

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 100263 / June 4, 2024

WHISTLEBLOWER AWARD PROCEEDING

File No. 2024-22

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 (“Initial Preliminary Determination”) recommending that ^{Redacted} (“Claimant”) receive a whistleblower award of twenty-eight percent (28%) of the monetary sanctions collected in the above-referenced Covered Action (the “Covered Action”). On ^{Redacted}, after considering additional information, the CRS issued a revised Preliminary Determination (“Revised Preliminary Determination”) that recommended that Claimant receive an award of twenty-three percent (23%) of the monetary sanctions collected in the Covered Action. Claimant filed a timely response (“Response”) contesting the Revised Preliminary Determination.¹ For the reasons discussed below, the recommendation in the Revised Preliminary Determination is adopted.

¹ The Initial Preliminary Determination also recommended that the award application of one other claimant be denied. This claimant did not submit a request for reconsideration and, as such, the Preliminary Determination with respect to his/her award claim became the Final Order of the Commission, pursuant to Exchange Act Rule 21F-10(f), 17 C.F.R. § 240.21F-10(f).

I. Background

A. The Covered Action

On ^{Redacted}, the Commission instituted a settled administrative cease-and-desist proceeding against ^{Redacted} (“Respondent”). The Commission found that Respondent ^{Redacted}

^{Redacted} As a result, Respondent ^{Redacted} Among other relief, Respondent agreed to pay disgorgement of ^{Redacted}, prejudgment interest of ^{Redacted}, and a civil penalty of ^{Redacted}.

On ^{Redacted}, the Office of the Whistleblower (“OWB”) posted a Notice of Covered Action on the Commission’s public website inviting claimants to submit whistleblower award applications within 90 days. Claimant submitted a timely whistleblower award claim.

B. The Initial Preliminary Determination

The Initial Preliminary Determination recommended that Claimant receive an award of twenty-eight percent (28%) of the monetary sanctions collected in the Covered Action. The record supporting the Initial Preliminary Determination included staff declarations (“Initial Declarations”) from an accountant in the Division of Examinations (“EXAMS”) who was assigned to an examination of Respondent (“Examination”) that resulted in a referral to the Division of Enforcement (“Enforcement”) and from an Enforcement attorney who was assigned to the subsequent investigation (“Investigation”) that led to the Covered Action. The Initial Declarations both included statements to the effect that Claimant’s TCR² caused EXAMS staff to commence an examination of Respondent. The Initial Preliminary Determination cited this as one of the factors considered by the CRS in reaching the recommended award percentage.

C. The Proposed Final Determination

On ^{Redacted}, following written notice of Claimant’s decision not to contest the Initial Preliminary Determination, the Commission was notified of a Proposed Final Determination (“Proposed Final Determination”) recommending a twenty-eight percent (28%) award for Claimant.³ OWB subsequently received information from EXAMS that indicated that, contrary to the stated bases for the CRS’s Initial Preliminary Determination, Claimant’s tip did not cause staff to open the Examination. In light of this new information, OWB requested that the Proposed Final Determination be withdrawn from Commission consideration at that time, to be resubmitted for consideration by the Commission at a later date. OWB then obtained

² The TCR System is the Commission’s electronic database which records and stores information received from whistleblowers and others about potential securities law violations and records staff action taken with regard to tips, complaints, and referrals (“TCRs”) entered into the system.

³ Under Rule 21F-10(f), because Claimant did not contest the Initial Preliminary Determination, it was deemed a Proposed Final Determination for purposes of Rule 21F-10(h). See Exchange Act Rule 21F-10(f), 17 C.F.R. § 240.21F-10(f).

additional staff declarations to clarify and correct the factual record⁴ and subsequently submitted the revised record to the CRS for its further consideration and the issuance of a revised Preliminary Determination.

D. The Revised Preliminary Determination

The Revised Preliminary Determination recommended that Claimant receive an award of twenty-three percent (23%) of the monetary sanctions collected in the Covered Action and noted that the CRS had received new evidence concerning the opening of the Examination. Specifically, the Revised Preliminary Determination stated that the new evidence clarified that the Examination already had been scheduled to begin and staff had already been assigned to conduct it prior to the Commission's receipt of Claimant's tip. The record supporting the Revised Preliminary Determination included supplemental declarations ("Supplemental Declarations") from the Enforcement and EXAMS staff members who provided the Initial Declarations that acknowledged and corrected errors⁵ contained in the Initial Declarations, as well as an additional declaration from an Assistant Regional Director in the Division of Examinations ("EXAMS Supervisory Declaration") that addressed the circumstances under which Respondent was selected for examination. The Supplemental Declarations and EXAMS Supervisory Declaration indicate that the Respondent was selected for examination ^{Redacted} and not as the result of Claimant's tip.⁶

E. Claimant's Response to the Revised Preliminary Determination

Claimant's Response asserts that Claimant should receive the uncontested twenty-eight percent award initially recommended by the CRS for four reasons. First, the Response argues that the whistleblower program rules do not permit an uncontested Preliminary Determination to be "reopened" by OWB or the CRS and that the Revised Preliminary Determination must be invalidated because it was rendered in violation of the whistleblower program rules. Second, the Response contends that the factual record supporting a Preliminary Determination "closes" once a Preliminary Determination is deemed a Proposed Final Determination, which "occurs

⁴ The whistleblower rules contemplate that, in making an award determination, the Commission, the CRS, and OWB may rely upon, as relevant here, sworn declarations from Commission staff regarding any matters relevant to the award determination, as well as the publicly available materials related to the covered action, the claimant's tip, the claimant's award application, and any other materials timely submitted by the claimant in response to the Preliminary Determination. See Exchange Act Rule 21F-12(a), 17 C.F.R. § 240.21F-12(a).

⁵ In addition to correcting information regarding the opening of the Examination, the Supplemental Declarations clarified and corrected prior statements regarding the number of TCRs Claimant had submitted and how EXAMS staff made use of Claimant's information in conducting the Examination. While the Initial Declarations stated that Claimant submitted two TCRs, the Supplemental Declarations clarified that Claimant had submitted only one TCR (the "Initial TCR") on ^{Redacted}. The Initial TCR was sequestered by the Commission's Office of Market Intelligence for a privilege review after EXAMS staff discovered, while conducting research on Respondent, that some of the attachments to the TCR were marked as privileged and confidential. Although EXAMS staff reviewed the allegations Claimant included in response to the TCR complaint form questions, staff did not review the contents of the attachments to the TCR. After the privilege review was completed, a redacted version of Claimant's TCR, with ^{***} privileged attachments redacted therefrom (the "Redacted TCR"), was emailed to EXAMS staff on ^{Redacted}, and uploaded to the TCR system on ^{Redacted}.

⁶ According to the EXAMS Supervisory Declaration, which we credit, Respondent was selected for examination ^{Redacted}, and staff were assigned to the Examination on ^{Redacted}, three days before Claimant submitted his/her tip.

automatically when a [Preliminary Determination] is uncontested.” Third, the Response asserts that the staff declarations supporting the Initial and Revised Preliminary Determinations “are so wildly inconsistent that they render the statements themselves inherently unreliable and lacking credibility.” Finally, the Response states that reducing Claimant’s award “after the fact and based on contradictory testimony” will threaten the long-term programmatic interests of the whistleblower program.

II. Analysis

To qualify for an award under Section 21F of the Exchange Act, a whistleblower must voluntarily provide the Commission with original information that leads to the successful enforcement of a covered action.⁷ Under Rule 21F-4(c)(1), a claimant’s original information will be deemed to have led to a successful enforcement action if it caused the Commission to commence an examination, open or reopen an investigation, or inquire into different conduct as part of a current Commission examination or investigation and the Commission brought a successful action based in whole or in part on conduct that was the subject of the claimant’s original information.⁸ Alternatively, under Rule 21F-4(c)(2), a claimant’s original information will be deemed to have led to a successful enforcement action if the conduct was already under examination or investigation, and the original information “significantly contributed to the success of the action.”⁹ In determining whether information “significantly contributed” to the success of the action, the Commission will consider whether the information was “meaningful” in that it “made a substantial and important contribution” to the success of the covered action.¹⁰

We find that the record demonstrates that Claimant voluntarily provided original information to the Commission that led to the successful enforcement of the Covered Action. Accordingly, Claimant is eligible for a whistleblower award. Applying the award criteria in Rule 21F-6 to the specific facts and circumstances here, we find that an award of twenty-three percent (23%) is appropriate.

In reaching that determination, we considered that: (1) although Claimant’s tip was not the basis for opening the Examination, Claimant provided new and helpful information that assisted with both the Examination and subsequent Investigation into Respondent; (2) Claimant’s information assisted EXAMS staff in formulating additional requests for information from Respondent, the results of which helped support findings included in a referral to the Division of Enforcement; (3) Claimant provided ongoing assistance during the Investigation, including participating in a voluntary interview with Commission staff, and Claimant’s information supported certain findings ^{Redacted} in the Commission’s settled administrative order; (4) Claimant’s tip implicated strong law enforcement interests as it alleged ^{Redacted} ^{Redacted}; (5) Claimant persistently raised

⁷ See Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1). See also Exchange Act Rule 21F-3(a), 17 C.F.R. § 240.21F-3(a).

⁸ See Exchange Act Rule 21F-4(c)(1), 17 C.F.R. § 240.21F-4(c)(1).

⁹ See Exchange Act Rule 21F-4(c)(2), 17 C.F.R. § 240.21F-4(c)(2).

¹⁰ See Order Determining Whistleblower Award Claims, Exchange Act Release No. 90922 at 4 (Jan. 14, 2021); see also Order Determining Whistleblower Award Claims, Exchange Act Release No. 85412 at 9 (Mar. 26, 2019). Exchange Act Rule 21F-4(c)(3), 17 C.F.R. § 240.21F-4(c)(3), is not relevant here.

concerns internally in an effort to remedy the misconduct and took personal and professional risk in coming forward to the Commission; and (6) Claimant suffered significant hardships as a result of Claimant's reporting, ^{Redacted}. The award percentage also recognizes that Claimant unreasonably delayed reporting to the Commission for over twenty-one months and that Claimant's information contributed to only a portion of the findings in the Covered Action.

Additionally, we find no merit in Claimant's arguments contesting the Revised Preliminary Determination, for the following reasons.

A. The Revised Preliminary Determination is Valid

As an initial matter, we disagree with the Response's first argument that the Revised Preliminary Determination must be set aside because it was rendered in violation of the whistleblower program rules. Specifically, the Response asserts that an uncontested Preliminary Determination "must be deemed a Proposed Final Determination" and "must be sent automatically to the Commission for its review and approval"; the Commission may not consider the Supplemental Declarations in rendering a final decision on the award claim; and the whistleblower program rules do not permit the CRS to issue a revised Preliminary Determination.

To the extent the Response argues that the uncontested Initial Preliminary Determination was not presented to the Commission as a Proposed Final Determination and therefore the requirements of Rules 21F-10(f) and 21F-10(h)¹¹ were not satisfied, the record does not support such an argument. The record shows that following OWB's receipt of notice that Claimant would not contest the Initial Preliminary Determination, it was presented to the Commission for our consideration as a Proposed Final Determination.

The Commission is not required, however, to approve a Proposed Final Determination that comes before it, even if the CRS's Preliminary Determination is uncontested. Determinations of whether, to whom, and in what amount to make awards are committed to the Commission's discretion.¹² In reaching these determinations, the Commission must first consider whether a claimant has satisfied the eligibility conditions to receive an award; if so, the Commission must then consider the criteria set forth in Rule 21F-6¹³ in determining the amount

¹¹ Rule 21F-10(f) provides, in part, that if a claimant fails to submit a timely response contesting a Preliminary Determination, "the Preliminary Determination will become the Final Order of the Commission (except where the Preliminary Determination recommended an award, in which case the Preliminary Determination will be deemed a Proposed Final Determination for purposes of [Rule 21F-10(h)])." *See* Exchange Act Rule 21F-10(f), 17 C.F.R. § 240.21F-10(f). Rule 21F-10(h) provides, in part, that OWB "will notify the Commission of each Proposed Final Determination." *See* Exchange Act Rule 21F-10(h), 17 C.F.R. § 240.21F-10(h).

¹² *See* Exchange Act Section 21F(f), 15 U.S.C. § 78u-6(f); Exchange Act Rule 21F-13(a), 17 C.F.R. § 240.21F-13(a).

¹³ These factors include: (1) the significance of the information provided by a whistleblower to the success of the Commission action or related action; (2) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action; (3) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; (4) participation by the whistleblower in internal compliance systems; (5) culpability of the whistleblower; (6) whether the whistleblower unreasonably delayed reporting; and (7) interference with internal compliance and reporting systems by the whistleblower. *See* Exchange

of any award.¹⁴ Where the Commission makes an award based on the factors set forth in Rule 21F-6, the Commission's determination regarding the amount of an award, including the allocation of an award as between multiple whistleblowers and any factual findings, legal conclusions, policy judgments, or discretionary assessments involving the Commission's consideration of the factors set forth in Rule 21F-6, is not appealable.¹⁵

As the Response acknowledges, Rule 21F-10(h) provides that within 30 days of receiving notice of a Proposed Final Determination, any Commissioner may request that the Proposed Final Determination be reviewed by the Commission.¹⁶ In this case, within the 30-day review period following the Commission's receipt of the Proposed Final Determination and while the Proposed Final Determination was still pending with the Commission, new information came to OWB's attention indicating that certain statements included in the Initial Declarations, which the CRS relied upon in issuing the Initial Preliminary Determination, were not correct. Subsequently, OWB requested that the matter be withdrawn from further Commission consideration so that OWB could obtain additional staff declarations to clarify and correct the factual record and resubmit the matter for Commission consideration at a later date.

With respect to Claimant's argument that OWB and the CRS acted outside whistleblower program rules in issuing the Revised Preliminary Determination, we disagree. The Commission is authorized under Rule 21F-12(a) to consider sworn staff declarations regarding any matters relevant to the award determination in making a final determination.¹⁷ Given this authority, we believe the CRS's issuance of the Revised Preliminary Determination in this case served to further the Commission's interest in obtaining a fulsome and accurate record prior to reaching a final determination on this matter. Further, it provided the Claimant an opportunity¹⁸ to refute or otherwise respond to the revised factual record prior to the Commission's final determination. Therefore, we believe it was appropriate to issue a Revised Preliminary Determination in this case and we reject Claimant's first argument that the Revised Preliminary Determination was rendered in violation of whistleblower program rules.¹⁹

Act Rule 21F-6, 17 C.F.R. § 240.21F-6.

¹⁴ See Exchange Act Rule 21F-5(b), 17 C.F.R. § 240.21F-5(b) ("If all of the conditions are met for a whistleblower award in connection with a Commission action or a related action, the Commission will then decide the percentage amount of the award applying the criteria set forth in [Rule 21F-6] and pursuant to the procedures set forth in [Rule 21F-10] and [Rule 21F-11].").

¹⁵ See Exchange Act Rule 21F-13(a); 17 C.F.R. § 240.21F-13(a).

¹⁶ See Exchange Act Rule 21F-10(h), 17 C.F.R. § 240.21F-10(h).

¹⁷ In light of this express authority, we also disagree with the Response's assertion that allowing the record to be supplemented once the Commission is notified of a Proposed Final Determination is "administratively untenable" and "manifestly unfair to whistleblowers who do not contest a preliminary determination."

¹⁸ Exchange Act Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e), provides claimants an opportunity to request the record supporting a Preliminary Determination and to contest a Preliminary Determination. We note that, absent the issuance of the Revised Preliminary Determination, Claimant would not have had an opportunity to refute the revised record prior to our final determination in this matter.

¹⁹ Contrary to Claimant's arguments, it is not unprecedented for the CRS to issue a revised Preliminary Determination. See the Final Orders of the Commission, effective by operation of law pursuant to Rule 21F-10(f), available at <https://www.sec.gov/files/denial-order-91823.pdf>, <https://www.sec.gov/files/denial-order-112123-nm.pdf>, and <https://www.sec.gov/files/denial-orders-53023.pdf>.

B. Additional Staff Declarations Are Appropriate

We disagree with Claimant’s argument that, in reaching a final determination on this award claim, the Commission may not consider the Supplemental Declarations or any other evidence that was not before the CRS at the time of the Initial Preliminary Determination. In support of this argument, Claimant cites Rule 21F-10(h), which provides in part that in the event a Commissioner requests a review of a Proposed Final Determination, “the Commission will review the record that the staff relied upon in making its determinations” When reviewing Proposed Final Determinations, the Commission is expressly authorized to rely upon the materials specified in Rule 21F-12(a), including “[s]worn declarations (including attachments) from the Commission staff regarding any matters relevant to the award determination.” Claimant’s suggested interpretation of Rule 21F-10(h) as requiring that the record be “closed” once the CRS has rendered a Preliminary Determination cannot be reconciled with the express authority provided under Rule 21F-12(a) for the Commission to consider sworn staff declarations regarding any matters relevant to the award determination. Taking this authority into account, we read the language in Rule 21F-10(h) that “the Commission will review the record that the staff relied upon in making its determinations” to mean that, while the Commission is obliged to review the record the CRS considered, it is not prohibited from considering additional staff declarations, or other materials specifically permitted under Rule 21F-12(a), in rendering final decisions on whistleblower award claims.²⁰

In order to satisfy the whistleblower program goal of incentivizing whistleblowers to come forward with high-quality information and to allow the Commission to treat award claimants fairly vis-à-vis our rules and other award claimants, it is of utmost importance that our award decisions are based on accurate factual records. In this case, the information brought to OWB’s attention that Claimant’s tip did not lead staff to open the Examination was relevant to both Claimant’s eligibility to receive an award and the significance of Claimant’s information to the success of the Covered Action, one of the factors we must consider under Rule 21F-6. For these reasons, we believe the Commission has ample authority to consider the Supplemental Declarations, and we have treated them as part of the record for this award proceeding.

C. The Declarations Are Consistent

Turning to Claimant’s third argument, we disagree that the Revised Preliminary Determination is arbitrary and capricious and therefore invalid because the Initial Declarations and Supplemental Declarations are “so factually divergent and contradictory that they are inherently unreliable and raise serious credibility questions.” Given that the Supplemental Declarations expressly acknowledge and correct specific errors included in the Initial Declarations, we do not find them to be inconsistent with the Initial Declarations, as the Claimant urges. Although errors were made in the Initial Declarations, we have no reason to doubt the truthfulness of the Supplemental Declarations or, as corrected, the Initial Declarations.

²⁰ In support of this argument, the Response also asserts that it is “disingenuous” to characterize the information supporting the Revised Preliminary Declaration as “new evidence” given that the declarants would have known all the information that was contained in their later declarations at the time they provided the Initial Declarations. We disagree. The EXAMS Supervisory Declaration, which was provided at the time the CRS issued the Revised Preliminary Determination, clarified the circumstances under which Respondent was selected for examination.

We note that the Initial Declarations and the Supplemental Declarations were provided by staff who worked on the related Examination and Investigation and thus are in the best position to understand and explain the factual background of the Examination and Investigation. Further, with respect to the circumstances under which the Examination began, the Supplemental Declarations are bolstered by the EXAMS Supervisory Declaration.²¹ Finally, other than arguing that the Supplemental Declarations are “wildly inconsistent” with the Initial Declarations, Claimant does not provide any evidence to dispute the facts averred in the Supplemental Declarations.²² Therefore, we credit the Supplemental Declarations and, as corrected, the Initial Declarations.

D. Whistleblower Program Interests

Lastly, we disagree with the Response’s fourth argument that reducing Claimant’s award “after the fact” and “based on contradictory testimony” will threaten the long-term programmatic interests of the whistleblower program by disincentivizing whistleblowers from stepping forward. First, as discussed above, the whistleblower program rules expressly contemplate that final award decisions are in the discretion of the Commission; the whistleblower program rules thus recognize that in reaching final award decisions the Commission may depart from the recommendations of the CRS. Second, in order to achieve the whistleblower program goal of incentivizing whistleblowers to come forward with high-quality information, we believe it is critical that we base our eligibility and award determinations on accurate factual records, so that we may reward only those whistleblowers whose information has “led to” a successful enforcement action and make reasoned assessments of the positive and negative award factors specified in Rule 21F-6.

III. Conclusion

Accordingly, it is hereby ORDERED that Claimant shall receive an award of twenty-three percent (23%) of the monetary sanctions collected in the Covered Action.

By the Commission.

Vanessa A. Countryman
Secretary

²¹ This sworn declaration was provided by the supervisor of the Examination, who had direct knowledge of Respondent’s selection for examination and assigned staff to the Examination.

²² Contrary to Claimant’s arguments, the Supplemental EXAMS Declaration does not conclude that the Examination “was independent of [Claimant’s] information.” To the contrary, the Supplemental EXAMS Declaration avers that the Redacted TCR “meaningfully assisted” the Examination, “played a significant role in supporting” several findings included in the referral to Enforcement, and “supported the staff’s finding that [Respondent] failed to meet ^{Redacted}.” Further, contrary to the claim in the Response that the Supplemental EXAMS Declaration states that the EXAMS declarant “reviewed” some of the attachments to Claimant’s TCR, that declaration states that the declarant “opened” at least some of the attachments, “but upon seeing that the attachments were marked as privileged and confidential, [the declarant] did not review their contents,” consulted supervisors as to the best course of action, and was subsequently instructed “not to further review the Initial TCR until the privilege review was complete.”