In the Matter of Claims for Award by: Redacted WB-APP Redacted ; Redacted WB-APP Redacted ; and Redacted WB-APP Redacted In Connection With Notice of Covered Action Redacted	CFTC Whistleblower Award Determination No. 18-WB-4

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS

The Commodity Futures Trading Commission ("Commission") received whistleblower award applications from Redacted in response to the Commission's Notice of Covered Action Redacted regarding Redacted . The Claims Review Staff ("CRS") has evaluated each of the applications in accordance with the Commission's Whistleblower Rules ("Rules"), 17 C.F.R. pt. 165 (2017) (as amended by 82 Fed. Reg. 24,487, 24,496–521 (May 30, 2017)), promulgated pursuant to Section 23 of the Commodity Exchange Act ("CEA" or "Act"), 7 U.S.C. § 26 (2012). On Redacted , the CRS issued a Preliminary Determination recommending that the Applicant receive ***% of the amount of monetary sanctions collected in Redacted , and that Redacted claims be denied. For the reasons set forth below, we agree with the CRS's determination. Accordingly, the Applicant's claim is approved in the amount of ***%, and Redacted and Redacted claims are denied.

I. BACKGROUND

Redacted arose out of an investigation opened in response to information that the Applicant Redacted submitted to the Commission regarding Redacted

Redacted

. On Redacted, the Applicant submitted a Form TCR (Tip, Complaint or Referral), in which he/she alleged that Redacted

. Division staff forwarded the Applicant's Form TCR Redacted the Commission's Redacted for review, at which point the Division opened investigation Redacted

Redacted

Redacted

. The Applicant, Redacted, and Redacted

subsequently submitted whistleblower award applications in response to Notice of Covered Action Redacted regarding Redacted .

II. PRELIMINARY DETERMINATION

On Redacted , the CRS issued a Preliminary Determination recommending that the Applicant receive a whistleblower award in the amount of ***% of monetary sanctions collected because the Applicant voluntarily provided original information that led to the successful enforcement of a covered action. The Preliminary Determination also recommended denying Redacted and Redacted claims because Redacted and Redacted information is unrelated to the subject matter of the covered action.

On Redacted , Redacted requested that the Commission's Whistleblower Office ("WBO") provide the record forming the basis of the Preliminary Determination. *See* 17 C.F.R. § 165.7(g)(2)(i). On Redacted , the WBO provided for review a copy of all of the documents in the record, as defined in Rule 165.10. Redacted Redacted reviewed the record in person at the Commission. On Redacted , the Applicant, Redacted , timely submitted a written response contesting the Preliminary Determination. *See* 17 C.F.R. § 165.7(g)(2)(ii). On Redacted , the Applicant Redacted met with the director and staff of the WBO to present the Applicant's arguments for reconsideration. On Redacted , the Applicant submitted an additional letter to supplement his/her response, which the WBO accepted in its discretion.

Redacted did not view the record but submitted additional materials in response to the Preliminary Determination. Under Rule 165.7(g)(2)(i), Redacted had 60 calendar days from the date of Preliminary Determination, or until Redacted , to submit a written response. *** timely submitted additional documents on Redacted , but none of the documents

appear to have any facial nexus to Redacted or the covered action. Redacted neither viewed the record nor submitted reconsideration materials.

III. LEGAL ANALYSIS

The CRS has discretion in determining the award amount but must consider certain criteria specified in the CEA. 7 U.S.C. § 26(c)(1)(A). The Rules contain both factors that incorporate the statutory criteria for determining the award amount and factors that may increase or decrease the award amount. The determination of the appropriate percentage of a whistleblower award involves a highly individualized review of the facts and circumstances. Depending upon the facts and circumstances of each case, some factors may not be applicable or may deserve greater weight than others. The analytical framework in the Rules provides general principles without mandating a particular result. The criteria for determining the amount of an award in Rule 165.9, 17 C.F.R. § 165.9, are not listed in any order of importance and are not assigned relative importance. The Rules do not specify how much any factor in Rule 165.9(b) or (c) should increase or decrease the award percentage. Not satisfying any one of the positive factors does not mean that the award percentage must be less than 30%, and the converse is true. Not having any one of the negative factors does not mean the award percentage must be greater than 10%. These principles serve to prevent a vital whistleblower from being penalized for not satisfying the positive factors. For example, a whistleblower who provides the Commission with significant information and substantial assistance such as testifying at trial and producing smoking gun documents could receive 30% even if the whistleblower did not participate in any internal compliance systems. In contrast, in order to prevent a windfall, a whistleblower who provides some useful but partial information and limited assistance to the Commission may receive 10% even if none of the negative factors were present.

A. Applicant

The Applicant contests that the recommended award amount of *** % is too low, arguing that the CRS considered inadmissible material in the record and failed to properly apply the criteria in the Rules for making an award determination. We agree with the CRS that these arguments are baseless. In arriving at the recommended award amount, the CRS has applied the factors in Rule 165.9 in relation to the facts and circumstances of the Applicant's award application. Further, the record is properly constituted, and neither the CEA nor the Rules prohibit the CRS from considering certain facts, including those relating to Redacted Redacted

1. The CRS Has Considered All Relevant Award Factors

a) Significance of the Applicant's Information

The Applicant argues that because his/her information led to the opening of the investigation, it is the most significant information available to the Commission. This argument ignores the plain language of the Rules and conflates an eligibility requirement with a factor for increasing the award amount. Causing the Commission to open an investigation is merely one of the ways a whistleblower can satisfy the basic eligibility requirement that his or her information led the Commission to bring a successful enforcement action. *See* 17 C.F.R. § 165.2(i). It does not by itself justify the maximum award percentage. To assess the significance of a whistleblower's information, the Commission would consider the nature of the whistleblower's information and how it related to the enforcement action, including whether the whistleblower's information is reliable and complete as to help the Commission conserve resources, and the degree to which the whistleblower's information supported the claims that the Commission brought. *See id.* § 165.9(a)(1), (b)(1). In particular, if a whistleblower's information related only

to a small portion of a larger action, then a lower percentage is justified. *See* Whistleblower Incentives and Protection, 76 Fed. Reg. 53,172, 53,189 n.116 (Aug. 25, 2011) ("[I]f the whistleblower's information supported only a small part of a larger action, that would be a reason for making an award based upon a smaller percentage amount than otherwise would have been awarded.").

As applied, the Applicant's information is only tangentially related to the claims in *** Redacted , which is evident in a comparison between allegations in the Applicant's submissions and the Commission's charges Redacted . The Applicant primarily alleged that Redacted , but Redacted was based on Redacted , claims more aligned Redacted Redacted . Division staff found that Redacted

In addition, the details the Applicant provided to Division staff were largely inconsequential and extraneous to Redacted , including information relating to *** Redacted

. None of these formed the underpinnings of Redacted . Redacted Redacted

Redacted

. In addition, none of the names the Applicant provided produced anything of consequence. The breakthrough in the Redacted came from Redacted , which Division staff found to Redacted . Consequently, had the Redacted . In light of these facts, the Applicant did not provide particularly significant information to the Commission. Therefore, a *** % award is justified.

b) Degree of the Applicant's Assistance

The CRS did not narrowly apply this factor as the Applicant claims. The Applicant's information raised a red flag and pointed Division staff in the right direction toward *** Redacted generally, but the Applicant did little beyond Redacted causing the Division to open Redacted . The Applicant's impact was minimal once Redacted were under way. As the CRS pointed out, the record is fraught with examples of how the Applicant was unable to aid Division staff once Redacted began. For example, Redacted , that the Applicant provided in response to questions from Division staff:

- Redacted

  , but he/she could not provide specifics Redacted

  ."

- Redacted

  "I could not really contribute to the debate because Redacted

  ."

- The Applicant did not and Redacted

- Redacted

  , but he/she could not provide

  Redacted because Redacted

  ." The Applicant stated, " Redacted

  ."

- The Applicant indicated that " Redacted ."
- The Applicant could not Redacted

  because " Redacted

  ."

- The Applicant did not know if Redacted

- The Applicant believed that Redacted but was

  unable to Redacted .

- The Applicant was unable to provide Redacted

- The Applicant described Redacted , but Redacted

In addition, as stated in the Division staff declaration, although the Redacted were over Redacted , only Redacted were relevant to Redacted were not particularly helpful. Because the Applicant's impact was minimal once Redacted were under way, a ***% award is justified.

c) Commission's Law Enforcement Interest

The CRS has considered the Commission's law enforcement interest. The Commission has significant interests in Redacted . However, depending upon the facts and circumstances of each case, some factors deserve greater weight than others. *See* Whistleblower Incentives and Protection, 76 Fed. Reg. at 53,188. In this case, the Applicant contributed minimally beyond being Redacted that caused the Commission to open Redacted , and Redacted was based on Redacted and not Redacted Given these facts, the Commission's general and ongoing interest in Redacted in and of itself does not support granting the Applicant a high award percentage.

d) Negative Factors

The Applicant argues that he/she deserves more than ***% because none of the decreasing factors in Rule 165.9(c) applies to him/her. We agree with the CRS that this argument is flawed. As previously stated, not satisfying any one of the positive factors does not mean that the award percentage must be lower than 30%, and the converse is true. Not having any one of the negative factors does not mean the award percentage must be greater than 10%. These principles

are consistent with those of the SEC's whistleblower program, which Congress established at the same time as the Commission's whistleblower program. *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34331 (June 13, 2011) ("[T]he absence of any one of the positive factors does not mean that the award percentage will be lower than 30 percent, nor does the absence of negative factors mean the award percentage will be higher than 10 percent."). These principles serve to prevent a vital whistleblower from being penalized for not satisfying the positive factors. For example, a whistleblower who provides the Commission with significant information and substantial assistance such as testifying at trial and producing smoking gun documents could receive 30% even if the whistleblower did not participate in any internal compliance systems. In contrast, in order to prevent a windfall, a whistleblower who provides some useful but partial information and limited assistance to the Commission may receive 10% even if none of the negative factors were present. Here, because the Applicant did little beyond causing the Division to open Redacted , the lack of negative factors does not justify increasing the award amount.

2. The CRS Did Not Impermissibly Consider Certain Information in the Record

The Applicant also argues that the CRS impermissibly considered prejudicial and irrelevant information in the record. The Applicant requests that the information be redacted or removed from the record and that the truncated record be subsequently sent to a newly constituted CRS for a new determination. We decline to grant this request.

The only factor that the CEA prohibits the Commission from considering in an award determination is the balance of the Customer Protection Fund, the fund from which whistleblower awards are paid. *See* 7 U.S.C. § 26(c)(1)(B)(ii). Conversely, the only enumerated factors the CEA requires the Commission to consider are the significance of the whistleblower's

information, the degree of his or her assistance, and the Commission's programmatic interest. *See id.* § 26(c)(1)(B)(i). Except for these factors, Congress explicitly left determination of the award amount to the discretion of the Commission. *Id.* § 26(c)(1)(A) ("The determination of the amount of an award . . . shall be in the discretion of the Commission."); *id.* § 26(c)(1)(B) ("In determining the amount of an award . . . the Commission shall take into consideration such additional relevant factors as the Commission may establish by rule or regulation.").

In its discretion, the Commission has created a "permissible" and "non-exhaustive" list of factors. *See* Whistleblower Incentives and Protection, 76 Fed. Reg. at 53,188 ("The permissible Commission considerations include, but are not limited to . . . ."); *id.* at 53,186 n.104 (referring to the list of factors in Rule 165.9 as "non-exhaustive"). Rule 165 states that the Commission "may take into account . . . other things" not specifically listed in the Rules when deciding whether to increase or decrease the award amount. *See* 17 C.F.R. § 165.9(b), (c). This permissive language is repeated throughout Rule 165.9 and included in what the Commission may consider when assessing the significance of the whistleblower's information, the degree of his or her assistance, the Commission's law enforcement interest, the whistleblower's culpability, the whistleblower's participation in internal compliance systems, and any unreasonable delay in the whistleblower's reporting. *See, e.g., id.* § 165.9(b) ("In considering this factor, the Commission may take into account, among other things . . . ."). Hence, the Rules permit the CRS to consider Redacted .

Consideration of Redacted is not arbitrary or capricious or manifestly contrary to the CEA. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). It is eminently reasonable because determination of the appropriate percentage of a whistleblower award involves a highly individualized review of the facts and circumstances

surrounding each matter. *See* 76 Fed. Reg. at 53,188. Consequently, the CRS cannot make a meaningful award determination without all of the relevant facts before it, particularly those that shed light on the context and background of the investigation leading up to the covered action. For example, in assessing the significance of a whistleblower's information and the degree of his or her assistance, Rule 165.9(b) directs the Commission to consider resources conserved as a result of the whistleblower. *See* 17 C.F.R. § 165.9(b)(1)(i). An analysis of whether the Commission conserved resources because of information or assistance provided by the whistleblower, however, will depend in part on the availability of other information at the Commission's disposal that contributed to the conservation of the Commission's resources, including other whistleblowers, investigative journalism, and in this case, Redacted . In other words, the Commission cannot make a fully informed decision on the criteria for determining an award in a vacuum. Context is relevant and necessary.

In addition, Rule 165.10 states the Division staff declaration may include "any matters relevant to the award determination." In this case, facts about opening of the investigation are not only relevant but crucial to the Applicant's determination because the Applicant is claiming an award on the basis that his/her information led to the opening of the investigation. Accordingly, the CRS had to learn what led Division staff to open an investigation. Redacted

. Moreover, Redacted

is particularly relevant to the significance of the information provided by the Applicant. Without knowing about Redacted , it would be difficult for the CRS to adequately weigh this factor.

Further, the Rules do not make a distinction between what the CRS is allowed to see and what constitutes the record. Under Rule 165.10, the record is what the CRS will see and use to make a determination. *See* 17 C.F.R. § 165.10. The only redactions referenced in Rule 165.10 pertain to redactions the WBO may make to shield any Commission pre-decisional or internal deliberative process materials from award applicants during the record-viewing stage of the proceeding. *See id.* § 165.10(b). In addition, the Applicant was not deprived of due process, as the Applicant had the ability to see what the CRS depended on for making its decision. The Applicant saw not only Redacted but also Division staff's assessment of *** Redacted .

Lastly, even if all references to Redacted were removed from the record in the manner requested by the Applicant,[1] the remaining facts in the record still justify a ***% award. The facts about the Applicant do not change. Consideration of Redacted was not prejudicial because it did not prevent the Applicant from receiving an award, and the ***% award is consistent with the factors in Rule 165.9 as applied. As previously stated, while the Applicant's information led to the opening of Redacted , he/she provided limited assistance during the investigation, and ultimately, Redacted was based on Redacted , not Redacted .

3. The Commission Gave the Applicant a Fair Proceeding in Accordance With the Commission's Rules and Due Process Requirements

The Commission treated the Applicant fairly and equitably in the proceeding. In addition to providing all of the documents in the record for the Applicant's review, Redacted Redacted , the director and staff of the WBO agreed to meet with *** Redacted despite having discretion under the Rules to refuse such a meeting. The

[1] Redacted provided the WBO with proposed redactions to the staff declaration.

director also granted the Applicant an extension not required by the Rules to supplement his/her reconsideration letter. However, the Applicant complains that he/she is unfairly disadvantaged Redacted because the Commission withheld Redacted Redacted . Nevertheless, the Commission Redacted . Additionally, because the Commission has a general obligation under 17 C.F.R. § 11.3 to keep all information related to its investigations confidential, Rule 165.10(b) allows the WBO to make redactions when necessary.[2] Redacted Redacted , the confidentiality requirement under Rule 165.4 would still have prevented the Commission from divulging *** Redacted . *See* 17 C.F.R. § 165.4(a). Consistent with this confidentiality rule, the WBO redacted, without any objection from the Applicant, Redacted Redacted , before providing the record to Redacted . Further, as previously stated, with or without Redacted , the facts in the record about the Applicant support a ***% award.

B. Redacted

Redacted reconsideration submissions do not provide any grounds to justify an award. The submissions are a compilation of miscellaneous documents that have no facial nexus to the covered action. Accordingly, Redacted reconsideration request is denied.

C. Redacted

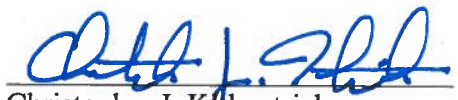
Redacted did not submit a reconsideration request. Therefore, the Preliminary Determination became final with respect to Redacted . Redacted failure to submit a

[2] In balancing the Division's obligation to keep investigative information confidential with the Applicant's right to the record, the WBO minimally redacted Redacted

response contesting the Preliminary Determination constituted a failure to exhaust administrative remedies. Therefore, Redacted is prohibited from pursuing an appeal under Rule 165.13, 17 C.F.R. § 165.13.

IV. CONCLUSION

Accordingly, it is ORDERED that the Applicant shall receive an award of *** % of the monetary sanctions collected in Redacted ; and it is further ORDERED that *** Redacted whistleblower award claims be, and hereby are, denied.



Christopher J. Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, DC 20581