

THE NATIONAL LAW REVIEW

Appealing an SEC Whistleblower Award Determination

Friday, September 1, 2017

SEC Whistleblowers Denied Multimillion-Dollar Award

On August 31, 2017, two whistleblowers appealed to the Second Circuit the SEC's denial of a whistleblower award related to a 2012 enforcement action against Syntax-Brilliant Corporation. According to the court filings, the whistleblowers provided information to the SEC that led to [\\$60 million in civil fraud judgments](#) against the company and its officers. The whistleblowers, however, failed to apply for an award within 90 days of the SEC posting the [Notice of Covered Actions](#) as required by the [SEC Whistleblower Program's rules](#). In fact, the whistleblowers did not apply for the award until nearly two years after SEC issued a notice of covered action.

This unfortunate outcome for these whistleblowers underscores the value of retaining an [experienced SEC whistleblower attorney](#) to avoid similar pitfalls. Knowing the rules can make the difference between recovering a multimillion-dollar whistleblower award and not receiving any award at all.

This article describes the process to apply for an [SEC whistleblower award](#) and appeal an SEC whistleblower award determination.

Preliminary SEC Whistleblower Award Determination

After a whistleblower applies for an SEC whistleblower award (by submitting a completed [Form WB-APP](#) within 90 calendar days of the SEC posting the Notice of Covered Action), the SEC Whistleblower Office's Claims Review Staff will review the application in accordance with the rules of the SEC Whistleblower Program and make a *preliminary* award determination. The Claims Review Staff may base this determination on:

- The whistleblower's Form TCR;
- The whistleblower's Form WB-APP;
- Sworn declarations from the SEC staff that worked on the enforcement action;
- The enforcement action's orders and pleadings; and
- Other appropriate materials as detailed in [17 C.F.R. § 240.21F-12\(a\)](#).

After the Claims Review Staff makes its preliminary determination (recommending whether to issue and award and the proposed award amount), it will send the whistleblower a written notification of the determination and an explanation of the whistleblower's rights in the awards claims process. At this point, the whistleblower will have 30 calendar days to:

- Request the record that was used by the Claims Review Staff in making the preliminary determination; and/or
- Request a meeting with the SEC Whistleblower Office staff to discuss the preliminary determination (however, such meetings are not required and the office may decline the request). See [Rule 21-F10](#).



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Appealing the Preliminary SEC Whistleblower Award Determination

Whistleblowers can appeal the Claims Review Staff's preliminary determination to deny an award or, in the event the preliminary determination recommends the granting of an award, the amount of the award. The deadline for submitting an appeal is 60 calendar days from the later of: (i) the date of the preliminary award determination, or (ii) the date when the SEC Whistleblower Office made materials available for review.

If a whistleblower chooses to appeal the preliminary determination, they will receive a written acknowledgment that the SEC Whistleblower Office received the appeal. Thereafter, the Claims Review Staff will consider the whistleblower's response, along with any supporting documentation provided, and will make its proposed *final* determination. See [Rule 21-F10](#).

If a whistleblower chooses not to appeal a preliminary determination, or fails to appeal in a timely manner, the preliminary determination will become the SEC's final order (except where the preliminary determination recommends granting an award, in which case it will become a proposed *final* determination). Importantly, a whistleblower's failure to contest a preliminary determination will constitute a failure to exhaust administrative remedies, and the whistleblower will be prohibited from appealing the determination to a United States Court of Appeals. See [Rule 21-F10](#).

Proposed Final Award Determination and SEC Final Order

After the preliminary determination becomes the proposed final determination, the whistleblower and the SEC will receive written notification of the determination. Within 30 days of receiving this notification, any Commissioner can request a full review of the proposed final determination. If there is no requested review within 30 days, the proposed final determination will become the SEC's final order. See [Rule 21-F10](#).

Appealing SEC Whistleblower Award Determination to United States Court of Appeals

If the SEC denies an award to a whistleblower, the whistleblower may file an appeal in the appropriate United States Court of Appeals (either the United States Court of Appeals for the District of Columbia Circuit, or to the circuit where the aggrieved person resides or has his or her principal place of business) within 30 days of the issuance of the decision. If the SEC issues an award to the whistleblower of between 10 to 30 percent of the monetary actions collected in the action, the whistleblower may not appeal the award determination if the award was made in accordance with subsection (b). See [Rule 21F-13](#).

SEC Whistleblower Reward Program

The SEC Whistleblower Reward Program has been very successful. Indeed, as discussed in a recent [Forbes article](#), whistleblower disclosures have enabled the SEC to recover more than \$1 billion in penalties and protect investors by halting ongoing fraud schemes.

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