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10 Important Aspects Of The CFTC Whistleblower Program

Law360, New York (June 03, 2014, 1:15 PM ET) -- On May 19, 2014, the U.S. Commodity Futures Trading Commission issued its first award under the CFTC's whistleblower award program.[1] The anonymous whistleblower will receive approximately \$240,000. Because the Commodity Exchange Act dictates that a qualifying whistleblower will receive 10 to 30 percent of the amount recovered, \$2.4 million is the maximum amount recovered in this action or a related action.

While the CFTC's whistleblower award program has been in effect for approximately 2 1/2 years, it has attracted modest attention — especially when compared to the U.S. Securities and Exchange Commission's whistleblower award program. The CFTC's whistleblower award program, however, is gaining momentum.

In fiscal 2012, the CFTC received 58 whistleblower tips; in fiscal 2013, the CFTC received 138.[2] With the announcement of its first award, the profile of the CFTC and its whistleblower award program are expected to increase even further.

This article highlights 10 important aspects of the whistleblower provisions of the CEA and the regulations promulgated thereunder (collectively, the "CFTC Whistleblower Rules") that companies operating under the jurisdiction of the CEA should understand.

1. Generally, what are the CFTC Whistleblower Rules?

The CFTC Whistleblower Rules are comprised of two main components: (1) the CFTC whistleblower award program; and (2) the anti-retaliation protections.

Under the CFTC's whistleblower award program, the CFTC is required to pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provided original information to the CFTC that led to the successful enforcement of a judicial or administrative action brought by the commission under the CEA resulting in monetary sanctions greater than \$1 million. Once this \$1 million threshold has been met, the amount of the whistleblower award may be based on related actions brought by other government agencies.

With respect to the anti-retaliation protections, CEA Section 23(h) and related CFTC regulations provide protection to whistleblowers against retaliation for providing information to the commission and aiding the commission in related investigations and enforcement actions.

2. Does a whistleblower have to comply with a company's internal reporting procedure to be eligible for an award under the CFTC's whistleblower award program?

No. To be eligible for an award under the CFTC's whistleblower award program, a whistleblower is not required to report internally and is not required to cooperate with an internal investigation under the CEA or CFTC regulations.[3] Further, a whistleblower who only reports a potential CEA violation internally is not entitled to any award under the CFTC Whistleblower Rules.

In an effort to incentivize internal reporting, the CFTC Whistleblower Rules provide that a whistleblower who reports internally before or at the same time as he or she reports to the CFTC can receive credit for all the information later provided by the company to the CFTC, whether or not the information was provided by the whistleblower.[4] This could potentially result in the whistleblower receiving a larger award when the commission considers the significance of the information provided in its award determination.[5]

But, these provisions may not provide sufficient incentive for whistleblowers to report internally because the opportunity for an increased award could be outweighed by the possibility of internal reporting leading to the imposition of lesser or no material monetary sanctions on the company.

3. If an individual reports internally, does the company have a duty under the CEA or CFTC regulations to keep the whistleblower informed about the status of the report or the ultimate resolution of the complaint?

No. Although, there may be good reasons to keep the whistleblower apprised of the report's status. For example, if a whistleblower only reported internally but feels ignored by his or her employer, he or she might be more inclined to report to the CFTC.

4. Can a whistleblower still receive an award under the CFTC's whistleblower award program if the whistleblower already received an award under the SEC's whistleblower award program?

Yes. Even if a whistleblower first receives an award under the SEC's whistleblower award program, the whistleblower can later receive an award under the CFTC's whistleblower award program.[6] If, however, the whistleblower first receives an award under the CFTC's whistleblower award program, then the whistleblower is no longer eligible to receive an award under the SEC's whistleblower award program.[7]

5. Does a whistleblower have to report to the CFTC to be afforded protection under the anti-retaliation provisions of CEA Section 23(h)?

Yes. The anti-retaliation protections under CEA Section 23(h) are only available if the whistleblower reports the information to the CFTC in accordance with the rules and regulations prescribed by the commission.[8]

6. Are the anti-retaliation protections afforded under CEA Section 23(h) available only to individuals entitled to an award under the CFTC's whistleblower award program?

No. Under CFTC Regulation 165.2(p)(2), the protections afforded under CEA Section 23(h) are available regardless of whether the whistleblower is entitled to an award under the CFTC's whistleblower award program. In addition, these protections are not limited to employees.[9]

7. Can the protections afforded to whistleblowers intersect with employment agreements?

Yes. Companies should be cognizant of the protections that are afforded to whistleblowers under the anti-retaliation provisions of the CEA and CFTC regulations and how these

protections may limit contractual agreements, such as confidentiality agreements or terms of employment.

CFTC Regulation 165.19 states that “[t]he rights and remedies provided for in [the Whistleblower Rules] may not be waived by any agreement, policy, form, or condition of employment, including by a predispute arbitration agreement.” In addition, the anti-retaliation provisions in CEA Section 23(h) prohibit employers from discharging, demoting, suspending, threatening, harassing, directly or indirectly, or in any other manner discriminating against a “whistleblower” who has lawfully provided information to the CFTC in accordance with the regulations or assisted with a related investigation.

CEA Section 23(h)(1) further provides a federal cause of action for such violations and lists potential relief available to a prevailing whistleblower, including reinstatement, back pay, and compensation for related expenses such as litigation costs and reasonable attorneys’ fees.

8. What can companies do to prepare for the effects of the CFTC’s whistleblower award program?

In order to prepare for the effects of the CFTC’s whistleblower award program, companies may want to consider:

- fostering an environment where whistleblowers feel comfortable reporting potential violations internally;
- ensuring that compliance materials are easy to access and understand;
- ensuring that the compliance program is able to adapt to changing technology or regulatory requirements;
- providing rewards for reporting potential violations internally; and
- the implications of CFTC Regulation 165.19 and the anti-retaliation provisions of the CEA when drafting employment or confidentiality agreements.

Generally, companies that promote a culture of compliance will be better positioned to deal with the effects of the CFTC’s whistleblower award program.

9. Will the CFTC exercise enforcement authority over whistleblower retaliation claims?

Not likely. The CFTC determined that it does not have the statutory authority to initiate an enforcement action over the retaliation claims.[10] However, companies should keep in mind that the SEC indicated that it will exercise enforcement authority over violations of the SEC’s anti-retaliation provisions.[11]

10. Additional considerations for energy and commodities companies

Energy and commodities companies may want to consider how the CFTC’s whistleblower award program could be affected by (1) the memorandum of understanding between the Federal Energy Regulatory Commission and the CFTC regarding information sharing and (2) the CFTC’s special call process.

With respect to the CFTC-FERC MOU, the increased efforts to share information between the two agencies could lead to more successful enforcement actions. This could result in larger monetary sanctions and provide an additional incentive for whistleblowers to report externally.

Regarding special calls — over the last two years, many energy and commodities

companies received and responded to special calls from the CFTC's Division of Market Oversight covering a range of trading activities. Where a company has responded to a special call, a whistleblower may not be eligible for an award under the CFTC's whistleblower award program.

The commission can request information through the "special call" process from companies regarding trading or delivery activity, including information about positions and transactions in an underlying commodity and information on persons who control or have financial interest in an account.

Since receiving a special call imposes a duty upon the recipient, there are two ways that it may prevent a whistleblower from meeting the prerequisite that the information is "voluntarily" provided to the CFTC.

First, information requested will not be considered to have been submitted voluntarily. Second, if the employer receives a special call, then under the CFTC Whistleblower Rules, the request is imputed to the whistleblower if the information is in the whistleblower's purview.[12]

A whistleblower may still be able to provide such information "voluntarily" if the employer, after receiving the responsive documents or information from the whistleblower, fails to provide such information to the requesting authority in a timely manner.[13]

The CFTC's whistleblower award announcement should motivate companies to understand the CFTC's whistleblower program. Companies should consider having processes in place that encourage internal reporting of potential violations and avoid implicating anti-retaliation provisions.[14]

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[1] CFTC Whistleblower Award Determination Panel, Order re WB-APP 2014-02-19-01 (May 19, 2014).

[2] CFTC Annual Report on the Whistleblower Program and Customer Education Initiatives (Oct. 2012 and Oct. 2013).

[3] CFTC Final Rules, Whistleblower Incentives and Protection, 76 Fed. Reg. 53172, 53186, 53195 (Aug. 25, 2011).

[4] 17 C.F.R. 165.2(i)(3); 76 Fed. Reg. at 53178.

[5] See 17 C.F.R. 165.9(b)(1).

[6] 76 Fed. Reg. at 53179.

[7] 17 C.F.R. 240.21F-3(b)(3).

[8] See CEA Section 23(a)(7); see also 17 C.F.R. 165.2(p).

[9] See 17 C.F.R. 165.2(p)(2).

[10] 76 Fed. Reg. at 53182.

[11] SEC Final Rule, Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34340 (June 13, 2011).

[12] 17 C.F.R. 165.2(o).

[13] Id.

[14] Lee A. Peifer and Brittany M. Cambre are recognized for their contributions.

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