

CFTC Makes First Whistleblower Award Under Dodd-Frank

On May 20, 2014, the Commodity Futures Trading Commission ("CFTC") Acting Chairman Mark Wetjen announced that the agency would make its first award under the Whistleblower Program created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"). The CFTC disclosed that the anonymous whistleblower will receive approximately \$240,000 for providing "specific, timely and credible information" about violations of the Commodity Exchange Act ("CEA").¹ Information that could reveal the identity of the whistleblower (e.g., the identity of the violator, as well as the nature of the violations and total amount of recovery), remains confidential.

The announcement of the CFTC's first whistleblower award comes nearly three years after the Dodd-Frank Act amended the CEA to establish the Whistleblower Program,² and nearly two years since the Securities and Exchange Commission ("SEC") issued its first award under its own program.³ Nonetheless, the CFTC has set aside more than \$76 million in a special fund for whistleblower rewards,⁴ and insider tips to the program have more than doubled from 58 in fiscal year 2012 to 138 in 2013.⁵ While the SEC's whistleblower program has received more attention to date, Tuesday's announcement signals that the CFTC is gearing up to similarly supplement its enforcement efforts.

¹ According to statements by CFTC Division of Enforcement Acting Director Gretchen Lowe. <http://www.cftc.gov/PressRoom/PressReleases/pr6933-14>.

² <http://www.cftc.gov/ConsumerProtection/WhistleblowerProgram/index.htm>.

³ Under its program, the SEC provides monetary awards to persons who provide original information resulting in the SEC obtaining more than \$1 million in monetary sanctions. Details about the SEC's program are available at: <http://www.sec.gov/news/press/2011/2011-116.htm> and http://www.cliffordchance.com/briefings/2011/05/us_regulatory_updatesecissuesfina.html.

⁴ The full budget and estimates for the fund for fiscal years 2013 and 2014 can be found at <http://www.cftc.gov/reports/presbudget/2014/2014presidentsbudget0302.html>.

⁵ Compare CFTC's ANNUAL REPORT ON THE WHISTLEBLOWER PROGRAM AND CUSTOMER EDUCATION INITIATIVES (2013), available at http://www.cftc.gov/ucm/groups/public/@whistleblownotices/documents/file/wb_fy2013reporttocongress.pdf, with CFTC's ANNUAL REPORT ON THE WHISTLEBLOWER PROGRAM AND CUSTOMER EDUCATION INITIATIVES (2012), available at http://www.cftc.gov/ucm/groups/public/@whistleblownotices/documents/file/wb_fy2012reporttocongress.pdf.

The CFTC Whistleblower Program

The CFTC Whistleblower Program provides awards to eligible tippers who voluntarily provide the agency with original information about violations of the CEA that lead to enforcement actions resulting in more than \$1 million in monetary sanctions. Information provided by the whistleblower must be original – *i.e.*, not already known to the CFTC. The total award received by the whistleblower will be between 10 and 30 percent of the monetary sanctions collected in the CFTC action or a related regulatory action.

Among the factors that determine the award amount, the CFTC considers: a) the significance of the information to the success of the enforcement action, b) participation of the whistleblower in the company's internal compliance process, c) the whistleblower's interference with the company's internal compliance process, d) participation of the whistleblower in the culpable conduct, e) timeliness of the report to the CFTC, f) degree of assistance provided, and g) the award's effect on deterring future violations of the CEA by encouraging whistleblowers to come forward.

The Whistleblower Program takes significant steps to protect the employee from retaliation by his or her company. As evidenced by Tuesday's award announcement, the CFTC will not reveal the identity of the whistleblower or the nature of the information provided, officially treating both as non-public and confidential, including in response to Freedom of Information Act requests. Finally, the Dodd-Frank Act creates federal causes of action for whistleblowers terminated in retaliation and extends the period in which the whistleblowing employee may file a claim with the Department of Labor.

According to the CFTC's annual report to Congress on its Whistleblower Program, reported tips have involved activities such as market manipulation, dissemination of false information into the market, misrepresentations to customers regarding the handling of their accounts, physical trading designed to influence price indexes, Ponzi schemes and other off-exchange investment scams involving futures, and wash trades.⁶ The CFTC has highlighted the proliferation of Ponzi schemes and its initiatives to educate prospective whistleblowers on the red flags surrounding such scams.⁷ Tips are forwarded to the CFTC's enforcement division for evaluation and disposition.

Because some companies may be regulated by both the CFTC and SEC, the agencies' whistleblower rules largely mirror each other. However, a few key differences exist that make obtaining an award from the CFTC easier in certain instances, and more difficult in others:

- The CFTC does not have a "double dip" provision while the SEC does. Consequently, a whistleblower could potentially recover twice if he or she receives the SEC award first.
- The CFTC's rules do not contain the exclusion for employees of public accounting firms, creating the opportunity for outside auditors to qualify for an award by reporting original information. However, both the CFTC and SEC's rules exclude company employees with principal duties of compliance or internal auditing from award eligibility.
- In certain circumstances, the CFTC will impute a request for information upon the company to the employee, thereby limiting that employee's ability to provide voluntary original information to the Whistleblower Program and qualify for an award. Under the SEC's rules, a prospective whistleblower will be made ineligible only if the request for information is directed to that person or their representative.
- One of the factors considered by the CFTC – and not by the SEC – in determining the amount of the award is whether the award might be so large as to create an adverse incentive.

⁶ See *id* (2013 Annual Report).

⁷ See *id*.

- The statute of limitations for a retaliation claim under the CFTC's whistleblower rules is two years from the date of the violation, while the SEC provides potential claimants six years from the date of the violation or three years from when the material facts of the claim were known or should have been known. The CFTC's rules also specify what might be considered retaliatory conduct and list potential relief available to whistleblowers.
- Despite containing identical language as the SEC's Dodd-Frank whistleblower provision, the CFTC has expressly declined to enforce retaliation claims, leaving the whistleblower to pursue his or her own private right of action. The SEC continues to reserve its right to bring anti-retaliation claims in its actions and administrative proceedings.

The SEC and CFTC's programs also share a significant similarity: internal reporting to the employer's compliance function is not a prerequisite to being eligible for a whistleblower reward under either regime.

Conclusion

With Tuesday's announcement, the CFTC has made clear that it seeks to grow its Whistleblower Program as a source for leads to combat financial misconduct. Companies and their counsel must renew efforts to protect themselves by promoting a vigorous culture of compliance backed by strong policies and procedures so that potential whistleblowers will have confidence that claims reported internally will be taken seriously and handled expeditiously.

Contacts

Rob Houck
Partner

T: +1 212 878 3224
E: rob.houck
@cliffordchance.com

Steven Gatti
Partner

T: +1 202 912 5095
E: steven.gatti
@cliffordchance.com

David Yeres
Counsel

T: +1 212 878 8075
E: david.yeres
@cliffordchance.com

Polly Snyder
Counsel

T: +1 202 912 5025
E: polly.snyder
@cliffordchance.com

Daniel Portnov
Associate

T: +1 212 878 3116
E: daniel.portnov
@cliffordchance.com

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Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA
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