

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 95711 / September 9, 2022

WHISTLEBLOWER AWARD PROCEEDING

File No. 2022-79

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In the Matter of the Claims for an Award

in connection with

Notice of Covered Action

Redacted

and

Notice of Covered Action

Redacted

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**ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS**

The Claims Review Staff (“CRS”) issued Preliminary Determinations recommending the denial of whistleblower award claims submitted by <sup>Redacted</sup> (“Claimant”) in connection with the above-referenced covered actions (the “Covered Actions”).<sup>1</sup> Claimant filed a timely response contesting the preliminary denials. For the reasons discussed below, Claimant’s award claims are denied.

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<sup>1</sup> Claimant’s award application also sought awards in connection with five other covered actions. On March 26, 2019, we denied Claimant’s award claim in Covered Action <sup>Redacted</sup> because it had been submitted after the deadline for submitting award claims for that covered action. *See* Order Determining Whistleblower Award Claim, Release No. 85412 (Mar. 26, 2019). On March 24, 2020, we denied Claimant’s award claims in Covered Actions <sup>Redacted</sup> and <sup>Redacted</sup> because each had been submitted after the deadline for submitting award claims for those covered actions. *See* Order Determining Whistleblower Award Claim, Release No. 88464 (Mar. 24, 2020). Then on May 10, 2021, we denied Claimant’s award claim in Covered Action <sup>Redacted</sup> because it too had been submitted after the deadline for submitting award claims in that covered action. *See* Order Determining Whistleblower Award Claim, Release No. 91805 (May 10, 2021).

## I. Background

### A. The Covered Actions

Redacted The Office of the Whistleblower (“OWB”) received one Form WB-APP on or about Redacted from Claimant applying for awards in connection with the Covered Actions. \*\*\*

On Redacted OWB posted Notice of Covered Action Redacted on the Commission’s public website inviting claimants to submit whistleblower award applications within 90 days.<sup>2</sup> The 90-day deadline for this posting was Redacted Claimant’s award application for Covered Action Redacted was submitted approximately six months after the deadline.

On Redacted OWB posted Notice of Covered Action Redacted on the Commission’s public website inviting claimants to submit whistleblower award applications within 90 days. The 90-day deadline for this posting was Redacted Claimant’s award application for Covered Action Redacted was submitted approximately three months after the deadline.

### B. The Preliminary Determinations

On Redacted the CRS issued Preliminary Determinations recommending that Claimant’s award claims for the Covered Actions be denied because Claimant failed to submit the claims for award to OWB within ninety days of the dates of the Notices of Covered Action, as required under Rule 21F-10 of the Exchange Act.<sup>3</sup>

### C. Claimant’s Response to the Preliminary Determinations

Claimant submitted a timely written request contesting the Preliminary Determinations.<sup>4</sup> In the reconsideration request, Claimant contends that the Commission never alerted Claimant to the necessity of filing for a whistleblower award in the Covered Actions and that the Commission should use its authority under Exchange Act Rule 21F-8(a) to waive the award application deadlines in the above-captioned Covered Actions.

## II. Analysis

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

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<sup>2</sup> See Exchange Act Rule 21F-10(a), 17 C.F.R. § 240.21F-10(a).

<sup>3</sup> 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. 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).

<sup>4</sup> See Exchange Act Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e).

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.<sup>5</sup>

Claimant argues that the Commission should use its authority under Exchange Act Rule 21F-8(a) to waive the ninety-day filing requirement in the two Covered Actions discussed herein. Rule 21F-8(a) provides that “the Commission may, in its sole discretion, waive any of these procedures upon a showing of extraordinary circumstances.”<sup>6</sup> 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.”<sup>7</sup> 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.<sup>8</sup>

Claimant provided the same explanation for Claimant’s tardiness in filing award applications in the Covered Actions as Claimant provided in five previous late-filed award applications, 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” required by Rule 21F-8(a):

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 Actions and Claimant’s untimely whistleblower application in <sup>Redacted</sup> 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 NoCAs for the Covered Actions were clearly posted on the Commission’s website, along with the requisite deadlines. 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

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<sup>5</sup> See *Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 64545, 76 Fed. Reg. 34300, 34300; Order Determining Whistleblower Award Claim, Release No. 88464 at 3 (Mar. 24, 2020).

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

<sup>7</sup> 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).

<sup>8</sup> 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).

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.<sup>9</sup>

### **III. Conclusion**

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

By the Commission.

Vanessa A. Countryman  
Secretary

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<sup>9</sup> Order Determining Whistleblower Award Claim, Release No. 88464 at 3-4 (March 24, 2020) (internal citations omitted).