ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1095

In the United States Court of Appeals
for the District of Columbia Circuit

In re: JOHN DOE,

Petitioner.

PETITION FOR A WRIT OF MANDAMUS DIRECTED TO THE SECURITIES AND EXCHANGE COMMISSION TO COMPEL AGENCY ACTION THAT HAS BEEN UNREASONABLY DELAYED

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28, Petitioner makes the following disclosures:

Parties and Amici

Petitioner[1]

Securities and Exchange Commission ("SEC")

Rulings Under Review

This petition for a writ of mandamus seeks to redress the SEC's unreasonable delay in making a preliminary determination pursuant to 17 C.F.R. § 240.21F-10 regarding the Petitioner's right to an award under 15 U.S.C. § 78u-6(b) for voluntarily providing original information to the Commission that led to, and provided material support for, the government's successful enforcement actions against Teva Pharmaceuticals Ltd., and related entities ("Teva").

Related Cases

To Petitioner's knowledge, no person has filed an action in this Court regarding entitlement to a whistleblower award arising out of the SEC's successful enforcement actions against Teva. Contemporaneously with this Petition, undersigned counsel is filing a similar petition against the SEC for unreasonable

[1] The Petitioner's identity is protected from public disclosure pursuant to 15 U.S.C. § 78u-6(h)(2)(A) and 17 C.F.R. § 240.21F-7. Circuit Rule 47.1 provides that portions of a record placed under seal before an agency remain under seal in this Court unless otherwise ordered. Pursuant to these authorities, Petitioner discloses his/her identity to this Court on page App.2 of the sealed appendix, and has contemporaneously filed a motion for leave to proceed under an alias and for his identity to remain sealed.

delay in processing a different claim for an SEC whistleblower award on behalf of another SEC whistleblower.

In 2015, a similar petition for a writ of mandamus regarding the SEC's unreasonable delay in making a preliminary determination regarding a right to an award under 15 U.S.C. § 78u-6(b) regarding a different enforcement matter was filed in *In re John Doe*, No. 15-1444 (D.C. Cir. filed Dec. 10, 2015). This Court ordered the SEC to respond to that petition. The SEC instead issued the preliminary determination that the petition sought, and this Court dismissed the petition as moot. *See id.,* February 8, 2016 Order, Document #1597743.

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GLOSSARY

DOJ	Department of Justice
FCPA	Foreign Corrupt Practices Act
FOIA	Freedom of Information Act
NOCA	Notice of Covered Action
OWB	Office of the Whistleblower
SEC	Securities and Exchange Commission
TCR	Tip, Complaint or Referral
TRAC	*Telecommunications Research & Action Center v. Federal Communications Commission*, 750 F.2d 70 (D.C. Cir. 1984)

STATEMENT OF JURISDICTION

This Court established in *Telecommunications Research & Action Center v. Federal Communications Commission* ("*TRAC*"), 750 F.2d 70, 75-77 (D.C. Cir. 1984), that the All Writs Act, 28 U.S.C. § 1651(a), grants this Court jurisdiction to hear a petition for a writ of mandamus seeking relief from unreasonable agency delay where, as here, a statute commits the delayed final agency action at issue to review by this Court. This case involves unreasonable delay by the SEC in issuing a preliminary determination and Final Order in connection with a whistleblower award pursuant to 15 U.S.C. § 78u-6. Section 78u-6(f) vests review of such an award in "the appropriate court of appeals of the United States." The SEC has interpreted that phrase to mean "the United States Court of Appeals for the District of Columbia, or … the circuit where the aggrieved person resides or has his principal place of business." 17 C.F.R. § 240.21F-13(a).

PRELIMINARY STATEMENT

This Court has held that "[j]ustice delayed is justice denied," and that the maxim has equal force when an administrative agency, rather than a court, unreasonably delays the determination of federal rights. *Rohr Indus., Inc. v. Wash. Metro. Area Transit Auth.*, 720 F.2d 1319, 1327 (D.C. Cir. 1983). The SEC has denied Petitioner justice by unreasonably delaying a preliminary determination on Petitioner's claim for an award under the SEC's whistleblower program.

Petitioner submitted a detailed, 42-page tip regarding Teva's violations of the Foreign Corrupt Practices Act ("FCPA") on May 9, 2011, shortly after the program incepted and almost eight years ago. SEC and Department of Justice's ("DOJ") officials then followed up with Petitioner and his attorneys 31 times, and Petitioner submitted four formal written supplements to provide additional information that the government requested.

The SEC and DOJ prosecuted successful enforcement actions regarding the very conduct Petitioner reported to recover $519 million from Teva, and the SEC published a notice of this recovery on January 31, 2017. Petitioner submitted a timely claim for an award under 15 U.S.C. § 78u-6 on April 27, 2017, two years ago. Petitioner has heard nothing since other than a boilerplate letter acknowledging that the SEC received his claim.

This *TRAC* case is unusual because the agency delay at issue involves a simple task. This Court applies a "rule of reason" analysis to evaluate agency delay based on the nature and complexity of the agency's task. Most *TRAC* cases involve complex scientific inquiries and substantial fact-finding outside of the agency, such as establishing limits on the exposure of uranium miners to radon particles. In this case, the SEC needs only apply the straightforward statutory criteria in Section 78u-6(c)(1)(B) to facts and evidence that the Commission already possesses. At base, those criteria merely require the SEC's Office of the

Whistleblower ("OWB") to determine whether, and to what extent, the whistleblower's tip contributed to the initiation and/or successful resolution of an enforcement action.

Indeed, the SEC's task is more akin to a court deciding a motion than the kind of scientific or technical decision-making that ordinarily is the subject of *TRAC* appeals for agency delay. Federal Courts of Appeals do not allow district courts to deny justice to parties by unreasonably delaying the resolution of routine motions for years, and this Court should not permit the SEC to continue to deny justice to Petitioner in these similar circumstances.

STATEMENT OF THE ISSUE PRESENTED

Whether the SEC has unreasonably delayed—for two years—issuing a preliminary determination and Final Order pursuant to 17 C.F.R. § 240.21F-10(d) regarding Petitioner's claim for a whistleblower award under 15 U.S.C. § 78u-6.

RELIEF SOUGHT

Petitioner asks this Court to impose a deadline for the SEC to fulfill its statutory obligation to determine the existence and amount of the Petitioner's right to an award under the whistleblower program that Congress established in the Dodd-Frank Act, Pub. L. No. 111-203, § 922, 124 Stat. 1841 (July 21, 2010), and codified at 15 U.S.C. § 78u-6. Petitioner requests that the Court issue a writ of mandamus requiring the SEC to issue a preliminary determination on Petitioner's

claim within 60 days, and to issue a Final Order on Petitioner's claim within six months thereafter.

STATEMENT OF THE CASE

I. The SEC Whistleblower Program.

Congress established the SEC whistleblower program to encourage the disclosure of securities violations by creating an incentive program that awards whistleblowers between 10 and 30 percent of the money recovered in any successful enforcement action based on, or aided by, the whistleblower's tip. *Id.* The relevant provision, 15 U.S.C. § 78u-6(b)(1), mandates that the SEC "*shall* pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the enforcement of the covered judicial or administrative action." (Emphasis added.) Congress also required the SEC to establish a separate office, the Office of the Whistleblower, "to administer and enforce the provisions of section 78u-6"—that is, to run the SEC whistleblower program. 15 U.S.C. §78u-7(d). Congress thereby ensured that whistleblower claims do not impede, or compete for resources with, the SEC's other enforcement priorities.

Congress imposed the program on the SEC to address the SEC's failure to act on a series of tips by Harry Markopolos that, if competently investigated, would have exposed Bernie Madoff's Ponzi scheme. Mr. Markopolos submitted

detailed reports to the SEC that exposed Mr. Madoff's fraud in 2000, 2001, 2005, 2007, and 2008. *Assessing the Madoff Ponzi Scheme and Regulatory Failures: Hearing Before the Subcomm. on Capital Markets, Ins. and Gov't Sponsored Enters.*, 111th Cong. 5 (Feb. 4, 2009). Had the SEC acted on Mr. Markopolos's tips, the fraud could have been stopped at $7 billion. *Id.* Instead, the SEC's inaction allowed the fraud to grow to $50 billion. *Id.*

The SEC officials who appeared before Congress refused to even try to explain the Commission's inaction, much to the consternation of the subcommittee members. As Congressman Gary Ackerman of New York summarized:

> I am frustrated beyond belief. … The previous witness said that you guys as an Agency act like you are deaf, dumb, and blind. I figured you were coming here, and you were going to testify before Congress. … You have told us nothing, and I believe that is your intention. … What the heck went on? … It seems to me … one guy with a few friends and helpers discovered this thing nearly a decade ago, led you to this pile of dung that is Bernie Madoff, and stuck your nose in it, and you couldn't figure it out. You couldn't find your backside with two hands if the lights were on. … You have single-handedly defused the American people of any sense of confidence in our financial markets if you are the watchdogs. You have totally and thoroughly failed in your mission. Don't you get it? … And now you are trying to tell us that because other people are looking at it, you are not going to tell us what is going on? Like hell you won't. What happened here? That is a question.

Id. at 65.

House and Senate Conference Reports confirm that Congress enacted the whistleblower program based in part on Mr. Markopolos's recommendations. *See* S. Rep. No. 111-176, at 110 (2010); 156 Cong. Rec. H5233, H5237 (2010) ("the legislation adopts recommendations made by … Harry Markopolos").[2]

Congress requires the SEC to submit an annual report regarding how it has handled whistleblower claims. 15 U.S.C. § 78u-7(d). In the 2017 Annual Report, the Chief of the OWB stated that "Whistleblowers have provided tremendous value to the SEC's enforcement efforts," "aided the SEC's efforts to uncover and stop fraudulent investment schemes," and led to the recovery of "over $975 million in total monetary sanctions, including more than $671 million in disgorgement of ill-gotten gains and interest."[3]

The OWB published a helpful graphic on page 13 of its 2017 Annual Report that summarizes the process through which a whistleblower submits a tip and receives an award.

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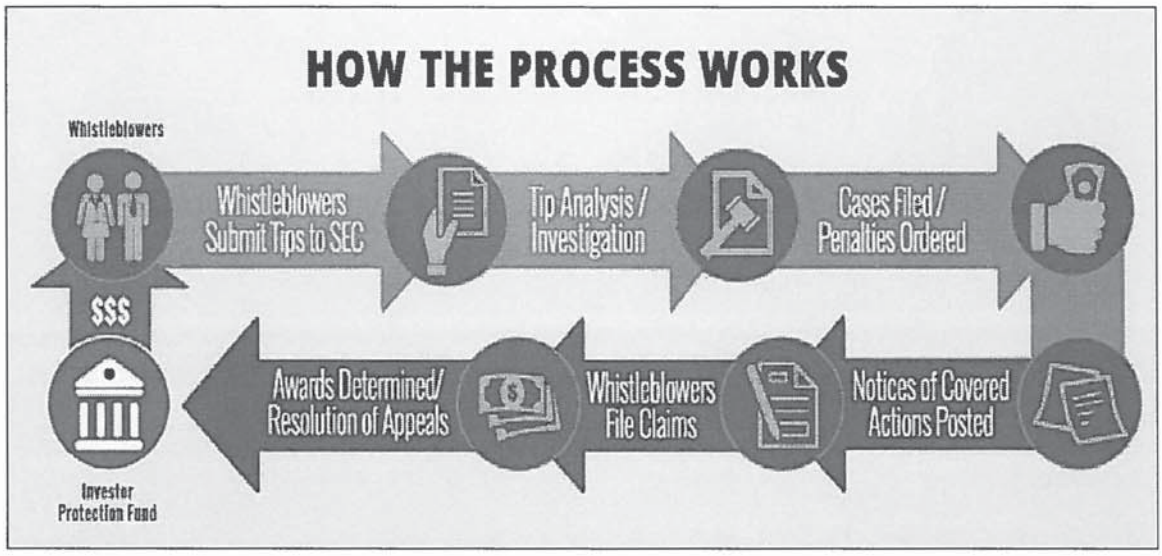
[2] The Supreme Court relied upon the same Senate Conference Report to confirm Congress's intent for the whistleblower program in *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 773 (2018), noting that "Dodd–Frank responded to numerous perceived shortcomings in financial regulation."

[3] SEC Office of the Whistleblower 2017 Annual Report to Congress ("2017 OWB Report") at 1, available at https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf. Courts may take judicial notice of a commission's report to Congress. *See, e.g., Williams v. Lew*, 819 F.3d 466, 473 (D.C. Cir. 2016).



A whistleblower starts the process by submitting "original information"—a non-publicly known tip—on a specified form, Form TCR. 17 C.F.R. § 240.21F-9(a)(2). The data from that form is then entered into a specific database in which the OWB tracks all tips. 2017 OWB Report at 8.

The SEC then investigates the tip and communicates with the whistleblower. "Whenever a Commission action results in monetary sanctions totaling more than $1,000,000," regardless of whether the SEC believes the enforcement resulted from the tip, "the Office of the Whistleblower will cause to be published on the Commission's Web site a 'Notice of Covered Action.'" 17 C.F.R. § 240.21F-10(a). It is the whistleblower's responsibility to monitor the SEC's website for these notices. 2017 OWB Report at 6, 14.

Once the SEC publishes such a notice, a whistleblower who submitted a tip regarding the noticed action must submit a claim by filing another specified form,

Form WB-APP, within "ninety (90) calendar days of the date of the Notice of Covered Action." 17 C.F.R. § 240.21F-10(a). The "claims review staff" is then supposed to promptly review the claim and issue "a Preliminary Determination … as to whether the claim should be allowed or denied, and, if allowed, setting forth the proposed award percentage amount." *Id.* § 204.21F-10(d). If the OWB determines that information from the whistleblower's tip furthered the enforcement action, the SEC must award an amount between 10 and 30 percent of the money recovered. 15 U.S.C. § 78u-6(b)(1).

The OWB needs only to apply simple criteria spelled out by Congress to information that the SEC already possesses to resolve whistleblower award claims:

> (I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;
>
> (II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;
>
> (III) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws

15 U.S.C. § 78u-6(c)(1)(B)(i). The SEC has issued a regulation clarifying how it applies those factors. *See* 17 C.F.R. § 240.21F-6. The SEC summarized the clarifying regulation in its 2018 OWB Report, and confirmed that it does not substantively complicate the statutory factors:

> The Whistleblower Rules outline a number of positive and negative factors that the Commission and Claims Review Staff may consider in assessing an individual's award percentage. Award percentages are based on the particular facts and circumstances of each case, and are not based on any predetermined mathematical formula.
>
> Factors that may increase an award percentage include the significance of the information provided by the whistleblower, the level of assistance provided by the whistleblower, the law enforcement interests at stake, and whether the whistleblower reported the violation internally through his or her firm's internal reporting channels or mechanisms.
>
> Factors that may decrease an award percentage include whether the whistleblower was culpable or involved in the underlying misconduct, interfered with internal compliance systems, or unreasonably delayed in reporting the violation to the Commission.

2018 OWB Report at 14 (citations omitted).[4] The SEC's own description of the process for evaluating whistleblower claims confirms the simplicity of the OWB's task.

> OWB attorneys evaluate each application for a whistleblower award. OWB works closely with investigative staff responsible for the relevant action, as well as other Commission staff who may have interacted with the claimant, to understand the contribution or involvement the applicant may have had in the matter.
>
> Utilizing the information and materials provided by the claimant in support of the application, as well as other relevant materials, OWB prepares a written recommendation to the Claims Review Staff as to

[4] Available at https://www.sec.gov/sec-2018-annual-report-whistleblower-program.pdf.

> whether the applicant meets the criteria for receiving an award, and if so, the percentage of the award.

2017 OWB Report at 14. In short, OWB staff considers the claimant's submission and talks to the SEC personnel involved in the enforcement action to make a Preliminary Determination. No outside investigation or scientific inquiry is required.

After a Preliminary Determination, a whistleblower has only 60 days to contest it with a written response. 17 C.F.R. § 240.21F-10(e)(2). If the whistleblower does not respond, the Preliminary Determination becomes the SEC's Final Order on the matter. 17 C.F.R. § 240.21F-10(f). If the whistleblower responds, the Claims Review Staff considers the response and issues a Proposed Final Determination, which is then forwarded to and reviewed by the Commissioners and, once approved, becomes a Final Order. 17 C.F.R. § 240.21F-10(g)-(i).

II. Petitioner's Submission of a Whistleblower Tip and Claim for an Award.

Petitioner submitted a tip to the SEC using its prescribed TCR system on May 9, 2011, almost eight years ago. App.14 (Addendum to Form WB-APP of the Claimant ("Claim") at 4), 69-114 (5/9/11 Tip).[5] In his 42-page submission, he

[5] Petitioner has included his submissions to the SEC, including his initial tip, four supplements, and his claim for an award (which included as attachments his written communications with SEC investigators and other staff) in an appendix. By regulation, these "items constitute the materials that the Commission and the

explained in detail how Teva violated the FCPA through pervasive bribery in Argentina to encourage prescriptions of its drug Copaxone to treat multiple sclerosis. *Id.* The tip also noted significant concerns about Teva's Anti-Corruption Policy that made it likely that Teva engaged in similar unlawful conduct globally. *Id.* at 14-15 (Claim at 4-5), 74 (5/9/11 Tip at 5 n.6). Petitioner also reported Teva's FCPA violations to its board, senior management, and outside auditors in an anonymous email on June 28, 2012. *Id.* at 24-25 (Claim at 5), 176-82 (Exhibit D).

Petitioner's communications with the SEC regarding his tip were extensive and included responding to numerous follow-up inquiries by SEC and DOJ personnel. In addition to his original 42-page submission, he submitted four official supplements to provide additional information that the government requested, the first two of which were 28 and 8 pages respectively. *Id.* at 119-54 (First Supplement), 157-69 (Second Supplement), 173-84 (Third Supplement), 192-519 (Fourth Supplement). In the claim for an award he filed on April 27, 2017, Petitioner describes in detail at least 31 communications that Petitioner

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Claims Review Staff may rely upon to make an award determination" and therefore are part of the administrative record. *See* 17 C.F.R. § 240.21F-12(a). The SEC specifies in 17 C.F.R. § 240.21F-13(b) that "[t]he record on appeal shall consist of," among other items, "those set forth in § 240.21F-12(a) of this chapter that either the claimant or the Commission identifies for inclusion in the record."

(through counsel) had with SEC and DOJ personnel, including multiple lengthy teleconferences. *Id.* at 14-51 (Claim at 4-41).[6]

Less than a month after Petitioner submitted his initial tip, Acting SEC FCPA Unit Chief Charles Cain and SEC Senior Counsel Michael Catoe scheduled a 30-minute call with Petitioner's counsel for June 16, 2011. *Id.* at 11 (Claim at 1). During that call, they asked a series of detailed follow-up questions. *Id.* Less than a month later, on July 14, 2011, Petitioner's counsel emailed Messrs. Cain and Catoe a written supplemental submission that answered their questions. *Id.* at 12 (Claim at 2), 156-69 (Exhibit C). Senior Counsel Catoe confirmed receipt, and copying Acting Chief Cain responded: "[w]e will review and let you know if we have any further questions." *Id.* at 21 (Claim at 11), 171 (Exhibit D). FCPA Unit Chief Cain and Senior Counsel Catoe eventually transferred the case to the SEC's Miami office, which makes sense as Petitioner's tip involved Latin America and Miami is where Teva's Latin American operation is based.

The record establishes that the SEC and DOJ acted on Petitioner's tip and used the information Petitioner supplied to successfully resolve their enforcement actions against Teva. For example on July 9, 2012, the SEC issued a subpoena regarding Teva's FCPA compliance in Latin America. *Id.* at 23-24 (Claim at 2),

[6] Petitioner does not discuss in detail the relevance of these communications to the settlements that the SEC and DOJ procured from Teva, because such matters bear more directly upon the Petitioner's right to an award, rather than Petitioner's right to a preliminary determination. Nevertheless, a detailed summary of those communications is provided in Petitioner's Claim. *See id.*

578 (Exhibit L). The DOJ followed up with an informal document request to Teva regarding the same subject in October 10, 2012, after it received some of Petitioner's submissions. *Id.* On October 16, 2012, Petitioner communicated to ensure that the DOJ had received all the submissions he had sent to the SEC, and he forwarded a complete set of those submissions. *Id.* at 31 (Claim at 21), 598 (Exhibit R). Ten days later, on October 26, 2012, the DOJ supplemented its informal document request to Teva. *Id.* at 32 (Claim at 22), 593 (Exhibit P).

The SEC also treated Petitioner's anonymous whistleblower email to Teva's leadership as a significant event in its case. In June 2015, SEC Senior Counsel Jenny Trotman reached out to Petitioner, sought information regarding the allegations in that email, and requested additional assistance with the SEC's investigation into Teva's FCPA violations. *Id.* at 34 (Claim at 24), 638 (Exhibit W).

The SEC's and DOJ's related investigations into Teva's FCPA violations culminated in a December 22, 2016, agreement in which Teva agreed to pay $519 million to settle parallel civil and criminal charges regarding its FCPA violations in marketing Copaxone. *Id.* at 50 (Claim at 40), 674 (Exhibit BB). In a press release, Teva stated that it did not begin investigating the systemic FCPA violations that Petitioner reported until "learning of initial FCPA concerns from both Teva employees and the U.S. government in early 2012,"—*i.e.*, six months after

Petitioner reported Teva's misconduct to the SEC—at which time "Teva began a voluntary and comprehensive investigation into our global operations." *Id.* at 566-67.

Nor could the Petitioner's tip and the SEC's enforcement action credibly be characterized as a mere coincidence. Teva markets approximately 550 generic drugs.[7] Petitioner reported the exact scheme involving the exact drug that was the subject of the SEC's enforcement six months before any related investigation.

The SEC issued Notice of Covered Action 2017-5 regarding its settlement with Teva on January 31, 2017. Notice of Covered Actions (2017), SEC Office of the Whistleblower, available at https://www.sec.gov/whistleblower/nocas?aId=edit-year&year=2017. Petitioner timely filed his claim for a whistleblower award on April 27, 2017, on the required Form WB-APP, and attached a 54-page supplement (and over 650 pages of supporting exhibits) detailing all of the information and assistance he had provided to the SEC. App.1-719. He since has received no response from the SEC regarding his claim other than a boilerplate letter acknowledging receipt.

[7] "As the leading generic pharmaceutical company in the world, Teva is pleased to offer the largest portfolio of FDA-approved generic products on the market. Approximately 550 Teva medicines are currently available, covering all major therapeutic categories." Teva Generics Product Search, available at https://www.tevagenerics.com/products/product-search/.

III. The SEC's Delay in Processing Whistleblower Claims.

The SEC does not disclose its delays in issuing preliminary determinations on whistleblower award claims in its Annual Reports to Congress or anywhere else. However, its recent statements and actions indicate that the agency's delays are substantial, and that it has sought with increasing vigilance to avoid disclosing the magnitude of its delays.

The OWB does not claim to resolve whistleblower claims on a first-in, first-out basis. Rather, it "prioritizes those claims that, based on our initial triaging and communications with investigative staff, appear to be award-eligible." 2018 OWB Report at 1. Petitioner submitted a detailed 54-page award claim on April 27, 2017, that attached and described with particularity his five formal submissions and more than 31 communications with the SEC and DOJ over the six-year duration of their enforcement actions against Teva. App.6-64. He has heard nothing in response from the SEC other than a boilerplate letter acknowledging that the SEC received his claim.

The SEC also has obfuscated its delays by redacting information necessary to match its preliminary determinations with the corresponding Notice of Covered Action ("NOCA"). The SEC justifies these redactions based on a purported duty to protect a whistleblower's identity:

> Dodd-Frank prohibits the Commission and its staff from disclosing any information that reasonably could be

> expected to reveal the identity of a whistleblower .... Consequently, information that may tend to reveal a whistleblower's identity is redacted from Commission orders granting or denying awards before they are issued publicly.

2018 OWB Report at 16. Yet the information about the SEC's own delay that it redacts—in the past inconsistently but now without exception—says nothing about the identity of a whistleblower.

After the *Wall Street Journal* published an article in 2015 regarding the OWB's delay in processing awards based on a comparison of the SEC's NOCAs and Final Orders, the SEC became more vigilant in redacting information that could disclose its delays.[8] Nevertheless, Petitioner was able to determine the delays for a few OWB awards.[9] The SEC has demonstrated that in simple cases with one whistleblower, it can resolve claims in substantially less than one year.

[See table on next page.]

[8] *See* Rachel Louise Ensign & Jean Eaglesham, *SEC Backlog Delays Whistleblower Awards*, Wall St. J., May 4, 2015, available at https://www.wsj.com/articles/sec-backlog-delays-whistleblower-awards-1430693284.

[9] After the SEC consummates a settlement, it publishes its NOCAs at https://www.sec.gov/whistleblower/nocas. The SEC publishes redacted final orders at https://www.sec.gov/whistleblower/final-orders-of-the-commission.

Whistleblower Defendant and Settlement Value	Date SEC Settled	Final Order Granting Award	Days from Settlement to Final Order	Factors Impacting Complexity
Paradigm Capital $2.18M Sanctions	6/16/2014	3/9/2015	266 days	1 WB Claimant Awarded $650K (30%)
Monsanto $80M Sanctions	2/9/2016	8/30/2016	203 days	1 WB Claimant Awarded $22.4M (28%)
Chicago Convention Center $147M Sanctions	4/19/2013	9/30/2013	164 days	1 WB Claimant Awarded $14.7M (10%)
Average Delay			**211 days**	

Based on the record in this case, there is no reason to believe that Petitioner's claim for a whistleblower award is substantially more complex than these cases.

Even if Petitioner's claim was more complex, the SEC's practice illustrates that such complexity would not justify the two-year delay that he has endured. On June 23, 2016, the SEC settled an enforcement action against Merrill Lynch for $415 million. SEC Press Release, *Merrill Lynch to Pay $415 Million for Misusing Customer Cash and Putting Customer Securities at Risk*, available at https://www.sec.gov/news/pressrelease/2016-128.html. The SEC announced a

final decision awarding three whistleblowers $83 million on March 19, 2018, less than two years later. SEC Press Release, *SEC Announces Its Largest-Ever Whistleblower Awards*, available at https://www.sec.gov/news/press-release/2018-44. It was later confirmed by the whistleblowers' counsel that the award related to the Merrill Lynch settlement.

Seven whistleblowers had submitted claims, and five objected to the Claims Review Staff's preliminary determination. Yet the SEC was able to issue a final award in that case in less time than it already has delayed issuing just a preliminary determination on Petitioner's equally meritorious claim.

In its 2018 OWB Report, the SEC made new defensive comments regarding its delays, implicitly acknowledging them for the first time:

> Depending on the complexity of the award claim and the number of claimants who applied, this due diligence process may take a significant amount of time for OWB attorneys to conduct. While a less diligent process could result in quicker determinations for claimants, OWB strives to reach the soundest, not the quickest, result.

2018 OWB Report at 13. This is the closest the SEC has come to acknowledging to Congress that some whistleblowers have to wait years for a preliminary determination. And yet, the SEC still avoids disclosing actual data regarding its delays, much less a justification for why a straightforward determination based on a confined record entirely within the agency's knowledge takes more than two years.

ARGUMENT

The SEC has delayed unreasonably in issuing a preliminary determination regarding Petitioner's claim for a whistleblower award pursuant to 15 U.S.C. § 78u-6(b). Only this Court can compel the agency to remedy that delay. This Court held in *TRAC*, 750 F.2d at 75-77, that it has the power and responsibility to compel agency action that has been unreasonably delayed.

This Court's authority arises under the All Writs Act, 28 U.S.C. § 1651, which provides that "the Supreme Court and all courts established by an Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions." *TRAC*, 750 F.2d at 76. Under the Administrative Procedure Act, a federal agency must "conclude a matter" presented to it "within a reasonable time." 5 U.S.C. § 555(b). A "reviewing court shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). This Court has held that "section 706(1) coupled with section 555(b) does indicate a congressional view that agencies should act within reasonable time frames and that courts designated by statute to review agency actions may play an important role in compelling agency action that has been improperly withheld or unreasonably delayed." *TRAC*, 750 F.2d at 77; *see also In re Am. Rivers and Idaho Rivers United*, 372 F.3d 413, 418-19 (D.C. Cir. 2004).

In one respect, this is "a paradigmatic *TRAC* case," as Petitioner "seeks to compel agency action that the [P]etitioner claims is legally required and that directly affects the party before the court." *Wilderness Soc'y v. Norton*, 434 F.3d 584, 593-94 (D.C. Cir. 2006). This Court in *TRAC* established "the hexagonal contours of a standard"—six factors—that courts should consider when deciding whether to compel agency action that has been unreasonably delayed.

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

TRAC, 750 F.2d at 80 (citations omitted). As these factors support the conclusion that the SEC has delayed unreasonably, this Court should impose a 60-day deadline for the SEC to issue a preliminary determination on Petitioner's claim.

I. The SEC Has Unreasonably Delayed Issuing a Preliminary Determination Regarding Petitioner's Whistleblower Award Claim Given the Straightforward Nature of the Analysis Involved.

The first and most significant *TRAC* factor to determine whether an agency has delayed unreasonably is a "rule of reason" analysis. *TRAC*, 750 F.2d at 80. "There is 'no *per se* rule as to how long is too long to wait for agency action,' but a reasonable time for agency action is typically counted in weeks or months, not years." *In re Am. Rivers*, 372 F.3d at 419; *see also Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) ("[T]his court has stated generally that a reasonable time for an agency decision could encompass months, occasionally a year or two, but not several years."); *MCI Telecom. Corp. v. FCC,* 627 F.2d 322, 340 (D.C. Cir. 1980) (holding that Congress "assume[d] that rates will be finally decided within a reasonable time encompassing months" and its legislative goal "is subverted when the delay continues for several years").

In this case, the SEC's two-year delay in issuing a preliminary determination is unreasonable. This Court measures the reasonableness of an agency's delay based on the extent to which the task at issue is "complex and labor-intensive." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003). The SEC's preliminary determination on Petitioner's whistleblower claim is a far simpler task than the agency actions this Court has considered in its prior *TRAC* jurisprudence.

Most *TRAC* cases challenging multi-year agency delays involve tasks that are complex and labor intensive, and require investigations beyond the agency's walls. For example, *Oil, Chemical & Atomic Workers International Union v. Zeeger*, 768 F.2d 1480, 1487-88 (D.C. Cir. 1985), involved "complex scientific and technical issues" relating to the Mine Safety and Health Administration's determination of permissible exposure limits in "uranium and certain other mines" for "radon daughters," a cancer-causing product of radon gas decay. *Mashpee Wampanoag Tribal Council*, 336 F.3d at 1097, involved the Department of the Interior's "glacial" pace—a five-year delay—in processing the "extremely complex and labor-intensive task" of deciding petitions to recognize a new American Indian tribe, which are "evaluated against a demanding set of regulatory criteria by a three-person team comprising an historian, a cultural anthropologist, and a genealogist." *In re American Rivers*, 372 F.3d at 416-17, involved the Federal Energy Regulatory Commission's delay in examining the impact of a hydropower project on certain species of fish in the area. These cases all involved extensive investigation into facts outside the agency's knowledge and substantial scientific or technical inquiries to answer complex questions.

The SEC's resolution of whistleblower award claims under 15 U.S.C. § 78u-6(b) is far simpler. The SEC merely applies three statutory criteria, as it has expounded upon them in 17 C.F.R. § 240.21F-6, to facts and evidence that it

already possesses. Those criteria merely require the OWB to determine whether, and to what extent, the whistleblower's tip contributed to the initiation or success of an enforcement action. *See* 2018 OWB Report at 13-14. The OWB reviews the whistleblower's claim and correspondence with the SEC and speaks with the relevant SEC enforcement personnel "whenever possible":

> OWB attorneys evaluate each application for a whistleblower award. In addition to analyzing the information provided by the claimant on the Form WB-APP, OWB attorneys look at prior correspondence between the claimant and the Commission and consult intra-agency databases to understand the origin of the case and what tips or other correspondence the claimant may have submitted to the Commission. In addition, whenever possible, OWB attorneys work closely with investigative staff responsible for the relevant action, and/or other Commission staff who may have interacted with the claimant or have other relevant knowledge, to understand the contribution or involvement the claimant may have had in the matter.

2018 OWB Report at 13. No investigation, or scientific or technical inquiry, is required. The application of straightforward legal standards to a confined record is precisely the sort of simple task for which "a reasonable time for agency action is typically counted in weeks or months, not years." *In re American Rivers*, 372 F.3d at 419.

Because the OWB needs only to apply established legal standards to evidence within the agency's possession, its task more closely resembles a court deciding a motion than the complex scientific and technical inquiries at issue in

most of this Court's prior *TRAC* cases. Federal Courts of Appeals have held that a similar or shorter delay in resolving a party's motion "has the potential to offend due process." *In re Blyden*, 626 F. App'x 368, 370 (3d. Cir. 2015) (finding "over 12 months ... delay" in resolving motion for return of petitioner's improperly seized property "has the potential to offend due process," and giving the district court another 45 days to resolve motion); *see also In re Burrell*, 626 F. App'x 33, 35 (3d Cir. 2015) (holding that district court's delay of more than a year in deciding *in forma pauperis* motion "has the potential to offend due process").

Courts of Appeals repeatedly have issued writs of mandamus based on a similar or shorter delay in deciding a motion. *See, e.g., In re Google Inc.*, No. 2015-138, 2015 WL 5294800, at *1 (Fed. Cir. July 16, 2015) (eight-month delay in deciding a motion to transfer venue); *In re Hicks*, 118 F. App'x 778 (4th Cir. 2005) (one-and-a-half-year delay in deciding motion); *Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990) (holding "that the fourteen-month delay in this case for no reason other than docket congestion is impermissible" and explaining "[a]t this point, justice delayed is justice denied"); *Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978) ("Busy court dockets cannot justify a 14-month delay in processing this claim from the date of remand."). These cases establish that it is unreasonable for the government to take two years to apply unambiguous legal standards to a confined record.

II. The Time Limits That Congress and the SEC Have Imposed Regarding Whistleblower Claims Confirm That Congress Intended for the Claims to Be Resolved Expeditiously.

In *TRAC*, this Court held that where "Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed," such indicia are relevant to the rule of reason analysis to determine whether an agency's delay is reasonable. *TRAC*, 750 F.2d at 80. Congress did not impose a deadline on the OWB to make a preliminary determination within a set number of days after receiving a whistleblower claim. However, Congress and the SEC have imposed 30-, 60-, and 90-day claim-defeating deadlines upon whistleblowers that suggest an expectation that the OWB will act with reciprocal alacrity. When the OWB processes claims within a reasonable time, these deadlines are a reasonable part of an orderly process that avoids backlogs and stale claims. When the OWB instead tarries for years, these deadlines become merely a "gotcha" pretext to deny legitimate claims.

The SEC acknowledges its duty to "assess[]" and "make" an "award to any qualifying whistleblowers" in a "timely" fashion. *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34343 (June 13, 2011). Elsewhere in the same publication in which it promulgated final rules implementing the whistleblower program, the SEC defined a "timely fashion" as 120 days. *Id.* at 34322.

The SEC requires whistleblowers to submit a claim within 90 days after the OWB publishes the corresponding NOCA. 17 C.F.R. § 240.21F-10(b). The SEC denies "late-filed award claims," and one court has confirmed the Commission's authority to do so. 2018 OWB Report at 13; *Cenry v. SEC*, 707 F. App'x 29, 31 (2d Cir. 2017). Earlier this year, the SEC denied claims that two whistleblowers filed after the 90-day deadline, stating that the deadline enables it to "make timely awards to meritorious whistleblowers."[10] Having established 90 days as a reasonable amount of time for a whistleblower to marshal all supporting evidence and write a claim submission, the SEC should be able to read that submission and issue a decision within the 120 days it defines as "timely."

Once the OWB makes a Preliminary Determination, the Whistleblower has only 60 days to file a written response challenging the determination. 17 C.F.R. § 240.21F-10(e)(2). The SEC also tells whistleblowers that if they "fail to submit a timely response … then the Preliminary Determination will become the Final Order of the Commission." 17 C.F.R. § 240.21F-10(f). The SEC also takes the position that such a "failure to submit a timely response … will constitute a failure to exhaust administrative remedies, and [the whistleblower] will be prohibited from pursuing an appeal" of that determination in Court. *Id.*

[10] SEC Final Order in Whistleblower Award Proceeding, File No. 2019-3 (Mar. 8, 2019), available at https://www.sec.gov/rules/other/2019/34-85273.pdf.

Finally, Congress imposed a deadline for whistleblowers to challenge an agency Final Order in Court of "not more than 30 days after the determination is issued by the Commission." 15 U.S.C. § 78u-6(f). The SEC's enforcement of these time limits to terminate federal rights only makes sense if the SEC is resolving claims in a reasonable timeframe. When the SEC delays its reciprocal tasks for years, these deadlines serve no purpose other than to deny whistleblowers' otherwise valid claims.

III. The Dodd-Frank Whistleblower Program Is an Economic Regulation, but the Crimes It Stops Impact Human Welfare Severely.

The third *TRAC* factor is whether the delayed agency action involves purely "economic regulation" or "human health and welfare are at stake." 750 F.2d at 80. Nevertheless, "economic harm is clearly an important consideration and will, in some cases, justify court intervention." *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987). On its face, the Whistleblower Program of the Dodd-Frank Act is an economic regulation focused on uncovering and deterring economic crimes. However, those economic crimes have a substantial impact on "human welfare" that warrants consideration as part of the *TRAC* analysis.

Congress enacted the Whistleblower Program in response to the SEC's failure to investigate tips that exposed Bernie Madoff's Ponzi scheme years, and billions of dollars, before it collapsed. *See infra* at 4-6. As the Assistant U.S. Attorney who prosecuted Mr. Madoff stated, the scheme "destroyed a lifetime of

hard work of thousands of victims." Tr. of Sentencing Hr'g at 39, *United States v. Madoff*, No. 09 CR 213 (S.D.N.Y. June 29, 2009).[11] Some victims were wealthy individual investors whom Mr. Madoff rendered virtually destitute. *Madoff's Victims*, 7 Bromberg & Lowenfels on Securities Fraud § 19:3 (2d ed.). Others included a 98-year-old grandmother (who relied on the investment to pay for her round-the-clock care), parents (who lost their children's college funds), pensions, charities, and schools. *Id.* And several investors and one of Mr. Madoff's sons committed suicide reportedly as a result of the scheme. *Id.*

In this case, Petitioner's tip ended a scheme that threatened human health. The object of Teva's FCPA violations—paying bribes to secure prescriptions for its Copaxone drug to treat multiple sclerosis—was to supplant medical judgment with a monetary incentive. As a result of Teva's scheme, patients who would have received a different drug based solely on medical judgment were instead prescribed Copaxone. Even outside the medical context, the Supreme Court of the United States has held that such bribes harm "the public welfare." *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 548 (1961).

[11] Available at https://www.cbsnews.com/htdocs/pdf/madoff_transcript.pdf.

IV. Requiring the SEC to Issue a Preliminary Determination on Petitioner's Whistleblower Claim in a Reasonable Amount of Time Will Not Impede the SEC's Enforcement Activities.

The fourth *TRAC* factor is "the effect of expediting delayed action on agency activities of a higher or competing priority." 750 F.2d at 80. Congress ensured that whistleblower award claims would not compete with, or be subordinated to, the SEC's enforcement activities when it established the OWB as a separate office. 15 U.S.C. § 78u-7(d). And, according to the SEC's 2018 Annual Report, "one of the top priorities of the Office of the Whistleblower (OWB) [is] … processing meritorious award claims." 2018 OWB Report at 1. The SEC says that OWB attorneys review the whistleblower's claim, and the process places very little burden on enforcement personnel. "OWB attorneys assess the application and the eligibility of the claimant and confer with relevant investigative or other Commission staff to understand the contribution of the claimant, if any, to the success of the Covered Action." *Id.* at 6. The only burden on enforcement is that OWB attorneys speak with the relevant SEC enforcement personnel to obtain their views on the whistleblower's contributions. That is a conversation, not justification for a multi-year delay.

V. The SEC's Delay Undermines the Incentives Congress Intended to Create through the Whistleblower Program and the Integrity of Its Decision-Making.

The fifth *TRAC* factor is "the nature and extent of the interests prejudiced by delay." 750 F.2d at 80. The SEC's delay in processing award claims undermines the incentives that Congress established to encourage whistleblowers like Petitioner to come forward. It also jeopardizes the SEC's ability to reach the right result as memories fade, relevant enforcement personnel leave the SEC, and evidence is lost.

When Congress created the whistleblower program as part of its Dodd-Frank Act reforms, it recognized that "whistleblowers often face the difficult choice between telling the truth and ... committing 'career suicide.'" *Digital Realty Tr.*, 138 S. Ct. at 773-74. Indeed, the SEC has said that Congress's "principal purpose" was "to motivate those with insider knowledge to come forward" and "take the enormous risk of blowing the whistle in calling attention to fraud."[12] The SEC's unreasonable delay in resolving Petitioner's whistleblower award claim undermines that motivation.

This Court has recognized that an agency's undue delay can "undermin[e] the statutory scheme" by "frustrating the statutory goal." *See Cutler*, 818 F.2d at

[12] SEC Final Order in Whistleblower Award Proceeding, File No. 2016-1 (Nov. 4, 2015), available at https://www.sec.gov/rules/other/2015/34-76338.pdf (quoting S. Rep. No. 111-176, at 110-11 (2010)).

897-98 (citing cases). This is particularly true when Congress creates a financial incentive for private parties to enforce a law. Unwarranted litigation stays "stymie and offset" the "strong incentive of triple recovery" that Congress enacted to "encourage[] private litigants to vigorously enforce antitrust laws." *Phila. Hous. Auth. v. Am. Radiator & Standard Sanitary Corp.*, 269 F. Supp. 540 (E.D. Penn. 1967). Similarly, "unnecessary delays" in calculating attorneys' fees awards "undermine the incentive Congress intended to exist to encourage attorneys to represent social security claimants." *York v. Sec'y of Health & Human Servs.*, 582 F. Supp. 768, 769 (W.D. Mo. 1984).

The SEC's unreasonable delay is particularly detrimental to Congress's goal because of the risk of reprisal that whistleblowers endure. Senator Chuck Grassley has issued a statement fearing that "people have felt they've put their livelihoods on the line and heard nothing but radio silence in return." Ensign & Eaglesham, *supra* note 8. Petitioner has waited almost eight years since he tipped the SEC to Teva's bribery scheme on May 9, 2011, and two years since he submitted his award claim on April 27, 2017. Yet, as Senator Grassley feared, he has heard nothing from the SEC other than a boilerplate letter confirming that the SEC received his claim.

Whistleblowers' loss of faith in the system is justified by the danger that evidence will be lost and results will be altered due to the passage of so much time.

"Delay can lead to a less accurate outcome as witnesses become unavailable and memories fade." *New York v. Hill*, 528 U.S. 110, 117 (2000). Some delay between when a whistleblower submits a tip and receives an award is unavoidable, as the SEC first must prosecute an enforcement action successfully. In this case, the SEC announced its settlement with Teva on December 22, 2016, five years and eight months after Petitioner tipped the SEC to Teva's FCPA violations. SEC Press Release, *Teva Pharmaceutical Paying $519 Million to Settle FCPA Charges*, available at https://www.sec.gov/news/pressrelease/2016-277.html. Yet the SEC's additional delay—another two years and four months—was avoidable.

There is a very real danger that the OWB will lose the evidence and institutional knowledge it needs to fulfill the SEC's obligation of "assessing any applications and making a timely award to any qualifying whistleblowers." *See* 76 Fed. Reg. at 34343. Lawyers who prosecuted an enforcement action leave the SEC. Details of telephone calls with whistleblowers are forgotten. Emails get deleted. Once gone, a whistleblower cannot recreate the evidence he or she needs to support an award claim, especially when the OWB tarries for years having a simple conversation with the relevant enforcement personnel.

A whistleblower has no effective independent means to ensure that the SEC preserves relevant evidence. Petitioner embedded a FOIA request in footnote 17 on page 54 of his award claim in an attempt to preserve relevant evidence, which

he submitted to the agency over two years ago.[13] App.64 n.17. He has received nothing. This is troubling, as page 26 of the the SEC's Enforcement Manual, available at https://www.sec.gov/divisions/enforce/enforcementmanual.pdf, purports to permit the agency to destroy records relevant to a closed enforcement matter if they are not subject to a pending FOIA request.

The SEC's unreasonable delay also impairs this Court's ability to review the Commission's final determination. "[L]itigation is better conducted when the dispute is fresh and additional facts may, if necessary, be taken without a substantial risk that witnesses will die or memories fade." *Spencer v. Kemna*, 523 U.S. 1, 25 n.7 (1998). The SEC's delay forces this Court to review the Commission's final determinations based on a degraded record, and compromises this Court's ability to enforce a proper claim-review process on remand.

VI. The SEC's Delay in Resolving Petitioner's Claim Is Unjustifiable, Regardless of Any Impropriety.

The final "hexagonal countour[]" under *TRAC,* 750 F.2d at 80, is more observation than inquiry—"the court need not 'find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'" Petitioner does not know why his award claim has languished for so long. What is

[13] Petitioner's inclusion of a FOIA request in his award claim to preserve the agency record is proper. *See Zemansky v. EPA*, 767 F.2d 569, 574 (9th Cir. 1985) (reversing district court order that required FOIA request to be in a "separate document which is clearly defined as an FOIA request" and not "intertwined with non-FOIA matters").

certain, however, is that the SEC's delay is not warranted by the complexity of the task at hand. Petitioner's award for blowing the whistle on Teva's FCPA violations, and for enduring the attendant risk of retribution, is long overdue.

CONCLUSION

For the reasons stated above, this Court should issue a writ of mandamus directing the SEC to issue a preliminary determination regarding Petitioner's whistleblower award claim within 60 days, and a Final Order within six months.

Dated: April 29, 2019

Respectfully submitted,

/s/ William E. Copley

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CERTIFICATE OF COMPLIANCE

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Dated: April 29, 2019 By: /s/ William E. Copley
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CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that the foregoing was hand filed with the Clerk's Office and hand served on the persons listed below on this 29th day of April, 2019:

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