

CFTC Enhances Whistleblower Protections

On May 22, 2017, the Commodity Futures Trading Commission (CFTC) announced substantive enhancements to its rules governing the filing and administration of whistleblower claims, including significant amendments designed to prevent retaliation against persons filing such claims. The new rules will become effective sixty days after the date of their publication in the Federal Register.

I. Overview

In 2011 the CFTC adopted regulations that established a framework to implement the agency's whistleblower program, which was created in 2010 as part of the Dodd-Frank Wall Street Reform Act.¹ The framework "provides for the payment of awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the [CFTC] with original information about a violation of the [Commodity Exchange Act (CEA)] that leads to the successful enforcement of an action brought by the [CFTC] that results in monetary sanctions exceeding \$1,000,000 . . . or the successful enforcement of a Related Action, as that term is defined in the rules."² In August 2016 the CFTC proposed enhancements to these regulations designed to achieve three goals: (1) "provide for targeted revisions to the [whistleblower] claims review process and to the authority of [CFTC] staff to administer the whistleblower program," (2) "implement [the CFTC's] anti-retaliation authority under Section 23(h)(1) [of the CEA] based on a reinterpretation of that authority," and (3) "permit whistleblowers to receive awards based on both Covered Actions and the successful enforcement of Related Actions, as defined in the [CFTC's] rules."³ The rules enacted this month adopt the 2016 proposals with minor changes made in response to comments received from the public.

II. Revisions to the Whistleblower Rules

Whistleblower Eligibility Requirements

The CFTC's rule enhancements include amendments to Rule 165.5, which governs a person's eligibility to receive a whistleblower award, to clarify that a claimant may receive an award in a Covered Action, a Related Action, or both, as those terms are defined in the CFTC's rules. The amendments also clarify that a claimant may be eligible for an award by providing the CFTC with "original information" even if the claimant is not the original *source* of the information.⁴ Amendments to the definition of "original source" found in Rule 165.2(l) extend the

¹ In 2011, the Securities and Exchange Commission (SEC) adopted its own whistleblower rules. *See* Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, SEC Release No. 34-64545 (May 25, 2011).

² Whistleblower Awards Process, CFTC Release No. 7559-17 at 2 (May 22, 2017).

³ *Id.* at 2-3. "Covered Actions" are defined in CFTC Rule 165.2(e) as "any judicial or administrative action brought by the [CFTC] under the [CEA] whose successful resolution results in monetary sanctions exceeding \$1,000,000." "Related Actions" are defined in CFTC Rule 165.2(m) as "any judicial or administrative action brought by an entity listed in § 165.11(a) that is based upon the original information voluntarily submitted by a whistleblower to the [CFTC] pursuant to § 165.3 that led to the successful resolution of the [CFTC] action."

⁴ "Original information" is defined in CFTC Rule 165.2(k) to include information that (1) is derived from the independent knowledge or independent analysis of the whistleblower; (2) is not already known to the CFTC from another source, unless the whistleblower is the original source of the information; (3) is not exclusively derived from an allegation made in a judicial or administrative hearing, a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information; and (4) is submitted to the CFTC for the first time after July 21, 2010.

time within which a whistleblower is required to file a Tip, Complaint or Referral Form (Form TCR)—the mechanism through which a whistleblower initially submits information about potentially violative conduct to the CFTC—from 120 days to 180 days. Finally, the CFTC added certain “foreign futures authorities,” as defined in CEA Section 1a(26), to the list of authorities and entities enumerated in Rule 165.2(l) to which a claimant may provide information prior to filing a Form TCR without losing his or her “original source” status.

Award Claims Review Process

The CFTC’s rule enhancements include several changes to the award claims review process under CFTC Rule 165.7 intended to “provide the public and claimants with greater transparency in the awards claim review process and enhance the expeditious and fair administration of the program.”⁵ Changes include the discontinuation of the Whistleblower Award Determination Panel and its replacement by a review process administered by a Claims Review Staff designated by the Director of the CFTC’s Division of Enforcement in consultation with the Executive Director, “with the Claims Review Staff being assisted by the Whistleblower Office staff within the Division of Enforcement.”⁶ Revised Rule 165.7(g)(1) authorizes the Claims Review Staff to issue a Preliminary Determination setting forth a preliminary assessment of whether a claim should be granted or denied and, if granted, setting forth the proposed award percentage amount. The amended rules also provide a mechanism for claimants to contest the Claims Review Staff’s Preliminary Determination, while revised Rule 165.7(d) permits a claimant to withdraw an award application at any point in the review process by submitting a written request to the Whistleblower Office.

Awards for Related Actions

There are three key amendments concerning awards for Related Actions.⁷ First, the enhanced whistleblower rules include amendments to Rule 165.11 that permit claimants who are eligible to receive an award in a covered judicial or administrative action to receive an award based on money collected from a final judgment in a Related Action. However, under the revised rule, awards in such Related Actions would be unavailable if a claimant has been granted an award for the same action through the SEC’s whistleblower program. Second, if the SEC previously denied an award to a claimant in a Related Action, he or she would be precluded from relitigating issues before the CFTC that the SEC had resolved against the claimant pursuant to its award determination process. Third, based on a comment received from the public concerning the timing of notifications made to the CFTC and other authorities, the CFTC clarified that “a whistleblower retains eligibility under Rule 165.11, Rule 165.5, and Rule 165.2(l) for an award based on information provided by the whistleblower to another authority prior to the time that the whistleblower provided the information to the [CFTC].”⁸

Whistleblower Identifying Information

The recent rule changes include a new provision governing the dissemination of whistleblower identifying information beyond the CFTC. New Rule 165.15(a)(3) delegates authority to the Director of the Division of Enforcement to act on behalf of the CFTC to disclose whistleblower identifying information as permitted by the CEA and the CFTC’s rules—namely, to certain other agencies and authorities including the

⁵ CFTC Release No. 7559-17 at 14.

⁶ *Id.* at 9. In its release adopting the new rules, the CFTC noted that the changes to the award claims review process “would establish a review process similar to that established under the SEC’s whistleblower rules.” *Id.*

⁷ *See supra* n.3.

⁸ CFTC Release No. 7559-17 at 17.

Department of Justice, other departments or agencies of the federal government (presumably including the SEC), self-regulatory organizations, certain state authorities, and foreign futures authorities. This authority was previously vested in the Director of the Whistleblower Office. According to the CFTC, “this delegation of authority will increase investor protection by facilitating administration of the whistleblower program as well as investigations and actions by those agencies and authorities that are eligible to receive whistleblower identifying information” under the CEA and CFTC rules.⁹

Retaliation Against Whistleblowers

Finally, and most important, the new CFTC rules substantially enhance the agency’s authority to prevent retaliation against whistleblowers. Amended Rule 165.19 prohibits “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.”¹⁰ Similarly, new Rule 165.20(a) provides that employers may not “discharge, demote, suspend, directly or indirectly threaten or harass, or in any other manner discriminate against, a whistleblower” who has provided information to the CFTC or assisted in a CFTC action based on or related to such information. And new Rule 165.20(c) provides that “the anti-retaliation protections [of Rule 165] apply whether or not the whistleblower satisfies the requirements, procedures, and conditions to qualify for an award.”¹¹

To implement these anti-retaliation measures, the CFTC was required to revise a 2011 interpretation of the CEA’s whistleblower provisions, pursuant to which the CFTC determined that it lacked statutory authority to bring an enforcement action against an employer that retaliated against a whistleblower. According to the CFTC’s new, revised interpretation, “[t]he 2011 interpretation failed to fully consider the statutory context of” the relevant CEA provisions, and “d[id] not comport with” the CEA’s prohibition against retaliation, the CFTC’s broad rulemaking authority, and the CFTC’s general authority to prosecute violations of the CEA and the CFTC’s rules or orders.¹² The revised interpretation now allows the CFTC to promulgate rules authorizing CFTC enforcement of the CEA’s anti-retaliation provision. Applying the revised interpretation, new Rule 165.20(b) provides that the CFTC’s whistleblower provisions, including its anti-retaliation rules, “shall be enforceable in an action or proceeding brought by the [CFTC] including where retaliation is in response to a whistleblower providing information to the [CFTC] after reporting the information through internal whistleblower, legal or compliance procedures.”¹³

III. Conclusion

As the CFTC explained in the release accompanying the adoption of the revised whistleblower rules, the revisions were intended to align the CFTC’s whistleblower practice with the SEC’s practice, provide clarity about the claims and award process, and enhance protection of market participants and the public. On balance, the revisions relax the requirements for initiating whistleblower claims and provide greater protections for the individuals who initiate them. Consequently, the new rules may result in an increase in the number of whistleblower claims filed, and now will empower the CFTC to bring anti-retaliation actions, which to date have not been brought.

⁹ *Id.* at 22.

¹⁰ *Id.* at 24.

¹¹ *Id.* at 59.

¹² *Id.* at 26.

¹³ *Id.* at 59.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Kimberly Petillo-Décossard at 212.701.3265 or kpetillo-decossard@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or David Slovic at 212.701.3978 or dslovick@cahill.com.

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