

SEC Explains Denial of Whistleblower Award

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The SEC's recent denial of a request for a whistleblower [award](#) reinforces its earlier decision in a separate proceeding this past July that claims made for tips submitted before the enactment of the Dodd-Frank Act do not constitute "original information," but also, for the first time, addresses whether the rules afford claimants fair proceedings.

In this case, the claimant provided information to, and met with, the SEC staff until July 2009. The staff opened an investigation regarding an allegation of sales of unregistered non-exempt securities in March 2009, and filed an action in June 2010. Dodd-Frank was enacted a month later. In September 2010, the claimant submitted additional information that the primary defendant in the enforcement action made inaccurate statements during depositions. The claimant also resubmitted certain information previously provided to the staff. After a final judgment was rendered in the action in January 2011, the claimant sought a whistleblower award.

The SEC found in its preliminary determination that the claimant had not submitted "original information," as required under the whistleblower rules, because it was not provided before the Dodd-Frank Act, and the information submitted later in September 2010 did not lead to the enforcement action. The claimant sought extensive discovery from the Office of the Whistleblower and the Claims Review Staff, contesting not only the preliminary determination but also the procedural rights available to dispute award decisions.

The Commission, in denying the award, determined that the statute did not apply retroactively and did not intend to reward individuals who came forward with allegations before Dodd-Frank's enactment, and that resubmission of pre-enactment information is not required to be considered by the staff. In addition, they found no evidence that the claimant's 2010 information led to the success of the enforcement action, since it did not cause the staff to open a new avenue of its investigation or significantly contribute to the success of the action.

The Commission addressed whether the claimant was given a fair proceeding in accordance with SEC rules and due process requirements. It determined that the Office of the Whistleblower appropriately made available for claimant's review the materials that formed the basis of the Claim Review Staff's preliminary determination to deny the award, including sworn declarations provided by enforcement staff with direct knowledge of the case. Since the rules state that claimants are not entitled to obtain internal deliberative process materials that assist the staff in deciding a claim, the Commission determined that allowing claimants "free-wheeling discovery" on internal deliberations would constitute an unwarranted and potentially damaging intrusion. However, it left open the possibility that there may be another case where such discovery is permitted, albeit under "extraordinary circumstances."

While the Commission ruled that the claimant was accorded all procedural protections required under the due process clause, it took special pains to "remind counsel" that the Commission has a substantial interest in granting awards, stating that "our goal is to work with whistleblowers and their counsel in a collaborative, non-adversarial manner to determine whether the whistleblowers satisfy the award criteria."

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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