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# It's All in the Footnotes: A Field Guide to SEC Whistleblower Awards

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More than seven years since the Dodd-Frank Act's whistleblower incentive provisions became effective, and more than five years since the first SEC whistleblower program award, only a few courts have put the program under a microscope. In the absence of meaningful case law and in light of the SEC's practice to heavily redact orders granting and denying awards, how do we know what makes the program really tick? The short answer: it's all in the footnotes.

In this first-of-a-kind article, we tie together more than 350 footnotes in 120 SEC whistleblower orders so that you can get easy answers to four key questions: Who qualifies for SEC whistleblower awards? What procedural rights and responsibilities do they have? When does the SEC make exceptions? And how does the SEC calculate and allocate awards?

## BACKGROUND

In March 2018, the SEC whistleblower program announced its largest-ever awards: $33 million to one whistleblower, and an additional $50 million to be shared between two others in the same action.[1] These awards are massive—staggering even—but they are also consistent with the SEC's long track record of granting multimillion dollar awards to qualified whistleblowers. In fact, "[t]he SEC has awarded more than $262 million to 53 whistleblowers since issuing its first award in 2012," and it has an Investor Protection Fund dedicated to paying any eligible whistleblowers who come forward in the future.[2] The upper limit on these awards is 10–30 percent of the monetary sanctions recovered, meaning high-quality information about high-impact securities law violations will only break these records over time.

Given these record-breaking awards, and the U.S. Supreme Court's recent decision in Digital Realty Trust, Inc. v. Somers,[3] whistleblowers will be sprinting to the SEC, but what are the requirements to qualify for a financial award under the SEC whistleblower program, and how does a tip get submitted, evaluated, and ultimately awarded once the SEC has prosecuted its case? Although courts have increasingly weighed in on Dodd-Frank antiretaliation claims,[4] they haven't had much chance to scrutinize the SEC whistleblower program. In fact, only six opinions have been issued at the time of this writing, and most of them were cursory and involved a pro se claimant.[5]

Luckily, there's another way to read the tea leaves. Over the years, the SEC has created a custom of interpreting the Dodd-Frank Act and its whistleblower rules thereunder in publicly available orders granting or denying awards.[6] Although the main text of these orders can certainly provide important insights, they are often heavily redacted, and it's more often the footnotes where the SEC provides the clearest guidance, applies the facts to the rules, and signals how it will approach novel issues in future cases.

With hundreds of footnotes scattered throughout scores of SEC whistleblower orders, it's a daunting task see the forest through the trees, but we're here to help. Below we present a "field guide" to SEC whistleblower awards. Our noble goal is to restate all of the SEC's valuable guidance in a digestible format—in other words, we comb through the fine print so you don't have to.

Anyone who wants to understand this process should carefully consider these issues with experienced counsel, along with a host of other requirements that the SEC has not yet addressed in its orders.

## WHO QUALIFIES FOR AN SEC WHISTLEBLOWER AWARD?

Under the Dodd-Frank Act, a "whistleblower" is defined as "any individual who provides . . . information relating to a violation of the securities laws to the [SEC]" in a manner consistent with the SEC whistleblower rules.[7] However, only certain whistleblowers qualify for an award under the SEC whistleblower program. In the first part of our field guide, we consider footnotes related to the four main elements of eligibility: "voluntarily provided" the SEC with "original information" that "led to the successful enforcement" of a "covered . . . or related action."[8] We also consider footnotes related to special timing issues, getting assistance from professionals like lawyers and accounting experts, eligibility of foreign whistleblowers, and potential disqualifications for providing false information.

### *1. Voluntarily Provided*

To begin, only whistleblowers who "voluntarily" provide information to the SEC are eligible for an award.[9] This generally means that the individual has no preexisting legal or contractual duty to report the information to the SEC, and the SEC has not already sent the individual a "request, inquiry, or demand" for that information.[10] Sometimes, however, a whistleblower has already volunteered information to a government authority other than the SEC, and the SEC subsequently contacts or subpoenas the whistleblower for similar information. A November 2017 order confirmed that such a whistleblower is still eligible for an award: "a claimant's 'submission of information to the [SEC] will be considered voluntary if [he] voluntarily provided the same information to' any authority of the federal government 'prior to receiving a request, inquiry, or demand from the [SEC].'"[11] In the SEC's view, the whistleblower did not need to provide exactly the "same information" to the other government authority; it is sufficient if the information "'relates to the subject matter of' the [SEC]'s later inquiry."[12]

### *2. Original Information*

Likewise, only whistleblowers who provide "original information" to the SEC are eligible for an award.[13] Per the SEC whistleblower rules, original information must be: (i) derived from the whistleblower's "independent knowledge" or "independent analysis"; (ii) not already known to the SEC (unless the whistleblower is the "original source" of the information); (iii) not exclusively derived from allegations in certain public sources (unless the whistleblower is "a source" of the information); and (iv) provided to the SEC for the first time after July 21, 2010, the date Dodd-Frank was enacted.[14]

The final element is analyzed further below. As for the first three elements, various SEC orders have deemed the following examples not to be "original": providing information that appeared to be "largely copied from a third party's publicly-available court filings";[15] merely providing "an article written from a press release from NASDAQ, printed in a [securities trade group] magazine";[16] merely providing "an internet link to a news article (including information taken from that news article)";[17] and providing a promotions mailer that the SEC had already received "several years earlier" and that "was publicly available on the internet."[18]

Another issue is dirt provided by individuals who obtained the information through positions of trust, such as attorneys, officers, directors, public accountants, and compliance and internal audit professionals. This information is generally deemed not to be "original" under the whistleblower rules, but there are a variety of exceptions.[19] For instance, in August 2014 and April 2015, the SEC granted awards to compliance/internal audit professionals under two of these exceptions: the first whistleblower was eligible because he had reported the information up the ladder "at least 120 days before reporting the information to the [SEC],"[20] and the second was eligible because he "had a reasonable basis to believe that disclosure of the information to the Commission [was] necessary to prevent the relevant entity from engaging in conduct that [was] likely to cause substantial injury to the financial interest or property of the entity or investors."[21] Likewise, in November 2017, the SEC granted an award to someone who had apparently received the information pursuant to up-the-ladder reporting because he had "reported the information to other responsible persons at the entity . . . or such persons knew about it, at least 120 days before Claimant reported the information to the Commission."[22]

What about government employees? A July 2017 order clarified that, "[g]enerally speaking, an employee of a federal, state, or local government agency can . . . be eligible for an award."[23] However, under the Dodd-Frank Act, a whistleblower is disqualified if he or she "is, or was at the time [he or she] acquired the original information submitted to the [SEC], a member, officer, or employee of" certain types of government organizations.[24] These exclusions include "appropriate regulatory authorities" and "law enforcement organizations." Although "appropriate regulatory authority" is explicitly defined (it includes banking regulators, such as the Fed or the FDIC),[25] "law enforcement organization" is not. In the July 2017 order mentioned above, the SEC had to decide "whether the exclusion . . . applies to an entire governmental agency that may contain components with law enforcement responsibilities, or only to those divisible sub-agency components that perform the law enforcement responsibilities."[26] The SEC ultimately granted an award to the government employee, finding that "it is reasonable to interpret the exclusion flexibly and, in appropriate cases such as this one, to apply it only to employees of a clearly separate agency component that performs law enforcement functions, rather than to all employees of an entire agency that happens to have been granted law enforcement powers among its many other separate responsibilities and powers."[27]

### *3. Led to Successful Enforcement*

In addition, an individual is eligible for a whistleblower award only if the original information he or she provided "led to" a successful enforcement action.[28] This is the causation element and becomes relevant only if there is original information in the first place.[29] As summarized in a November 2016 order, original information "leads to" a successful action if either: (i) "the original information caused the staff to open an investigation, reopen an investigation, or inquire into different conduct as part of a current investigation, and the [SEC] brought a successful action based in whole or in part on conduct that was the subject of the original information"; or (ii) "the conduct was already under examination or investigation, and the original information significantly contributed to the success of the action."[30]

The second prong may be relevant when two or more whistleblowers independently provide information regarding similar conduct.[31] It may also be relevant when a sole whistleblower provides information far along into an open SEC investigation. For instance, a May 2016 order found that the whistleblower had "significantly contribute[d]" to the action after the preliminary award determination was issued because his tip caused the staff to focus on a certain issue, and "this evidentiary development strengthened the [SEC]'s case by meaningfully increasing Enforcement staff's leverage during the settlement negotiations."[32] The order noted, however, that the whistleblower would have failed the first prong because the SEC already knew about similar misconduct. The SEC explained that a tip generally causes the SEC to "inquire into different conduct" where "staff has an open investigation into one type of misconduct, and a whistleblower subsequently submits a tip alerting staff that the entity is engaged in substantially different misconduct";

not where it causes staff merely to "initiate new and more directed inquiries" into misconduct it already knew about it.[33]

In making a determination under either prong, the SEC examines the administrative record—including the TCR System and TCR Repository[34]—and looks at a variety of factors related to the chronology of events and interactions among the whistleblower and various SEC stakeholders. These factors include: (1) how the Office of Market Intelligence (OMI) disposed of the tip (e.g., entering an "NFA" indicating the tip was closed and no further action should be taken, versus forwarding the tip to investigative staff for further action);[35] (2) how, if, and when investigative staff received the tip from OMI, the whistleblower, or another source;[36] (3) how investigative staff disposed of the tip (e.g., entering an NFA, versus using the tip to open or further a Matter Under Inquiry (MUI) or formal investigation);[37] (4) the extent to which investigative staff relied on the tip and worked with the whistleblower during the investigation;[38] and (5) the factual and legal nexus between the tip and the misconduct ultimately charged in the enforcement action.[39] In a June 2016 order granting an award, the SEC cautioned that this determination is fact-intensive and therefore "not precedential."[40] In an April 2014 order, the SEC warned that although it has "a general practice of taking reasonable steps to develop the record," the claimant has "the ultimate responsibility" to "specifically identify those correspondence or communications in which the purported 'original information' was provided to the Commission."[41]

### *4. Covered Actions and Related Actions*

Furthermore, an award is available to an otherwise eligible whistleblower only if there is a "covered judicial or administrative action," meaning "any judicial or administrative action brought by the [SEC] under the securities laws that results in monetary sanctions exceeding $1,000,000."[42] In an April 2016 order, for instance, the SEC denied an award in part because the monetary sanctions were less than $1 million.[43]

Whistleblower awards are calculated not just from the recovery in SEC covered actions, but also amounts collected in certain "related actions" brought by other government authorities. The related action must be "based upon" the same original information that the whistleblower provided to the SEC.[44] Eligible non-SEC entities are: (1) the U.S. Attorney General, (2) an "appropriate regulatory authority" (e.g., as noted above, banking regulators such as the Fed or the FDIC), (3) a "self-regulatory organization" (e.g., FINRA or the Municipal Securities Rulemaking Board), or (4) a state attorney general in a criminal case.[45] Related actions do not extend to other entities, and the SEC has denied claims on that basis, including in a September 2017 order.[46] In addition, the SEC's orders have made clear that awards from related actions are available only if the whistleblower otherwise qualifies for an award in an SEC covered action.[47] In other words, if a claimant "does not qualify for an award in a Commission covered action," the related action request will be denied.[48]

### *5. Special Timing Issues*

1. Eligibility Begins After July 21, 2010
In many cases, an individual who provided information to the SEC prior to the enactment of Dodd-Frank has attempted to claim an award under the whistleblower program. However, as mentioned above, the whistleblower rules deem a submission to be "original information" only if it was "[p]rovided to the [SEC] for the first time after July 21, 2010 (the date of enactment of [Dodd-Frank])."[49] This eligibility start-date rule can make or break awards, even for committed whistleblowers.

In an October 2013 order, the SEC denied an award claim in part because the individual's SEC reporting efforts—which spanned four years and preceded a $19 million enforcement action—occurred completely prior to the enactment of Dodd-Frank.[50] The claimant challenged the start-date rule, but after a lengthy analysis, the SEC concluded that "the whistleblower statutory provisions do not authorize awards for information originally provided prior to Dodd-Frank's enactment" and "our interpretation of 'original information' ensures that the [Investor Protection] Fund is used to reward those who provide new, high quality tips, not to pay for information that was already in the Commission's possession on July 21, 2010."[51] The claimant appealed to federal court, and in Stryker v. SEC—one of the rare appeals of these orders—the Second Circuit deferred to the start-date rule.[52] Before and after Stryker, the SEC has routinely denied awards, or disregarded certain information for the purpose of determining awards, on the basis of that rule.[53] Some whistleblowers apparently have tried to get creative, but a May 2017 order denied an award for an individual who provided the SEC with a letter that "merely restated" information previously submitted before the July 21, 2010 eligibility date.[54] One claimant asked the SEC to reconsider the rule, but in a June 2017 order the SEC refused to change its mind.[55] The most that these whistleblowers can get was demonstrated in a November 2016 order in which the SEC denied an award under the start-date rule but, as a consolation prize, merely "agree[d]" that this whistleblower "should be lauded."[56]

2. "In Writing" Requirement for Pre-August 12, 2011 Submissions
Relatedly, Dodd-Frank created a safe harbor for the very specific situation where information is submitted after July 21, 2010, but prior to the effective date of the SEC whistleblower rules (which was August 12, 2011). Even if it does not comport with all of the requirements of the SEC whistleblower rules, such information may still be deemed "original information" if it was submitted "in writing."[57]

A November 2016 order confirmed that the safe harbor has limited use and did not apply where "the Claimant first approached the [SEC] after the effective date of the Commission's whistleblower program rules."[58] As summarized in a May 2017 order, such tips "must be submitted through the [SEC]'s online portal or on Commission Form TCR. If the [SEC] receives an individual's information in another manner or through another source . . . , the individual will generally not be able to recover an award for that information."[59]

### *6. Professional Assistance*

A variety of other eligibility issues can arise in certain circumstances. One involves the use of professional assistance. Whistleblowers who report anonymously must be represented by counsel.[60] Otherwise—as the SEC made clear in a November 2017 order—"the [SEC] does not require whistleblowers to retain experts or other professionals to assist them in their whistleblowing."[61] Although it may be

prudent for whistleblowers to seek professional assistance, they are eligible for a full award "whether or not their information is accompanied by expert knowledge or analysis, or provided with the assistance of a lawyer or other professional."[62]

As for experts who wish to submit their own whistleblower claims, that same November 2017 order drew a line between experts who are acting in furtherance of others' whistleblowing efforts and those who are acting on their own behalf. Given that only individuals are eligible for whistleblower awards, professionals who provide expert reports or other assistance to the SEC through a firm (e.g., an "incorporated entity") are less likely to be eligible for an award.[63]

### *7. Foreign Whistleblowers*

Foreign whistleblowers also present unique eligibility issues. Although agents of foreign governments are not eligible for awards,[64] the SEC has signaled that it would happily shell out awards to other types of foreign whistleblowers. In a September 2014 order granting an award, the SEC announced: "In our view, there is a sufficient U.S. territorial nexus whenever a claimant's information leads to the successful enforcement of a covered action brought in the United States, concerning violations of the U.S. securities laws, by the [SEC], the U.S. regulatory agency with enforcement authority for such violations. When these key territorial connections exist, it makes no difference whether, for example, the claimant was a foreign national, the claimant resides overseas, the information was submitted from overseas, or the misconduct comprising the U.S. securities law violation occurred entirely overseas."[65]

### *8. Disqualification for Providing False Information*

Finally, what about "whistleblowers" who mislead the SEC? A claimant is disqualified from receiving a whistleblower award if he or she knowingly provides false information or documentation in (i) the whistleblower submission under consideration, (ii) his or her "other dealings with the [SEC]," or (iii) his or her dealings with another authority in connection with a related action.[66] In May 2014 and August 2015 orders, the SEC interpreted "other dealings with the SEC" to include "statements or representations in previous whistleblower submissions as well as a claimant's correspondence with [SEC] officials."[67]

The SEC has permanently barred at least two individuals from the program, including an individual who submitted 143 frivolous award claims[68] and an individual who submitted 25 frivolous award claims.[69] The SEC found that both of these individuals had engaged in bad-faith conduct, failed to correct their actions when the SEC explained the whistleblower rules, and then attempted unsuccessfully to withdraw their applications when unfavorable orders were issued.[70] The SEC has also threatened to bar at least two individuals, including one who represented on Form WB-APP, under penalty of perjury, that he was "the 44th President of the United States,"[71] and another who represented that he was entitled to an award "notwithstanding the lack of even a superficial factual nexus" between the information he provided and the covered action.[72] Despite their permanent bar, at least one of these individuals subsequently filed award claims, which were summarily rejected.[73]

## WHAT PROCEDURAL RIGHTS AND RESPONSIBILITIES DO AWARD CLAIMANTS HAVE?

In the second part of our field guide, we consider footnotes related to two procedural aspects of the SEC whistleblower program: filing a whistleblower claim and contesting the SEC's preliminary award determination.

### *1. Filing a Whistleblower Claim*

What happens when the SEC's investigation is coming to a close and the whistleblower believes a potential award is on the horizon? Per the whistleblower rules, the next steps involve waiting for the SEC to issue a Notice of Covered Action and then filing a whistleblower award claim: "[w]henever 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.' . . . 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."[74] Specifically, the claimant must complete a Form WB-APP and mail or fax a signed copy and any attachments to the Office of the Whistleblower within 90 calendar days of the Notice of Covered Action.[75]

The SEC has denied claims where the claimant failed to declare, under penalty of perjury, that the Form WB-APP is "true and correct to the best of [his] knowledge and belief" at the time of submission.[76] The SEC has also routinely denied claims that were filed after the 90-day window.[77] In particular, the SEC has made clear that it is not required to provide potential claimants with direct, actual notice of the covered action (e.g., by calling a whistleblower who aided investigative staff and telling him or her it is now time to file a claim).[78] Instead, as noted in a December 2016 order, whistleblowers must take a proactive approach and actively monitor the SEC website: a "potential claimant's responsibility includes the obligation to regularly monitor the Commission's web page for [Notice of Covered Action] postings and to properly calculate the deadline for filing an award claim."[79]

In rare cases, a claimant may withdraw his or her claim and then later attempt to reinstate it. As the SEC made clear in an October 2013 order, it will not recognize such a request if: (i) the withdrawal was "voluntary and unconditional"; (ii) the claimant "failed to provide a 'good cause' explanation for seeking reinstatement"; and (iii) the claimant "did not identify any factual or legal basis to suggest that" reinstatement would not "needlessly tie up the processes and limited resources of the [SEC]'s whistleblower program."[80]

### *2. Contesting a Preliminary Determination*

Once the covered action is fully appealed (or the time for filing appeals has expired), the Claims Review Staff "will evaluate all timely whistleblower award claims submitted on Form WB-APP" and issue a so-called preliminary determination.[81] Within 60 days, the claimant may then submit a written response contesting either "the denial of an award" or "the proposed amount of an award."[82] In deciding whether to contest a preliminary determination, a claimant may, within 30 days, request to review a copy of the administrative record (i.e., certain materials that "formed the basis of" the preliminary determination), and/or meet with the Office of the Whistleblower, which "may in its sole discretion decline" the meeting.[83]

Before providing the claimant with a copy of the record (or certain nonpublic materials therein), the whistleblower office may require him or her to sign a confidentiality agreement.[84] Several SEC orders have confirmed that this prerequisite is "standard practice," and the claimant's refusal to sign in a form acceptable to the whistleblower office is proper grounds to withhold these materials.[85] Even if a confidentiality agreement is signed, claimants are entitled to receive only certain enumerated materials, which may be redacted.[86] In October 2013 and November 2017 orders, the SEC found that the whistleblower office properly withheld requested materials when those materials went beyond the enumerated materials and/or those that "formed the basis of" the preliminary determination,[87] and in a May 2017 order, the SEC found that a claimant was not prejudiced by the redaction of two sentences in a staff declaration because the sentences "ha[d] no material bearing on the Claimant's potential eligibility."[88]

If a claimant ultimately decides not to contest the preliminary determination, or fails to timely contest, then: (a) the preliminary determination becomes a final order;[89] and (b) he or she cannot appeal to a federal court because he or she has failed to exhaust administrative remedies.[90] It is apparent that this outcome has occurred when the SEC publishes an order with the following stamp at the top: "Final Order–This Preliminary Determination Became the Final Order of the Commission on [Date] Pursuant to Rule 21F-10(f) of the Exchange Act."[91] Alternatively, if there are multiple claimants, one of whom did contest a preliminary determination, then the SEC may note in the final order that others did not contest.[92]

If a claimant does decide to contest the preliminary determination, SEC orders have made clear that "[a]ny factual or legal contentions not expressly raised and addressed in [the claimant]'s Response are deemed waived."[93] In addition to substantive arguments regarding their eligibility for an award or the SEC's finding of facts, some claimants have raised constitutional due process issues. The SEC has not been convinced by these arguments, including in a lengthy October 2013 order analyzing the claimant's assertions that the whistleblower office "committed numerous procedural errors that denied [claimant] a fair proceeding."[94] Finally, some claimants have requested oral argument before the Commission itself, but SEC orders have suggested that oral argument would be entertained only if it would "benefit the Commission's consideration" of the award application.[95]

## WHEN DOES THE SEC MAKE EXCEPTIONS?

Moving on to the third part of our field guide, we consider footnotes related to exceptions. Given the number of technicalities involved in the SEC whistleblower program, it's no surprise that many claimants have fatal issues, and that many claimants beg the SEC for leniency. There are two paths to receive an exception. Under the whistleblower rules, the SEC may, "in its sole discretion," waive any of the procedural requirements for whistleblower claims "based upon a showing of extraordinary circumstances."[96] In addition, section 36(a) of the Exchange Act provides the SEC with the authority to exempt any provisions thereof—including the Dodd-Frank Act securities whistleblower provisions and rules thereunder—"to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."[97]

In considering exceptions, the SEC routinely uses its 2010 PennMont decision as precedent.[98] As summarized in an October 2017 whistleblower order, "the 'extraordinary circumstances' exception is to be narrowly construed and applied only in limited circumstances."[99] The "critical question" is whether the facts and circumstances, "as they existed at the time that the failure occurred," were "sufficiently beyond the control of the claimant to justify the procedural deficiency."[100] If a timing requirement is at issue, the claimant must proceed "as soon as reasonably practicable" once the extraordinary circumstances end, or the exception generally won't be granted.[101] Examples of extraordinary circumstances that affect timing may include "serious illness" or "ineffective assistance of counsel."[102]

Most commonly, claimants ask the SEC to forgive their failure to timely file a whistleblower claim in the requisite 90-day window. The SEC has denied these waiver requests in a number of orders, including a July 2014 order where the claimant's attorney engaged in "ordinary negligence" (as opposed to "blatant client deception, outright abandonment or similar egregious misconduct" that might support an exception) by failing to advise him of the whistleblower program's existence, and then waiting a month to submit the whistleblower claim once he became aware.[103]

One claimant unsuccessfully asked the SEC to waive the substantive "led to" requirement. In the related March 2018 order, the SEC explained that its waivers of substantive eligibility requirements have involved either: (i) "the application of our rules to events that predated the adoption of our rules"; or (ii) "unusual factual situations" that "were simply not contemplated by the Commission in crafting the whistleblower rules and the Commission found that a strict application of the rules in those specific instances would be contrary to the public interest and the broader purposes of the whistleblower program."[104]

Although they are rare, the SEC has granted several waivers over the course of the whistleblower program, including the "voluntarily provided" requirement,[105] the "in writing" requirement for information provided after Dodd-Frank was enacted but before the rules were effective,[106] and the requirement to sign a declaration under penalty of perjury at the time the initial tip was submitted.[107]

## HOW DOES THE SEC CALCULATE AND ALLOCATE AWARDS?

In the fourth and final part of our field guide, we consider footnotes related to the award itself. The prospect of a multimillion dollar award may be the final push a whistleblower needs to report his or her concerns to the SEC—or maybe he or she would have blown the whistle anyway, and the award is just an added bonus. Either way, eligible whistleblowers are entitled to 10–30 percent of the monetary sanctions that the SEC and related authorities are able to collect.[108] If there is more than one meritorious claimant, the SEC will allocate the 10–30 percent between or among them.[109]

The SEC considers a number of case-specific factors in determining whether to increase or decrease the award percentage, as well as the relative allocation among multiple whistleblowers.[110] These factors are: "(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."[111]

Although the SEC has explicitly analyzed these factors in a number of orders,[112] the "unreasonable reporting delay" factor gets the most ink. The SEC has applied the reporting delay factor less severely where: (i) some or all of the delay occurred prior to the enactment of the Dodd-Frank Act's whistleblower incentive provisions;[113] (ii) the claimant "witnessed a single violation and was unaware of the full extent of the fraud";[114] and/or (iii) the claimant was "a foreign national working outside the United States" (as it was unclear whether the Dodd-Frank antiretaliation protections would apply extraterritorially).[115]

With respect to the allocation among multiple claimants, the SEC noted in a March 2016 order, for instance, that one claimant was entitled to a greater allocation than the others because his tip "caused the investigative staff to open the investigation"; it came "approximately eighteen months" before the other information was submitted; and the claimant met with staff several times before the other information was submitted.[116] Some claimants have sought to forego an award so that others would receive it, but in a November 2017 order the SEC made clear that the other claimants would have to qualify for an award themselves.[117]

Our final issue is how the SEC determines the amount to which the 10–30 percent is applied when there is a related action. The SEC provided an answer in an April 2016 order: the SEC will not double-count any monetary sanctions that "are either deemed to satisfy or in fact used to satisfy any payment obligations of the defendants in the other action"; such monetary sanctions will first be attributed to the SEC's covered action "up to the full amount of monetary sanctions ordered . . . , with any remaining amounts attributed" to the related action.[118]

## CONCLUSION

With record-breaking SEC whistleblower awards and the U.S. Supreme Court's recent Digital Realty Trust decision, whistleblowers now have clear incentives to report suspected securities law violations to the SEC. Whether you are a compliance-focused company or an individual, it is important to seek the advice of experienced counsel who understand the ins and outs of the SEC whistleblower program and—in the absence of concrete judicial guidance—fully appreciate the SEC's current practices. Millions of dollars could be at stake.

FOOTNOTES

[1] See Press Release, SEC, SEC Announces Its Largest-Ever Whistleblower Awards (Mar. 19, 2018).

[2] Id.

[3] See Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767, 772–73 (2018) ("To sue under Dodd-Frank's anti-retaliation provision, a person must first 'provid[e] . . . information relating to a violation of the securities laws to the Commission.'") (quoting 15 U.S.C. § 78u-6(a)(6)) (formatting in original); see generally Christopher F. Regan, Thomas A. Sporkin & Matthew E. Newman, Supreme Court Limits Definition of "Whistleblower" in Potentially Hollow Victory for Public Companies, Westlaw J.: Bank & Lender Liability, at 3–4 (Mar. 19, 2018).

[4] See generally Christopher F. Regan, Thomas A. Sporkin & Matthew E. Newman, Why Securities Lawyers Are the New Employment Laywers, Law360 (Nov. 15, 2017).

[5] See Barnes v. SEC, 698 F. App'x 390 (9th Cir. 2017); Cerny v. SEC, 707 F. App'x 29 (2d Cir. 2017); Givens v. United States, 698 F. App'x 517 (9th Cir. 2017); Smith-Penny v. SEC, 672 F. App'x 19 (D.C. Cir. 2016); Stryker v. SEC, 780 F.3d 163 (2015); Regnante v. SEC Officials, 134 F. Supp. 3d 749 (S.D.N.Y. 2015).

[6] See SEC, Office of the Whistleblower, Final Orders of the Commission.

[7] 15 U.S.C. § 78u-6(a)(6); see also, e.g., 17 C.F.R. § 240.21F-2(a) (further defining "whistleblower"); SEC Whistleblower (WB) Order, Exchange Act Release No. 77037, at 1 n.2 (Feb. 2, 2016) (setting forth definition of "whistleblower"); SEC WB Order, at 2 n.2 (Apr. 26, 2016) (claimant not a "whistleblower").

[8] 15 U.S.C. § 78u-6(b)(1).

[9] Id.

[10] 17 C.F.R. § 240.21F-4(a) (defining "voluntarily").

[11] SEC WB Order, Exchange Act Release No. 82181, at 3 n.3 (Nov. 30, 2017) (quoting 17 C.F.R. § 240.21F-4(a)(2)).

[12] Id. (quoting 17 C.F.R. § 240.21F-4(a)(1)).

[13] 15 U.S.C. § 78u-6(a)(3).

[14] 17 C.F.R. § 240.21F-4(b) (defining "original information" and related terms).

[15] SEC WB Order, Exchange Act Release No. 74815, at 2 n.2 (Apr. 27, 2015).

[16] SEC WB Order, Exchange Act Release No. 79464, at 2 n.2 (Dec. 5, 2016) (internal quotations omitted).

[17] SEC WB Order, at 1 n.2 (Sept. 11, 2017) (Notice of Covered Action No. 2012-72).

[18] SEC WB Order, at 1 n.2 (Sept. 11, 2017) (Notice of Covered Action No. 2012-24).

[19] 17 C.F.R. § 240.21F-4(b)(4).

[20] SEC WB Order, Exchange Act Release No. 72947, at 2 n.1 (Aug. 29, 2014) (citing 17 C.F.R. § 240.21F-4(b)(4)(v)(C)).

[21] SEC WB Order, Exchange Act Release No. 74781, at 1–2 n.1 (Apr. 22, 2015) (quoting 17 C.F.R. § 240.21F-4(b)(4)(v)(A)) (internal quotation removed; formatting in original).

[22] SEC WB Order, Exchange Act Release No. 74404, at 1 n.1 (Mar. 2, 2015) (citing 17 C.F.R. § 240.21F-4(b)(4)(v)(C)).

[23] SEC WB Order, Exchange Act Release No. 81200, at 2 n.2 (July 25, 2017).

[24] 15 U.S.C. § 78u-6(c)(2)(A); see also 17 C.F.R. § 240.21F-8(c)(1).

[25] 15 U.S.C. § 78u-6(b)(1); 15 U.S.C. § 78u-6(a)(5); 17 C.F.R. § 240.21F-3(b).

[26] SEC WB Order, Exchange Act Release No. 81200, at 2 n.2 (July 25, 2017) (emphasis added).

[27] Id.

[28] 15 U.S.C. § 78u-6(b)(1); 17 C.F.R. § 240.21F-4(c) (defining "information that leads to successful enforcement"); see also, e.g., SEC WB Order, Exchange Act Release No. 79294, at 7 n.9 (Nov. 14, 2016) (emphasizing "led to" as eligibility requirement).

[29] See, e.g., SEC WB Order, Exchange Act Release No. 70772, at 6 n.17 (Oct. 30, 2013) ("Because the CRS determined that the information provided by Claimant, other than the September 2010 Email, was not original information . . . , the CRS did not need to consider the relationship between Claimant's information and the opening of either the [Matter Under Inquiry] or the formal ATG Investigation.").

[30] SEC WB Order, Exchange Act Release No. 79294, at 5 n.6 (Nov. 14, 2016); see also, e.g., SEC WB Order, Exchange Act Release No. 74815, at 2 n.1 (Apr. 27, 2015) (summarizing requirements); SEC WB Order, Exchange Act Release No. 75752, at 2 n.2 (Aug. 24, 2015) (same); SEC WB Order, Exchange Act Release No. 77948, at 1 n.1 (May 31, 2016) (same); SEC WB Order, Exchange Act Release No. 78355, at 1 n.2 (July 19, 2016) (same); SEC WB Order, Exchange Act Release No. 78356, at 1 n.2 (July 19, 2016) (same); SEC WB Order, Exchange Act Release No. 82562, at 2 n.2 (Jan. 22, 2018) (same). Alternatively, the "led to" requirement can be met if the whistleblower internally reported the information pursuant to designated channels, the entity later provided that information to the SEC, and that entity-provided information "led to" the action. See 17 C.F.R. § 240.21F-4(c)(3).

[31] See, e.g., SEC WB Order, Exchange Act Release No. 82181, at 13 n.25 (Nov. 30, 2017) ("[T]he second whistleblower . . . will need to demonstrate that his submission 'significantly contributed' to the enforcement action if the investigation was already ongoing when he came forward.") (citing Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34321/3-34322/2 (June 13, 2011)).

[32] SEC WB Order, Exchange Act Release No. 77833, at 3 (May 13, 2016).

[33] Id. n.1 (emphasis added).

[34] See, e.g., SEC WB Order, Exchange Act Release No. 82807, at 4 n.8 (Mar. 6, 2018) (describing the TCR System and TCR Repository).

[35] See, e.g., SEC WB Order, Exchange Act Release No. 75752, at 2 n.4 (Aug. 24, 2015) (tip NFA'd by OMI); SEC WB Order, Exchange Act Release No. 77948, at 2 n.2 (May 31, 2016) (same); SEC WB Order, Exchange Act Release No. 79604, at 3 n.5 (Dec. 19, 2016) (same); SEC WB Order, at 1 n.1 (Feb. 11, 2018) (same); SEC WB Order, Exchange Act Release No. 82807, at 4 n.9 (Mar. 6, 2018) (same).

[36] See, e.g., SEC WB Order, Exchange Act Release No. 79294, at 7 n.9 (Nov. 14, 2016) ("[T]here is no indication in the record that [redacted] communicated any information from [redacted] to the Covered Action Staff."); id. at 8 n.12 ("[C]ontrary to Claimant 3's contention, the investigative staff handling [redacted] disagrees with Claimant 3's assertion that they had an arrangement with Claimant 3 . . . ."); SEC WB Order, at 1 n.1 (Feb. 18, 2017) ("[N]one of the information provided to the [SEC] by the Claimant was provided to the staff responsible for the Covered Action . . . ."); SEC WB Order, at 2 n.1 (May 2, 2017) (Notice of Covered Action No. [Redacted]) ("Claimant 2's tip was not provided to the investigative staff handling the ongoing investigation nor was the investigative staff made aware of the tip at any time prior to the resolution of the Covered Action."); SEC WB Order, Exchange Act Release No. 80596, at 3 n.3 (May 4, 2017) (noting, in conjunction with surrounding text, that the claimant referenced his or her tip in a letter sent to the SEC Chair, the SEC Secretary, and a Commissioner, but not relevant investigative staff); SEC WB Order, Exchange Act Release No. 82562, at 3 n.4 (Jan. 22, 2018) ("That meeting, however, occurred . . . after Final Judgment was entered in the underlying Covered Action, and was not with the investigative staff responsible for the Covered Action."); SEC WB Order, Exchange Act Release No. 82897, at 12 n.20 (Mar. 19, 2018) ("[N]othing that the Claimants provided to the [SEC] was received by the Covered Action staff (either directly from the Claimants or indirectly through the specialty unit staff to which Claimants #6 and #7 had provided their information).").

[37] See, e.g., SEC WB Order, Exchange Act Release No. 78355, at 4 n.5 (July 19, 2016) (tip NFA'd by investigative staff); SEC WB Order, Exchange Act Release No. 78356, at 3 n.6 (July 19, 2016) (same); SEC WB Order, Exchange Act Release No. 80596, at 3 n.4 (May 4, 2017) (same); see also SEC WB Order, Exchange Act Release No. 70772, at 6 n.16 (Oct. 30, 2013) (quoting guidance on when an MUI should be opened).

[38] See, e.g., SEC WB Order, Exchange Act Release No. 71849, at 4 n.8 (Apr. 3, 2014) ("Indeed, the primary Enforcement attorney who worked on the [redacted] matter has never heard of [Claimant #1]."); SEC WB Order, at 2 n.2 (May 12, 2014) ("[T]he information . . . was in no way relied upon . . . ."); SEC WB Order, Exchange Act Release No. 79294, at 6 n.7 (Nov. 14, 2016) ("Staff Member 1 was intimately involved in the totality of the investigation leading to the Covered Action and, as such, relative to Claimant 2, may have a clearer understanding of how the disputed events in the investigation unfolded and how those events fit into the broader investigation."); SEC WB Order, at 2 n.1 (June 20, 2017) ("[N]one of the information . . . was used in the matter in any way."); SEC WB Order, at 2 n.1 (Jan. 23, 2017) (Notice of Covered Action No. [Redacted]) ("[T]he information was generally duplicative of the information that the [SEC] had already received . . . as part of the company's earlier self-reporting and/or did not rise to the level of warranting any further investigative efforts on the staff s part given what the staff had already learned directly from [redacted]."); SEC WB Order, Exchange Act Release No. 82181, at 16 n.28 (Nov. 30, 2017) ("[T] he information . . . did not add meaningfully to the information and materials that the Enforcement staff on the Investigation already knew of or which were publicly-available to the staff.").

[39] See, e.g., SEC WB Order, at 2 n.2 (May 12, 2014) (analyzing "the sole covered action that did bear a superficial factual nexus"); SEC WB Order, Exchange Act Release No. 77948, at 2 n.2 (May 31, 2016) ("[O] ther than identifying the same target company, Claimant's tip bears no factual or legal nexus to the charges brought by the Commission in the Covered Action."); SEC WB Order, Exchange Act Release No. 82897, at 10 n.17 (Mar. 19, 2018) ("[S]taff opened a new and separate investigation to test Claimant #5's allegations and found insufficient evidence to support them.").

[40] SEC WB Order, Exchange Act Release No. 78025, at 3 n.3 (June 9, 2016).

[41] SEC WB Order, Exchange Act Release No. 71849, at 4 n.7 (Apr. 3, 2014).

[42] 15 U.S.C. § 78u-6(a)(1).

[43] SEC WB Order, at 2 n.1 (April 1, 2016) ("Claimant #2 also claims an award in connection with [redacted]. That action, however, did not result in monetary sanctions over $1,000,000 and therefore, does not qualify as a Covered Action for which an award may be made.").

[44] 15 U.S.C. § 78u-6(a)(5); 17 C.F.R. § 240.21F-3(b); 17 C.F.R. § 240.21F-11.

[45] 15 U.S.C. § 78u-6(b)(1); 15 U.S.C. § 78u-6(a)(5); 17 C.F.R. § 240.21F-3(b).

[46] SEC WB Order, at 2 n.1 (Sept. 9, 2017, Order 1) ("[S]ome of the cases Claimants . . . identified as the basis for their related action awards are not 'related actions' since those cases were not brought by the non-Commission entities designated under Exchange Act Rules 21F-3(b)(1) and 21F-4(g) and (f).").

[47] SEC WB Order, at 2 n.2 (Sept. 9, 2017, Order 1) ("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."); SEC WB Order at 2 n.2 (Sept. 9, 2017, Order 2) (same).

[48] SEC WB Order, Exchange Act Release No. 80596, at 7 n.10 (May 4, 2017); see also SEC WB Order, Exchange Act Release No. 72178, at 3 n.2 (May 16, 2014) (similar language); SEC WB Order at 2 n.1 (Apr. 1, 2016) (similar language).

[49] 17 C.F.R. § 240.21F-4(b)(1)(iv) (emphasis added).

[50] SEC WB Order, Exchange Act Release No. 70772, at 8–13 (Oct. 30, 2013).

[51] Id. at 12.

[52] Stryker v. SEC, 780 F.3d 163, 163 (2015) ("Larry Stryker petitions for review of an order of the [SEC] denying his claim for a whistleblower award. . . . Concluding that the SEC's interpretation of Section 21F was within its authority and consistent with the legislation, we deny the petition.").

[53] See, e.g., SEC WB Order, at 1 n.2 (Mar. 9, 2014) (Notice of Covered Action No. 2011-46) (citing the Oct. 30, 2013 order); SEC WB Order, Exchange Act Release No. 71849, at 4 n.5–6 (Apr. 3, 2014) (same); SEC WB Order, at 7–9 n.6 (July 23, 2014) (citing only Rule 21F-4(b)(1)(iv)); SEC WB Order, at 1 n.1 (Nov. 30, 2015) (Notice of Covered Action No. [Redacted #2]) (citing Stryker and the Oct. 30, 2013 order); SEC WB Order, Exchange Act Release No. 76921, at 2 n.2 (Jan. 15, 2016) (citing Stryker); SEC WB Order, at 1 n.1 (Apr. 26, 2016) (same); SEC WB Order, Exchange Act Release No. 78025, at 4 n.4 (June 9, 2016) (same); SEC WB Order, Exchange Act Release No. 79294, at 4 n.4, 6 n.8 (Nov. 14, 2016) (same); SEC WB Order, Exchange Act Release No. 80596, at 4 n.5 (May 4, 2017) (same); SEC WB Order, at 1 n.1 (Sept. 11, 2017) (Notice of Covered Action No. 2012-24) (same); SEC WB Order, at 1 n.1 (Sept. 11, 2017) (Notice of Covered Action No. 2012-72) (same); SEC WB Order, Exchange Act Release No. 82181, at 4 n.4 (Nov. 30, 2017) (citing only Rule 21F-4(b)(1)(iv)); SEC WB Order, Exchange Act Release No. 82562, at 2 n.2, 3 n.5 (Jan. 22, 2018) (citing Stryker); SEC WB Order, Exchange Act Release No. 82807, at 3 n.6 (Mar. 6, 2018).

[54] SEC WB Order, Exchange Act Release No. 80596, at 5 n.7 (May 4, 2017).

[55] SEC WB Order, Exchange Act Release No. 34-80871, at 1–2 n.3, 2 n.4 (June 7, 2017); see also id. at 2–3 n.5 (also declining to delay final resolution of the award so the claimant would have an opportunity to petition for a rulemaking).

[56] SEC WB Order, Exchange Act Release No. 79294, at 8 n.13 (Nov. 14, 2016) ("Although we are not able to consider Claimant 3 for an award in that case because it pre-dates the enactment of our whistleblower program, we agree with the views expressed by a staff attorney assigned to [redacted] that Claimant 3 'should be lauded for [Claimant 3's] assistance' in connection with that case.").

[57] 15 U.S.C. § 78u-7(b) ("Information provided to the Commission in writing by a whistleblower shall not lose the status of original information . . . 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."); see also 17 C.F.R. § 240.21F-9(d) (SEC Rule 21F-9(d) implementing the safe harbor); SEC WB Order, Exchange Act Release No. 79747, at 1 n.2 (Jan. 6, 2017) (describing Rule 21F-9(d)); SEC WB Order, Exchange Act Release No. 81227, at 1–2 n.2 (July 27, 2017) (same); SEC WB Order, Exchange Act Release No. 70772, at 3 n.10 (Oct. 30, 2013) (noting that the Whistleblower Office confirmed that it was not necessary to resubmit such information once the rules became effective).

[58] SEC WB Order, at 1 n.1 (Nov. 7, 2016) (Notice of Covered Action No. [Redacted #2]).

[59] SEC WB Order, Exchange Act Release No. 80596, at 6 n.9 (May 4, 2017); see also, e.g., SEC WB Order, Exchange Act. Release No. 77037, at 1–2 n.3 (Feb. 2, 2016) ("[W]histleblowers are required to submit their information about a possible securities law violation through the [SEC]'s online system, or by mailing or faxing a Form TCR, and to declare under penalty of perjury that the information submitted is true and correct to the best of the individual's knowledge and belief.") (citing 17 C.F.R. § 240.21F-9(a), (b)); SEC WB Order, Exchange Act Release No. 79604, at 4 n.6 (Dec. 19, 2016) ("Rule 21F-8(a) requires that, in order to be eligible for a whistleblower award, a whistleblower 'must give the Commission information in the form and manner that the Commission requires,' specifically referencing the TCR submission procedures set out in Rule 21F-9.").

[60] 15 U.S.C. § 78u-6(d)(2); 17 C.F.R. § 240.21F-7.

[61] SEC WB Order, Exchange Act Release No. 82181, at 12 n.23 (Nov. 30, 2017).

[62] Id.

[63] Id. at 8 n.13 ("The record indicates that the [redacted] expert report and certain other assistance that Claimants #3 and #4 rely upon in seeking an award were provided by an incorporated entity . . . and not by Claimants #3 and #4 in their individual capacities. . . . The [redacted] firm itself would be ineligible for an award for those submissions, because only individuals can qualify as whistleblowers under Section 21F. These additional considerations further counsel against any determination that would retroactively deem Claimants #3 and #4 in their individual capacities as whistleblowers before their [redacted] Form TCR."); see also id. at 10–12 (detailing related issues with failure to provide "original information").

[64] 17 C.F.R. § 240.21F-8(c)(2).

[65] SEC WB Order, Exchange Act Release No. 73174, at 2 n.2 (Sept. 22, 2014).

[66] 15 U.S.C. § 78u-6(i); 17 C.F.R. § 240.21F-8(c)(7).

[67] SEC WB Order, at 1 n.1 (May 12, 2014); SEC WB Order, at 1 n.1 (Aug. 5, 2015) (25 Notices of Covered Action).

[68] SEC WB Order (May 12, 2014).

[69] SEC WB Order (Aug. 5, 2015) (25 Notices of Covered Action).

[70] SEC WB Order, at 3 n.6 (May 12, 2014) ("We caution [redacted] that we will not entertain any attempt by [redacted] to withdraw [redacted] WB-APPs following the issuance of this Preliminary Determination given: (i) [redacted] previous gamesmanship with withdrawing and then seeking to reinstate a WB-APP; and (ii) [redacted] repeated unwillingness to withdraw these frivolous applications when [redacted] had a reasonable opportunity to do so, see supra note 4, and that [redacted] attempt now to change course would simply be a transparent effort to evade the consequences of [redacted] bad faith conduct."); see also SEC WB Order, at 3 n.4 (Aug. 5, 2015) (25 Notices of Covered Action) (similar language).

[71] SEC WB Order, at 1 n.1 (Feb. 13, 2015) (Notice of Covered Action No. 2011-206).

[72] SEC WB Order, at 2 n.3 (May 24, 2015) ("Claimant #2 made a clear false and fictitious statement on the Form WB-APP by claiming to be entitled to an award notwithstanding the lack of even a superficial factual nexus between any information Claimant #2 provided to the Commission and the Covered Action.").

[73] SEC WB Order, Exchange Act Release No. 77322, at 1 n.2 (Mar. 8, 2016) ("On August 5, 2015, the Commission issued a final order . . . determining that . . . this claimant is ineligible for an award in all of [redacted] pending or future covered or related actions . . . ."); SEC WB Order, Exchange Act Release No. 79294, at 1 n.1 (Nov. 14, 2016) ("[T]his claimant's application was not processed because this claimant had previously been permanently barred from submitting award applications as a result of numerous false and fictitious statements this claimant made in connection with earlier award claims.").

[74] 17 C.F.R. § 240.21F-10(a); see SEC, Office of the Whistleblower, Notice of Covered Actions.

[75] 17 C.F.R. § 240.21F-10(b); see also, e.g., SEC WB Order, Exchange Act Release No. 72178, at 1 n.1 (May 16, 2014) (summarizing procedural requirements); SEC WB Order, Exchange Act Release No. 72659, at 2–3 n.1 (July 23, 2014) (same); SEC WB Order, Exchange Act Release No. 77037, at 1 n.1 (Feb. 2, 2016) (same).

[76] See, e.g., SEC WB Order, Exchange Act Release No. 82181, at 8 n.12 (Nov. 30, 2017).

[77] See, e.g., SEC WB Order, at 2 n.1 (Nov. 30, 2015) (Notice of Covered Action Nos. 2012-104 & 2012-53); SEC WB Order, Exchange Act Release No. 77368, at 1 n.1, 2 n.3 (Mar. 14, 2016); SEC WB Order, at 2 (Feb. 11, 2018).

[78] See, e.g., SEC WB Order, Exchange Act Release No. 77037, at 2 n.4 (Feb. 2, 2016); SEC WB Order, Exchange Act Release No. 77368, at 3–4 n.11, 4 n.12 (Mar. 14, 2016); SEC WB Order, Exchange Act Release No. 79464, at 3 n.6, 3–4 n.7 (Dec. 5, 2016).

[79] SEC WB Order, Exchange Act Release No. 79464, at 3 n.6 (Dec. 5, 2016).

[80] SEC WB Order, Exchange Act Release No. 70775, at 1 n.1 (Oct. 30, 2013).

[81] 17 C.F.R. § 240.21F-10(d).

[82] 17 C.F.R. § 240.21F-10(e); see also, e.g., SEC WB Order, Exchange Act Release No. 70772, at 5 n.14 (Oct. 30, 2013) (summarizing the rule); SEC WB Order, Exchange Act Release No. 71849, at 3 n.3 (Apr. 3, 2014) (same); SEC WB Order, Exchange Act Release No. 77368, at 2 n.4 (Mar. 14, 2016) (same). The 60 days begin when the preliminary determination is issued or—if the claimant requests to review materials—when the relevant materials are provided. Id.

[83] 17 C.F.R. § 240.21F-10(e)(1).

[84] See 17 C.F.R. § 240.21F-12(b) ("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."); id. § 240.21F-8(b)(4) ("You may be required to: . . . 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.").

[85] See, e.g., SEC WB Order, Exchange Act Release No. 76921, at 4 n.4 (Jan. 15, 2016) (claimant refused to sign even after extension given); SEC WB Order, Exchange Act Release No. 77529, at 3 n.1 (Apr. 5, 2016) (claimant refused to sign unless the SEC agreed "to provide Claimant with counsel and to pay for Claimant's legal costs and expenses in connection with Claimant's challenge of the Preliminary Determination"); SEC WB Order, Exchange Act Release No. 77530, at 2 n.2 (Apr. 5, 2016) (same); SEC WB Order, Exchange Act Release No. 29604, at 2 n.2, 3 n.4 (Dec. 19, 2016) (general refusals to sign).

[86] See 17 C.F.R. § 240.21F-12(b) ("These rules do not entitle claimants to obtain from the Commission any materials . . . other than those listed in paragraph (a) of this section. Moreover, the Office of the Whistleblower may make redactions as necessary . . . .").

[87] See, e.g., SEC WB Order, Exchange Act Release No. 70772, at 6 n.15, 7 n.18 (Oct. 30, 2013) (Whistleblower Office properly withheld copies of defendants' deposition transcripts in underlying action); SEC WB Order, Exchange Act Release No. 82181, at 15–16 n.27 (Nov. 30, 2017) (finding that the provided materials were not over-redacted, that the whistleblower office properly withheld "the submissions made by other claimants" as well as certain "internal deliberative process files," and that certain of the claimant's supplemental submissions were in fact included in the record); see also, e.g., SEC WB Order, Exchange Act Release No. 80596, at 6 n.8 (May 4, 2017) (disagreeing that claimant should be permitted to review "a full record").

[88] SEC WB Order, Exchange Act Release No. 80596, at 4–5, n.6 (May 4, 2017).

[89] 17 C.F.R. § 240.21F-10(f). Or, in the case of a preliminary determination that an award should be granted, a "proposed final determination" that becomes a final order in 30 days unless a Commissioner requests a review. Id. § 240.21F-10(f), (h).

[90] 17 C.F.R. § 240.21F-10(f).

[91] See, e.g., SEC WB Order, at 1 (Nov. 13, 2012).

[92] See, e.g., SEC WB Order, Exchange Act Release No. 67698, at 1 n.1 (Aug. 21, 2012); SEC WB Order, Exchange Act Release No. 72947, at 2 n.2 (Aug. 29, 2014); SEC WB Order, Exchange Act Release No. 74781, at 2 n.2 (Apr. 22, 2015); SEC WB Order, Exchange Act Release No. 75752, at 1 n.1 (Aug. 24, 2015); SEC WB Order, Exchange Act Release No. 76921, at 1 n.1 (Jan. 15, 2016); SEC WB Order, Exchange Act Release No. 77751, at 1 n.1 (Apr. 29, 2016); SEC WB Order, Exchange Act Release No. 78025, at 2 n.2 (June 9, 2016); SEC WB Order, Exchange Act Release No. 78355, at 2 n.3 (July 19, 2016); SEC WB Order, Exchange Act Release No. 78356, at 2 n.3 (July 19, 2016); SEC WB Order, Exchange Act Release No. 79464, at 2 n.1 (Dec. 5, 2016); SEC WB Order, Exchange Act Release No. 79604, at 1 n.1 (Dec. 19, 2016); SEC WB Order, Exchange Act Release No. 80596, at 1–2 n.2 (May 4, 2017); SEC WB Order, Exchange Act Release No. 81200, at 1 n.1 (July 25, 2017); SEC WB Order, Exchange Act Release No. 82181, at 1 n.1 (Nov. 30, 2017); SEC WB Order, Exchange Act Release No. 82897, at 1 n.1 (Mar. 19, 2018).

[93] SEC WB Order, Exchange Act Release No. 82897, at 7 n.10 (Mar. 19, 2018); see, e.g., SEC WB Order, Exchange Act Release No. 71849, at 4 n.7 (Apr. 3, 2014) (by failing to specify communications at issue, claimant waived argument that information contained therein "led to" success of the enforcement action); SEC WB Order, Exchange Act Release No. 72659, at 5 n.2 (July 23, 2014) (claimant waived due process argument); SEC WB Order, Exchange Act Release No. 77037, at 2 n.5 (Feb. 2, 2016) (claimant waived argument that he qualified as a "whistleblower").

[94] SEC WB Order, Exchange Act Release No. 70772, at 14–19 (Oct. 30, 2013); see also SEC WB Order, Exchange Act Release No. 78025, at 6 n.7 (June 9, 2016) ("We have considered Claimant #5's various constitutional claims, but we find them frivolous."); SEC WB Order, Exchange Act Release No. 72659, at 5 n.2 (July 23, 2014) (finding, sua sponte, that due process does not require the claimant to receive actual notice of the whistleblower award program's existence).

[95] SEC WB Order, Exchange Act Release No. 77368, at 2 n.5 (Mar. 14, 2016) (denying request for oral argument); SEC WB Order, Exchange Act Release No. 79604, at 2 n.2 (Dec. 19, 2016) (same).

[96] 17 C.F.R. § 240.21F-8(a).

[97] 15 U.S.C. § 78mm(a).

[98] In the Matter of the Application of PennMont Sec. (PennMont), Exchange Act Release No. 61967, 2010 WL 1638720 (Apr. 23, 2010), aff'd, PennMont Sec. v. SEC, 414 F. App'x 465 (3d Cir. 2011).

[99] SEC WB Order, Exchange Act Release No. 81857, at 2 n.1 (Oct. 12, 2017) (quoting PennMont, 2010 WL 1638720 at *4).

[100] Id. (emphasis added).

[101] PennMont, 2010 WL 1638720 at *4.

[102] Id. at *4 n.24.

[103] SEC WB Order, Exchange Act Release No. 72659, at 4–7 (July 23, 2014); see also, e.g., SEC WB Order, at 1 n.1 (Mar. 9, 2014) (Notice of Covered Action No. 2011-46); SEC WB Order, Exchange Act Release No. 72178, at 2–4 (May 16, 2014); SEC WB Order, at 1 n.1 (Aug. 5, 2015) (Notice of Covered Action No. [Redacted #2]); SEC WB Order, at 1 n.2 (Nov. 30, 2015) (Notice of Covered Action Nos. 2012-104 & 2012-53); SEC WB Order, Exchange Act Release No. 77368, at 3 (Mar. 14, 2016); SEC WB Order, Exchange Act Release No. 79464, at 4 n.9 (Dec. 5, 2016); SEC WB Order, Exchange Act. Release No. 79604, at 5 n.7 (Dec. 19, 2016).

[104] SEC WB Order, Exchange Act Release No. 89897, at 8 n.12 (Mar. 19, 2018) (emphasis in original).

[105] SEC WB Order, Exchange Act Release No. 72727, at 1–2 n.1 (July 31, 2014).

[106] SEC WB Order, Exchange Act Release No. 79747, 1 n.1, 2 n.3 (Jan. 6, 2017); SEC WB Order, Exchange Act Release No. 81227, at 1 n.1, 2 n.4 (July 27, 2017); SEC WB Order, Exchange Act Release No. 82181, at 4 n.5 (Nov. 30, 2017). Contrast with SEC WB Order, at 2 n.3–4 (Feb. 11, 2018) (denying request to waive start-date eligibility rule).

[107] SEC WB Order, Exchange Act Release No. 81857, at 2 n.1 (Oct. 12, 2017).

[108] 15 U.S.C. § 78u-6(b)(1); 17 C.F.R. § 240.21F-5(b).

[109] 17 C.F.R. § 240.21F-5(c); see also, e.g., SEC WB Order, Exchange Act Release No. 82181, at 2 n.2 (Nov. 30, 2017) ("[I]n the context of an award proceeding involving two or more meritorious whistleblower claimants, the award must be allocated among the claimants and may never exceed an aggregate percentage amount of 30% of the monetary sanctions collected."); SEC WB Order, Exchange Act Release No. 82897, at 2 n.4 (Mar. 19, 2018) (same).

[110] 15 U.S.C. § 78u-6(c)(1); 17 C.F.R. § 240.21F-6; see also, e.g., SEC WB Order, Exchange Act Release No. 73174, at 3 n.4 (Sept. 22, 2014) ("[E]ach award determination involves a highly individualized review of the facts and circumstances surrounding the particular case.").

[111] SEC WB Order, Exchange Act Release No. 82214, at 1–2 n.1 (Dec. 5, 2017).

[112] See, e.g., SEC WB Order, Exchange Act Release No. 78719, at 1–2 n.1 (Aug. 30, 2016) (culpability mitigated because claimant "did not financially benefit from the misconduct"); SEC WB Order, Exchange Act Release No. 81227, at 2 n.3 (July 27, 2017) (among the positive factors considered, "Claimant alerted the [SEC] to a serious, multi-year fraud that would have otherwise been difficult to detect" and "continued to provide substantial assistance to Enforcement staff during the investigation"); SEC WB Order, Exchange Act Release No. 79294, at 3 n.3 (Nov. 14, 2016) ("Among the actions that Claimant 1 is relying on to seek an upward adjustment to Claimant 1's award include [redacted]. We find that this action cannot fairly be construed as an attempt to report a potential securities violation by participating in an internal compliance system."); SEC WB Order, Exchange Act Release No. 76338, at 3 n.6 (Nov. 4, 2015) (claimant's delay caused "the great majority of the total disgorgement ordered in the underlying enforcement matter").

[113] See, e.g., SEC WB Order, Exchange Act Release No. 73174, at 3 n.5 (Sept. 22, 2014); SEC WB Order, Exchange Act Release No. 75477, at 2 n.3 (July 17, 2015); SEC WB Order, Exchange Act Release No. 81227, at 2 n.3 (July 27, 2017); SEC WB Order, Exchange Act Release No. 82214, at 2 n.2 (Dec. 5, 2017).

[114] SEC WB Order, Exchange Act Release No. 76338, at 3 n.7 (Nov. 4, 2015).

[115] SEC WB Order, Exchange Act Release No. 82214, at 2 n.2 (Dec. 5, 2017).

[116] SEC WB Order, Exchange Act Release No. 77322, at 2 n.3 (Mar. 8, 2016).

[117] SEC WB Order, Exchange Act Release No. 82181, at 5–6 n.6, 7 n.9 (Nov. 30, 2017).

[118] SEC WB Order, Exchange Act Release No. 77530, at 2 n.1 (Apr. 5, 2016); see also, e.g., SEC WB Order, Exchange Act Release No. 72301, at 2 n.1 (June 3, 2014) ("A portion of the disgorgement and prejudgment interest ordered to be paid in the Covered Action was 'deemed satisfied' by Respondents' payment of that amount pursuant to a civil action brought by [redacted] and shall be included in our calculation of the award payment to the claimants here. We interpret Section 21 F(b)(l) of the Exchange Act, which provides for payment of awards based on 'what has been collected of the monetary sanctions' imposed in a Commission Covered Action, to include amounts that are deemed satisfied when collected in actions brought by other governmental authorities."); SEC WB Order, Exchange Act Release No. 80521, at 2 n.1 (Apr. 25, 2017) (similar).