

U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549

Re: File No. S7-16-18, Amendments to the SEC's Whistleblower Program Rules

Dear SEC Commissioners,

Thank you for your service to our country and for considering my comments. I also want to thank the many others at the Commission who work with diligence and determination to protect the financial interests of those who invest in and rely on our markets.

I have read through the 184 pages of Proposed Amendments to the Commission's Whistleblower Program Rules. There is a lot of information and ideas to digest, so I am going to focus my feedback in this letter solely on the Commission's desire to expedite Preliminary Determinations and Final Orders of Whistleblower Awards.

As one who has been waiting to receive a Preliminary Determination, I was encouraged to see that the Commission is looking for ways to streamline the determination process. Thank you for caring about the delays. In the life of a whistleblower, waiting for a Preliminary Determination can feel like a hopeless eternity. My wife commented to me recently that she was unsure "if it has been worth it," when pondering if a future monetary reward of any size has been worth the risks we have taken, the troubles we have endured or the time and experiences we have lost as a family? How do you put a value on time lost, as there is no way to get it back? Waiting years for a determination can feel like a lifetime, especially for those of us who lack the financial resources to stay afloat while waiting for an award, or for those of us who just want to bring finality and closure to the difficulties endured as a whistleblower.

While communicating the Proposed Amendment to Rule 21F-8 (pertaining to claimants who submit false information to the Commission or who abuse the award application process) the Commission stated on page 77:

"Processing these frivolous award applications uses staff resources that could be devoted to potentially meritorious award applications. Beyond the diversion of staff resources, we have found that, by utilizing the procedural opportunities to object to an award, these repeat applicants can significantly delay the processing of meritorious award applications and the eventual payment of awards."

Thank you for proposing to permanently ban any applicant from seeking an award after the Commission determines that the applicant has abused the process by submitting three or more frivolous award applications. I am in favor of this component of the proposed amendments.

Further, while communicating the Proposed Amendment to Rule 21F-18 (pertaining to establishing a summary disposition process), the Commission stated on page 91:

"Over the course of the years that the Commission has implemented the whistleblower award program, it has become apparent to us that a significant number of award applications may be

denied on relatively straightforward grounds because they do not implicate novel or important legal or policy questions. These grounds for denial include, among other things, the fact that the individual did not comply with the form-and-manner requirements as specified in Rule 21F-9 for submitting information to be eligible for an award, or that the information was not used by the staff responsible for investigating, preparing and litigating the covered action and thus the individual's information did not "lead to" the success of the covered action.

In an effort to provide a more timely resolution of relatively straightforward denials, we are proposing a summary disposition process. This process would be in lieu of the claims adjudication processes that are specified in Rule 21F-10 and Rule 21F-11. The principal difference between the proposed summary disposition process and the existing processes specified in Rule 21F-10 and 21F-11 is that for a claim designated for summary disposition the CRS would not be involved in reviewing the record, issuing a Preliminary Determination, considering any written response filed by the claimant, or issuing the Proposed Final Determination; these functions would be assumed by the Office of the Whistleblower in an effort to streamline the Commission's consideration of denials that are relatively straightforward."

Thank you for proposing this streamlined process. I appreciate that you are addressing a learned bottleneck (the involvement of the Claims Review Staff [CRS] on such matters) and for proposing an excellent solution (letting the Office of the Whistleblower [OWB] handle the resolution of relatively straightforward denials). I am in favor of this component of the proposed amendments.

The Commission has also communicated that it desires to create a 30-day period for claimants to reply to a Preliminary Summary Disposition, which was noted as being shorter than the allowed 60-day period for replying to a Preliminary Determination. I propose that a claimant be allowed, and automatically granted (by notifying the commission in writing) an additional 30-day extension when responding to a Preliminary Summary Disposition. Thus, a claimant would have up to 60 days to reply. This would represent a compromise between what the Commission believes is appropriate and what is best for claimants who are legitimately trying to contest the denial. For claimants who do not contest the denial within the 30-day period, the Preliminary Summary Disposition could automatically become the Final Order. The issue that I have with only allowing a 30-day window to contest a Preliminary Summary Disposition is that a claimant's attorney (or even the actual claimant) may be buried deep in other urgent matters, and as such, may be unable to quickly pivot to working on contesting the denial. I believe the data shows that hundreds of claimants have and continue to wait several years before receiving any type award determination. When claimants have no knowledge nor advance notice as to when they may hear any news or feedback from the Commission on an award claim, to expect claimants to reply within 30 days seems potentially problematic.

The Commission also stated on page 94 that the proposed Preliminary Summary Disposition process could also be employed on award claims where multiple claimants are involved, "even if other of the applications are subjected to the regular consideration processes specified in Rules 21F-10 and 21F-

11.” The Commission believes “this could free up staff resources to concentrate on the meritorious claims or the more difficult determinations,” and “may potentially permit the Commission to more promptly pay any meritorious whistleblower on any award that may eventually result from the final order issued under the Rule 21F-10 or Rule 21F-11 process.” I am in favor of this component of the proposed amendments but reiterate that I believe a claimant should have up to 60-days to respond to a Preliminary Summary Disposition.

I hope that the proposed amendments to streamline the awards process will make a big difference in expediting Preliminary and Final Determinations for eligible whistleblowers. I recently read a Freedom of Information Act Request, pertaining to the total number of properly filled out whistleblower award claims for SEC Covered Actions since the beginning of the Whistleblower Program through June 8, 2018 (<https://www.sec.gov/files/18-02174-FOIA.pdf>)

The Division of Enforcement stated that 1,004 WB-APPs have been properly filled out. By utilizing the Final Orders section of the Office of the Whistleblower website, I was able to approximate 419 Denial Orders and 57 Award Orders from inception through September 13, 2018. The calculations by year are:

- 2012 – 2 Denials / 1 Award
- 2013 – 58 Denials / 5 Awards
- 2014 – 153 Denials / 8 Awards
- 2015 – 113 Denials / 9 Awards
- 2016 – 29 Denials / 15 Awards
- 2017 – 48 Denials / 13 Awards
- 2018 – 16 Denials / 6 Awards

I hope that my calculations are wildly incorrect, as I became discouraged when adding up the numbers. It appears that 476 decisions have been made (528 still undecided), out of 1,004 claimants waiting to for a determination (or stated another way, 52.59% of all claimants have not received a decision on their award claim).

The first Award Order was issued 7/18/2012 and the most recent Commission Order was issued on 9/06/2018. During this nearly 74 month window, the Office of the Whistleblower employed the following number of attorneys during the year (based on information communicated in the Annual Whistleblower Reports):

- 2012 – 8 attorneys
- 2013 – 9 attorneys
- 2014 – 9 attorneys
- 2015 – 10 attorneys (report stated that 2 additional attorneys would be hired)
- 2016 – 11 attorneys (it appears the 2<sup>nd</sup> attorney was not added)
- 2017 – 11 attorneys

When adding up the attorneys and then dividing by 6 years, the Office of the Whistleblower has employed 9.67 attorneys per year  $[(8+9+9+10+11+11) / 6 \text{ years}]$ .

By analyzing the above data, I suggest for consideration that:

- 476 Orders have been issued during the 74 month span (from 7/2012 – 9/2018), or about 77.19 Orders per year  $[(476 \text{ Orders} / 74 \text{ months}) * 12 \text{ months}]$ .
- On average, an Office of the Whistleblower attorney can handle 7.98 Award or Denial Orders per year  $[77.19 \text{ Orders} / \text{historical average of } 9.67 \text{ OWB attorneys}]$ . If 11 staff attorneys are currently employed at the OWB, then the OWB can process 87.78 Award or Denial Orders per year  $[7.98 \text{ Orders per attorney} * 11 \text{ attorneys}]$ .
- If the Office of the Whistleblower is employing 11 attorneys in 2018, and if the OWB maintains 11 attorneys into the future, then it will take over 6 years (72.18 months) to work through the 528 undecided award applications.  $[528 \text{ undecided claims} / 87.78 \text{ claims per year that can be determined with an } 11 \text{ attorney staff at the OWB}]$ .
- It is important to note that the above figures include low hanging fruit denials (one claimant was denied on 196 orders and another claimant was denied on 25 orders). If these two claimants were excluded from the above calculations, the number of orders that an OWB attorney could close during a year would decline, and it could potentially take much longer than 72 months to work through the current determination backlog.
- If the 221 outlier denials (the frivolous claims submitted by the two claimants) are excluded from the 476 decisions made to date, then there has effectively been 198 denials and 57 awards. This factors out to 22.35 awards and 77.64 denials per every 100 claims.  $[57 \text{ Award Orders} / 255 \text{ total determinations}]$ . With an estimated 528 claims still undecided, it is possible that there are 118 Award Orders yet to be determined  $[22.35\% \text{ Award Orders} * 528 \text{ undecided claims}]$ .
- Of the 476 denial or award decisions rendered, 46.42% of all decisions made relate to the 221 frivolous claims submitted by the two problematic claimants  $[221 \text{ frivolous claims} / 476 \text{ total determinations}]$ .
- In 2016 there were 44 Final Orders, 2017 had 61 Final Orders, and 2018 has seen 22 Final Orders (through 9 months – or a projected 29 Final Orders for all of 2018). Thus, the ratio of Final Orders to OWB attorneys for the last 3 years is:
  - 2016 – 44 Final Orders / 11 attorneys = 4.00 Final Orders per attorney
  - 2017 – 61 Final Orders / 11 attorneys = 5.55 Final Orders per attorney
  - 2018 – 29 Final Orders (est) / 11 attorneys = 2.64 Final Orders per attorney

So, it seems a good question to ask is this: Is the bottleneck due to (1) an understaffed Office of the Whistleblower, (2) an overcommitted Claims Review Staff, (3) process inefficiencies, (4) frivolous award claims or (5) all of the above?

If the problem is with an understaffed OWB, and each OWB attorney can currently handle 4 determinations per year (averaging out the 3-year average of 2016-2018), then it will take approximately 12 years to process the current 528 claimant backlog [ $528 / (11 \text{ OWB attorneys} * 4 \text{ orders per year})$ ].

If the problem is with an overcommitted Claims Review Staff, then it seems that more Claims Review Staff (or support staff working on claim reviews) needs to be added, combined with the proposed amendments to reduce the types of determinations the CRS needs to be involved with.

If the problem is with process inefficiencies, and the inefficiencies are being address with the proposed amendments, would the Commission be willing to temporarily deploy an additional 20 - 30 attorneys to the OWB or CRS to assist with working through the current backlog?

I do not believe the bottleneck is currently affected by frivolous award applicants (when looking at the overall scope and magnitude of Preliminary Determination delays. The Commission stated on page 147 that:

“... two individuals have submitted approximately 24% of all award applications in connection with Commission covered actions. All but one of the applications submitted by these two individuals have been found by the Office of the Whistleblower to be entirely frivolous.”

I believe the Commission is referring in large part to the Denial Orders on March 19, 2013 (51 claims) and May 12, 2014 (143 claims) and August 5, 2015 (25 claims). Again, I completely agree that eliminating frivolous award claims is necessary. However, it appears that delays in the awards process is unrelated to frivolous claims, as these two claimants had their claims denied 65, 48 and 37 months ago respectively. Frivolous claims may be problematic in the future, but it does not seem to answer the question as to why delays exist right now in processing award applications.

It appears that a much larger problem is a shortage of Commission staff to handle whistleblower matters. I request that the Division of Enforcement fully evaluate ways to increase staff – in the CRS, OWB, or both.

Consider the 2017 Annual Whistleblower Report, which stated that:

“In FY 2017, we received over 4,400 tips, an increase of nearly 50 percent since FY 2012, the first year for which we have full-year data.”

and also

“During FY 2017, we returned nearly 3,200 calls from members of the public, exceeding the number of calls returned the prior fiscal year. Since May 2011 when the hotline was established, OWB has returned over 18,600 calls from the public.”

In my humble opinion, it seems impossible for eleven attorneys and a support staff to handle 4,400 tips per year along with 3,200 calls per year (often with at least two attorneys on the call). How are eleven attorneys supposed to handle all of this, then also research, investigate, document and promptly recommend Award or Denial Orders?

I have recently wondered if the Division of Enforcement has shaped the whistleblower program (as currently constructed and staffed) to primarily focus on the intake and maintenance of tips, and the program may not be designed to quickly process award claims. As an example, look at the two of the Denial Orders from September 11, 2017 – as both pertain to NOCAs from 2012, which were five years earlier. When a whistleblower sees delays like this, it is really discouraging.

I believe in the past it was possible to make award determinations quickly. I am reminded of the Final Award Order on September 30, 2013. The Preliminary Determination had been made on September 5, 2013, and the award involved a Notice of Covered Action in which the Claim Due Date was just six weeks before the Preliminary Determination was made (I realize that this award involved a single claimant and was not appealed). This example was over five years ago, and so I wonder if this is the decision-making speed that is still possible when not dealing with a massive backlog.

There is a certain computer company's business model, where one specs out a desired build-to-order computer on the website, and then the company provides an anticipated delivery date. Every single time I have placed an order with this company, the computer has always arrived a few days early. The company does a great job of setting my expectations, and then beating my expectations by delivering the computer early. I encourage the OWB and/or CRS to do something similar and provide claimants with a calendar date that they will receive a Preliminary Determination by. As Stephen Covey has stated in *The Seven Habits of Highly Effective People*, "The key is not to prioritize what's on your schedule, but to schedule your priorities." Please make claimant determinations a greater priority. By providing claimants with a date, claimants can have peace of mind knowing that their claims are actively being worked on, and the Commission will have a much better idea of staffing requirements needed to meet the delivery dates.

When a whistleblower is forced to wait months or even years for a Preliminary Determination or an Award Order, it can create many challenges and difficulties. There may be a misconception that since a whistleblower can remain anonymous, then in general they can live their lives, keep their jobs and go about as if nothing ever happened. What about the whistleblowers who don't have a soft landing?

In conclusion, I ask the Commission to do everything possible to expedite award determinations. I fully believe in the OWB and the CRS, and I have confidence that the delays in issuing determinations can be resolved. Please promptly reward eligible whistleblowers who have taken many risks to do what is right. Expediting determinations can help to bring closure to some of the chapters in whistleblowers' lives that we would like to put behind us. I look forward to the day when I will be able to think of myself as a former whistleblower, rather than as a whistleblower in the present tense.

Thank you for considering my comments.