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Filing Pointers From CFTC's Whistleblower Office

Law360, New York (October 12, 2012, 3:44 PM ET) -- The Dodd-Frank Act created whistleblower programs at the U.S. Commodity Futures Trading Commission and the U.S. Securities and Exchange Commission. In a nutshell, the programs allow both agencies to pay monetary awards to eligible whistleblowers who voluntarily provide original information that leads to successful enforcement actions that result in more than \$1 million in monetary sanctions.

Under certain conditions, both agencies can also pay whistleblower awards based on monetary sanctions obtained by other authorities. Both programs also feature anti-retaliation protections. Although there are important differences between the two programs, the enacting statutory provisions and implementing rules are very similar, and both agencies use a similar intake form, called "Form TCR."

While there is no such thing as a perfect whistleblower submission that is guaranteed to lead to an award, this article is intended to provide some common sense tips that can help prospective CFTC whistleblowers and their attorneys make successful filings. It should be understood, however, that the applicable provisions and rules — Section 23 of the Commodity Exchange Act (CEA) [7 U.S.C. § 26] and the CFTC's whistleblower rules [17 C.F.R. § 165] — are very detailed, and the discussion below merely brushes the surface of our requirements. Prospective whistleblowers and their attorneys should therefore read the provisions and rules thoroughly before acting.

The Characteristics of a Quality Submission

In general, a quality submission should contain detailed allegations, a description of the whistleblower and the sources of his/her information, and appropriate supporting materials.

Provide Detailed Allegations

The CFTC must allocate its investigatory resources carefully. Detailed whistleblower submissions can facilitate such decisions and lead to more efficient and effective investigations. On the other hand, superficial allegations are more difficult to value and may take significantly longer to evaluate.

Among the most important information to include is the precise nature of the alleged wrongdoing, the identity and roles of all parties involved (including alleged violators, accomplices and victims), and the dates of the alleged misconduct, including whether it is ongoing. Attorneys can also add value by working with their clients to demonstrate how the submitted information establishes a violation of the CEA or CFTC regulations.

Describe the Whistleblower and the Sources of the Information Submitted

CEA Section 23 and the whistleblower rules require whistleblowers to provide "original information," which essentially is information not already known to the public or the CFTC

that is derived from the whistleblower's "independent knowledge" or "independent analysis," all of which are defined terms. A whistleblower can be any person who possesses such information, from a corporate officer or insider, to a trader or market observer, to an investor or fraud victim.

Whistleblowers can assist the CFTC, and at the same time help themselves, by describing in detail how they obtained their information; for example, at work, through discussions with others, by observing trading, by analyzing records, or by being defrauded. Providing this information will help the CFTC determine the strength of the allegations, the potential for effective enforcement, and any challenges in conducting an investigation.

Prospective whistleblowers and their attorneys should also read the CFTC's whistleblower rules carefully to be aware of the types of information that do not qualify as "independent knowledge" for award purposes. For instance, information from sources generally available to the public does not qualify, while an analysis of such information may. Also excluded are attorney-client communications and information obtained in connection with the legal representation of a client.

While there are exceptions that allow consideration of such information — such as waiver, authorization or other permitted exceptions — whistleblowers should consider carefully whether such information is necessary to support a submission before filing. If a whistleblower does provide such information, he/she should identify it clearly, as required in Form TCR, and segregate it if possible.

In addition, information brought to the CFTC by certain persons — such as officers, directors, trustees or partners of the entity at issue, as well as compliance and internal audit personnel — cannot be considered for purposes of granting an award except in certain circumstances, such as in cases of likely substantial injury, where the relevant entity is engaging in conduct that will impede an investigation, or after 120 days of inaction by responsible entity personnel. These circumstances are fact-specific and time-sensitive. Prospective whistleblowers and their attorneys should therefore have a firm grasp of the relevant rules when including such information.

Provide Appropriate Supporting Materials and Describe Others

In general, a whistleblower should provide the supporting records in his/her possession, and describe the supporting records held by others by title, location and custodian. Doing so helps the CFTC evaluate the merits of the allegations more efficiently. Information that is or may be privileged, however, should be described rather than produced. When in doubt, err on the side of description rather than production. This is another area where attorneys can be particularly helpful by describing how the underlying information and materials may be privileged, and by analyzing whether an exception applies or whether privilege has been waived.

Anti-Retaliation Protections

Under the CFTC's whistleblower anti-retaliation provisions, no employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against a whistleblower for providing information to or assisting the CFTC. If an employer retaliates against a CFTC whistleblower, the whistleblower can bring suit in federal court.

It is important to note that a person can be considered a whistleblower for purposes of the CFTC's anti-retaliation protections regardless of whether that person satisfies the requirements, procedures and conditions to qualify for an award. Accordingly, prospective whistleblowers and their attorneys should consider whether to file a Form TCR not only in terms of becoming eligible for a whistleblower award, but also in terms of the ability to

invoke anti-retaliation protections.

Ask Questions

The CFTC's Whistleblower Office welcomes questions about the program. While we cannot offer legal advice, we can explain our rules and requirements. Persons with questions about the program should send an email to whistleblower@cftc.gov. You can also learn more about the program by visiting the "Whistleblower Program" webpage on the CFTC's website, www.cftc.gov.

How to File

A whistleblower can file a Form TCR either electronically, by mail or by facsimile. Electronic submissions can be made by clicking the "File a Tip or Complaint" button on the right-hand side of the CFTC's homepage. Select the first option under the description of the whistleblower program. A whistleblower can also mail or fax a printed Form TCR, which can be found on the "Whistleblower Program" webpage, to the following address or number: Commodity Futures Trading Commission, Whistleblower Office, 1155 21st St., NW, Washington, D.C., 20581, Fax: (202) 418-5975.

A whistleblower interested in filing with the SEC can do so by clicking the "Submit a Tip or File a Complaint" button on the right-hand side of the SEC's homepage, www.sec.gov. Select the first option, "Report a possible securities fraud." Anyone with questions about the SEC's whistleblower program can call the SEC's Office of the Whistleblower at (202) 551-4790.

--By Vincente L. Martinez, CFTC Whistleblower Office

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