an individual must (among other things) provide
information regarding a potential securities law violation to the Commission in the form and
manner that is required by Rule 21F-9(a), which Claimant did not do. The CRS preliminarily
reasoned that while Claimant provided information to Redacted Claimant was not

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Claimant has applied for a related action award in connection with the Other Action. The Preliminary
Determination reasoned that because Claimant was not eligible for an award in the Covered Action, he/she was not
eligible for an award in connection with any related action.

³ See Exchange Act Rule 21F-10(a), 17 C.F.R. § 240.21F-10(a).

⁴ See Exchange Act Rule 21F-10(d), 17 C.F.R. § 240.21F-10(d).

⁵ The record supporting the Preliminary Determination included the declaration (“Declaration”) of one of the
Division of Enforcement (“Enforcement”) attorneys who was assigned to the investigation that led to the Covered
Action (“Investigation”). See Exchange Act Rule 21F-12(a), 17 C.F.R. § 240.21F-12(a).

a whistleblower because Claimant did not provide information directly to the Commission via a TCR, as required by 15 U.S.C. § 78u-6(a)(6) and Rule 21F-2(a)(1).⁶

C. Claimant’s Response to the Preliminary Determination

In response, Claimant argues that the Preliminary Determination must be vacated because Claimant purportedly provided “original information” to the Commission in multiple ways and that he/she qualifies as a “whistleblower” under the whistleblower program rules (“Rules”). Claimant states that he/she worked for and with various persons and entities charged in the Covered Action. Claimant states that in ^{Redacted} he/she voluntarily came forward as a confidential informant and had numerous communications with ^{Redacted} ^{Redacted} (“Agency 2”). Claimant states that from ^{Redacted} while he/she was not represented by counsel—Claimant provided Agency 2 with an extensive amount of original information. Claimant asserts that the Commission subsequently received his/her information from Agency 2; Claimant alleges that such information was the basis for and led to the success of the Covered Action. Thus, according to Claimant, he/she provided original information to the Commission under Rule 21F-4(b)(5).⁷ Further, Claimant asserts that he/she later provided original information directly to the Commission by filing a TCR in ^{Redacted} Claimant alleges that he/she thus satisfies Rule 21F-2(a)(1) and Rule 21F-9(a).

Claimant also argues that the Preliminary Determination must be vacated because it was not based on a complete factual record. Claimant alleges that the Declaration did not fully develop the scope of the information Claimant provided to Agency 2, which was then provided to the Commission and led to the Covered Action and its success. Claimant argues that in the absence of such complete information, the Commission should rely on and credit Claimant’s representations about the nature and importance of his/her information. Claimant argues that alternatively, the Commission should be required to make a more complete record.

Claimant argues that if the Commission determines that Claimant did not provide original information as defined by the Rules, then the Commission should waive Claimant’s non-compliance with the Rules and issue him/her an award. Specifically, Claimant states that if the Rules require that a TCR be filed with the Commission within 30 days of the provision of information to another regulatory agency (or within 30 days of the other agency providing the information to the Commission), then such a timing requirement should be waived in accordance

⁶ See also *Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018); Order Determining Whistleblower Award Claims, Exchange Act Rel. No. 80596, n.9 (May 4, 2017).

⁷ Claimant also states that he/she believes that certain questions that Agency 2 asked him/her during his/her work with Agency 2 originated from others, including from the Commission. Consequently, Claimant alleges that the Commission indirectly communicated with him/her via Agency 2.

with Rule 21F-8 and Section 36(a) of the Exchange Act. Claimant believes that a waiver is warranted because he/she complied with all other requirements of the Rules and significantly contributed to the success of the Covered Action at great personal risk and expense.⁸

II. Analysis

We deny an award to Claimant in connection with the Covered Action. To qualify for an award under Section 21F of the Exchange Act, an individual must be a “whistleblower” within the meaning of Rule 21F-2(a)(1).⁹ To qualify as a whistleblower, an individual must (among other things) provide information regarding a potential securities law violation to the Commission in the form and manner that is required by Rule 21F-9(a).¹⁰ Under Rule 21F-9(a), an individual must submit his/her information directly to the Commission through one of the enumerated methods specified in that Rule.¹¹ Additionally, under Rule 21F-4(b)(5), “[t]he Commission will consider [a claimant] to be an original source of the same information that we obtain from another source if the information satisfies the definition of original information and the other source obtained the information from [the claimant] or [claimant’s] representative.”¹² Finally, Rule 21F-4(b)(7) specifies that if the claimant “provide[s] information to . . . any other authority of the Federal government . . . and [the claimant], *within 120 days, submit[s] the same information to the Commission pursuant to [Rule 21F-9], as [the claimant] must do in order*

⁸ Claimant asserts that

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Claimant alleges he/she has struggled financially and suffered extreme hardship as a result of reporting his/her information to the government. Claimant states that he/she lost his/her job due to his/her whistleblowing

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Subsequently, Claimant could not find employment

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due to his/her

contributions to the government’s prosecutions.

⁹ Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1); Exchange Act Rule 21F-2(a)(1), 17 C.F.R. § 240.21F-2(a)(1) (“You are a whistleblower for purposes of Section 21F of the Exchange Act (15 U.S.C. 78u-6) as of the time that, alone or jointly with others, you provide the Commission with information in writing that relates to a possible violation of the federal securities laws (including any law, rule, or regulation subject to the jurisdiction of the Commission) that has occurred, is ongoing, or is about to occur.”). *See also* 15 U.S.C. § 78u-6(a)(6) (“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.”).

¹⁰ Exchange Act Rule 21F-9(a), 17 C.F.R. § 240.21F-9(a).

¹¹ *Id.* (“To submit information in a manner that satisfies § 240.21F-2(b) and § 240.21F-2(c) of this chapter you must submit your information to the Commission by any of these methods: (1) Online, through the Commission’s website located at www.sec.gov, using the Commission’s electronic TCR portal (Tip, Complaint, or Referral); [or] (2) Mailing or faxing a Form TCR to the SEC Office of the Whistleblower . . .”).

¹² Exchange Act Rule 21F-4(b)(5), 17 C.F.R. § 240.21F-4(b)(5).

for [the claimant] to be eligible to be considered for an award, then, for purposes of evaluating [the claimant’s] claim to an award . . . the Commission will consider that [the claimant] provided information as of the date of [the claimant’s] original disclosure, report or submission to” the other authority.¹³

Here, although Claimant provided information to Other Agency 2, Claimant was not a “whistleblower” under the Rules because Claimant did not provide information directly to the Commission in accordance with the Rules.

The Declaration, which we credit, confirmed under penalty of perjury that the staff responsible for the Covered Action (“Staff”) did not have any direct dealings or contact with Claimant, nor did Staff even know Claimant’s name during the Investigation. The Declaration stated that in about ^{Redacted} Agency 2 reached out to Staff and began to share information that Agency 2 had previously obtained from Claimant. The information that Staff received from Agency 2 indicated that before Agency 2’s contact with Staff, Claimant provided Agency 2 with information about the Entity and the Individual. The Declaration noted that Claimant’s statement in his/her whistleblower award application—that Claimant “never directly reported violations to the Commission”—was true. At no point before or during the Investigation or the litigation of the Covered Action did Staff receive information directly from Claimant.

Instead, Claimant only submitted information directly to the Commission several years after all relevant events related to the Covered Action and Notice of Covered Action transpired. In ^{Redacted} the Commission filed the Covered Action in the Court. In ^{Redacted} the Court entered a final judgment against the Entity in the Covered Action. In ^{Redacted} OWB posted the Notice of Covered Action on the Commission’s public website. In ^{Redacted} Claimant filed a timely whistleblower award claim for the Covered Action with OWB through counsel. However, it was not until more than three and a half years later in ^{Redacted} that Claimant, for the first time, filed a TCR with the Commission. Because Claimant provided information to Agency 2, Claimant was required to submit the same information to the Commission within 120 days of submitting it to Agency 2 in order to be eligible to be considered for an award, pursuant to Rule 21F-4(b)(7). This, however, did not happen. Claimant is therefore ineligible for an award for the Covered Action.¹⁴

¹³ Exchange Act Rule 21F-4(b)(7), 17 C.F.R. § 240.21F-4(b)(7) (emphasis added).

¹⁴ Because Claimant is not eligible for an award in the Covered Action, Claimant is not eligible for an award in the Related Action. *See* Exchange Act Rule 21F-3(b)(1), (b)(2), 17 C.F.R. § 240.21F-3(b)(1), (b)(2); Exchange Act Rule 21F-11(a), 17 C.F.R. § 240.21F-11(a).

Claimant also did not submit his/her information on a TCR or sign the requisite whistleblower declaration in accordance with Rules 21F-9(a) and (b). A claimant must submit a TCR within 30 days of when the claimant first provides the Commission with information that the claimant relies upon as a basis for claiming an award. Should a claimant fail to comply with this procedure, the Commission will nonetheless waive the claimant's noncompliance pursuant to the automatic waiver under Rule 21F-9(e). Rule 21F-9(e) applies when a claimant complies with the requirements of Rules 21F-9(a) or (b) "within 30 days of first obtaining actual or constructive notice about those requirements (or 30 days from the date [the claimant] retain[ed] counsel to represent [the claimant] in connection with [the claimant's] submission of original information, whichever occurs first)."¹⁵ Here, Claimant had constructive notice of the TCR filing requirement, at the very least, for three and a half years before he/she submitted a TCR to the Commission for the first time. In particular, Claimant's counsel filed a whistleblower award claim on Claimant's behalf in ^{Redacted} but did not file a Form TCR on Claimant's behalf until ^{Redacted}. Claimant thus does not satisfy Rules 21F-9(a) and (b) and is not entitled to the automatic waiver under Rule 21F-9(e).

Claimant's other arguments about why he/she should receive an award are unavailing. Because Claimant failed to satisfy Rule 21F-4(b)(7)'s 120-day submission requirement—thereby making him/her ineligible to be considered for an award—it is immaterial whether Claimant satisfies Rule 21F-4(b)(5). That Rule merely concerns the circumstances where a claimant is considered to be an original source of the same information the Commission obtains from another source. Moreover, there is no merit to Claimant's argument that the Preliminary Determination was not based on a complete factual record. The record, which includes the Declaration, conclusively demonstrates that Claimant is not entitled to an award under the Rules. As confirmed by the Declaration, Claimant "never directly reported violations to the Commission" and Staff never received any information directly from Claimant.¹⁶

Finally, despite Claimant's contentions otherwise, waiver of Claimant's non-compliance with the Rules pursuant to Rule 21F-8 or Section 36(a) of the Exchange Act is not warranted. Under Rule 21F-8(a), "the Commission may, in its sole discretion, waive" the TCR filing requirement "upon a showing of extraordinary circumstances."¹⁷ We have explained that "the extraordinary circumstances exception is to be narrowly construed and applied only in limited

¹⁵ Exchange Act Rule 21F-9(e)(1), 17 C.F.R. § 240.21F-9(e)(1).

¹⁶ Claimant's other arguments—that Claimant provided documents to Agency 2 that were instrumental to the Other Action and the Covered Action and that Claimant indirectly communicated with the Commission through questions he/she was asked by Agency 2—are immaterial to our conclusion to deny Claimant an award. Because Claimant did not satisfy Rule 21F-4(b)(7), Claimant is simply ineligible to be considered for an award based on the information he/she provided to Agency 2.

¹⁷ Exchange Act Rule 21F-8(a); 17 C.F.R. § 240.21F-8(a).

circumstances.”¹⁸ We have further explained that an extraordinary circumstance in the context of a late filing requires a claimant to show that the reason for the failure to timely file was beyond the claimant’s control.¹⁹

Claimant argues that it was beyond his/her control to timely file a TCR for several reasons. Claimant states that he/she began working with Agency 2 Redacted
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Claimant asserts that he/she was unaware that the Commission’s whistleblower program existed and that no one from the government notified him/her about it. Claimant also states that he/she worked with Agency 2 as a confidential informant without representation by counsel for ***

Redacted However, none of these purported reasons excuse Claimant’s failure to file a timely TCR. As we have previously stated, a lack of awareness of the Commission’s whistleblower program does not rise to the level of an extraordinary circumstance.²⁰

Applying Rule 21F-8(a)’s demanding standard here, we therefore find that Claimant has not demonstrated that his/her failure to timely file a TCR was caused by factors beyond his/her control. In light of the facts in this matter, we therefore find it inappropriate to invoke our discretionary authority to waive the Form TCR filing requirement under Rule 21F-8(a).

There is also no reason to invoke our Section 36(a) exemptive authority to waive Claimant’s non-compliance with the Rules. Section 36(a) grants the Commission the authority in certain circumstances to “exempt any person . . . from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.” In whistleblower matters, the Commission has found that the public interest warranted an exemption from a rule requirement in a limited number of cases where the unique circumstances of the particular matter raised considerations substantially different from those which had been considered at the time the rules were adopted, and a strict application of the rules would result in undue hardship, unfairness, or inequity.²¹ Given the factual circumstances involved here, we do not believe that any such considerations exist.

¹⁸ See, e.g., Order Determining Whistleblower Award Claim, Exchange Act Rel. No. 77368, 2016 WL 1019130, at *3 (Mar. 14, 2016), *pet. denied sub nom. Cerny v. SEC*, 707 F. App’x 29 (2d Cir. 2017).

¹⁹ *Id.* Additionally, we have identified attorney misconduct or serious illness that prevented the applicant from making a timely filing as two examples of the demanding showing an applicant must make for us to consider exercising our discretionary authority to excuse an untimely filing under Rule 21F-8.

²⁰ *Id.* at 3; Order Determining Whistleblower Award Claim, Exchange Act Rel. No. 72659, at 5 (July 23, 2014) (“Claimants have it well within their control to learn about the whistleblower program’s existence and its requirements . . . they simply need to visit the Commission’s web page, which prominently features the relevant information about the program. Their failure to do so does not warrant equitable relief . . .”).

²¹ See, e.g., Order Determining Whistleblower Award Claim, Rel. No. 34-86010 (June 3, 2019) (“voluntary”

Here, as discussed previously, Claimant had constructive notice of the TCR filing requirement, at the very least, for three and a half years before he/she submitted a TCR to the Commission for the first time in ^{Redacted} There is nothing in the record that excuses or provides a justifiable reason for the delay in the submission of the late-filed TCR. And, as we have stated previously, a claimant is not “relieved of the requirement to file a Form TCR merely because [he/she] first report[s] to another federal agency, and that agency provides the same information to the Commission.”²² We thus conclude that it is inappropriate for us to invoke our Section 36(a) exemptive authority to waive Claimant’s non-compliance with the Rules.

III. Conclusion

Accordingly, it is hereby ORDERED that the whistleblower award application of Claimant in connection with the Covered Action and the Other Action be, and hereby is, denied.

By the Commission.

Vanessa A. Countryman
Secretary

requirement of Rule 21F-4(a) waived where, among other factors, claimants were not notified of request from SRO that preceded their whistleblower submission); Order Determining Whistleblower Award Claims, Rel. No. 34-84046 (Sept. 6, 2018) (“voluntary” requirement waived where, among other factors, claimant learned the information he/she reported after he/she was interviewed by other agency); Order Determining Whistleblower Award Claims, Rel. No. 34-90721 (Dec. 18, 2020) (claimant’s counsel used information from the claimant to submit an application as a whistleblower on behalf of themselves); Order Determining Whistleblower Award Claims, Rel. No. 34-90580 (Dec. 7, 2020) (counsel misunderstood communications from the staff about whether the claimant met the procedural requirements for participating in the whistleblower program).

²² Order Determining Whistleblower Award Claim, Exchange Act Rel. No. 94797, at 2 (Apr. 27, 2022).