

CFTC Approves Amendments to Whistleblower Rules Including Significant Enhancements of its Anti-Retaliation Protections

May 25, 2017

On May 22, 2017, the U.S. Commodity Futures Trading Commission (“CFTC”) unanimously approved amendments to the rules governing its whistleblower program.¹ Among other changes, the amendments:

- Significantly strengthen whistleblower protections against retaliation,
- Preclude reliance on confidentiality or arbitration clauses that would prevent employees from reporting to the CFTC,
- Clarify that the CFTC itself may bring enforcement actions for violation of the anti-retaliation rules (in addition to private enforcement),
- Revise and clarify the whistleblower eligibility criteria, and
- Amend certain procedural aspects of the whistleblower program.

These revisions, which bring the CFTC’s program into greater alignment with the rules governing the whistleblower program implemented by the Securities and Exchange Commission (“SEC”), should be taken into account in designing corporate compliance and employment policies for companies that may be subject to CFTC oversight, as well as in the context of managing internal investigations and responding to whistleblower complaints that may implicate the federal commodities laws.²

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¹ Press Release, CFTC Strengthens Anti-Retaliation Protections for Whistleblowers and Enhances the Award Claims Review Process, available at <http://www.cftc.gov/PressRoom/PressReleases/pr7559-17>.

² The revised rules will take effect 60 days after publication in the Federal Register and are available at <http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/federalregister052217.pdf>.



The CFTC's Whistleblower Program

Amendments to the Commodities Exchange Act (“CEA”) enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 established the CFTC’s whistleblower program. A qualifying whistleblower under the program is any individual, or two or more individuals acting jointly, who provides information relating to a potential violation of the CEA to the CFTC in the manner established under the CFTC’s whistleblower rules.

Subject to certain eligibility requirements, under the rules of its program, the CFTC pays awards to whistleblowers who voluntarily provide it with original information about violations of the CEA that leads to a successful enforcement action by the CFTC and that results in a monetary sanction exceeding \$1 million (“Covered Action”), or the successful enforcement of a Related Action.³ In fiscal year 2016, the CFTC received 273 whistleblower tips and complaints, issued 11 Final Orders, and paid 3 whistleblower awards, including one award over \$10 million.⁴

Revisions to Anti-Retaliation Provisions

Among the core provisions changed by the CFTC’s recent amendments to the whistleblower program are those concerning the protection of whistleblowers, which are strengthened both in substance and in terms of how they may be enforced. In summary, the key revisions are as follows:

³ A “Related Action” is an administrative or judicial action brought by the U.S. Department of Justice, other federal and state agencies and law enforcement authorities, certain associations and self-regulatory organizations, or foreign futures authorities that are based upon the same original information that the whistleblower voluntarily submitted to the CFTC and that led to a successful resolution of a CFTC action. 17 C.F.R. § 165.11.

⁴ 2016 Annual Report to the Senate Committee on Agriculture, Nutrition and Forestry, available at https://www.whistleblower.gov/files/Reports/wb_fy2016reporttocongress.pdf.

CFTC Enforcement of Anti-Retaliation Provisions

The CEA’s anti-retaliation provisions generally prohibit employers from taking certain adverse employment actions against whistleblowers because they provided information to the CFTC in accordance with law or assisted the CFTC, which may include firing, demoting, suspending, or otherwise discriminating against a whistleblower.⁵

The amendments make clear that enforcement of the anti-retaliation provisions of the CEA may be by the CFTC itself, in addition to private enforcement. Previously, the CFTC’s position was that it lacked statutory authority to bring an enforcement action for retaliation against a whistleblower.⁶ The CFTC may enter cease-and-desists orders and seek civil penalties for violations of the CEA and CFTC regulations.⁷ In private enforcement actions, whistleblowers may seek reinstatement, back pay plus interest, and special damages such as costs and attorney’s fees.⁸

Prohibitions on Inhibiting Disclosure, Including Through Confidentiality Agreements

The amendments also prohibit anyone from taking any action to impede an individual from communicating directly with the CFTC’s staff about a possible violation of the CEA, including by enforcing, or threatening to enforce, a confidentiality agreement or predispute arbitration agreement with respect to such communications. This is an important protection, and one that often comes into conflict with existing corporate policies and procedures (which may generically prohibit disclosure) and with the instructions given in the context of internal investigations. When adopting employee

⁵ 7 U.S.C. § 26(h)(1)(A).

⁶ Importantly, the CFTC may bring enforcement action for violations of the anti-retaliation provisions of the CEA whether or not the whistleblower qualifies for an award.

⁷ 7 U.S.C. §§ 13a, 13b, 13a-1(d)(1)(A).

⁸ *Id.* § 26(h)(1)(C).

confidentiality provisions, whistleblower policies,⁹ and employee handbooks, companies would be well advised to consider whether those policies make sufficiently clear that they do not prohibit disclosure of illegal conduct to law enforcement and regulatory authorities.

The CFTC's amendment aligns its regulations with existing SEC Rule 21F-17, and it is likely that it will be interpreted similarly. In recent years, the SEC has relied on Rule 21F-17 to bring enforcement actions against companies that used restrictive language in confidentiality provisions that had the potential to discourage potential whistleblowers from reporting to the SEC.¹⁰

Expanded Protection of Internal Reporting

The CFTC has also clarified that the anti-retaliation provisions may apply not only to actions taken in response to a whistleblower's disclosure to the CFTC, but also to actions taken by an employer after a whistleblower reports internally but before reporting to the CFTC. While the definition of a "whistleblower" under the CEA continues to require reporting to the CFTC (and generally does not include those who *only* report conduct internally), the CFTC's amendments make clear that the whistleblower or CFTC need not tie allegations of retaliation specifically to the external disclosure. Given that it is typically impossible to

⁹ Indeed, we are aware of companies considering or adopting whistleblower policies that explicitly or implicitly require internal reporting prior to disclosure of illegal conduct to government authorities. We consider that such provisions risk conflicting with the CFTC's amended guidance.

¹⁰ For example, in April 2015, the SEC charged Houston-based global technology and engineering firm KBR, Inc. with violating Rule 21F-17 because it required witnesses in internal investigation interviews to sign a form confidentiality statement that warned that witnesses could face disciplinary action if they discussed any particulars regarding the subject matter of an interview without prior approval from the company's legal department. *See In re KBR, Inc.*, No. 34-74619. The SEC took action even though, as it noted, it was not aware of any instance in which KBR actually enforced the agreement or prevented any witness from disclosing a matter under investigation.

know whether an employee has (or may in the future) make a disclosure to the CFTC, this revised guidance means that employers would be well cautioned to assume that internal whistleblowers may ultimately qualify for protections under the anti-retaliation provisions of the CEA and should treat them accordingly.

Expanded Whistleblower Eligibility Requirements

The CFTC's amended rules broaden the eligibility for awards in several notable ways:

- *Revision of the Original Source Rule.* Under existing rules, a whistleblower was required to both provide "original information" and be the "original source" of the information. The latter of these requirements has now been removed. As a result, while a whistleblower must still provide the CFTC with information from his or her independent knowledge, the fact that the whistleblower was not the CFTC's original source (for example, because the employee reported internally, and the company self-reported) will not preclude an award provided that the information originated with the whistleblower.
- *Disclosure to Foreign Commodities Authorities Permitted.* Under the revised rule, a whistleblower retains eligibility for an award based on information the whistleblower provided to foreign futures authorities before providing to the CFTC.
- *Extension of the Reporting Deadline.* Where a whistleblower first reports a CEA violation internally or to another authority, the CFTC's rules provide that the whistleblower may still qualify if a report is also made directly to the CFTC within a specified time. The rule amendments extend that period from 120 to 180 days.
- *CFTC May Waive Procedural Requirements.* Finally, the revised rule clarifies that the CFTC may waive its procedural requirements upon a showing of "extraordinary circumstances," which are undefined, to provide added flexibility for whistleblowers of varying sophistication.

Procedural Revisions

In addition to the substantive revisions discussed above, the CFTC's amendments also modify certain of the rules concerning how the CFTC will evaluate whistleblower claims. For example, the existing Whistleblower Award Determination Panel (which was independent of the Division of Enforcement) is being replaced by a Claims Review Staff under the supervision of the Director of the Division of Enforcement and assisted by the Whistleblower Office staff, which it is hoped may provide a more direct route for whistleblower claims to translate into enforcement action.

Conclusion

In the current context, it is increasingly critical for companies to have in place clear and appropriate guidance regarding the treatment of whistleblower complaints to avoid running afoul of the anti-retaliation mechanisms. To discuss these or any related issues, please contact the authors of this Alert or any of your regular firm contacts.

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