

## Outside Counsel

## Expert Analysis

# CFTC Moves to Protect Whistleblowers And to Make Claims and Awards Easier

**O**n May 22, 2017, the U.S. Commodity Futures Trading Commission (Commission or CFTC) announced important changes to its whistleblower program, aiming to encourage more whistleblowers to come forward by enhancing anti-retaliation protections and relaxing eligibility requirements.<sup>1</sup> The rule amendments also largely harmonize the Commission's whistleblower framework with the Security Exchange Commission's (SEC) program.<sup>2</sup>

In 2010, Congress authorized the Commission to establish a whistleblower program in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Implementing that authority, the Commission adopted its initial whistleblower rules in 2011. Under the CFTC's program, an individual who reports to the CFTC possible violations of the Commodity Exchange Act (CEA) is eligible for a monetary award when the individual's original information leads to a successful

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Commission enforcement action in which the agency recovers more than \$1 million.<sup>3</sup> Those awards can range anywhere from 10 to 30 percent of the amount the agency collected.<sup>4</sup> To date, the Commission has issued three whistleblower awards, only

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one of which was for a substantial amount (more than \$10 million).<sup>5</sup> The amended rules seek to incentivize more whistleblowers to come forward by enhancing anti-retaliation protections and expanding the whistleblower eligibility requirements. The rule amendments also largely harmonize the Commission's whistleblower framework with the SEC program.

The most significant change the Commission announced involves a re-interpretation of its enforcement authority with respect to whistleblowers. When it promulgated whistleblower rules in 2011, the Commission concluded that it lacked authority to enforce the whistleblower anti-retaliation prohibition in CEA §23(h)(1)(A), 7 U.S.C. §26(h)(1)(A) (prohibiting an employer from taking any retaliatory action against a whistleblower for "providing information to the Commission" or for "assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information"). At the time, the CFTC determined that the private right of action provided in CEA §23(h)(1)(B) was the exclusive remedy for whistleblowers who experienced retaliation.<sup>6</sup> In the rule amendments announced last week, the Commission changed its position. The CFTC concluded that it does in fact have the authority to combat retaliation, citing its "broad [whistleblower] rulemaking authority" under CEA §23(i) (added by Dodd-Frank) and its longstanding general authority to enforce any violations of the CEA. 82 Fed. Reg. at 24,493 ("The 2011 interpretation failed to fully consider the statutory context of

[s]ection 23 and other CEA provisions.”). The CFTC’s about-face brings it into line with the SEC, which originally interpreted its very similar Dodd-Frank whistleblower authority to encompass enforcement actions for retaliation.<sup>7</sup>

The CFTC gave effect to its new interpretation by establishing Rule 165.20, which provides that the Commission may enforce violations of CEA §23(h)(1)(A) and the rules “promulgated thereunder.” 82 Fed. Reg. at 24,494 (adding subsection 165.20(b)). The Commission further specified that such enforcement actions could now “includ[e] where retaliation is in response to a whistleblower providing information to the Commission after reporting the information through internal whistleblower, legal or compliance procedures.” *Id.* And the Commission’s anti-retaliation authority does not depend on the success of the whistleblower before the agency; the rule provides that the CFTC may combat retaliation “whether or not the whistleblower satisfies the requirements, procedures, and conditions to qualify for an award.” *Id.* (adding subsection 165.20(c)).

Addressing the issue of retaliation against whistleblowers for internal reporting, the Commission indicated that it seeks to encourage internal reporting and to avoid placing such whistleblowers “in a worse position than whistleblowers who do not report internally prior to reporting to the Commission.”<sup>8</sup> The CFTC recognized, however, that the statutory anti-retaliation prohibition—by proscribing retaliation for providing information to the Commission or assisting with a Commission investigation or action—does “not extend to all whistleblowers who report

internally.” *Id.*; see also 7 U.S.C. §23(a)(7) (defining “whistleblower” as “any individual ... who provides information relating to a violation of th[e] [CEA] to the Commission, in a manner established by rule or regulation by the Commission”). The Commission reasoned nonetheless that “[a]ctions that an employer took after a whistleblower reported internally but before providing information to the Commission may be relevant to whether retaliation that is prohibited under Section 23(h)(1) occurred.” Whistleblower Awards Process, 82 Fed. Reg. at 24,494. The Commission’s evident desire to provide some protection for internal reporting is reflected in new Rule 165.20(b), which specifies that the Commission’s authority to enforce possible violations of CEA §23(h)(1)(A) includes “where retaliation is in response to a whistleblower providing information to the Commission after reporting the information through internal whistleblower, legal or compliance procedures.” But whether that language will play a significant role in CFTC anti-retaliation actions is unclear given the statutory requirement that the retaliation be linked to the whistleblower’s interaction with the Commission.

The Commission’s reinterpretation is part of a larger effort to harmonize with the SEC’s whistleblower program, but the SEC—relying on statutory language that is unique to its whistleblower scheme—has construed its authority to protect whistleblowers for certain types of purely internal reporting. In particular, the SEC’s Dodd-Frank anti-retaliation authority—which in other respects is basically identical to the CFTC’s—extends to protect “disclosures that are required or

protected under the Sarbanes-Oxley Act of 2002” and other securities laws. 15 U.S.C. §78u-6(h)(1)(A)(iii). Based on that provision, the SEC has defined a whistleblower to include someone who makes only internal disclosures, 17 C.F.R. §240.21F-2(b)(1)(ii), notwithstanding that the word “whistleblower” in Dodd-Frank is defined by statute to include only those individuals who provide information about potential securities law violations to the SEC. 15 U.S.C. §78u-6(a)(6).

The SEC’s interpretation is now before the Supreme Court on a petition for a writ of certiorari filed by Digital Realty Trust,<sup>9</sup> which seeks review of a 2-1 decision by the U.S. Court of Appeals for the Ninth Circuit holding that the Dodd-Frank whistleblower amendments authorize a private cause of action for retaliation based on internal reporting, consistent with the SEC’s interpretation. *Somers v. Dig. Realty Trust.*, 850 F.3d 1045 (2017). The Ninth Circuit’s opinion followed a 2-1 decision by the U.S. Court of Appeals for the Second Circuit in *Berman v. Neo@Ogilvy*, 801 F.3d 145 (2015). Because another circuit ruled to the contrary, see *Asadi v. G.E. Energy (USA)*, 720 F.3d 620, 630 (5th Cir. 2013) (holding that the plaintiff is not a Dodd-Frank whistleblower because he “did not provide any information to the SEC”), Supreme Court review of the conflict is a distinct possibility. If the Supreme Court ultimately were to grant review and reject the SEC’s interpretation, then the CFTC and SEC Dodd-Frank anti-retaliation authorities would be essentially parallel because neither would protect purely internal reporting.

To both further strengthen anti-retaliation protections and harmonize with the SEC, the CFTC amended Rule 165.19 to

prohibit employers from impeding communications between an employee and CFTC staff about possible violations of the CEA, “including by enforcing, or threatening to enforce, a confidentiality agreement or pre-dispute arbitration agreement with respect to such communications.”<sup>10</sup> The CFTC’s rule language is similar to SEC Rule 21F-17. Over the past couple years, the SEC has brought and settled several actions that have included civil monetary penalties for asserted violations of the SEC rule.<sup>11</sup> The SEC has seized on language in confidentiality and severance agreements that (1) restricts employees from disclosing confidential information without making an exception for communications with the SEC or (2) requires employees to waive or forgo payments, including whistleblower awards. Companies subject to CFTC jurisdiction would be well advised to review the settlement orders in the SEC cases and review their confidentiality, severance, arbitration and other agreements with employees to ensure that they do not contain the same or similar language that could be construed to discourage communication with the CFTC or require waiving awards.

The CFTC whistleblower amendments further encourage whistleblowers to provide the CFTC information by relaxing their eligibility requirements. One rule expands the type of entities to which a whistleblower may report information before reporting that information to the Commission. Amended Rule 165.2 adds foreign futures authorities to the list of qualifying entities to prompt individuals outside the United States to report information to a local authority. In doing so, the Commission cited the “global nature of the futures

and swaps markets and the number of the Commission’s recent enforcement actions that have been undertaken with the cooperation of foreign governments.” Whistleblower Awards Process, 82 Fed. Reg. at 24,489. Amended Rule 165.2(l) expands the timeframe from 120 days to 180 days within which a whistleblower must report the information to the Commission after reporting to another qualified entity. Id. The Commission explained that compliance with this deadline allows the Commission to treat the information as having been received on the date it was initially reported to the qualifying agency (a so-called “look-back” provision) and clarified that failure to meet the deadline would not

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“render a whistleblower ineligible for an award.” Id.

The Commission also amended Rule 165.5(b) to remove the requirement that a whistleblower be the original source of information. Id. The new rule only requires that a whistleblower provide the CFTC with original information. Id. at 24,488. The Commission explained that the change is designed to avoid the situation in which a whistleblower is disqualified from receiving an award after initially reporting the information internally only to have the employer then report the information to the Commission before the employee. Id. at 24,489.

The whistleblower amendments also enlarge a whistleblower’s potential

recovery by authorizing collection of an award in *both* a covered judicial or administrative action brought by the Commission *and* a so-called “Related Action.” Id. at 24,498 (amending Rule 165.5(a)(3)) *and* id. at 24,500 (amending Rule 165.11). A “Related Action” is any judicial or administrative action brought by a specified entity<sup>12</sup> that is based upon the original information that the whistleblower submitted to the Commission and led to the successful resolution of the Commission action. 17 C.F.R. §165.2(m).<sup>13</sup> As this definition makes clear, a whistleblower cannot recover in the “Related Action” unless the CFTC’s action is successful. In order to prevent a whistleblower from “double dipping,” Whistleblower Awards Process, 82 Fed. Reg. at 24,491, however, the Commission amended Rule 165.11 to bar a whistleblower who receives an award for the same action under the SEC’s whistleblower program from receiving an award from the CFTC.<sup>14</sup> Conversely, if the SEC previously *rejected* the whistleblower’s claim for an award in the Related Action, the CFTC will not permit the whistleblower to “relitigat[e] any issues before the Commission that the SEC resolved against the claimant as part of the award denial.” Id. at 24,500 (amending subsection 165.11(b)).

Another way in which the CFTC has further aligned its whistleblower rules with the SEC is by enhancing the authority of the CFTC Director of the Division of Enforcement to administer the whistleblower program. Under the original rule, the Commission had delegated responsibility for the program to the Executive Director and the Whistleblower Office. See 17 C.F.R. §165.15 (2012). The new rules clearly vest the Director of

the Division of Enforcement with that authority together with other specified responsibilities, including designating three to five Commission staff members to review whistleblower award applications (the Claims Review Staff)<sup>15</sup> and disclosing as appropriate whistleblower identifying information to authorized recipients. Whistleblower Awards Process, 82 Fed. Reg. at 24501 (amending Rule 165.15). These changes appear to be designed not only to harmonize with the SEC but also to establish more clear lines of accountability for the program within the Division of Enforcement.

Furthermore, the Commission stated that its amended rules will promote greater transparency and efficiency in the whistleblower claims review process. *Id.* at 24,490. The process it has adopted aligns with the SEC's here too.<sup>16</sup> Amended Rule 165.7 sets forth in great detail the CFTC's whistleblower award review process, including the issuing by the Claims Review Staff of "Preliminary Determinations" and "Proposed Final Determinations" and the amount of time and options a whistleblower has at each stage. Whistleblower Awards Process, 82 Fed. Reg. at 24,499-500 (amending subsections 165.7(d)-(l)). The amended rules also provide more specificity about how to file the required form for award applications, Form WB-APP, including an additional method for doing so and different timing scenarios for filing the form based on the sequence of final judgments in covered judicial or administrative actions and Related Actions.<sup>17</sup> *Id.* at 24,498-499 (amending subsection 165.7(b)).

The CFTC's whistleblower changes could lead to the CFTC receiving a larger number of tips and issuing a larger number

of awards. The most important change to monitor is the CFTC's reinterpretation of its anti-retaliation authority. While the SEC's approach can provide some guidance, market participants will have to wait until the CFTC begins applying its new-found authority to develop a more firm sense for how the agency intends to enforce the statutory anti-retaliation prohibition and the rules implementing it.

The CFTC's decision to harmonize the agency's whistleblower rules with those of the SEC appears to reflect a broader trend. For example, two weeks before the CFTC's whistleblower rule changes, the Commission cited recent changes that the SEC had made to its chief compliance officer rules in proposing to revamp its own rules on chief compliance officer duties. The CFTC's adopting release repeatedly notes that the proposed rule changes will bring the rules in line with the SEC's, a result that the CFTC believes will achieve "greater efficiencies." Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants; Amendments, 82 Fed. Reg. 21,330, 21,334 (proposed May 8, 2017) (to be codified at 17 C.F.R. pt. 3). In another recent rulemaking, the CFTC similarly expressed a desire to harmonize its rules with the SEC's rules where it makes sense to do so. See Recordkeeping, 82 Fed. Reg. 6356, 6358 (proposed Jan. 19, 2017) (to be codified at 17 C.F.R. pts. 1 & 23). Given the CFTC's recent emphasis on harmonization, it is reasonable to expect this trend to continue.

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1. See Whistleblower Awards Process, 82 Fed. Reg. 24,487 (May 22, 2017) (to be codified at 17 C.F.R. pt. 165).

2. *Id.* at 24,495.

3. Whistleblower Incentives and Protection, 76 Fed. Reg. 53,172, 53,172 (Aug. 25, 2011) (codified at 17 C.F.R. pt. 165).

4. *Id.* at 53,188.

5. Order, CFTC Whistleblower Award Determination No. 16-WB-06, Comm. Fut. L. Rep. (CCH) §33,708 (March 28, 2016). The Commission did not issue its first whistleblower award until 2014 and issued one more in 2015. Both awards were below \$300,000. See Press Release, Commodity Futures Trading Comm'n, CFTC to Issue Whistleblower Award of Approximately \$290,000 (Sept. 29, 2015); Press Release, Commodity Futures Trading Comm'n, CFTC Issues First Whistleblower Award (May 20, 2014).

6. Whistleblower Incentives and Protection, 76 Fed. Reg. at 53,182.

7. Securities Whistleblower Incentives and Protection, 76 Fed. Reg. 34,300, 34,303 (July 13, 2011) (codified at 17 C.F.R. pts. 240 & 249).

8. Whistleblower Awards Process, 82 Fed. Reg. at 24,494.

9. Petition for a Writ of Certiorari, Dig. Realty Trust, Inc. v. Somers, No. 16-1276 (S.Ct. April 25, 2017).

10. Whistleblower Awards Process, 82 Fed. Reg. at 24,501 (to be codified at 165.19(b)).

11. See BlackRock, Inc., Securities Exchange Act Release No. 79804 (Jan. 17, 2017); NeuStar, Inc., Securities Exchange Act Release No. 79593 (Dec. 19, 2016); BlueLinx Holdings, Inc., Securities Exchange Act Release No. 78528 (Aug. 10, 2016); KBR, Inc., Securities Exchange Act Release No. 74619 (April 1, 2015).

12. The entities that can bring Related Actions are: the Department of Justice; an appropriate Federal agency or department acting within its jurisdiction; a registered entity, registered futures association, or self-regulatory organization (as defined in section 3(a) of the Securities Exchange Act of 1934); a state criminal or civil agency acting within its jurisdiction; or foreign futures authority. Whistleblower Awards Process, 82 Fed. Reg. at 24,500 (amending subsection 165.11(a)).

13. *Id.* at 24,491.

14. *Id.* at 24,500.

15. The only limitations on the Enforcement Director's designation power are (1) a requirement of consultation with the Executive Director; (2) no staff members who "had direct involvement in the underlying enforcement action" may be selected; and (3) "at least one staff member who does not work in the division of Enforcement" must be selected. Whistleblower Awards Process, 82 Fed. Reg. at 24,501 (amending paragraph 165.15(a)(2)).

16. See 17 C.F.R. §240.21F-10(d)-(h).

17. Whistleblower Awards Process, 82 Fed. Reg. at 24,489.