

SEC Waives "In Writing" Requirement in Exceptional Case

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On January 6, 2017, the U.S. Securities and Exchange Commission (SEC) made a highly unusual decision to award more than [\\$5.5 million to a whistleblower](#) who did not follow one of the cardinal rules that information must be provided in writing. While the particular whistleblower in this case qualified for an award on the basis of information provided by telephone, it is clear that the SEC departure from its rules was unique and few whistleblowers can expect to benefit from this precedent going forward.

About the In-Writing Rule

The [Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010](#) (Dodd-Frank) created an award program for whistleblowers who provide original information about violations of the federal securities laws to the SEC. To be eligible for an award, the whistleblower's information must lead to a successful enforcement action or settlement by the SEC.

Dodd-Frank initially only required whistleblowers to submit their tips to the SEC "in writing." When the SEC promulgated rules under Dodd-Frank, effective August 2011, the agency specified that whistleblowers can file information **online** through the SEC's website, or may **fax** or **mail** the information to the SEC on a Form TCR (Tip, Complaint or Referral). See 17 C.F.R. § 240.21F-9(a)(2).

Under these rules, whistleblowers are eligible for an award only if they provide information in writing through one of these channels. For those whistleblowers who submitted tips after the enactment of Dodd-Frank on July 21, 2010, but before the federal rules went into effect in August 2011, the agency accepts written tips in any form for consideration in the award program. *Id.* 21F-9(d).

The Exceptional Case

In the award the SEC announced on January 6, 2017, the whistleblower did not submit information in writing. The SEC noted that the failure to comply with the requirement of Rule 21F-9(d) ordinarily would lead to denial of an award but the unusual circumstances of this case justified waiver of that requirement. The commission noted that it has the discretionary authority to waive non-compliance with the rule under the Securities and Exchange Act, § 36(a), 15 U.S.C. § 78mm, when it is "necessary or appropriate in the public interest" and "consistent with the protection of investors" to do so.

Here, the SEC considered the waiver of the "in writing" requirement justified because:

1. The commission's staff was actively working with the tipster before the enactment of the Dodd-Frank Act, and it would have been "counter-productive and unreasonable" to require him to revert to providing information in writing;
2. The tipster provided new post Dodd-Frank Act information in the format the enforcement staff expressly requested; and
3. The indicia of reliability and the certainty about the time the information was provided, which are the principle policy rationales for the writing requirement, are satisfied in this case.

The SEC strictly protects the confidentiality of whistleblowers and does not disclose any information that might reveal their identities, so all other specific information has been redacted from the order determining the whistleblower award in this case. Thus, it is unclear how the whistleblower initially conveyed information to the SEC, except that it was not done in writing after the enactment of Dodd-Frank.

The Takeaway for SEC Whistleblowers

While the SEC's decision to depart from the in-writing rule with this dramatic whistleblower reward appears unique, making an exception in the interest of uncovering securities fraud sends a strong message about the agency's commitment to enforce the law and protect investors. It is still the case that the vast majority of whistleblowers must comply with the plain language of Dodd-Frank in order to qualify for an award. The SEC has denied award claims from individuals who submitted tips prior to the enactment of Dodd-Frank, for example, even when their information led to successful enforcement actions. The Second Circuit sided with the SEC a case involving these so-called "zombie claims" and held that the pre-act "zombie" tipster could not recover an award because the rules disqualify information submitted prior to July 21, 2010. See *Stryker v. Securities and Exchange Commission*, 780 F.3d 163 (2d Cir. 2015). Although the claimant in the January 2017 award did provide some information prior to the enactment of Dodd-Frank, he was not a "zombie" tipster because he continued to work with the SEC and provided information after the law went into effect.

The Dodd-Frank reward program continues to play an important role in bringing securities fraud to light and protecting the interests of investors. While the SEC has made an extraordinary exception in making its most recent award, whistleblowers should act promptly and conform as carefully as possible to the SEC's tip submission rules to maximize their eligibility for the reward program.