

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 79464 / December 5, 2016

WHISTLEBLOWER AWARD PROCEEDING
File No. 2017-2

In the Matter of the Claim for Award

in connection with

Redacted

Redacted

Notice of Covered Action Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS

I. Introduction

On Redacted , the Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Redacted
Redacted Making Findings, and Imposing Remedial Sanctions and a Cease-And-Desist Order
in Redacted
Securities Exchange Act Release No. Redacted (the “Covered Action”). Because the monetary sanctions imposed on Respondents Redacted
(collectively, “the Respondents”) exceeded the statutory threshold for a potential whistleblower award under Section 21F of the Securities Exchange Act of 1934 (“Exchange Act”), the Office of the Whistleblower (“OWB”) posted Notice of Covered Action Redacted for the Covered Action. The Commission subsequently received several award applications in response.

On Redacted the Claims Review Staff (“CRS”) issued a Preliminary Determination addressing each of the award claims. As relevant here, the Preliminary Determination recommended that Redacted (“Claimant 1”) receive a whistleblower award of Redacted
Redacted of the monetary sanctions collected or to be collected in the Covered Action, which will constitute an award of \$3.5 million. As also relevant here, the Preliminary Determination recommended that the award application submitted by Redacted
 (“Claimant 2”) be denied on two alternative grounds: (1) Claimant 2 did not provide any information that led to the successful enforcement of the Covered Action, and (2) Claimant 2

failed to submit an award application by the award application deadline. Only Claimant 2 timely contested the Preliminary Determination.¹

For the reasons stated below, we fully adopt the recommendations of the CRS with respect to Claimant 1 and Claimant 2.

II. Claimant 1's claim is approved.

Based on the underlying record, we have determined to adopt the award recommendation of the CRS that Claimant 1 receive an award in the amount of Redacted of the monetary sanctions collected or to be collected in the Covered Action. Further, our assessment of the appropriate award is based exclusively on the award factors that are specified in Exchange Act Rule 21F-6, 17 C.F.R. § 240.21F-6.

III. Claimant 2's claim is denied.

As noted above, Claimant 2 submitted a response contesting the Preliminary Determination (hereinafter, "Response") in which Claimant 2 makes two arguments challenging the preliminary denial. First, Claimant 2 points to the information Claimant 2 provided to the Commission about the Respondents and argues that this information "should have caused an investigation."² Second, Claimant 2 argues that the Commission should have contacted Claimant 2 "to give directions for applying for any action other than posting it on a new section of the [Commission's] website." We address both of these contentions in turn below.

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. 15 U.S.C. § 78u-6(b)(1). As relevant here, original information "leads to" a successful enforcement action if either: (i) the original information caused the staff to open an investigation, reopen an investigation, or inquire into different conduct as part of a current investigation, and the Commission brought a successful action based in whole or in part on conduct that was the subject of the original information; or (ii) the conduct was already under examination or investigation, and the original information significantly contributed to the success of the action. Exchange Act Rule 21F-4(c)(1)-(2), 17 C.F.R. § 240.21F-4(c)(1)-(2).

Notwithstanding Claimant 2's assertion that Claimant 2's information should have led to an investigation, the record in this matter conclusively demonstrates that none of the information

¹ The Preliminary Determination also recommended that a whistleblower award claim filed by a third claimant be denied. This claimant did not seek reconsideration of the Preliminary Determination and, therefore, the Preliminary Determination as to that claimant became the final order of the Commission pursuant to Exchange Act Rule 21F-10(f).

² Specifically, Claimant 2 states that **** provided "an article written from a press release from NASDAQ, printed in a SIFMA [Securities Industry and Financial Markets Association] magazine,...." Although not a basis for our decision, we note that Claimant 2 would not be entitled to an award for merely providing the Commission with publicly available information. See Exchange Act Rule 21F-4(b)(1) - (2), 17 C.F.R. § 240.21F-4(b)(1) - (2) (defining "original information" and "independent knowledge").

Claimant 2 submitted led to the successful enforcement of the Covered Action. Specifically, the record demonstrates that none of the tips that Claimant 2 submitted to the Commission were provided to the investigative staff responsible for the Covered Action. With one exception, each of Claimant 2's tips were designated for "no further action" ("NFA") by the Commission's Office of Market Intelligence ("OMI") – the Commission's office within the Division of Enforcement that is responsible for the initial intake review of whistleblower tips – and were not provided to investigative staff for further inquiry or for use in connection with *any* Commission investigation.³ With respect to the only tip submitted by Claimant 2 that was not designated NFA, the record is clear that this tip was not referred to the staff investigating the Covered Action. As explained in a declaration provided by an Enforcement attorney overseeing the investigation and settlement of the Covered Action, at no point prior to the settlement did any of the staff members assigned to the matter have any contact with, or receive any information from, Claimant 2.

Turning to the untimeliness of Claimant 2's award application, we note at the outset that Claimant 2 does not dispute the finding in the Preliminary Determination that the award application was submitted after the deadline had passed. Instead, as noted above, Claimant 2 contends that the Commission should have provided Claimant 2 with actual notice of the Covered Action posting. We reject this contention, as we have done on two prior occasions in final orders.⁴ The Commission's rules, which were adopted through notice-and-comment rulemaking, clearly provide for constructive, not actual, notice of the posting of a covered action. Specifically, Rule 21F-10(a)(1) states that "[w]hen a Commission action results in monetary sanctions totaling more than \$1,000,000, the Office of the Whistleblower will cause to be published on the Commission's website a "Notice of Covered Action." 17 C.F.R. § 240.21F-10(a)(1).⁵ As we explained in our release accompanying the adoption of the whistleblower rules, this constructive notice procedure "provides the best mechanism to provide notice to all whistleblower claimants who may have contributed to the action's success."⁶ Moreover, our experience to date in the administration of our whistleblower program has confirmed that our constructive notice procedure is a workable, productive, and fair mechanism for ensuring that individuals interested in making a timely whistleblower award claim receive appropriate notice of the deadline for submitting an award application.⁷

³ An NFA disposition indicates that OMI will not take any additional steps with respect to a tip unless subsequent information leads OMI to reopen or reexamine that tip.

⁴ See *In the Matter of the Claim for Award in connection with* [Redacted] Notice of Covered Action [Redacted] Exchange Act Rel. No. 77368 (Mar. 14, 2016) (the [Redacted] Matter"); *In the Matter of the Claim for Awards in connection with* [Redacted] [Redacted], Notice of Covered Action [Redacted] Exchange Act Rel. No. 72659 (July 23, 2014).

⁵ Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Rel. No. 64545 (May 25, 2011) at *171, available at <http://www.sec.gov/rules/final/2011/34-64545.pdf>.

⁶ As we explained in the [Redacted] Matter, "[a] potential claimant's responsibility includes the obligation to regularly monitor the Commission's web page for NoCA postings and to properly calculate the deadline for filing an award claim."

⁷ Even assuming for argument's sake that actual notice were required (or otherwise appropriate) in certain

We thus find that because the Covered Action was posted on the Commission’s website *along with the filing deadline*, Claimant 2 received proper notice under Rule 21F-10(a)(1) and nothing more was required of the agency or the staff.⁸ Moreover, the consequence of Claimant 2’s failure to timely submit an application is clear. As Rule 21F-10 unambiguously states, an award application that is not received by OWB within ninety (90) calendar days of the date of the Notice of Covered Action “will be barred.” Accordingly, Claimant 2’s failure to submit an application before the deadline provides an additional grounds for denying Claimant 2’s award application.⁹

IV. Conclusion

Upon due consideration under Rules 21F-10(f) and (h), 17 C.F.R. § 240.21F-10(f) and (h), it is hereby ORDERED that Claimant 1 shall receive an award of Redacted of the monetary sanctions collected in this Covered Action, including any monetary sanctions collected after the date of this Order. It is FURTHER ORDERED that Claimant 2’s whistleblower award claim be denied.

By the Commission.

Brent J. Fields
Secretary

circumstances, we would still reject Claimant 2’s arguments in this matter. Simply stated, there is no reason why OWB would have provided Claimant 2 with actual notice to apply for an award in this matter because Claimant 2’s information did not contribute in any way to the Covered Action – and indeed the investigative staff did not receive any information from Claimant 2 prior to the settlement. Thus, OWB would have had no basis to believe that Claimant 2 should have been provided with actual notice to apply for an award.

⁸ See <https://www.sec.gov/about/offices/owb/owb-awards.shtml>.

⁹ Rule 21F-8(a) affords us discretionary authority to “waive any of these procedures based upon a showing of extraordinary circumstances.” But Claimant 2 has provided no explanation for the failure to file before the deadline other than that OWB failed to notify Claimant 2 of the Covered Action posting. This contention does not qualify as an extraordinary circumstance that might qualify for exemptive relief under Rule 21F-8(a).