

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 97450 / May 8, 2023

WHISTLEBLOWER AWARD PROCEEDING
File No. 2023-57

In the Matter of the Claim for Award

in connection with

Redacted

Redacted

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”). 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 instituted public administrative cease-and-desist proceedings against Redacted (“Respondent 1”)—Redacted
Redacted—and Redacted (“Respondent 2”)—Redacted
Redacted—(collectively, “Respondents”) for their roles in a Redacted
Redacted Respondent 1 Redacted

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

Respondent 2

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The Covered Action found that Respondents

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violated

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and that Respondent 2 caused certain violations by Respondent 1. Respondents consented to the Covered Action without admitting or denying the allegations and agreed to pay over Redacted in monetary sanctions.² Respondent 2 also agreed to Redacted

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 for two reasons.

First, Claimant was not a “whistleblower” within the meaning of Rule 21F-2(b) 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 reasoned that Claimant was not a whistleblower for award purposes until Claimant submitted information on a TCR to the Commission in Redacted. In fact, four years passed between the time of Claimant’s Redacted in Redacted and Claimant’s TCR submission to the Commission in Redacted. Therefore, Claimant also was not eligible for the 120-day lookback provision set forth in Rule 21F-4(b)(7).⁶

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All monetary

sanctions—including those imposed upon Respondents—have been paid in full.

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).

⁶ See Exchange Act Rule 21F-4(b)(7), 17 C.F.R. § 240.21F-4(b)(7) (“if the claimant “provide[s] information to . . . an entity’s internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law, and [the claimant], within 120 days, submit[s] the same information to the Commission pursuant

Second, Claimant’s TCR submission was not made voluntarily as required by Exchange Act Section 21F and Rules 21F-3 and 21F-4(a)(1) because Claimant made the submission after a request, inquiry, or demand that relates to the same subject matter as the submission was directed to Claimant or anyone representing Claimant by the Commission.⁷ Specifically, prior to Claimant submitting information to the Commission in ^{Redacted} Commission staff contacted Claimant’s counsel in ^{Redacted} and Claimant received a subpoena from the Commission in ^{Redacted}. Therefore, Claimant’s TCR submission was not voluntary because it was submitted only after the Commission inquired with Claimant relating to the same subject matter as Claimant’s submission.

C. Claimant’s Response to the Preliminary Determination

In response, Claimant first argues that the Preliminary Determination erred in finding that Claimant was not a “whistleblower” within the meaning of Rule 21F-2(b) with respect to the Covered Action. According to Claimant, the Preliminary Determination ^{Redacted}

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^{Redacted} Claimant states that the Preliminary Determination’s 120-day argument is at best a technicality that is inconsistent with the public policy of rewarding legitimate, good faith whistleblowers. Claimant alleges that his/her TCR submission ^{Redacted} did not cause any prejudice to the Commission or any other entity or person because the Covered Action was not filed until ^{Redacted}

Claimant also argues that the Preliminary Determination erred in finding that Claimant’s TCR submission was not made voluntarily. Claimant asserts that he/she had been voluntarily cooperating with the Commission, in a variety of matters, for a number of years, dating back to ^{***}

Claimant alleges that his/her TCR was submitted prior to the date of his/her voluntary testimony with the Commission.

Finally, Claimant argues that even if he/she did not comply with the whistleblower program rules (“Rules”), the Commission should exercise its discretionary authority to waive requirements under the Rules and grant Claimant an award. Claimant alleges that the Covered

to [Rule 21F-9], as [the claimant] must do in order 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.”).

⁷ See Exchange Act Section 21F, 15 U.S.C. §78u-6; Exchange Act Rule 21F-3, 17 C.F.R. § 240.21F-3; Exchange Act Rule 21F-4(a)(1), 17 C.F.R. § 240.21F-4(a)(1).

Action contains claims that were based on facts contained in Claimant's TCR and that Claimant has helped the government recover Redacted Citing a Commission order in which the Commission exercised its authority under Section 36(a) of the Exchange Act to award a whistleblower an award even though that whistleblower failed to comply with Rule 21F-9(d), Claimant alleges that the Commission has used its discretion in the past to grant claimants awards despite procedural deficiencies in their applications for whistleblower awards. Claimant believes that the interests of justice and fairness require that the Commission exercise its discretionary authority. Claimant alleges that he/she has suffered substantial hardship as a result of his/her whistleblowing.

II. Analysis

We deny an award to Claimant in connection with the Covered Action because Claimant's information submission was not made voluntarily as required by Exchange Act Section 21F and Rules 21F-3 and 21F-4(a)(1). Further, there is no compelling reason for us to exercise our discretionary authority to waive requirements under the Rules. Because the claim fails on the basis that Claimant did not submit the information to the Commission voluntarily, we decline to reach the merits of the issue whether Claimant is a "whistleblower" with respect to the Covered Action.

The Declaration, which we credit, confirmed under penalty of perjury that the staff responsible for the Covered Action ("Staff") did not receive information directly from Claimant until Redacted only after Staff first contacted Claimant in Redacted Specifically, in Redacted Claimant wrote Redacted Redacted Redacted Redacted Redacted conducted an internal investigation. Redacted Respondent 1 self-reported to the Commission. The internal investigation and Respondent 1's self-report validated many, but not all, of the Redacted allegations discussed in the Redacted Redacted

Redacted Respondent 1 made a presentation to Staff. Redacted During that presentation, Respondent 1 stated that Redacted Redacted Redacted Redacted Redacted caused Staff to expand the scope of the matter beyond Respondent 2 and certain of his/her direct reports. In Redacted Staff opened a matter under inquiry ("MUI") as a result of the information Redacted contained in Respondent 1's self-report and Redacted In Redacted Staff

converted the MUI into the Investigation, and in ^{Redacted} Staff obtained a Formal Order of Investigation.

According to the Declaration, in ^{Redacted} Staff reached out to Claimant’s then-counsel. Staff and Claimant’s then-counsel set up the logistics of Staff taking Claimant’s testimony. On ^{Redacted} Staff subpoenaed Claimant to provide documents and testimony about ^{Redacted} On ^{Redacted} Claimant provided testimony before the Commission; Claimant produced substantive documents to the Commission in advance of that testimony. Staff did not receive any information regarding the ^{Redacted} directly from Claimant or his then-counsel before Claimant’s document production and testimony before the Commission. On ^{Redacted} —four years after ^{Redacted} —Claimant submitted a TCR through his new (and current) counsel to the Commission. In the TCR, Claimant reported information that was consistent with the information and documents Claimant provided to Staff and with Claimant’s testimony before the Commission.

Based on this factual record, Claimant’s information submission was not made voluntarily as required by Exchange Act Section 21F and Rules 21F-3 and 21F-4(a)(1).⁸ For a claimant’s submission to be made voluntarily, it must be provided to the Commission “before a request, inquiry, or demand that relates to the subject matter of your submission is directed to you or anyone representing you (such as an attorney)” by the Commission.⁹

Here, Claimant only submitted information to the Commission Staff requested to schedule testimony with the Claimant and after Staff subpoenaed Claimant to provide documents and testimony. Claimant submitted his/her TCR on ^{Redacted} —four years after ^{Redacted} —which was also the same date that Claimant testified before the Commission. Claimant’s TCR related to the same subject matter as the subpoena that Staff issued Claimant.

None of Claimant’s arguments dissuade us from denying Claimant’s claim for award. Although Claimant states that he/she had been cooperating with the Commission dating back to at least ^{***} Claimant’s prior contact with the Commission concerned misconduct involving allegations that ^{Redacted} the Commission brought an enforcement action related to this matter in ^{***} Claimant’s other assertions—that the Preliminary Determination erred in not taking into account the ^{Redacted} that Claimant should be awarded for being

⁸ See Exchange Act Rule 21F-3, 17 C.F.R. § 240.21F-3; Exchange Act Rule 21F-4(a)(1), 17 C.F.R. § 240.21F-4(a)(1).

⁹ Exchange Act Rule 21F-4(a)(1), 17 C.F.R. § 240.21F-4(a)(1).

a legitimate, good faith whistleblower; that Claimant’s TCR submission in ^{Redacted} did not cause any prejudice to the Commission because the Covered Action was not filed until ^{Redacted} and that Claimant has suffered substantial hardship after his/her whistleblowing—do not alter the fact that under the Rules, his/her information submission was made after the Commission’s request and was therefore not made voluntarily. Claimant is thus precluded from receiving an award for the Covered Action.

The circumstances in this matter do not warrant invoking 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.¹¹ Given the factual circumstances involved here, we do not believe that any such considerations exist.

Claimant submitted his/her information ^{Redacted} in ^{Redacted} ^{***} but did not submit information to the Commission until ^{Redacted} Claimant only submitted information to the Commission after Staff contacted Claimant in ^{Redacted} and subpoenaed him/her in ^{Redacted} for documents and testimony. There is nothing in the record that excuses or provides a justification for the delay in the submission of the information to the Commission until after the Commission requested to schedule testimony with the Claimant. 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.

¹¹ *See, e.g.*, Order Determining Whistleblower Award Claim, Rel. No. 34-86010 (June 3, 2019) (“voluntary” 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).

As relevant to our Section 36(a) considerations, we also note that at the time that Claimant provided his/her information internally, Claimant

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reported misconduct to the Commission

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Here, Respondent 1 promptly self-

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Thus, Respondent 1's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law worked properly.

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III. Conclusion

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

By the Commission.

Vanessa A. Countryman
Secretary

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