

LITIGATION, DERIVATIVES & STRUCTURED PRODUCTS | APRIL 5, 2016

CFTC's Publication of Largest Whistleblower Award Follows Increased Focus on Whistleblowing Initiatives

On April 4, 2016, the US Commodity Futures Trading Commission (“CFTC”) announced the issuance of a whistleblower award of more than \$10 million for original information that it said led to a major enforcement action over violations of the Commodity Exchange Act (“CEA”). This was just the third whistleblower award issued under the CFTC’s whistleblower program and it represents a significant increase over the previous two awards (for approximately \$240,000 and \$290,000, respectively). The award is also the first following the disclosure in December 2015 by the CFTC’s Inspector General of his review of the CFTC’s whistleblower office over the limited number of awards issued when compared to a similar whistleblower program by the SEC, likely a sign of things to come.

CFTC's Whistleblower Program Overview

In 2011, the CFTC announced the opening of its Whistleblower Office, created under Section 748 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”) and Section 23 of the CEA. Much like the more heavily publicized and talked-about whistleblower program of the Securities and Exchange Commission, under the CFTC whistleblower program, the CFTC is required to pay awards, subject to certain limitations and conditions, to whistleblowers for original information that led to a successful enforcement action resulting in monetary sanctions greater than \$1 million.¹ We highlight some of the key components of the CFTC whistleblower program here:

- Original information must be based on the whistleblower’s independent knowledge or independent analysis. With certain exceptions, the information cannot be derived from the public sources such as corporate filings or from protected sources such as communications subject to the attorney-client privilege. The whistleblower also cannot have obtained the information through the entity’s mechanism for identifying possible violations of law or as a result of the whistleblower’s compliance or internal audit responsibilities.
- The information must be provided voluntarily to the CFTC, meaning that the information must be provided before any request, inquiry, or demand for information from the CFTC, Congress, certain other agencies, entities, or self-regulatory organizations.
- The whistleblower is not obligated to report potential violations internally in order to qualify for the CFTC whistleblowing awards. However, to incentivize internal reporting, the CFTC allows for the whistleblower to

¹ See CFTC Final Rules, Whistleblower Incentives and Protection, available online at

<http://www.cftc.gov/idc/groups/public/@lfederalregister/documents/file/2011-20423a.pdf>.

receive credit if they choose to report internally and they subsequently report to the CFTC within 120 days; and if the company conducts an investigation and reports the results to the CFTC, the whistleblower can seek credit for the information provided by the company.

- The total amount of a whistleblower award is set between 10 and 30 percent of any monetary sanctions collected in either the CFTC action or a related action where their information played a key role. Per its rules, the CFTC has not disclosed the exact percentage of monetary sanctions in its publication of whistleblower awards.
- The CFTC also will pay monetary awards to eligible whistleblowers whose information leads to successful enforcements of related actions brought by other governmental entities based on information submitted to the CFTC. Notably, unlike the SEC whistleblower program, the CFTC does not bar monetary awards to a whistleblower who has previously received an award from the SEC's whistleblower system, in part due to certain statutory differences in the definition of "related actions."
- Employers may not retaliate against whistleblowers, who are afforded protections under the CFTC whistleblower program, under Section 23 of the CEA. Although the CFTC has determined that it does not have the statutory authority to initiate an enforcement action over retaliation claims, Section 23 of the CEA provides a federal cause of action for such violations and lists potential reliefs including reinstatement, back pay, compensation for related expenses, and reasonable attorney's fees.

Current Impact of the CFTC Whistleblower Program

The CFTC's whistleblower program has to date received far fewer tips and paid significantly fewer awards than the SEC's similar program. The most recent award marks only the third award granted by the CFTC since its program's inception over four years ago. In FY 2015, the CFTC received 232 whistleblower tips and complaints and 75 additional non-whistleblower tips and complaints, and did not pay any whistleblower awards.² In contrast, the SEC received almost 4,000 whistleblower tips in FY 2015 and paid more than \$37 million in whistleblower awards.³

Part of the difference might be attributed to the broader mandate of the SEC. The Head of the CFTC's Whistleblower Office, Chris Ehrman, has previously noted the technical nature of the CFTC's cases and the agency's smaller scope may explain the slow progress of the CFTC whistleblower program.⁴ In addition, differences in the enforceability of its retaliation provisions and the number of relevant statutes decrease the potential footprint of the CFTC whistleblower program. But part of the difference is likely due to lack of publicity and awareness of potential whistleblowers, factors that significant awards like the one announced on April 4 may begin to change. As

² CFTC 2015 Annual Report on the Whistleblower Program and Customer Education initiatives, available online at https://www.whistleblower.gov/files/Reports/wb_fy2015reporttocongress.pdf.

³ SEC 2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program, available online at <https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf>.

⁴ Russell-Kraft, Stephanie, CFTC Whistleblower Head Forecasts Big Things to Come, Law360, May 1, 2015, available online at <http://www.law360.com/articles/649672/cftc-whistleblower-head-forecasts-big-things-to-come>.

the CFTC continues to increase its enforcement focus and bring higher-profile cases in a range of subject areas, potential whistleblowers will likely take note.

Future Trajectory of the CFTC Whistleblower Program

As with its previous announcements of whistleblower awards, the CFTC did not provide information that would directly or indirectly identify the whistleblower and also declined to publicize the percentage of the monetary award when compared to the total sanctions. Still, even without these details, there are some lessons learned from the newest multi-million dollar award.

Going into FY 2016, the CFTC is clearly prioritizing awareness and efficacy of its whistleblower program. We have already seen a reflection of its increased efforts with the announcement of the Inspector General's investigation into the "low number" of whistleblowing awards in December 2015. In February 2016, the CFTC also launched a website for the whistleblower program at "whistleblower.gov" in order to promote the whistleblower program, providing a dedicated space for filing tips and complaints, notices of actions, and orders concerning awards. These actions, coupled with the publicity surrounding the \$10 million whistleblower award and the CFTC's increased enforcement activity generally, will surely encourage more potential whistleblowers to step up and consider the CFTC as a potential destination for their tips. And because the CFTC has far fewer tips to evaluate every year than the SEC, it may be able to more easily prioritize prompt investigations.

Accordingly, while every instance of an actual whistleblower must be dealt with delicately and on a case-by-case basis depending on the nature of any allegations, even in the absence of a specific whistleblower allegation we encourage companies dealing in businesses regulated by the CFTC to take steps to review their compliance programs to ensure that they provide adequate mechanisms for internal reporting and anti-retaliation measures so as to encourage internal reporting and investigation of any potential CEA violations before they reach the CFTC. Tips to the CFTC will surely increase in the coming months and years, and it is best for companies to be as prepared as possible.

CONTACTS

Adam S. Hakki
New York
+1.212.848.4924
ahakki@shearman.com

Joseph J. Frank
New York
+1.212.848.5254
joseph.frank@shearman.com

Donna M. Parisi
New York
+1.212.848.7367
dparisi@shearman.com

John W. Finley III
Washington, DC
+1.212.848.4346
sean.finley@shearman.com

Daniel H.R. Laguardia
New York
+1.212.848.4731
daniel.laguardia@shearman.com

Agnès Dunogué
New York
+1.212.848.5257
agnes.dunoque@shearman.com

Geoffrey B. Goldman
New York
+1.212.848.4867
geoffrey.goldman@shearman.com

Stephen Fishbein
New York
+1.212.848.4424
sfishbein@shearman.com

Matthew L. Craner
New York
+1.212.848.5255
matthew.craner@shearman.com

Mark D. Lanpher
Washington, DC
+1.202.508.8120
mark.lanpher@shearman.com

John A. Nathanson
New York
+1.212.848.8611
john.nathanson@shearman.com

Jeffrey J. Resetarits
New York
+1.212.848.7116
jeffrey.resetarits@shearman.com

Nathan Greene
New York
+1.212.848.4668
ngreene@shearman.com

ABU DHABI | BEIJING | BRUSSELS | DUBAI | FRANKFURT | HONG KONG | LONDON | MENLO PARK | MILAN | NEW YORK
PARIS | ROME | SAN FRANCISCO | SÃO PAULO | SAUDI ARABIA* | SHANGHAI | SINGAPORE | TOKYO | TORONTO | WASHINGTON, DC

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

599 LEXINGTON AVENUE | NEW YORK | NY | 10022-6069

Copyright © 2015 Shearman & Sterling LLP. Shearman & Sterling LLP is a limited liability partnership organized under the laws of the State of Delaware, with an affiliated limited liability partnership organized for the practice of law in the United Kingdom and Italy and an affiliated partnership organized for the practice of law in Hong Kong.

* Dr. Sultan Almasoud & Partners in association with Shearman & Sterling LLP