

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 88464 / March 24, 2020

WHISTLEBLOWER AWARD PROCEEDING

File No. 2020-10

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In the Matter of the Claim for Award

in connection with

Redacted

Redacted

Notice of Covered Action Redacted

Redacted

Notice of Covered Action Redacted

Redacted

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Notice of Covered Action Redacted

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**ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM**

The Claims Review Staff (“CRS”) issued a Preliminary Determination recommending the denial of the whistleblower award claims of Redacted (“Claimant”) in connection with Covered Action Redacted Covered Action Redacted and Covered Action Redacted (collectively, the “Covered Actions”). Claimant filed a timely response contesting the preliminary denial. For the reasons discussed below, Claimant’s award claims are denied.

## I. Background

### A. The Covered Actions

On <sup>Redacted</sup> the Office of the Whistleblower (“OWB”) posted the Notice for Covered Action <sup>Redacted</sup> relating to <sup>Redacted</sup> on its website. The ninety-day filing deadline was posted as <sup>Redacted</sup>

On <sup>Redacted</sup> OWB posted the Notice for Covered Action <sup>Redacted</sup> relating to <sup>Redacted</sup> on its website. The ninety-day filing deadline was posted as <sup>Redacted</sup>

On <sup>Redacted</sup> OWB posted the Notice for Covered Action <sup>Redacted</sup> relating to <sup>Redacted</sup> on its website. The ninety-day filing deadline was posted as <sup>Redacted</sup>

The Commission received Claimant’s award application for the Covered Actions on <sup>Redacted</sup> approximately 5 ½ years, 41 months, and 31 months after the deadlines to apply for awards for the Covered Actions, respectively.<sup>1</sup> Claimant stated that Claimant did not know the Covered Actions had been published but did not attempt to explain or justify the late filing of the award claims beyond stating that Claimant believed the Commission would notify Claimant of the posting of the Covered Action.

### B. The Preliminary Determination

The CRS issued a Preliminary Determination<sup>2</sup> recommending that Claimant’s award claims be denied because they were submitted years after the filing deadlines.<sup>3</sup>

### C. Claimant’s Response to the Preliminary Determination

Claimant submitted a timely written response contesting the Preliminary Determination. Specifically, Claimant argues in the response to the Preliminary Determination that the Commission has “a pattern and practice of avoidance not communicating the status of covered

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<sup>1</sup> Claimant’s single award application also sought award claims in connection with four other Covered Actions. On March 26, 2019, we denied Claimant’s award claim in Covered Action <sup>Redacted</sup> because it had been submitted after the deadline for submitting award claims for that covered action. *See* Order Determining Whistleblower Award Claim, Release No. 34-85412 (Mar. 26, 2019).

<sup>2</sup> *See* 17 C.F.R. § 240.21F-10(d).

<sup>3</sup> Exchange Act Rule 21F-10(a) (“A claimant will have ninety (90) days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred”); *see* Order Determining Whistleblower Award Claim, Release No. 34-77368, at 3 (Mar. 14, 2016), *pet. for rev. denied sub nom. Cerny v. SEC*, 708 F. App’x 29 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 2005 (2018).

actions” and that the agency never alerted Claimant to the issue of filing for a whistleblower award in the Covered Actions. Claimant believed that the Commission would contact claimants about filing an award application.

## II. Analysis

The requirement that claimants file whistleblower award claims within ninety days of the posting of a Notice of Covered Action (“NoCA”), set forth in Exchange Act Rule 21F-10(b), serves important programmatic functions.<sup>4</sup> The deadline ensures fairness to potential claimants by giving all an equal opportunity to have their competing claims evaluated at the same time. The deadline also brings finality to the claim process so that the Commission can make timely awards to meritorious whistleblowers.<sup>5</sup>

Notwithstanding these important programmatic functions, we recognize that there may be rare situations where an exception should be made. To allow for this, Exchange Act Rule 21F-8(a) provides that “the Commission may, in its sole discretion, waive” the ninety-day filing requirement “upon a showing of extraordinary circumstances.”<sup>6</sup> We have explained that the “extraordinary circumstances” exception is “narrowly construed” and requires an untimely claimant to show that “the reason for the failure to timely file was beyond the claimant’s control.”<sup>7</sup> Further, we have identified “attorney misconduct or serious illness” that prevented a timely filing as two examples of the “demanding showing” that an applicant must make before we will consider exercising our discretionary authority to excuse an untimely filing.<sup>8</sup>

Applying that demanding standard here, we find that Claimant has failed to show that extraordinary circumstances beyond Claimant’s control were responsible for the years of delay between the application deadline for the Covered Actions and Claimant’s untimely whistleblower application in <sup>Redacted</sup>. Contrary to Claimant’s contentions, the Commission is not obligated to notify a claimant of the posting of a NoCA or the deadline for submitting an award application.<sup>9</sup> As we have explained, our whistleblower rules provide “for constructive, not actual, notice of the posting of a covered action and of the deadline for submitting a claim.”<sup>10</sup>

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<sup>4</sup> See 17 C.F.R. § 240.21F-10(b).

<sup>5</sup> See *Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 34-64545, 76 Fed. Reg. 34300, 34300.

<sup>6</sup> 17 C.F.R. § 240.21F-8(a).

<sup>7</sup> Order Determining Whistleblower Award Claim, Release No. 34-77368, at 3 (Mar. 14, 2016), *pet. for rev. denied sub nom. Cerny v. SEC*, 708 F. App’x 29 (2d Cir. 2017), cert. denied, 138 S.Ct. 2005 (2018); Order Determining Whistleblower Award Claim, Release No. 34-85412, at 13 (Mar. 26, 2019) (denying same claimant on grounds of untimeliness).

<sup>8</sup> See *id.*; Order Determining Whistleblower Award Claim, Release No. 34-82181 (Nov. 30, 2017); Order Determining Whistleblower Award Claim, Release No. 34-72659 (July 23, 2014); Order Determining Whistleblower Award Claim, Release No. 34-72178 (May 16, 2014).

<sup>9</sup> Order Determining Whistleblower Award Claim, Release No. 34-77368, at 3 (Mar. 14, 2016).

The NoCAs for the Covered Actions were clearly posted on the Commission’s website, along with the requisite deadlines. Under our rules, that is all the notice that Claimant was due.

Despite Claimant’s asserted unawareness of this notice, “a lack of awareness about the [whistleblower award] program does not . . . rise to the level of an extraordinary circumstance as a general matter [since] potential claimants bear the ultimate responsibility to learn about the program and to take the appropriate steps to perfect their award applications.”<sup>11</sup> “A potential claimant’s responsibility includes the obligation to regularly monitor the Commission’s web page for NoCA postings and to properly calculate the deadline for filing an award claim.”<sup>12</sup> Claimant’s failure to regularly monitor the Commission’s web page for NoCA postings is not an “extraordinary circumstance” that might trigger our discretion to excuse the fact that Claimant submitted the award application more than two years late.<sup>13</sup>

### III. Conclusion

Accordingly, it is ORDERED that Claimant’s whistleblower award claims be, and hereby are, denied.

By the Commission.

Vanessa A. Countryman  
Secretary

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<sup>10</sup> *Id.* at \*3-4 & n.11 (citing Rule 21F-10(a)).

<sup>11</sup> Order Determining Whistleblower Award Claim, Release No. 34-72659, at 5 (July 23, 2014) (“The Commission is under no duty to provide Claimant . . . with direct notice of the filing deadline.”).

<sup>12</sup> Order Determining Whistleblower Award Claim, Release No. 34-77368, at 4.

<sup>13</sup> If the Commission believes that an award is merited notwithstanding that the untimely filing was within the claimant’s control, the Commission could still have recourse to its general exemptive authority under Section 36(a) of the Exchange Act. However, we do not find any evidence that would support the Commission exercising its authority to exempt Claimant from Claimant’s obligation to have timely filed.