UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70772 / October 30, 2013

WHISTLEBLOWER AWARD PROCEEDING
File No. 2014-1

In the Matter of the Claim for Award

in connection with

SEC v. Advanced Technologies Group LTD, Alexander Stelmak, and Abelis Raskas, LLC, 10-cv-4868 (S.D.N.Y. 2011)
Notice of Covered Action 2011-4

ORDER DENYING WHISTLEBLOWER AWARD CLAIM

Claimant timely filed a whistleblower award claim pursuant to Section 21F of the Securities Exchange Act of 1934 (the "Exchange Act"),[1] in connection with Notice of Covered Action 2011-4. The Claims Review Staff ("CRS") issued a Preliminary Determination recommending that Claimant 's claim be denied. Claimant filed a response contesting the Preliminary Determination. For the reasons set forth below, Claimant 's claim is denied.

I. Background

Beginning in Redacted and continuing through July 2009, Claimant submitted information to the Division of Enforcement ("Enforcement") staff regarding wrongdoing purportedly being engaged in by Alexander Stelmak ("Stelmak"), among others, in connection with the solicitation of securities by Advanced Technologies Group LTD ("ATG") and its predecessor entity.[2] In addition to calling and emailing the staff and sending it certain documents, Claimant also met with

[1] 15 U.S.C. § 78u-6.

[2] Claimant Redacted
Redacted

the staff in April 2009.

The staff opened an investigation of ATG, Stelmak and Stelmak's partner, Abelis Raskas ("Raskas")[3] on or about March 5, 2009 (the "ATG Investigation"). On June 23, 2010, the Commission filed an enforcement action in *SEC v. Advanced Technologies Group LTD, Alexander Stelmak, and Abelis Raskas, LLC,* 10-cv-4868 (the "ATG Action"). The Commission alleged in its complaint that ATG, Stelmak, and Raskas, engaged in a series of offerings of unregistered non-exempt securities of ATG and ATG's predecessor entities between 1997 and 2006 in violation of Section 5 of the Securities Act of 1933. The unlawful offerings occurred through nationwide cold-calling campaigns supervised by Stelmak.

Effective July 21, 2010, Congress enacted Section 21F of the Exchange Act, "Securities Whistleblower Incentives and Protection," as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[4] Section 21F directs the Commission to pay whistleblower awards, subject to certain statutory criteria and "under regulations prescribed by the Commission,"[5] to individuals who provide information that leads to successful enforcement actions. One of the statutory requirements found in Section 21F is that the information provided by a whistleblower be "original information."[6]

On September 14, 2010, Claimant sent a brief email to an Enforcement attorney whom ** had previously communicated with, as well as certain other SEC officials, in which ** identified two allegedly inaccurate statements that Stelmak made in his deposition taken during discovery in the ATG Action (the "September 2010 Email"). The first was Stelmak's statement that Redacted Redacted Redacted Redacted (Claimant Redacted). The second was Stelmak's statement that Redacted , Redacted , Claimant Redacted , Redacted " Redacted ."

On October 5, 2010, Commission staff notified the district court that they and the defendants had negotiated the agreed to terms of a proposed settlement that would soon be submitted to the Commission for its consideration; thereafter, in mid-November 2010, following the Commission's acceptance of those settlement terms, ATG, Stelmak and Raskas signed consent agreements that formally settled the ATG Action.[7] On January 12, 2011, the court

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[3] ATG was owned and operated by Stelmak and Raskas.

[4] Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841 (July 21, 2010).

[5] 15 U.S.C. 78u-6(b)(1).

[6] 15 U.S.C. 78u-6(a)(3).

[7] See, e.g., Order of Oct. 6, 2010 (S.D.N.Y. 10-civ-4868) (Dkt. #37); Raskas Consent Agreement (attached to Final

entered final judgments against the defendants in which, among other remedies, ATG and Stelmak were ordered jointly and severally liable for disgorgement in the amount of $14,741,760.76, together with prejudgment interest in the amount of $4,444,775.56, and ordered to pay civil penalties of $65,000 and $6,500, respectively. Of this disgorgement amount, defendant Raskas was jointly and severally liable for $3,639,920, together with prejudgment interest in the amount of $1,110,028.03.

On January 11, 2011, Claimant 's counsel submitted a claim for a whistleblower award along with a letter and exhibits in support of ** claim. In this submission, Claimant s counsel restated information ** client had provided to the staff between Redacted and 2009, as well as the September 2010 Email. By letter dated February 11, 2011, Claimant resubmitted this package to the Commission.

Effective August 12, 2011, we adopted Rules 21F-1 through 21F-17 under the Exchange Act to implement our whistleblower program.[8] Rule 21F-4(b)(1) defines "original information" in the same manner as that term is defined in Section 21F(a)(3) of the Exchange Act, but adds that the information must be "[p]rovided to the Commission for the first time after July 21, 2010 (the date of enactment of [Dodd-Frank])."[9]

On August 12, 2011, the Office of the Whistleblower ("OWB") posted a Notice of Covered Action (the "NoCA") for the ATG Action. As noted, Claimant had previously submitted a claim application setting forth the information and assistance ** had provided to the Commission.[10] In ** application, ** claimed that ** was entitled to an award because both the Commission and the general public "benefitted from [**] persistent efforts to bring Stelmak's and ATG's, as well as related individuals' and entities', wrongful conduct to light . . . [and that] ** efforts substantially assisted the SEC in its enforcement action."

In support of ** application for an award, Claimant identifies information that ** communicated to Enforcement staff between Redacted and September 2010 concerning possible securities law violations committed by Stelmak, ATG, and other related individuals and entities.

Judgment as to Defendant Abelis Raskas (S.D.N.Y. 10-civ-4868) (Dkt. #41)); Stelmak and ATG Consent Agreement (attached to Judgment (S.D.N.Y. 10-civ-4868) (Dkt. #42)).

[8] 17 C.F.R. §§ 240.21F-1 to -17.

[9] 17 C.F.R. § 240.21F-4(b)(1); 15 U.S.C. § 78u-6(a)(3).

[10] On August 17, 2011, following the effective date of the final rules implementing the whistleblower program, Claimant sent a letter to the OWB asking for confirmation that ** did not need to resubmit ** claim application and that ** earlier submissions were sufficient to satisfy the requirements for submitting a claim under the rules. In an email dated August 23, 2011, the OWB confirmed that it was not necessary for Claimant to resubmit.

However, with the exception of the September 2010 Email, all of Claimant 's information was submitted to the staff between Redacted and 2009, well before the enactment of Section 21F. As described above, in an apparent effort to overcome this obstacle, Claimant repackaged ** information and provided it again in written submissions to the Commission in January and February 2011 – after Section 21F was enacted (collectively, Claimant 's "2011 Submissions").

II. Preliminary Determination (November 5, 2012)

In its Preliminary Determination, the CRS found that the information provided by Claimant prior to July 21, 2010, including information that Claimant re-submitted after July 21, 2010, was not "original information" within the meaning Section 21F(a)(1) of the Exchange Act and Rule 21F-4(b)(1)(iv) because it was not provided to the Commission for the first time after July 21, 2010 as required by the rule. The CRS further determined that the September 2010 Email did not lead to the successful enforcement of a covered judicial or administrative action as required by Section 21F(b)(1) of the Exchange Act and Rules 21F-3(a) and 21F-4(c) because it did not cause the Commission to open the ATG Investigation (or inquire into different conduct as part of the investigation) nor did it significantly contribute to the success of the ATG Action. Accordingly, the CRS recommended denying Claimant 's award application.

III. Claimant 's Response to the Preliminary Determination

Pursuant to Rule 21F-10(e)(1)(i), the OWB permitted Claimant to review the materials from among those set forth in Rule 21F-12(a) that formed the basis of the CRS's Preliminary Determination. However, Claimant sought extensive discovery, not permitted by the Commission's rules, of other documents and information relating to the ATG Investigation. Because the OWB denied these discovery requests, Claimant contests not only the CRS's Preliminary Determination to deny ** a whistleblower award, but also the procedural rights that ** has been afforded under our rules.

A. Claimant 's motions and requests following the Preliminary Determination

On November 16, 2012, Claimant 's attorneys requested that they be permitted to review the materials that formed the basis of the Preliminary Determination,[11] and that the OWB meet with them to discuss the Preliminary Determination.[12] On December 4, 2012, the OWB mailed the requested materials to Claimant 's attorneys; however, the packet inadvertently excluded the

[11] Rule 21F-10(e)(1)(i) permits a claimant, before deciding whether to contest a Preliminary Determination, to request that OWB make available for the claimant's review "the materials . . . that formed the basis of the Claims Review Staff's Preliminary Determination."

[12] Rule 21F-10(e)(1)(ii) permits a claimant, before deciding whether to contest a Preliminary Determination to "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."

second of two sworn staff declarations that the CRS had relied upon.[13]

On December 19, 2012, senior staff of the OWB, as well as staff of the Commission's Office of General Counsel, met with Claimant 's attorneys. Claimant 's counsel primarily used the meeting as an opportunity to present their views on the retroactivity issue, explaining why in their view the legislative history and case law require the Commission to make awards for information provided for the first time before Dodd-Frank's enactment.

On December 21, 2012, Claimant 's attorneys submitted various requests for documents relating to the April 2009 meeting between Enforcement staff and Claimant ; specifically, (1) any transcript of the April 2009 meeting; (2) a copy of the documentary evidence provided by Claimant to Enforcement staff in connection with the April 2009 meeting; and (3) any formal order of investigation which would have been available or in effect at that time.

On December 26, 2012, the OWB discovered that it had omitted the second staff declaration from the packet it had sent to Claimant 's attorneys on December 4, 2012. On that same day, December 26, the OWB emailed the second declaration to Claimant 's attorneys, advising them that this declaration had been inadvertently omitted from the December 4 package. The OWB further advised Claimant 's attorneys that, as a result of this error, the OWB would re-start the 60-day period for Claimant to contest the Preliminary Determination, such that the new date for Claimant to file a response would be February 25, 2013.[14]

By letter dated December 28, 2012, Claimant 's counsel made five demands regarding the second staff declaration: (1) that both staff declarations be stricken from the record; (2) that Claimant 's counsel be permitted to take the Enforcement staff attorney's deposition to discover, among other matters, the extent of the information Claimant provided to the Enforcement staff, the degree to which this information assisted the staff in the underlying investigation and enforcement action, and the circumstances surrounding the preparation of the two staff declarations; (3) that counsel be permitted to obtain all documents from the Enforcement staff pertaining to Claimant 's April 2009 meeting with the staff and, more broadly, the underlying

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[13] At a meeting held on September 14, 2012 to consider the Claimant award application, the CRS deferred issuing a preliminary determination and directed the OWB to request that the Enforcement staff supplement the record with additional detail concerning the ATG investigation, the ATG Action, and the information provided by Claimant . At a meeting held on November 5, 2012, the CRS considered a second staff declaration, dated October 26, 2012. In compiling the documents to send to Claimant 's attorneys, OWB included all the documents from the binder it had assembled in advance of the September 14 meeting but inadvertently omitted the October 26 staff declaration.

[14] Rule 21F-10(e)(2) provides that a claimant who wishes to contest a Preliminary Determination must submit his written request and supporting materials within 60 days of the later of the date of the Preliminary Determination or the date OWB makes the CRS's review materials available to the claimant.

investigation and enforcement action so that Claimant 's counsel could determine the extent to which Claimant assisted in the investigation and the enforcement action; (4) that the OWB disclose all intra-agency communications with the staff attorney regarding the creation and purpose of the two declarations; and (5) that the OWB delay the start of the 60-day period for responding to the Preliminary Determination until 60 days after counsel has completed the discovery sought in its letter.

On January 4, 2013, the OWB responded that the whistleblower rules did not authorize the OWB to amend the record or to grant claimants discovery of materials not considered by the CRS.[15] With regard to counsel's request that the OWB delay the start of the 60-day period for responding to the Preliminary Determination until 60 days after counsel had completed the discovery sought in its letter, the OWB pointed out that Rule 21F-10(e)(2) provided that the 60-day period to contest the Preliminary Determination began when the OWB made available the materials that formed the basis of the Claims Review Staff's preliminary determination. Further, the OWB explained that it had provided the last of those materials (*i.e.*, the second staff declaration dated October 26, 2012) to counsel on December 26, 2012, and thus the 60-day period commenced on that date.

On January 22, 2013, Claimant 's attorneys requested that the OWB advise them when any and all Matters Under Inquiry ("MUIs") commenced with respect to the ATG Investigation.[16] On January 23, 2013, the OWB responded that, as such information was not included in the record that formed the basis of the CRS's Preliminary Determination, the OWB was not authorized to provide it to counsel.[17]

On January 28, 2013, Claimant 's counsel requested copies of the entire deposition

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[15] The OWB specifically directed counsel's attention to Rule 21F-12(b) which states, in relevant part, that claimants are not entitled to obtain any materials from the Commission other than the materials delineated in Rule 21F-12(a) that the Commission and the CRS may rely upon in making an award determination. The OWB did inform counsel, however, that pursuant to Rules 6 and 7(a) of the SEC's Rules Relating to Investigations, 17 C.F.R. §§ 203.6 and 203.7(a), it was working with Enforcement staff to respond to counsel's requests for the transcript of Claimant's meeting with Enforcement staff attorneys in April 2009 and the formal order of investigation that led to the covered action. On January 11, 2013, OWB provided Claimant's counsel with copies of the documents produced by Claimant at the April 2009 meeting and the formal order of investigation for the ATG Investigation. With regard to counsel's request for a transcript of the April 2009 meeting, OWB advised counsel that the meeting had not been recorded or transcribed.

[16] Enforcement opens a MUI if it determines that "the facts underlying the MUI show that there is potential to address conduct that violates the federal securities laws; and [that]. . . the assignment of a MUI to a particular office will be the best use of resources for the Division as a whole." SEC Enforcement Manual, ¶ 2.3.1.

[17] Because the CRS determined that the information provided by Claimant , other than the September 2010 Email, was not original information within the meaning of Rule 21F-4(b)(1), the CRS did not need to consider the relationship between Claimant 's information and the opening of either the MUI or the formal ATG Investigation.

transcripts of Stelmak and Raskas, portions of which had been attached as exhibits to the Commission's Declaration in Support of Plaintiff's Application for Asset Freeze and Other Relief in the ATG Action. On January 31, 2013, the OWB again responded that it was not authorized to provide these items since they were not included in the materials that formed the basis of the CRS's Preliminary Determination.[18]

B. Claimant 's response contesting the Preliminary Determination

On February 25, 2013, Claimant submitted a response contesting the Preliminary Determination. Claimant raised three central contentions:

- The requirement of Rule 21F-4(b)(1)(iv) that information be submitted to the Commission for the first time after the enactment of Dodd-Frank "was neither included nor required in the Dodd-Frank Act . . . [and] cannot be applied retroactively to the Claimant who provided information to the Commission before July 21, 2010, and then timely submitted that information in writing after the passage of the Act but before the Final Rules became effective."

- At a minimum, the information Claimant has provided to the Commission since Redacted either caused the Commission to commence the ATG investigation or, to the extent the investigation was already underway, significantly contributed to the success of the enforcement action.

- The OWB "committed a variety of procedural errors" in reviewing and processing " claim that "deprive[d] the Claimant of due process of law," including denying " a "fair opportunity to take discovery" in order to contest "the wrongfulness of [] the assertions" made in the two staff attorney declarations.

Additionally, Claimant requested that, if the Preliminary Determination is upheld, then " should be permitted to conduct a "*de novo* review" with the "opportunity to take reasonable discovery from the Commission (including, without limitation, deposition(s) of any and all individuals who executed declarations) on issues pertaining to ["] claim for award."

[18] In its response, the OWB also noted that the Commission's Rules Relating to Investigations do not authorize Claimant 's access to the requested transcripts, citing specifically to Rule 203.6, 17 C.F.R § 203.6, which provides that "[a] person who has submitted . . . testimony in a formal investigative proceeding shall be entitled . . . to procure a copy of . . . a transcript of his testimony." The OWB pointed out that counsel's request for these deposition transcripts fell outside of this rule since counsel was not requesting the transcripts on Stelmak's and Raskas's behalf.

IV. Analysis

A. Claimant 's argument about "retroactive" application of Rule 21F-4(b)(1)(iv) has no merit.

Claimant 's first contention is that the CRS should not have denied " claim based on the information that " originally submitted to the Commission before the effective date of Dodd-Frank and later re-packaged and submitted to the Commission in 2011. Claimant does not dispute that this denial followed from Rule 21F-4(b)(1)(iv), which requires that a whistleblower submission have been "[p]rovided to the Commission for the first time after July 21, 2010 (the date of enactment of [Dodd-Frank])" in order for it to be considered "original information." Rather, " argues that Rule 21F-4(b)(1)(iv) constitutes impermissible retroactive rulemaking by the Commission.

While Claimant 's argument is not entirely clear, " appears to be framing it in two different ways. First, " claims that Rule 21F-4(b)(1)(iv) is contrary to the statute insofar as it requires that information be submitted to the Commission for the first time after Dodd-Frank's effective date. Second, " claims that the rule is impermissibly retroactive because it deprives " of " "vested right" to an award based on " 2011 Submissions. As we explain below, each of these contentions is incorrect.

The first variant of Claimant 's argument, in our view, is not really about impermissible retroactivity of the Commission's rule. It is simply an argument that the Commission rule should be considered invalid because it conflicts with the statute. In fact, it is Claimant whose position relies on a retroactive application of law; in " view, Dodd-Frank *requires* that " be paid for information " provided before the whistleblower statute even existed. While " appears to accept that " cannot literally base " award claim on the submissions of information " made from Redacted to 2009 – *i.e.*, before Dodd-Frank was the law – " argues that by resubmitting the same information in written form in 2011, " made Claimant eligible for an award arising from the ATG action, even though that action had already been filed in June 2010 and was then on the verge of final settlement.

Claimant argues that " 2011 Submissions entitle " to an award because they satisfy the statutory definition of "original information." " further claims that " argument is supported by Section 924(b) of Dodd-Frank, which states that "[i]nformation provided to the Commission in writing by a whistleblower shall not lose the status of original information . . . solely because the whistleblower provided the information prior to the effective date of the regulations, if the information is provided by the whistleblower after the date of enactment of this subtitle."[19] In essence, Claimant contends that Section 924(b) *requires* the Commission to treat information

[19] Pub. L. No. 111-203, § 924(b), 124 Stat. 1376, 1850 (July 21, 2010).

submitted before the enactment of Dodd-Frank as eligible for an award as long as the information is re-submitted in writing after the date of enactment.

We disagree. Neither the statutory language, the legislative history, nor sound policy considerations suggest that Congress's adoption of a new whistleblower reward program in July 2010 was intended to pay awards to people like Claimant who gave the Commission original information years before the statute was enacted.

The starting point in any statutory analysis is the statutory language. Here, there is nothing in the statutory language that demonstrates Congressional direction to pay awards based on information submitted before Dodd-Frank was enacted. To the contrary, the few statutory provisions that specifically address timing issues do not mention payments for information provided before enactment.

Dodd-Frank includes a general effective date provision; one day after enactment "[e]xcept as otherwise specifically provided" in the statute.[20] No provision of Dodd-Frank establishes a different effective date for our whistleblower award program. Two provisions pertaining to whistleblower awards specifically address timing issues – Sections 924(b) and 924(c) – but each has its own very specific and limited focus, and neither suggests that Congress intended to pay awards for information submitted prior to enactment.

As noted, Section 924(b) requires that information that satisfies the statutory definition of "original information" be treated as such if it is submitted in writing after the effective date of the statute but before the promulgation of the Commission's regulations. This provision shows that Congress expressly considered, and provided for, the issue of how to treat information submitted *after* enactment of the statute but *before* adoption of the implementing Commission rules. Congress affirmatively directed that the Commission should treat as eligible for award payments all such information provided in writing, but *only if "the information [was] provided ... after the date of enactment...."* Congress did not similarly direct payment for information provided *before* the date of enactment, although it could have done so.[21]

Section 924(c) is to similar effect. That section provides that a whistleblower "may receive an award ... regardless of whether any violation ... underlying the judicial or administrative action upon which the award is based, occurred prior to the date of enactment" of Dodd-Frank.[22] Thus, Congress expressly provided that payments could be made even if the

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[20] Pub. L. No. 111–203, §4, 124 Stat. 1376, 1390 (Jul. 21, 2010).

[21] Here we are particularly mindful of the well-established canon of statutory construction expression *unius est exclusion alterius*, or the expression of one thing implies the exclusion of others. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001); *United States v. Giordano*, 416 U.S. 505, 514 (1974).

[22] Pub. L. No. 111-203, § 924(c), 124 Stat. 1376, 1850 (July 21, 2010).

violation underlying the action on which the award is based occurred before enactment, but once again failed to include a similar express statement for *information* provided before enactment. It is clear from Sections 924(b) and 924(c) that Congress knew how to give specific directions for the pre-enactment application of the statute, yet plainly did not require the Commission to pay awards for information submitted before enactment.

The legislative history of Section 924(b) also supports our conclusion that Congress intended that the Commission only make awards for information provided for the first time after Dodd-Frank's enactment. In both the House and Senate bills, the provision that became Section 924(b) treated information submitted after the date of enactment, but before the adoption of our rules, as "original information" eligible for award consideration. However, the House bill also would have conferred "original information" status on information submitted pre-enactment if the information could have merited an award under the Commission's previous insider trading bounty program.[23] The Senate-passed substitute for the House bill would have permitted awards for information submitted by a whistleblower before enactment of the statute as long as the Commission collected monetary sanctions in the resulting enforcement action after the date of enactment.[24] Both of these provisions were omitted from the final version of Section 924(b) that emerged from the conference committee.[25] Thus, Congress considered alternatives that would have provided for varying degrees of retroactivity in the whistleblower award program, but ultimately failed to include them in the final version of Section 924(b). We take this as a strong indication that Congress made a conscious decision against authorizing whistleblower awards for information that was provided to the Commission prior to the Act's passage. At the very least, it provides no support for Claimant 's claim that Congress meant to *require* the Commission to consider pre-enactment submissions of information as eligible for awards.[26]

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[23] *Wall Street Reform and Consumer Protection Act of 2009,* H.R. 4173, 111th Cong. § 7205(b) (as passed by House, Dec. 11, 2009) (information deemed original information "provided such information was submitted after the date of enactment of this subtitle, *or related to insider trading violations for which a bounty could have been paid at the time such information was submitted.*") (emphasis added). Former Section 21A(e) of the Exchange Act authorized the Commission to award bounties to persons who provided information leading to the recovery of civil penalties for insider trading violations. Section 21A(e) was repealed by Section 923(b) of Dodd-Frank.

[24] *Restoring American Financial Stability Act of 2010,* H.R. 4173, 111th Cong. § 924(b) (as passed by Senate, May 20, 2010) (information deemed original information "provided that the information is— (1) provided by the whistleblower after the date of enactment of this subtitle, *or monetary sanctions are collected after the date of enactment of this subtitle*; ....") (emphasis added).

[25] The Senate language providing for award eligibility where monetary sanctions were collected after enactment of the statute was used in the base text that went to the conference committee, but was deleted by the conferees.

[26] The Senate-passed version of Section 924(b) also would have treated as "original information" any information provided by a whistleblower that was "related to a violation for which an award under section 21F of the Securities Exchange Act of 1934, as added by this subtitle, could have been paid at the time the information was provided by the whistleblower." *Id.* § 924(b)(2). While this language is not entirely clear, it arguably would have supported

We believe that the Congressional purpose in creating the new whistleblower program also supports the conclusion that Congress did not intend the program to cover information provided to the Commission for the first time before the enactment of Dodd-Frank. The principal purpose of Section 21F was "to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws...."[27] As further explained in the adopting release accompanying the final rules:

> Congress enacted Section 21F in order to provide new incentives for individuals with knowledge of securities violations to report those violations to the Commission. We believe that applying Section 21F prospectively—for new information provided to the Commission after the statute's enactment and not to information previously submitted—is most consistent with Congressional intent and with the language of the statute.[28]

In our view Congress did not intend for Section 21F to reward individuals who came forward before Dodd-Frank's enactment; rather, Congress intended for the award program to create powerful new incentives for the public to assist the Commission in its fight against securities law violations. Leveraging the limited assets of the Investor Protection Fund established by Section 21F(g) of the Exchange Act to pay those individuals who respond to the new incentive by coming forward after Dodd-Frank's enactment is consistent with that Congressional purpose.[29]

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blanket retroactivity, permitting whistleblower awards for any information submitted to the Commission pre-Dodd-Frank that satisfied the criteria set forth under Section 21F. This language was also deleted from the final version of Section 924(b).

[27] S. Rep. No. 111-176 at 110 (2010).

[28] *Securities Whistleblower Incentives and Protections,* Release No. 34-64545, 76 Fed. Reg. 34300, 34310 (June 13, 2011). The Commission further observed that "[t]he statute incentivizes whistleblowers to report possible securities law violations to the Commission by offering them financial awards, reducing the risks from employment retaliation, and lowering the barriers through user-friendly procedures and appellate redress." 76 Fed. Reg. at 34326, n.228.

[29] Section 21F(g) of the Exchange Act, 15 U.S.C. § 78u-6(g), established the "Securities and Exchange Commission Investor Protection Fund" (the "Fund") to fund the payment of whistleblower awards. In general, this section provides that the money to be paid into the Fund will come from "monetary sanction[s] collected by the Commission in any judicial or administrative action brought by the Commission under the securities laws that is not . . . otherwise distributed to victims of a violation of the securities laws." The method for funding award payments thus operates prospectively only. If, as Claimant argues, Dodd-Frank requires that awards must be paid for information provided before its enactment and simply resubmitted in writing afterwards, whistleblower claims based on such repackaged information could threaten to exhaust the fund in short order. If that had been its intention, we believe Congress would have established additional and more robust funding mechanisms to satisfy the possible flood of claims from individuals who provided information to the Commission in the past.

For all of the above reasons, we believe that the whistleblower statutory provisions do not authorize awards for information originally provided prior to Dodd-Frank's enactment. It is, in any event, clear that the statute does not *require* the Commission to pay awards based on pre-enactment submissions of information. Moreover, to the extent there is any ambiguity based on the lack of express direction in the statutory language, we believe, as set forth in Rule 21F-4(b)(iv), and based on our experience and expert judgment, that the better approach here is to allow whistleblower awards only for information provided to the Commission for the first time after July 21, 2010. As we observed, "overly broad definitions and unduly permissive provisions could result in inefficient use of the Investor Protection Fund."[30] Simply put, our interpretation of "original information" ensures that the Fund is used to reward those who provide new, high quality tips, not to pay for information that was already in the Commission's possession on July 21, 2010.

As noted above, Claimant presents a second variation of ** retroactivity argument: ** argues that our rule represents improper retroactive rulemaking because it takes away ** "vested right" to have ** 2011 Submissions considered as "original information." In this version of ** argument, ** seeks to rely on principles of retroactivity law by noting that a rule is retroactive when it "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."[31] Claimant asserts, in essence, that Dodd-Frank unambiguously created a vested right to have ** re-submission of previously submitted information treated as "original information," and that Rule 21F-4(b)(1)(iv) upset that vested right. As explained above, however, the statute creates no such right, as it nowhere indicates that the Commission is required to consider re-submissions of pre-enactment information as eligible for awards. Accordingly, this version of Claimant 's retroactivity argument also must fail.[32]

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[30] 76 Fed. Reg. at 34356 (June 13, 2011).

[31] Quoting *Hughes Aircraft Co. v. U.S. ex rel Shumer*, 520 U.S 939, 947 (1997) (internal quotation omitted). For a more recent enunciation of this principle, *see Coalition for Common Sense in Government Procurement v. United States Department of Defense*, 707 F.3d 311, 317 (D.C. Cir. 2013) (citing *National Mining Association v. Department of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002)). *See also Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (a statute has retroactive effect if it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."); *Enterprise Mortg. Acceptance Co., LLC, Securities Litigation v. Enterprise Mortg. Acceptance Co.*, 391 F.3d 401, 406 (2d Cir. 2004) (same).

[32] We note that Section 21F(b) of the Exchange Act expressly provides that whistleblower awards shall be paid "under regulations prescribed by the Commission." Therefore, until the Commission issued its final regulations spelling out the procedures for whistleblower awards and the Commission's interpretations of relevant statutory provisions, Claimant could have not had any "vested right" to a particular interpretation of the statute that would require that ** award application be granted. As noted above, in adopting the definition of original information found in Rule 21F-4(b)(1), we relied on our understanding of Congressional intent, as well as our expertise as to

In sum, we reject Claimant s contention that Rule 21F-4(b)(1)(iv) is impermissibly retroactive.

B. Claimant 's information did not lead to the ATG Action.

Claimant 's response to the Preliminary Determination further contends that the information " provided to the Commission after Dodd-Frank led to the successful enforcement of the ATG Action. Specifically, Claimant claims that, in the second declaration, the Enforcement attorney "wrongfully attempt[ed] to discredit Claimant as the original source of the information contained in Claimant's September 2010 Email." Claimant argues that the second declaration erroneously states that none of the information in the September 2010 Email about Redacted Redacted , was new to the staff. Claimant bases this argument on " belief that, if the Commission had previously known that information, it "would surely have led Enforcement to open the Investigation and commence the Enforcement Action" years before the investigation was actually opened.

We credit the staff's representation that the staff had long been aware of Redacted Redacted from a separate investigation into a Redacted Redacted In any event, there is no evidence that this information led to the success of the action, either in causing the staff to open a new avenue of its investigation or by significantly contributing to the success of the ATG Action.

Original information "leads to" a successful enforcement action if either: (i) the information caused the staff to open an investigation, commence an examination, or to inquire into different conduct as part of an existing investigation or examination, and we bring a successful action based in whole or in part on conduct that was the subject of the original information; or (ii) the conduct was already under investigation or examination, and the original information significantly contributes to the success of the action.[33] We find no evidence that the

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how the whistleblower program could best assist in the Commission's efforts to enforce the securities laws. *Cf. Ohio Head Start Association, Inc. v. HHS*, 873 F. Supp. 2d 335, 348 (D.D.C. 2012), *aff'd*, 510 Fed. App'x 1 (D.C. Cir. 2013 (where Congress directed HHS to develop a system for ensuring that renewals of Head Start grants were only given to high-quality service providers, regulation that required grantees with a single deficiency finding to re-compete for grants did not operate retroactively against grantees who received deficiency findings between date of statutory authorization and date of regulation because regulation merely "codified the authority Congress granted to the Secretary...."); *Coalition for Common Sense in Government Procurement v. United States Department of Defense*, 671 F. Supp. 2d 48, 58 (D.D.C. 2009), *aff'd*, 703 F.3d 311 (D.C. Cir. 2013) (retroactivity not a concern where statute clearly subjected prescriptions to federal price ceilings as of a certain date, and all parties understood that their transactions could be governed by subsequent rule; "...the rule only identifies how that statutory requirement is implemented.").

[33] Rule 21F-4(c)(1)-(2).

September 2010 Email was used in either the ATG Investigation or in the ATG Action. The Enforcement staff states in its sworn declaration that it did not use the information from Claimant 's September 2010 Email in any way and that the information had no impact on the terms of the October 2010 settlement of the ATG Action. The staff further states in its declaration that the September 2010 Email did not cause the staff to correct any of Stelmak's purported false testimony or to ask Stelmak for any clarification of his testimony. Claimant 's contentions to the contrary are based on pure conjecture and we do not find them credible.

Because we have already determined that Claimant 's 2011 Submissions did not constitute "original information," we do not need to consider their impact on the ATG Investigation or the ATG Action. Moreover, the court entered final judgments in the ATG Action on January 12, 2011 – one day after Claimant submitted ** award claim, including ** re-submitted information. It is manifest that a submission made a mere one day before an action is concluded cannot have led to the success of the action.

C. Claimant has been given a fair proceeding in accordance with the Commission's rules and due process requirements.

Claimant asserts that the Commission through the OWB committed numerous procedural errors that denied ** a fair proceeding. Specifically, ** objects to the denial of ** requests to depose the Enforcement attorney who signed the staff declarations and to obtain certain documents that were not relied upon by the CRS.[34] Claimant also contends that ** should be permitted discovery "from the Commission (including, without limitation, deposition(s) of any and all individuals who executed declarations) on issues pertaining to [**] claim for award."

Rule 21F-10(e)(1)(i) provides that before deciding whether to contest a Preliminary Determination, a claimant may request "that the Office of the Whistleblower make available for [the claimant's] 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." Claimant received all of the materials permitted to ** by Rule 21F-12(a). These materials included publicly available materials from the ATG Action, such as the complaint, the October 2010 settlement order and the final judgments, Claimant 's 2011 Submissions, additional correspondence between Claimant 's attorneys and the OWB, and the two sworn declarations provided by Enforcement staff with direct knowledge of the case. While the second of these declarations was received by Claimant approximately three weeks after the rest of the materials, the OWB advised Claimant 's counsel in its accompanying email that they would have the full 60 days authorized under Rule 21F-10(e)(2) from their receipt of the second declaration to submit a written response

[34] Among the denied requests was Claimant 's motion to obtain all documents pertaining to ** April 2009 meeting with the staff and to require that the OWB disclose all intra-agency communications regarding the creation and purpose of the two declarations.

contesting the Preliminary Determination. We therefore find that Claimant received all of the materials ** was entitled to receive under our rules and that ** was accorded the complete time period set out in the rules to review these materials before submitting ** written response to the Preliminary Determination.

While a claimant has a right to request and to review these materials before contesting the Preliminary Determination, the rules "do not entitle claimants to obtain from the Commission any materials (including any pre-decisional or internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim) other than those listed in [Rule 21F-12(a)]."[35] Claimant nonetheless claims that, notwithstanding that the rules do not authorize additional discovery, the OWB's decision not to grant ** requests denied ** a fair review of ** claim.

Claimant 's argument has no merit. In enacting the whistleblower program, Congress expressly provided in Section 21F(j) that "[t]he Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section."[36] "Absent constitutional constraints or extremely compelling circumstances" an administrative agency "should be free to fashion [its] own rules of procedure and to pursue methods of inquiry capable of permitting [it] to discharge [its] multitudinous duties."[37] Indeed, it is "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure."[38]

Here, the Commission Rules 21F-10(e) and 12 give claimants the right to review all the materials that formed the basis of the CRS's Preliminary Determination, other than pre-decisional or internal deliberative process materials. Importantly, the materials made available to claimants include declarations from knowledgeable Commission staff, sworn to under penalty of perjury, "regarding any matters relevant to the award determination."[39] In this case the CRS requested that the record be supplemented with additional information relevant to the ATG Investigation from the staff declarant, and Claimant was given access to this declaration as well as to the rest of the material upon which the CRS relied. To go further and permit claimants free-wheeling discovery on issues such as the staff's internal deliberations in evaluating and utilizing

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[35] Rule 21F-12(b).

[36] Similarly, Section 21F(b)(1) states that the Commission shall pay awards "under regulations prescribed by the Commission."

[37] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543 (1978).

[38] *Id.* at 544. *See, e.g., Katzon Bros., Inc. v. E.P.A.*, 839 F.2d 1396, 1399 (10th Cir. 1988).

[39] Rule 21F-12(a)(4).

a whistleblower's information or in considering the merits of a claimant's application, would constitute an unwarranted and a potentially damaging intrusion into our investigative processes, including the frank discussion of legal and policy decisions concerning whether an enforcement action should be brought, the specific causes of action that should be charged, and the parties that should be named as defendants.[40] The disclosure of this sort of information would, as we explained when it adopted the whistleblower rules, "have a chilling effect on our decision- making process."[41]

Finally, even were it appropriate in extraordinary circumstances to permit discovery beyond the information provided for in Rule 21F-12(a), this would surely not be the proper case in which to do so. This is because much, if not all, of the information Claimant seeks has no bearing on ** claim for an award since it concerns how Enforcement handled the information ** provided *before the enactment of Dodd-Frank.*

Claimant asserts that due process requires that we permit ** to take sweeping discovery in order to bolster ** claim for an award, citing *Mathews v. Eldridge*, 424 U.S 319 (1976). We do not decide whether Section 21F created any protected property interest subject to due process requirements[42] because, even assuming that the statute did so, our whistleblower rules provide all

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[40] 76 Fed. Reg. at 34347 and n.360 (citing to *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993), which held that "frank discussion of legal and policy matters is essential to the decision-making process of a governmental agency"). In this regard, we note that Rules 21F-10(e)(1) and 21F-12 are consistent with the long-recognized privilege of government agencies to protect against disclosure of information that would tend to reveal law enforcement investigative techniques or sources. *See e.g., Black v. Sheraton Corp. of America*, 564 F.2d 531, 545 (D.C. Cir. 1977). The purpose of this privilege is "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, [and] to safeguard the privacy of individuals involved in an investigation . . . . ." *In re Department of Investigation of City of New York*, 856 F.2d 481, 484 (2d Cir. 1988). Further, the public interest in nondisclosure does not terminate simply because the subject investigation has concluded. *Black* at 546, quoting *Aspin v. Department of Defense*, 491 F.2d 24, 30 (D.C. Cir. 1973)("[I]f investigatory files were made public subsequent to the termination of enforcement proceedings, the ability of any investigatory body to conduct future investigations would be seriously impaired."); *Frankel v. SEC*, 460 F.2d 813, 817 (2d Cir. 1972) (noting that, if disclosure of an agency's investigative files were required as soon as an investigation concluded, "it would soon become a matter of common knowledge with the result that few individuals, if any, would come forth to embroil themselves in controversy or possible recrimination by notifying the [agency] of something which might justify investigation," quoting *Evans v. Dept. of Transportation*, 446 F.2d 821, 824 (5th Cir. 1971)); *In re City of New York*, 607 F.3d 923, 944 (2d Cir. 2010) (holding that an investigation need not be ongoing for the law enforcement privilege to apply as "the ability of a law enforcement agency to conduct future investigations may be seriously impaired if certain information" is revealed to the public); *Dorsett v. County of Nassau*, 762 F. Supp. 2d 500, 520 (E.D.N.Y. 2011) (same).

[41] 76 Fed. Reg. at 34347 and n.361 (citing to *Dep't of Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 8–9 (2001) which stated that the "deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news").

[42] "Whether a given statutory scheme gives rise to a protected interest depends on whether the authority promulgating the statute or regulation has placed *substantive* limits on official discretion." *Tarpeh-Doe v. United*

the discovery and other procedural opportunities that due process could possibly require in a proceeding of this kind.

In *Mathews v. Eldridge*, the Supreme Court held that the Social Security Administration ("SSA") was not required to hold an evidentiary hearing prior to terminating disability benefits and that the administrative procedures for such termination fully comported with due process. In assessing whether an agency has provided sufficient procedural protections, the Court stated that the reviewing court must weigh three distinct factors:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[43]

Here, all three factors support our view that Claimant was accorded all the procedural protections required under the Due Process Clause.

First, the private interest that will be affected by our action is the denial of Claimant 's claim for a monetary award. While the receipt of an award would no doubt benefit Claimant , its denial would not rise to the level of economic impact that might result, for example, from the termination of disability or welfare benefits where a recipient's very well-being could be at risk.[44]

Second, the procedures established under our whistleblower rules provide substantial safeguards against erroneous decisions. In *Mathews*, the Supreme Court pointed to SSA's policy of:

States, 904 F.2d 719, 722 (D.C. Cir. 1990), citing *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (emphasis in original). Although Section 21F directs the Commission to pay whistleblower awards to individuals who voluntarily provide the Commission with original information that leads to the successful enforcement of covered judicial or administrative actions, Congress left it entirely to our discretion to determine, by rule, when we consider a claimant's information to have "led to" a successful enforcement action. *See Ohio Head Start Association, Inc. v. Department of Health and Human Services*, 873 F. Supp. 2d 335, 349-50 (D.D.C. 2012), *aff'd*, 2013 U.S. App. LEXIS 11540 (D.C. Cir. 2013) (no protected property interest in renewal of Head Start grants where statute directed agency to award grants to providers of "high-quality and comprehensive" services but left agency discretion to decide which providers met that standard).

[43] 424 U.S. at 335.

[44] *See id.* at 342 (finding that "significant" hardship imposed upon erroneously terminated disability recipient not sufficient to require an evidentiary hearing).

> allowing the disability recipient's representative full access to all information relied upon by the state agency. In addition, prior to the cutoff of benefits the agency informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions. These procedures . . . enable the recipient to "mold" his argument to respond to the precise issues which the decisionmaker regards as crucial.[45]

Our whistleblower award procedures are directly analogous. Specifically, our rules allowed Claimant and ** counsel access to all information relied upon by the CRS other than deliberative process materials. In addition, the Preliminary Determination informed Claimant of the bases upon which the CRS determined to deny ** claim. OWB staff then granted the request of Claimant 's counsel for a meeting at which Claimant was able to present any additional information concerning the merits of ** claim. Claimant has also been afforded the opportunity to submit additional evidence and arguments in writing, enabling ** to challenge directly the information in the record, and the Preliminary Determination of the CRS. Finally, under our rules, once Claimant challenged the Preliminary Determination, ** award claim was elevated from the CRS directly to the Commission. As in *Mathews v. Eldridge*, these procedures were fully in accordance with the strictures of due process, enabling Claimant to "mold" ** argument to respond to the precise issues which the CRS regarded as crucial in its Preliminary Determination.

Finally, in weighing the Government's interest, we note that "the Commission's primary goal, consistent with the congressional intent behind Section 21F, is to encourage the submission of high-quality information to facilitate the effectiveness and efficiency of the Commission's enforcement program."[46] If claimants were granted the extensive discovery rights that Claimant seeks, this would not only cause the "chilling effect on our decision-making process," as discussed above,[47] it would also inevitably lengthen the claims resolution process, delay the Commission's ability to pay awards to eligible whistleblowers, and, thereby, potentially discourage prospective whistleblowers from submitting information to the Commission.[48]

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[45] *Mathews v. Eldridge,* 424 U.S. at 345-6.

[46] 76 Fed. Reg. at 34323.

[47] *See supra* n.41 and text therein.

[48] *See* 424 U.S. at 347 (1976) (in determining the appropriate process an agency owes to a claimant, a court must weigh in assessing the appropriate due process balance "the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases . . . .").

Accordingly, we find that Claimant received all of the discovery and other process that the rules provide and due process requires.

* * *

Finally, we take this opportunity to remind counsel that the Commission has a substantial interest in granting awards to whistleblower applicants who satisfy the statutory and regulatory criteria for an award. In furtherance of that interest, our goal is to work with whistleblowers and their counsel in a collaborative, non-adversarial manner to determine whether the whistleblowers satisfy the award criteria. We firmly believe that this approach best serves the interests of whistleblowers and the Commission, and thus should help maximize the award program's overall effectiveness in the enforcement of the federal securities laws and the protection of investors.

V. Conclusion

It is ORDERED that Claimant 's whistleblower award claim be, and hereby is, denied.

By the Commission.

Elizabeth M. Murphy
Secretary