

Quarterly Whistleblower Award Update

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The **SEC** recently announced that it has denied **whistleblower claims** in connection with three different matters and awarded an additional \$150,000 to the inaugural recipient of an award under the SEC's whistleblower program.

The SEC denied a whistleblower award claim relating to its case against penny stock promoters for fraudulently hyping Anscott Industries. *See SEC v. Esposito*, No. 08:00494 T26 (M.D. Fla. June 30, 2011). In *Esposito*, the court entered final judgments against the defendants ordering them to pay more than \$20 million in disgorgement and civil penalties in a fraudulent touting case. The SEC denied the award because (1) the claimant failed to submit the claim within 90 days of the Notice of Covered Action and failed to demonstrate such tardiness should be waived based on extraordinary circumstances as "claimant failed to diligently pursue the claim for award upon termination of the purported 'extraordinary circumstances'"; and (2) the claimant failed to provide original information since claimant did not provide information for the first time to the SEC after the date of enactment of Dodd-Frank.

The SEC denied a second set of whistleblower award claims because claimant failed to demonstrate she provided original information. In what the SEC described as "an unusual award application," the claimant did not contend she provided information directly to the SEC, but instead contends that she provided information to the U.S.

Department of Housing and Urban Development (“HUD”) and the FBI, which in turn shared that information with the SEC. The claimant alleged that this information helped the SEC in its case against former officers of subprime lender New Century Financial Corp., who allegedly lied about the company’s losses from loan defaults. See *SEC v. Morrice*, No. 09-0426 (C.D. Cal.); *SEC v. Mozilo*, No. 09-03994 (C.D. Cal.). The SEC reached a settlement with the officers that included more than \$1,000,000 in disgorgement and civil penalties. The SEC denied the award because (1) any information provided by HUD or the FBI to the SEC prior to the enactment of Dodd-Frank in July 2010 would not be original information under Rule 21F-4(b)(1)(iv) and (2) any information provided after July 21, 2010, failed to meet the procedural requirements that original information must be provided to the SEC in writing by the claimant under Rule 21F-9(b).

The SEC denied two other whistleblower award claims determining that the first claimant failed to provide original information that led to a successful enforcement action and that the second claimant did not timely submit his application in response to the Notice of Covered Action. The first claimant had provided information to the SEC both before and after the enactment of Dodd-Frank. With respect to the first claimant’s pre-Dodd-Frank information, the SEC reiterated that information provided by the claimant to the SEC before the enactment of Dodd-Frank in July 2010 did not constitute original information under Rule 21F-4(b)(1)(iv). With respect to the post-Dodd-Frank information, the SEC concluded that the information did not lead to a successful enforcement action. According to the SEC, under Rule 21F-4(c)(1)-(2), “original information ‘leads to’ a successful enforcement action if either: (i) the original information caused the staff to open an investigation, and the Commission 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 investigation, and the original information significantly contributed to the success of the action.” The SEC determined the second claimant did not submit his Form WB-APP ([Application for Award for Original Information Submitted Pursuant to Section 21F of the Securities Exchange Act of 1934](#)) within 90 days of the Notice of Covered Action as required by Rule 21F-10(b). The SEC rejected claimant’s argument the SEC lost his original, timely WB-APP because the late-filed WB-APP did not cross-reference an earlier submission, claimant did not argue he had filed an earlier WB-APP until the SEC issued its Preliminary Determination, the claimant did not produce a copy of his alleged original submission, the SEC did not find it after an “exhaustive review of [its] records,” and the claimant did not offer any explanation why he filed the “second” WB-APP if he already had filed a timely form.

The first person to receive an award under the SEC’s whistleblower program received another \$150,000 after the SEC collected an additional \$500,000 in the case. [link to previous client alert] This award represents the maximum percentage payout (30%) under the whistleblower program. Sean McKessy, chief of the SEC’s whistleblower office, commented “[t]his latest payment shows that the SEC’s aggressive collection efforts pay dividends not only for harmed investors but also for whistleblowers,” and emphasized that “[a]s [the SEC collects] additional funds from securities law violators, we can increase the payouts to whistleblowers.”

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