



SEC Whistleblower Program Is A Black Hole Of Despair (<http://www.brokeandbroker.com/2735/sec-oig-owb/>)

📅 April 9, 2015

As part of my law practice, I represent whistleblowers, and for several years, I have been representing one such client before the Securities and Exchange Commission ("SEC") and dealing with the federal regulator's *Office of the Whistleblower* ("OWB"). Frankly, the experience has been incredibly frustrating. I simply cannot persuade the OWB that it needs to adjust its mind-set and understand that my client is not an adversary or a defendant/respondent in a criminal/regulatory case. If OWB's attitude doesn't change, it will undermine the SEC's Whistleblower Program and dissuade informants from coming forward and deter lawyers from representing those individuals on a contingency basis.

As a former regulator with two Wall Street self-regulatory organizations, I fully understand and respect the need for prosecutors and regulators to scrupulously maintain whatever confidentiality is mandated for investigations and trials/hearings. Since I represent individuals and entities that are often industry defendants/respondents **and** I also represent defrauded public customers, I am particularly vested in ensuring that the regulatory and criminal justice processes remain legal and ethical. I understand the rules of the game and I honor the rulebook. It is in that spirit that I urge the SEC to implement more deadlines within its Rule 21F. Also, I urge the SEC to investigate its *Office of the Inspector General* ("OIG") and determine whether the use of third-party service providers is appropriate for the intake of complaints directed to that office.

90 Days to Claim An Award

Section 21F of the Securities Exchange Act of 1934: *Securities Whistleblower Incentives and Protection*, requires the SEC "to pay awards, subject to certain limitations and conditions, to whistleblowers who provide the Commission with original information about violations of the federal securities laws." In furtherance of Exchange Act Section 21F, the SEC promulgated Rule 21F.

Under Rule 21F-10 *Procedures for making a claim for a whistleblower award in SEC actions that result in monetary sanctions in excess of \$1,000,000.*, we are informed in relevant part that:

(b) To file a claim for a whistleblower award, you must file Form WB-APP, Application for Award for Original Information Provided Pursuant to Section 21F of the Securities Exchange Act of 1934 (referenced in § 249.1801 of this chapter). You must sign this form as the claimant and submit it to the Office of the Whistleblower by mail or fax. 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.

As such, after a whistleblower has submitted a *Form TCR* informing OWB of the nature of the information to be disclosed, after OWB has forwarded the whistleblower to SEC Staff for purposes of investigation, after a matter has been settled or adjudicated, and after the SEC publishes a *Notice of Covered Action* ("NoCA"), we arrive at the stage of the process where claims for an award may be made by the whistleblower. As set forth in Rule 21F-10(b), such claims must be made via *Form WB-APP* within 90 calendar days after the publication of a NoCA. If you fail to meet that deadline, your subsequent efforts to claim an award may be rebuffed as untimely filed.

Following An Evaluation

In contrast to the 90 days for filing the *Form WB-APP* in 21F-10(b), note the lack of deadlines in Rule 21F-10(d):

(d) Once the time for filing any appeals of the Commission's judicial or administrative action has expired, or where an appeal has been filed, after all appeals in the action have been concluded, the staff designated by the Director of the Division of Enforcement ("Claims Review Staff") will evaluate all timely whistleblower award claims submitted on Form WB-APP (referenced in § 249.1801 of this chapter) in accordance with the criteria set forth in these rules. In connection with this process, the Office of the Whistleblower may require that you provide additional information relating to your eligibility for an award or satisfaction of any of the conditions for an award, as set forth in § 240.21F-(8)(b) of this chapter. Following that evaluation, the Office of the Whistleblower will send you a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award percentage amount.

Under 21F-10(d), a *Claims Review Staff* ("CRS") is designated to "evaluate all timely " claims. When is the designation of the CRS supposed to be made? After how many days or weeks . . . by what deadline or guideline? No . . . that is not set forth in the Rule.

After CRS is appointed, how long does the Rule provide for the evaluation of a *Form WB-APP*? That too is not designated.

As best as I can discern, the deadlines for completion under Rule 21F-10(d) are *whenever* CRS is appointed, *whenever* CRS gets around to evaluating a *Form WB-APP*, and *following whenever* that evaluation is completed. *Whenever* and *following* are amorphous concepts so meaningless as to not even rise to the level of "vague."

How long is permitted for OWB to take before forwarding to the whistleblower the *Preliminary Determination*? That time is purportedly the elastic "following the evaluation."

Rule 21F-10(d) injects far too much uncertainty into the process and causes friction between claimants and their attorneys, on the one hand, and, on the other hand, OWB. This section of the Rule is a horrific black hole in which time ceases to exist.

30 and 60 Day Deadlines For Contesting Preliminary Determination

Let's assume that you are an unhappy camper upon reading the *Preliminary Determination*. Your claim has been denied. You are not credited with what you deem a fair percentage of the award. Here are your options, in pertinent part, under Rule 21F-10(e):

(e) You may contest the Preliminary Determination made by the Claims Review Staff by submitting a written response to the Office of the Whistleblower setting forth the grounds for your objection to either the denial of an award or the proposed amount of an award. The response must be in the form and manner that the Office of the Whistleblower shall require. You may also include documentation or other evidentiary support for the grounds advanced in your response.

(1) Before determining whether to contest a Preliminary Determination, you may:

(i) Within thirty (30) days of the date of the Preliminary Determination, request that the Office of the Whistleblower make available for your review the materials from among those set forth in § 240.21F-12(a) of this chapter that formed the basis of the Claims Review Staff's Preliminary Determination.

(ii) Within thirty (30) calendar days of the date of the Preliminary Determination, request a meeting with the Office of the Whistleblower; however, such meetings are not required and the office may in its sole discretion decline the request.

(2) If you decide to contest the Preliminary Determination, you must submit your written response and supporting materials within sixty (60) calendar days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (e)(1) of this section, then within sixty (60) calendar days of the Office of the Whistleblower making those materials available for your review. . .

Under Rule 21F-10(e) a whistleblower must request the production of further materials or a meeting with OWB within 30 days of the issuance of the *Preliminary Determination*. Note that even when a meeting with OWB is timely requested, that office is "not required and the office may in its sole discretion decline the request." How long does OWB have to decline your request for that meeting? That's not set forth in the Rule.

If you decide to contest the *Preliminary Determination*, you must do so within 60 calendar days of the determination or the provision of requested materials by OWB. Perhaps by now you are noticing the developing pattern: *Deadlines exist in order to prompt action by whistleblowers but when action is required by the SEC, the Rule fails to spell out specific deadlines.*

Considering Your Contest of the Preliminary Determination

Assuming that you timely contested the *Preliminary Determination*, how long does CRS have to consider your arguments? Rule 21F-10(g) explains that:

(g) If you submit a timely response pursuant to paragraph (e) of this section, then the Claims Review Staff will consider the issues and grounds advanced in your response, along with any supporting documentation you provided, and will make its Proposed Final Determination.

Once again, nary a word about 30 days or 60 days or any deadline whatsoever. Under the Rule, CRS is granted whatever time is inherent in the word "consider." *Are we talking days, weeks, months, or years?* In response to such a request for guidance, OWB explains that the application is being evaluated, there are many other applications pending, and you should be patient.

30 Days Notice Of Proposed Final Determination

Next, we truly fall into an abyss. As if by alchemy, the *Preliminary Determination* is rendered a *Proposed Final Determination*. When the *Proposed Final Determination* is submitted to the Commissioners for approval or denial, you would imagine that at this point in time, we would have some certainty as to the deadline for their action. Consider Rule 21F-10:

(h) The Office of the Whistleblower will then notify the Commission of each Proposed Final Determination. Within thirty 30 days thereafter, any Commissioner may request that the Proposed Final Determination be reviewed by the Commission. If no Commissioner requests such a review within the 30-day period, then the Proposed Final Determination will become the Final Order of the Commission. In the event a Commissioner requests a review, the Commission will review the record that the staff relied upon in making its determinations, including your previous submissions to the Office of the Whistleblower, and issue its Final Order.

(i) The Office of the Whistleblower will provide you with the Final Order of the Commission.

How long can OWB sit with a *Proposed Final Determination* before presenting it to the Commissioners? There is no deadline. There is, however, a 30-day limit on the time any Commissioner may request a review; and if no such review is sought, the *Proposed Final Determination* become a *Final Order*.

How soon after the passage of the 30-day waiting period must the proposal be drafted into a *Final Order* and then published? That is not prescribed.

Although Rule 21F(10)(i) provides that OWB will provide whistleblower claimants with the *Final Order*, oddly, there is no deadline for such action.

In my handling of a matter that went to a *Proposed Final Determination*, OWB refused to inform me as to the date when the notification was provided to the Commissioners, thus making it impossible for me to calculate the expiration of the 30-day deadline. Even after a period far in excess of what I deemed to be 30 days had passed, OWB continued to stonewall queries as to when it would issue a *Final Order* and provide same to my law firm.

Getting Paid By The "Following"

Finally, let's assume that your patience was rewarded and you are entitled to an award. Let's consider, in pertinent part, the mechanics of cutting the check and getting the dollars into your hands;

§ 240.21F-14 Procedures applicable to the payment of awards.

(a) Any award made pursuant to these rules will be paid from the Securities and Exchange Commission Investor Protection Fund (the "Fund").

(b) A recipient of a whistleblower award is entitled to payment on the award only to the extent that a monetary sanction is collected in the Commission action or in a related action upon which the award is based.

(c) Payment of a whistleblower award for a monetary sanction collected in a Commission action or related action shall be made following the later of:

(1) The date on which the monetary sanction is collected; or

(2) The completion of the appeals process for all whistleblower award claims arising from:

(i) The Notice of Covered Action, in the case of any payment of an award for a monetary sanction collected in a Commission action; or

(ii) The related action, in the case of any payment of an award for a monetary sanction collected in a related action. . .

Under Rule 21F-14(a) we're simply told that the source of funds will be from the SEC *Investor Protection Fund*. Under Rule 21F-14(b) we're told that claimants will get paid only after the SEC has actually "collected" the sanction. Under (c) we're told

that payment shall be made following the later of the date of collection or the completion of the *NoCA* appeals process or a related action.

There is a serious flaw in that rulemaking. It's one that many lawyers and whistleblowers have missed.

There is no date certain or even a time limit by which the SEC must pay you -- even after it is in full receipt of all fines and even after the lapse of all times for appeals. You may think that it's provided in the rule, but it's not. What is provided is simply that payment "shall be made following . . ." *Following* as in one day, one week, one month, one year, one decade???? Even after the monetary sanction is collected and/or the appeals process is complete, there is no sense of urgency, there is no limit upon how much longer the SEC may take to render payment of the award. "

Case In Point

In light of the need to preserve a client's confidentiality, I am constrained to refer to the informant solely as "the Whistleblower client," and to avoid characterizations or references to the Respondent or the underlying investigation/matter. I will note that the Whistleblower client had no liability or exposure in the underlying matter and the client's cooperation was substantial and material during the investigative phase.

SIDE BAR: The Whistleblower client's and my experience with the SEC Divisional Staff conducting the investigation was superb. In my three decades of Wall Street experience, I have rarely dealt with more competent and courteous regulators. The difficulties set forth in this article are not about the SEC Divisional Staff, who did the grunt work, but about my dealings with the OWB Staff and the nameless, faceless personages of the OIG.

At various stages in my representation of the Whistleblower client, I found myself confronted by those timeless gaps in the SEC's Rule 21F noted above. After the publication of the *NoCA* and my client's timely submission of *Form WB-APP*, I sought guidance as to how long it would likely take for the issuance of a *Preliminary Determination*. I asked OWB if they thought it would be days, weeks, months or years. We were essentially told that it would take whatever time it would take and to be patient.

When the determination was finally rendered, my whistleblower client did not object to the proposed award and waived the right of appeal; notwithstanding, we then went through another waiting game. When we asked OWB to provide us with the date of submission of the *Proposed Final Determination* to the Commissioners, that was declined -- thus making it impossible for me to calculate when the 30-day review period had expired.

You may imagine my exasperation when trying to divine the date on which a *Proposed Final Determination* and an *Order* would be forthcoming. In response to such queries for guidance, OWB gave polite but essentially non-responsive replies.

Understand that we are talking about an SEC regulatory matter that has been going on for several years from the date of the cited misconduct through the processing of the *WB-APP*. The evaluation of my client's eligibility for an award has now taken longer than the investigation by the SEC of the Respondent's misconduct!

November 2014 OIG Complaint

In November 2014, after several more failed attempts to elicit guidance from OWB as to where in the pipeline my Whistleblower client's award stood, I telephoned the SEC OIG and filed a complaint against OWB's policies, procedures, and practices pertaining to the office's refusal to provide me and my client with reasonable guidance as to how much longer it would like take until an approval or denial was forthcoming. Pursuant to OIG's website mission statement, my complaint satisfied several of their mandates:

Mission of the SEC Office of Inspector General (http://www.sec.gov/about/offices/inspector_general_about.shtml#.VSQNe_nF98E)

The mission of the Office of Inspector General (OIG) is to promote the integrity, efficiency, and effectiveness of the critical programs and operations of the U.S. Securities and Exchange Commission. This mission is best achieved by having an effective, vigorous, and independent office of seasoned and talented professionals. Those individuals carry out the OIG's mission by:

- conducting independent and objective audits, evaluations, inspections, investigations, and other reviews of Commission programs and operations;
- preventing and detecting fraud, waste, abuse, and mismanagement in Commission programs and operations;
- identifying vulnerabilities in Commission systems and operations and recommending constructive solutions;
- offering expert assistance to improve Commission programs and operations;

- communicating timely and useful information that facilitates management decisionmaking and the achievement of measurable gains; and
- keeping the Commission and the Congress fully and currently informed of significant issues and developments.

The OIG uses a curious process for the intake of complaints about the SEC and its divisions and staff. You can utilize an online filings system (<http://iwf.tnwgrc.com/secoig/InternationalSplashPage/tabid/183/language/en-US/Default.aspx>) or a toll-free hotline telephone number. Apparently both are serviced by third-party service provider. I opted to file my grievance via telephone. The telephone call in November 2014 was protracted, during which time I was asked a series of questions (likely from a script) and, in response, I provided names, dates, rules, and events in support of my complaint. I know that OIG got the complaint because they provided me with a Report number and sent to me this email on November 20, 2014:

OIG

4:14 PM (0 minutes ago)

to me

Dear Mr. Singer,

Thank you for contacting the U.S. Securities and Exchange Commission (SEC) Office of Inspector General (OIG). We have received the report of your complaint (Report No. 120583993) concerning the SEC Office of the Whistleblower. We will contact you if we require further information.

Thank you again for contacting the OIG.

Respectfully,

The Office of Inspector General
U.S. Securities and Exchange Commission
100 F Street, NE, Washington, DC 20549-2977
fax 202-772-9265; oig@sec.gov

OIG Silence

After about a month of not hearing back from anyone at OIG, I telephoned the third-party service provider and was told that they had my complaint on file and someone would get back to me if needed.

After still not having heard back from anyone at OIG and encountering yet further stonewalling by OWB, on April 2, 2015, I again telephoned OIG's third-party provider, received the same confirmation of the complaint being on file, received a confirmation of my earlier query for a status update, and was assured that they would inform OIG of my concerns. Growing increasingly frustrated with the runaround, I also sent this email to OIG's publicly disclosed OIG@sec.gov email address on April 2, 2015:

Query from Bill Singer, Esq. # 120583993

Bill Singer

Apr 2 (4 days ago)

to oig

On or about November 20, 2014, I submitted an initial complaint through your telephonic third-party service provider but have never had any follow-up communication from anyone in OIG. The number assigned to the matter was 120583993. I have left two queries with your third-party service but have not had any response to either during the past four-plus months.

Bill Singer

Talk To OWB About Your Complaints About OWB

In response to either or both the April 2 telephone call and email, OIG replied on April 3, 2015, with an email that referenced two attached PDF files, one of which included the following message:

From: OIG
To:
Subject: SEC OIG Hotline Report No. 120583993
Date: Friday, April 03, 2015 8:16:00 AM

Dear Mr. Singer,

For information about the administration of the SEC's Whistleblower Program, you should visit the website www.sec.gov/whistleblower or contact the SEC Office of the Whistleblower directly at (202) 551-4790.

Respectfully,

The Office of Inspector General
U.S. Securities and Exchange Commission
100 F Street, NE, Washington, DC 20549-2977
fax 202-772-9265; oig@sec.gov

In response to the above OIG message, on April 3, 2015 I emailed this reply:

I do not seek information about the administration of the SEC's Whistleblower program. I am a 33-year veteran industry attorney and am seeking to prompt an investigation by OIG into the manner in which OWB administers the program based upon a number of troubling experiences that I have encountered when dealing with the office.

Despite having cooperated fully with the intake procedures that OIG has implemented, it seems that OIG either lost, destroyed, or misplaced the notes of my November 2014 complaint. Inexplicably, in response to complaints about OWB's policies and practices, OIG waited four months before referring me back to OWB.

Would You Do Our Work For Us?

In response to my April 3rd email message above, I received yet another April 3rd email reply from OIG:

Dear Mr. Singer,

Please provide specific information or evidence to the OIG as follows: (1) the rules, regulations, or statutes that you believe the employee allegedly violated; (2) if known, the identity of the employee(s) involved; (3) the specific nature of the alleged misconduct; and (4) other persons who might be aware of this alleged misconduct.

Thank you again for contacting the OIG.

Respectfully, . . .

Respectfully, indeed.

As I painstakingly made clear in November 2014 during the OIG intake interview, I was complaining to OIG about OWB's conduct in connection with a **CONFIDENTIAL** informant. If OIG staff had reviewed its file for Case #120583993, it should have been apparent that the Whistleblower matter of which I was complaining involved a confidential whistleblower.

During recent interaction with OWB, they have transmitted correspondence using the SEC's encrypted *Zixmail* program, which requires passwords to open a transmission and email replies to OWB are purportedly forwarded to an encrypted SEC confidential email address. Shockingly, OIG requests that I disclose information and identities in a reply back to its relatively insecure OIG@sec.gov address. It should be noted that I avoided any reference to my Whistleblower client's identity or the underlying regulatory matter in my emails to OIG@sec.gov.

Inadvertent TCR Production

I would respectfully refer OIG to In the Matter of J. Kenneth Alderman, CPA et al (<http://www.sec.gov/alj/aljorders/2013/ap-755.pdf>). (*Order on Motion For Protective Order*, Securities And Exchange Commission, Admin Pro. Rulings Release No. 755, Admin. Proc. File #3-15127, March 5, 2013) and direct OIG's attention to the disclosure in that case that "(4) an email forwarding a complaint from the Commission's Tips, Complaints, and Referrals (TCR) system" was inadvertently disclosed by

the SEC to respondents in a disciplinary matter unrelated to the issues set forth in the TCR. I trust that OIG is aware that the initial whistleblower tip is supposed to be submitted via the TCR. OIG can also read about the incident at:

- " (<http://www.brokeandbroker.com/1906/email-sec-whistleblower/>)Inadvertent Email Production By Securities And Exchange Commission Raises Concerns About Whistleblower Tips" (<http://www.brokeandbroker.com/1906/email-sec-whistleblower/>)(*BrokeAndBroker.com Blog*, March 6, 2013)

Further, OIG might also take notice that on <https://www.sec.gov/about/offices/owb/owb-tips.shtml> (<https://www.sec.gov/about/offices/owb/owb-tips.shtml>) , the SEC discusses the TCR system, and also assures informants of the various confidentiality protections provided thereunder -- I doubt that OIG@sec.gov offers the appropriate security.

From The Sublime To The Ridiculous

OWB apparently forgets that the SEC's Whistleblower program was, in some measure, prompted by the SEC's failures to promptly act in the Stanford Financial and Madoff frauds -- notwithstanding the efforts of whistleblowers, such as Harry Markopolos, who were largely ignored by the SEC.

- **READ:** "Federal Court Cites the Securities And Exchange Commission Dithering (<http://www.brokeandbroker.com/2732/zelaya-sec/>)" (*BrokeAndBroker.com Blog*, April 6, 2015)

In reading the questions set forth in OIG's April 3rd email to me, it appears that the office can't locate the initial complaint that I filed because they are seeking information from me that I had previously provided to their service provider during the intake telephone call. It seems that OIG did nothing for four months -- and for OIG to refer me back to OWB for answers to my complaints, when I am complaining to OIG about OWB, is beyond comprehension.

When the Whistleblower client stepped forward, the SEC was eager to conduct interviews or obtain written responses -- at times, the client and I worked on weekends, at nights, and during inconvenient hours in order to timely and professionally respond. Now, when it comes time to rewarding the Whistleblower client's diligence and efforts, the SEC dithers.

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About Bill Singer (http://www.rrbdlaw.com/bios_singer.html)

BILL SINGER is a lawyer who represents securities-industry firms, individual registered persons, Wall Street whistleblowers, and defrauded public investors. For over three decades, Singer has represented clients before the American Stock Exchange, the New York Stock Exchange, the Financial Industry Regulatory Authority (formerly the NASD), the United States Securities and Exchange Commission, and in criminal investigations brought by various federal, state, and local prosecutors. He has the distinction of representing witnesses during Congressional investigations. In 2015, Singer achieved a significant award in excess of \$1 million from the Securities and Exchange Commission on behalf of a whistleblower client.

Singer is presently Of Counsel to a law firm and the publisher of the BrokeAndBroker.com Blog, which was rated as one of the industry's top eight destination websites and the leading legal/regulatory blog by "Investment News."

Before entering the private practice of law, Singer was employed in the Legal Department of Smith Barney, Harris Upham & Co.; as a regulatory attorney with both the American Stock Exchange and the NASD (now FINRA); and as a Legal Counsel to Integrated Resources Asset Management. Singer was formerly Chief Counsel to the Financial Industry Association; General Counsel to the NASD Dissidents' Grassroots Movement; and General Counsel to the Independent Broker-Dealer Association. He was registered for a number of years as a Series 7 and Series 63 stockbroker.

Singer regularly appears as a commentator on television and radio, and is frequently quoted in the press. He is an outspoken critic of ineffective regulation and an advocate for economic and political sanity.

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