

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 80596/ May 4, 2017
WHISTLEBLOWER AWARD PROCEEDING
File No. 2017-10

In the Matter of the Claims for Award
in connection with

Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS

On September 30, 2015, the Claims Review Staff (“CRS”) issued Preliminary Determinations related to Covered Actions Redacted (collectively, the “Covered Actions”).¹ The Preliminary Determinations recommended that Redacted (“Claimant”) be denied an award in the Covered Actions.² Claimant submitted a timely written response to the Preliminary Determinations.

¹ We have administratively consolidated these *** matters for purposes of processing the award applications.

² The CRS also preliminarily determined to recommend that the claims submitted by a second applicant,

For the reasons set forth below, Claimant's award claims are denied.

I. Background

A. The Covered Actions

Redacted

B. Claimant's information and tips

Redacted be denied. That second claimant did not submit a response contesting the Preliminary Determination within the 60-day deadline set out in Rule 21F-10(e). As such, the Preliminary Determination as to the second claimant has become the Final Order of the Commission, in accordance with the provisions of Rule 21F-10(f).

On [Redacted] staff from the [Redacted] contacted Commission Enforcement staff to advise that they had recently met with Claimant. [Redacted] staff told Enforcement staff that the Claimant stated that [Redacted] had notified the Commission in [Redacted] that a specified individual was engaging in misconduct in connection with [Redacted]. [Redacted] requested that Enforcement staff search for the tip. Enforcement staff searched internally and failed to find any tips from Claimant related to the [Redacted] that were under investigation. Prior to [Redacted] contact in [Redacted] Enforcement staff was unaware of Claimant or any information [Redacted] purportedly provided about [Redacted]. Moreover, no one from the investigative staff thereafter contacted Claimant, nor did Enforcement staff participate in any of the meetings that Claimant had with [Redacted] or any other federal agencies at any point.

On [Redacted] Claimant addressed a letter to the then Chair of the Commission.³ The letter referenced a tip Claimant purportedly sent to the Commission in [Redacted] regarding [Redacted] and noted that [Redacted]. Claimant also noted in the letter that Claimant had recently spoken with staff from [Redacted] regarding the [Redacted] tip. Critically, the letter was not provided to the Enforcement staff handling the investigations that resulted in the Covered Actions nor otherwise used in connection with the investigations.

On [Redacted] (after [Redacted] Covered Actions were completed), Claimant submitted a written tip on Form TCR to the Commission. This TCR was forwarded by the Commission's Office of Market Intelligence—the office within the Commission that is responsible for the initial processing of tips—to one of the principal Enforcement attorneys responsible for the Covered Actions. The tip stated that [Redacted].

[Redacted] (As noted above, contrary to Claimant's contention, the administrative record demonstrates that Commission staff did not participate in any meetings with the Claimant).

The Enforcement attorney closed the tip with a disposition of "no further action" planned (or "NFA").⁴ The attorney did so because, at this point, the staff had already completed the

³ Claimant appears to have also sent copies of this letter to the Commission's Secretary and a Commissioner.

⁴ A disposition of NFA generally means that no further action is planned with respect to that tip unless subsequent information leads staff to reopen, or re-examine, the tip.

specific investigation relating to Redacted and was finalizing with the company the terms of a draft settlement for consideration by the Commission. The outstanding issues at that point concerned the exact amount of monetary sanctions to be paid Redacted and none of the information from the TCR was used in any manner in reaching the settlement.

On Redacted Claimant filed a supplement to Redacted TCR. This supplement was forwarded to the same Enforcement attorney who had reviewed the earlier Redacted TCR and that attorney determined that the additional information did not warrant a change in the NFA disposition of the tip. This communication post-dated all of the Covered Actions and, thus, none of the information contained in the supplement could have been used in connection with the Covered Actions.

C. Claimant's award application and the preliminary determination

Claimant timely submitted award applications for the Covered Actions.

On September 30, 2015, the CRS issued Preliminary Determinations recommending that Claimant's award claims be denied on two separate grounds. *First*, any information Claimant provided prior to July 21, 2010, the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), does not qualify as "original information" within the meaning of Rule 21F-4(b)(iv) of the Exchange Act.⁵ Such information therefore could not be the basis for an award.

Second, the submissions that the Claimant made to the Commission after the enactment of the Dodd-Frank Act did not lead to the successful enforcement of the Covered Actions. Specifically, these submissions did not cause the Commission to open the investigations (or inquire into different conduct as part of a current Commission investigation), nor did Claimant's submissions significantly contribute to the success of the subsequent enforcement actions. *See* Section 21F(b)(1) of the Exchange Act, and Rule 21F-3(a) thereunder, 17 C.F.R. § 240.21F-3(a).

D. Claimant's response

On February 16, 2016, Claimant filed a timely written response contesting the Preliminary Determinations.⁶ In it, Claimant does not appear to argue that any information that

⁵ *See Stryker v. SEC*, 780 F.3d 163 (2d Cir. 2015).

⁶ Claimant appears to suggest in Claimant's response that Claimant may have somehow been prejudiced in responding to the Preliminary Determinations because two sentences in a staff declaration were redacted in the administrative record that was provided to Claimant. We have reviewed the redacted sentences and find that they have no material bearing on the Claimant's potential eligibility for an award. Both redacted sentences relate to events that occurred in the period between Redacted, which is a period that our whistleblower program does

Claimant submitted prior to July 21, 2010 could serve as the basis for an award. Nor does the Claimant appear to argue that the tip that Claimant submitted on Form TCR in [Redacted] (and which Claimant supplemented in [Redacted] led to the success of the Covered Actions.

Rather, Claimant argues that the Preliminary Determinations were incorrect because, in Claimant's view, they failed to consider whether the information that the Claimant provided during Claimant's meeting on [Redacted] (and in follow-up meetings thereafter) with [Redacted] was subsequently shared by those agencies with the Commission's Enforcement staff and, in turn, whether that information led to the success of the Covered Actions. In advancing this argument, Claimant argues that Claimant should be considered the "original source" under Exchange Act Rule 21F-4(b)(5) of any of Claimant's information that might have been shared by the other government agencies with the Commission's Enforcement staff. Relatedly, Claimant argues that the administrative record is incomplete on this factual issue and that the Commission is obligated to obtain information and declarations from the relevant staff at these other government agencies to understand whether and to what extent these other government agencies might have shared with the Commission information for which Claimant was the original source.

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 judicial or administrative action or related action. 15 U.S.C. § 78u-6(b)(1).

We first apply this standard to the tips that the Claimant made directly to the Commission and find that none of them can serve as the basis for an award. With respect to any tips that the Claimant may have provided before July 21, 2010, our rules unambiguously provide that these tips could not be the basis for an award because any information contained therein would not constitute "original information." With respect to the Claimant's [Redacted] letter to the Commission's Chair and the Form TCR that the Claimant provided in [Redacted] (and supplemented in [Redacted] we find that the administrative record demonstrates that these submissions were not used in any way by the Enforcement staff and, thus, these submissions did not lead to the success of the Covered Actions.⁷

not cover.

⁷ We also find that the administrative record demonstrates that the [Redacted] letter does not contain any original information about a potential securities law violation. By the Claimant's own concession, the information about potential securities law violations that was contained in the [Redacted] letter was not new, but rather merely restated information that the Claimant says Claimant provided to the Commission in [Redacted].

That still leaves the question whether any information that the Claimant may have provided to Redacted and other federal agencies in Redacted and in any follow-up meetings thereafter, could serve as the basis for an award. Following Claimant's response contesting the Preliminary Determinations, staff adduced additional record evidence conclusively showing that any information that Claimant may have provided to the other government agencies in Redacted *** could not have led to the success of the Covered Actions. Investigative staff responsible for the Covered Actions contacted staff at Redacted who Claimant identified as having attended their Redacted meeting, and Redacted staff confirmed that, beyond asking the Commission staff to locate the Claimant's purported *** tip, they did not share, directly or indirectly, any information provided by Claimant with Commission staff. As such, any information provided by Claimant to these other federal agencies could not have had any impact on the Covered Actions.⁸ Accordingly, we find that none of Claimant's information that the Claimant shared with Redacted led to the success of the Covered Actions.⁹

III. Conclusion

⁸ In Claimant's response to the Preliminary Determinations, Claimant argued that the then-existing administrative record was incomplete regarding whether Redacted shared Claimant's information with the Commission staff. Claimant further asserted that, before the Commission issues its final determination, the Claimant should be permitted to review a full record that includes such information. We do not agree. We note that our whistleblower rules, which were adopted through notice-and-comment rulemaking, do not provide for such a step. Moreover, we find that the Claimant has not made a compelling case for departing from our rules to afford this additional procedural opportunity here, particularly given that Redacted staff who Claimant identified as having attended the Redacted meeting firmly stated that they did not provide the Claimant's information to the Commission's staff.

⁹ Although not a basis for our decision, we note that Claimant likely would have been procedurally barred from obtaining an award based on any information that either Redacted 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. *But see* Exchange Act Rule 21F-4(b)(7) (If an individual submits his or her tip to another federal agency, and that agency then shares the information with the Commission before the individual comes to us with that information, the Commission, in considering an award application from that individual, will treat the information as though it had been submitted to us directly from the individual at the same time that it was submitted to the other agency, *provided that the individual submitted that same information to the Commission no later than 120 days after the individual first went to the other government agency*). 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.

Accordingly, it is ORDERED that Claimant's whistleblower award claims be, and hereby are, denied.¹⁰

By the Commission.

Brent J. Fields
Secretary

¹⁰ Because Claimant does not qualify for an award in a Commission covered action, Claimant's request for an award in connection with certain related actions is denied. We may make an award in a related action only if a claimant receives an award in a Commission covered action. *See* Exchange Act Rule 21F-11(a).