

June 5, 2017

CFTC Issues Final Rules to Expand Its Whistleblower Authority

The CFTC Unanimously Votes to Adopt New Rules Granting the CFTC the Power to Bring Enforcement Actions and Prohibiting the Enforcement of Confidentiality Clauses in Employment Agreements

SUMMARY

On May 22, 2017, the Commodity Futures Trading Commission (the “CFTC”) unanimously adopted final rules to amend and update Part 165 of the CFTC’s rules that govern its whistleblower program (the “Final Rules”). The Final Rules amend the CFTC’s regulations and forms to enhance the process for reviewing whistleblower claims and to make related changes to clarify staff authority to administer the whistleblower program. In addition, the Final Rules implement the CFTC’s reinterpretation of its authority under the Commodity Exchange Act (the “CEA”) with respect to retaliation against whistleblowers and to make certain rule amendments to implement that expanded authority. The Final Rules will become effective sixty days after publication in the Federal Register; there is no extended transition period or compliance date.

The Final Rules will allow the CFTC to bring enforcement actions against entities that retaliate against a whistleblower and will prohibit the enforcement of confidentiality clauses in employment contracts that would frustrate the whistleblower program. These changes will, in many respects, resolve inconsistent interpretations of their respective authorizing statutes by the Securities and Exchange Commission (the “SEC”) and the CFTC and signal a period of more aggressive enforcement by the CFTC with respect to whistleblower actions. In addition, while the Final Rules leave the basic framework of the CFTC’s whistleblower rules substantially unchanged, they strengthen anti-retaliation protections for whistleblowers and add transparency to the CFTC’s process of deciding whistleblower award claims.

BACKGROUND

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) provided the CFTC with statutory authority to establish a whistleblower program and Section 922 of Dodd-Frank gave the SEC similar statutory authority. In 2011, the CFTC adopted its part 165 to establish a whistleblower program pursuant to this authority.¹ The whistleblower program provides for the payment of awards to whistleblowers who provide original information leading to monetary sanctions greater than \$1 million in a successful enforcement action under the CEA. Under the program, a whistleblower must file a claim after the successful resolution of the enforcement action. If a whistleblower files a successful claim, the whistleblower can receive an award from the CFTC equal to between 10 and 30 percent of the amount of the monetary sanctions, depending on the CFTC’s determination of the significance of the information and the degree of assistance.

In 2011, the SEC issued rules pursuant to its Dodd-Frank statutory authority to establish a whistleblower program. Although similar to the CFTC whistleblower program, the SEC rules gave the SEC authority to bring enforcement actions against any entity that retaliates against a whistleblower or “take[s] any action to impede an individual from communicating directly with the [SEC] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.”²

However, the CFTC did not interpret its statutory authority as broadly as the SEC when adopting its regulations in 2011. At the time, the CFTC declined to recognize that it had the power to bring actions for retaliation against whistleblowers, stating that the CEA “clearly states only an individual who alleges retaliation in violation of being a whistleblower may bring such a cause of action.”³

Since the whistleblower program was established in 2011, the need for certain improvements has become apparent to the CFTC. In order to address the underlying issues, the CFTC proposed amendments to its rules in part 165 on August 30, 2016 (“Proposed Amendments”).⁴ The Final Rules largely follow the Proposed Amendments to the existing whistleblower program issued by the CFTC on August 30, 2016, subject to certain limited changes highlighted below.

OVERVIEW OF THE FINAL RULE

A. DIRECT ENFORCEMENT ACTIONS BY THE CFTC AGAINST ENTITIES THAT RETALIATE AGAINST WHISTLEBLOWERS

Based on its reinterpretation of the CFTC’s anti-retaliation authority under the CEA, the Final Rules provide that the CFTC now may bring direct enforcement actions against employers that retaliate against whistleblowers. Additionally, in response to the comments received, the Final Rules make clear that actions taken by an employer after a whistleblower reports internally through internal whistleblower, legal or compliance procedures, but before providing information to the CFTC, may be relevant to whether

unlawful retaliation occurred.⁵ A whistleblower's right to pursue a private cause of action against an employer who retaliates against them remains unchanged.

In adopting the Final Rules, the CFTC is revising its 2011 interpretation that under its Dodd-Frank statutory authority, it lacked the authority to bring an enforcement case against an employer that violates the anti-retaliation prohibitions in the CEA. In its 2011 rulemaking, the CFTC interpreted the CEA's private right of action for whistleblowers who have been retaliated against as precluding any similar right by the CFTC itself to bring actions against entities that retaliate against whistleblowers. However, in the Final Rules, the CFTC states that the 2011 interpretation failed to fully consider the statutory context of Section 23 and other CEA provisions, arguing that the CEA both explicitly establishes a prohibition against retaliation⁶ and provides broad rulemaking authority⁷ sufficient to provide it with the same right of action that the SEC enjoys under its interpretation of its relevant statutory authority. Therefore, in light of the SEC's interpretation of similar statutory language and its experiences in the intervening years, the CFTC has reinterpreted its authority as giving it the same right as the SEC to bring enforcement actions against entities that retaliate against whistleblowers. In doing so, the release accompanying the Final Rules notes the Final Rules will "harmonize the CFTC's rules with those of the [SEC's] whistleblower program."⁸

B. PROHIBITION ON EMPLOYERS FROM TAKING STEPS TO IMPEDE COMMUNICATION WITH THE CFTC

In addition to the right of action described above, the Final Rules amend Rule 165.19 to prohibit a person 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. The release accompanying the Proposed Amendment noted that such rules are necessary to implement the provisions in the CEA banning retaliation against whistleblowers.

Under its whistleblower authority, the SEC has recently brought enforcement actions against publicly traded companies for violations of SEC regulations prohibiting retaliation against whistleblowers. In one recent SEC action, the respondent company's severance agreements contained a provision whereby departing employees waived a right to file a claim to receive an award under the SEC's whistleblower program. Although nothing in the agreement precluded the employee from providing the SEC with information, the SEC brought and settled an enforcement action on the basis that the severance agreement "removed the financial incentive for its former employees who executed that agreement to communicate with [SEC] staff concerning possible securities law violations" at the company.⁹ In another action, the respondent settled the SEC's claim related to severance agreements that prevented former employees from sharing confidential information unless "compelled to do so by law or legal process."¹⁰

Based on the amendments in the Final Rules, it is expected that the CFTC will bring enforcement actions for similar violations of the CFTC rules prohibiting retaliation against whistleblowers.

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C. ADDITIONAL CHANGES

In addition to the changes described above, the Final Rules include several other changes, including:

Changes Regarding Retaliation

- Prohibition against employers threatening, harassing or retaliating against individuals who participate in the CFTC's whistleblower program, irrespective of whether those individuals qualify for an award.

Changes Regarding Eligibility Requirements

- Removal of the requirement that the whistleblower be the original source of information received by the CFTC.
- Revision of the definition of "original source" to allow whistleblowers to claim an award based on information provided to certain persons or authorities other than the CFTC (including foreign futures authorities), provided that the CFTC receives the information within 180 days, compared to the previous threshold of 120 days, and the whistleblower files a Form TCR.
- Clarification that the CFTC may, in its sole discretion, waive any procedural requirements based upon a showing of extraordinary circumstances.

Changes Regarding Awards for Related Actions

- Expansion of eligibility requirements for whistleblower awards to allow a claimant to receive an award based on an action brought by certain other agencies and authorities (including foreign futures authorities) that is merely related to the CFTC action for which it provided information.
- However, the CFTC will not make an award to a whistleblower for a related action if the whistleblower has been granted an award by the SEC for the same action under the SEC's whistleblower program.

Changes Regarding Award Claims Review

- Creation of a Claims Review Staff, in place of the Whistleblower Award Determination Panel, to handle the claims review process whereby a claimant can contest the denial of an award or the size of the award under a successful claim.
- Revision of Form TCR (used by a whistleblower to provide information to the CFTC) and Form WB-APP (used by a whistleblower to initiate a claim for a whistleblower award).

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ENDNOTES

- ¹ Whistleblower Incentives and Protection, 76 Fed. Reg. 53,172 (August 25, 2011).
- ² SEC Rule 21F-17(a).
- ³ Whistleblower Incentives and Protection, 76 Fed. Reg. 53,172, 53,182.
- ⁴ Whistleblower Awards Process, 81 Fed. Reg. 59,551 (August 30, 2016).
- ⁵ Whistleblower Awards Process (not yet published in the Federal Register) (May 22, 2017) (to be codified at 17 C.F.R. pt. 165.20(b) ("Section 23(h)(1)(A) of the Commodity Exchange Act (7 U.S.C. 26(h)(1)), including the rules in this part promulgated thereunder, shall be enforceable in an action or proceeding brought by the Commission including where retaliation is in response to a whistleblower providing information to the Commission after reporting the information through internal whistleblower, legal or compliance procedures.").
- ⁶ 7 U.S.C. § 26(h)(1)(A) ("No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower (i) in providing information to the [CFTC] in accordance with subsection (b); or (ii) in assisting in any investigation or judicial or administrative action of the [CFTC] based upon or related to such information.").
- ⁷ 7 U.S.C. § 26(i) ("The [CFTC] shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.").
- ⁸ Whistleblower Awards Process, 81 Fed. Reg. 59,955 (August 30, 2016).
- ⁹ Health Net, Inc., Securities Exchange Act Release No. 78,590 (August 16, 2016), <https://www.sec.gov/litigation/admin/2016/34-78590.pdf>.
- ¹⁰ Blue Linx Holdings Inc., Securities Exchange Act Release No. 78,528 (August 10, 2016), <https://www.sec.gov/litigation/admin/2016/34-78528.pdf>.

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