

Interview with Vincente Martinez of the CFTC Whistleblower Program: Part I

Tuesday, September 4, 2012 at 3:28AM

Jessica Tillipman in Accomodation Trades, CFTC Whistleblower Office, Commodities Futures Trading Commission, Corners, Dodd-Frank Act, Fictitious Sales, Front Running, Libor, Squeezes, Vincente Martinez, Wash Sales, whistleblower culpability



In 2010, the Dodd-Frank Act created whistleblower bounty programs in both the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC). While readers of this blog are familiar with the SEC's program because of its impact on FCPA enforcement, they may not be as familiar with the CFTC's program.

I recently sat down with Vincente Martinez, Director of the CFTC Whistleblower Office (WBO), who graciously agreed to answer some of my questions about the WBO.

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What is the purpose of the Commodity Futures Trading Commission's (CFTC) Whistleblower Office? For readers of the FCPA Blog who are not familiar with the Commodity Exchange Act (CEA), could you describe the type of violations that are reported to your office?

Thank you for speaking with me. First, please note that any opinions I express are my own and do not necessarily reflect the views of the Commission, the Commissioners or other CFTC staff. I would also like to note that my answers often paraphrase our Whistleblower Rules (Rules), which can be found on the **"Whistleblower Program" webpage** on www.cftc.gov. Prospective whistleblowers and their representatives should read the Rules carefully.

The Whistleblower Office (WBO) administers the CFTC's whistleblower program. The Dodd-Frank Act created whistleblower programs at both the CFTC and the Securities and Exchange Commission (SEC). Our program provides monetary awards to eligible persons who voluntarily provide us with original information about violations of the CEA that lead us to bring enforcement actions that result in more than \$1 million in monetary sanctions. We can also pay

whistleblower awards based on monetary sanctions collected by other authorities in actions that are related to CFTC enforcement actions, and are based on information provided by CFTC whistleblowers.

Examples of misconduct commonly investigated and prosecuted by the CFTC include: manipulations of the price of a commodity, such as squeezes, corners, flooding the market with orders and manipulating settlement prices; disseminating false information into the market; trading ahead of or front-running customer orders; trade practice violations, such as wash sales, accommodation trades and fictitious sales; and off-exchange frauds, such as Ponzi schemes and frauds conducted by commodity professionals such as commodity pool operators.

More specifically, our Enforcement Division has recently brought actions related to the manipulation of LIBOR, the unlawful handling of customer funds, noncompetitive trades and commodity-related Ponzi schemes. Anyone interested in learning more about our enforcement efforts should visit the **Enforcement Division's webpage** and read our **Enforcement Press Releases**.

How many attorneys work in your office? Do you have any plans to expand?

The office is comprised of the Director, a staff attorney and a paralegal. Further staff will be added as needs dictate. We also recruit interns.

Are there any features of your program that differ from the SEC's (other than the type of violations reported)?

The two programs are materially identical with some differences. For instance, while the SEC requires anonymous whistleblowers to file through an attorney, we do not; CFTC whistleblowers can file anonymously on their own. Also, while there are certain persons who cannot receive whistleblower awards under each program – such as persons employed by certain government agencies and self-regulatory organizations – the lists are not identical for the two agencies. Further, while the SEC allows whistleblowers to collect awards based on an aggregate of sanctions collected by the SEC and other authorities in a particular matter, the CFTC limits awards to the amount obtained either by the CFTC or another authority in a related action. There are other differences between the two programs and so prospective whistleblowers and their representatives – particularly those making dual jurisdiction allegations – should read the rules for both programs carefully.

How many complaints have resulted in your contact with the relevant companies to obtain a response? How many have resulted in an agency investigation?

I cannot comment. Both the existence of an investigation and the status of our investigative efforts is non-public and confidential information.

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Tomorrow: Part II of the interview with Vincente Martinez of the CFTC Whistleblower Program.

Jessica Tillipman is a contributing editor of the FCPA Blog. She's the Assistant Dean for Field Placement and Professorial Lecturer in Law at The George Washington University Law School. She also teaches an Anti-Corruption seminar that focuses on corruption control issues in government procurement.

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Interview with Vincente Martinez of the CFTC Whistleblower Program: Part II

Wednesday, September 5, 2012 at 3:18AM

Jessica Tillipman in CFTC Whistleblower Office, Commodities Futures Trading Commission, Vincente Martinez, Whistleblower



This is Part II of a four-part interview with Vincente Martinez, Director of the CFTC Whistleblower Office (WBO). Click here for **Part I**.

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As you are aware, many companies have expressed concerns about the lack of an internal reporting requirement for whistleblowers. What, if anything, do you have to say in response to critics who argue that this undermines their compliance programs?

The CFTC respects the value of internal compliance systems. In the **preamble to our final Whistleblower Rules**, the Commission “recognize[d] that internal compliance and reporting systems ought to contribute to the goal of detecting, deterring and preventing misconduct, including CEA violations,” and that the Commission “does not want to discourage employees from using such systems when they are in place.” Nevertheless, the Commission felt that it was “inappropriate to require whistleblowers to report violations internally to be eligible for an award.” Accordingly, the Commission sought to strike an “appropriate balance” between the interests of maintaining strong internal compliance systems and the interests of the whistleblower program by tailoring our Rules to provide incentives to whistleblowers to report internally, but not requiring them to do so.

Specifically, if a whistleblower first reports internally, we will consider that as a factor that may increase the amount of an award. Conversely, we will consider a whistleblower’s interference with an internal compliance system as a factor that may decrease the amount of an award.

A whistleblower may also be eligible for an award for reporting original information internally if the company later reports information to the CFTC that leads to a successful enforcement action. Under our Rules, all of the information provided by the company to the CFTC will be attributed

to the whistleblower, which means that the whistleblower will get credit – and potentially a greater award – for information provided by the company to the CFTC in addition to the information originally reported by the whistleblower. But it is very important for whistleblowers and their representatives to know that they must file with the CFTC within 120 days of reporting internally.

If whistleblowers must be “first to report” in order to receive an award, won’t this policy discourage them from reporting internally?

No. If a whistleblower first reports internally, that information will be deemed to have been submitted to the CFTC on the date that it was reported internally if the whistleblower also reports it to us within 120 days of that date.

Some companies have concerns that the whistleblower rules encourage potential whistleblowers to disclose privileged, confidential, and even proprietary material that may support the whistleblower’s claim. What precautions is your office taking to help minimize the disclosure of this material?

Our Rules discourage the inappropriate submission of privileged communications and similar material. Both attorney-client privileged communications and information obtained in connection with the legal representation of a client cannot be considered part of the whistleblower’s independent knowledge when determining eligibility for an award. In other words, a whistleblower cannot be given credit for reporting such information, unless the disclosure is permitted by law or otherwise authorized. WBO also screens for such information by asking whistleblowers to identify in **Form TCR** “any information [that] was obtained from an attorney or in a communication where an attorney was present.”

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Tomorrow: Part III of the interview with Vincente Martinez of the CFTC Whistleblower Program.

*Jessica Tillipman is a contributing editor of the FCPA Blog. She's the **Assistant Dean for Field Placement and Professorial Lecturer in Law at The George Washington University Law School**. She also teaches an Anti-Corruption seminar that focuses on corruption control issues in government procurement.*

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Interview with Vincente Martinez of the CFTC Whistleblower Program: Part III

Thursday, September 6, 2012 at 2:28AM

Jessica Tillipman in CFTC Whistleblower Office, Commodities Futures Trading Commission, Dodd-Frank Act, Vincente Martinez, Whistleblower, anti-retaliation, whistleblower culpability



This is Part III of a four-part interview with Vincente Martinez, Director of the CFTC Whistleblower Office (WBO). Click here for **Part I** and **Part II**.

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As companies adjust to the new whistleblowing regimes under the Dodd-Frank Act, what changes do you recommend that they make to their existing compliance programs to ensure they are adequately prepared to manage whistleblowers and/or CFTC inquiries in response to whistleblower complaints?

Companies should make sure that their compliance systems and cultures have certain common sense features and characteristics.

First, company management, compliance and legal personnel should be well acquainted with the anti-retaliation provisions of the Dodd-Frank Act and the Sarbanes-Oxley Act. The anti-retaliation provisions of the Dodd-Frank Act are written broadly. Companies should develop careful, conscientious and consistent policies and procedures for responding to internal whistleblowers that limit the possibility of actions that could be deemed retaliatory.

Second, companies should have well-publicized compliance systems that provide clear and easy-to-use reporting mechanisms. I believe it is particularly important for companies to allow employees to report anonymously.

Last, it is to a company's benefit to establish and promote a culture where whistleblowers feel comfortable in reporting violations. An ethical tone at the top is essential to encourage whistleblowers to report internally.

How will you determine whether a whistleblower will receive a reward and, if so, how much? What factors will you consider?

First, there are detailed eligibility criteria. The whistleblower must have provided the information voluntarily; i.e., before being asked for it by authorities. The information must also have been "original information." While there are many factors to the definition of "original information," the basic idea is that it must be information not already known to us that is derived from (i) the whistleblower's independent knowledge (information that is not generally known or available to the public), or (ii) the whistleblower's independent analysis (the whistleblower's examination and evaluation of information that may be publicly available but which reveals information that is not generally known). Some kinds of information cannot be considered for an award, including improperly disclosed attorney-client communications. Likewise, certain persons are not eligible for an award, including employees of certain government agencies and self-regulatory organizations, persons convicted of criminal violations for the conduct at issue, and persons who make false statements or omissions to the CFTC.

Assuming that the whistleblower meets all eligibility requirements, we consider numerous factors to determine what amount of award is appropriate. We may increase the award based on: the significance of the whistleblower's information; how much assistance the whistleblower provided; our law enforcement interests; and whether, and how much, the whistleblower participated in an internal compliance system. On the other hand, we may reduce the award based on: whether the whistleblower was involved in, or culpable for, the conduct at issue; whether the whistleblower unreasonably delayed reporting a violation to us; and whether the whistleblower interfered with an internal compliance system.

If a whistleblower is implicated in the company's misconduct, does it preclude their eligibility for an award?

It depends. A whistleblower who is convicted criminally for the misconduct at issue is not eligible for an award. A culpable whistleblower who is not convicted criminally still cannot collect an award based on a sanction levied against him/her or any entity whose liability is based primarily on conduct that the whistleblower principally directed, planned or initiated. In some cases, that limit may preclude the whistleblower from receiving any award. That being said, there will be situations where a whistleblower with limited culpability will be able to collect an award based on information that led to sanctions being levied against others.

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Tomorrow: Part IV of the interview with Vincente Martinez of the CFTC Whistleblower Program.

*Jessica Tillipman is a contributing editor of the FCPA Blog. She's the **Assistant Dean for Field Placement and Professorial Lecturer in Law at The George Washington University Law School**. She also teaches an Anti-Corruption seminar that focuses on corruption control issues in government procurement.*

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Interview with Vincente Martinez of the CFTC Whistleblower Program: Part IV

Friday, September 7, 2012 at 3:18AM

Jessica Tillipman in CFTC Whistleblower Office, Commodities Futures Trading Commission, Dodd-Frank Act, Vincente Martinez, Whistleblower, anti-retaliation, whistleblower culpability



This is Part IV of a four-part interview with Vincente Martinez, Director of the CFTC Whistleblower Office (WBO). Click here for [Part I](#), [Part II](#) and [Part III](#).

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Do whistleblowers have any protection against retaliation under your whistleblowing program?

Yes. The Dodd-Frank Act includes anti-retaliation provisions for whistleblowers, under which an employer may not discharge, demote, suspend, harass, or in any way discriminate against a whistleblower because of any lawful act done by the whistleblower to provide information to the CFTC under the whistleblower program or assist the CFTC in an investigation or proceeding based on the information submitted. A whistleblower who suffers retaliation can bring a private action in federal court against the employer within two years of the retaliatory act. The whistleblower may be entitled to reinstatement, back pay, litigation costs, expert witness fees and attorney's fees.

Can retaliation against a CFTC whistleblower trigger other anti-retaliation laws?

Yes. If a whistleblower also files with the SEC, the company's retaliation may also violate the SEC's Dodd-Frank whistleblower anti-retaliation provisions. Depending upon whether the allegation involves fraud against shareholders of a publically-traded company, the anti-retaliation provisions of the Sarbanes-Oxley Act may also be triggered. Additionally, several states have enacted anti-retaliation laws that may be applicable.

May a whistleblower submit an anonymous report? If not, how will your office protect the whistleblower's identity?

A whistleblower can file with us anonymously, either directly or through an attorney. Because

we may need to contact the whistleblower for more information, and because the whistleblower is required to cooperate with us while we are investigating a matter, we advise anonymous whistleblowers to provide some means of contact, such as a telephone number or email address.

We are committed to protecting whistleblowers' identities, whether they file anonymously or not. For instance, we will not disclose a whistleblower's identity in response to requests under the Freedom of Information Act. As a general rule, the CFTC treats information learned during the course of an investigation, including the identity of a source, as non-public and confidential information.

There are limits on our ability to shield a whistleblower's identity. In an administrative or court proceeding, we may be required to produce documents or other information that would reveal a whistleblower's identity. In appropriate circumstances, we may also provide whistleblower information, subject to confidentiality requirements, to other authorities.

Once whistleblowers report misconduct to your office, do you notify them whether action has or will be taken with respect to the issues raised in their reports?

As a matter of policy, we cannot update anyone as to whether any action has been taken, or will be taken, regarding the information they provide. The fact that the Commission may investigate a company or person generally will not be disclosed until such time as a public proceeding is brought either before the Commission or in federal court.

However, when the CFTC obtains a final judgment that contains more than \$1 million in monetary sanctions, we will post a "Notice of Covered Action" for 90 days on our Whistleblower Notices webpage on www.cftc.gov. Whistleblowers and their representatives should monitor the webpage periodically. Anyone can also sign up for our [Email Subscription Service](#) or [RSS Feeds](#) to receive Whistleblower Notices automatically. Other final judgments and orders are published by the Enforcement Division on the [Enforcement Press Releases](#) webpage.

Do whistleblowers and/or their attorneys play a role in your investigations?

Yes, to an extent. The amount of whistleblower participation is determined by our investigatory needs as well as the quantity and quality of the whistleblower's information and insight, but it is within our discretion. We may interview a whistleblower, take sworn testimony or request documents or other information. Whistleblowers are required under our Rules to provide further information and assistance if requested. We may also require a whistleblower to enter into a confidentiality agreement to ensure that the subject of an investigation is not made aware of the investigation prematurely.

How can potential whistleblowers contact the CFTC Whistleblower Office and what information should they have available when they do so?

To become a whistleblower, submit a [Form TCR](#) by mail or facsimile to Commodity Futures

Trading Commission, Whistleblower Office, 1155 21st Street, NW, Washington, DC 20581, Fax: (202) 418-5975. A whistleblower can file directly or through an attorney. In general, a quality whistleblower submission should have (i) a detailed set of allegations, (ii) a description of the whistleblower and the sources of the information provided, and (iii) supporting materials. Anyone with questions should send an email to **whistleblower@cftc.gov**.

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