
It's all in the footnotes: A field guide to SEC whistleblower awards (Part 2 of 5)

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- 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.
- But 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?
- The answers to these questions are found in the more than 350 footnotes in 120 SEC whistleblower orders, where the SEC provides the clearest guidance, applies the facts to the rules, and signals how it will approach novel issues in future cases.

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 the aforementioned questions. Part Two of this five-part series will continue to examine the question of who qualifies for SEC whistleblower awards.

Who Qualifies for an SEC Whistleblower Award?

5. *Special Timing Issues*

a. *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.

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

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

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.”).

b. “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

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.*

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 claims⁶⁸ and an individual who submitted 25 frivolous award claims.⁶⁹ The

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).

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

Part Three — “What Procedural Rights and Responsibilities Do Award Claimants Have?” — will examine footnotes related to two procedural aspects of the SEC whistleblower program: filing a whistleblower claim and contesting the SEC’s preliminary award determination.

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.”).
