

Inside The CFTC's Enhanced Whistleblower Protections

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Law360, New York (June 9, 2017, 12:26 PM EDT) -- The Commodity Futures Trading Commission recently adopted amendments that strengthen anti-retaliation protections for whistleblowers by expanding the CFTC's enforcement authority to include the ability to take enforcement action against employers who retaliate against whistleblowers. These amendments reflect proposed changes to the CFTC's regulations that the agency issued in August 2016, which we discussed in detail at that time in an article appearing in Law360.



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The CFTC also adopted proposed amendments to the whistleblower awards process, creating a more transparent and defined mechanism for whistleblowers to pursue award claims. These amendments more closely align the CFTC's whistleblower awards process and anti-retaliation protections with that of the U.S. Securities and Exchange Commission's program.



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The CFTC's revised whistleblower protection and newly created anti-retaliation authority applies to persons and employers that are engaged in transactions subject to CFTC regulation under the Commodity Exchange Act (CEA). The CFTC's decision to create an administrative enforcement mechanism to investigate and penalize potential instances of retaliation is a significant new area of exposure for entities transacting in derivative markets subject to regulation by the CFTC under the CEA.



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Background

Following enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFTC established its whistleblower program in 2011. At that time, the CFTC interpreted the CEA to permit an individual to bring a civil action against his or her employer if the employer retaliated against that individual following his or her decision to allege that the employer engaged in a CEA violation. As a result, the CFTC concluded that it lacked the authority to take enforcement action against an employer for retaliating against a whistleblower.



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The CFTC revisited this issue after receiving questions about the apparent inconsistency between its interpretation of its enforcement authority and the SEC's interpretation of its authority to bring enforcement actions against those who violate the anti-retaliation provisions of the SEC's whistleblower

protection rules. Following this review, the CFTC issued a notice of proposed rulemaking last August proposing to reinterpret its statutory authority to harmonize its whistleblower program with that of the SEC.

CFTC's Amendments to Implement Reinterpretation of Anti-Retaliation Authority

In the final rule, the CFTC adopted its proposed amendments and reinterpretation of its anti-retaliation authority, explaining that nothing in the CEA precludes or limits the CFTC from exercising its general enforcement authority in cases of retaliation or suggests that the private cause of action is exclusive. In so doing, the CFTC added new provisions to 17 CFR Part 165, specifically addressing whistleblower anti-retaliation protections. Among other things, these provisions (1) specifically provide when the CFTC may initiate a retaliation action, (2) identify actions that employers may not take against whistleblowers, and (3) provide that the anti-retaliation protections apply regardless of whether the whistleblower qualifies for an award.

Implementation of CFTC Enforcement Authority

Section 165.20(b) specifically provides that the CFTC may enforce the anti-retaliation rules by initiating an action or proceeding under the CEA. This confirms the CFTC's decision to reinterpret its statutory authority to include the ability to initiate an enforcement action against an employer who violates the CEA's anti-retaliation provision. The CFTC may initiate such actions when a whistleblower is retaliated against for providing information to the CFTC after reporting the information through internal whistleblower, legal or compliance procedures.

Prohibited Actions by Employers

Newly added Section 165.20(a) explains that employers may not discharge, demote, suspend, directly or indirectly threaten or harass, or in any other manner discriminate against a whistleblower in the terms and conditions of employment because the whistleblower provided information to the CFTC or assisted in any CFTC investigation, judicial or administrative action based on or related to that information. These actions are broadly defined. And according to the CFTC, even actions that an employer took after a whistleblower reported concerns internally but before the whistleblower provided information to the CFTC may be relevant in determining whether retaliation occurred.

Application of Anti-Retaliation Protections

The CFTC also clarified that anti-retaliation protections apply to whistleblowers regardless of whether the whistleblower satisfies the requirements, procedures and conditions to qualify for a whistleblower award. The CFTC noted, however, that the anti-retaliation protections do not extend to all whistleblowers that report an alleged violation internally. Whistleblowers must be able to establish that they were retaliated against as a result of them lawfully providing information to the CFTC or assisting in a CFTC investigation, judicial or administrative action.

Prohibited Employment Confidentiality Agreements

The regulations also prohibit any person from taking action to impede an individual from communicating directly with the CFTC's staff about a possible CEA violation. It is important to note that this prohibition applies to any person and not simply to the employer. This includes enforcing or threatening to enforce a confidentiality agreement or pre-dispute arbitration agreement in a pre-employment agreement, an employment agreement, or post-employment agreement with respect to such communications.

Questions Raised by Final Rule

The CFTC's final rule raises several questions for employers engaged in CFTC-regulated derivative markets. Notably, the amendments expand the commission's enforcement authority into a new area in which its staff may have limited to no experience. The CFTC has not indicated whether it will be adding new staff or training existing staff to administer this aspect of the CFTC's whistleblower program. It also remains unclear what process the CFTC will follow to decide whether to pursue an enforcement action and the types of information on which it will rely. In addition, the manner in which the CFTC will exercise its enforcement authority is unclear. Notably, the final rule does not explain how the CFTC will assess penalties against employers found to have violated the anti-retaliation provision and what, if any, remedial measures employers will be required to take.

Practical Tips for Employers

In light of the CFTC's final rule, employers should review their compliance programs and related policies to confirm that they are robust and consistent with best practices, including:

- Encouraging employees to bring any compliance concerns to management's attention
- Establishing an independent office or program to evaluate the concerns, including retaliation concerns
- Addressing concerns in a timely manner commensurate with their significance
- Giving employees timely feedback regarding how their concerns are being addressed, as appropriate

Employers also should ensure that all levels of supervision are aware of and receive training on the CFTC's new whistleblower anti-retaliation protections and how to detect and prevent retaliation, as well as management actions that may be perceived to be retaliatory and that could have a negative impact on the willingness of individuals to raise concerns. Additionally, employers should review their employment agreements and policies to determine whether they include confidentiality or pre-dispute arbitration clauses that may impede a employees from freely communicating with the CFTC and other enforcement authorities. If so, they should be revised, as appropriate, to comply with the CFTC's amendments.

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