

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 96228 / November 4, 2022

WHISTLEBLOWER AWARD PROCEEDING

File No. 2023-10

In the Matter of the Claim for an Award

in connection with

Redacted

Notice of Covered Action ^{Redacted}

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

The Claims Review Staff (“CRS”) issued a Preliminary Determination recommending the denial of the whistleblower award claim submitted by ^{Redacted} (“Claimant”) in connection with the above-referenced covered action (the “Covered Action”). Claimant filed a timely response contesting the preliminary denial. For the reasons discussed below, Claimant’s award claim is denied.

I. Background

A. The Covered Action

On ^{Redacted}, the Commission filed a complaint against ^{Redacted} (collectively, the “Defendants”) alleging that the Defendants ^{Redacted}

^{Redacted} Defendants. ^{Redacted} Instead, the Commission alleged that ^{Redacted} Defendants. ^{Redacted} On ^{Redacted}, the court entered final judgment against the ^{Redacted} ordering ^{Redacted} liable for disgorgement of ^{Redacted} plus ^{Redacted} prejudgment interest of ^{Redacted} Defendant ^{Redacted} was separately ordered to pay a civil ^{Redacted} penalty in the amount of ^{Redacted}

On ^{Redacted}, the Office of the Whistleblower (“OWB”) posted the Notice for the Covered Action on the Commission’s public website inviting claimants to submit whistleblower award applications within 90 days, or no later than ^{Redacted}. Claimant filed a whistleblower award claim on ^{Redacted}.

B. The Preliminary Determination

On ^{Redacted}, the CRS issued a Preliminary Determination recommending that Claimant’s claim be denied because Claimant failed to submit his/her claim for award to OWB within ninety days of the date of the Notice of Covered Action, as required under Rule 21F-10 of the Exchange Act.¹ The CRS noted that Claimant submitted his/her application weeks after the ninety day deadline had expired.² In addition, the CRS recommended that Claimant’s claim be denied on the independent ground that Claimant’s submission was not made voluntarily as required by Rules 21F-3 and 21F-4(a)(1). The CRS noted that investigative staff contacted and interviewed Claimant regarding the subject matter covered by Claimant’s subsequent tip before Claimant submitted his/her information to the Commission. The CRS also noted that Claimant submitted his/her tip approximately one year after the Commission filed the Covered Action.

C. Claimant’s Response to the Preliminary Determination

Claimant submitted a timely written response (the “Response”) contesting the Preliminary Determination.³ Claimant argues, among other things, that while Claimant’s whistleblower application may have been submitted more than ninety days after the Notice of the Covered Action for this matter, the Commission should exercise its discretionary authority pursuant to Rule 21F-8(a) to waive that timing requirement, or alternatively use the Commission’s general authority under Exchange Act Section 36(a) to exempt Claimant from the same requirement.⁴ Claimant states that Claimant inadvertently subscribed to the email notifications of a different agency and did not realize this mistake until after the deadline had passed, and further cited to hardships Claimant had endured due to the Defendant’s misconduct. In addition, Claimant contends that his/her information was indeed voluntary because, even though the staff interviewed Claimant about his/her experience as an investor in ^{Redacted} prior to the submission of Claimant’s TCR, Claimant had not understood “what the investigator was inquiring about, and ultimately what the Commission’s investigation really entailed,” until after the Commission filed the Covered Action. Once Claimant became aware of the filing of the Covered Action, Claimant argues that Claimant then reached out to the Commission and began to provide valuable information. Claimant argues that Claimant “provid[ed] extensive tips and

¹ Exchange Act Rule 21F-10(b), 17 C.F.R. § 240.21F-10(b).

² The Preliminary Determination misstated the date of the deadline to file a whistleblower application as ^{Redacted}. ^{Redacted} A supplemental staff declaration confirmed that the deadline to file the application for this Covered Action was ^{Redacted}. As the deadline was correctly stated on the Commission’s public website, and Claimant filed his/her whistleblower application well after both of these dates, this error does not affect the analysis herein.

³ See Exchange Act Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e).

⁴ See Exchange Act Rule 21F-8(a), 17 C.F.R. § 240.21F-8(a).

information the likes of which either could not have existed, or did not exist at the time of the original investigative interview in question.”

II. Analysis

A. Timeliness of Whistleblower Application

The requirement that claimants file whistleblower award claims within ninety days of the posting of a Notice of Covered Action (“NoCA”), set forth in Exchange Act Rule 21F-10, serves important programmatic functions. The deadline ensures fairness to potential claimants by giving all an equal opportunity to have their competing claims evaluated at the same time. The deadline also brings finality to the claims process so that the Commission can make timely awards to meritorious whistleblowers.⁵

Here, Claimant’s whistleblower application was submitted more than three months after the ninety-day filing period had closed. Claimant argues that the Commission should use its authority under Exchange Act Rule 21F-8(a) to waive the ninety-day filing requirement. Rule 21F-8(a) provides that “the Commission may, in its sole discretion, waive any of these procedures upon a showing of extraordinary circumstances.”⁶ We have explained that the “extraordinary circumstances” exception is “narrowly construed” and requires an untimely claimant to show that “the reason for the failure to timely file was beyond the claimant’s control.”⁷ Further, we have identified “attorney misconduct or serious illness” that prevented a timely filing as two examples of the “demanding showing” that an applicant must make before we will consider exercising our discretionary authority to excuse an untimely filing.⁸

Applying this demanding standard here, we find that Claimant has failed to show that extraordinary circumstances beyond Claimant’s control were responsible for the delayed filing of his/her whistleblower application. To the contrary, and as admitted by Claimant in his/her submissions, Claimant was aware of the final judgment entered against the Defendants in Redacted

. While his/her submissions argue Claimant inadvertently failed to subscribe to the Commission’s email notification system announcing the posting of notices of covered actions, such an action was directly under Claimant’s control. “A potential Claimant’s responsibility includes the obligation to regularly monitor the Commission’s web page for NoCA postings and to properly calculate the deadline for filing an award claim.”⁹ Based on these facts, we do not

⁵ See *Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 64545, 76 Fed. Reg. 34300, 34343 (June 13, 2011) (hereinafter, the “Adopting Release”); Order Determining Whistleblower Award Claim, Release No. 88464 at 3 (Mar. 24, 2020).

⁶ Exchange Act Rule 21F-8(a), 17 C.F.R. § 240.21F-8(a).

⁷ Order Determining Whistleblower Award Claim, Release No. 77368 at 3 (Mar. 14, 2016), *pet. for rev. denied sub nom. Cerny v. SEC*, 708 F. App’x 29 (2d Cir. 2017), *cert. denied*, 138 S.Ct. 2005 (2018).

⁸ See Order Determining Whistleblower Award Claim, Release No. 77368 at 3; *see also* Order Determining Whistleblower Award Claim, Release No. 82181 (Nov. 30, 2017); Order Determining Whistleblower Award Claim, Release No. 72659 (July 23, 2014); Order Determining Whistleblower Award Claim, Release No. 72178 (May 16, 2014).

⁹ Order Determining Whistleblower Award Claim, Release No. 91805 at 3 (May 10, 2021) (internal quotation

find any “extraordinary circumstances” that might trigger our discretion to excuse the fact that Claimant submitted his/her award application more than three months late.¹⁰

Accordingly, we find that Claimant is not eligible for an award because Claimant’s application was not submitted within ninety days of the date the NoCA was posted.¹¹

B. Voluntary Submission

Claimant also contests the CRS’s conclusion that his/her information was not provided voluntarily to the Commission. Among other things, Section 21F(b)(1) of the Exchange Act requires that a whistleblower submit original information “voluntarily” in order to be considered for an award.¹² The purpose of this requirement is to “create a strong incentive for whistleblowers to come forward early with information about possible violations of the federal securities laws, rather than wait to be approached by investigators.”¹³ Rule 21F-4(a)(1) establishes a “simple and straightforward test for when we will treat a whistleblower as having submitted information voluntarily; as relevant here, the whistleblower must provide his or her tip to the Commission before investigators direct a ‘request, inquiry, or demand’ to the whistleblower that relates to the subject matter of the tip.”¹⁴

Here, the record shows that Enforcement staff contacted Claimant because Claimant was an investor in the Defendants’ scheme. The Enforcement staff interviewed Claimant by phone in ^{Redacted} about his/her experience as an investor, approximately twenty-one months before Claimant submitted his/her TCR to the Commission. Indeed, in response to a question on the Form TCR asking whether the complainant had “received a request, inquiry or demand that relates to the subject matter of [the complainant’s] submission,” Claimant checked “Yes.” Claimant further acknowledged in his/her ^{***} TCR that Claimant had been briefly interviewed ^{Redacted} by phone by an “SEC investigator” on . Claimant’s Response argues that after learning of the Covered Action, Claimant provided additional valuable information to the staff about his/her dealings with the Defendants, and that this information was not available at

omitted). We also note that when a NoCA is posted on the Commission’s website, a corresponding “Claim Due Date,” which reflects the deadline for filing an award claim, is simultaneously posted.

¹⁰ Claimant mentions Section 36(a) of the Exchange Act in his/her Response, which we construe as a request for a Section 36(a) waiver. However, we do not find evidence that would support the Commission exercising its authority under Section 36(a) to exempt Claimant from his/her obligation to have timely filed the application.

¹¹ Claimant suggests in his/her Response, based upon statements in a 2013 SEC Office of Inspector General Report and OWB’s 2020 Annual Report to Congress, that OWB bears some responsibility to contact potential claimants to notify them to submit award applications. We reject this argument. As we have previously stated, the whistleblower rules “provide for constructive, not actual, notice of the posting of a covered action and of the deadline for submitting a claim. The NoCA[] for the Covered Action[] w[as] clearly posted on the Commission’s website, along with the requisite deadline[]. Under our rules, that is all the notice that Claimant was due.” Order Determining Whistleblower Award Claim, Release No. 91805 at 3 (May 10, 2021) (internal quotation omitted).

¹² Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).

¹³ Adopting Release, 76 Fed. Reg. at 34306.

¹⁴ Order Determining Whistleblower Award Claim, Exchange Act Release No. 84046 at 8 (Sept. 6, 2018).

the time of the interview.¹⁵ However, a submission of information is not voluntary “even if the submission provides more information than was specifically requested [by the staff], if it only describes additional instances of the same or similar conduct, provides additional details, or describes other conduct that is closely related as part of a single scheme,” as is the case here.¹⁶ Accordingly, we find that Claimant’s submission of information was not voluntary.¹⁷

For these reasons, Claimant is not entitled to an award.¹⁸

III. Conclusion

Accordingly, it is hereby ORDERED that the whistleblower award application of Claimant in connection with the Covered Action be, and it hereby is, denied.

By the Commission.

Vanessa A. Countryman
Secretary

¹⁵ Although not a basis for the CRS’s preliminary denial, we note that the staff declaration confirmed that none of the information Claimant provided to the Commission was relied upon by the staff when recommending the Covered Action or when filing the charges brought by the Commission in the Covered Action.

¹⁶ Adopting Release, 76 Fed. Reg. at 34308.

¹⁷ Claimant’s Response at times construes Claimant’s untimely filing of the whistleblower application and lack of a voluntary submission to the Commission as having “to do exclusively with what the Commission has apparently deemed to be unreasonable delay(s) . . . Unreasonable delays, moreover, are only one reason among the seven (7) listed in the Commission’s summary of criteria ostensibly considered via all Award Orders . . .” Claimant’s Response argues that such “delays” should “favor an Award or a negligible reduction in the amount, if any . . .” Claimant’s Response confuses eligibility criteria for an award, such as the voluntary submission of information pursuant to Rule 21F-4(a) and a timely submission of a whistleblower award application pursuant to Rule 21F-10(b), with the criteria the Commission evaluates to determine the amount of an award pursuant to Rule 21F-6 once a whistleblower is determined to be eligible for an award. Because Claimant did not submit a timely whistleblower application or voluntarily submit information to the Commission, as discussed above, Claimant is ineligible for an award and thus no evaluation of the Rule 21F-6 factors is required. To the extent that Claimant asks the Commission to waive application of these eligibility requirements pursuant to Section 36(a) on the grounds that Claimant is an “unsophisticated investor,” we decline to do so. We do not find that Claimant has met his/her burden to demonstrate the considerations that would support the Commission exercising its authority under Section 36(a) to exempt Claimant from these obligations.

¹⁸ Claimant’s Response also argues that the Commission failed to protect Claimant from retaliation by one of the Defendants in the Covered Action. Such concerns, if true, are beyond the scope of this whistleblower award proceeding, which addresses whether Claimant voluntarily provided original information that led in fact to the success of the Covered Action. *See* Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).