

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

John M. Barr,
Petitioner,

v.

U.S. Securities and Exchange
Commission,
Respondent.

Case No. 23-_____



PETITION FOR REVIEW

Pursuant to 15 U.S.C. 78u-6(f), 17 C.F.R. 240.21F-13, and Fed. R. App. P. 15(a), Petitioner John M. Barr hereby petitions the U.S. Court of Appeals for the Fifth Circuit to review the *Order Determining Whistleblower Award Claims* (Notice of Covered Action 2015-036; Release No. 97202; File No. 2023-42), entered by the U.S. Securities and Exchange Commission on March 27, 2023 (attached as Appendix A).¹ That order misreads the operative statute and contains multiple prejudicial errors that violate Mr. Barr's legal rights. This Court has jurisdiction to review the order under 15 U.S.C. 78u-6(f) and

¹ At the SEC's request, Mr. Barr is attaching the public, redacted version of the final order to avoid any confidentiality concerns involving other claimants (who are not parties to this proceeding).

17 C.F.R. 240.21F-13, and venue is proper because Mr. Barr resides in this circuit. See *ibid*.

Mr. Barr respectfully submits that the order is unlawful and defective on multiple grounds, including that it is arbitrary and capricious, an abuse of discretion, unsupported by evidence, contrary to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, procedurally and substantively flawed, and otherwise not in accordance with law. See 5 U.S.C. 706(2)(A). Mr. Barr requests that the Court vacate or modify the order, in whole or in part, and otherwise provide all appropriate relief to which Mr. Barr may be entitled.

Respectfully submitted.

/s/ Daniel L. Geysler

Daniel L. Geysler
HAYNES AND BOONE, LLP
2323 Victory Avenue, Ste. 700
Dallas, TX 75219
Tel.: (303) 382-6219
daniel.geysler@haynesboone.com

Counsel for Petitioner John M. Barr

J. Kevin Edmundson
EDMUNDSON SHELTON WEISS PLLC
600 East Highway 290
Dripping Springs, TX 78620
Tel.: (512) 720-0782
kevin@eswpllc.com

April 24, 2023

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 15(c) and 25(d), I hereby certify that on April 24, 2023, an electronic copy of the foregoing Petition for Review was filed with the Clerk of Court for the U.S. Court of Appeals for the Fifth Circuit, using the appellate CM/ECF system. I further certify that I have caused the foregoing petition to be served on the following parties by electronic mail and first-class mail:

Megan Barbero, General Counsel
Stephen Yoder, Senior Litigation Counsel
Emily True Parise, Senior Litigation Counsel
Office of the General Counsel
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549
OGC@sec.gov
YoderS@sec.gov
PariseE@sec.gov

Nicole C. Kelly, Chief
Emily Pasquinelli
Kristina Guidi
Office of the Whistleblower
U.S. Securities and Exchange Commission
100 F. Street, N.E., Mail Stop 5631
Washington, DC 20549
KellyN@sec.gov
PasquinelliE@sec.gov
GuidiK@sec.gov

/s/ Daniel L. Geysler

Daniel L. Geysler

HAYNES AND BOONE, LLP

2323 Victory Avenue, Ste. 700

Dallas, TX 75219

Tel.: (303) 382-6219

daniel.geysler@haynesboone.com

April 24, 2023

APPENDIX A

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 97202 / MARCH 27, 2023

WHISTLEBLOWER AWARD PROCEEDING
File No. 2023-42

In the Matter of the Claims for an Award

in connection with

Redacted

Redacted

Notice of Covered Action Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS

The Claims Review Staff (“CRS”) issued Preliminary Determinations recommending that (i) ^{Redacted} (“Claimant 1”) receive a whistleblower award equal to ^{Redacted} percent (^{Redacted} %) of the monetary sanctions collected, or to be collected, in connection with the above referenced Covered Action (the “Covered Action”); (ii) ^{Redacted} (“Claimant 2”) receive a whistleblower award equal to ^{Redacted} percent (**%) of the monetary sanctions collected, or to be collected, in connection with the Covered Action; and (iii) the whistleblower award applications submitted by ^{Redacted} (“Claimant 3”) and ^{Redacted} (“Claimant 4”) in connection with the Covered Action be denied. Each of the Claimants filed a timely response contesting the Preliminary Determination.

After review of the reconsideration requests and additional information submitted by Claimant 4, we find Claimant 4 to be eligible for an award. Accordingly, we reallocate a maximum thirty percent award among Claimants 1, 2, and 4 and (i) award Claimant 1 ^{Redacted} percent (^{Redacted} %) of the monetary sanctions collected or to be collected in the Covered Action, equal to over \$21,000, (ii) award Claimant 2 ^{Redacted} percent (**%) of the monetary sanctions collected or to be collected in the Covered Action, equal to over \$5,000, and (iii) award Claimant 4 ^{Redacted} percent (**%) of the monetary sanctions collected or to be collected in the Covered Action, equal to over \$5,000. We deny an award to Claimant 3.

I. Background

A. The Covered Action

In ^{Redacted}, staff in the United States Securities and Exchange Commission’s (“Commission”) Division of Enforcement (“Enforcement”) opened a matter under inquiry to investigate certain conduct by ^{Redacted} (the “Company”), a public company in the business of ^{Redacted}. On ^{Redacted}, the Commission filed a civil action in federal district court charging the Company and ^{Redacted} its officers with violations of ^{Redacted} of the federal securities laws.

^{Redacted} The Commission’s Complaint alleged, among other things, that the Company ^{Redacted}

On ^{Redacted}, the district court entered a final judgment by consent in favor of the Commission that ordered ^{Redacted} the Company’s officers ^{Redacted} to pay a civil penalty of ^{Redacted} ^{Redacted}. The ^{Redacted} continued to trial, and the jury returned a verdict finding ^{Redacted}

After the trial, the court ^{Redacted}

^{Redacted} On ^{Redacted}, the Court entered a final judgment ordering the ^{Redacted} Company to pay ^{Redacted} and the ^{Redacted} to pay ^{Redacted}

On ^{Redacted}, the Company filed ^{Redacted} (the “Bankruptcy Action”). On ^{Redacted}, the ^{Redacted} Plan ^{Redacted} of the Company became effective. The plan established ^{Redacted}

^{Redacted} As part of the plan, the Commission received ^{Redacted} distributions ^{Redacted} and agreed that any ^{Redacted} would be reallocated to investors.

As to ^{Redacted} the ^{Redacted} ordered ^{Redacted} On ^{Redacted}, on remand, the district court ordered ^{Redacted} (i) ^{Redacted} to pay ^{Redacted} (ii) the ^{Redacted} to pay ^{Redacted} (iii) the ^{Redacted} to pay ^{Redacted} and (iv) the ^{Redacted}

On ^{Redacted}, the Office of the Whistleblower posted a Notice of Covered Action on the Commission’s public website inviting claimants to submit whistleblower award applications within ninety days. Claimant 1, Claimant 2, and Claimant 4 submitted timely award claims on Form WB-APP. Claimant 3 submitted a claim on Form WB-APP on ^{Redacted}, almost two months after the deadline.

B. The Preliminary Determinations

The CRS issued Preliminary Determinations¹ recommending that Claimant 1 receive a whistleblower award of % and Claimant 2 receive a whistleblower award of % of the monetary sanctions collected, or to be collected, in the Covered Action.

The CRS recommended that Claimant 4’s application be denied because Claimant 4 did not submit information that led to the successful enforcement of the Covered Action within the meaning of Section 21F(b)(1) of the Exchange Act and Rules 21F-3(a)(3) and 21F-4(c) thereunder. In reaching the Preliminary Determination, the CRS noted that (i) the Enforcement staff opened the underlying investigation more than three years before Claimant 4 submitted his/her tip to the Commission; (ii) Claimant 4 did not testify at trial ^{Redacted}; (iii) although ^{Redacted} Claimant 4’s information assisted the staff in preparing the Commission’s motion ^{Redacted} the court denied that motion ^{Redacted}.

^{***} and (iv) Claimant 4’s assistance in the bankruptcy proceedings does not qualify as having “led to the successful enforcement of” the Covered Action under Section 21F(b)(1) because it did not contribute to the process leading to the entry of the final judgment and consequent relief in the Commission’s favor and also did not result in the subsequent entry of any additional relief for the violations alleged by the Commission.

The CRS also recommended that Claimant 3’s application be denied because Claimant 3 did not submit information that led to the successful enforcement of the Covered Action within the meaning of Section 21F(b)(1) of the Exchange Act and Rules 21F-3(a)(3) and 21F-4(c) thereunder. In reaching the Preliminary Determination, the CRS noted that (i) the Enforcement staff opened the underlying investigation more than two years before Claimant 3 submitted his/her tip to the Commission; (ii) Claimant 3’s information was not new or meaningful to the success of the Covered Action; (iii) Claimant 3 was not called to testify at the trial in the Covered Action; and (iv) while Claimant 3 identified a potential witness, Enforcement staff did not present that witness at trial. The CRS also recommended that Claimant 3’s application be denied because Claimant 3 failed to meet the deadline for applying for an award in connection with the Covered Action and submitted a Form WB-APP almost two months late.²

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

² Exchange Act Rules 21F-10(a) (“A claimant will have ninety (90) days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred”) and 10(b)(1) (“All claim forms, including any attachments, must be received by the Office of the Whistleblower within ninety (90) calendar days of the date of the Notice of Covered Action in order to be considered for an award”).

C. Claimants' Responses to the Preliminary Determinations

Claimant 1 submitted a timely written response contesting the Preliminary Determination.³ Specifically, Claimant 1 argues, alternatively, that (i) Claimant 1's award should be based on the amount that the Commission was "able to collect" rather than the amount it actually collected; (ii) Claimant 1's award should be based on any amounts collected by the bankruptcy trustee and distributed to defrauded investors; or (iii) the Commission should use its discretion under Section 36(a)(1) of the Exchange Act to exempt Claimant 1 from the whistleblower program rules and issue an appropriate award amount.

Claimant 2 submitted a timely written response contesting the Preliminary Determination. Specifically, Claimant 2 argues that the Commission should use its discretion to award ^{Redacted} to Claimant 2. Claimant 2 asserts that this award amount is necessary in order for Claimant 2 to recover the losses Claimant 2 suffered as a result of ^{Redacted} the Covered Action.

Claimant 4 submitted a timely written response contesting the Preliminary Determination. Specifically, Claimant 4 argues that Claimant 4 is entitled to an award because Claimant 4's information led to the success of the Covered Action. Claimant 4 claims that (i) Claimant 4 would have been an important witness were Claimant 4 allowed to testify at the trial; (ii) Claimant 4 provided new information and documents, including certain documents that the Commission introduced as evidence at trial; (iii) Claimant 4 identified a critical witness ("Witness") for the Commission at the trial; and (iv) Claimant 4 provided significant information and supporting evidence, including ^{Redacted} that would have been helpful to the Commission in connection with ^{Redacted} and that helped in the appointment of the bankruptcy trustee. Claimant 4 also claims that even if staff were already aware of the Witness, he/she provided new, important information by telling staff that the Witness would make a good witness for the SEC at trial because of the ^{Redacted} ^{Redacted}. In addition, pursuant to a request from the Office of the Whistleblower ("OWB"), Claimant 4 provided information indicating that the Commission used ^{Redacted} provided by Claimant 4 in obtaining additional relief in the remanded final judgment.

Claimant 3 submitted a timely written response contesting the Preliminary Determination. Specifically, Claimant 3 argues that Claimant 3 is entitled to an award because Claimant 3's information led to the success of the Covered Action by saving the Commission time and resources in focusing on the key documents and issues. Claimant 3 claims that: (i) Claimant 3 had multiple communications with Enforcement staff during the litigation; (ii) during the trial, Enforcement staff relied on the information Claimant 3 provided, namely, that there was ^{Redacted} ^{Redacted} (iii) while the Commission may already have had the information described in (ii), Claimant 3's provision of this information saved significant Commission resources; and (iv) Claimant 3 initially was asked to testify at the trial, but

³ See Exchange Act Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e).

ultimately did not do so. Claimant 3 did not provide any explanation as to why Claimant 3 submitted the WB-APP late.

Upon further questioning by OWB as to the reason for the late WB-APP, Claimant 3's current counsel explained that Claimant 3 had been previously represented by another attorney, who had represented Claimant 3 with respect to all actions concerning the whistleblower submission and claim process. According to Claimant 3's current counsel, on ^{Redacted}, Claimant 3 was conducting an internet search regarding the status of the SEC enforcement proceeding and discovered that a Notice of Covered Action had been posted. Prior to that time, Claimant 3 was unaware of the Notice of Covered Action process, the existence or need to file Form WB-APP, or of the time requirements for filing. Claimant 3 sent the information he/she had found during the search on ^{Redacted} to his/her then-attorney, who then submitted the WB-APP the following day, ^{Redacted}.⁴ Claimant 3's current counsel asks that the Commission waive the filing deadline.

III. Analysis

A. Claimant 1

1. Award Analysis

The record demonstrates that Claimant 1 voluntarily provided original information to the Commission that significantly contributed to the success of the Covered Action.⁵ In reaching this determination, we assessed, among other things, the following facts: (i) Claimant 1 provided information early in the investigation, beginning just three months after the Commission staff opened the matter; (ii) Claimant 1's information saved the staff time and resources in conducting its investigation and included ^{Redacted} that the staff likely would not have uncovered without Claimant 1's help; (iii) Claimant 1 provided continuing assistance, including communicating with the staff on many occasions and providing voluminous documents to the staff; and (iv) there is a close nexus between Claimant 1's information and several paragraphs in the Commission's Complaint.

The CRS preliminarily determined that the aggregate award in this matter should be at the statutory maximum and that Claimant 1 should receive a ***% award and that Claimant 2 should receive a **% award because Claimant 1's information was more significant and Claimant 1 provided extraordinary ongoing assistance. Since then, Exchange Act Rule 21F-6(c) was adopted creating a presumption of a statutory maximum award of 30% where: (i) the maximum award would be \$5 million or less; (ii) the claimant's application presents no negative award factors under Rule 21F-6(b) – *i.e.*, culpability, unreasonable reporting delay, or interference with

⁴ We note that the dates provided by Claimant 3's counsel do not comport with other aspects of the record. Claimant 3 faxed the WB-APP to OWB on ^{Redacted}, and the WB-APP was dated ^{Redacted}. As ^{Redacted} such, Claimant 3 must have become aware of the NoCA filing by no later than ^{Redacted}, and not on ^{Redacted}.

⁵ 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).

an internal compliance and reporting system—and (iii) the award claim does not trigger Rule 21F-16.⁶ The Commission may depart from the presumption if: (i) the assistance provided by the whistleblower was, “under the relevant facts and circumstances, limited,” or (ii) a maximum award “would be inconsistent with the public interest, the promotion of investor protection, or the objectives of the whistleblower program.”⁷

The 30% presumption applies in this matter. Based on current collections, the statutory maximum award is approximately \$32,000, and the Commission does not reasonably anticipate that future collections would cause the statutory maximum award to exceed \$5 million. No negative factors are associated with Claimant 1’s application, Claimant 1 bears no responsibility for the misconduct, and Claimant 1 did not benefit financially from the wrongdoing. There is nothing in the record that suggests Claimant 1 unreasonably delayed in reporting information to the Commission or interfered with the Company’s internal compliance or reporting systems. Also, there is no reason to depart from the presumption of the statutory maximum award. Claimant 1 provided more than limited assistance. Furthermore, there are no public interest, investor protection, or programmatic concerns that would warrant departure from a 30% award.

Based on these factors and all aspects of the record, and after considering Claimant 1’s contributions relative to Claimant 2’s and Claimant 4’s contributions, we find that an award of ***% is appropriate for Claimant 1.

2. Request for Reconsideration

We disagree with Claimant 1’s contention that Claimant 1’s award calculation should be based on a larger amount than the Commission collected in connection with the Covered Action. Claimant 1 notes that Exchange Act Rule 21F-5(b) provides, in part, that the amount of an award “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.” Claimant 1 asserts that the Commission was “able to collect” a much larger amount of monetary sanctions than it in fact did collect in the Covered Action, because it voluntarily subordinated its interest in the Bankruptcy Action to the interests of defrauded investors. As such, Claimant 1 argues that Claimant 1’s award should be based on the amount that the Commission could have collected rather than the amount that the Commission actually collected.

First, Claimant 1’s argument is based on an incorrect factual premise, as Claimant 1 assumes that the Commission could have collected the full ^{Redacted} had it not voluntarily subordinated its interest in the bankruptcy proceeding. The ^{Redacted} million civil penalty against the Company would have been disallowed or subordinated in the bankruptcy as a matter of law. At best, the Commission, as a general unsecured creditor, could only have been able to recover a

⁶ Exchange Act Rule 21F-16 applies only when the claimant was ordered to pay sanctions or an entity whose liability was based substantially on conduct that the claimant directed, planned or initiated was ordered to pay sanctions in connection with the covered action. Rule 21F-16 is not applicable here.

⁷ Exchange Act Rule 21F-6(c)(1)(iv).

fraction of the disgorgement.⁸ Contrary to Claimant 1’s assertions, the Commission did not simply walk away from a collection of ^{Redacted}, because it would only have been able to collect a *de minimis* amount, and any such collections would have been dependent upon the Commission winning on appeal.

Second, we decline to follow Claimant 1’s interpretation of Rule 21F-5(b) because it is at odds with the statute that it is designed to implement. Congress established the statutory minimum and maximum whistleblower awards as “(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.”⁹ Because the statutory maximum whistleblower award is based on the amount actually collected in connection with the Covered Action, we cannot base the amount of Claimant 1’s award on a higher amount that the Commission may have been able to but did not collect.

Third, calculating whistleblower award payments based on what the Commission hypothetically “was able to collect,” but did not, would introduce uncertainty, inconsistency, and could delay the processing of award claims.

We also disagree with Claimant 1’s argument that the award should be based on any amounts collected in the Bankruptcy Action. As we noted in connection with the adoption of several rule amendments, “our statutory authority does not extend to paying whistleblower awards for recoveries in bankruptcy proceedings or other proceedings that may in some way ‘result from’ the Commission’s enforcement action and the activities of the whistleblower.”¹⁰ Under Section 21F of the Exchange Act, the Commission is authorized to pay whistleblower awards only on the basis of monetary sanctions that are imposed in a covered judicial or administrative action or related action. A covered judicial or administrative action means an “action brought by the Commission under the securities laws that results in monetary sanctions exceeding \$1,000,000.”¹¹ A related action must be brought by one of the authorities specified in the statute.¹² Bankruptcy proceedings are not brought by either the Commission acting under the securities laws or by one of the designated related-action authorities, and orders to pay money that result from bankruptcy proceedings are not imposed in Commission covered actions or related actions.

Finally, we deny Claimant 1’s request that the Commission use its discretion under Section 36(a)(1) of the Exchange Act to exempt Claimant 1 from the requirements under the whistleblower program and set Claimant 1’s award amount above the statutory limit. Section

⁸ The payout rate to unsecured creditors, like the Commission, was only *** %. Therefore, the Commission could only have collected *** % of the final disgorgement, which at best would have been ^{Redacted} of the *** of disgorgement.

⁹ Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).

¹⁰ See Whistleblower Program Rules, Release No. 34-899963, 2020 WL 5763381, at *12 (Sept. 23, 2020).

¹¹ Exchange Act Section 21F(a)(1), 15 U.S.C. § 78u-6(a)(1).

¹² See Exchange Act Section 21F(a)(5), 15 U.S.C. § 78u-6(a)(5).

36(a)(1) provides that “the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person...from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”¹³ We have used this discretionary authority to exempt whistleblowers from certain of the program’s rules under limited circumstances.¹⁴ However, the limitation on the amount of the award to be issued in connection with any Covered Action was set by statute, and we have never used our discretion under Section 36(a)(1) of the Exchange Act to exempt a whistleblower from a statutory requirement or to approve an award amount above the statutory limit. The text of the statute reflects a clear congressional design to grant awards of no more than 30 percent of the amounts collected. Congress established the same framework for awards to be paid to whistleblowers in cases brought by the Commodity Futures Trading Commission¹⁵ and under the Anti-Money Laundering Act.¹⁶ Given the clarity and consistency of the statutory design for whistleblower awards, the Commission does not believe it would be appropriate to use its exemptive authority to award an amount above the statutory limit even in cases such as this one, where a higher award amount might otherwise be warranted.

B. Claimant 2

1. Award Analysis

The record demonstrates that Claimant 2 voluntarily provided original information to the Commission that significantly contributed to the success of the Covered Action. In reaching this determination, we assessed, among other things, the following facts: (i) Claimant 2 voluntarily submitted information to the Commission staff approximately nine months after the investigation was opened and before the Commission had filed its complaint against the Company; (2) Claimant 2 participated in an initial phone call with staff, provided documents related to Claimant 2’s ^{Redacted}, and provided ongoing assistance to the staff; (3) Claimant 2’s information included information that was not previously known to the staff, and the information informed the direction of the staff’s investigation and the charges ultimately brought against the Company.

As noted above, the presumption of a statutory maximum award of 30% applies in this matter. Based on all aspects of the record, and after considering Claimant 2’s contributions relative to Claimants 1’s and Claimant 4’s contributions, we find that an award of **% is appropriate for Claimant 2.

¹³ 15 U.S.C. § 78mm(a)(1).

¹⁴ See, e.g., Order Determining Whistleblower Award Claims, Release No. 34-90580 (Dec. 7, 2020) (providing whistleblower with exemption from the TCR filing requirements under Rules 21F-9(a) and (b)); Order Determining Whistleblower Award Claims, Release No. 34-86010 (June 3, 2019) (providing whistleblower with exemption from the voluntary requirement under Rule 21F-4(a)).

¹⁵ 7 U.S.C § 26(b)(1).

¹⁶ 31 U.S.C. § 5323(b)(1).

2. Request for Reconsideration

We decline Claimant 2's request that we set Claimant 2's award amount at ^{Redacted}. As discussed above, the limit for a whistleblower award to all meritorious claimants in the aggregate is set by statute at 30% of the amount collected of the monetary sanctions imposed in the action or related actions. Even if Claimant 2 were the sole meritorious claimant, which Claimant 2 is not, a 30% award would be less than the amount Claimant 2 requests. We decline to set Claimant 2's award above the statutory limit. Further, whistleblower award payments are based on the amounts collected in the underlying Covered Action, not the amount of loss suffered by the claimant.

C. Claimant 4's Award Analysis

The record demonstrates that Claimant 4 voluntarily provided original information to the Commission that significantly contributed to the success of the Covered Action. Specifically, we find that the ^{Redacted} provided by Claimant 4 were helpful to the Commission in obtaining additional relief in the remanded final judgment.¹⁷

As noted above, the presumption of a statutory maximum award of 30% applies in this matter. Based on all aspects of the record, and after considering Claimant 4's contributions relative to Claimants 1's and Claimant 2's contributions, we find that an award of 30% is appropriate for Claimant 4.

D. Claimant 3

Claimants must give the Commission information in the form and manner that the Commission requires in order to be eligible for a whistleblower award.¹⁸ The Commission's rules require Claimants to file any application for a whistleblower award on Form WB-APP.¹⁹ Further, the Form WB-APP must be filed within ninety days from the date of the Notice of Covered Action or the claim will be barred.²⁰ Claimants bear the ultimate responsibility to learn about and follow the Commission's rules regarding the award application process.²¹

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

¹⁷ We note that the other information provided by Claimant 4 did not significantly contribute to the success of the Covered Action, because, for example, the Enforcement staff had already obtained the information through other sources.

¹⁸ See Exchange Act Rule 21F-8(a), 17 C.F.R. § 240.21F-8(a).

¹⁹ See Exchange Act Rule 21F-10(b), 17 C.F.R. § 240.21F-10(b).

²⁰ See Exchange Act Rule 21F-10(a), 17 C.F.R. § 240.21F-10(a).

²¹ See Order Determining Whistleblower Award Claim, Release No. 34-72659, at 5 (July 23, 2014).

claims evaluated at the same time. The deadline also brings finality to the claim process so that the Commission can make timely awards to meritorious whistleblowers.²²

Notwithstanding these important programmatic functions, the whistleblower program rules recognize that there may be rare situations where an exception should be made. To allow for this, Rule 21F-8(a) of the Exchange Act provides that “the Commission may, in its sole discretion, waive” the filing requirements “upon a showing of extraordinary circumstances.”²³ The Commission has explained that the “extraordinary circumstances” exception is “narrowly construed” and requires an untimely claimant to show that “the reason for the failure to timely file was beyond the claimant’s control.”²⁴ The Commission has identified “attorney misconduct or serious illness” that prevented a timely filing as two examples of the “demanding showing” that an applicant must make before the Commission will consider exercising its discretionary authority to excuse an untimely filing.²⁵ The Commission has previously found that “a lack of awareness about the [whistleblower award] program does not . . . rise to the level of an extraordinary circumstance as a general matter [since] potential claimants bear the ultimate responsibility to learn about the program and to take the appropriate steps to perfect their award applications.”²⁶ “A potential claimant’s responsibility includes the obligation to regularly monitor the Commission’s web page for NoCA postings and to properly calculate the deadline for filing an award claim.”²⁷

Claimant 3’s lack of awareness of the NoCA posting or of the 90-day deadline is not an “extraordinary circumstance” that would excuse his/her failure to submit a timely Form WB-APP. Nothing interfered with his/her ability to monitor the Commission’s web page or submit an application by the 90-day deadline. Furthermore, there are no unique circumstances here that might support the Commission’s exercise of its separate, discretionary authority under Section 36(a) of the Exchange Act to exempt Claimant 3 from the 90-day filing deadline.²⁸

²² See *Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34300, 34343 (June 13, 2011); Order Determining Whistleblower Award Claims, Release No. 95711 (Sept. 9, 2022); Order Determining Whistleblower Award Claims, Release No. 88464 (Mar. 24, 2020); Order Determining Whistleblower Award Claims, Release No. 96765 (Jan. 30, 2023).

²³ 17 C.F.R. § 240.21F-8(a).

²⁴ Order Determining Whistleblower Award Claims, Release No. 77368, at 3 (Mar. 14, 2016), *pet. for rev. denied sub nom. Cerny v. SEC*, 708 F. App’x 29 (2d Cir. 2017), cert. denied, 138 S. Ct. 2005 (2018).

²⁵ Order Determining Whistleblower Award Claim, Release No. 77368; Order Determining Whistleblower Award Claim, Release No. 82181 (Nov. 30, 2017).

²⁶ Order Determining Whistleblower Award Claims, Release No. 95711 (Sept. 9, 2022) (citing to Order Determining Whistleblower Award Claim, Release No. 88464 (Mar. 24, 2020)).

²⁷ *Id.* The whistleblower rules provide “for constructive, not actual, notice of the posting of a covered action and of the deadline for submitting a claim.” *Id.*; see also Order Determining Whistleblower Award Claims, Release No. 96765 (Jan. 30, 2023) (finding that claimant’s lack of awareness about the whistleblower program and limited understanding of the whistleblower rules “failed to meet the demanding standard for showing that there were extraordinary circumstances”).

²⁸ *Cf.* Order Determining Whistleblower Award Claims, Release No. 92086 (June 2, 2021) (exercising Section 36(a) exemptive authority to waive the 90-day deadline where the claimant faced “unique obstacles” to timely filing the claim).

We therefore conclude that Claimant 3 failed to submit a claim for award on Form WB-APP to the Office of the Whistleblower within ninety days of the date of the Notice of Covered Action as required under Rule 21F-10(b) of the Exchange Act and that, as a result, Claimant 3 is ineligible for an award with respect to the Covered Action.²⁹

IV. Conclusion

Accordingly, it is ORDERED that Claimant 1 receive an award of ^{Redacted} percent (^{***} %) of the monetary sanctions collected, or to be collected, in the Covered Action; Claimant 2 receive an award of ^{***} percent (**%) of the monetary sanctions collected, or to be collected, in the Covered Action; Claimant 4 receive an award of ^{***} percent (**%) of the monetary sanctions collected, or to be collected, in the Covered Action; and that Claimant 3's award application be denied.

By the Commission.

Vanessa A. Countryman
Secretary

²⁹ Because Claimant 3 is ineligible for an award based on the late filing of a Form WB-APP, we decline to consider whether Claimant 3's information led to the success of the Covered Action.