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News/Columns

# Whistleblower Challenges SEC Over Award Claim

D.C. Circuit is urged to force the agency to act on tipster's claim.

C. Ryan Barber, The National Law Journal

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Three years after requesting a reward for tipping off financial regulators, a whistleblower has asked a federal appeals court in Washington to light a fire under the U.S. Securities Exchange Commission to force it to decide on the award application.

In a [petition filed on Dec. 10](#), Butzel Long partner Max Maccoby described the whistleblower's award request as the "tip of the iceberg" in a backlog that threatens to diminish the effectiveness of the SEC's compensation program for tipsters. The tipster is identified as "John Doe" in court papers.

Citing a [May article](#) in The Wall Street Journal, Maccoby wrote that only 47 of the 297 whistleblowers who've applied for awards since 2011 have received a final decision from the SEC. In about half of the decisions, the commission handed down a preliminary finding in "no more than two-thirds of the amount of time" his client has been waiting, Maccoby wrote.

The three-year wait, he argued, is "simply unreasonable on its face."

"Given how quickly it has dug the hole in which it now finds itself, the SEC is unlikely to be able to climb out of it if left to its own devices. Rather, it needs to be motivated by something from outside the commission," Maccoby wrote in his petition in the U.S. Court of Appeals for the D.C. Circuit. "And unless Congress acts, this court is the only available source for such motivation."

The SEC declined to comment.

In the spring of 2011, the whistleblower, according to his petition, turned over information that ultimately led to a "well-known publicly traded corporation" paying "well in excess of \$1 million" to resolve the claims brought by the SEC.

The corporation was not identified in the D.C. Circuit filing.

Because the corporation paid more than \$1 million, the whistleblower was eligible to seek a reward under a program created under the Dodd-Frank Act. Under the program, a

whistleblower can receive between 10 percent and 30 percent of the monetary sanctions collected.

Maccoby wrote in the petition that he sent three letters to the commission between March 2014 and August 2015 to check in on his client's claim.

In the August letter, he threatened to go to court if the commission let another two months pass without issuing a preliminary decision on the application. Maccoby wrote that the commission, in responding to the letters, has said that the claim remained under consideration and that the agency could not predict when a preliminary decision would be made.

The three-year anniversary of the whistleblower's filing passed in October. Maccoby declined to comment about the D.C. Circuit case.

## SEC TOUTS WHISTLEBLOWER PROGRAM

In the petition, Maccoby argued that his client's claim is likely one of the oldest currently pending. And since the commission does not appear to review the applications on a first-in-first-out basis, Maccoby wrote, his client has no assurance that the claim will be given priority over those filed after it.

[In an April speech](#) at Northwestern University Pritzker School of Law, SEC Chairwoman Mary Jo White credited the whistleblower program with improving the agency's efficiency and preserving its "scarce resources."

"First, we know that the regime does, in fact, create powerful incentives to come to the commission with real evidence of wrongdoing that harms investors and it meaningfully contributes to the efficiency and effectiveness of our enforcement program," White said. "And whether the whistleblowers are reluctant or eager, motivated by a desire to do what's right or by the prospect of financial reward, or both, they have, and will continue to, come forward."

Companies' awareness of the program, White said, "should create at least equally strong incentives for companies to build truly effective compliance programs and to foster atmospheres where internal compliance reporting is not only tolerated, but actively encouraged."

But Maccoby, who cited White's speech in his petition, argued that "the longer it takes for award claims to be decided, the less attractive the incentive to potential whistleblowers will become."

## GROWING BACKLOG

The commission's backlog is only growing deeper, Maccoby argued. In its [annual report to Congress](#), the commission reported that more than 120 whistleblower award claims were submitted in fiscal 2015 — an amount that represented "a significant increase compared to prior years."

David Marshall, a partner at Katz, Marshall & Banks who has represented whistleblowers, said the backlog of whistleblower claims can be blamed on a lack of resources.

Marshall said the SEC office that's devoted to considering whistleblower award claims has

been "very attentive to the needs and the interests of whistleblowers, from the preparation and submission of tips to claiming awards." Still, he acknowledged the frustration that comes with waiting for decisions.

"And certainly timeliness is an important feature of the program," Marshall said. "It's something that the agency needs to pay attention to, but the problem is that Congress and the SEC leadership need to make sure that the whistleblower program has enough staff to process the growing number of tips and award applications."

Marshall said the number of tips and the number of award applications has increased significantly in recent years, and that the SEC's whistleblower office "has not been able to ramp up its staff in the appropriate proportion."

So far this year, the commission has issued 20 decisions on award applications, denying 13 and approving seven. The commission often redacts in its orders the percentage awarded to a whistleblower but provides an approximate amount of the reward. In other cases, the commission provides a percentage but no sense of the amount that will be awarded.

The commission has awarded at least \$6.28 million to whistleblowers this year, with one reward that exceeded \$3 million, according to agency documents.

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