

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 85793 / May 7, 2019
WHISTLEBLOWER AWARD PROCEEDING
File No. 2019-5

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 Covered Action ^{Redacted} (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

On ^{Redacted} the Commission filed a civil injunctive action in federal district court charging ^{Redacted} (collectively, the “Covered Action Defendants”), ^{Redacted}
^{Redacted}
^{Redacted}
^{Redacted} On ^{Redacted} the district court entered a final judgment, in settlement of the Commission’s charges with the consent of the Covered Action Defendants, that ordered them to pay ^{Redacted} The final judgment also ^{Redacted}

On ^{Redacted} the Commission’s Office of the Whistleblower (“OWB”) posted Notice of Covered Action ^{Redacted} for the Covered Action.¹ Claimant filed a timely whistleblower award application. The application asserted that Claimant had voluntarily provided original information to Commission staff via telephone about violations of the federal securities laws by the Covered Action Defendants. The application further asserted that Claimant later worked with employees at ^{Redacted} (the “Firm”), where Claimant was ^{Redacted} to provide information to the staff that contributed to the success of the Covered Action. The application also pointed to a Form TCR submitted by Claimant in ^{Redacted} as supporting the award claim.

II. Preliminary Determination and Response

The CRS preliminarily determined to deny Claimant’s award claim. The record of that preliminary determination included a declaration (“Initial Declaration”) by a member of the Commission’s staff who had served as a staff attorney on the investigation and the litigation of the Covered Action. The Initial Declaration explained that the staff had opened a matter under inquiry on ^{Redacted} in response to information received on an anonymous telephone call on or before ^{Redacted} and that the staff later converted the matter to a formal investigation on ^{Redacted}. Moreover, the Initial Declaration explained that on ^{Redacted} the staff sent the Firm a document request pursuant ^{Redacted} based on the Firm’s ^{Redacted} by the Covered Action Defendants. But, the Initial Declaration continued, the Firm “did not provide any information that substantially advanced the [investigation] or strengthened our position in the [litigation]” of the Covered Action. The Initial Declaration also explained that by the time Claimant submitted a Form TCR in ^{Redacted} the Covered Action was already in litigation and, in any event, the Form TCR referenced information already produced by the Firm and “did not contain any new information that was used in any way in” the litigation.

The CRS therefore gave three reasons for its preliminary denial of Claimant’s award application: First, any information provided by Claimant prior to the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) on July 21, 2010, did not qualify as “original” information under Exchange Act Rule 21F-4(b)(iv). Second, any information submitted by the Firm starting in ^{Redacted} in response to the staff’s requests was provided by the Firm, and not by Claimant. As such, Claimant was not a “whistleblower” at that time under Exchange Act Rule 21F-2(a)(1). Third, the information in Claimant’s ^{Redacted} Form TCR did not lead to the successful enforcement of the Covered Action under Exchange

¹ See Exchange Act Rule 21F-10(b).

Act Rule 21F-4(c)(1)-(2), and the information also was not original because the same information was already in the Commission’s possession by that date.

After requesting and reviewing the record supporting the Preliminary Determination, Claimant submitted a written request for reconsideration. In the request, Claimant asserts that Claimant was the person who provided the anonymous tip via telephone call that prompted the staff to open its investigation in ^{Redacted} and that Claimant further “provided the staff with a complete summary of the facts in this matter as I knew them” prior to the staff’s document request to the Firm in ^{Redacted}. Claimant also believes that the staff issued this document request to the Firm because of information Claimant had provided rather than because of any other information in the staff’s possession. And Claimant asks that “any technical flaws in my claim that may exist (e.g., timing of tip . . .)” be excused “to the extent that your office has any discretion in this matter (e.g., the Whistleblower Program was very new and the current procedural requirements didn’t exist at that time).”

OWB asked Claimant to supplement the request for reconsideration by answering certain written questions,³ which Claimant did by facsimile. In this supplement, Claimant explains that Claimant provided additional information to staff verbally rather than in writing during the period between the enactment of Dodd-Frank on July 21, 2010, and the staff’s document request to the Firm on ^{Redacted}. Claimant also asserts that prior to this document request Claimant directed a colleague to create a document memorializing certain facts concerning the misconduct charged in the Covered Action (the “Memo”), that the information in the Memo was verbally communicated by Claimant to the staff prior to the document request, and that the Memo itself was provided to the staff later in ^{Redacted}.

III. Analysis

To qualify for a whistleblower award under Section 21F of the Exchange Act, an individual must voluntarily provide the Commission with original information that leads to the successful enforcement of a covered action.⁴ For the reasons that follow, we conclude that Claimant’s whistleblower award claim should be denied.

A. Information provided prior to Dodd-Frank

Claimant does not dispute that, as reflected in the Initial Declaration, the Commission’s staff opened the investigation that culminated in the Covered Action on ^{Redacted} in response to an anonymous tip received by telephone call on or before ^{Redacted}. Even assuming that Claimant was the person who provided the anonymous tip to the staff, that tip was undisputedly

³ See Exchange Act Rules 21F-8(b), 21F-10(d).

⁴ Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).

provided prior to the enactment of Dodd-Frank on July 21, 2010, and therefore does not qualify as original information under Exchange Act Rule 21F-4(b)(iv).⁵

Claimant asks that we excuse this noncompliance with Rule 21F-4(b)(iv) as a mere technicality. But, as we have previously explained, the Rule implements the considered policy judgment of Congress, as reflected in the text and history of Dodd-Frank, that the whistleblower award program in Exchange Act Section 21F was designed to create *new* incentives for persons to provide information to the Commission after Dodd-Frank's enactment, rather than to reward persons who already had provided information in the past.⁶ Against this backdrop, Claimant offers no reason to believe that an exemption for information provided prior to Dodd-Frank would be appropriate in the public interest or consistent with the protection of investors.⁷ While we commend Claimant for any efforts Claimant made to alert the staff to possible misconduct in this matter, we have never before granted an exemption from Rule 21F-4(b)(iv), and we decline Claimant's invitation to do so now.

B. Information provided after Dodd-Frank and before the staff's document request to the Firm

Claimant also does not dispute that any information Claimant submitted to the Commission's staff between July 21, 2010, and ^{Redacted} (the date of the staff's document request to the Firm) was provided verbally rather than in writing. Claimant's submissions during this period thus failed to comply with Exchange Act Rule 21F-9(d), which requires that any information submitted after Dodd-Frank but before the effective date of our whistleblower rules must have been provided in writing, in order for the submitter to be considered a whistleblower. Claimant therefore was not a whistleblower during this period.

To the degree that Claimant could be understood as asking us to excuse this noncompliance with Rule 21F-9(d), we decline to do so. We previously have exercised our discretionary exemptive authority to excuse noncompliance with Rule 21F-9(d) where we determined, due to highly unusual circumstances, that an exemption would be appropriate in the public interest and consistent with the protection of investors.⁸ In particular, the records in these cases unambiguously established that: (i) prior to Dodd-Frank, the claimant was actively working with the staff, (ii) after Dodd-Frank, the claimant provided new information in a format expressly requested by the staff, and (iii) the indicia of reliability and certainty were clearly

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

⁶ See generally *In the Matter of the Claim for Award*, Release No. 34-70772 (Oct. 30, 2013), *pet. rev. denied sub nom. Stryker v. SEC*, 780 F.3d 163 (2d Cir. 2015).

⁷ See Exchange Act Section 36(a), 15 U.S.C. § 78mm(a).

⁸ See Exchange Act Section 36(a), 15 U.S.C. § 78mm(a).

satisfied with respect to the time the information was provided, thus fulfilling the principal policy rationale underlying the writing requirement of Rule 21F-9(d).⁹

By contrast, the record in this case does not clearly establish what information Claimant provided verbally, when, or whether Claimant in fact provided any information at all. When OWB asked Claimant to supplement the request for reconsideration by specifying the dates, contents, and recipients of Claimant’s post-Dodd-Frank submissions, Claimant conceded, “Unfortunately, I do not have a firm recollection of all the individuals I spoke to at that time (and when) and exactly what was conveyed during each such communication.” Further, responding to Claimant’s assertions, the staff attorney assigned to the investigation reaffirmed his Initial Declaration, in which he describes his sole experience with Claimant as being the Firm’s principal point of contact for purposes of coordinating the Firm’s response to the staff’s document request. This case illustrates the importance of the requirement of Rule 21F-9(d) that a submission prior to the effective date of our rules be made “in writing” for a claimant to qualify as a whistleblower and the reasons for our reluctance to grant exemptions to the rule. The record here lacks the requisite indicia of reliability and certainty with respect to the time(s) Claimant purportedly provided information to the staff between July 2010 and ^{Redacted} as well as with respect to the contents and recipients of any such submissions. We therefore conclude that Claimant has failed to meet Claimant’s burden¹⁰ to show that an exemption would be appropriate in the public interest and consistent with the protection of investors,¹¹ in light of the need for reliability and certainty that underlies the writing requirement of Rule 21F-9(d).

C. Information provided after the staff’s document request to the Firm

Claimant also was not a whistleblower with respect to information provided after the staff’s document request to the Firm on ^{Redacted}. The record reflects that the staff directed its information request to the Firm, and that responsive information was provided by the Firm, with Claimant acting as the principal point of contact at the Firm given Claimant’s roles as ^{Redacted}. As such, Claimant did not provide such

⁹ See *In the Matter of Claims for Award*, Release No. 34-82181, at n.5 (Nov. 30, 2017); *In the Matter of the Claim for Award*, Release No. 34-81227, at n.4 (July 27, 2017); *In the Matter of Claim for Award*, Release No. 34-79747, at n.3 (Jan. 6, 2017).

¹⁰ See, e.g., *In the Matter of the Claim for Award*, Release No. 34-77368 (Mar. 14, 2016) (“We believe that none of the Claimants has met their burden to demonstrate any considerations that would satisfy the requirements for us to exercise our Section 36(a) exemptive authority.”), *pet. rev. denied*, 707 F. App’x 29 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 2005 (2018), *reh’g denied*, 138 S. Ct. 2715 (2018); *Definition of Terms in and Specific Exemptions*, Release No. 34-44291 (May 11, 2001) (“As a general matter, under the federal securities laws, parties relying on an exception or exemption have the burden of demonstrating that they qualify for such exception or exemption.”).

¹¹ See Exchange Act Section 36(a), 15 U.S.C. § 78mm(a).

information in an individual capacity and thus was not a whistleblower under Exchange Act Rule 21F-2(a)(1).

Claimant tries to take credit for information provided by the Firm by suggesting that it was Claimant's prior sharing of information that prompted the staff to issue the document request to the Firm. But we reject this assertion in light of the more plausible explanation in the Initial Declaration that the document request to the Firm was prompted rather by the staff's "understanding that [the Firm] [the Covered Action Defendants], and, as such, [the staff] believed that [the Firm] might have documents and other information relevant to the" investigation.

Claimant likewise attempts to take credit for a Memo that, Claimant asserts, was created by a colleague at Claimant's direction to memorialize facts relevant to the misconduct. But Claimant concedes that this document was provided to the staff only in well after the staff's document request. Moreover, the email cited by Claimant as submitting this Memo to the staff was sent from Claimant's email address at the Firm, with a signature identifying Claimant as of the Firm. Thus, the record simply does not reflect that Claimant provided the Memo to the staff in an individual capacity.

Even if we were to give Claimant credit for any of the information provided by the Firm, this information would still fail to support an award for the alternative reason that none of this information led to the successful enforcement of the Covered Action. The Initial Declaration emphatically states that the staff "had already obtained a significant amount of information from other parties" prior to the document request to the Firm and that "the information provided by [the Firm] corroborated, but did not materially add to, information [the staff] had already learned during the" investigation. As a result, the Initial Declaration explains, the Firm "did not provide any information that substantially advanced the [investigation] or strengthened our position in the [litigation]." Therefore, none of the information for which Claimant seeks credit significantly contributed to the successful enforcement of the Covered Action under Exchange Act Rule 21F-4(c)(2).¹²

D. Information provided in the Form TCR

Finally, Claimant does not contest the Preliminary Determination of the CRS that Claimant's Form TCR does not provide a basis for granting a whistleblower award. Accordingly, Claimant has forfeited any challenge in this respect. Even if Claimant did raise such a challenge, the Initial Declaration fully supports the CRS's preliminary conclusions that the information provided by Claimant in the Form TCR did not lead to the successful

¹² As already discussed, it is undisputed that the staff's investigation was opened prior to the staff's document request to the Firm, and thus the Firm's information could not have prompted the opening of the investigation. *See* Exchange Act Rule 21F-4(c)(1).

enforcement of the Covered Action under Exchange Act Rule 21F-4(c)(1) & (2)¹³ and that the information also was not original.

IV. Conclusion

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

By the Commission.

Vanessa A. Countryman
Acting Secretary

¹³ As we have previously explained, a claimant's TCR submission "may not piggyback off of the contributions to the [i]nvestigation that resulted from the earlier disclosures of the original information." Rather, a claimant must demonstrate that something unique about the claimant's submission of the same information in a later-filed TCR made an additional significant contribution to the success of the covered action. *See In the Matter of Claims for Award*, Release No. 34-82181 (Nov. 30, 2017).