

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 82955 / March 27, 2018

WHISTLEBLOWER AWARD PROCEEDING
File No. 2018-7

In the Matter of the Claim for an Award

in connection with

Redacted

Notice of Covered Action ^{Redacted}

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

On ^{Redacted} the Claims Review Staff (“CRS”) issued a Preliminary Determination recommending the denial of a claim for a whistleblower award submitted by ^{Redacted} (“Claimant”) in connection with Covered Action ^{Redacted} (the “Covered Action”).¹ Claimant filed a timely request for reconsideration.

For the reasons stated below, Claimant’s award claim is denied.

I. Background

On ^{Redacted}
(the “Company”), ^{Redacted}

¹ The Preliminary Determination also recommended denying an award to one other claimant. That determination was not contested and, thus, the CRS’s recommendation to deny that award application became final pursuant to Rule 21F-10(f) under the Securities Exchange Act of 1934 (“Exchange Act”).

On ^{Redacted}, the Commission’s Office of the Whistleblower (“OWB”) posted Notice of Covered Action ^{Redacted} for the Covered Action. Claimant filed a timely whistleblower award application. In Claimant’s application, Claimant asserted that although Claimant ^{Redacted}

(the “Report”), and that, through the online publication of the Report, ^{Redacted}

Further, Claimant argued—without appending any evidentiary support—that Claimant supplied ^{Redacted} additional documents from Claimant’s investigation, dropping them off at the Commission’s ^{Redacted} Regional Office (the “Regional Office”) to be provided to the staff investigating the Covered Action Defendants.

II. Preliminary Determination and Response

On ^{Redacted} the CRS preliminarily determined to deny Claimant’s award application for three reasons. First, Claimant was not a whistleblower within the meaning of Rule 21F-2(a) under the Exchange Act because Claimant did not provide the Commission with information relating to a possible violation of the federal securities laws pursuant to the procedures set forth in Rule 21F-9(a).³ Second, Claimant did not provide original information to the Commission on a voluntary basis, as required by Rule 21F-4(a), because any information that Claimant claimed to have provided followed a Commission request relating to the same subject

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Redacted

³ See Exchange Act Rule 21F-2(a), 17 C.F.R. § 240.21F-2(a); Exchange Act Rule 21F-9(a), 17 C.F.R. § 240.21F-9(a).

matter as an earlier Commission request directed to
Business”), of which Claimant was

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(“Claimant’s

Redacted 4

Third, the CRS preliminarily found that Claimant’s information did not “lead to” the successful enforcement of the Covered Action. It preliminarily found that the information purportedly provided by Claimant did not cause the Commission to open its investigation (or inquire into different conduct as part of a current Commission investigation) or significantly contribute to the success of the subsequent administrative proceeding.⁵ The CRS added that “the staff obtained the [Report] regarding [the Company] from a public website; and . . . the record does not support [Claimant’s] claim that [Claimant] left other documents at the [Regional Office] to be delivered to staff investigating [the Company].”

After requesting and reviewing the record supporting the Preliminary Determination, Claimant submitted a written request for reconsideration on Redacted. Addressing the CRS’s first ground for denying Claimant’s award application, Claimant argues that Rule 21F-9 has no bearing here because that rule was adopted after Claimant’s purported submission of information, that the Report was Claimant’s, and that Claimant provided the Report to the Commission by way of online publication. Claimant further asserts that Claimant personally hand-delivered documents concerning the Company to a receptionist at the Regional Office, and Claimant points to an email from Regional Office staff inviting Claimant to deliver documents to the Regional Office. As to the requirement of voluntariness, Claimant contends that Claimant’s actions meet the everyday meaning of the word “voluntary” because Claimant did not act under any legal obligation and that Rule 21F-4 does not apply here because that rule, too, was adopted after Claimant’s alleged submission of information. Finally, Claimant argues that the Report was “the entire reason” for the Commission’s investigation of the Company, and that denying Claimant’s award application will discourage Redacted similar efforts to uncover Redacted fraud.

III. Analysis

To qualify for a whistleblower award under Section 21F of the Exchange Act, an individual must voluntarily provide the Commission with original information that leads to the successful enforcement of a covered action.⁶ Below, we analyze Claimant’s whistleblower award application and request for reconsideration by addressing: (A) whether Claimant provided information to the Commission; (B) whether Claimant did so voluntarily; and (C) whether Claimant’s information led to the successful enforcement of the Covered Action.

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

⁵ See Section 21F(b)(1) of the Exchange Act, 15 U.S.C. § 78u-6(b)(1); Exchange Act Rule 21F-3(a), 17 C.F.R. § 240.21F-3(a).

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

A. Claimant did not provide information to the Commission.

Claimant seeks a whistleblower award on the basis of two alleged submissions of information to the Commission between ^{Redacted} : the Report and the documents Claimant allegedly hand-delivered to the Regional Office. We consider both in turn and, upon a careful examination of the record, we conclude that neither alleged submission was actually provided by Claimant to the Commission, as required by Section 21F of the Exchange Act and our whistleblower rules. For this reason, Claimant does not qualify as a whistleblower under our statute and rules.

Section 21F of the Exchange Act directs that, in any covered action, “the Commission, *under regulations prescribed by the Commission and subject to subsection (c)*, shall pay an award or awards to 1 or more whistleblowers who voluntarily *provided* original information to the Commission that led to the successful enforcement of” the covered action.⁷ The statute defines the term “whistleblower” to include “any individual who *provides . . .* information relating to a violation of the securities laws to the Commission, *in a manner established, by rule or regulation, by the Commission.*”⁸ It also directs that “[n]o award under subsection (b) shall be made . . . to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.”⁹

The Commission implemented Section 21F by promulgating rules on May 25, 2011, with an effective date of August 12, 2011.¹⁰ Rule 21F-2(a)(1) states, “You are a whistleblower if . . . you *provide* the Commission with information pursuant to the procedures set forth in § 240.21F-9(a) of this chapter, and the information relates to a possible violation of the Federal securities laws.”¹¹ The same rule also states, “To be eligible for an award, you *must submit* original information in accordance with the procedures and conditions described in §§ 240.21F-4, 240.21F-8, and 240.21F-9 of this chapter.”¹²

Rule 21F-9 generally requires that information be submitted either online through a portal on the Commission’s public website or by mailing or faxing a Form TCR (Tip, Complaint or Referral) to the Commission.¹³ The same rule also provides a safe harbor for information

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

⁸ Exchange Act Section 21F(a)(6), 15 U.S.C. § 78u-6(a)(6) (emphasis added).

⁹ Exchange Act Section 21F(c)(2)(D), 15 U.S.C. § 78u-6(c)(2)(D) (emphasis added; formatting altered).

¹⁰ *Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34,300 (June 13, 2011).

¹¹ Exchange Act Rule 21F-2(a)(1), 17 C.F.R. § 240.21F-2(a)(1) (emphasis added).

¹² *Id.* § 240.21F-2(a)(2) (emphasis added).

¹³ *Id.* § 240.21F-9(a).

submitted in writing to the Commission after the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) was enacted and before the rules took effect: “If you *submitted* original information *in writing* to the Commission after July 21, 2010 (the date of enactment of [Dodd-Frank]) but before the effective date of these rules, your submission will be deemed to satisfy the requirements set forth in paragraphs (a) and (b) of this section.”¹⁴

1. *The Report*

Redacted

Thus, during the relevant time period (that is, Redacted), an individual must have submitted information in writing to the Commission in order to qualify as a “whistleblower” for award eligibility. However, it is undisputed that Claimant never submitted the Report to the Commission.

Claimant asserts that Claimant should receive full credit for the Redacted and online publication of the Report Redacted

Redacted. Even assuming Claimant’s Redacted of the Report, however, Claimant errs in arguing that “[w]hether [Claimant] provided the information publicly or privately to the SEC, [Claimant] provided it.” The plain language of Section 21F and of our whistleblower rules, quoted above, requires that information be “provided” and “submitted” directly to the Commission in order to support an award—and makes no allowance for the online publication of information that, by happenstance, indirectly makes its way into the hands of Commission staff. As Congress explained in enacting Section 21F, the whistleblower awards program “aims to motivate those with inside knowledge *to come forward and assist the Government* to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud.”¹⁵ If individuals were motivated only to post information online—and not to provide that information directly to the Commission—then this core purpose of the whistleblower awards program would be undermined. Accordingly, we reject Claimant’s argument that online publication of the Report constituted provision of the Report to the Commission.

Claimant contends that this result “somehow erases [Claimant] as the original source of the information” in the Report.¹⁶ Even if Claimant was the original source of the Report, Claimant still would need to demonstrate that Claimant provided the Report to the Commission. That is, even an individual who qualifies as the original source of information that the

¹⁴ Exchange Act Rule 21F-9(d), 17 C.F.R. § 240.21F-9(d) (emphasis added).

¹⁵ S. Rep. No. 111-176, at 110-12 (2010) (emphasis added).

¹⁶ See Exchange Act Section 21F(a)(3)(B)-(C), 15 U.S.C. § 78u-6(a)(3)(B)-(C) (defining “original information” as information that, in addition to other requirements, “is not known to the Commission from any other source, unless the whistleblower is the original source of the information,” and “is not exclusively derived . . . from the news media, unless the whistleblower is a source of the information”); Exchange Act Rule 21F-4(b)(1)(ii)-(iii), 17 C.F.R. § 240.21F-4(b)(1)(ii)-(iii) (same).

Commission receives indirectly must *also* provide that same information directly to the Commission in order to qualify for an award.¹⁷

We recently explained this point with respect to another claimant (the “File No. 2017-10 Claimant”) who sought an award based on information that the File No. 2017-10 Claimant had provided to other federal agencies, in light of the possibility that those agencies could have shared File No. 2017-10 Claimant’s information with the Commission:

[W]e note that [the File No. 2017-10] Claimant likely would have been procedurally barred from obtaining an award based on any information that either [agency] might have shared had they in fact done so. Specifically, for an individual to qualify for an award based on information that he or she provides, our whistleblower rules require that the individual must provide his or her tip directly to the Commission and he or she must do so in accordance with the requirements of Exchange Act Rule 21F-9. Among other things, Rule 21F-9 requires that tips provided to the Commission before the effective date of the whistleblower rules (i.e., August 12, 2011) must be provided in writing; and for any tip submitted on or after the effective date, the tip must be submitted through the Commission’s online portal or on Commission Form TCR. If the Commission receives an individual’s information in another manner or through another source (such as another federal government agency), the individual will generally not be able to recover an award for that information. . . . Among other things, failure to submit information to the Commission in accordance with the whistleblower rules discussed above means that the individual will generally not qualify as a “whistleblower” (as defined in Exchange Act Rule 21F-2(a)) with respect to the information the Commission received and used.¹⁸

With the Covered Action currently at issue, Claimant released a report to the Internet, instead of—but analogous to—the File No. 2017-10 Claimant’s sharing of information with federal agencies other than the Commission. Just like the File No. 2017-10 Claimant would have had to also provide the information to the Commission to be award-eligible, here, Claimant needed to have provided to the Commission the written report that Claimant had only released to the Internet to be award-eligible.

Claimant also argues that Rule 21F-9 has no bearing here because the Commission adopted its whistleblower rules after the time of Claimant’s alleged submission of the Report. Section 21F, however, directs the Commission to pay awards to qualifying whistleblowers

¹⁷ See *Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. at 34,321 n.187 (original source of information “must still satisfy all of the other requirements of Section 21F and of [the whistleblower] rules, including that the information was submitted voluntarily, it led to a successful Commission enforcement action or related action, and [the claimant] is not ineligible for an award”).

¹⁸ In the Matter of the Claims for Award, Notice of Covered Action ^{Redacted} Exchange Act Release No. 80596, Whistleblower Award Proceeding File No. 2017-10 at 6 n.9 (May 4, 2017), *public/redacted version available at www.sec.gov/rules/other/2017/34-80596.pdf* (last visited Jan. 29, 2018).

“under regulations prescribed by the Commission.”¹⁹ The statute, thus, conditions any possible entitlement to an award on conformity to the whistleblower rules that the Commission later adopted. Further, as noted above, our rules expressly considered the status of whistleblowers before the rules were adopted and provided a path to award consideration; these individuals needed only to submit information to the Commission in writing, which Claimant failed to do here.

Moreover, even if we were to consider the language of Section 21F in isolation from Rule 21F-9, the statute’s plain language directs the Commission to pay awards only to “whistleblowers who voluntarily *provided* original information to the Commission.”²⁰ The statute itself therefore requires the provision of information to the Commission in order to support an award, and so the same result follows.²¹

2. *Other documents*

In requesting reconsideration, Claimant has submitted a declaration asserting that Claimant “personally hand delivered . . . documents to the receptionist at the [Regional Office] on or about ^{Redacted} .” Claimant also attached to Claimant’s declaration an email addressed to Claimant from a member of the Regional Office staff, dated ^{Redacted}, in which the staff states that “we would be happy to receive documents” on behalf of the Enforcement staff responsible for the investigation into the Company. At the same time, however, the record contains probative evidence reflecting that Claimant did not drop off documents. The two Regional Office staff members who were in contact with Claimant during the relevant time period have both declared that Claimant never provided them with any information regarding the Company. One of those two staff members—who also is on the email that Claimant attached to Claimant’s declaration—has also stated in a supplemental declaration, after reviewing the email and her own files, that “I know that I never received any documents relating to [the Company] from [Claimant] and that I never forwarded any documents relating to [the Company] that had been received from [Claimant] to” the ^{Redacted} Enforcement staff responsible for the investigation into the Company. Moreover, one of the principal Enforcement attorneys on the investigation into the Company has declared, based on personal knowledge and inquiries of other staff on the same matter, that “the staff on the [Company] Matter never received any documents from [the Regional Office] relating to the [Company] Matter from” Claimant.

¹⁹ Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).

²⁰ Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1) (emphasis added); *accord* Exchange Act Section 21F(a)(6), 15 U.S.C. § 78u-6(a)(6); Exchange Act Section 21F(c)(2)(D), 15 U.S.C. § 78u-6(c)(2)(D).

²¹ See *Coalition for Common Sense in Gov’t Procurement v. United States*, 707 F.3d 311, 317-19 (D.C. Cir. 2013) (rejecting challenge to application of later-adopted rule where statutory language expressly contemplated same result).

Based on our thorough examination of the record and assessment of the evidence, we find that Claimant never delivered documents concerning the Company to the Regional Office. Claimant's own declaration has less evidentiary value than the contrary declarations of Commission staff, because of the lack of probative corroborating materials in Claimant's declaration. The one email offered by Claimant as corroboration does not state that any delivery to the Regional Office in fact took place. Instead, it simply suggests that the Commission's staff was willing to accept such a delivery in the future. Claimant has not produced any email in which Claimant followed up with any of the Commission's staff to confirm either the receipt of such documents from Claimant by the relevant Regional Office staff or the transmission of such documents to the staff responsible for the investigation into the Company.²²

Further, the staff declarations in the record consistently point in a direction opposite from Claimant's own declaration. The two Regional Office staff members who were in contact with Claimant never received any documents from Claimant concerning the Company, and the ^{Redacted} Enforcement staff on the investigation into the Company never received any documents concerning the Company from Claimant via the Regional Office. Having carefully reviewed all evidence in the record, we think the most reasonable conclusion is that Claimant never delivered documents to the Regional Office.

B. Claimant's alleged delivery of documents was not done voluntarily.

Even if we were to credit Claimant's declaration that Claimant personally hand-delivered documents concerning the Company to the Regional Office, we would conclude that this submission of documents cannot support an award for the independent reason that it was not done voluntarily.²³ The statute does not define the term "voluntarily," but our whistleblower rules explain:

Your submission of information is made voluntarily . . . if you provide your submission before a request, inquiry, or demand that relates to the subject matter of your submission is directed to you or anyone representing you (such as an attorney) . . . [b]y the Commission [or another listed authority].²⁴

²² Given all the circumstances of Claimant's purported delivery to the Regional Office, one might expect that a reasonably prudent person in Claimant's shoes would have sought such confirmation that the documents actually reached the intended recipient. The absence of any confirmation is telling.

²³ Section 21F authorizes the Commission to pay awards only to whistleblowers who provide information to the Commission "voluntarily." Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1); *accord* Exchange Act Rule 21F-3(a)(1), 17 C.F.R. § 240.21F-3(a)(1).

²⁴ Exchange Act Rule 21F-4(a)(1), 17 C.F.R. § 240.21F-4(a)(1).

The record reflects, and Claimant does not dispute, that on ^{Redacted}, the Commission’s staff in the Regional Office sent a letter to Claimant’s Business requesting the production of, among other documents, “[a]ll documents relating to [the Company].” Although our rules do not deem a request directed to an employer as also having been directed to all employees *per se*,²⁵ it is appropriate on the facts of this matter to deem the letter request to Claimant’s Business as also having been directed to Claimant as ^{Redacted}.
^{Redacted}. Indeed, Claimant responded to the request on behalf of Claimant’s Business. The letter request to Claimant’s Business preceded Claimant’s asserted hand-delivery of documents concerning the Company on ^{Redacted}, and related to the subject matter of those documents—namely, the Company. Accordingly, Claimant’s alleged hand-delivery of documents to the Regional Office, even if it took place, was not done voluntarily.

Claimant argues that Claimant’s hand-delivery of documents was done “voluntarily” in the ordinary sense of the word because Claimant was not acting under any legal obligation, and that the Commission’s narrower interpretation of that term in Rule 21F-4(a)(1) was adopted only after Claimant made this submission. As explained above, however, Section 21F conditions any possible entitlement to an award on conformity to “regulations prescribed by the Commission.”²⁶ Moreover, not only does the plain language of the statute require that a submission be made “voluntarily” in order to support an award, but also the legislative history indicates that the core purpose of the whistleblower awards program is “to motivate those with inside knowledge to come forward and assist the Government.”²⁷ The language and design of the statute, as well as sound policy, thus support “a requirement that the whistleblower come forward before being contacted by government investigators.”²⁸ We therefore reject Claimant’s attempt to drive a wedge between Section 21F and our whistleblower rules.

C. Claimant’s information did not lead to the success of the Covered Action.

In the alternative, we conclude that neither the Report nor the documents Claimant allegedly hand-delivered to the Regional Office can support an award because none of this information led to the successful enforcement of the Covered Action.²⁹ The whistleblower rules explain:

²⁵ See *Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. at 34,309.

²⁶ Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).

²⁷ S. Rep. No. 111-176, at 110-12.

²⁸ See *Coalition for Common Sense in Gov’t Procurement*, 707 F.3d at 317-19; *Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. at 34,307 & n.71 (collecting cases).

²⁹ Section 21F authorizes the Commission to pay awards to whistleblowers who voluntarily provide information to the Commission only if that information “leads to the successful enforcement” of a covered

The Commission will consider that you *provided* original information that led to the successful enforcement of a judicial or administrative action in any of the following circumstances: (1) *You gave* the Commission original information that . . . cause[d] the staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning different conduct as part of a current examination or investigation, and the Commission brought a successful judicial or administrative action based in whole or in part on conduct that was the subject of your original information; or (2) *You gave* the Commission original information about conduct that was already under examination or investigation by the Commission . . . and your submission significantly contributed to the success of the action.³⁰

Because Claimant never “provided” or “gave” either the Report or the purported other documents concerning the Company to the Commission, as discussed earlier, none of that information led to the successful enforcement of the Covered Action under Rule 21F-4(c). Moreover, even if Claimant had hand-delivered documents concerning the Company to the Regional Office, none of the Commission staff on the investigation into the Company received those documents, and therefore those documents were neither used in nor could have led to the success of the Covered Action.

In reaching this conclusion, we do not intend to diminish Claimant’s role in exposing the wrongdoing at the Company . Nor do we wish to discourage others from undertaking similar efforts. However, our whistleblower awards program is designed “to motivate those with inside knowledge *to come forward and assist the Government* to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud.”³¹ To that end, Section 21F and our whistleblower rules unambiguously require individuals like Claimant to provide their original information directly to the Commission, prior to receiving a request from the Commission, if they wish to pursue a whistleblower award.

IV. Conclusion

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

By the Commission.

Brent J. Fields
Secretary

action. Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1); *accord* Exchange Act Rule 21F-3(a)(3), 17 C.F.R. § 240.21F-3(a)(3).

³⁰ Exchange Act Rule 21F-4(c), 17 C.F.R. § 240.21F-4(c) (emphasis added; formatting altered).

³¹ S. Rep. No. 111-176, at 110-12 (emphasis added).