

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 95038 / June 3, 2022

WHISTLEBLOWER AWARD PROCEEDING
File No. 2022-59

In the Matter of the Claims for Awards

in connection with

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS

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

I. Background

A. The Covered Actions

The Office of the Whistleblower (“OWB”) received one Form WB-APP on or about ^{Redacted} from Claimant applying for awards in connection with the following Covered Actions:

a. On ^{Redacted} ^{Redacted} OWB posted Notice of Covered Action ^{Redacted} on the Commission’s public website inviting claimants to submit whistleblower award applications within 90 days, by ^{Redacted}.¹ Claimant’s award application for Covered Action ^{Redacted} was submitted over 7 months after the deadline.

b. On ^{Redacted} ^{Redacted} OWB posted Notice of Covered Action ^{Redacted} on the Commission’s public website inviting claimants to submit whistleblower award applications within 90 days, by ^{Redacted}.¹ Claimant’s award application for Covered Action ^{Redacted} was submitted over 2 years and 11 months after the deadline.

c. On ^{Redacted} ^{Redacted} OWB posted Notice of Covered Action ^{Redacted} on the Commission’s public website

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

inviting claimants to submit whistleblower award applications within 90 days, by
Redacted Claimant's award application for Covered Action Redacted was
submitted over 3 years and 2 months after the deadline.

d. On Redacted OWB posted Notice of Covered Action Redacted
Redacted on the Commission's public website
inviting claimants to submit whistleblower award applications within 90 days, by Redacted
Redacted Claimant's award application for Covered Action Redacted was submitted over
3 years and 10 months after the deadline.

e. On Redacted OWB posted Notice of Covered Action Redacted
Redacted on the
Commission's public website inviting claimants to submit whistleblower award
applications within 90 days, by Redacted Claimant's award application for
Covered Action Redacted was submitted over 3 years and 11 months after the deadline.

f. On Redacted OWB posted Notice of Covered Action Redacted
Redacted) on the Commission's public
website inviting claimants to submit whistleblower award applications within 90 days, by
Redacted Claimant's award application for Covered Action Redacted was
submitted over 4 years after the deadline.

g. On Redacted OWB posted Notice of Covered Action Redacted
Redacted on the Commission's public website inviting claimants
to submit whistleblower award applications within 90 days, by Redacted Claimant's
award application for Covered Action Redacted was submitted over 5 years and 9
months after the deadline.

h. On Redacted OWB posted Notice of Covered Action Redacted
Redacted on the Commission's public website inviting claimants
to submit whistleblower award applications within 90 days, by Redacted
Claimant's award application for Covered Action Redacted was submitted over 6 years
and 1 month after the deadline.

i. On Redacted OWB posted Notice of Covered Action Redacted
Redacted on the Commission's public website inviting
claimants to submit whistleblower award applications within 90 days, by Redacted
Redacted Claimant's award application for Covered Action Redacted was submitted over 6
years and 1 month after the deadline.

j. On Redacted OWB posted Notice of Covered Action Redacted
Redacted on the Commission's public website inviting
claimants to submit whistleblower award applications within 90 days, by Redacted
Redacted Claimant's award application for Covered Action Redacted was submitted over 6 years
and 10 months after the deadline.

k. 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, by [Redacted]. Claimant's award application for Covered Action [Redacted] was submitted over 8 years and 1 month after the deadline.

l. 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, by [Redacted]. Claimant's award application for Covered Action [Redacted] was submitted over 8 years and 4 months after the deadline.

m. 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, by [Redacted]. Claimant's award application for Covered Action [Redacted] was submitted over 8 years and 4 months after the deadline.

n. 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, by [Redacted]. Claimant's award application for Covered Action [Redacted] was submitted over 8 years and 4 months after the deadline.

B. The Preliminary Determinations

On [Redacted], the CRS issued its Preliminary Determinations² recommending that Claimant's claims in each of the Covered Actions be denied because Claimant failed to submit the claims for award to OWB within ninety (90) days of the dates of the Notices of Covered Actions, as required under Rule 21F-10 of the Exchange Act.³

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

³ 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. 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).

C. Claimant’s Response to the Preliminary Determinations

On ^{Redacted}, Claimant submitted a timely written response contesting the Preliminary Determinations.⁴ In the response, Claimant does not address the failure to submit the claims for award within the required ninety-day deadline other than to state that Claimant “filed timely WB-APPs” and “could not have responded sooner”, without further explanation. Claimant also states that after Claimant submitted tips Commission staff “made nothing known to me not even the NOCAS.” And finally, Claimant states that OWB did not provide Claimant with the materials on which the Preliminary Determinations were decided, harming Claimant’s due process to obtain awards on the Covered Actions. The remainder of Claimant’s response sets forth a number of assertions unrelated to the Preliminary Determinations.

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 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.⁵

Notwithstanding these important programmatic functions, we recognize that there may be rare situations where an exception should be made. To allow for this, Exchange Act Rule 21F-8(a) provides that “the Commission may, in its sole discretion, waive” the ninety-day filing requirement “upon a showing of extraordinary circumstances.”⁶ 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.”⁷ 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.⁸

Applying that standard here, we find that Claimant has failed to show that extraordinary circumstances beyond Claimant’s control were responsible for the delay, ranging from 7 months to over 8 years, between the application deadlines for the Covered Actions and Claimant’s untimely whistleblower application in ^{Redacted}. In fact, Claimant does not provide an

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

⁵ See *Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 34-64545, 76 Fed. Reg. 34300, 34300; Order Determining Whistleblower Award Claim, Release No. 34-88464 at 3 (Mar. 24, 2020).

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

⁷ 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).

⁸ See *supra* Order Determining Whistleblower Award Claim, Release No. 34-77368 at 3; Order Determining Whistleblower Award Claim, Release No. 34-82181 (Nov. 30, 2017); Order Determining Whistleblower Award Claim, Release No. 34-72659 (July 23, 2014); Order Determining Whistleblower Award Claim, Release No. 34-72178 (May 16, 2014).

explanation for failing to file timely award applications, asserting incorrectly that the applications were timely filed.

Claimant also states that Commission staff did not provide Claimant with information about the NoCAs. To the extent that Claimant argues that the Commission should exercise its discretion to waive the ninety-day filing requirement because the Commission failed to alert Claimant to the NoCAs, we note that 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.”⁹ Further, “a lack of awareness about the [whistleblower award] program does not . . . rise to the level of an 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.”¹⁰ “A potential claimant’s responsibility includes the obligation to regularly monitor the Commission’s web page for NoCA postings.”¹¹ 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 applications months and years late.¹²

Finally, Claimant states that the Commission failed to provide the materials on which the Preliminary Determinations were decided, harming Claimant’s due process to obtain awards on the Covered Actions. Rule 21F-12 identifies the materials that may form the basis of an award determination and that may comprise the record on appeal, and the rule specifies that OWB may request an executed Confidentiality Agreement (“CA”) as a precondition to providing these materials to a claimant. On ^{Redacted}, Claimant wrote to OWB, objecting to the request that Claimant execute the CA and informing OWB that Claimant would not execute the CA. OWB’s request that Claimant sign a CA is consistent with OWB’s practice. Moreover, Rule 21F-12(b), providing that OWB may require the execution of a CA, is reasonably designed to protect whistleblower confidentiality and the Commission’s law enforcement interests. Accordingly, OWB’s decision not to provide the materials to Claimant – because Claimant would not sign the CA – was warranted and consistent with Commission practice.

We conclude that Claimant failed to file Claimant’s award applications within the ninety-day application deadline and that Claimant has failed to show that extraordinary circumstances beyond Claimant’s control were responsible for the delay.

⁹ Order Determining Whistleblower Award Claim, Release No. 34-88464 at 3-4 (Mar. 24, 2020) (internal citations omitted).

¹⁰ *Id.* at 4.

¹¹ *Id.*

¹² *Id.*

III. Conclusion

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

By the Commission.

Vanessa A. Countryman
Secretary