

Rise In Whistleblower Claims Likely With New CFTC Rules

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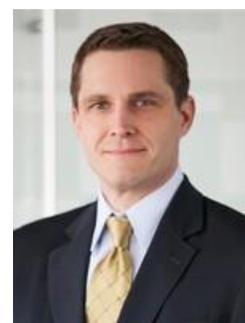
Following the enactment of the Dodd-Frank Act in 2010, Congress amended the Commodity Exchange Act to provide the U.S. Commodity Futures Trading Commission with expanded enforcement authority to encourage individuals to report potential commodity trading and securities violations. This new authority, including the ability of the CFTC to issue financial rewards to “whistleblowers,” was considered by some market observers to transform the legal landscape — by giving employees strong financial incentives to report perceived violations to regulators and protecting them from retaliation for doing so.

Six years after the Dodd-Frank Act became law, the number of financial awards issued by the CFTC to whistleblowers have been limited. To date, the CFTC has issued fewer than five award claims even though over 40 claims have been made by purported “whistleblowers” and hundreds of tips have been provided. The CFTC apparently is not satisfied with these numbers and has stated that the need for “improvements have become apparent.” Accordingly, the CFTC proposed new rules on Aug. 30 that, if adopted, would alter the existing whistleblower provisions implemented under the CEA’s provisions amended by the Dodd-Frank Act in two very substantial and significant ways.

First, the new rules would amend the CFTC’s existing whistleblower awards process and create a more transparent and defined mechanism for whistleblowers to pursue award claims. Second, the new rules would expand the CFTC’s authority into an unprecedented area for the agency insofar as policing energy and other market participants is concerned. Specifically, the proposed amendments reinterpret the CFTC’s enforcement authority to include the ability to take enforcement action against employers that retaliate against whistleblowers. This change marks a complete reversal of the CFTC’s prior position on its enforcement authority.

Background

Section 748 of the Dodd-Frank Act amended the CEA to provide incentives and protections to whistleblowers who provide certain information to the CFTC or assist in any investigation or judicial or administrative action of the CFTC related to such information. The CFTC implemented this provision and established its whistleblower program in 2011. Under this program, the CFTC can issue an award to a whistleblower who voluntarily provides the CFTC with



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original information about a violation of the CEA that leads to the successful enforcement of a CFTC action with monetary sanctions of at least \$1 million (covered action) or the successful enforcement of a related action. A whistleblower award can range between 10 percent and 30 percent of the monetary sanctions collected in a covered action or related action. The significance of the information provided and the degree of the whistleblower's assistance are two considerations that go into the determination of the amount of the award.

Section 748 also amended the CEA to prohibit employers from retaliating against whistleblowers because of any lawful act undertaken by the whistleblower, including providing information to the CFTC concerning CEA violations or otherwise assisting the CFTC in an investigation. As a result of the amendment, whistleblowers who suffer retaliation can bring an action in federal district court within two years seeking reinstatement, back pay with interest, and compensation for any special damages sustained as a result of the retaliatory conduct. Nevertheless, despite the clear statutory prohibition against retaliation, in implementing the Dodd-Frank Act's amendments to the CEA, the CFTC at that time concluded that it did not possess the authority to bring a separate enforcement action against an employer that retaliated against a whistleblower in violation of the CEA.

Proposed Amendments to Whistleblower Awards Process

In deciding how to revise the whistleblower awards process, the CFTC drew from its experience and the experience of the SEC in administering their respective whistleblower programs. The proposed changes are intended to enhance the transparency of the whistleblower program and make it easier for whistleblowers to participate in the awards process. For example, one proposed change extends the time a potential claimant has to file the necessary form to seek an award from 120 days to 180 days.

Many of the proposed amendments are modeled after the SEC's whistleblower program, which was also implemented due to newly established authority created in the Dodd-Frank Act. In this regard, similar to the SEC's program, the amendments call for award applications to be reviewed and handled by a claims review staff designated by the director of the Division of Enforcement, which replaces the Whistleblower Award Determination Panel. The whistleblower office staff will assist the claims review staff and will have primary responsibility over handling facially ineligible claims. The whistleblower office will notify the claimant of the deficiencies in the application, who will then have an opportunity to correct or withdraw the claim. The whistleblower office can also request additional assistance, explanation or information from the claimant, which may include information demonstrating that the claimant voluntarily provided the agency or organization the same original information that led to the commission's successful enforcement action and the successful enforcement of the related action.

If the whistleblower office recommends denial of the application, it will issue a proposed final disposition, which the claims review staff will have an opportunity to review. If the claims review staff declines to request review, the proposed final disposition becomes the final order of the commission. On the other hand, if the claims review staff requests review, it can remand to the whistleblower office for further action or issue a final order that consists of the proposed denial.

For claims that are handled by the claims review staff, the staff will issue a preliminary determination that provides a preliminary assessment on whether the claim should be granted or denied, and if granted, a proposed award percentage amount. The claimant will receive a copy of this preliminary determination and, upon request, can review the materials that formed the basis of the preliminary determination. The claimant can contest the determination by submitting a written response that sets forth the objections to the determination and that may include additional evidentiary support.

In addition, the claimant may request a meeting with the whistleblower office, which the office may decline at its discretion. If the claimant submits a response, the claims review staff will issue a proposed final determination after reviewing the response and any supporting documentation the claimant provides. Any commissioner can request review of the proposed final determination, and the commission will review the record before issuing a final order. If no commissioner requests review, the proposed final determination becomes a final order. The office of the general counsel will review the proposed determinations for legal sufficiency before the determinations are issued.

Notably, the proposed amendments would allow a claimant who is eligible to receive an award in a covered judicial or administrative action to also receive an additional award based on the monetary sanctions collected in a related action. Nevertheless, they preclude a claimant from “double dipping” by receiving an award for a “related action” if the claimant already received an award from the SEC for the “same action.” The CFTC considers a “related action” to be a judicial or administrative proceeding brought by certain entities (e.g., U.S. Department of Justice, a registered entity, or futures organization) that is based on the same information the whistleblower voluntarily provided and that led to the original successful enforcement. The regulations and proposed amendments do not, however, define or otherwise specify what constitutes a “same action.”

Whistleblower Protection and Anti-Retaliation Enforcement Authority

Until now, the CFTC has not considered its enforcement authority as covering retaliation against whistleblowers in violation of the CEA. The CFTC proposes to set aside this interpretation. As noted by the CFTC, this change will make the CFTC’s whistleblower protection program more consistent with that of the U.S. Securities and Exchange Commission. In reinterpreting its statutory authority, the CFTC explained that, while the CEA allows whistleblowers to bring retaliation claims before federal district courts, nothing in that section precludes the commission from bringing related enforcement actions where retaliation is found to occur. The proposed amendments include a provision that specifically allows the commission to “bring an enforcement action against an employer that retaliates against a whistleblower by discharge, demotion, suspension, direct or indirect threats or harassment, or any other manner of discrimination.”

Nonetheless, the CFTC stops short of explaining how it will exercise its authority where retaliation occurs, including whether it will rely on the findings made by district courts in instances where a whistleblower files suit against an employer or whether it will make its own retaliation findings in the course of an enforcement investigation. The CFTC is also silent as to how it will proceed if a whistleblower does not bring a civil action against an employer or how the CFTC will reconcile contrary or inconsistent findings that may be made by a district court in a civil action (in which the Federal Rules of Evidence apply) and the CFTC in an administrative action (in which the Federal Rules of Evidence do not apply).

Given that the CFTC is looking to reconcile an inconsistency between itself and the SEC, however, it is reasonable to expect the CFTC to (like the SEC has done) initiate its own enforcement actions and make its own factual findings (rather than rely on findings made by a district court in a retaliation claim filed by a whistleblower against an employer). In 2014, the SEC took the same course of action in its first retaliation matter under Section 922 of the Dodd-Frank Act. In that matter, the SEC acted to enforce its anti-retaliation enforcement authority against a regulated entity when, in a first-of-its-kind enforcement action, it accused a hedge fund adviser of squashing a top trader after learning the trader had tipped off the agency about alleged trade violations. The hedge fund, Paradigm Capital Management, settled

retaliation allegations brought by the SEC in an administrative proceeding for nearly \$2 million, although no federal court findings existed on which the SEC could choose to rely; rather, the SEC performed its own independent investigation.

Possible Impact of Proposed Amendments

The CFTC's proposed expansion of its whistleblower program and enforcement authority indicates that the CFTC will be devoting more resources and attention to its whistleblower awards process and the protection of whistleblowers. This increased focus could increase the number of awards applications and/or retaliation claims brought by covered employees. As a result, employers could face increased scrutiny from inside and outside the company, as well as greater exposure to enforcement actions. The lack of details on how the CFTC intends to exercise its enforcement authority in the area of whistleblower protection raises a number of questions. Regardless, it will require employers subject to the CEA to ensure that their compliance programs and related policies are up to date and consistent with the CFTC's new regulations, any revised guidance and industry best practices, including with respect to detecting and preventing retaliation.

Examples of such best practices include actively encouraging employees to bring compliance issues to management's attention, addressing those concerns in a timely manner commensurate with their significance, and giving employees timely feedback regarding how their concerns are being addressed. The same principles apply to responding to allegations of retaliation. Ideally, employers have a mechanism in place to evaluate concerns that is independent of the personnel or business unit that is implicated in a potential retaliation matter.

Comments on the CFTC's proposed amendments must be filed by Sept. 29, 2016.

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