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) CFTC Whistleblower Award
) Determination No. 20-WB-07
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ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS

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I. BACKGROUND

A. The Award Program

The Commission's Whistleblower Program was created by Section 748 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Whistleblowers are eligible to receive between 10 percent and 30 percent of the monetary sanctions collected in certain enforcement actions for which they voluntarily provided original information that led to a successful enforcement.³

B. Relevant Facts

The Covered Action arose out of an investigation opened in response to information that Claimant 1 submitted to the Commission. Claimant 2, a company insider, participated in some of the CEA violations resolved by the Covered Action, but he/she provided information to the Division of Enforcement ("Division") that significantly contributed to the successful outcome of the Covered Action. Claimant 1 requested reconsideration of Claimant 2's eligibility for an award because Claimant 2 submitted his/her information after the Division sought information from his/her employer. Claimant 1 argued in his/her ^{Redacted} Request for Reconsideration ("Reconsideration Request") that Claimant 2's subsequent submission of information should not be considered "voluntarily provided" under the Rules if the information the Division sought from Claimant 2's employer was within the scope of the information that Claimant 2 provided—which would, according to Claimant 1, make Claimant 2 ineligible to receive a whistleblower award. Claimant 2 did not seek reconsideration of the Preliminary Determination.

II. DISCUSSION

A. Preliminary Determination

On ^{Redacted}, the CRS issued a Preliminary Determination recommending that Claimant 1 and Claimant 2 receive whistleblower awards, finding that Claimant 2 significantly contributed to the Covered Action. In making its award recommendation, the CRS balanced the fact that Claimant 2 had some limited participation in the underlying misconduct with the importance of the information Claimant 2 provided. The CRS relied on a declaration provided by Division staff who worked on the Covered Action ("Declaration"). The Declaration described the information the Division requested from Claimant 2's employer prior to Claimant 2's providing information to both the Commission and ^{Redacted} ("Regulator").

B. Claimant 1's Reconsideration Request

Claimant 1's Reconsideration Request made four main points. First, Claimant 1 questioned whether Claimant 2 is eligible for an award, arguing that he/she failed to voluntarily provide information pursuant to the Rules because his/her employer received a request for

³ See 17 C.F.R. § 165.5(a).

information (“November Request”) from the Division prior to Claimant 2’s submitting a Form TCR, and the information Claimant 2 provided may have been “within the scope” of that November Request. Second, Claimant 1 argued the CRS failed to follow agency regulations and failed to consider relevant evidence by not examining the text of the November Request. Third, Claimant 1 argued that the CRS impermissibly relied on what Claimant 1 deemed to be Division staff’s own determination that Claimant 2’s submission was voluntary. Finally, Claimant 1 sought to increase his/her award percentage because, in his/her view, both Claimant 1’s assistance deserved a higher award percentage, and Claimant 2 should be deemed ineligible for a whistleblower award and therefore not count against the total award percentage allowed by the CEA.⁴

C. The Division’s November Request and Claimant 2’s Submission

We have reviewed the text of the Division’s November Request, which sought information from Redacted (“Company X”) related to Redacted that were, as Redacted, maintained by Company X’s Redacted.⁵ Specifically, the November Request asked for the following information for certain Redacted “data and/or reports reflecting [Company X’s]” Redacted

In contrast, the information Claimant 2 provided on his/her Form TCR included evidence regarding Company X’s intent Redacted

⁴ On Redacted, Claimant 1’s counsel sent a supplemental request for reconsideration arguing that Claimant 2 should be barred from getting an award because whistleblower awards cannot be given to “any whistleblower who submits information to the Commission that is based on the facts underlying the covered action submitted previously by another whistleblower.” As discussed above, Rule 165.7(g)(2) does not permit Claimant 1 to make this argument and his/her argument is time-barred. See 17 C.F.R. § 165.7(g)(2). Substantively, this argument must also fail because the Rules contemplate a whistleblower providing additional information that “significantly contributes” to a matter already under investigation. See *id.* § 165.2(i)(2). The Rules do require a whistleblower to provide original information; however, Claimant 1 and Claimant 2 each provided different information, and Claimant 2’s information stemmed from his/her observations and actions while Redacted. See *id.* § 165.5(a)(2). Additionally, on Redacted, Claimant 1’s counsel sent a second untimely request for reconsideration subsequent to receiving copies of the November Request Redacted to Claimant 2’s employer pursuant to a Freedom of Information Act Request. This second untimely request again argued that Claimant 2’s information was not voluntarily provided because the CFTC had already requested information from the whistleblower’s employer that was relevant to Claimant 2’s submission.

⁵ We also reviewed the language of a later request the Division made to Claimant 2’s employer about a specific *** (other than Claimant 2) after Claimant 2 provided information to the Regulator, but before Claimant 2 submitted his/her Form TCR. Claimant 2 filed his/her Form TCR within 120 days of contacting the Regulator, and is therefore entitled to the safe harbor provision that deems information to have been simultaneously submitted to the Commission as of the date of submission to the other regulator. See 17 C.F.R. § 165.2(l)(2) (2016). Therefore, the contents of the later request are irrelevant. Even if the safe harbor rules were not in effect, the later request did not seek information that Claimant 2’s employer would have had to obtain from Claimant 2, which is the key issue.

November Request, as well as (2) estimated Redacted. The Regulator then provided this information to the Division.⁶

D. Analysis

1. Claimant 1's Award Is Appropriate

Claimant 1 seeks to increase his/her award percentage, both because he/she thinks he/she deserves a higher percentage and because he/she thinks Claimant 2 should be deemed ineligible for an award. Claimant 1's Reconsideration Request reiterated why he/she thought he/she was entitled to an award at the top of the 10 to 30 percent range:

As described in the award application, our client's submission was timely, and [his/her] contributions were reliable and complete. [He/she] directed the Commission to the key individuals and information necessary to bring a successful enforcement action. On the other hand, [he/she] did not participate in nor financially benefit from the Redacted and, in fact, placed [himself/herself] at risk by disclosing [his/her] identity to the CFTC and [the Regulator].

Although Claimant 2 aided the investigation by adding details [he/she] learned while participating in the scheme, [he/she] came forward long after Claimant 1 had alerted the CFTC to Redacted. The Commission had already begun investigating Redacted, and Claimant 1 had identified Claimant 2 as a potential witness and culpable participant. It was inevitable that the Commission would interview [him/her]. Claimant 2 must have been aware that the CFTC was investigating Redacted [he/she] submitted [his/her] tip and, with the Commission's participation assured, the likelihood of a successful outcome was high. [His/her] decision to join presented far fewer risks than those faced by Claimant 1, who had no assurance that the CFTC would pursue the matter in the first instance.

We have carefully reviewed Claimant 1's arguments as to why he/she should receive an award at the top of the 10 to 30 percent share range. We determine that Claimant 1's award of *** % is appropriate. Claimant 1's arguments fail, and he/she provides no new argument why *** % is insufficient without regard to Claimant 2's award and the statutory limit on a total award of 30% of the monetary sanctions collected. In arriving at this award amount, we applied the factors set forth in Rule 165.9, 17 C.F.R. § 165.9, in relation to the facts and circumstances of Claimant 1's award application. Although Claimant 1's information caused the Commission to open its investigation, and he/she provided some additional information, Claimant 1 provided limited assistance because he/she did not have direct knowledge of the CEA violations. Accordingly, we determine that an award of *** % to Claimant 1 is appropriate.

⁶ On Redacted, staff from the Regulator forwarded to Division staff the Redacted Claimant 2 had provided.

data

2. Claimant 2 Provided Information Voluntarily, Notwithstanding the November Request

The Commission considered whether Claimant 2 provided information to the Commission voluntarily. The Division's November Request to Claimant 2's employer sought some of the same Redacted that Claimant 2 provided to the Division via the other Regulator.

Rule 165.2(o) provides that information is not "voluntarily submitted" if the whistleblower or his/her employer has received a request for "documents or information from the whistleblower" or the "whistleblower's documents." With one exception not relevant here, this applies only to documents or information "within the scope of a request, inquiry, or demand that the whistleblower's employer receives."⁷ This language is somewhat ambiguous as to the meaning of the term "documents or information from the whistleblower" or the "whistleblower's documents." However, we determine that the Commission intended the phrase "documents or information from the whistleblower" to apply only to "employees who possess the documents or other information that is necessary for the employer to respond."⁸

Claimant 2 provided information voluntarily, despite the overlap in the information Claimant 2 provided to the other Regulator and the information requested by the CFTC in its November Request. Instead of being in Claimant 2's custody, this Redacted was maintained and available from another unit within Claimant 2's employer. Additionally, the record reflects that the Division did not request documents in the personal possession of Claimant 2 prior to his/her provision of information to the Regulator and the Commission. The Division also did not seek to interview Claimant 2 prior to his/her provision of information to the Division. Therefore, we determine that Claimant 2's submission was voluntary under the Rules.

⁷ 17 C.F.R. § 165.2(o).

⁸ See 17 C.F.R. § 165.2(o); Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act, 75 Fed. Reg. 75,728, 75,734 (proposed Dec. 6, 2010). The text of Rule 165.2(o) provides two possible readings of "documents or information from the whistleblower" or "whistleblower's documents." 17 C.F.R. § 165.2(o). The first reading is that Rule 165.2(o) would apply to documents or information needed to be obtained from the whistleblower's personal possession, and the second reading would be that Rule 165.2(o) applies to anything the whistleblower provided to the Division that the Division had previously requested from the whistleblower's employer. An adoption of the second reading would make Claimant 2's submission not voluntarily provided because there was an overlap in Redacted requested by the Division in the November Request and Redacted that Claimant 2 provided the other Regulator (which the other Regulator provided to the Division). After a careful reading of the adopting releases for the Proposed and Final Whistleblower Rules, as well as an examination of the underlying purpose of the Whistleblower Program, we determine that Rule 165.2(o) applies to documents or information needed to be obtained from the whistleblower's personal possession. See Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act, 75 Fed. Reg. 75,728, 75,734 (proposed Dec. 6, 2010); Whistleblower Incentives and Protection, 76 Fed. Reg. 53,172, 53,181 & n.62 (Aug. 25, 2011).

III. CONCLUSION

Accordingly, it is ORDERED that Claimant 1 shall receive an award of *** % of the monetary sanctions collected in the Covered Action; and it is further ORDERED that Claimant 2 shall receive an award of *** % of the monetary sanctions collected in the Covered Action.⁹

⁹ If the Commission's Order were to negatively impact a Claimant who was preliminarily granted an award by the Claims Review Staff, but who did not request reconsideration, that Claimant would have the opportunity to appeal the Order. *See* 7 U.S.C. § 26(f).

By the Commission.

A handwritten signature in black ink, reading "Robert Sidman". The signature is fluid and cursive, with the first name "Robert" and last name "Sidman" clearly distinguishable. It is positioned above a thin horizontal line.

Robert Sidman
Deputy Secretary of the Commission
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, DC 20581

Dated: July 20, 2020