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SEC Responds to Whistleblower Who Challenged Agency Delay

C. Ryan Barber, The National Law Journal

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A purported whistleblower who, last December, [turned to a federal appeals](#) court to force U.S. securities regulators to act on their delay in processing his award claim has received a response from the agency after a three-year wait.

Last week, the anonymous whistleblower notified the U.S. Court of Appeals for the D.C. Circuit that the U.S. Securities and Exchange Commission had responded to his application. Neither court papers nor an attorney for the whistleblower indicated whether the preliminary determination was favorable to the tipster. The SEC did not return a request for comment.

The [whistleblower had petitioned](#) the D.C. Circuit to prod the commission to issue a preliminary determination on his request. He argued that the three-year wait was "simply unreasonable on its face."

The petition called attention to the backlog of whistleblower claims pending at the SEC. Citing a Wall Street Journal article from May, the whistleblower's attorney, Butzel Long partner Max Maccoby, wrote that only 47 of the 297 whistleblowers who've applied for awards since 2011 have received a final decision from the SEC.

Maccoby confirmed that the SEC responded with a preliminary determination. He declined to comment on whether the commission had concluded that his client was eligible to receive an award under the whistleblower program created by the Dodd-Frank Act.

On Monday, four days after Maccoby filed the "suggestion of mootness," the D.C. Circuit mistakenly released an order directing the SEC to respond to the whistleblower's petition within 30 days. Later, the clerk's office terminated the case and vacated the order, explaining that it was entered in error.

Maccoby said it was "serendipitous that the SEC did, in fact, issue a preliminary determination when it did, considering the fact that the court of appeals ordered a response from the SEC so quickly thereafter."

The SEC, he said, would have been forced "to be accountable for these very long delays in deciding fee award petitions, and I don't know any government agency that wants to be held

accountable for what it does and does not do.”

It was unclear whether the timing of the SEC’s preliminary determination was influenced by the petition Maccoby filed in federal court.

“It’s difficult to know, of course, because we’re not privy to what prompted the SEC to act, or whether they were going to issue their preliminary determination of the award on this timetable anyway, said Erika Kelton, a Phillips & Cohen partner who represented the foreign tipster who received \$30 million—the largest whistleblower award in the program’s history. “But it does appear that they acted in a manner that would moot this writ, and that is what happened.”

Kelton said the petition that Maccoby filed could have the effect of pushing the SEC to pick up the pace in its reviews of award applications.

“The SEC must understand that other whistleblowers who are facing a prolonged wait time for a preliminary determination are probably going to be considering this option,” she said about the potential for litigation. “That might have the impact of speeding things up.”

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