

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 92067 / May 28, 2021

WHISTLEBLOWER AWARD PROCEEDING
File No. 2021-53

In the Matter of the Claim for an Award

in connection with

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 application submitted by ^{Redacted} (“Claimant”) in connection with the above referenced 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 United States Securities and Exchange Commission (“Commission”) filed a civil action in federal district court charging ^{Redacted}

On ^{Redacted}, the district court entered a final judgment in favor of the Commission that ordered ^{Redacted} ***

On ^{Redacted}, the Office of the Whistleblower posted the Notice of Covered Action on the Commission’s public website inviting claimants to submit whistleblower award applications for the Covered Action within ninety days, by ^{Redacted}. Claimant

submitted an award claim on Form WB-APP for the Covered Action years later on ^{Redacted}

B. The Preliminary Determination

The CRS issued a Preliminary Determination¹ recommending that Claimant's application be denied because Claimant failed to submit a claim for award on Form WB-APP to the Office of the Whistleblower within ninety days of the date of the Notice of Covered Action, as required under Rule 21F-10(b) of the Exchange Act. Claimant submitted Claimant's application for award on Form WB-APP on ^{Redacted}, nearly three years after the deadline. The CRS noted that Claimant asserted that Claimant's prior counsel submitted a Form TCR in ^{Redacted}, which was meant to serve as Claimant's award application for the Covered Action. However, the Form TCR did not cite to any covered action or judicial or administrative action.

C. Claimant's Response to the Preliminary Determination

Claimant submitted a timely written response contesting the Preliminary Determination.² Specifically, Claimant argues in response to the Preliminary Determination that the Commission should consider Claimant's award application under the "extraordinary circumstances" exception found in Rule 21F-8(a) of the Exchange Act.³ Claimant asserts that Claimant "fired [Claimant's] former counsel for poor performance" and asks that the Commission not deny Claimant's award application because "[Claimant's] counsel mistakenly filed the wrong document within the correct window."

III. Analysis

Claimants must give the Commission information in the form and manner that the Commission requires in order to be eligible for a whistleblower award.⁴ The Commission's rules require Claimants to file any application for a whistleblower award on Form WB-APP.⁵ Further, the Form WB-APP must be filed within ninety days from the date of the Notice of Covered Action or the claim will be barred.⁶ Claimants bear the ultimate responsibility to learn about and follow the Commission's rules regarding the award application process.⁷

The requirement that claimants file whistleblower award claims within ninety days of the posting of a Notice of Covered Action serves important programmatic functions. The deadline ensures fairness to potential claimants by giving all an equal opportunity to have their competing

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

² See Exchange Act Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e).

³ 17 C.F.R. § 240.21F-8(a) ("[Y]ou need to follow [these procedures] in order to be eligible for an award, except that the Commission may, in its sole discretion, waive any of these procedures based upon a showing of extraordinary circumstances.").

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

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

⁶ See Exchange Act Rule 21F-10(a), 17 C.F.R. § 240.21F-10(a).

⁷ See Order Determining Whistleblower Award Claim, Release No. 34-72659, at 5 (July 23, 2014).

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.⁸

Notwithstanding these important programmatic functions, the whistleblower program rules recognize that there may be rare situations where an exception should be made. To allow for this, Rule 21F-8(a) of the Exchange Act provides that “the Commission may, in its sole discretion, waive” the filing requirements “upon a showing of extraordinary circumstances.”⁹ In determining whether a claimant has demonstrated extraordinary circumstances to excuse an untimely submission under Rule 21F-8(a), we have looked to our analogous decision in *In the Matter of the Application of PennMont Securities*.¹⁰ 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.”¹¹ 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.¹²

Applying that demanding standard here, we find that the 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 award application. Claimant asserts that Claimant filed a Form TCR within the proper timeframe for filing an award application for this Covered Action. However, the Commission’s rules require that all award applications be filed on Form WB-APP. Further, Claimant’s Form TCR does not cite to any covered action or judicial or administrative action and makes no mention of applying for an award. As such, we decline to treat Claimant’s Form TCR as a timely application for an award.

We are unpersuaded by Claimant’s assertion that the untimeliness should be forgiven because it stemmed from mistakes made by Claimant’s former attorney. As noted above, we have acknowledged that attorney misconduct may give rise to extraordinary circumstances. But, the requisite level of attorney misconduct causing the untimely submission must be severe in order for equitable relief to be warranted – ordinary negligence will not suffice.¹³ In this case, it appears that Claimant is merely asserting that Claimant’s former attorney failed to properly file the award application. This type of attorney error does not constitute an extraordinary circumstance.

Finally, we note that “[e]ven when circumstances beyond the applicant’s control give rise to the delay...an applicant must also demonstrate that he or she promptly arranged for the

⁸ See *Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34300, 34343 (June 13, 2011).

⁹ 17 C.F.R. § 240.21F-8(a).

¹⁰ Release No. 34-61967, 2010 WL 1638720 (April 23, 2010).

¹¹ Order Determining Whistleblower Award Claim, Release No. 34-77368, at 3 (Mar. 14, 2016).

¹² See, e.g., *Id.*; *PennMont*, 2010 WL 1638720, at *4; Order Determining Whistleblower Award Claim, Release No. 34-72659, at 6 (July 23, 2014).

¹³ See, e.g., *Irwin v. Dep 't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (explaining that an attorney's ordinary negligence generally does not warrant equitable tolling); *Rouse v. Lee*, 339 F.3d 238, 248 (4th Cir. 2003) (noting that a majority of the circuits have held that basic attorney errors such as miscalculation of a filing deadline are generally insufficient to support equitable tolling).

filing...as soon as reasonably practicable thereafter.”¹⁴ Claimant has not provided any explanation as to why it took Claimant until ^{Redacted} to properly file the award application on Form WB-APP. We observe that Claimant alleges that Claimant severed Claimant’s relationship with the former attorney in ^{Redacted} after the attorney became unresponsive and withheld certain files for a period of months. However, there is nothing in the record to explain why Claimant did not follow up on the Form TCR until ^{Redacted} years later when Claimant’s new counsel first contacted the Office of the Whistleblower in ^{Redacted}.

We therefore conclude that Claimant failed to submit a claim for award on Form WB-APP to the Office of the Whistleblower within ninety days of the date of the Notice of Covered Action as required under Rule 21F-10(b) of the Exchange Act and that, as a result, Claimant is ineligible for an award with respect to the Covered Action.

IV. Conclusion

Accordingly, it is hereby ORDERED that Claimant’s whistleblower award application be, and hereby is, denied.

By the Commission.

Jill M. Peterson
Assistant Secretary

¹⁴ *PennMont*, 2010 WL 1638720, at *4.