

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 91805 / May 10, 2021

WHISTLEBLOWER AWARD PROCEEDING
File No. 2021-44

In the Matter of the Claim for Award

in connection with

Redacted

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-captioned 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’s Office of the Whistleblower (“OWB”) posted a Notice of Covered Action on the Commission’s public website inviting claimants to submit whistleblower award applications for the Covered Action within 90 days.¹ The 90-day deadline for this posting was ^{Redacted}. The Commission received Claimant’s award application for the Covered Action on ^{Redacted}, approximately 32 months after the deadline.² Claimant stated that Claimant did not know the Notice for the Covered Action had been

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

² Claimant’s award application also sought awards in connection with six other covered actions. On March 26, 2019, we denied Claimant’s award claim in Covered Action ^{Redacted} because it had been submitted after the deadline for submitting award claims for that covered action. See Order Determining Whistleblower Award Claim, Release No. 34-85412 (Mar. 26, 2019). Then on March 24, 2020, we denied Claimant’s award claims in Covered Actions ^{Redacted} because each had been submitted after the deadline for submitting award claims for those covered actions. See Order Determining Whistleblower Award Claim, Release No. 34-88464 (Mar. 24, 2020).

published but did not attempt to explain or justify the late filing of the award claim beyond stating that Claimant believed the Commission would notify Claimant of the posting of the Covered Action.

B. The Preliminary Determination

The CRS issued a Preliminary Determination³ recommending that Claimant's award claim be denied because Claimant failed to submit the claim for award to OWB within ninety (90) days of the date of the Notice of Covered Action, as required under Rule 21F-10 of the Exchange Act.⁴

C. Claimant's Response to the Preliminary Determination

Claimant submitted a timely written request contesting the Preliminary Determination.⁵ In the reconsideration request, Claimant contends that the Commission never alerted Claimant to the necessity of filing for a whistleblower award in the Covered Action.

II. Analysis

The requirement that claimants file whistleblower award claims within ninety days of the posting of a Notice of Covered Action, 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 claim process so that the Commission can make timely awards to meritorious whistleblowers.⁶

Notwithstanding these important programmatic functions, we recognize that there may be rare situations where an exception should be made. To allow for this, Exchange Act Rule 21F-8(a) provides that "the Commission may, in its sole discretion, waive" the ninety-day filing requirement "upon a showing of extraordinary circumstances."⁷ 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."⁸ Further, we have identified "attorney misconduct or serious illness" that prevented a

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

⁴ Exchange Act Rules 21F-10(a) ("A claimant will have ninety (90) days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred") and 10(b)(1) ("All claim forms, including any attachments, must be received by the Office of the Whistleblower within ninety (90) calendar days of the date of the Notice of Covered Action in order to be considered for an award"). See also Order Determining Whistleblower Award Claim, Release No. 34-77368, 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).

⁵ See Exchange Act Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e).

⁶ See *Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 34-64545, 76 Fed. Reg. 34300, 34300; Order Determining Whistleblower Award Claim, Release No. 34-88464 at 3 (Mar. 24, 2020).

⁷ Exchange Act Rule 21F-8(a), 17 C.F.R. § 240.21F-8(a).

⁸ Order Determining Whistleblower Award Claim, Release No. 34-77368 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). See also *supra* note 2

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.⁹

Claimant provided the same explanation for Claimant’s tardiness in filing an award application in the Covered Action as Claimant provided in four previous late-filed award applications,¹⁰ namely that the Commission failed to alert Claimant to the necessity of filing for a whistleblower award. As we explained in our previous orders, Claimant has failed to satisfy the “demanding showing” for our waiving the ninety-day filing requirement:

Applying that demanding standard here, we find that Claimant has failed to show that extraordinary circumstances beyond Claimant’s control were responsible for the years of delay between the application deadline for the Covered Action[] and Claimant’s untimely whistleblower application in ^{Redacted}. Contrary to Claimant’s contentions, the Commission is not obligated to notify a claimant of the posting of a NoCA or the deadline for submitting an award application. As we have explained, our 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.

Despite Claimant’s asserted unawareness of this notice, “a lack of awareness about the [whistleblower award] program does not . . . rise to the level of an extraordinary circumstance as a general matter [since] potential claimants bear the ultimate responsibility to learn about the program and to take the appropriate steps to perfect their award applications.” “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.” Claimant’s failure to regularly monitor the Commission’s web page for NoCA postings is not an “extraordinary circumstance” that might trigger our discretion to excuse the fact that Claimant submitted the award application more than two years late.¹¹

(previous orders denying award claims by Claimant on grounds of untimeliness).

⁹ See *supra* Order Determining Whistleblower Award Claim, Release No. 34-77368 at 3; Order Determining Whistleblower Award Claim, Release No. 34-82181 (Nov. 30, 2017); Order Determining Whistleblower Award Claim, Release No. 34-72659 (July 23, 2014); Order Determining Whistleblower Award Claim, Release No. 34-72178 (May 16, 2014).

¹⁰ See *supra* note 2.

¹¹ Order Determining Whistleblower Award Claim, Release No. 34-88464 at 3-4 (Mar. 24, 2020) (internal citations omitted). If the Commission believes that an award is merited notwithstanding that the untimely filing was within the claimant's control, we still have recourse to our general exemptive authority under Section 36(a) of the Exchange Act. However, we do not find any evidence that would support exercising this authority to exempt Claimant from Claimant’s obligation to have timely filed.

III. Conclusion

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

By the Commission.

Vanessa A. Countryman
Secretary