

No. 20-2174

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RICHARD J. HERBER,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE
SECURITIES AND EXCHANGE COMMISSION

MOTION OF THE SECURITIES AND EXCHANGE COMMISSION
FOR SUMMARY AFFIRMANCE

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INTRODUCTION

Richard J. Herber petitions for review of the Securities and Exchange Commission's order denying his claim for a whistleblower award. A58-63.¹ The Commission's determination that Herber is not entitled to an award is reviewed "in accordance with [5 U.S.C. § 706]." 15 U.S.C. § 78u-6(f). This Court therefore may set aside that determination only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or is unsupported by substantial evidence. 5 U.S.C. § 706.

The Commission's order should be summarily affirmed. The Commission reasonably concluded based on undisputed record evidence that Herber never provided information to the Commission concerning the relevant enforcement action, that Herber filed his whistleblower award claim ten months after the deadline set by the Commission's whistleblower rules, and that Herber's proffered justification (his lack of home internet access) failed to demonstrate that this delay was caused by factors beyond his control. Summary affirmance is therefore appropriate because "any issues which could be raised are insubstantial and . . . further briefing would not

¹ "A____" refers to the relevant record documents in the appendix to this motion. The record documents have been redacted to the extent that they contain information that could reasonably be expected to reveal the identity of the other individual whose whistleblower award claim was decided in the same order of the Commission. *See* 15 U.S.C. § 78u-6(h)(2)(A). The redactions do not remove information essential to the Court's consideration of Herber's petition.

be helpful to the court’s consideration of the issues.” *Dunn v. Wells Fargo Bank, N.A.*, No. 20-1080, 2020 WL 1066008, at *1 (7th Cir. Feb. 25, 2020) (unpublished) (citing *Taylor v. City of New Albany*, 979 F.2d 87 (7th Cir. 1992));² see *Williams v. Chrans*, 42 F.3d 1137, 1139 (7th Cir. 1995) (*per curiam*) (“Summary disposition is appropriate ‘when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists.’”) (quoting *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994)).

BACKGROUND

I. The Commission’s whistleblower award program

In the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), Pub. L. No. 111-203, 124 Stat. 1376 (2010), Congress established a whistleblower award program to motivate people with knowledge of securities law violations to come forward and assist the government. See S. Rep. No. 111-176, at 110 (2010). Under Section 21F of the Securities Exchange Act of 1934 (“Exchange Act”), enacted by Section 922 of Dodd-Frank, whistleblowers may merit an award if they “voluntarily provided original information to the Commission that led to the successful enforcement” of a “‘covered judicial or administrative action’ . . . brought by the Commission under the securities laws” resulting in more than \$1 million in

² This unpublished decision is included in the addendum to this motion.

monetary sanctions. 15 U.S.C. § 78u-6(b) & (a)(1).³ The statute grants the Commission authority “to issue such rules and regulations as may be necessary or appropriate to implement” Section 21F, *id.* § 78u-6(j), in addition to the Commission’s general Exchange Act rulemaking authority under 15 U.S.C. § 78w(a)(1). The statute also grants the Commission broad discretion to determine “whether, to whom, or in what amount to make awards.” *Id.* § 78u-6(f). To date, the Commission has awarded approximately \$505 million to whistleblowers who have assisted the Commission in bringing successful enforcement actions against violators. *See* Press Release No. 2020-155, Securities and Exchange Commission, *SEC Issues \$3.8 Million Whistleblower Award* (July 14, 2020), *available at* <https://www.sec.gov/news/press-release/2020-155>.

Pursuant to this statutory authority, the Commission has adopted rules establishing the procedures that whistleblowers must follow to establish eligibility for an award. *See generally* *Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34300 (June 13, 2011) (“Adopting Release”).⁴ To qualify as a “whistleblower” under these rules, a person must provide the Commission with information relating to a possible violation of the federal securities laws in accordance with the procedures set forth in

³ Section 21F of the Exchange Act is reproduced in the addendum to this motion.

⁴ More recently, the Commission has proposed several amendments to its whistleblower rules, none of which are relevant to Herber’s petition. *See Whistleblower Program Rules*, 83 Fed. Reg. 34702 (July 20, 2018).

Rule 21F-9(a). *See* Rule 21F-2(a), 17 C.F.R. § 240.21F-2(a); Rule 21F-8(a), 17 C.F.R. § 240.21F-8(a).⁵ Specifically, Rule 21F-9(a) requires that such information be submitted either online through the Commission’s website or by mailing or faxing a Form TCR (Tip, Complaint or Referral). Rule 21F-9(a). And an individual who “fails to submit information to the Commission in such form as the Commission” requires is not eligible to receive an award. 15 U.S.C. § 78u-6(c)(2)(D).

Following the entry of a final judgment or order in a Commission action that results in monetary sanctions exceeding \$1,000,000—a “covered action”—the Commission’s Office of the Whistleblower will publish a Notice of Covered Action on the Commission’s public website. *See* Rule 21F-10(a). A person then has “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.” *Id.* To do so, the claimant must submit Form WB-APP, together with any attachments, by mail or fax, and these documents “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.” Rule 21F-10(b). A claimant who fails to follow the foregoing procedures is ineligible for an award, “except that the Commission may, in its sole

⁵ Each whistleblower rule designated as Rule 21F-___ is codified at 17 C.F.R. § 240.21F-___. All of the Commission’s whistleblower rules are reproduced in the addendum to this motion.

discretion, waive any of these procedures based upon a showing of extraordinary circumstances.” Rule 21F-8(a).

II. The Commission’s proceeding against The Bank of New York Mellon

On June 13, 2016, the Commission issued an order instituting a settled administrative proceeding against The Bank of New York Mellon. *Bank of New York Mellon*, Investment Company Act of 1940 Release No. 32151, 2016 WL 3345651 (June 13, 2016). In its order, the Commission alleged that from at least 2000 through at least August 2011, The Bank of New York Mellon and its predecessors (the “Bank”) misled certain of its custodial clients, including certain registered investment company customers, by representing that foreign exchange execution would be provided according to “best execution standards” and at “best rates,” when in fact the Bank priced these transactions near the end of the trading day or session at or near the worst interbank rates reported during that day or session. *Id.* at *1. This resulted in substantial revenues to the Bank based on the difference between the rates that the Bank assigned to its clients and the rates that it obtained on its own behalf. *Id.* Moreover, the Bank failed to disclose either the time of the transactions or the manner of pricing in the trade confirmations and transaction reports it provided to these clients. *Id.* at *2. To settle the Commission’s proceeding, the Bank agreed, among other things, to pay roughly \$133 million in disgorgement plus prejudgment interest, to be deemed satisfied by the Bank’s payment of an equivalent amount in settlement of related actions brought by the U.S. Department of Justice and the New

York Attorney General. *Id.* at *6. The Bank also agreed to pay the Commission a civil penalty of \$30 million. *Id.*⁶

III. Herber's whistleblower award claim

On July 29, 2016, the Commission's Office of the Whistleblower published Notice of Covered Action 2016-86 concerning the *Bank of New York Mellon* proceeding on the Commission's public website and invited claimants to submit whistleblower award applications based on that proceeding within 90 days, by October 27, 2016. A1-3. The Office of the Whistleblower received Herber's award claim for Notice of Covered Action 2016-86 nearly ten months after that deadline, on August 23, 2017. A35 ¶7. Herber later submitted an amended application that also claimed an award in connection with the related actions brought by the U.S. Department of Justice and the New York Attorney General. A5-22. In his application, Herber admitted that he did "not remember if [he] filed a whistleblower complaint with the SEC," but he asserted that he had provided information concerning the Bank to the U.S. Attorney's Office for the Southern District of New York. A16.

The Commission's staff preliminarily determined that Herber's claim should be denied on two grounds: first, that he never qualified as a "whistleblower" by

⁶ The Commission's proceeding and the two related actions are explained in detail in two of the staff declarations in the record. A28, A30-32.

submitting information to the Commission relating to the *Bank of New York Mellon* proceeding; and second, that he failed to submit his award claim within 90 days of the Notice of Covered Action. A42. The staff also preliminarily denied Herber's claim for an award in the two related actions on the ground that he failed to qualify for an award in the Commission's action in the first instance. A42 n.2. At the same time, the staff preliminarily granted the whistleblower award claim of another person ("Claimant 1"). A40-41. Herber appealed the staff's determination to the Commission, arguing that he had provided information to the Commission jointly with Claimant 1 and that his late application should be excused due to his disability and his lack of a computer and internet access at home. A43-55.

On June 4, 2020, the Commission entered a final order granting Claimant 1 an award of nearly \$50 million and denying Herber's award claim on two grounds. A58.⁷ First, the Commission concluded that Herber failed to qualify as a "whistleblower" under Rules 21F-2(a) and 21F-9(a) because "[t]here is no evidence in the record that [Herber] submitted any information to the Commission relating to the Covered Action pursuant to the required procedures or otherwise, and [Herber] has not identified any submissions that [he] made." A61. As the Commission observed,

⁷ The Commission's final order is reproduced at A58-63 and is also available at 2020 WL 3030497. Claimant 1 has not petitioned for review, but payment of Claimant 1's award is deferred pending the resolution of Herber's petition. See Rule 21F-14(c)(2).

Herber admitted in his application that he did not remember whether he provided information to the Commission, and “[a] search of the Commission’s records reveal[ed] only that, after the date of the Covered Action, [Herber] submitted a whistleblower tip regarding unrelated issues.” A61 n.10. Rejecting Herber’s argument that he had acted jointly with Claimant 1, the Commission reasoned that “there is no evidence in the record to support a finding that [Herber] was a participant in any manner in Claimant 1’s tip.” A61, A63 n.21.

Second, the Commission determined that Herber’s claim failed for the independent reason that he filed his claim nearly ten months after the 90-day deadline for Notice of Covered Action 2016-86 as required by Rule 21F-10(b). A61. The Commission emphasized that this 90-day deadline serves “important programmatic functions,” by giving all claimants an equal opportunity to have their competing claims evaluated at the same time and by bringing finality to the review process so that awards can be made on a timely basis. A61. Moreover, the Commission determined that Herber had failed to make a showing of “extraordinary circumstances” under Rule 21F-8(a), a necessary predicate to triggering the Commission’s discretionary authority to waive the deadline. A62-63. As the Commission explained, this threshold element of extraordinary circumstances under Rule 21F-8(a), in the context of a late filing, requires that “the reason for the failure timely to file was beyond the control of the applicant” and that the claimant “promptly arranged for the filing . . . as

soon as reasonably practicable” after the asserted impediment ceased. A62 (internal quotation marks omitted).

Applying this standard, the Commission reasoned that Herber’s asserted lack of access to a computer or to the internet at his home did not demonstrate that the failure to timely file was beyond Herber’s control, given the evidence of widespread access to computers and the internet at public libraries in the United States. A62-63. The Commission also observed that, even assuming Herber initially could not access the internet, he submitted an unrelated, online tip to the Commission in December 2016, and thus his further delay of eight months before filing his award claim in August 2017 showed that he had not promptly arranged for such filing as soon as reasonably practicable. A63; *see* A36 ¶8.

Finally, the Commission denied Herber’s claim for awards in the related actions brought by the U.S. Department of Justice and the New York Attorney General because under Section 21F and the Commission’s rules a claimant must provide information to the Commission to be eligible for such a related-action award. A63 n.22.

On July 2, 2020, Herber timely filed his petition for review. This Court has jurisdiction pursuant to 15 U.S.C. § 78u-6(f).

ARGUMENT

Summary disposition is appropriate because undisputed evidence in the record establishes that the Commission properly denied Herber’s whistleblower award claim

both because he was not a whistleblower in the covered action and also because his award application was untimely by nearly ten months. *See Williams*, 42 F.3d at 1139. Even if Herber were to raise new arguments in this Court, any such argument would be forfeited by virtue of his failure to raise it before the Commission in the first instance. *See Ester v. Principi*, 250 F.3d 1068, 1072 (7th Cir. 2001) (“[A]ny objections not made before the administrative agency are subsequently waived before the courts.”) (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).⁸

I. The Commission properly denied Herber’s whistleblower award claim because he failed to establish that he was a whistleblower in the covered action.

As the Commission observed, the administrative record contains no evidence that Herber ever provided information to the Commission concerning the *Bank of New York Mellon* proceeding, either individually or jointly with Claimant 1. A61. To the contrary, the record contains Herber’s own acknowledgment that he does not remember providing any such information to the Commission (A16), as well as the declaration of a staff attorney in the Commission’s Office of the Whistleblower who searched the Commission’s database of tips and found nothing from Herber except

⁸ Herber has forfeited any challenge to the Commission’s denial of his claim for an award in the two related actions because he failed to contest the staff’s preliminary denial of that claim. A43-55. Even if he were to challenge that denial in this Court, the Commission’s denial was undoubtedly proper because Section 21F(a)(5) & (b)(1) and Rule 21F-3(a) & (b)(2) require a claimant to provide information to the Commission to qualify for such a related-action award. A63 n.22.

one unrelated complaint concerning the City of Fort Wayne that he submitted online months after the covered action concluded (A36 ¶¶8-9). That finding is corroborated by the separate declaration of a senior trial attorney responsible for the covered action, who stated under oath that neither he nor others who worked on the covered action had any communication with Herber or were aware of any information provided by Herber concerning the covered action. A27 ¶14.

Despite multiple opportunities in the administrative proceeding, Herber has never proffered any evidence that he gave the Commission information concerning the covered action. Instead, he has asserted without substantiation that he worked jointly with Claimant 1 and that the format of the required application form prevented him from affixing his name on Claimant 1's award application. A46-47.⁹ In light of the undisputed record evidence, the Commission reasonably rejected that assertion and concluded that Herber was not a "whistleblower" in the covered action under Rules 21F-2(a) and 21F-9(a). A61. Because the record evidence is undisputed, that conclusion should be summarily affirmed.

⁹ In his petition for review, Herber makes similar assertions and further argues that it was deficiencies in the Commission's online portal that required him to work jointly with Claimant 1 rather than submit information on his own to the Commission. Case No. 20-2174, Doc.1-1, at 6-7. But here, too, he has failed to proffer any evidence that he actually worked jointly with Claimant 1.

II. The Commission properly denied Herber's whistleblower award claim as untimely and rejected his excuse as meritless.

Before the Commission, Herber never disputed that he filed his whistleblower award claim on August 16, 2017, nearly ten months after the October 27, 2016 deadline to file claims for Notice of Covered Action 2016-86. And, in any event, substantial evidence in the form of a staff declaration (A35 ¶7) supports the Commission's finding that Herber's claim was untimely under Rule 21F-10(b). *See, e.g., Jifry v. FAA*, 370 F.3d 1174, 1181 (D.C. Cir. 2004) (affidavit of agency official constitutes substantial evidence).

As the Commission explained (A61-62), the filing deadline in Rule 21F-10(b) serves the important programmatic goals of allowing all competing claims in a single covered action to be evaluated at the same time and of providing finality to that process so that claims can be conclusively determined and awards can be timely paid to meritorious whistleblowers. *Accord Claim for Award*, Release No. 34-77368, 2016 WL 1019130, at *2 (Mar. 14, 2016) ("Release No. 34-77368"), *pet. denied sub nom. Cerny v. SEC*, 707 F. App'x 29 (2d Cir. 2017); *Claim for Awards*, Release No. 34-72659, 2014 WL 3613224, at *2 (July 23, 2014) ("Release No. 34-72659"); *Claim for Awards*, Release No. 34-72178, 2014 WL 1998521, at *2 (May 6, 2014) ("Release No. 34-72178"); Adopting Release, 76 Fed. Reg. at 34343 & n.351. "To reopen the process to consider claims . . . long after the deadline has passed . . . would undercut these

important goals and make the whistleblower claims process unworkable.” Release No. 34-72178, 2014 WL 1998521, at *2.

In light of these programmatic goals, the Commission has consistently interpreted the “extraordinary circumstances” standard in Rule 21F-8(a) in “narrow[]” fashion as requiring a claimant to show “that the reason for the failure timely to file” —such as attorney misconduct or serious illness—“was beyond the control of the applicant.” A62; Release No. 34-77368, 2016 WL 1019130, at *2; Release No. 34-72659, 2014 WL 3613224, at *3; Release No. 34-72178, 2014 WL 1998521, at *2-3. In adopting this interpretation, the Commission reasoned by analogy to the provisions governing untimely filings in the Commission’s own Rules of Practice, which in turn borrow from the judicial doctrine of equitable tolling. *See Application of PennMont Secs.*, Release No. 34-61967, 2010 WL 1638720, at *4-5 & nn.21-26 (Apr. 23, 2010) (“*PennMont*”), *pet. denied*, 414 F. App’x 465 (3d Cir. 2011).¹⁰ Indeed, the U.S. Court of Appeals for the Second Circuit has held that the Commission’s interpretation of Rule

¹⁰ “Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). *See also Menominee Tribe of Wisc. v. United States*, 136 S. Ct. 750, 756 (2016) (“We therefore affirm that the second prong of the equitable tolling test is met only where the circumstances that caused a litigant’s delay are both extraordinary *and* beyond its control.”) (emphasis in original).

21F-8(a) in this respect is “controlling” because it is neither plainly erroneous nor inconsistent with the regulation. *Cerny*, 707 F. App’x at 31.¹¹

Applying that interpretation here, the Commission reasonably concluded that Herber’s excuse fell far short of extraordinary circumstances, as required under Rule 21F-8(a) to trigger the Commission’s discretion to excuse his late filing, because Herber failed to show that the untimeliness of his whistleblower claim was beyond his control. A62-63. Even without full briefing and argument in this Court, the administrative record amply demonstrates that this conclusion lay well within the Commission’s broad discretion. *See* 15 U.S.C. § 78u-6(f) (Whistleblower award determinations “shall be in the discretion of the Commission.”).

Herber’s excuse before the Commission was that his lack of home access to a computer and the internet, together with his disability and low income, prevented him from monitoring the Commission’s website for Notices of Covered Action and thus from submitting his application in timely fashion. A47-48. But, the Commission observed, nearly every public library in the United States offers free access to computers and the internet. A63 (citing data from the American Library Association available at <http://www.ala.org>). Thus, Herber’s lack of a computer or internet access in his home does not demonstrate that he was unable to access the Commission’s website at a local public library.

¹¹ This unpublished decision is included in the addendum to this motion.

Moreover, as the Commission further reasoned, even assuming Herber initially lacked any internet access, he failed to explain why he filed his award claim any later than December 2016, when he submitted an unrelated, online complaint to the Commission about the City of Fort Wayne. A63. As the Commission has reiterated when addressing late filings, “[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 filing . . . as soon as reasonably practicable thereafter.” Release No. 34-72659, 2014 WL 3613224, at *4 (quoting *PennMont*, 2010 WL 1638720, at *4); accord Release No. 34-72178, 2014 WL 1998521, at *2-3. Herber’s failure to offer the Commission *any* reason for the eight-month delay between December 2016 and August 2017 is therefore fatal to his attempt to show extraordinary circumstances under Rule 21F-8(a) that would trigger the Commission’s discretionary authority to excuse the untimeliness of his whistleblower award claim under Rule 21F-10(b).¹²

¹² In his petition for review, Herber argues that the rural nature of his residence together with certain logistical constraints at his local library prevented him from accessing the internet and that, in any event, “[n]o harm has been done filing late.” Case No. 20-2174, Doc. 1-1, at 8-9. But none of these considerations establishes that he exercised reasonable diligence between filing his online complaint in December 2016 and filing his award claim in August 2017. He also suggests that the Office of the Whistleblower should have personally notified him of Notice of Covered Action 2016-86. *See id.* But the Commission’s rules do not require that the staff provide direct notice to claimants, and instead they afford constructive notice through the posting of Notices of Covered Action on the Commission’s public website. *See* Rule 21F-10(a); Adopting Release, 76 Fed. Reg. at 34342-43. As the Second Circuit

CONCLUSION

For the foregoing reasons, Herber's petition for review should be denied and the Commission's final order should be summarily affirmed.

Respectfully submitted,

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August 20, 2020

recognized, "adopting such a rule is within the scope of the Commission's discretion" under Section 21F. *Cerny*, 707 F. App'x at 31.

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limit of Fed. R. App. P. 27(d)(2) because it contains 3,800 words as counted using Microsoft Office Word 2010, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

I further certify that this motion complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(e) and 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-Point Garamond.

/s/ Stephen G. Yoder

Stephen G. Yoder
Senior Litigation Counsel

Dated: August 20, 2020

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ties Act of 1933 (15 U.S.C. 77a et seq.), commenced before and pending on Dec. 22, 1995, see section 108 of Pub. L. 104-67, set out as an Effective Date of 1995 Amendment note under section 771 of this title.

CONSTRUCTION

Nothing in section to be deemed to create or ratify any implied right of action, or to prevent Commission, by rule or regulation, from restricting or otherwise regulating private actions under this chapter, see section 203 of Pub. L. 104-67, set out as a note under section 78j-1 of this title.

§ 78u-6. Securities whistleblower incentives and protection

(a) Definitions

In this section the following definitions shall apply:

(1) Covered judicial or administrative action

The term “covered judicial or administrative action” means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding \$1,000,000.

(2) Fund

The term “Fund” means the Securities and Exchange Commission Investor Protection Fund.

(3) Original information

The term “original information” means information that—

(A) is derived from the independent knowledge or analysis of a whistleblower;

(B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and

(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

(4) Monetary sanctions

The term “monetary sanctions”, when used with respect to any judicial or administrative action, means—

(A) any monies, including penalties, disgorgement, and interest, ordered to be paid; and

(B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.

(5) Related action

The term “related action”, when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

(6) Whistleblower

The term “whistleblower” means any individual who provides, or 2 or more individuals

acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.

(b) Awards

(1) In general

In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—

(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

(2) Payment of awards

Any amount paid under paragraph (1) shall be paid from the Fund.

(c) Determination of amount of award; denial of award

(1) Determination of amount of award

(A) Discretion

The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.

(B) Criteria

In determining the amount of an award made under subsection (b), the Commission—

(i) shall take into consideration—

(I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;

(II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;

(III) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and

(IV) such additional relevant factors as the Commission may establish by rule or regulation; and

(ii) shall not take into consideration the balance of the Fund.

(2) Denial of award

No award under subsection (b) shall be made—

(A) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of—

- (i) an appropriate regulatory agency;
- (ii) the Department of Justice;
- (iii) a self-regulatory organization;
- (iv) the Public Company Accounting Oversight Board; or
- (v) a law enforcement organization;

(B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;

(C) to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of section 78j-1 of this title; or

(D) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.

(d) Representation

(1) Permitted representation

Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.

(2) Required representation

(A) In general

Any whistleblower who anonymously makes a claim for an award under subsection (b) shall be represented by counsel if the whistleblower anonymously submits the information upon which the claim is based.

(B) Disclosure of identity

Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information as the Commission may require, directly or through counsel for the whistleblower.

(e) No contract necessary

No contract with the Commission is necessary for any whistleblower to receive an award under subsection (b), unless otherwise required by the Commission by rule or regulation.

(f) Appeals

Any determination made under this section, including whether, to whom, or in what amount to make awards, shall be in the discretion of the Commission. Any such determination, except the determination of the amount of an award if the award was made in accordance with subsection (b), may be appealed to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Commission. The court shall review the determination made by the Commission in accordance with section 706 of title 5.

(g) Investor Protection Fund

(1) Fund established

There is established in the Treasury of the United States a fund to be known as the "Securities and Exchange Commission Investor Protection Fund".

(2) Use of Fund

The Fund shall be available to the Commission, without further appropriation or fiscal year limitation, for—

(A) paying awards to whistleblowers as provided in subsection (b); and

(B) funding the activities of the Inspector General of the Commission under section 78d(i) of this title.

(3) Deposits and credits

(A) In general

There shall be deposited into or credited to the Fund an amount equal to—

(i) any monetary sanction collected by the Commission in any judicial or administrative action brought by the Commission under the securities laws that is not added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) or otherwise distributed to victims of a violation of the securities laws, or the rules and regulations thereunder, underlying such action, unless the balance of the Fund at the time the monetary sanction is collected exceeds \$300,000,000;

(ii) any monetary sanction added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) that is not distributed to the victims for whom the Fund was established, unless the balance of the disgorgement fund at the time the determination is made not to distribute the monetary sanction to such victims exceeds \$200,000,000; and

(iii) all income from investments made under paragraph (4).

(B) Additional amounts

If the amounts deposited into or credited to the Fund under subparagraph (A) are not sufficient to satisfy an award made under subsection (b), there shall be deposited into or credited to the Fund an amount equal to the unsatisfied portion of the award from any monetary sanction collected by the Commission in the covered judicial or administrative action on which the award is based.

(4) Investments

(A) Amounts in Fund may be invested

The Commission may request the Secretary of the Treasury to invest the portion of the Fund that is not, in the discretion of the Commission, required to meet the current needs of the Fund.

(B) Eligible investments

Investments shall be made by the Secretary of the Treasury in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Fund as determined by the Commission on the record.

(C) Interest and proceeds credited

The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to the Fund.

(5) Reports to Congress

Not later than October 30 of each fiscal year beginning after July 21, 2010, the Commission

shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives a report on—

(A) the whistleblower award program, established under this section, including—

(i) a description of the number of awards granted; and

(ii) the types of cases in which awards were granted during the preceding fiscal year;

(B) the balance of the Fund at the beginning of the preceding fiscal year;

(C) the amounts deposited into or credited to the Fund during the preceding fiscal year;

(D) the amount of earnings on investments made under paragraph (4) during the preceding fiscal year;

(E) the amount paid from the Fund during the preceding fiscal year to whistleblowers pursuant to subsection (b);

(F) the balance of the Fund at the end of the preceding fiscal year; and

(G) a complete set of audited financial statements, including—

(i) a balance sheet;

(ii) income statement; and

(iii) cash flow analysis.

(h) Protection of whistleblowers

(1) Prohibition against retaliation

(A) In general

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

(B) Enforcement

(i) Cause of action

An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).

(ii) Subpoenas

A subpoena requiring the attendance of a witness at a trial or hearing conducted under this section may be served at any place in the United States.

(iii) Statute of limitations

(I) In general

An action under this subsection may not be brought—

(aa) more than 6 years after the date on which the violation of subparagraph (A) occurred; or

(bb) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subparagraph (A).

(II) Required action within 10 years

Notwithstanding subclause (I), an action under this subsection may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

(C) Relief

Relief for an individual prevailing in an action brought under subparagraph (B) shall include—

(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;

(ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and

(iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.

(2) Confidentiality

(A) In general

Except as provided in subparagraphs (B) and (C), the Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C). For purposes of section 552 of title 5, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section.

(B) Exempted statute

For purposes of section 552 of title 5, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(C) Rule of construction

Nothing in this section is intended to limit, or shall be construed to limit, the ability of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

(D) Availability to government agencies

(i) In general

Without the loss of its status as confidential in the hands of the Commission, all information referred to in subparagraph (A) may, in the discretion of the Commission, when determined by the

Commission to be necessary to accomplish the purposes of this chapter and to protect investors, be made available to—

- (I) the Attorney General of the United States;
- (II) an appropriate regulatory authority;
- (III) a self-regulatory organization;
- (IV) a State attorney general in connection with any criminal investigation;
- (V) any appropriate State regulatory authority;
- (VI) the Public Company Accounting Oversight Board;
- (VII) a foreign securities authority; and
- (VIII) a foreign law enforcement authority.

(ii) Confidentiality

(I) In general

Each of the entities described in subclauses (I) through (VI) of clause (i) shall maintain such information as confidential in accordance with the requirements established under subparagraph (A).

(II) Foreign authorities

Each of the entities described in subclauses (VII) and (VIII) of clause (i) shall maintain such information in accordance with such assurances of confidentiality as the Commission determines appropriate.

(3) Rights retained

Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement.

(i) Provision of false information

A whistleblower shall not be entitled to an award under this section if the whistleblower—

- (1) knowingly and willfully makes any false, fictitious, or fraudulent statement or representation; or
- (2) uses any false writing or document knowing the writing or document contains any false, fictitious, or fraudulent statement or entry.

(j) Rulemaking authority

The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.

(June 6, 1934, ch. 404, title I, §21F, as added Pub. L. 111-203, title IX, §922(a), July 21, 2010, 124 Stat. 1841.)

REFERENCES IN TEXT

The Sarbanes-Oxley Act of 2002, referred to in subsec. (h)(1)(A)(iii), is Pub. L. 107-204, July 30, 2002, 116 Stat. 745. For complete classification of this Act to the Code, see Short Title note set out under section 7201 of this title and Tables.

This chapter, referred to in subsec. (h)(1)(A)(iii), was in the original “the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.)”. This chapter, referred to in subsec. (h)(2)(D)(i), was in the original “this Act”. See Ref-

erences in Text note set out under section 78a of this title.

EFFECTIVE DATE

Section effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111-203, set out as a note under section 5301 of Title 12, Banks and Banking.

§ 78u-7. Implementation and transition provisions for whistleblower protection

(a) Implementing rules

The Commission shall issue final regulations implementing the provisions of section 78u-6 of this title, as added by this subtitle, not later than 270 days after July 21, 2010.

(b) Original information

Information provided to the Commission in writing by a whistleblower shall not lose the status of original information (as defined in section 78u-6(a)(3) of this title, as added by this subtitle) solely because the whistleblower provided the information prior to the effective date of the regulations, if the information is provided by the whistleblower after July 21, 2010.

(c) Awards

A whistleblower may receive an award pursuant to section 78u-6 of this title, as added by this subtitle, regardless of whether any violation of a provision of the securities laws, or a rule or regulation thereunder, underlying the judicial or administrative action upon which the award is based, occurred prior to July 21, 2010.

(d) Administration and enforcement

The Securities and Exchange Commission shall establish a separate office within the Commission to administer and enforce the provisions of section 78u-6 of this title (as add¹ by section 922(a)).² Such office shall report annually to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives on its activities, whistleblower complaints, and the response of the Commission to such complaints. (Pub. L. 111-203, title IX, §924, July 21, 2010, 124 Stat. 1850.)

REFERENCES IN TEXT

This subtitle, referred to in subsecs. (a) to (c), means subtitle B (§§921-929Z) of title IX of Pub. L. 111-203.

Section 922(a), referred to in subsec. (d), means section 922(a) of Pub. L. 111-203.

CODIFICATION

Section was enacted as part of the Investor Protection and Securities Reform Act of 2010, and also as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and not as part of the Securities Exchange Act of 1934 which comprises this chapter.

EFFECTIVE DATE

Section effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111-203, set out as a note under section 5301 of Title 12, Banks and Banking.

DEFINITIONS

For definitions of “Commission” and “securities laws” as used in this section, see section 5301 of Title 12, Banks and Banking.

¹ So in original. Probably should be “added”.

² See References in Text note below.

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(6) If a hearing on the matter has been held by the organization, a certified copy of the hearing record, together with copies of any exhibits introduced therein;

(7) All written submissions not included in a certified oral hearing record which were considered by the organization in its disposition of the matter;

(8) All information furnished in writing to the self-regulatory organization by the staff of the Commission for consideration by the organization in its disposition of the matter or the incorporation by reference of such information, and a statement of the organization's views thereon; and

(9) Such other matters as the organization or person deems relevant.

If the application contains assertions of material facts not a matter of record before the organization, such facts shall be sworn to by affidavit of the person or organization offering such facts for Commission consideration.

(f) *Definitions.* For purposes of this rule:

(1) The term *applicable disqualification* shall mean:

(i) Any effective order of the Commission pursuant to section 15(b) (4) or (6), 15B(c) (2) or (4) or 19(h) (2) or (3) of the Act—

(A) Revoking, suspending or placing limitations on the registration, activities, functions, or operations of a broker or dealer;

(B) Suspending, barring, or placing limitations on the association, activities, or functions of an associated person of a broker or dealer;

(C) Suspending or expelling any person from membership or participation in a self-regulatory organization; or

(D) Suspending or barring any person from being associated with a member of a national securities exchange or registered securities association;

(ii) Any conviction of injunction of a type described in section 15(b)(4) (B) or (C) of the Act; or

(iii) A failure under the provisions of Rule G-4 of the Municipal Securities Rulemaking Board under the Act, to meet qualifications standards, and such failure may be remedied by a finding or determination by the Commission pursuant to such rule(s) that the

person affected nevertheless meets such standards.

(2) The term *control* shall mean the power to direct or cause the direction of the management or policies of a company whether through ownership of securities, by contract or otherwise; *Provided, however, That*

(i) Any person who, directly or indirectly, (A) has the right to vote 10 percent or more of the voting securities, (B) is entitled to receive 10 percent or more of the net profits, or (C) is a director (or person occupying a similar status or performing similar functions) of a company shall be presumed to be a person who controls such company;

(ii) Any person not covered by paragraph (i) shall be presumed not to be a person who controls such company; and

(iii) Any presumption may be rebutted on an appropriate showing.

(g) Where it deems appropriate to do so, the Commission may determine whether to (1) direct, pursuant to section 6(c)(2), 15A(g)(2) or 17A(b)(4)(A) of the Act, that a proposed admission covered by a notice filed pursuant to paragraph (a) of this section shall be denied or an order barring a proposed association issued or (2) grant or deny an application filed pursuant to paragraph (d) of this section on the basis of the notice or application filed by the self-regulatory organization, the person subject to the disqualification, or other applicant (such as the proposed employer) on behalf of such person, without oral hearing. Any request for oral hearing or argument should be submitted with the notice or application.

(h) The Rules of Practice (17 CFR part 201) shall apply to proceedings under this rule to the extent that they are not inconsistent with this rule.

(15 U.S.C. 78a *et seq.*, as amended by Pub. L. 94-29 (June 4, 1975) and by Pub. L. 98-38 (June 6, 1983), particularly secs. 11A, 15, 19 and 23 thereof (15 U.S.C. 78k-1, 78o, 78s and 78w))

[46 FR 58661, Dec. 3, 1981, as amended at 48 FR 53691, Nov. 29, 1983]

SECURITIES WHISTLEBLOWER INCENTIVES AND PROTECTIONS

SOURCE: Sections 240.21F-1 through 240.21F-17 appear at 76 FR 34363, June 13, 2011.

§ 240.21F-1**17 CFR Ch. II (4-1-18 Edition)****§ 240.21F-1 General.**

Section 21F of the Securities Exchange Act of 1934 (“Exchange Act”) (15 U.S.C. 78u-6), entitled “Securities Whistleblower Incentives and Protection,” requires the Securities and Exchange Commission (“Commission”) to pay awards, subject to certain limitations and conditions, to whistleblowers who provide the Commission with original information about violations of the Federal securities laws. These rules describe the whistleblower program that the Commission has established to implement the provisions of Section 21F, and explain the procedures you will need to follow in order to be eligible for an award. You should read these procedures carefully because the failure to take certain required steps within the time frames described in these rules may disqualify you from receiving an award for which you otherwise may be eligible. Unless expressly provided for in these rules, no person is authorized to make any offer or promise, or otherwise to bind the Commission with respect to the payment of any award or the amount thereof. The Securities and Exchange Commission’s Office of the Whistleblower administers our whistleblower program. Questions about the program or these rules should be directed to the SEC Office of the Whistleblower, 100 F Street, NE., Washington, DC 20549-5631.

§ 240.21F-2 Whistleblower status and retaliation protection.

(a) *Definition of a whistleblower.* (1) You are a whistleblower if, alone or jointly with others, you provide the Commission with information pursuant to the procedures set forth in § 240.21F-9(a) of this chapter, and the information relates to a possible violation of the Federal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing, or is about to occur. A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower.

(2) To be eligible for an award, you must submit original information to the Commission in accordance with the procedures and conditions described in §§ 240.21F-4, 240.21F-8, and 240.21F-9 of this chapter.

(b) *Prohibition against retaliation.* (1) For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you are a whistleblower if:

(i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and;

(ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).

(iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.

(2) Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), including any rules promulgated thereunder, shall be enforceable in an action or proceeding brought by the Commission.

§ 240.21F-3 Payment of awards.

(a) *Commission actions:* Subject to the eligibility requirements described in §§ 240.21F-2, 240.21F-8, and 240.21F-16 of this chapter, the Commission will pay an award or awards to one or more whistleblowers who:

(1) Voluntarily provide the Commission

(2) With original information

(3) That leads to the successful enforcement by the Commission of a Federal court or administrative action

(4) In which the Commission obtains monetary sanctions totaling more than \$1,000,000.

NOTE TO PARAGRAPH (a): The terms *voluntarily*, *original information*, *leads to successful enforcement*, *action*, and *monetary sanctions* are defined in § 240.21F-4 of this chapter.

(b) *Related actions:* The Commission will also pay an award based on amounts collected in certain related actions.

(1) A *related action* is a judicial or administrative action that is brought by:

(i) The Attorney General of the United States;

(ii) An appropriate regulatory authority;

(iii) A self-regulatory organization; or

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(iv) A state attorney general in a criminal case, and is based on the same original information that the whistleblower voluntarily provided to the Commission, and that led the Commission to obtain monetary sanctions totaling more than \$1,000,000.

NOTE TO PARAGRAPH (b)(1): The terms *appropriate regulatory authority* and *self-regulatory organization* are defined in §240.21F-4 of this chapter.

(2) In order for the Commission to make an award in connection with a related action, the Commission must determine that the same original information that the whistleblower gave to the Commission also led to the successful enforcement of the related action under the same criteria described in these rules for awards made in connection with Commission actions. The Commission may seek assistance and confirmation from the authority bringing the related action in making this determination. The Commission will deny an award in connection with the related action if:

(i) The Commission determines that the criteria for an award are not satisfied; or

(ii) The Commission is unable to make a determination because the Office of the Whistleblower could not obtain sufficient and reliable information that could be used as the basis for an award determination pursuant to §240.21F-12(a) of this chapter. Additional procedures apply to the payment of awards in related actions. These procedures are described in §§240.21F-11 and 240.21F-14 of this chapter.

(3) The Commission will not make an award to you for a related action if you have already been granted an award by the Commodity Futures Trading Commission ("CFTC") for that same action pursuant to its whistleblower award program under Section 23 of the Commodity Exchange Act (7 U.S.C. 26). Similarly, if the CFTC has previously denied an award to you in a related action, you will be precluded from relitigating any issues before the Commission that the CFTC resolved against you as part of the award denial.

§ 240.21F-4 Other definitions.

(a) *Voluntary submission of information.* (1) Your submission of informa-

tion is made *voluntarily* within the meaning of §§ 240.21F-1 through 240.21F-17 of this chapter if you provide your submission before a request, inquiry, or demand that relates to the subject matter of your submission is directed to you or anyone representing you (such as an attorney):

(i) By the Commission;

(ii) In connection with an investigation, inspection, or examination by the Public Company Accounting Oversight Board, or any self-regulatory organization; or

(iii) In connection with an investigation by Congress, any other authority of the Federal government, or a state Attorney General or securities regulatory authority.

(2) If the Commission or any of these other authorities direct a request, inquiry, or demand as described in paragraph (a)(1) of this section to you or your representative first, your submission will not be considered voluntary, and you will not be eligible for an award, even if your response is not compelled by subpoena or other applicable law. However, your submission of information to the Commission will be considered voluntary if you voluntarily provided the same information to one of the other authorities identified above prior to receiving a request, inquiry, or demand from the Commission.

(3) In addition, your submission will not be considered voluntary if you are required to report your original information to the Commission as a result of a pre-existing legal duty, a contractual duty that is owed to the Commission or to one of the other authorities set forth in paragraph (a)(1) of this section, or a duty that arises out of a judicial or administrative order.

(b) *Original information.* (1) In order for your whistleblower submission to be considered *original information*, it must be:

(i) Derived from your independent knowledge or independent analysis;

(ii) Not already known to the Commission from any other source, unless you are the original source of the information;

(iii) Not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental

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report, hearing, audit, or investigation, or from the news media, unless you are a source of the information; and

(iv) Provided to the Commission for the first time after July 21, 2010 (the date of enactment of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*).

(2) *Independent knowledge* means factual information in your possession that is not derived from publicly available sources. You may gain independent knowledge from your experiences, communications and observations in your business or social interactions.

(3) *Independent analysis* means your own analysis, whether done alone or in combination with others. *Analysis* means your examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public.

(4) The Commission will not consider information to be derived from your independent knowledge or independent analysis in any of the following circumstances:

(i) If you obtained the information through a communication that was subject to the attorney-client privilege, unless disclosure of that information would otherwise be permitted by an attorney pursuant to §205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise;

(ii) If you obtained the information in connection with the legal representation of a client on whose behalf you or your employer or firm are providing services, and you seek to use the information to make a whistleblower submission for your own benefit, unless disclosure would otherwise be permitted by an attorney pursuant to §205.3(d)(2) of this chapter, the applicable state attorney conduct rules, or otherwise; or

(iii) In circumstances not covered by paragraphs (b)(4)(i) or (b)(4)(ii) of this section, if you obtained the information because you were:

(A) An officer, director, trustee, or partner of an entity and another person informed you of allegations of misconduct, or you learned the information in connection with the entity's processes for identifying, reporting,

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and addressing possible violations of law;

(B) An employee whose principal duties involve compliance or internal audit responsibilities, or you were employed by or otherwise associated with a firm retained to perform compliance or internal audit functions for an entity;

(C) Employed by or otherwise associated with a firm retained to conduct an inquiry or investigation into possible violations of law; or

(D) An employee of, or other person associated with, a public accounting firm, if you obtained the information through the performance of an engagement required of an independent public accountant under the Federal securities laws (other than an audit subject to §240.21F-8(c)(4) of this chapter), and that information related to a violation by the engagement client or the client's directors, officers or other employees.

(iv) If you obtained the information by a means or in a manner that is determined by a United States court to violate applicable Federal or state criminal law; or

(v) *Exceptions.* Paragraph (b)(4)(iii) of this section shall not apply if:

(A) You have a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the relevant entity from engaging in conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors;

(B) You have a reasonable basis to believe that the relevant entity is engaging in conduct that will impede an investigation of the misconduct; or

(C) At least 120 days have elapsed since you provided the information to the relevant entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or your supervisor, or since you received the information, if you received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or your supervisor was already aware of the information.

(vi) If you obtained the information from a person who is subject to this section, unless the information is not

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excluded from that person's use pursuant to this section, or you are providing the Commission with information about possible violations involving that person.

(5) The Commission will consider you to be an *original source* of the same information that we obtain from another source if the information satisfies the definition of original information and the other source obtained the information from you or your representative. In order to be considered an original source of information that the Commission receives from Congress, any other authority of the Federal government, a state Attorney General or securities regulatory authority, any self-regulatory organization, or the Public Company Accounting Oversight Board, you must have voluntarily given such authorities the information within the meaning of these rules. You must establish your status as the original source of information to the Commission's satisfaction. In determining whether you are the original source of information, the Commission may seek assistance and confirmation from one of the other authorities described above, or from another entity (including your employer), in the event that you claim to be the original source of information that an authority or another entity provided to the Commission.

(6) If the Commission already knows some information about a matter from other sources at the time you make your submission, and you are not an original source of that information under paragraph (b)(5) of this section, the Commission will consider you an original source of any information you provide that is derived from your independent knowledge or analysis and that materially adds to the information that the Commission already possesses.

(7) If you provide information to the Commission, any other authority of the Federal government, a state Attorney General or securities regulatory authority, any self-regulatory organization, or the Public Company Accounting Oversight Board, or to an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law, and

you, within 120 days, submit the same information to the Commission pursuant to § 240.21F-9 of this chapter, as you must do in order for you to be eligible to be considered for an award, then, for purposes of evaluating your claim to an award under §§ 240.21F-10 and 240.21F-11 of this chapter, the Commission will consider that you provided information as of the date of your original disclosure, report or submission to one of these other authorities or persons. You must establish the effective date of any prior disclosure, report, or submission, to the Commission's satisfaction. The Commission may seek assistance and confirmation from the other authority or person in making this determination.

(c) *Information that leads to successful enforcement.* The Commission will consider that you provided original information that led to the successful enforcement of a judicial or administrative action in any of the following circumstances:

(1) You gave the Commission original information that was sufficiently specific, credible, and timely to cause the staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning different conduct as part of a current examination or investigation, and the Commission brought a successful judicial or administrative action based in whole or in part on conduct that was the subject of your original information; or

(2) You gave the Commission original information about conduct that was already under examination or investigation by the Commission, the Congress, any other authority of the Federal government, a state Attorney General or securities regulatory authority, any self-regulatory organization, or the PCAOB (except in cases where you were an original source of this information as defined in paragraph (b)(4) of this section), and your submission significantly contributed to the success of the action.

(3) You reported original information through an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law before or at the same

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time you reported them to the Commission; the entity later provided your information to the Commission, or provided results of an audit or investigation initiated in whole or in part in response to information you reported to the entity; and the information the entity provided to the Commission satisfies either paragraph (c)(1) or (c)(2) of this section. Under this paragraph (c)(3), you must also submit the same information to the Commission in accordance with the procedures set forth in § 240.21F-9 within 120 days of providing it to the entity.

(d) An *action* generally means a single captioned judicial or administrative proceeding brought by the Commission. Notwithstanding the foregoing:

(1) For purposes of making an award under § 240.21F-10 of this chapter, the Commission will treat as a Commission action two or more administrative or judicial proceedings brought by the Commission if these proceedings arise out of the same nucleus of operative facts; or

(2) For purposes of determining the payment on an award under § 240.21F-14 of this chapter, the Commission will deem as part of the Commission action upon which the award was based any subsequent Commission proceeding that, individually, results in a monetary sanction of \$1,000,000 or less, and that arises out of the same nucleus of operative facts.

(e) *Monetary sanctions* means any money, including penalties, disgorgement, and interest, ordered to be paid and any money deposited into a disgorgement fund or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)) as a result of a Commission action or a related action.

(f) *Appropriate regulatory agency* means the Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and any other agencies that may be defined as appropriate regulatory agencies under Section 3(a)(34) of the Exchange Act (15 U.S.C. 78c(a)(34)).

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(g) *Appropriate regulatory authority* means an appropriate regulatory agency other than the Commission.

(h) *Self-regulatory organization* means any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board, and any other organizations that may be defined as self-regulatory organizations under Section 3(a)(26) of the Exchange Act (15 U.S.C. 78c(a)(26)).

§ 240.21F-5 Amount of award.

(a) The determination of the amount of an award is in the discretion of the Commission.

(b) If all of the conditions are met for a whistleblower award in connection with a Commission action or a related action, the Commission will then decide the percentage amount of the award applying the criteria set forth in § 240.21F-6 of this chapter and pursuant to the procedures set forth in §§ 240.21F-10 and 240.21F-11 of this chapter. The amount will be at least 10 percent and no more than 30 percent of the monetary sanctions that the Commission and the other authorities are able to collect. The percentage awarded in connection with a Commission action may differ from the percentage awarded in connection with a related action.

(c) If the Commission makes awards to more than one whistleblower in connection with the same action or related action, the Commission will determine an individual percentage award for each whistleblower, but in no event will the total amount awarded to all whistleblowers in the aggregate be less than 10 percent or greater than 30 percent of the amount the Commission or the other authorities collect.

§ 240.21F-6 Criteria for determining amount of award.

In exercising its discretion to determine the appropriate award percentage, the Commission may consider the following factors in relation to the unique facts and circumstances of each case, and may increase or decrease the award percentage based on its analysis of these factors. In the event that awards are determined for multiple

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whistleblowers in connection an action, these factors will be used to determine the relative allocation of awards among the whistleblowers.

(a) *Factors that may increase the amount of a whistleblower's award.* In determining whether to increase the amount of an award, the Commission will consider the following factors, which are not listed in order of importance.

(1) *Significance of the information provided by the whistleblower.* The Commission will assess the significance of the information provided by a whistleblower to the success of the Commission action or related action. In considering this factor, the Commission may take into account, among other things:

(i) The nature of the information provided by the whistleblower and how it related to the successful enforcement action, including whether the reliability and completeness of the information provided to the Commission by the whistleblower resulted in the conservation of Commission resources;

(ii) The degree to which the information provided by the whistleblower supported one or more successful claims brought in the Commission or related action.

(2) *Assistance provided by the whistleblower.* The Commission will assess the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action. In considering this factor, the Commission may take into account, among other things:

(i) Whether the whistleblower provided ongoing, extensive, and timely cooperation and assistance by, for example, helping to explain complex transactions, interpreting key evidence, or identifying new and productive lines of inquiry;

(ii) The timeliness of the whistleblower's initial report to the Commission or to an internal compliance or reporting system of business organizations committing, or impacted by, the securities violations, where appropriate;

(iii) The resources conserved as a result of the whistleblower's assistance;

(iv) Whether the whistleblower appropriately encouraged or authorized

others to assist the staff of the Commission who might otherwise not have participated in the investigation or related action;

(v) The efforts undertaken by the whistleblower to remediate the harm caused by the violations, including assisting the authorities in the recovery of the fruits and instrumentalities of the violations; and

(vi) Any unique hardships experienced by the whistleblower as a result of his or her reporting and assisting in the enforcement action.

(3) *Law enforcement interest.* The Commission will assess its programmatic interest in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws. In considering this factor, the Commission may take into account, among other things:

(i) The degree to which an award enhances the Commission's ability to enforce the Federal securities laws and protect investors; and

(ii) The degree to which an award encourages the submission of high quality information from whistleblowers by appropriately rewarding whistleblowers' submission of significant information and assistance, even in cases where the monetary sanctions available for collection are limited or potential monetary sanctions were reduced or eliminated by the Commission because an entity self-reported a securities violation following the whistleblower's related internal disclosure, report, or submission.

(iii) Whether the subject matter of the action is a Commission priority, whether the reported misconduct involves regulated entities or fiduciaries, whether the whistleblower exposed an industry-wide practice, the type and severity of the securities violations, the age and duration of misconduct, the number of violations, and the isolated, repetitive, or ongoing nature of the violations; and

(iv) The dangers to investors or others presented by the underlying violations involved in the enforcement action, including the amount of harm or

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potential harm caused by the underlying violations, the type of harm resulting from or threatened by the underlying violations, and the number of individuals or entities harmed.

(4) *Participation in internal compliance systems.* The Commission will assess whether, and the extent to which, the whistleblower and any legal representative of the whistleblower participated in internal compliance systems. In considering this factor, the Commission may take into account, among other things:

- (i) Whether, and the extent to which, a whistleblower reported the possible securities violations through internal whistleblower, legal or compliance procedures before, or at the same time as, reporting them to the Commission; and
- (ii) Whether, and the extent to which, a whistleblower assisted any internal investigation or inquiry concerning the reported securities violations.

(b) *Factors that may decrease the amount of a whistleblower's award.* In determining whether to decrease the amount of an award, the Commission will consider the following factors, which are not listed in order of importance.

(1) *Culpability.* The Commission will assess the culpability or involvement of the whistleblower in matters associated with the Commission's action or related actions. In considering this factor, the Commission may take into account, among other things:

- (i) The whistleblower's role in the securities violations;
- (ii) The whistleblower's education, training, experience, and position of responsibility at the time the violations occurred;
- (iii) Whether the whistleblower acted with scienter, both generally and in relation to others who participated in the violations;
- (iv) Whether the whistleblower financially benefitted from the violations;
- (v) Whether the whistleblower is a recidivist;
- (vi) The egregiousness of the underlying fraud committed by the whistleblower; and
- (vii) Whether the whistleblower knowingly interfered with the Commission's investigation of the violations or related enforcement actions.

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(2) *Unreasonable reporting delay.* The Commission will assess whether the whistleblower unreasonably delayed reporting the securities violations. In considering this factor, the Commission may take into account, among other things:

- (i) Whether the whistleblower was aware of the relevant facts but failed to take reasonable steps to report or prevent the violations from occurring or continuing;
- (ii) Whether the whistleblower was aware of the relevant facts but only reported them after learning about a related inquiry, investigation, or enforcement action; and
- (iii) Whether there was a legitimate reason for the whistleblower to delay reporting the violations.

(3) *Interference with internal compliance and reporting systems.* The Commission will assess, in cases where the whistleblower interacted with his or her entity's internal compliance or reporting system, whether the whistleblower undermined the integrity of such system. In considering this factor, the Commission will take into account whether there is evidence provided to the Commission that the whistleblower knowingly:

- (i) Interfered with an entity's established legal, compliance, or audit procedures to prevent or delay detection of the reported securities violation;
- (ii) Made any material false, fictitious, or fraudulent statements or representations that hindered an entity's efforts to detect, investigate, or remediate the reported securities violations; and
- (iii) Provided any false writing or document knowing the writing or document contained any false, fictitious or fraudulent statements or entries that hindered an entity's efforts to detect, investigate, or remediate the reported securities violations.

§ 240.21F-7 Confidentiality of submissions.

(a) Section 21F(h)(2) of the Exchange Act (15 U.S.C. 78u-6(h)(2)) requires that the Commission not disclose information that could reasonably be expected to reveal the identity of a whistleblower, except that the Commission

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may disclose such information in the following circumstances:

(1) When disclosure is required to a defendant or respondent in connection with a Federal court or administrative action that the Commission files or in another public action or proceeding that is filed by an authority to which we provide the information, as described below;

(2) When the Commission determines that it is necessary to accomplish the purposes of the Exchange Act (15 U.S.C. 78a) and to protect investors, it may provide your information to the Department of Justice, an appropriate regulatory authority, a self regulatory organization, a state attorney general in connection with a criminal investigation, any appropriate state regulatory authority, the Public Company Accounting Oversight Board, or foreign securities and law enforcement authorities. Each of these entities other than foreign securities and law enforcement authorities is subject to the confidentiality requirements set forth in Section 21F(h) of the Exchange Act (15 U.S.C. 78u-6(h)). The Commission will determine what assurances of confidentiality it deems appropriate in providing such information to foreign securities and law enforcement authorities.

(3) The Commission may make disclosures in accordance with the Privacy Act of 1974 (5 U.S.C. 552a).

(b) You may submit information to the Commission anonymously. If you do so, however, you must also do the following:

(1) You must have an attorney represent you in connection with both your submission of information and your claim for an award, and your attorney's name and contact information must be provided to the Commission at the time you submit your information;

(2) You and your attorney must follow the procedures set forth in § 240.21F-9 of this chapter for submitting original information anonymously; and

(3) Before the Commission will pay any award to you, you must disclose your identity to the Commission and your identity must be verified by the Commission as set forth in § 240.21F-10 of this chapter.

§ 240.21F-8 Eligibility.

(a) To be eligible for a whistleblower award, you must give the Commission information in the form and manner that the Commission requires. The procedures for submitting information and making a claim for an award are described in § 240.21F-9 through § 240.21F-11 of this chapter. You should read these procedures carefully because you need to follow them 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.

(b) In addition to any forms required by these rules, the Commission may also require that you provide certain additional information. You may be required to:

(1) Provide explanations and other assistance in order that the staff may evaluate and use the information that you submitted;

(2) Provide all additional information in your possession that is related to the subject matter of your submission in a complete and truthful manner, through follow-up meetings, or in other forms that our staff may agree to;

(3) Provide testimony or other evidence acceptable to the staff relating to whether you are eligible, or otherwise satisfy any of the conditions, for an award; and

(4) Enter into a confidentiality agreement in a form acceptable to the Office of the Whistleblower, covering any non-public information that the Commission provides to you, and including a provision that a violation of the agreement may lead to your ineligibility to receive an award.

(c) You are not eligible to be considered for an award if you do not satisfy the requirements of paragraphs (a) and (b) of this section. In addition, you are not eligible if:

(1) You are, or were at the time you acquired the original information provided to the Commission, a member, officer, or employee of the Commission, the Department of Justice, an appropriate regulatory agency, a self-regulatory organization, the Public Company Accounting Oversight Board, or any law enforcement organization;

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(2) You are, or were at the time you acquired the original information provided to the Commission, a member, officer, or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Exchange Act (15 U.S.C. 78c(a)(52));

(3) You are convicted of a criminal violation that is related to the Commission action or to a related action (as defined in §240.21F-4 of this chapter) for which you otherwise could receive an award;

(4) You obtained the original information that you gave the Commission through an audit of a company's financial statements, and making a whistleblower submission would be contrary to requirements of Section 10A of the Exchange Act (15 U.S.C. 78j-a).

(5) You are the spouse, parent, child, or sibling of a member or employee of the Commission, or you reside in the same household as a member or employee of the Commission;

(6) You acquired the original information you gave the Commission from a person:

(i) Who is subject to paragraph (c)(4) of this section, unless the information is not excluded from that person's use, or you are providing the Commission with information about possible violations involving that person; or

(ii) With the intent to evade any provision of these rules; or

(7) In your whistleblower submission, your other dealings with the Commission, or your dealings with another authority in connection with a related action, you knowingly and willfully make any false, fictitious, or fraudulent statement or representation, or use any false writing or document knowing that it contains any false, fictitious, or fraudulent statement or entry with intent to mislead or otherwise hinder the Commission or another authority.

§ 240.21F-9 Procedures for submitting original information.

(a) To be considered a whistleblower under Section 21F of the Exchange Act (15 U.S.C. 78u-6(h)), you must submit

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your information about a possible securities law violation by either of these methods:

(1) Online, through the Commission's Web site located at <http://www.sec.gov>; or

(2) By mailing or faxing a Form TCR (Tip, Complaint or Referral) (referenced in §249.1800 of this chapter) to the SEC Office of the Whistleblower, 100 F Street NE., Washington, DC 20549-5631, Fax (703) 813-9322.

(b) Further, to be eligible for an award, you must declare under penalty of perjury at the time you submit your information pursuant to paragraph (a)(1) or (2) of this section that your information is true and correct to the best of your knowledge and belief.

(c) Notwithstanding paragraphs (a) and (b) of this section, if you are providing your original information to the Commission anonymously, then your attorney must submit your information on your behalf pursuant to the procedures specified in paragraph (a) of this section. Prior to your attorney's submission, you must provide your attorney with a completed Form TCR (referenced in §249.1800 of this chapter) that you have signed under penalty of perjury. When your attorney makes her submission on your behalf, your attorney will be required to certify that he or she:

(1) Has verified your identity;

(2) Has reviewed your completed and signed Form TCR (referenced in §249.1800 of this chapter) for completeness and accuracy and that the information contained therein is true, correct and complete to the best of the attorney's knowledge, information and belief;

(3) Has obtained your non-waivable consent to provide the Commission with your original completed and signed Form TCR (referenced in §249.1800 of this chapter) in the event that the Commission requests it due to concerns that you may have knowingly and willfully made false, fictitious, or fraudulent statements or representations, or used any false writing or document knowing that the writing or document contains any false fictitious or fraudulent statement or entry; and

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(4) Consents to be legally obligated to provide the signed Form TCR (referenced in §249.1800 of this chapter) within seven (7) calendar days of receiving such request from the Commission.

(d) If you submitted original information in writing to the Commission after July 21, 2010 (the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act) but before the effective date of these rules, your submission will be deemed to satisfy the requirements set forth in paragraphs (a) and (b) of this section. If you were an anonymous whistleblower, however, you must provide your attorney with a completed and signed copy of Form TCR (referenced in §249.1800 of this chapter) within 60 days of the effective date of these rules, your attorney must retain the signed form in his or her records, and you must provide of copy of the signed form to the Commission staff upon request by Commission staff prior to any payment of an award to you in connection with your submission. Notwithstanding the foregoing, you must follow the procedures and conditions for making a claim for a whistleblower award described in §§240.21F-10 and 240.21F-11 of this chapter.

§ 240.21F-10 Procedures for making a claim for a whistleblower award in SEC actions that result in monetary sanctions in excess of \$1,000,000.

(a) Whenever 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 Web site a "Notice of Covered Action." Such Notice will be published subsequent to the entry of a final judgment or order that alone, or collectively with other judgments or orders previously entered in the Commission action, exceeds \$1,000,000; or, in the absence of such judgment or order subsequent to the deposit of monetary sanctions exceeding \$1,000,000 into a disgorgement or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002. 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.

(b) To file a claim for a whistleblower award, you must file Form WB-APP, *Application for Award for Original Information Provided Pursuant to Section 21F of the Securities Exchange Act of 1934* (referenced in §249.1801 of this chapter). You must sign this form as the claimant and submit it to the Office of the Whistleblower by mail or fax. 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.

(c) If you provided your original information to the Commission anonymously, you must disclose your identity on the Form WB-APP (referenced in §249.1801 of this chapter), and your identity must be verified in a form and manner that is acceptable to the Office of the Whistleblower prior to the payment of any award.

(d) Once the time for filing any appeals of the Commission's judicial or administrative action has expired, or where an appeal has been filed, after all appeals in the action have been concluded, the staff designated by the Director of the Division of Enforcement ("Claims Review Staff") will evaluate all timely whistleblower award claims submitted on Form WB-APP (referenced in §249.1801 of this chapter) in accordance with the criteria set forth in these rules. In connection with this process, the Office of the Whistleblower may require that you provide additional information relating to your eligibility for an award or satisfaction of any of the conditions for an award, as set forth in §240.21F-(8)(b) of this chapter. Following that evaluation, the Office of the Whistleblower will send you a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award percentage amount.

(e) You may contest the Preliminary Determination made by the Claims Review Staff by submitting a written response to the Office of the Whistleblower setting forth the grounds for your objection to either the denial of an award or the proposed amount of an

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award. The response must be in the form and manner that the Office of the Whistleblower shall require. You may also include documentation or other evidentiary support for the grounds advanced in your response.

(1) Before determining whether to contest a Preliminary Determination, you may:

(i) Within thirty (30) days of the date of the Preliminary Determination, request that the Office of the Whistleblower make available for your review the materials from among those set forth in §240.21F-12(a) of this chapter that formed the basis of the Claims Review Staff's Preliminary Determination.

(ii) Within thirty (30) calendar days of the date of the Preliminary Determination, request a meeting with the Office of the Whistleblower; however, such meetings are not required and the office may in its sole discretion decline the request.

(2) If you decide to contest the Preliminary Determination, you must submit your written response and supporting materials within sixty (60) calendar days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (e)(1) of this section, then within sixty (60) calendar days of the Office of the Whistleblower making those materials available for your review.

(f) If you fail to submit a timely response pursuant to paragraph (e) of this section, then the Preliminary Determination will become the Final Order of the Commission (except where the Preliminary Determination recommended an award, in which case the Preliminary Determination will be deemed a Proposed Final Determination for purposes of paragraph (h) of this section). Your failure to submit a timely response contesting a Preliminary Determination will constitute a failure to exhaust administrative remedies, and you will be prohibited from pursuing an appeal pursuant to §240.21F-13 of this chapter.

(g) If you submit a timely response pursuant to paragraph (e) of this section, then the Claims Review Staff will consider the issues and grounds advanced in your response, along with

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any supporting documentation you provided, and will make its Proposed Final Determination.

(h) The Office of the Whistleblower will then notify the Commission of each Proposed Final Determination. Within thirty 30 days thereafter, any Commissioner may request that the Proposed Final Determination be reviewed by the Commission. If no Commissioner requests such a review within the 30-day period, then the Proposed Final Determination will become the Final Order of the Commission. In the event a Commissioner requests a review, the Commission will review the record that the staff relied upon in making its determinations, including your previous submissions to the Office of the Whistleblower, and issue its Final Order.

(i) The Office of the Whistleblower will provide you with the Final Order of the Commission.

§240.21F-11 Procedures for determining awards based upon a related action.

(a) If you are eligible to receive an award following a Commission action that results in monetary sanctions totaling more than \$1,000,000, you also may be eligible to receive an award based on the monetary sanctions that are collected from a related action (as defined in §240.21F-3 of this chapter).

(b) You must also use Form WB-APP (referenced in §249.1801 of this chapter) to submit a claim for an award in a related action. You must sign this form as the claimant and submit it to the Office of the Whistleblower by mail or fax as follows:

(1) If a final order imposing monetary sanctions has been entered in a related action at the time you submit your claim for an award in connection with a Commission action, you must submit your claim for an award in that related action on the same Form WB-APP (referenced in §249.1801 of this chapter) that you use for the Commission action.

(2) If a final order imposing monetary sanctions in a related action has not been entered at the time you submit your claim for an award in connection with a Commission action, you must submit your claim on Form WB-APP

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(referenced in §249.1801 of this chapter) within ninety (90) days of the issuance of a final order imposing sanctions in the related action.

(c) The Office of the Whistleblower may request additional information from you in connection with your claim for an award in a related action to demonstrate that you directly (or through the Commission) voluntarily provided the governmental agency, regulatory authority or self-regulatory organization the same original information that led to the Commission's successful covered action, and that this information led to the successful enforcement of the related action. The Office of the Whistleblower may, in its discretion, seek assistance and confirmation from the other agency in making this determination.

(d) Once the time for filing any appeals of the final judgment or order in a related action has expired, or if an appeal has been filed, after all appeals in the action have been concluded, the Claims Review Staff will evaluate all timely whistleblower award claims submitted on Form WB-APP (referenced in §249.1801 of this chapter) in connection with the related action. The evaluation will be undertaken pursuant to the criteria set forth in these rules. In connection with this process, the Office of the Whistleblower may require that you provide additional information relating to your eligibility for an award or satisfaction of any of the conditions for an award, as set forth in §240.21F-(8)(b) of this chapter. Following this evaluation, the Office of the Whistleblower will send you a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award percentage amount.

(e) You may contest the Preliminary Determination made by the Claims Review Staff by submitting a written response to the Office of the Whistleblower setting forth the grounds for your objection to either the denial of an award or the proposed amount of an award. The response must be in the form and manner that the Office of the Whistleblower shall require. You may also include documentation or other

evidentiary support for the grounds advanced in your response.

(1) Before determining whether to contest a Preliminary Determination, you may:

(i) Within thirty (30) days of the date of the Preliminary Determination, request that the Office of the Whistleblower make available for your review the materials from among those set forth in §240.21F-12(a) of this chapter that formed the basis of the Claims Review Staff's Preliminary Determination.

(ii) Within thirty (30) days of the date of the Preliminary Determination, request a meeting with the Office of the Whistleblower; however, such meetings are not required and the office may in its sole discretion decline the request.

(2) If you decide to contest the Preliminary Determination, you must submit your written response and supporting materials within sixty (60) calendar days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (e)(1)(i) of this section, then within sixty (60) calendar days of the Office of the Whistleblower making those materials available for your review.

(f) If you fail to submit a timely response pursuant to paragraph (e) of this section, then the Preliminary Determination will become the Final Order of the Commission (except where the Preliminary Determination recommended an award, in which case the Preliminary Determination will be deemed a Proposed Final Determination for purposes of paragraph (h) of this section). Your failure to submit a timely response contesting a Preliminary Determination will constitute a failure to exhaust administrative remedies, and you will be prohibited from pursuing an appeal pursuant to §240.21F-13 of this chapter.

(g) If you submit a timely response pursuant to paragraph (e) of this section, then the Claims Review Staff will consider the issues and grounds that you advanced in your response, along with any supporting documentation you provided, and will make its Proposed Final Determination.

(h) The Office of the Whistleblower will notify the Commission of each

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Proposed Final Determination. Within thirty 30 days thereafter, any Commissioner may request that the Proposed Final Determination be reviewed by the Commission. If no Commissioner requests such a review within the 30-day period, then the Proposed Final Determination will become the Final Order of the Commission. In the event a Commissioner requests a review, the Commission will review the record that the staff relied upon in making its determinations, including your previous submissions to the Office of the Whistleblower, and issue its Final Order.

(i) The Office of the Whistleblower will provide you with the Final Order of the Commission.

§ 240.21F-12 Materials that may form the basis of an award determination and that may comprise the record on appeal.

(a) The following items constitute the materials that the Commission and the Claims Review Staff may rely upon to make an award determination pursuant to §§ 240.21F-10 and 240.21F-11 of this chapter:

(1) Any publicly available materials from the covered action or related action, including:

(i) The complaint, notice of hearing, answers and any amendments thereto;

(ii) The final judgment, consent order, or final administrative order;

(iii) Any transcripts of the proceedings, including any exhibits;

(iv) Any items that appear on the docket; and

(v) Any appellate decisions or orders.

(2) The whistleblower's Form TCR (referenced in § 249.1800 of this chapter), including attachments, and other related materials provided by the whistleblower to assist the Commission with the investigation or examination;

(3) The whistleblower's Form WB-APP (referenced in § 249.1800 of this chapter), including attachments, and any other filings or submissions from the whistleblower in support of the award application;

(4) Sworn declarations (including attachments) from the Commission staff regarding any matters relevant to the award determination;

(5) With respect to an award claim involving a related action, any statements or other information that the

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entity provides or identifies in connection with an award determination, provided the entity has authorized the Commission to share the information with the claimant. (Neither the Commission nor the Claims Review Staff may rely upon information that the entity has not authorized the Commission to share with the claimant); and

(6) Any other documents or materials including sworn declarations from third-parties that are received or obtained by the Office of the Whistleblower to assist the Commission resolve the claimant's award application, including information related to the claimant's eligibility. (Neither the Commission nor the Claims Review Staff may rely upon information that the entity has not authorized the Commission to share with the claimant).

(b) These rules do not entitle claimants to obtain from the Commission any materials (including any pre-decisional or internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim) other than those listed in paragraph (a) of this section. Moreover, the Office of the Whistleblower may make redactions as necessary to comply with any statutory restrictions, to protect the Commission's law enforcement and regulatory functions, and to comply with requests for confidential treatment from other law enforcement and regulatory authorities. The Office of the Whistleblower may also require you to sign a confidentiality agreement, as set forth in § 240.21F-(8)(b)(4) of this chapter, before providing these materials.

§ 240.21F-13 Appeals.

(a) Section 21F of the Exchange Act (15 U.S.C. 78u-6) commits determinations of whether, to whom, and in what amount to make awards to the Commission's discretion. A determination of whether or to whom to make an award may be appealed within 30 days after the Commission issues its final decision to the United States Court of Appeals for the District of Columbia Circuit, or to the circuit where the aggrieved person resides or has his principal place of business. Where the Commission makes an award based on the factors set forth in § 240.21F-6 of this

Securities and Exchange Commission**§ 240.21F-15**

chapter of not less than 10 percent and not more than 30 percent of the monetary sanctions collected in the Commission or related action, the Commission's determination regarding the amount of an award (including the allocation of an award as between multiple whistleblowers, and any factual findings, legal conclusions, policy judgments, or discretionary assessments involving the Commission's consideration of the factors in § 240.21F-6 of this chapter) is not appealable.

(b) The record on appeal shall consist of the Preliminary Determination, the Final Order of the Commission, and any other items from those set forth in § 240.21F-12(a) of this chapter that either the claimant or the Commission identifies for inclusion in the record. The record on appeal shall not include any pre-decisional or internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim (including the staff's Draft Final Determination in the event that the Commissioners reviewed the claim and issued the Final Order).

§ 240.21F-14 Procedures applicable to the payment of awards.

(a) Any award made pursuant to these rules will be paid from the Securities and Exchange Commission Investor Protection Fund (the "Fund").

(b) A recipient of a whistleblower award is entitled to payment on the award only to the extent that a monetary sanction is collected in the Commission action or in a related action upon which the award is based.

(c) Payment of a whistleblower award for a monetary sanction collected in a Commission action or related action shall be made following the later of:

(1) The date on which the monetary sanction is collected; or

(2) The completion of the appeals process for all whistleblower award claims arising from:

(i) The Notice of Covered Action, in the case of any payment of an award for a monetary sanction collected in a Commission action; or

(ii) The related action, in the case of any payment of an award for a monetary sanction collected in a related action.

(d) If there are insufficient amounts available in the Fund to pay the entire amount of an award payment within a reasonable period of time from the time for payment specified by paragraph (c) of this section, then subject to the following terms, the balance of the payment shall be paid when amounts become available in the Fund, as follows:

(1) Where multiple whistleblowers are owed payments from the Fund based on awards that do not arise from the same Notice of Covered Action (or related action), priority in making these payments will be determined based upon the date that the collections for which the whistleblowers are owed payments occurred. If two or more of these collections occur on the same date, those whistleblowers owed payments based on these collections will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

(2) Where multiple whistleblowers are owed payments from the Fund based on awards that arise from the same Notice of Covered Action (or related action), they will share the same payment priority and will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

§ 240.21F-15 No amnesty.

The Securities Whistleblower Incentives and Protection provisions do not provide amnesty to individuals who provide information to the Commission. The fact that you may become a whistleblower and assist in Commission investigations and enforcement actions does not preclude the Commission from bringing an action against you based upon your own conduct in connection with violations of the Federal securities laws. If such an action is determined to be appropriate, however, the Commission will take your cooperation into consideration in accordance with its Policy Statement Concerning Cooperation by Individuals in Investigations and Related Enforcement Actions (17 CFR 202.12).

§ 240.21F-16**§ 240.21F-16 Awards to whistleblowers who engage in culpable conduct.**

In determining whether the required \$1,000,000 threshold has been satisfied (this threshold is further explained in § 240.21F-10 of this chapter) for purposes of making any award, the Commission will not take into account any monetary sanctions that the whistleblower is ordered to pay, or that are ordered against any entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated. Similarly, if the Commission determines that a whistleblower is eligible for an award, any amounts that the whistleblower or such an entity pay in sanctions as a result of the action or related actions will not be included within the calculation of the amounts collected for purposes of making payments.

§ 240.21F-17 Staff communications with individuals reporting possible securities law violations.

(a) No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by § 240.21F-4(b)(4)(i) and § 240.21F-4(b)(4)(ii) of this chapter related to the legal representation of a client) with respect to such communications.

(b) If you are a director, officer, member, agent, or employee of an entity that has counsel, and you have initiated communication with the Commission relating to a possible securities law violation, the staff is authorized to communicate directly with you regarding the possible securities law violation without seeking the consent of the entity's counsel.

INSPECTION AND PUBLICATION OF
INFORMATION FILED UNDER THE ACT

§ 240.24b-1 Documents to be kept public by exchanges.

Upon action of the Commission granting an exchange's application for registration or exemption, the exchange shall make available to public inspection at its offices during reason-

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able office hours a copy of the statement and exhibits filed with the Commission (including any amendments thereto) except those portions thereof to the disclosure of which the exchange shall have filed objection pursuant to § 240.24b-2 which objection shall not have been overruled by the Commission pursuant to section 24(b) of the Act.

(Sec. 24, 48 Stat. 901; 15 U.S.C. 78x)

CROSS REFERENCE: For regulations relating to registration and exemption of exchanges, see §§ 240.6a-1 to 240.6a-3.

[13 FR 8214, Dec. 22, 1948]

§ 240.24b-2 Nondisclosure of information filed with the Commission and with any exchange.

PRELIMINARY NOTE: Except as otherwise provided in this rule, confidential treatment requests shall be submitted in paper format only, whether or not the filer is required to submit a filing in electronic format.

(a) Any person filing any registration statement, report, application, statement, correspondence, notice or other document (herein referred to as the material filed) pursuant to the Act may make written objection to the public disclosure of any information contained therein in accordance with the procedure set forth below. The procedure provided in this rule shall be the exclusive means of requesting confidential treatment of information required to be filed under the Act.

(b) Except as otherwise provided in paragraphs (g) and (h) of this section, the person shall omit from material filed the portion thereof which it desires to keep undisclosed (hereinafter called the confidential portion). In lieu thereof, it shall indicate at the appropriate place in the material filed that the confidential portion has been so omitted and filed separately with the Commission. The person shall file with the copies of the material filed with the Commission:

(1) One copy of the confidential portion, marked "Confidential Treatment," of the material filed with the Commission. The copy shall contain an appropriate identification of the item or other requirement involved and, notwithstanding that the confidential portion does not constitute the whole



KeyCite Blue Flag – Appeal Notification

Petition for Certiorari Docketed by CHARLES M. CERNY, ET AL. v. SECURITIES AND EXCHANGE COMMISSION, U.S., April 4, 2018

707 Fed.Appx. 29

This case was not selected for

publication in West's Federal Reporter.

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1.

WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

United States Court of Appeals, Second Circuit.

Charles M. CERNY, Cliff Buxbaum, Petitioners,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION, Respondent.

16-934-ag

|

September 7, 2017

Synopsis

Background: Petitioners appealed from a final order of the Securities and Exchange Commission (SEC) denying as untimely their claims for whistleblower awards.

Holdings: The Court of Appeals held that:

[1] “extraordinary circumstances” warranting relief from filing deadline required circumstances beyond the claimant’s control;

[2] SEC was not required to provide actual notice to petitioners of their eligibility for whistleblower awards; and

[3] SEC’s notice rule was beyond the scope of appellate review.

Petition for review denied.

West Headnotes (3)

[1] **Securities Regulation**

🔑 Administrative rules and regulations

Securities and Exchange Commission’s (SEC’s) interpretation of “extraordinary circumstances” warranting relief from filing deadline for whistleblower award, to mean circumstances beyond the claimant’s control, was not plainly erroneous or inconsistent with the regulations; accordingly, it was controlling. 5 U.S.C.A. § 706(2)(A, E); 15 U.S.C.A. § 78u-6(f); 17 C.F.R. §§ 240.21F-8(a), 240.21F-10(a).

Cases that cite this headnote

[2] **Securities Regulation**

🔑 Proceedings in general

Securities and Exchange Commission (SEC) was not required to provide actual notice to potential claimants of their eligibility for a whistleblower award. 17 C.F.R. § 240.21F-10(a).

Cases that cite this headnote

[3] **Securities Regulation**

🔑 Scope of review

Securities and Exchange Commission’s (SEC’s) notice rule for whistleblower awards was within the scope of its discretion and therefore beyond the scope of appellate review. 15 U.S.C.A. § 78u-6(j); 17 C.F.R. § 240.21F-10(a).

Cases that cite this headnote

Appeal from a final order of the Securities and Exchange Commission.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the petition for review is **DENIED**.¹

¹ Petitioners' motion to compel the Securities and Exchange Commission to complete the administrative record, and the motions of non-parties Denise Warren and Ahmed Amr for leave to file *pro se* amicus briefs in support of petitioners are also denied.

Attorneys and Law Firms

FOR PETITIONERS: CHARLES M. CERNY, pro se, Brooklyn, New York, and Cliff Buxbaum, pro se, Thousand Oaks, California.

FOR RESPONDENT: STEPHEN G. YODER, Senior Litigation Counsel, Anne K. Small, General Counsel, Sanket J. Bulsara, Deputy General Counsel, Michael A. Conley, Solicitor, Catherine A. Broderick, Securities and Exchange Commission, Washington, D.C.

PRESENT: DENNY CHIN, SUSAN L. CARNEY, Circuit Judges.*

* Because Judge Ralph K. Winter, originally assigned to this panel, recused himself from this case, the remaining two judges issue this order in accordance with Second Circuit Internal Operating Procedure E(b).

Opinion

SUMMARY ORDER

Petitioners Charles M. Cerny and Cliff Buxbaum, proceeding *pro se*, seek review of a March 14, 2016 final order of the Securities and Exchange Commission (the "Commission") denying as untimely their claims for whistleblower awards. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

After discovering a notice on the Commission's website advising of the case's resolution, a development that made them potentially eligible for whistleblower awards based on securities fraud judgments obtained by the Commission, petitioners filed claims with the Commission seeking such awards. The notice listed the deadline to

file a claim as June 3, 2012, and petitioners submitted separate claims in 2014.² The Commission denied the claims, concluding that they were untimely and that petitioners had not demonstrated extraordinary circumstances warranting relief from the time bar. Petitioners timely petitioned for review.

² Buxbaum filed his March 30, 2014 claim on behalf of himself and three other individuals, including Cerny. Cerny, who had not signed Buxbaum's claim, subsequently submitted his own claim on July 14, 2014.

We review the Commission's whistleblower award determinations "in accordance with section 706 of Title 5." 15 U.S.C. § 78u-6(f). Accordingly, we will set aside an agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or if it is "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E). A whistleblower who wishes to apply for an award must submit an application within ninety days of the publication of a "Notice of Covered Action" on the Commission's website, "or the claim will be barred." 17 C.F.R. § 240.21F-10(a). Nevertheless, "the Commission may, in its sole discretion, waive any of the[] procedures [described in § 240.21F-10] based upon a showing of extraordinary circumstances." *Id.* § 240.21F-8(a).

[1] Petitioners acknowledge that they failed to meet the deadline, but argue that the quality of the information they provided to the Commission and the Commission's *31 alleged failure to properly catalogue petitioners' submissions constituted extraordinary circumstances warranting relief from the filing deadline. An agency's interpretation of its regulations, "regardless of the formality of the procedures used to formulate it, is 'controlling unless plainly erroneous or inconsistent with the regulation[s].'" *Encarnacion ex rel. George v. Astrue*, 568 F.3d 72, 78 (2d Cir. 2009) (alteration in original) (quoting *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997)). The Commission has consistently interpreted "extraordinary circumstances" to require that a claimant demonstrate "that the reason for the failure to timely file was beyond the claimant's control." Special App'x at 3; see also *Claim for Awards in Connection with Redacted & Redacted*, Exchange Act Release No. 72,659, 2014 WL 3613224, at *3 (July 23, 2014); *Claim for Awards in Connection with Redacted Notice of Covered Action Redacted*, Exchange Act Release No. 72,178, 2014 WL 1998521, at *2 (May 16, 2014); cf. *Application*

of PennMont Secs., Exchange Act Release No. 61,967, 2010 WL 1638720, at *4-5 (Apr. 23, 2010) (comparing “extraordinary circumstances” in another Commission rule to the doctrine of equitable tolling), *pet. denied*, 414 Fed.Appx. 465 (3d Cir. 2011). Petitioners fail to demonstrate how the Commission’s interpretation is plainly erroneous or inconsistent with the regulations. Accordingly, we conclude that the Commission’s interpretation is controlling, *see Encarnacion*, 568 F.3d at 78, and, therefore, that the Commission did not abuse its discretion by determining that petitioners had not established extraordinary circumstances warranting relief from the claim filing deadline.

[2] [3] Petitioners also argue that the untimeliness of their applications should have been excused because they never received actual notice from the Commission of their potential eligibility for a whistleblower award. Under the relevant regulation, however, the Commission is not required to provide actual notice to potential claimants. It provides simply: “Whenever 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 Web site a ‘Notice of Covered Action.’ ” 17 C.F.R. § 240.21F-10(a); *see also Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34,300, 34,342-43 (June 13, 2011) (rejecting commenters’ request that the Office of the Whistleblower be “required to contact whistleblowers directly to inform them [of] a covered action”). Accordingly, the Commission did not abuse its discretion by declining to excuse the untimeliness of petitioners’ claims based on their failure to receive actual notice from the Commission. To the extent petitioners challenge the notice rule itself as arbitrary or capricious, adopting such a rule is within the scope of the Commission’s discretion, 15 U.S.C. § 78u-6(j), and therefore lies beyond the scope of our current review.

We have considered petitioners’ remaining arguments and conclude they are without merit. Accordingly, we **DENY** the petition for review.

All Citations

707 Fed.Appx. 29

2020 WL 1066008

Only the Westlaw citation is currently available.
United States Court of Appeals, Seventh Circuit.

Joseph DUNN, et al., Plaintiffs-Appellees

v.

WELLS FARGO BANK, N.A., Defendant-Appellee

Appeal of: Adam Hoipkemier

No. 20-1080

Submitted February 11, 2020

Decided February 25, 2020

Originating Case Information:

District Court No: 1:17-cv-00481, Northern District of Illinois, Eastern Division, District Judge Manish S. Shah

Attorneys and Law Firms

Daniel Morris Hutchinson, Attorney, Lief, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA, Andrew Kaufman, Attorney, Lief, Cabraser, Heimann & Bernstein, LLP, Nashville, TN, Jonathan D. Selbin, Attorney, Lief, Cabraser, Heimann & Bernstein, LLP, New York, NY, for Plaintiffs-Appellees

Kevin Epps, Attorney, Kevin Epps, Watkinsville, GA, for Appellant

Michael H. Bornhorst, Attorney, Mayer Brown LLP, Chicago, IL, Mark D. Lonergan, Attorney, Rebecca Snavely Saelao, Attorney, Severson & Werson, San Francisco, CA, for Defendant-Appellee

Before KENNETH F. RIPPLE, Circuit Judge, DAVID F. HAMILTON, Circuit Judge, AMY C. BARRETT, Circuit Judge

ORDER

*1 The following are before the court:

1. **PLAINTIFFS-APPELLEES’ MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY AFFIRMANCE**, filed on January 21, 2020, by Attorney Jonathan Selbin.

2. **APPELLANT’S RESPONSE IN OPPOSITION TO PLAINTIFFS-APPELLEES’ MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY AFFIRMANCE**, filed on February 3, 2020, by counsel.

3. **REPLY IN SUPPORT OF PLAINTIFFS-APPELLEES’ MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY AFFIRMANCE**, filed on February 7, 2020, by Attorney Jonathan Selbin.

This court has carefully reviewed the final order of the district court, the record on appeal, and the motions papers. Based on this review, the court has determined that any issues which could be raised are insubstantial and that further briefing would not be helpful to the court’s consideration of the issues. *See Taylor v. City of New Albany*, 979 F.2d 87 (7th Cir. 1992); *Mather v. Village of Mundelein*, 869 F.2d 356, 357 (7th Cir. 1989) (per curiam) (court can decide case on motions papers and record where briefing would be not assist the court and no member of the panel desires briefing or argument). “Summary disposition is appropriate ‘when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists.’ ” *Williams v. Chrans*, 42 F.3d 1137, 1139 (7th Cir. 1995), citing *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994).

Hoipkemier argues that Judge Shah said his own testimony was not sufficient to prove his membership in the class. Stated so broadly, such a ruling would not be correct. A class member’s own self-serving testimony can be sufficient to establish his or her claim. *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 668—69 (7th Cir. 2015) (affirming class certification and noting that conviction for treason is only type of case in American law where testimony of one witness is legally insufficient to prove a fact). That is not, however, what the district court ruled. The problem here is that Hoipkemier’s account was so vague---no dates, no subject matter, and not even whether the calls were “artificial or pre-recorded”---that the court reasonably discounted it in comparison to the evidence from Wells Fargo that Hoipkemier never received one of the disputed types of calls. Accordingly,

IT IS ORDERED that the appellees’ motion is **GRANTED**, and the judgment of the district court is summarily **AFFIRMED**.

All Citations

Not Reported in Fed. Rptr., 2020 WL 1066008

End of Document

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APPENDIX

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Record Doc. 1 A1
 Notice of Covered Action No. 2016-86, *In the Matter of Bank of New York Mellon*, Administrative Proceeding File No. 3-17286, Notice of Covered Action: 2016 Archive, Commission Office of the Whistleblower (July 29, 2016), available at <https://www.sec.gov/whistleblower/nocas?aId=edit-year&year=2016>.¹

Record Doc. 6 A4
 Amended Form WB-APP: Application for Award for Original Information Submitted Pursuant to Section 21F of the Securities Exchange Act of 1934, with attachments, submitted by Richard J. Herber (“Herber”), dated September 5, 2017.

Record Doc. 7 [Redacted]² A23
 Declaration of Benjamin J. Hanauer, Senior Trial Counsel, Commission’s Division of Enforcement, dated December 11, 2019.

Record Doc. 8 [Redacted] A30
 Declaration of Donald A. Ryba, Accountant, Commission’s Division of Enforcement, dated December 12, 2019.

Record Doc. 9 [Redacted] A34
 Declaration of Michael H. Hurwitz, Attorney, Commission’s Division of Enforcement, Office of the Whistleblower, dated December 11, 2019.

¹ For brevity, the Appendix includes only the most relevant pages of the Notice of Covered Action as printed out from the Commission’s website on July 29, 2020.

² As explained in the Commission’s motion, the record documents have been redacted to the extent that they contain information that could reasonably be expected to reveal the identity of the other individual whose whistleblower award claim was decided in the same final order. *See* Exchange Act Section 21F(h)(2)(A), 15 U.S.C. § 78u-6(h)(2)(A). The redactions do not remove information essential to the Court’s consideration of Herber’s petition.

Record Doc. 10 [Redacted] A37
Preliminary Determination of the Claims Review Staff, Notice of Covered
Action No. 2016-086, with cover letter from Jane A. Norberg (“Norberg”),
Chief, Commission’s Office of the Whistleblower, both dated November 5,
2019.

Record Doc. 13..... A43
Request for Reconsideration, submitted by Herber, dated March 6, 2020.

Record Doc. 14 [Redacted] A56
Order Determining Whistleblower Award Claim, Securities Exchange Act
Release No. 89002, Whistleblower Award Proceeding File No. 2020-20,
with cover letter from Norberg, both dated June 4, 2020.

Notice of Covered Actions

Year:

Subscribe 

Notice No.: 2016-172

Action:

[In the Matter of EZTD Inc.](#)

Administrative Proceeding File No.: 3-17673

Case filed: November 10, 2016

Qualifying Judgment/Order: November 10, 2016

12/31/2016

03/31/2017

Notice No.: 2016-171

Action:

[SEC v. Southlake Resources Group, LLC, Cody M. Winters, and Nicholas R. Hamilton](#)

Case number: 16-cv-00992 (United States District Court for the Northern District of Texas)

Case filed: October 24, 2016

Qualifying Judgment/Order: October 27, 2016

12/31/2016

03/31/2017

Case: 20-2174 Document: 7

Filed: 08/20/2020

Pages: 114

Notice No.: 2016-86**Action:**[In the Matter of Bank of New York Mellon](#)**Administrative Proceeding File No.:** 3-17286**Date Filed:** June 13, 2016**Qualifying Judgment/Order:** June 13, 2016

07/29/2016

10/27/2016

Notice No.: 2016-85**Action:**[In the Matter of Analogic Corporation and Lars Frost](#)**Administrative Proceeding File No.:** 3-17305**Date Filed:** June 21, 2016**Qualifying Judgment/Order:** June 21, 2016

07/29/2016

10/27/2016

Notice No.: 2016-84**Action:**[SEC v. John Scott Clark](#)**Case number:** 16-cv-00040 (United States District Court for the District of Utah)**Case filed:** March 31, 2016**Qualifying Judgment/Order:** May 26, 2016

06/30/2016

09/28/2016

Case: 20-2174

Document: 7

Filed: 08/20/2020

Pages: 114

Notice No.: 2016-2**Action:**[SEC v. John Clifford Williams](#)**Case number:** 15-cv-00819 (United States District Court for the Western District of Missouri)**Case filed:** Month DD, YYYY**Qualifying Judgment/Order:** October 20, 2015

01/29/2016

04/28/2016

Notice No.: 2016-1**Action:**[SEC v. Douglas E. Cowgill and Professional Investment Management, Inc.](#)**Case number:** 14-cv-00396 (United States District Court for the Southern District of Ohio)**Case filed:** April 29, 2014**Qualifying Judgment/Order:** December 22, 2015

01/29/2016

04/28/2016

1 to 172 of 172 items

Received in OWB 09/11/2017

3901 N. Washington Rd.
Fort Wayne, IN 46804-1817
Richard J Herber@msn.com
(203) 644-2729 cell
September 5, 2017

SEC Office of the Whistleblower
100 F Street NE
Washington, EC 20549-5631

Dear Office of the Whistleblower,

I am resubmitting From WB-APP per your letter (attached) dated August 31, 2017 due to a deficiency.

I have corrected the deficiency and now come again filing my new claim.

Thank you.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Richard J. Herber', with a long, sweeping horizontal stroke at the end.

Richard J. Herber

Received in OWB 09/11/2017



DIVISION OF
ENFORCEMENT

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
August 31, 2017

Jane Norberg, Chief
Office of the Whistleblower
Phone: (202) 551-4790
Fax: (703) 813-9322

Mr. Richard J. Herber
3901 N. Washington Road
Fort Wayne, IN 46804-1817

**Re: Notice of Covered Action 2016-86
In the Matter of Bank of New York Mellon**

Dear Mr. Herber:

This will confirm our receipt of your application for a whistleblower award via Form WB-APP dated August 17, 2017 and supporting materials, for the above referenced matter.

While you have properly completed part of the form related to the SEC's action, you have not properly completed Section E of the WB-APP which requires that you provide a case name and number for any "Claims Pertaining to Related Actions" for which you seek an award. You failed to fully complete Section E of the Form WB-APP. **Accordingly, you have not submitted a properly filed whistleblower award application for a Related Action and we cannot consider your claim for an Related Action award at this time.** The deficiency I have described in this paragraph applies only to your attempt to make a claim for a Related Action and does not apply to the above underlying referenced matter identified in Notice of Covered Action 2016-86.

The Office of the Whistleblower will evaluate your claim related to the SEC's Covered Action and may contact you if we need additional information related to that claim. In the meantime, please retain this notice for future reference and keep us apprised of any change in your contact information. Of course, feel free to call, fax, or mail us any questions you may have.

If you would like to resubmit a Form WB-APP for the Related Action, please feel free to do so in the time period set forth in our whistleblower rules. If you have any questions, please do not hesitate to call us at (202) 551-4790.

Sincerely,

A handwritten signature in black ink, appearing to read "Jane Norberg", written over a printed name.

Jane Norberg

Received in OWB 09/11/2017

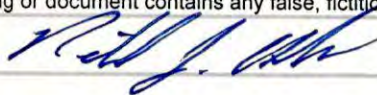
OMB APPROVAL	
OMB Number	3235-0686
Expires:	April 30, 2018
Estimated average burden hours per response.	2

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549**

FORM WB-APP

**APPLICATION FOR AWARD FOR ORIGINAL INFORMATION SUBMITTED
PURSUANT TO SECTION 21F OF THE SECURITIES EXCHANGE ACT OF 1934**

A. APPLICANT'S INFORMATION (REQUIRED FOR ALL SUBMISSIONS)			
1. Last Name	HERBER	First	RICHARD
		M.I.	J
		Social Security No.	[REDACTED]
2. Street Address	3901 N. WASHINGTON RD.		Apartment/ Unit #
City	FORT WAYNE	State/ Province	IN
		ZIP Code	46804-1817
		Country	USA
3. Telephone	(203) 644-2729	Alt. Phone	
		E-mail Address	RICHARD_J_HERBER@MSN.COM
B. ATTORNEY'S INFORMATION (IF APPLICABLE - SEE INSTRUCTIONS)			
1. Attorney's Name			
2. Firm Name			
3. Street Address			
City	State/ Province	ZIP Code	Country
4. Telephone	Fax	E-mail Address	
C. TIP/COMPLAINT DETAILS			
1. Manner in which original information was submitted to SEC: SEC website <input type="checkbox"/> Mail <input type="checkbox"/> Fax <input type="checkbox"/> Other <input checked="" type="checkbox"/> US ATTORNEY			
2a. Tip, Complaint or Referral number		2b. Date TCR referred to in 2a submitted to SEC / /	
2c. Subject(s) of the Tip, Complaint or Referral: BNY MELLON FX FRAUD / FALSE CLAIMS ACT			
D. NOTICE OF COVERED ACTION			
1. Date of Notice of Covered Action to which claim relates: 7/29/16		2. Notice Number: 2016-86	
3a. Case Name IN THE MATTER BNY MELLON		3b. Case Number 3-17286	
E. CLAIMS PERTAINING TO RELATED ACTIONS <i>(ALSO SEE ATTACHED MARK E.)</i>			
1. Name of agency or organization to which you provided your information US ATTORNEY FOR SOUTHERN DISTRICT OF NEW YORK			
2. Name and contact information for point of contact at agency or organization, if known, PIERRE ARMOND, LARRY FOGELMAN, CALLAN SMITH			
3a. Date you provided your information 1/23/12		3b. Date action filed by agency/organization 10/4/11	
4a. Case Name USA V. THE BANK OF NEW YORK MELLON and DAVID NICHOLS		4b. Case number 1:11-CV-06969-LAK	
F. ELIGIBILITY REQUIREMENTS AND OTHER INFORMATION			
1. Are you, or were you at the time you acquired the original information you submitted to us, a member, officer or employee of the Department of Justice, the Securities and Exchange Commission ("SEC" or "Commission"), the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, or the Municipal Securities Rulemaking Board? YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>			

2. Are you, or were you at the time you acquired the original information you submitted to us, a member, officer or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Securities Exchange Act of 1934 (15 U.S.C. §78c(a)(52))?	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
3. Did you obtain the information you are providing to us through the performance of an engagement required under the federal securities laws by an independent public accountant?	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
4. Did you provide the information identified in Section C above pursuant to a cooperation agreement with the SEC or another agency or organization?	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
5. Are you a spouse, parent, child, or sibling of a member or employee of the Commission, or do you reside in the same household as a member or employee of the Commission?	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
6. Did you acquire the information you are providing to us from any person described in questions F1 through F5?	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
7. If you answered "yes" to any of questions 1 through 6 above, please provide details. Use additional sheets if necessary.	
8a. Did you provide the information identified in Section C above before you (or anyone representing you) received any request, inquiry or demand that relates to the subject matter of your submission (i) from the SEC, (ii) in connection with an investigation, inspection or examination by the Public Company Accounting Oversight Board, or any self-regulatory organization; or (iii) in connection with an investigation by the Congress, any other authority of the federal government, or a state Attorney General or securities regulatory authority?	
YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	
8b. If you answered "No" to question 8a, please provide details. Use additional sheets if necessary.	
9a. Are you currently a subject or target of a criminal investigation, or have you been convicted of a criminal violation, in connection with the information upon which your application for an award is based?	
YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	
9b. If you answered "Yes" to question 9a, please provide details. Use additional sheets if necessary.	
G. ENTITLEMENT TO AWARD Explain the basis for your belief that you are entitled to an award in connection with your submission of information to us, or to another agency in a related action. Provide any additional information you think may be relevant in light of the criteria for determining the amount of an award set forth in Rule 21F-6 under the Securities Exchange Act of 1934. Include any supporting documents in your possession or control, and attach additional sheets, if necessary. (PLEASE SEE ATTACHED.)	
H. DECLARATION I declare under penalty of perjury under the laws of the United States that the information contained herein is true, correct and complete to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if, in my submission of information, my other dealings with the SEC, or my dealings with another authority in connection with a related action, I knowingly and willfully make any false, fictitious, or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.	
Signature 	Date 9/5/2017

E. CLAIMS PERTAINING TO RELATED ACTIONS

1. Name of agency or organization to which you provided your information:

INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS LOCAL 39
PENSION TRUST FUND

2. Name and contact information for point of:

CHRISTOPHER LEBSOCK

Contact at agency or organization, if known.

CHRISTOPHER LEBSOCK

3a. Date you provided your information:

2/9/2012

3b. Date action filed by agency/organization:

1/5/2012

4a. Case Name

INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS LOCAL 39
PENSION TRUST FUND v. THE BANK OF NEW YORK MELLON CORPORATION, THE BANK
OF NEW YORK MELLON, THE BANK OF NEW YORK COMPANY, INC., THE BANK OF NEW
YORK, and THE BANK OF NEW YORK MELLON TRUST COMPANY, NATIONAL
ASSOCIATION

4b. Case number:

3:11-CV-03620

Please note that this organization is specifically cited in 1:11-cv-06969-LAK as a "Customer Class Action."

¹ The Customer Class Actions are: *Southeastern Pennsylvania Transportation Authority v. The Bank of New York Mellon Corp.*, 12 Civ. 3066 (LAK) (S.D.N.Y.); *International Union of Operating Engineers, Stationary Engineers Local 39 Trust Fund v. The Bank of New York Mellon Corporation*, 12 Civ. 3067 (LAK) (S.D.N.Y.); *Ohio Police & Fire Pension Fund v. The Bank of New York Mellon Corporation*, 12 Civ. 3470 (LAK) (S.D.N.Y.); *Carver v. The Bank of New York Mellon*, 12 Civ. 9248 (LAK) (S.D.N.Y.); and *Fletcher v. The Bank of New York Mellon*, 14 Civ. 5496 (LAK) (S.D.N.Y.).

Privacy Act Statement

This notice is given under the Privacy Act of 1974. We are authorized to request information from you by Section 21F of the Securities Exchange Act of 1934. Our principal purpose in requesting this information is to assist in our evaluation of your eligibility and other factors relevant to our determination of whether to pay a whistleblower award to you under Section 21F of the Exchange Act.

However, the information provided may be used by SEC personnel for purposes of investigating possible violations of, or to conduct investigations authorized by, the federal securities law; in proceedings in which the federal securities laws are in issue or the SEC is a party; to coordinate law enforcement activities between the SEC and other federal, state, local or foreign law enforcement agencies, securities self regulatory organizations, and foreign securities authorities; and pursuant to other routine uses as described in SEC-42 "Enforcement Files."

Furnishing this information is voluntary, but a decision not to do so, or failure to provide complete information, may result in our denying a whistleblower award to you, or may affect our evaluation of the appropriate amount of an award. Further, if you are submitting this information for the SEC whistleblower program and you do not execute the Declaration, you may not be considered for an award.

Questions concerning this form may be directed to the SEC Office of the Whistleblower, 100 F Street, NE, Washington, DC 20549-5631, Tel. (202) 551-4790, Fax (703) 813-9322.

General

- This form should be used by persons making a claim for a whistleblower award in connection with information provided to the SEC or to another agency in a related action. In order to be deemed eligible for an award, you must meet all the requirements set forth in Section 21F of the Securities Exchange Act of 1934 and the rules thereunder.
- You must sign the Form WB-APP as the claimant. If you provided your information to the SEC anonymously, you must now disclose your identity on this form and your identity must be verified

in a form and manner that is acceptable to the Office of the Whistleblower prior to the payment of any award.

- If you are filing your claim in connection with information that you provided to the SEC, then your Form WB-APP, and any attachments thereto, **must be received by the SEC Office of the Whistleblower within ninety (90) days of the date of the Notice of Covered Action to which the claim relates.**
- If you are filing your claim in connection with information you provided to another agency in a related action, then your Form WB-APP, and any attachments thereto, must be received by the SEC Office of the Whistleblower as follows:
 - If a final order imposing monetary sanctions has been entered in a related action at the time you submit your claim for an award in connection with a Commission action, **you must submit your claim for an award in that related action on the same Form WB-APP that you use for the Commission action.**
 - If a final order imposing monetary sanctions in a related action has not been entered at the time you submit your claim for an award in connection with a Commission action, **you must submit your claim on Form WB-APP within ninety (90) days of the issuance of a final order imposing sanctions in the related action.**
- You must submit your Form WB-APP to us in one of the following two ways:
 - By mailing or delivering the signed form to the SEC Office of the Whistleblower, 100 F Street NE, Washington, DC 20549-5631; or
 - By faxing the signed form to (703) 813-9322.

Instructions for Completing Form WB-APP

Section A: Applicant's Information

Questions 1-3: Provide the following information about yourself:

- First and last name, and middle initial
- Social Security Number
- Complete address, including city, state and zip code
- Telephone number and, if available, an alternate number where you can be reached
- E-mail address

Section B: Attorney's Information. If you are represented by an attorney in this matter, provide the information requested. If you are not represented by an attorney in this matter, leave this Section blank.

Questions 1-4: Provide the following information about the attorney representing you in this matter:

- Attorney's name
- Firm name
- Complete address, including city, state and zip code
- Telephone number and fax number, and
- E-mail address.

Section C: Tip/Complaint Details

Question 1: Indicate the manner in which your original information was submitted to the SEC.

Question 2a: Include the TCR (Tip, Complaint or Referral) number to which this claim relates.

Question 2b: Provide the date on which you submitted your information to the SEC.

Question 2c: Provide the name of the individual(s) or entity(s) to which your complaint related.

Section D: Notice of Covered Action

The process for making a claim for a whistleblower award begins with the publication of a "Notice of Covered Action" on the Commission's website. This Notice is published whenever a judicial or administrative action brought by the Commission results in the imposition of monetary

sanctions exceeding \$1,000,000. The Notice is published on the Commission's website subsequent to the entry of a final judgment or order in the action that by itself, or collectively with other judgments or orders previously entered in the action, exceeds the \$1,000,000 threshold.

Question 1: Provide the date of the Notice of Covered Action to which this claim relates.

Question 2: Provide the notice number of the Notice of Covered Action.

Question 3a: Provide the case name referenced in Notice of Covered Action.

Question 3b: Provide the case number referenced in Notice of Covered Action.

Section E: Claims Pertaining to Related Actions

Question 1: Provide the name of the agency or organization to which you provided your information.

Question 2: Provide the name and contact information for your point of contact at the agency or organization, if known.

Question 3a: Provide the date on which you provided your information to the agency or organization referenced in question E1.

Question 3b: Provide the date on which the agency or organization referenced in question E1 filed the related action that was based upon the information you provided.

Question 4a: Provide the case name of the related action.

Question 4b: Provide the case number of the related action.

Section F: Eligibility Requirements

Question 1: State whether you are currently, or were at the time you acquired the original information that you submitted to the SEC, a member, officer, or employee of the Department of Justice; the Securities and Exchange Commission; the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision; the Public Company Accounting Oversight Board; any law enforcement organization; or any national securities exchange, registered securities association, registered clearing agency, or the Municipal Securities Rulemaking Board.

- Question 2: State whether you are, or were you at the time you acquired the original information you submitted to the SEC, a member, officer or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Securities Exchange Act of 1934.
- Section 3(a)(52) of the Exchange Act (15 U.S.C. §78c(a)(52)) currently defines "foreign financial regulatory authority" as "any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above."
- Question 3: Indicate whether you acquired the information you provided to the SEC through the performance of an engagement required under the Federal securities laws by an independent public accountant.
- Question 4: State whether you provided the information submitted to the SEC pursuant to a cooperation agreement with the SEC or with any other agency or organization.
- Question 5: State whether you are a spouse, parent, child or sibling of a member or employee of the Commission, or whether you reside in the same household as a member or employee of the Commission.
- Question 6: State whether you acquired the information you are providing to the SEC from any individual described in Question 1 through 5 of this Section.
- Question 7: If you answered "yes" to questions 1 through 6, please provide details.
- Question 8a: State whether you provided the information identified to the SEC before you (or anyone representing you) received any request, inquiry or demand from the SEC,

Congress, or any other federal, state or local authority, or any self regulatory organization, or the Public Company Accounting Oversight Board about a matter to which the information in your submission was relevant.

Question 8b: If you answered "no" to questions 8a, please provide details. Use additional sheets if necessary.

Question 9a: State whether you are the subject or target of a criminal investigation or have been convicted of a criminal violation in connection with the information upon which your application for award is based.

Question 9b: If you answered "yes" to question 9a, please provide details, including the name of the agency or organization that conducted the investigation or initiated the action against you, the name and telephone number of your point of contact at the agency or organization, if available and the investigation/case name and number, if applicable. Use additional sheets, if necessary.

Section G: Entitlement to Award

This section is optional. Use this section to explain the basis for your belief that you are entitled to an award in connection with your submission of information to us or to another agency in connection with a related action. Specifically address how you believe you voluntarily provided the Commission with original information that led to the successful enforcement of a judicial or administrative action filed by the Commission, or a related action. Refer to Rules 21F-3 and 21F-4 under the Exchange Act for further information concerning the relevant award criteria. You may attach additional sheets, if necessary.

Rule 21F-6 under the Exchange Act provides that in determining the amount of an award, the Commission will evaluate the following factors: (a) the significance of the information provided by a whistleblower to the success of the Commission action or related action; (b) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the

Commission action or related action; (c) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and (d) whether the award otherwise enhances the Commission's ability to enforce the federal securities laws, protect investors, and encourage the submission of high-quality information from whistleblowers. Address these factors in your response as well.

Additional information about the criteria the Commission may consider in determining the amount of an award is available on the Commission's website at www.sec.gov/whistleblower.

Section H: Declaration

This section must be signed by the claimant.

G. ENTITLEMENT TO AWARD:

I was a Foreign Exchange Salesperson who worked in The Bank of New York Mellon's small Foreign Exchange Group in Pittsburgh, Pennsylvania from about October 2010 to December 2010. I had about 20 years Foreign Exchange sales experience prior to joining BNYM. I started my banking career right out of college going Wachovia Bank in their Corporate Banking Associate Program. I have a total of about 20 years experience working as a Foreign Exchange Salesperson at large banks including Bank of America.

I was one of about fifteen people in BNY Mellon's Pittsburgh FX Group. I was hired through BNYM's New York office by Jorge Rodriguez and I also work with Dave Nichols. I also worked with informant Grant Wilson who is mentioned in the settlement of this case. Mr. Wilson was a Trader while I was a Salesperson. I would get foreign currency prices from Mr. Wilson and then they had me enter into standing instruction trades with bank clients. There was an elaborate "standing instructions" procedure which including how to book the trades with the client and also how to falsify fake time stamps onto the trades in the client confirmations. This exact procedure is described in Administrative Proceeding, File No. 3-17286. I could not have described it any better.

I had worked in the business for many years and never encountered this kind of "mill." What I mean it was an assembly line of elaborate procedures in place to make sure the client got the absolutely worse rate possible so the bank could profit the most. Prior to joining BNYM, I would speak with customers over the telephone and quote rates and they would execute the trade. At BNYM, it was all done through "standing instructions." I complained to my manager about this issue. I was terminated in December 2010 because of my complaints.

Soon after, I relocated back to Connecticut. I contacted several employment attorneys and also tried to report this fraud issue to as many law enforcement agencies as possible. *The Wall Street Journal* even contacted me as they were writing many articles on the BNY Mellon FX lawsuits. I contacted so many law enforcement agencies, and it was so long ago, that I do not remember if I filed a whistleblower complaint with the SEC. I probably did. Perhaps you can look? Several pension fund clients that had filed suit against BNYM in regards to the FX lawsuits also contacted me. I even reported the fraud to BNYM Enforcements & Investigations Department.

I was contacted by the U.S. Attorney's Office for the Southern District of New York on January 23, 2012. The person who made contact with me was Ms. Callan Smith. She told me that she wanted to have a conference call with her and several of her superiors regarding my complaint and experience working in BNYM's Pittsburgh FX Group. We had a lengthy conference call with her and her superiors. I told them everything. They wanted to know exactly how my experience working at BNYM FX was different then working at any of the other FX banks. I explained everything. I also emailed them the "standing instructions" booking procedures that I took with me when I left BNYM. It had all the information in it including how to issues the fake time stamps to the client so to falsify the time the trade was executed. I have attached our correspondence.

I strongly feel I am owed an award. According to 21F-6(1) I provided significant information to law enforcement. I was part of a small group and there were maybe about 5 of us actually assigned to booking trades using SI procedures. According to 21F-6(i) the nature of my information had enabled law enforcement to successfully take action. Per 21F-6(ii) the degree to which my information provided supported one or more successful claims brought in the Commission of related action.

I provided complete assistance per 21F-6(2). I made myself available at all times and provided all information at all times. My information was also timely per 21F-6 (2)(ii). I also want to be crystal clear that I did experience unique and severe hardship as a whistleblower per 21F-6 (2)(vi). I was never able to recover from this experience. I was terminated by BNYM in December 2010. I moved back home to Connecticut and tried to interview and get a job at several other NYC FX banks. It was impossible to find work. It was impossible to pay my bills. My small 1BR condo went into foreclosure (attached). I developed a severe illness and had to go on Social Security Disability Insurance (SSDI). I lost my condo in 2014. Today, it has been 7 years since leaving BNYM. I am living on meager SSDI and have a miserable existence. I feel that I am owed an award for my help in reporting the whistleblower violations. Again, there were only a handful of employees like myself who could have come forward and acted as a whistleblower. I also understand that this is the largest whistleblower payout to date and it has changed the industry. I please ask you carefully take the time to consider my application.



BNY MELLON

September 20, 2010

Richard Herber
46 Glen Ridge
Wilton, Connecticut, 06897

Dear Richard,

We would like to offer you employment with a wholly owned subsidiary of BNY Mellon, as a Senior Sales II, FX in our Global Markets Division. You will be reporting to Frank Pusateri and receive a base salary at an annual rate equal to \$125,000. You will be appointed as a Vice President.

You will be eligible to participate in the Global Markets Incentive Plan. Awards under these plans are made following the guidelines in the Plan description. To be eligible to receive awards from this incentive plan, you must be employed by BNY Mellon or its subsidiaries on the date of the payment or grant of the award.

You will receive relocation assistance that is subject to a one-year repayment agreement. The repayment agreement states that if you voluntarily terminate employment or are terminated for cause within one year of your start date in the new work location or the date you sign the repayment agreement with BNY Mellon, you will repay up to 100% of reimbursed expenses. We will forward this letter to Relocation Services, who in turn, will prepare a relocation package for mailing to your home address.

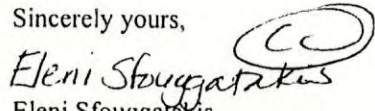
Enclosed is a summary of benefit coverage for which you are currently eligible. Detailed information about the Flexible Benefit Plan will be discussed during your orientation session, and you will be eligible to elect other available health coverage, life insurance and AD&D Coverage than that provided automatically.

All new employees participate in a general orientation session. Your orientation session is scheduled for 9:00 A.M. on Monday, November 1, 2010 at the BNY Mellon Center, 500 Grant Street, A/V Center, 12th Floor, Room 1210. By federal law, you must be prepared to produce documents on your first day of employment to prove your identity and employment eligibility in the United States. A list of acceptable documents is enclosed. If you are unable to produce the required documentation within three business days of your start date, your employment cannot continue. If you have paid an occupational privilege tax for 2010, please bring a pay stub or a receipt from your previous employer as proof of payment.

It is the policy of BNY Mellon to fingerprint all employees of our entities that are regulated by the Federal Deposit Insurance Act and or the Securities Exchange Act of 1934. We will also conduct standard background and reference checks. And, as part of our commitment to a drug free workplace, you are required to take a drug test within two business days of accepting this offer of employment. Additionally, you are required to have your fingerprints taken at 101 Barclay Street within two business days of accepting this offer of employment. Please contact me to schedule an appointment. This offer is contingent upon a negative result on the drug test and the successful and favorable completion of the background and reference check and fingerprint record. Your employment with BNY Mellon, its subsidiaries, affiliates, successors, related companies and assigns will remain at all times at will, and the employment relationship may be terminated at any time with or without cause.

We are confident that you will make a significant contribution to our Global Markets Division and are pleased that you will be joining us on Monday, November 1, 2010. If you have any questions, please feel free to contact me at 212/635-1907.

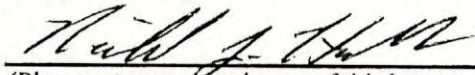
Sincerely yours,


Eleni Sfougataki
Eleni Sfougataki
Lead Recruiter, Vice President
Human Resources

Enclosure

Cc: Frank Pusateri

Accepted and Agreed:



(Please return a signed copy of this letter to me on or before your first day of employment.)

NOVEMBER 1, 2010 Start Date

Resume

Smith, Callan (USANYS) 14 <Callan.Smith@usdoj.gov>

Mon 1/23/2012 11:58 AM

To: richard_j_herber@msn.com <richard_j_herber@msn.com>;

Good Morning Mr. Herber,

I'm writing pursuant to our conversation last Friday regarding a follow-up call today at 3 pm. I am writing to confirm that you are still available at that time, and to see if you wouldn't mind sending along a copy of your resume as well. Thank you so much, and please feel free to contact me if you have any questions.

Callan Smith
212 637 2811

RE: Resume

Richard Herber

Mon 1/23/2012 5:14 PM

Sent Items

To: callan.smith@usdoj.gov <callan.smith@usdoj.gov>;

Callan,

Per our discussion today:

BNY Corporate FX Sales (all in Pittsburgh)

- 1) Frank Pusateri - MD, Head of Corp. FX Sales (direct quoting). He reports to Jorge Rodriguez and they are in constant contact via phone all the time.
- 2) Abigail Cook - MD, Corp. FX Sales (direct quoting)
- 3) John Orr - MD, He also sits on the desk but is more involved in IT function for iDealForex system. Good person to ask how it works since he designed it.
- 4) Richard Herber - (me) VP, Corporate FX Sales. (indirect quoting and some direct quoting). I worked there from 10/29/10 to 12/10/10 before they terminated me.

Neal Stephan - VP, Corporate FX Sales (indirect quoting and some direct quoting). He was in the job for 1.5 years before he asked to take a new roll in the Boston office. He trained me to do his old job.

I think all these people still with the bank but not sure.

Other people who left the group that I never knew:

Frank Cook - was old Manager of the desk who had Frank take over his job upon leaving. Heard he moved to Sarasota, FL.

Barb - Don't know much about her but she had my and Neal's job and I was told she simply quit one day.

I also would like to copy and mail to you a document on BNY Mellon letterhead titled "File Handling & Special Processing Instructions - Corp. FX" if you would like? It is a step by step manual on how to perform each trade including range of day and fake time stamps.

Best Regards,

Rich Herber
Wilton, CT
(203) 644-2729

CONFIDENTIALITY NOTICE:

FW: BNY Mellon FX

Richard Herber

Mon 1/23/2012 5:20 PM

Sent Items

To: Smith, Callan (USANYS) 14 <callan.smith@usdoj.gov>;

Callan,

As I said today, I mentioned to my boss (frank Pusateri) about my concern about putting customers on the indirect quoting system. I was soon terminated 12/10/10. I reported the fraud again to BNY Ethics on 2/17/10 after moving from Pittsburgh back home to Conn. up leaving the bank. Nothing happened but Ethics had this person (below) contact me via phone and email several times. Per your request I'll say no more.....

To: richard_j_herber@msn.com
Subject: My Contact Information
From: anthony.galioto@bnymellon.com
Date: Tue, 15 Mar 2011 12:57:01 -0400

Mr. Herber -

As you requested in our call yesterday, below is my contact information. Please consider my request to speak with me concerning your allegations of fraud. As I indicated, BNY Mellon takes such allegations very seriously, and I would very much like to have the opportunity to discuss the matter with you in detail.

I hope to hear from you soon.

Regards,
Anthony Galioto

Anthony J. Galioto
Managing Director & Managing Counsel
Enforcement & Investigations
The Bank of New York Mellon
One Wall Street, 11th Floor
New York, New York 10286
(212) 635-1161
anthony.galioto@bnymellon.com

The information contained in this e-mail, and any attachment, is confidential and is intended solely for the use of the intended recipient. Access, copying or re-use of the e-mail or any attachment, or any information contained therein, by any other person is not authorized. If you are not the intended recipient please return the e-mail to the sender and delete it from your computer. Although we attempt to sweep e-mail and attachments for viruses, we do not guarantee that either are virus-free and accept no liability for any damage sustained as a result of viruses.

Please refer to <http://disclaimer.bnymellon.com/eu.htm> for certain disclosures relating to European legal entities.

DECLARATION OF BENJAMIN J. HANAUER

I, Benjamin J. Hanauer, pursuant to 17 C.F.R. § 240.21F-12(a)(4), declare as follows:

1. I am a senior trial counsel in the Division of Enforcement (“Enforcement”) of the Securities and Exchange Commission (the “Commission”), and I make this declaration based on my own personal knowledge and information learned as one of the attorneys assigned to the investigation, Bank of New York Mellon Corporation [REDACTED] (the “BNY Mellon Investigation”), which culminated in the administrative proceeding *In the Matter of Bank of New York Mellon*, Admin. Proc. File No. 3-17286 (June 13, 2016) (the “BNY Mellon Order”). The sources of my information and the bases of my belief are documents, testimony and depositions obtained and reviewed by myself and/or other Enforcement staff working with me, information provided in interviews and meetings conducted by Commission staff, and information provided to me by other members of the Commission staff. To the extent that there are assertions herein concerning dates and numbers, they are approximate, based upon information and evidence gathered to date.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Richard Herber

14. I understand that Richard Herber applied for a whistleblower award in connection with the BNY Mellon Investigation and Order. Neither I nor, to the best of my knowledge having made inquiries of others involved in the investigation, any member of the BNY Mellon investigative team had any communications with Mr. Herber concerning our investigation or the BNY Mellon administrative proceeding. In addition, neither I, nor, to the best of my knowledge having made inquiries of others involved in the investigation, any member of the BNY Mellon investigative team, is aware of any information provided by Mr. Herber relating to our investigation of this matter. Further, I understand that another attorney working on this investigation searched the Concordance document database for the BNY Mellon investigation [REDACTED] for the following search term: Herber. The Concordance document database is an application often used by Enforcement staff to review documents gathered during the course of an investigation. While there were a number of hits for Herber (reflecting both Richard Herber and a bank client with the same last name), none show Richard Herber communicating with the SEC or otherwise assisting in our investigation.⁶ Accordingly, it is my belief and understanding that Mr. Herber did not provide any information to the Commission that either caused us to open the BNY Mellon Investigation or in any way contributed to our investigation or the resulting enforcement action.

⁶ Richard Herber's name was on several documents we received from BNY Mellon during the course of the investigation. Specifically, his name was on certain emails and group presentations in which the names of key witnesses appeared and on documents we requested from the Bank that it had produced to DOJ.

Commission Enforcement Action

15. Under the BNY Mellon Order, BNY Mellon was ordered to pay disgorgement of \$120,000,000.00, prejudgment interest of \$13,022,207 and a civil penalty of \$30,000,000. Although the BNY Mellon Order found that BNY Mellon's misconduct dated to 2000, the disgorgement amount ordered by the Commission reflected BNY Mellon's ill-gotten gains on standing instruction foreign currency transactions only back to April 8, 2008 in recognition of the applicable 5-year statute of limitations. The BNY Mellon Order further directed that the payment of the disgorgement amount (\$120,000,000) and prejudgment interest (\$13,022,207) was to be deemed satisfied by BNY Mellon's payment of \$133,022,207 under the terms of BNY Mellon's settlements with the DOJ and the New York Attorney General in *U.S. v. The Bank of New York Mellon*, No. 12-md-02335-LAK-JLC (S.D.N.Y.) and *People v. The Bank of New York Mellon Corp.*, No. 09/114735 (N.Y. Sup. Ct.), respectively. BNY Mellon paid the entire amount of the civil penalty to the Commission.

16. On June 13, 2016, the Commission instituted administrative proceedings against BNY Mellon pursuant to Sections 9(b) and 9(f) of the Investment Company Act of 1940. The Commission found that from at least 2000 through at least August of 2011, BNY Mellon and its predecessors misled certain of its custodial clients with regard to its execution of their Standing Instruction foreign currency transactions. However, the foreign currency trades that were at issue in the BNY Mellon Order were not transactions in securities, and the Commission did not charge BNY Mellon with fraud in connection with the purchase or sale of securities. Instead, the Commission found that the daily trade confirmations and monthly transaction reports that BNY Mellon provided to its RIC clients were misleading because they failed to disclose the time of execution and pricing methodology for foreign exchange trades for those clients, which information would have revealed that the bank's Standing Instruction service did not provide foreign exchange execution in the manner that had been represented. The Commission found that this conduct violated Section 34(b) of the Investment Company Act, which generally prohibits material misstatements and omissions in documents that are maintained or transmitted pursuant to the Investment Company Act, and caused violations of Section 31(a) of the Investment Company Act and Rule 31a-1(b), which require RICs to maintain records containing certain information about their transactions.

17. BNY Mellon acts as a custody and trust bank providing an array of services to clients, including public pension funds, states, colleges, charities and foundations, and RICs. However, as described above in ¶ 16, the Commission's action only charged BNY Mellon with securities law violations with respect to the bank's Standing Instruction foreign currency trades on behalf of its RIC clients. This represented a comparatively small amount of BNY Mellon's business in Standing Instruction foreign currency transactions relative to the overall business that was the subject of the Department of Justice's parallel action in *U.S. v. The Bank of New York Mellon*. For example, as set forth in the Second Amended Complaint filed in *U.S. v. The Bank of New York Mellon*, for the years 2008, 2009, and 2010 BNY Mellon made approximately \$1.26 billion in gross sales margin from Standing Instruction transactions for its top 200 clients. By contrast, for the period April 8, 2008 through August 8, 2011, BNY Mellon's gross sales margin from its Standing Instruction transactions for its RIC clients totaled approximately \$234 million.

Pursuant to 17 C.F.R. § 240.21F-12(a)(4), I, Benjamin J. Hanauer, declare under penalty of perjury that the foregoing is true and correct.

Executed on December 11, 2019



Benjamin J. Hanauer

DECLARATION OF DONALD A. RYBA

I, Donald A. Ryba, pursuant to 17 C.F.R. § 240.21F-12(a)(4), declare as follows:

1. I am an accountant in the Division of Enforcement (“Enforcement”) of the Securities and Exchange Commission (the “Commission”), and I make this declaration based on my own personal knowledge and information learned as the accountant assigned to the investigation, Bank of New York Mellon Corporation [REDACTED] (the “BNY Mellon Investigation”), which culminated in the administrative proceeding *In the Matter of Bank of New York Mellon*, Admin. Proc. File No. 3-17286 (June 13, 2016) (the “BNY Mellon Order”). The sources of my information and the bases of my belief are documents, testimony and depositions obtained and reviewed by myself and/or other Enforcement staff working with me, information provided in interviews and meetings conducted by Commission staff, and information provided to me by other members of the Commission staff. To the extent that there are assertions herein concerning dates and numbers, they are approximate, based upon information and evidence gathered to date.

[REDACTED]

Calculating the Disgorgement Amount for the BNY Mellon Order

3. The BNY Mellon Order required BNY Mellon to pay disgorgement, represented the revenue it received from its Standing Instruction customers as a result of its misconduct, of \$120,000,000.00 and prejudgment interest of \$13,022,207.00. In calculating the amount of disgorgement, we first examined the amount of BNY Mellon’s annual revenues and ill-gotten gains attributable to its Standing Instruction transactions for the years beginning in January 2008 and continuing through the end of 2011. During our settlement negotiation with BNY Mellon, we agreed that for 2011, we would only consider the revenues and ill-gotten gains for the first six months of 2011 -- the period covered by the quarterly report on Form 10-Q filed by BNY Mellon on August 8, 2011 when it finally disclosed its Standing Instruction pricing methodology. It is my belief, the dollar amount of the Standing Instruction transactions from the period beginning on July 1, 2011 through and including August 8, 2011, and the ill-gotten gains, if any, generated during this period, were not material. For the full four-year period of 2008 through 2011, the

amount of these revenues was approximately \$1.565 billion, broken down each year as follows:

<u>Year</u>	<u>Amount</u>	<u>% of Total</u>
2008	\$550 million	35.14%
2009	\$395 million	25.24%
2010	\$315 million	20.13%
2011	\$305 million	19.49%
	<u>\$1.565 billion</u>	<u>100.00%</u>

4. The amount of the disgorgement in the BNY Mellon Order was then calculated by determining the amount of BNY Mellon's ill-gotten gains from the Standing Instruction revenues from its custodial clients. We determined that the ill-gotten gains represented about half of these revenues. For the full four-year period of 2008 through 2011, the amount of the ill-gotten gains was approximately \$782 million, broken down each year as follows:

<u>Year</u>	<u>Amount</u>	<u>% of Total</u>
2008	\$275 million	35.16%
2009	\$197 million	25.19%
2010	\$158 million	20.21%
2011	\$152 million	19.44%
	<u>\$782 million</u>	<u>100.00%</u>

5. In calculating the amount of the disgorgement in the BNY Mellon Order, we looked at BNY Mellon's gross sales margins from its Standing Instruction transactions with its custodial clients which totaled approximately \$234 million during that time period. We determined that a significant portion of that amount — approximately \$94 million — was attributable to transactions in restricted currencies, for which BNY Mellon's margins did not, on average, exceed its margins in directly negotiated transactions. Thus, we determined not to seek disgorgement of the \$94 million attributable to transactions in restricted currencies which reduced the disgorgement figure to approximately \$140 million. The disgorgement amount was further reduced to reflect the fact that had BNY Mellon disclosed the truth about its Standing Instruction pricing. The custodial clients harmed by BNY Mellon's practice continued to do business with BNY Mellon despite the lawsuits and subsequent disclosures. Those custodial clients, who lacked access to the interbank market, would have directly negotiated a rate with BNY Mellon, and BNY Mellon would have received some sort of spread for negotiating those trades. On directly negotiated transactions during the relevant time period, BNY Mellon's clients paid a spread over prevailing interbank rates of, on average, of between 2 and 3 basis points. Thus, we concluded that a disgorgement figure of approximately \$120 million was appropriate in the context of this settled case. We were convinced that \$120 million represented that portion of BNY Mellon's Standing Instruction margin that was above and beyond the 2 to 3 basis point margin BNY Mellon might have earned had those transactions been directly negotiated.

6. For the full four-year period of 2008 through 2011, we determined that the disgorgement of \$120 million should be broken down for each year as follows:

<u>Year</u>	<u>Amount</u>	<u>% of Total</u>
2008	\$42.2 million	35.16%
2009	\$30.2 million	25.19%
2010	\$24.3 million	20.21%
2011	<u>\$23.3 million</u>	<u>19.44%</u>
	<u>\$120 million</u>	<u>100.00%</u>

[REDACTED]

[REDACTED]

[REDACTED]

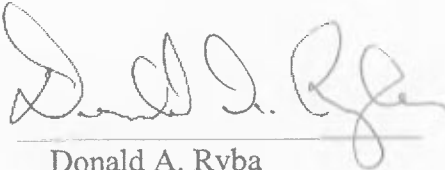
[REDACTED]

[REDACTED]

[REDACTED]

Pursuant to 17 C.F.R. § 240.21F-12(a)(4), I, Donald A. Ryba, declare under penalty of perjury that the foregoing is true and correct.

Executed on December 12, 2019



Donald A. Ryba

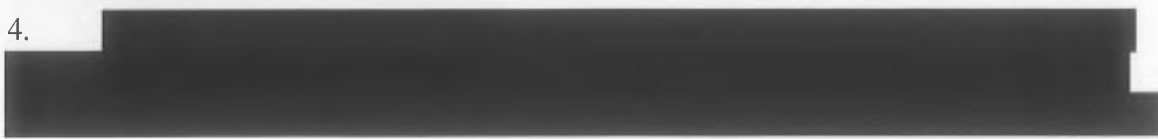
DECLARATION OF MICHAEL H. HURWITZ

I, Michael H. Hurwitz, pursuant to 17 C.F.R. § 240.21F-12(a)(4), declare as follows:

1. I am an attorney with the U.S. Securities and Exchange Commission (“Commission” or “SEC”), Office of the Whistleblower (“OWB”), in Washington, D.C.

2. The sources of my information and the bases of my beliefs are documents obtained and reviewed by myself and information provided to me by other members of the Commission staff and the United States Attorney’s Office for the Southern District of New York (“USAO”). The statements of others set forth herein are described in substance and in part and not verbatim. To the extent that there are assertions herein concerning dates and numbers, they are approximate, based upon information and evidence gathered to date.

3. 

4. 

[REDACTED]

5. Under the terms of the Bank's settlements with USAO and the NYAG in the Civil Action and *People v. The Bank of New York Mellon Corp.*, No. 09/114735 (N.Y. Sup. Ct.), respectively, announced on March 19, 2015, the Bank was ordered to pay monetary sanctions of \$335 million, half to be paid to the USAO and the other half to be paid to the NYAG. In an email to me dated August 13, 2019, Mr. Armand confirmed that the Bank paid the full amount of the monetary sanctions -- \$167.5 million -- that it was required to pay to the USAO.

6, [REDACTED]

7. By application dated August 16, 2017, Richard Herber submitted an Application for Award for Original Information Submitted Pursuant to Section 21F of the Securities Exchange Act of 1934 on Form WB-APP in connection with Notice of Covered Action 2016-86 for the SEC Action. The Notice of Covered Action for the SEC Action was posted on the OWB website on July 29, 2016 with a claim due date of October 27, 2016. Thus, Mr. Herber's Application for Award was submitted nearly ten months after the claim due date. In his application, Mr. Herber stated that he "probably" filed a whistleblower complaint with the SEC. Mr. Herber did not provide a TCR reference number, a copy of the TCR that he claims to have submitted, or any other new identifying information that could help locate the TCR that he claims to have "probably" submitted.

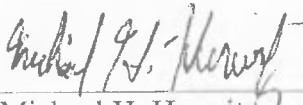
[REDACTED]

8. On September 5, 2017, I did a search in the Commission's Tips, Complaints and Referrals ("TCR") System to determine if Mr. Herber submitted any tips to the Commission. Under standard practice, whenever members of the public provide the Commission with information about possible violations of the securities laws pursuant to the procedures set forth at 17 C.F.R. §240.21F-9(a), or otherwise, that information is uploaded and preserved in the TCR system, where it is retrievable by the submitter's name (among other methods). In addition, the TCR system records staff action taken with regard to tips, complaints, and referrals entered into the system. I searched the TCR database for the correspondent last name "Herber" and first name "Rich*." The search results showed that a Mr. Herber submitted a single complaint on Form TCR through the system's online portal on December 6, 2016 which was assigned TCR number 1481043150808. This complaint alleged that the City of Fort Wayne had placed restrictions on Mr. Herber's home in 2008 that neither he nor his mortgage company had given consent. On December 22, 2016, the Office of Market Intelligence ("OMI") staff closed the item with a disposition of no further action ("NFA"). OMI is the Commission office that is responsible for the initial intake and review of whistleblower tips. An NFA disposition indicates that OMI will not forward the TCR to investigative staff of the Division of Enforcement for any additional investigative steps unless subsequent information leads OMI to reopen or reexamine that TCR.

9. On September 5, 2017, OWB staff attorney Jack McCreery emailed Robert T. Greene, a Branch Chief of the SEC's Office of Investor Education and Advocacy ("OIEA"), to request that OIEA perform a search of its database system for Richard Herber. On September 5, 2017, Mr. Greene emailed Mr. McCreery that OIEA's database showed no matches for Richard Herber.

Pursuant to 17 C.F.R. § 240.21F-12(a)(4), I, Michael H. Hurwitz, declare under penalty of perjury that the forgoing is true and correct.

Executed on December 11, 2019


Michael H. Hurwitz



DIVISION OF
ENFORCEMENT

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
November 5, 2019

Jane Norberg, Chief
Office of the Whistleblower
Phone: (202) 551-4790
Fax: (703) 813-9322

Mr. Richard J. Herber
3901 N. Washington Road
Fort Wayne, IN 46804-1817

**Re: In the Matter of Bank of New York Mellon
Notice of Covered Action 2016-086**

Related Action:

US v. Bank of New York Mellon, et al., 11-civ-6969 (SDNY 2011)

Dear Mr. Herber:

I am writing to inform you that our Claims Review Staff has reviewed your application for a whistleblower award submitted on Form WB-APP in connection with Notice of Covered Action 2016-86 (the "Covered Action") and the above-referenced related action claim. The Claims Review Staff has made a Preliminary Determination setting forth its preliminary assessment that your claims should be denied. The Preliminary Determination is enclosed with this letter. You are referred to as "Claimant 2" in the Preliminary Determination.

Procedures for Contesting the Preliminary Determination

If you wish to contest the Preliminary Determination, you may do so by submitting a written response to the Office of the Whistleblower setting forth the grounds for your objection to the denial of your claim. The written response should be **no more than 20 double-spaced pages** and should strive to address the Preliminary Determination's findings and conclusions. You may provide legal analysis. You may also provide additional information—including documentation and other evidentiary support—that either was not previously (i) requested as part of your application or (ii) reasonably available to you. You are encouraged not to simply repeat the same facts as contained in your original application for an award.

Before determining whether to contest the Preliminary Determination, you may request that our office make available for your review the materials that formed the basis of the Preliminary Determination as set forth in Rule 21F-12(a) of the Securities Exchange Act of 1934 (the "Exchange Act"). You may also request a meeting with the Office of the Whistleblower; however, such meetings are not required and we may in our sole discretion decline the request. Both the request to review the materials that formed the basis of the Preliminary Determination and the request to meet with our office must be in writing and must be sent **within thirty (30)**

Mr. Richard J. Herber
November 5, 2019
Page 2

calendar days of the date of the Preliminary Determination. Failure to submit these requests within the 30 day period will be deemed as waivers of your right to review the materials and/or request a meeting.

If you decide to contest the Preliminary Determination, you must submit your written response and supporting materials **within sixty (60) calendar days** of the later of (i) the date of the Preliminary Determination or (ii) the date when we made materials available for your review pursuant to a timely request for those materials. If you submit a timely response, then the Claims Review Staff will consider the issues and grounds advanced in your response, along with any supporting documentation you provided, and will make its Proposed Final Determination on your application for award.

If Preliminary Determination is Not Contested

Please note that if you choose not to submit a response to the Preliminary Determination or if you fail to submit a timely response, then the Preliminary Determination will become the Final Order of the Commission. Your failure to submit a timely response contesting the Preliminary Determination will constitute a failure to exhaust administrative remedies, and you will be prohibited from pursuing an appeal pursuant to Rule 21F-13 of the Exchange Act.

Issuance of Final Order of the Commission

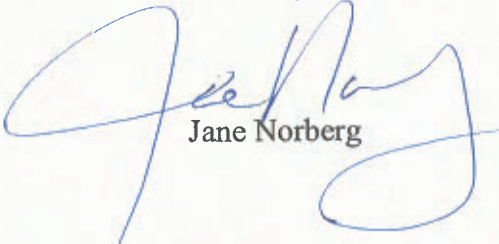
If you contest the Preliminary Determination, the Claims Review Staff will consider your arguments and issue a Proposed Final Determination to the Commission. Any Commissioner may request that the Proposed Final Determination be reviewed by the full Commission within thirty (30) days after we have informed the Commission of the Proposed Final Determination. If no Commissioner requests such a review within the 30-day period, then the Proposed Final Determination will become the Final Order of the Commission. In the event a Commissioner requests a review, the Commission will review the record that the Claims Review Staff relied upon in making its determinations, including your previous submissions to our office, and issue its Final Order. We will inform you of the Final Order of the Commission.

Appealing Final Order of the Commission

Any determination made under the whistleblower rules, including whether, to whom, or in what amount to make awards, shall be in the discretion of the Commission. You may appeal the Commission's determination of whether or to whom to make an award to the United States Court of Appeals for the District of Columbia Circuit, or to the circuit where you reside or have your principal place of business within thirty (30) days after the Commission issues its final decision.

Please call me if you have any questions or concerns.

Sincerely,



Jane Norberg

Enclosure

Notice of Covered Action 2016-86

In the Matter of Bank of New York Mellon, File No. 3-17286 (June 13, 2016) (“Covered Action”)

Non-SEC Actions

United States v. Bank of New York Mellon, et al., 11-civ-6969 (LAK) (S.D.N.Y. 2011)
 (“DOJ Civil Action”)

U.S. Department of Labor Settlement with Bank of New York Mellon (March 19, 2015), available at <https://www.dol.gov/newsroom/releases/ebsa/ebsa20150152> (“DOL Settlement”)

PRELIMINARY DETERMINATION OF THE CLAIMS REVIEW STAFF

In response to the above-referenced Notice of Covered Action, the Securities and Exchange Commission received whistleblower award claims from [REDACTED] (“Claimant 1”) for the above-referenced matters. In addition, the Securities and Exchange Commission received whistleblower award claims from Richard J. Herber (“Claimant 2”) for the first two of the above-referenced matters. Pursuant to Section 21F of the Securities Exchange Act of 1934 (the “Exchange Act”) and Rule 21F-10 promulgated thereunder, the Claims Review Staff has evaluated these award claims in accordance with the criteria set forth in Rules 21F-1 through 21F-17. The Claims Review Staff sets forth its Preliminary Determination for each award claimant as follows:

[REDACTED] (Claimant 1)

Covered Action

The Claims Review Staff has preliminarily determined to recommend to the Commission that Claimant 1 voluntarily provided original information to the Commission that led to the successful enforcement of the Covered Action pursuant to § 21F(b)(1) of the Exchange Act and Rule 21F-3(a) promulgated thereunder, and that Claimant 1 receive an award of 30% of the monetary sanctions collected or to be collected in the Covered Action, including any monetary sanctions collected after the date of the Commission’s Final Order.

In determining the amount of award to recommend to Claimant 1 in connection with the Covered Action, the Claims Review Staff considered the following factors set forth in Rule 21F-6 of the Exchange Act as they apply to the facts and circumstances of Claimant 1’s application: (1) the significance of information provided to the Commission; (2) the assistance provided in the Covered Action; (3) the law enforcement interest in deterring violations by granting awards; (4) participation in internal compliance systems; (5) culpability; (6) unreasonable reporting delay; and (7) interference with internal compliance and reporting systems. The Claims Review Staff considered, among other relevant factors, that Claimant 1’s information was highly significant, that Claimant 1 provided substantial and ongoing assistance to the Enforcement staff, and that the law enforcement interests were very high in this case. The Claims Review Staff also

Notice of Covered Action 2016-86

In the Matter of Bank of New York Mellon, File No. 3-17286 (June 13, 2016)

Non-SEC Actions

United States v. Bank of New York Mellon, et al., 11-civ-6969 (LAK) (S.D.N.Y. 2011)

U.S. Department of Labor Settlement with Bank of New York Mellon (March 19, 2015), available at <https://www.dol.gov/newsroom/releases/ebsa/ebsa20150152>

considered that Claimant 1 had taken significant actions to try to stop the wrongdoing by [REDACTED]

DOJ Civil Action

The Claims Review Staff has preliminarily determined to recommend that the Commission deny an award to Claimant 1 with respect to the DOJ Civil Action. The DOJ Civil Action was predominantly an action to address fraud affecting a federally-insured financial institution as to which a separate, directly applicable whistleblower award program administered by the United States Attorney General under the Financial Institutional Reform, Recovery and Enforcement Act of 1989 ("FIRREA") more appropriately applies.¹ Among the facts that we have relied upon in making this preliminary determination are the following: (1) the standing instruction foreign currency transactions that were the focus of both the Covered Action and the DOJ Civil Action were not transactions in securities; (2) the Covered Action was limited in scope to misrepresentations and omissions made by Bank of New York Mellon ("BNY Mellon") in records maintained by and for clients of the bank that were registered investment companies ("RICs") and did not charge violations in connection with the purchase or sale of securities; (3) the DOJ Civil Action did not charge the Bank with securities fraud; (4) the dollar volume of the standing instruction foreign currency transactions for BNY Mellon's RIC clients that was the subject of the Covered Action was comparatively small in relation to BNY Mellon's overall dollar volume of standing instruction foreign currency transactions during the relevant period; and (5) although the Covered Action found that BNY Mellon's misconduct dated to 2000, the disgorgement ordered in the Covered Action was limited to a period beginning in April 2008 as a result of the statute of limitations applicable to the Covered Action.

DOL Settlement

The Claims Review Staff has preliminarily determined to recommend that the Commission deny an award to Claimant 1 with respect to the DOL Settlement. Under Exchange

¹ See *Order Determining Whistleblower Award Claims*, Rel. No. 34-84046 (Sept. 6, 2018); 12 U.S.C. § 4205(d)(1) (providing that when the United States acquires funds or assets pursuant to a judgment, order, or settlement in an action brought under FIRREA and the Attorney General determines that the judgment, order, or settlement was based in whole or in part on information contained in a declaration filed by the declarant under 12 U.S.C. § 4201, the declarant shall have the right to share in the recovery in accordance with the formula set out in the subsection).

Notice of Covered Action 2016-86

In the Matter of Bank of New York Mellon, File No. 3-17286 (June 13, 2016)

Non-SEC Actions

United States v. Bank of New York Mellon, et al., 11-civ-6969 (LAK) (S.D.N.Y. 2011)

U.S. Department of Labor Settlement with Bank of New York Mellon (March 19, 2015), available at <https://www.dol.gov/newsroom/releases/ebsa/ebsa20150152>

Act Rules 21F-3(b) and 4(f), the DOL Settlement does not constitute a “related action” to the Covered Action.

Richard J. Herber (Claimant 2)

The Claims Review Staff has preliminarily determined to recommend that the Commission deny an award to Claimant 2. The basis for this determination is that Claimant 2 is not a “whistleblower,” within the meaning of Section 21F(a)(6) of the Exchange Act and Rule 21F-2(a) thereunder, because there is no evidence showing that Claimant 2 provided information to the Commission relating to the above-referenced Covered Action, as required by Rule 21F-9(a) or (d).

In addition, Claimant 2 failed to submit his claim for award on Form WB-APP within ninety (90) days of the above-referenced Notice of Covered Action, as required under Rule 21F-10(b) of the Exchange Act in order to be considered for an award. Further, Claimant 2 has not demonstrated that the Commission should waive, in its discretion, the filing deadline based on “extraordinary circumstances,” as provided under Rule 21F-8(a) of the Exchange Act.²

By: Claims Review Staff

Date: November 5, 2019

² Because Claimant 2 is not eligible for an award in the Covered Action, Claimant 2 is not eligible for an award in any related action. A related action award may be made only if, among other things, the claimant satisfies the eligibility criteria for an award for the applicable covered action in the first instance. See 15 U.S.C. § 78u-6(b); Exchange Act Rule 21F-3(b), (b)(1); Rule 21F-4(g) and (f); Rule 21F-11(a).

3901 N. Washington Rd.
Fort Wayne, IN 46804-1817
(203) 644-2729
March 6, 2020

Ms. Jane Nordberg
Chief, Office of the Whistleblower
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

**Re: In the Matter of Bank of New York Mellon
Notice of Covered Action 2016-086**

Related Action:

US v. Bank of New York Mellon, et al., 11-civ-6969 (SDNY 2011)

SENT ELECTRONICALLY ON MARCH 6, 2020 TO HURWITZM@SEC.GOV

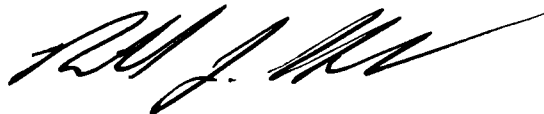
Dear Ms. Nordberg,

I am writing to you as required and forwarding to you my written responses and my supporting materials contesting the Preliminary Determination to my application for award in the above matter.

Please feel free to contact me at the above information should you have any questions or concerns.

Thank you.

Sincerely,



Richard J. Herber
Whistleblower/*Pro se* Claimant 2

Richard J. Herber, Whistleblower, *Pro Se* comes now and formally objects to the Commissions' denial of my claim. I am submitting this response as required to the Office of the Whistleblower by due date of March 6, 2020.

Professional Background

I have extensive experience and a long history in the Foreign Exchange (FX) markets. I have about a total of 20+ years of experience in this capacity. I graduated from college and joined Wachovia Bank in Atlanta and Winston-Salem, North Carolina and was selected to be part of their highly selective Corporate Banking Associate program. This program was made up of very talented recent MBA graduates from top business schools. Upon completion of this program, I joined Wachovia's Foreign Exchange Group. I worked both in a sales and trading capacity. I was also an Interbank Foreign Exchange Trader during this time where I would quote currency prices to other banks in the global foreign exchange market and manage the bank's global currency positions and overall risk. I then joined Bank of America's Foreign Exchange Group in Chicago, Illinois as a Corporate Foreign Exchange Salesperson where I covered Fortune 500 corporations. This is where most of my experience comes from. I then worked as an Institutional Foreign Exchange Salesperson for both Australia & New Zealand Bank and then onto Royal Bank of Canada both in New York City. My client base shifted during this period from covering Fortune 500 corporations to covering more demanding and higher dollar volume institutional FX accounts. This included Registered Investment Advisors (RIA), hedge funds and other investment orientated clients.

My final place of employment was when I worked for The Bank of New York Mellon (BNYM) where I worked on the Foreign Exchange Transaction Desk in Pittsburg, Pennsylvania.

I worked directly with “Claimant 1” there who worked as an Interbank FX Trader. I was able to secure employment with BNYM only because one of my former colleagues, Paul Park, worked there. Paul and I had worked together in the mid 1990’s at Wachovia Bank where we were both Interbank FX Dealers. I would not have gotten the job offer from BNYM as they seemed to be overly selective on who they would hire at the time. This was around the same time when there were claims of currency fraud starting to take place at the bank. Also, no one really left the FX Group at BNYM compared to the other banks that I had worked for. The people I worked with stayed there for decades. BNYM was, and is, a custody bank. The bank was completely different than any other bank I had traded FX at before. Furthermore, it should be noted that there are only about maybe 100 people in North America who do the type of work that I have done. The FX market is highly incestuous with a very limited amount of people who have the skills, experience and qualifications to successfully do the job. I was very lucky to be hired by BNYM and it was one of the best jobs I have had working in the banking industry.¹ There were only about a total of maybe 10 of us, including “Claimant 1”, working in BNYM Pittsburgh FX Group. I would say about 3 of the 10 people were low skilled support type people and had no significant responsibility for profit/loss. The Commission should take all this into account because it is very rare for someone like myself, and “Claimant 1,” to come forward under the False Claims Act and risk their career.²

New York City Office

¹ It should be noted that my total compensation working at BNYM was the highest that I have ever earned in my entire banking/foreign exchange career.

² It should be noted that there is Whistleblower protection against retaliation by their employer under Rule 21F(h)(1) *et seq.* However, it is very difficult, time consuming and expensive to go this route due to potential legal fees and many other obstacles and uncertainties.

I also had access and made frequent trips to BNYM's New York City Foreign Exchange Group offices. All of the 10 people on the Pittsburg FX desk were legacy Mellon Bank foreign exchange people. They did not get along with The Bank of New York FX people.³ I was the only person who essentially took trips to the New York office as I was haired by BNYM post merger. I also worked on the bank's electronic trading system called iDeal Forex which involved the bank's standing instruction pricing. Client trades would come over the system on the Transaction Desk that I worked on. I would then manage the position so to maximize the spread rate (as stated in the Complaint). Then price trades by getting market quotes from "Complaint 1" to cover the trade. I worked directly with David Nichols who was head of iDeal Forex at the time and mentioned in the Complaint various times. "Complaint 1" was older, near retirement age, and had worked for only 2 banks in his entire career I believe, State Street Bank being the other, and was an interbank dealer and very isolated in his job.

Objections to the Commission's Preliminary Determination

I object to the Commission's Preliminary Determination for the following reasons.

Number 1

The Commission's argument states,

"Claimant 2 is not a 'whistleblower,' within the meaning of Section 21F(a)(6) of the Exchange Act and Rule 21F-2(a) thereunder, because there is no evidence that showing the Claimant 2 provided information to the Commission relating to the above-referenced Covered Action, as required by Rule 21F-9(a) or (d)."

I totally disagree with this. The definition of a whistleblower is per 21F(a)(6),

means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.

³ The Bank of New York merged with Mellon Financial on July 1, 2007.

I worked directly in a very small group with “Claimant 1” and per Rule 21F(a)(6) we “jointly” provided information together who provided information relating to a violation of securities laws to the Commission, in a manner established, by rule or regulation, by the Commission. The information that “Claimant 1” provided could never have been gotten without us acting “jointly” in the matter. Again, “Claimant 1” was nothing but an older, retirement aged man who’s one job was to simply quote an exchange rate to the Transaction Desk that I worked on and cover the trade out in the FX market.

Furthermore, there is absolutely no space or section for parties acting “jointly” in Form WB-APP nor in Rule 21F-9(a) or (d). I therefore request that the Commission designate that I be added as a “joint” party in this matter as no space or section was designated.

Number 2

The Declarations made note how they did not think I had even worked in the Foreign Exchange Group at BNYM as my name had only appeared on internal emails. Attached is my BNYM employment letter which states all information confirming that I did indeed work in this group (Exhibit #1).

Number 3

Declaration by Hurwitz state to the affect that I had submitted Form WB-APP late by about 10 months. My argument here again is that “Claimant 1” WB-APP form was for both of us as there was no space for joint parties. Furthermore, under Rule 21F-8(a):

To be eligible for a whistleblower award, you must give the Commission information in the form and manner that the Commission requires. The procedures for submitting information and making a claim for an award are described in § 240.21F-9 through § 240.21F-11 of this chapter. You should read these procedures carefully because you need to follow them 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.**

In addition to this, I am also claiming “extraordinary circumstances” for submitting Form late. I am a World Trade Center Survivor and officially disabled receiving Social Security Disability Insurance (Exhibit #2). My office was at 1 Liberty Plaza in New York City when I was employed with Royal Bank of Canada and was directly next door to 2 World Trade Center. I have been diagnosed with severe lung disease issues including lesions breaking out on my lungs and lung scarring with reduced lung capacity. My Pulmonologist have conducted various tests and have determined it was caused by the dust and debris from the 9/11 World Trade Center attacks.

I am also low income. I do not have the resources that one needs to monitor the SEC Notice of Covered Action website for updates and print out the Notice and apply for the whistleblower rewards. One also needs a computer to download the notice which one can only find online. I would need not only a computer but expensive internet access for my home. I would need to get an expensive coaxial cable ran to my house and my home never has had cable. I would need to somehow install a ground rod and the internet company will not install one without a ground rod. I would need and expensive laser printer. It is easy for the SEC to overlook all this as all of you have these tools free and easy at your disposal. You also probably have your own tech help person who can even assist you. Because of this, I am asking for the Commission, in its sole discretion, waive these procedures based upon a showing of extraordinary circumstances in my case?

Number 4

While my joint party “Claimant 1” was working with the Commission, I was working directly with the United States Attorney’s Office, Southern District of New York. I worked with Pierre Armand, Lawrence Fogelman and another junior attorney. I had multiple conference calls

with them and turned over various BNYM standard pricing instruction documents. One of their main questions concerned my vast experience working at other banks such as Bank of America. They could not understand what was different between a BNYM and Bank of America or a Citibank. I helped explain the issue which many others would not be able to disclose to them as they did not have the same amount of experience and background that I had. I also sensed that they asked "Claimant 1" the same question. However, he would be unable to answer the question as he spent his entire career working for only two "custody banks." I strongly feel that I offered more credible evidence and information in this lawsuit than "Claimant 1" as I was more active, knew how the bank worked, and was exposed to so many different parts of the bank and had complete access to information without anyone blocking me.

Exhibit #1



BNY MELLON

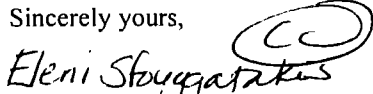
Richard Herber
46 Glen Ridge
Wilton, Connecticut, 06897

Dear Richard,

We would like to offer you employment with a wholly owned subsidiary of BNY Mellon, as a Senior Sales II, FX in our Global Markets Division. You will be reporting to Frank Pusateri and receive a base salary at an annual rate equal to \$125,000. You will be appointed as a Vice President.

REDACTED

Sincerely yours,

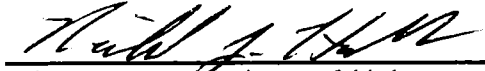
 CC

Eleni Sfougataki
Lead Recruiter, Vice President
Human Resources

Enclosure

Cc: Frank Pusateri

Accepted and Agreed:



(Please return a signed copy of this letter to me on or before your first day of employment.)

Exhibit #2

SOCIAL SECURITY ADMINISTRATION

Date: July 29, 2014

RICHARD J HERBER
3901 N WASHINGTON RD
FT WAYNE IN 46804-1817

You asked us for information from your record. The information that you requested is shown below. If you want anyone else to have this information, you may send them this letter.

Other Important Information

OUR RECORDS SHOW THAT YOU BECAME DISABLED ON 09/01/12.

IF YOU HAVE ANY QUESTIONS

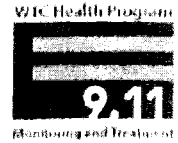
We invite you to visit our web site at www.socialsecurity.gov on the Internet to find general information about Social Security. If you have any specific questions, you may call us toll-free at 1-800-772-1213, or call your local office at 877-223-6061. We can answer most questions over the phone. If you are deaf or hard of hearing, you may call our TTY number, 1-800-325-0778. You can also write or visit any Social Security office. The office that serves your area is located at:

SOCIAL SECURITY
2122 LINCOLNWAY CT
FORT WAYNE, IN 46819

If you do call or visit an office, please have this letter with you. It will help us answer your questions. Also, if you plan to visit an office, you may call ahead to make an appointment. This will help us serve you more quickly when you arrive at the office.

OFFICE MANAGER

WTC Health Program
PO Box 7002
Rensselaer, NY 12144



Richard Herber
3901 N. Washington Rd.
Fort Wayne, IN 46804

RE: [REDACTED]

April 5, 2018

Dear Mr. Herber:

On March 29, 2018, the World Trade Center (WTC) Health Program received a letter from you requesting to appeal your denial of enrollment into the WTC Health Program. This letter is to notify you that the WTC Health Program has administratively closed your appeal for the following reason:

Based on information provided within your appeal letter, the WTC Health Program was able to overturn your original enrollment denial and enroll you into the Program. Based on your enrollment into the WTC Health Program, the appeal of your initial enrollment denial is no longer necessary. You will be receiving additional information regarding your enrollment under separate cover.

If you have additional questions about your appeal request, please contact 1-888-982-4748, Monday through Friday, 9 AM to 5 PM (Eastern Time Zone). You can also send a written inquiry to me at WTC@cdc.gov.

Sincerely,

A handwritten signature in cursive script that reads "Katie M. Howard".

Katie M. Howard
Appeal Coordinator
WTC Health Program

June 4, 2020

Jane Norberg, Chief
Office of the Whistleblower
Phone: (202) 551-4790
Fax: (703) 813-9322

BY SECURE EMAIL

Mr. Richard J. Herber
3901 N. Washington Road
Fort Wayne, IN 46804-1817
Richard_J_Herber@msn.com

**Re: In the Matter of Bank of New York Mellon
Notice of Covered Action 2016-086**

Related Action:

US v. Bank of New York Mellon, et al., 11-civ-6969 (SDNY 2011)

Dear Mr. Herber:

I am writing to inform you that your claim for an award in the above-referenced Covered Action has been denied. A copy of the Final Order is enclosed with this letter.

Pursuant to Section 21F(f) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 21F-13 thereunder, you may appeal this Final Order to the United States Court of Appeals for the District of Columbia Circuit, or to the circuit where you reside or have a principal place of business. Any such appeal must be filed within 30 days of this Final Order.

If you choose to appeal this Final Order, and if you want your identity to remain confidential on appeal, it will be your responsibility to promptly seek an order from the court permitting the pertinent information to be withheld from public disclosure on appeal (for example, permitting you to proceed under a pseudonym, permitting briefs and appendices to be filed under seal, and closing the courtroom for oral argument). If you file such an appeal in your own name without promptly seeking such an order from the court, the Commission will deem you to have voluntarily waived any confidentiality protection under Section 21F(h)(2)(A) of the Exchange Act for purposes of litigating the appeal.

Please call our office at (202) 551-4790 if you have any questions or concerns.

Sincerely,

Jane Norberg

Encl.: Final Order

UNITED STATES OF AMERICA

before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 89002 / June 4, 2020

WHISTLEBLOWER AWARD PROCEEDING
File No. 2020-20

In the Matter of the Claim for Award

in connection with

Notice of Covered Action: 2016-86

In the Matter of Bank of New York Mellon, File No. 3-17286 (June 13, 2016)

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

The Claims Review Staff (“CRS”) issued a Preliminary Determination recommending that [REDACTED] (“Claimant 1”) receive a whistleblower award in the amount of thirty percent (30%) of the monetary sanctions collected in Covered Action 2016-86 (the “Covered Action”) for a payout of nearly \$50 million, and that the award application submitted by Richard J. Herber (“Claimant 2”) be denied. Claimant 1 provided written notice of Claimant’s decision not to contest the Preliminary Determination and Claimant 2 submitted a timely notice contesting the preliminary denial of Claimant 2’s award claim. For the reasons discussed below, the recommendations of the CRS are adopted.

I. Background

A. The Covered Action

On June 13, 2016, the Commission instituted an administrating proceeding, *In the Matter of Bank of New York Mellon*, Investment Company Act of 1940 Rel. No. 32151, File No. 3-17286 (June 13, 2016), finding that the Bank of New York Mellon (the “Company”) had failed to disclose to certain of its registered investment company clients that it was pricing certain of its clients’ foreign exchange transactions near the end of the trading day or session at or near the worst interbank rates reported during that day or session, resulting in substantial revenues to the Company based on the difference between the rates that it assigned to its

clients and the rates that it obtained on its own behalf when buying and selling foreign currency in the interbank market. The Commission found that the Company violated Sections 31(a) and 34(b) of the Investment Company Act of 1940 and Rule 31a-1(b) thereunder, and required the Company to cease and desist from any future violations of these sections. Pursuant to Sections 9(b) and 9(f) of the Investment Company Act, the Company was also ordered by the Commission to pay a civil money penalty of \$30,000,000, disgorgement in the amount of \$120,000,000 and prejudgment interest of \$13,022,207.00.

On July 29, 2016, the Office of the Whistleblower posted the above-referenced Notice of Covered Action on the Commission's public website inviting claimants to submit whistleblower award applications within 90 days, by October 27, 2016.¹ Claimant 1 filed a timely whistleblower award claim. Claimant 2 filed an award claim on August 16, 2017 – nearly 10 months after the posted deadline.

B. The Preliminary Determination

The CRS issued a Preliminary Determination² recommending that (1) Claimant 1 receive an award of 30% of the monetary sanctions collected in the Covered Action,³ and (2) the award claim of Claimant 2 be denied. The CRS recommended that Claimant 2's claim be denied for two reasons – first, because Claimant 2 was not a “whistleblower,” within the meaning of Section 21F(a)(6) of the Exchange Act and Rule 21F-2(a) thereunder, since there was no evidence showing that Claimant 2 provided information to the Commission relating to the above-referenced Covered Action, as required by Rule 21F-9(a) or (d); and second, because Claimant 2 failed to submit Claimant 2's claim for award on Form WB-APP within ninety (90) days of the Notice of Covered Action in this matter, as required under Rule 21F-10(b) of the Exchange Act in order to be considered for an award and, further, did not demonstrate that the Commission should waive, in its discretion, the filing deadline based on “extraordinary circumstances,” as provided under Rule 21F-8(a) of the Exchange Act.⁴

¹ See Securities Exchange Act of 1934 (“Exchange Act”) Rule 21F-10(a), 17 C.F.R. § 240.21F-10(a).

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

³ The CRS also preliminarily determined to recommend that the Commission deny Claimant 1's award claims for two actions by other federal agencies on the grounds that these actions did not constitute “related actions.” See Exchange Act Section 21F(a)(5), 15 U.S.C. § 78u-6(a)(5); Exchange Act Rule 21F-3(b)(1), 17 C.F.R. § 240.21F-3(b)(1)10(d). Claimant 1 has not contested these preliminary denials. As a result, the CRS's Preliminary Determination of the related action claims became the final determination of the Commission pursuant to Exchange Act Rule 21F-11(f).

⁴ The Preliminary Determination noted that, because Claimant 2 should not be found eligible for an award in the Covered Action, Claimant 2 would not qualify for an award in any related action. A related action award may be made only if, among other things, the claimant satisfies the eligibility criteria for an award for the applicable covered action in the first instance. See 15 U.S.C. § 78u-6(b); Exchange Act Rule 21F-3(b), (b)(1); Rule 21F-4(g) and (f); Rule 21F-11(a).

C. Claimant 2's Response to the Preliminary Determination

On March 6, 2020, Claimant 2 submitted a timely written response contesting the Preliminary Determination.⁵ Claimant 2 argues in response to the Preliminary Determination that Claimant 2 was, in fact, a whistleblower because Claimant 2 had “jointly” provided the information that Claimant 1 provided in Claimant 1’s tip to the Commission. Claimant 2 also argues that Claimant 1 filed the application for award on Form WB-APP for both of them, as there was no space for them to both sign. Finally, Claimant 2 asserts that there were “extraordinary circumstances” excusing Claimant 2’s failure to file the award application before the posted deadline; namely that Claimant 2 does not have the resources, such as a computer or internet access, to monitor the SEC’s website for the postings of Notices of Covered Action. Claimant 2 further notes that Claimant 2 is disabled and suffering from a medical disability.

II. Analysis

A. Claimant 1

The record demonstrates that Claimant 1, a whistleblower, voluntarily provided original information to the Commission that led to the successful enforcement of the Covered Action.⁶ Accordingly, Claimant 1 qualifies for a whistleblower award.

Applying the award criteria specified in Rule 21F-6 of the Securities Exchange Act of 1934 to the specific facts and circumstances here, we find the proposed award amount is appropriate.⁷ In reaching that determination, we positively assessed the following facts: (i) Claimant 1’s information was highly significant and Claimant 1 provided first-hand observations of misconduct by the Company that was previously unknown to the staff; (ii) Claimant 1 laid out in detail substantial aspects of the scheme and provided a roadmap for the investigation; and (iii) Claimant 1’s information helped the Commission further significant law enforcement interests as Claimant 1’s information allowed the Commission to bring an enforcement action that, in conjunction with other agencies as part of a global settlement with the Company, returned a significant amount of money to those harmed by the Company’s misconduct.

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

⁶ See Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1); Exchange Act Rule 21F-3(a), 17 C.F.R. § 240.21F-3(a).

⁷ In assessing the appropriate award amount, Exchange Act Rule 21F-6 provides that the Commission consider: (1) the significance of information provided to the Commission; (2) the assistance provided in the Commission action; (3) law enforcement interest in deterring violations by granting awards; (4) participation in internal compliance systems; (5) culpability; (6) unreasonable reporting delay; and (7) interference with internal compliance and reporting systems. 17 C.F.R. § 240.21F-6.

B. Claimant 21. Claimant 2 was not a whistleblower under the applicable rules

The Commission is authorized to pay an award or awards to “1 or more *whistleblowers* who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action.”⁸ The Commission’s whistleblower rules define a whistleblower as a person who “alone or jointly with others, . . . provide[s] the Commission with information pursuant to the procedures set forth in § 240.21F-9(a) of this chapter, and the information relates to a possible violation of the federal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing, or is about to occur.”⁹

There is no evidence in the record that Claimant 2 submitted any information to the Commission relating to the Covered Action pursuant to the required procedures or otherwise, and Claimant 2 has not identified any submissions that Claimant 2 made.¹⁰ Instead, Claimant 2 argues that Claimant 2 should be credited as a “joint” whistleblower with Claimant 1 on the theory that Claimant 1 and Claimant 2 worked closely together in a small group at the Company. However, there is no evidence in the record to support a finding that Claimant 2 was a participant in any manner in Claimant 1’s tip. Accordingly, Claimant 2 does not qualify as a whistleblower and is thus not eligible to receive an award.

2. Claimant 2 did not show “extraordinary circumstances” excusing the late-filing of Claimant 2’s award application

Exchange Act Rule 21F-10(a) states that “[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.”¹¹ Claimant 2’s award application was filed nearly 10 months after the deadline.

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 claims evaluated at the same time. The deadline also brings finality to the

⁸ Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1) (emphasis added).

⁹ Exchange Act Rule 21F-2(a), 17 C.F.R. § 240.21F-2(a).

¹⁰ Claimant 2 acknowledges that Claimant 2 “does not remember if [Claimant 2] filed a whistleblower complaint with the SEC.” A search of the Commission’s records reveals only that, after the date of the Covered Action, Claimant 2 submitted a whistleblower tip regarding unrelated issues.

¹¹ 17 C.F.R. § 240.21F-10(a).

claim process so that the Commission can make timely awards to meritorious whistleblowers.¹²

Under Exchange Act Rule 21F-8(a), “the Commission may, in its sole discretion, waive” certain procedural requirements, including the ninety-day filing deadline, “upon a showing of extraordinary circumstances.”¹³ In determining whether a claimant has demonstrated extraordinary circumstances that would trigger the Commission’s discretion to waive the ninety-day filing deadline, we have previously looked to our decision in *In the Matter of the Application of PennMont Securities*.¹⁴ There, in determining whether applicants had demonstrated extraordinary circumstances that would trigger the Commission’s discretion to waive the thirty-day filing deadline under Commission Rule of Practice 420(b),¹⁵ we explained that “the ‘extraordinary circumstances’ exception is to be narrowly construed and applied only in limited circumstances.”¹⁶ An extraordinary circumstance is one “where the reason for the failure timely to file was beyond the control of the applicant”¹⁷ Further, “[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 filing . . . as soon as reasonably practical thereafter.”¹⁸ We have declined requests to waive the ninety-day filing deadline for whistleblower award claims because of claimants’ failures to meet the *PennMont* standard.¹⁹

While Claimant 2 may have been limited by Claimant 2’s lack of a home computer and internet connection and Claimant 2’s medical issues, Claimant 2 has not shown that the failure to timely file was beyond the control of Claimant 2. Access to the Commission’s website can be obtained at any computer or electronic device that has an Internet connection.

¹² See *Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 34-64545, at 172 (Effective Aug. 12, 2011) (available at <http://www.sec.gov/rules/final/2011/34-64545.pdf>); Order Determining Whistleblower Award Claims, Release No. 34-85412 (Mar. 26, 2019).

¹³ 17 C.F.R. § 240.21F-8(a).

¹⁴ *PennMont Sec.*, Release No. 34-61967 (Apr. 23, 2010), *pet. for rev. denied sub nom. PennMont Sec. v. SEC*, 414 F. App’x 465 (3rd Cir. 2011).

¹⁵ 17 C.F.R. § 201.420(b).

¹⁶ *PennMont Sec.* at 8-9.

¹⁷ *Id.* at 9.

¹⁸ *Id.*

¹⁹ See Order Determining Whistleblower Award Claim, Release No. 34-77368 (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), *reh’g denied*, 138 S. Ct. 2715 (2018) (“Release No. 34-77368”); see also Order Determining Whistleblower Award Claim, Release No. 34-85273 (Mar. 8, 2019); 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).

For example, nearly every U.S. public library offers free access to computers and the Internet.²⁰ Moreover, we note that Claimant 2 filed an online tip with the Commission in December 2016 – eight months before Claimant 2’s award application was filed. Thus, even assuming for the sake of argument that circumstances beyond Claimant 2’s control gave rise to an initial delay between October and December 2016, Claimant 2 has not demonstrated that “he or she promptly arranged for the filing..... as soon as reasonably practical thereafter.”²¹ For these reasons, we conclude that Claimant 2 has not met the heavy burden of demonstrating that extraordinary circumstances prevented Claimant 2 from timely submitting an award application for the Covered Action.²²

IV. Conclusion

Accordingly, it is hereby ORDERED that: (1) Claimant 1 shall receive an award of thirty percent (30%) of the monetary sanctions collected, or to be collected, in the Covered Action; and (2) Claimant 2’s whistleblower award application is denied.

By the Commission.



Vanessa A. Countryman
Secretary

²⁰ See 2005 study commissioned by the American Library Association and the Bill and Melinda Gates Foundation, available at <http://www.ala.org/news/news/pressreleases2005/june2005/librariescomputeraccess>. See also Quotable Facts About America’s Libraries – January 2019, American Library Association (noting that “[n]early 100% of public libraries provide Wi-Fi and have no-fee access to computers”), available at <http://www.ala.org/advocacy/sites/ala.org/advocacy/files/content/Quotable%20Facts..Jan.19.FINAL.ANNOTATED.pdf>.

²¹ We also reject Claimant 2’s argument that Claimant 1 filed Claimant 1’s application for award on Form WB-APP for both of them. There is no evidence in the record supporting Claimant 2’s contention. Moreover, Claimant 1’s attorney has advised the Commission’s staff that Claimant 1’s attorney only represented Claimant 1 in this matter and that Claimant 1 is the sole whistleblower.

²² Claimant 2 also argues that Claimant 2 assisted another agency on a purported related action and, because of Claimant 2’s experience and background, provided that agency with more credible evidence and information than Claimant 1 had provided. This argument has no merit because, in order to be eligible for an award, a whistleblower is required to have provided information to the Commission. See 15 U.S.C. § 78u-6 and 17 C.F.R. § 240.21F-3(a)(1).

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2020, I electronically filed the foregoing motion with addendum and appendix with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that on the same date, I caused four hard copies of the same document to be sent by overnight courier to the Clerk of Court.

I further certify that on the same date, I caused the same document to be sent to Petitioner Richard J. Herber, who is not a registered CM/ECF user, by email to Richard_J_Herber@msn.com, and by overnight courier (two hard copies) to the following address:

Richard J. Herber
3901 North Washington Road
Fort Wayne, IN 46804

/s/ Stephen G. Yoder
Stephen G. Yoder
Senior Litigation Counsel

Dated: August 20, 2020