

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 99070 / December 4, 2023

WHISTLEBLOWER AWARD PROCEEDING

File No. 2024-3

In the Matter of the Claim for an Award

in connection with

Redacted

Notice of Covered Action Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

The Office of the Whistleblower (“OWB”) issued a Preliminary Summary Disposition¹ recommending the denial of the whistleblower award claim submitted by Redacted (“Claimant”) in connection with the above-referenced covered action (“Covered Action”). Claimant filed a timely response contesting the preliminary denial. For the reasons discussed below, Claimant’s award claim is denied.

I. Background

A. The Covered Action

On Redacted, the Commission filed a civil action in federal district court charging Redacted (“Company”), Redacted and Redacted (collectively, “Defendants”) with violations of the federal securities laws, Redacted. The Commission’s complaint alleged, among other things, that Defendants Redacted.

Redacted. The Complaint further alleged that Defendants Redacted Redacted. Between Redacted and Redacted Redacted, final judgments were entered against the Defendants. Among other remedies, the

¹ See Exchange Act Rule 21F-18, 17 C.F.R. § 240.21F-18.

district court ordered Defendants to pay disgorgement, prejudgment interest, and civil penalties totaling over ^{Redacted}

On ^{Redacted}, OWB posted a Notice of Covered Action on the Commission's public website inviting claimants to submit whistleblower award applications within 90 days, or no later than ^{Redacted}. Claimant submitted an award application more than six months after the deadline.

B. The Preliminary Summary Disposition

OWB issued a Preliminary Summary Disposition recommending that Claimant's award claim be denied because Claimant submitted an untimely award application more than six months after the deadline and failed to specify in the award application any TCR² submission on which the claim for award was based. OWB noted that Claimant did not submit a tip on Form TCR or through the Commission's online TCR portal, as required by Rule 21F-9(a) under the Securities Exchange Act of 1934 ("Exchange Act"), nor did Claimant make the requisite whistleblower declaration as required by Exchange Act Rule 21F-9(b).

C. Claimant's Response to the Preliminary Summary Disposition

Claimant submitted a timely written response (the "Response") contesting the Preliminary Summary Disposition.³ The Response concedes that Claimant did not fill out a Form TCR or use the Commission's online TCR portal to submit the tip, but suggests that this failure is excused by Exchange Act Rule 21F-9(d).⁴ According to the Response, Claimant's initial contact was with one Commission staff member in ^{Redacted} and "[a]ll of [Claimant's] information was given directly to the ^{Redacted} SEC office." The Response states that Claimant's information was then "turned over," in succession, to three other staff members. The Response asserts that Claimant provided several hundred pages of information and leads "starting from ^{Redacted} to present."

Similarly, the Response concedes that Claimant did not file his/her award application by the deadline, but contends the Commission should waive any procedural deficiencies pursuant to Exchange Act Rule 21F-8(a).⁵ Claimant argues that "extraordinary circumstances" warranting a waiver of the procedural requirements exist because Claimant was a "pivotal source" of information used in the case, and his/her declaration and testimony were relied upon in a favorable ruling on a Motion for Summary Judgment filed by the Commission in the Covered Action. With respect to Claimant's failure to file the award claim by the applicable deadline, the Response further notes that an appeal of the Covered Action was still ongoing, and that Claimant was not aware that a Notice of Covered Action had been posted, or that one would be posted,

² The TCR System is the Commission's electronic database which records and stores information received from whistleblowers and others about potential securities law violations and records staff action taken with regard to tips, complaints, and referrals ("TCRs") entered into the system.

³ See Exchange Act Rule 21F-18(b)(3), 17 C.F.R. § 240.21F-18(b)(3).

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

⁵ Exchange Act Rule 21F-8(a), 17 C.F.R. § 240.21F-8(a).

prior to conclusion of the ongoing appeal.⁶ According to Claimant, it would be easy for a claimant to be unaware of the posting of a Notice of Covered Action unless the claimant checked for such a posting on a recurring basis.

II. Analysis

To qualify for an award under Section 21F of the Exchange Act, in addition to voluntarily providing the Commission with original information that leads to the successful enforcement of a covered action,⁷ a claimant must, among other requirements, comply with procedural requirements for submitting both his/her tip and whistleblower award claim. The record demonstrates that Claimant failed to follow these procedural requirements. As a result, Claimant is ineligible for an award with respect to the Covered Action.

A. TCR Filing and Whistleblower Declaration Requirements

To be eligible for a whistleblower award, an individual must, among other requirements, submit his/her tip on Form TCR or through the Commission's online TCR portal, as required by Exchange Act Rule 21F-9(a),⁸ and provide a declaration under penalty of perjury at the time of the submission that the information is true and correct to the best of the individual's knowledge and belief, as required by Exchange Act Rule 21F-9(b).⁹ These requirements serve important programmatic functions and are critical to the trackability, management, and reliability of tips.¹⁰ The Response concedes that Claimant did not file his/her information on Form TCR or through the Commission's online portal, but suggests that Exchange Act Rule 21F-9(d) excuses Claimant from the TCR filing and whistleblower declaration requirements. After considering the record, we find that Rule 21F-9(d) is inapplicable to Claimant.

Pursuant to Exchange Act Rule 21F-9(d), an individual who provides tips to the Commission after July 21, 2010, the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), but before August 12, 2011, the initial

⁶ Claimant's whistleblower award application also indicated that Claimant submitted the award claim on the first day he/she became aware of the Commission's whistleblower program.

⁷ Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).

⁸ See Exchange Act Rule 21F-9(a), 17 C.F.R. § 240.21F-9(a).

⁹ See Exchange Act Rule 21F-9(b), 17 C.F.R. § 240.21F-9(b). As relevant here, Exchange Act Rules 21F-8(a) and (c) provide that an individual is not eligible for an award if he/she does not comply with the procedural requirements for submitting whistleblower information to the Commission under Exchange Act Rule 21F-9 and for making a claim for an award under Exchange Act Rule 21F-10. See Exchange Act Rules 21F-8(a), 17 C.F.R. § 240.21F-8(a), and 21F-8(c), 17 C.F.R. § 240.21F-8(c).

¹⁰ See Order Determining Whistleblower Award Claims, Exchange Act Release No. 94398 at 5 (Mar. 11, 2022) ("The programmatic purposes of requiring whistleblowers to submit their information on Form TCR or through the online TCR portal include: allowing the Commission to promptly determine whether an individual who submits information is subject to heightened whistleblower confidentiality protections; helping the staff efficiently process the information and other documentation provided by the individual and assess its potential credibility; and assisting the Commission in eventually evaluating the individual's potential entitlement to an award. Also, by submitting a tip on Form TCR, the submitter declares under penalty of perjury that the information is true and correct to the best of the submitter's knowledge and belief. A tip that bypasses the TCR System may not contain the sworn declaration under penalty of perjury as to the veracity of the information." (footnote omitted)).

effective date of the Commission’s whistleblower rules, is required to have submitted original information in writing to the Commission in order to qualify as a whistleblower who could potentially obtain an award. In such cases, claimant’s submission of original information in writing will be deemed to satisfy the requirements of Exchange Act Rules 21F-9(a) and (b).¹¹ Claimant has indicated that he/she provided information to the Commission during this period. Specifically, according to the Response, Claimant’s initial contact was with one Commission staff member in ^{Redacted},¹² Claimant’s information was given “directly to the ^{Redacted} SEC office,” and his/her information was then “turned over,” in succession, to three other staff members. The Response asserts that Claimant provided several hundred pages of information and leads “starting from ^{Redacted} to present.”

However, according to a sworn declaration from Commission staff,¹³ which we credit, none of the Commission staff members identified in the Response were able to locate any information submitted by Claimant in writing to the Commission between July 21, 2010 and August 12, 2011. Moreover, a search of the email account that members of the public may use to submit information directly to the Commission’s ^{Redacted} Office revealed no emails sent to that account between July 21, 2010 and August 12, 2011 from either of Claimant’s two email accounts known to OWB. As staff has been unable to locate any written submission from Claimant to the Commission between July 21, 2010 and August 12, 2011, we conclude that the record does not support a finding that Rule 21F-9(d) is available to Claimant as an avenue to satisfy the requirements of Rules 21F-9(a) and (b). Because Claimant has failed to satisfy Exchange Act Rules 21F-9(a) and (b), we conclude that Claimant is ineligible for a whistleblower award.¹⁴

¹¹ See Exchange Act Rule 21F-9(d), 17 C.F.R. § 240.21F-9(d).

¹² In addition, Claimant’s whistleblower award application indicates that he/she submitted information by mail, fax, and “other,” between *** and ***. To the extent Claimant provided any information on or before July 21, 2010, the date of enactment of the Dodd-Frank Act, that information would not qualify as “original information” under Exchange Act Rule 21F-4(b)(1), 17 C.F.R. §240.21F-4(b)(1), and could not form the basis for an award grant.

¹³ The whistleblower rules contemplate that the record upon which an award determination is made shall consist of, as relevant here, a sworn declaration provided by the relevant Commission staff, in addition to the publicly available materials related to the Covered Action, the claimant’s tip, the claimant’s award application, and any other materials timely submitted by the claimant in response to the Preliminary Summary Disposition. See Exchange Act Rules 21F-18(c), 17 C.F.R. § 240.21F-18(c), and 21F-12(a), 17 C.F.R. § 240.21F-12(a).

¹⁴ Exchange Act Rule 21F-9(e), 17 C.F.R. § 240.21F-9(e), which provides a waiver to the Exchange Act Rule 21F-9(a) and (b) requirements, is not available in this case. Under Rule 21F-9(e), an automatic waiver of those requirements is available if two conditions are met. First, the claimant must show that he/she complied with the requirements of Rules 21F-9(a) and (b) within 30 days of first obtaining actual or constructive notice of those requirements, or within 30 days of retaining counsel in connection with the claimant’s submission of original information, whichever occurs first. Second, the Commission must be able to “readily develop an administrative record that unambiguously demonstrates that [the claimant] would otherwise qualify for an award.” Neither condition is satisfied in this case. First, Claimant concedes that he/she has never filed a TCR related to the Covered Action. Second, because Claimant failed to submit his/her award claim by the applicable deadline, the record does not unambiguously demonstrate that Claimant otherwise qualifies for an award.

B. Timeliness of Whistleblower Award Claim

Claimant's failure to submit his/her award claim by the applicable deadline provides an additional basis for denying Claimant's award application. The requirement that claimants file whistleblower award claims within ninety days of the posting of a Notice of Covered Action¹⁵ serves important programmatic functions.¹⁶ The deadline ensures fairness to potential claimants by giving all an equal opportunity to have their competing claims evaluated at the same time, and also brings finality to the claims process so that the Commission can make timely awards to meritorious whistleblowers.¹⁷

Claimant does not dispute that his/her award claim was submitted more than six months after the deadline specified in the Notice of Covered Action. Claimant asserts, however, that he/she was unaware that a Notice of Covered Action had been posted, or would be posted prior to conclusion of ongoing appeals in the Covered Action, and requests that the Commission exercise its discretionary waiver authority under Exchange Act Rule 21F-8(a)¹⁸ to excuse the untimely award application. For the reasons discussed below, we do not believe it is appropriate here to exercise our discretionary waiver authority. Accordingly, we find, as an additional ground for denial, that Claimant is not eligible for an award because Claimant failed to submit his/her application within ninety days of the posting date of the Notice of Covered Action.

C. Request for Waiver

Exchange Act Rule 21F-8(a) affords us discretionary authority to "waive any of [the] procedures [for submitting information or making a claim for an award] based upon a showing of extraordinary circumstances."¹⁹ Claimant urges us to exercise our discretion to waive his/her non-compliance with Rules 21F-9(a) and (b) and the applicable deadline for submitting a whistleblower award claim for the Covered Action, arguing that "extraordinary circumstances" exist because, according to Claimant, he/she was a "pivotal source" of information used in the case and his/her declaration and testimony were relied upon in a favorable ruling on a Motion for Summary Judgment filed by the Commission in the Covered Action.

We have explained that the "extraordinary circumstances" exception is to be "narrowly construed" and, in the context of a late filing, requires an untimely claimant to show that "the

¹⁵ See Exchange Act Rules 21F-10(a), 17 C.F.R. § 240.21F-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.") and 21F-10(b)(1), 17 C.F.R. § 240.21F-10(b)(1) ("All claim forms, including any attachments, must be received by the Office of the Whistleblower within ninety (90) calendar days of the date of the Notice of Covered Action in order to be considered for an award.").

¹⁶ See Order Determining Whistleblower Award Claim, Exchange Act Release No. 77368 at 2-3 (Mar. 14, 2016), *pet. for rev. denied sub nom. Cerny v. SEC*, 707 F. App'x 29 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 2005 (2018).

¹⁷ See *Securities Whistleblower Incentives and Protections*, Exchange Act Release No. 64545 (May 25, 2011). See also, e.g., Order Determining Whistleblower Award Claims, Exchange Act Release No. 97285 at 4 (Apr. 11, 2023).

¹⁸ Exchange Act Rule 21F-8(a), 17 C.F.R. § 240.21F-8(a).

¹⁹ *Id.*

reason for the failure to timely file was beyond the claimant's control."²⁰ For example, we have identified attorney misconduct or serious illness that prevented a timely filing of a whistleblower award application as two examples of the "demanding showing" that an applicant must make before we will consider exercising our discretionary authority to excuse a claimant's untimely award claim.²¹ With respect to other types of procedural deficiencies, such as the failure to file a TCR or submit the required whistleblower declaration, we have similarly looked to whether the claimant's failure to satisfy the applicable requirements could be attributed to circumstances beyond the claimant's control.²² The critical question is not how significant claimant's information was to the success of the enforcement action, but whether the facts and circumstances that gave rise to the late filing or other procedural deficiency were sufficiently beyond the control of the claimant to support an exercise of our discretionary authority under Exchange Act Rule 21F-8(a).²³

Here, Claimant's assertion that he/she was a "pivotal source" of information used in the Covered Action does not demonstrate that there were extraordinary circumstances beyond Claimant's control that caused any of Claimant's procedural deficiencies. Although Claimant asserts that he/she promptly filed his/her award application after becoming aware of the posting of the Notice of Covered Action, he/she has failed to allege any facts to suggest that the failure to file a TCR, submit the required whistleblower declaration, or file the award claim by the applicable deadline was beyond Claimant's control, or that Claimant was in any way impeded in complying with these requirements.

We have previously explained that "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."²⁴ Accordingly, we do not believe it is appropriate here to exercise our discretionary authority under Exchange Act Rule 21F-8(a) to

²⁰ See Exchange Act Release No. 77368 at 3.

²¹ See, e.g., Order Determining Whistleblower Award Claims, Exchange Act Release No. 96765 at 4 (Jan. 30, 2023); Order Determining Whistleblower Award Claims, Exchange Act Release No. 95711 (Sept. 9, 2022).

²² See Order Determining Whistleblower Award Claims, Exchange Act Release No. 94398 (Mar. 11, 2022) (declining to grant a Rule 21F-8(a) waiver excusing claimant's failure to file a TCR notwithstanding claimant's assertion that an online report he/she authored provided invaluable assistance to the Commission in its investigation); Order Determining Whistleblower Award Claims, Exchange Act Release No. 82181 (Nov. 30, 2017) (declining to find that claimants' "deliberate decision" to provide an expert report on behalf of a separate whistleblower amounted to "extraordinary circumstances" that would justify granting a Rule 21F-8(a) waiver and noting that the failure to provide whistleblower information in the form and manner required by Rule 21F-9(a) "can result in the denial of an award application, even if the individual voluntarily provided original information to the Commission and that information led to the success of a covered action.")

²³ See, e.g., Exchange Act Release No. 96765 at 4.

²⁴ See Order Determining Whistleblower Award Claim, Exchange Act Release No. 72659 at 4 (July 23, 2014); see also, e.g., Exchange Act Release No. 96765 at 5.

excuse Claimant's failure to comply with the TCR filing, whistleblower declaration, or whistleblower application timeliness requirements.²⁵

For these reasons, we deny Claimant's whistleblower award claim.

III. Conclusion

Accordingly, it is hereby ORDERED that Claimant's whistleblower award application be, and it hereby is, denied.

By the Commission.

Vanessa A. Countryman
Secretary

²⁵ Section 36(a) of the Exchange Act provides the Commission with broad authority to exempt any person from any provision of the Exchange Act or any rule or regulation thereunder to the extent that such exemption is "necessary or appropriate in the public interest" and "consistent with the protection of investors." Claimant has not specifically requested, and in our view the present facts and circumstances do not warrant, the exercise of our Section 36(a) exemptive authority.