



# Commodity Futures Trading Commission

## Office of Public Affairs

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## Strengthening Anti-Retaliation Protections for Whistleblowers and Enhancing the Award Claims Review Process

The Commodity Futures Trading Commission (CFTC or Commission) adopted amendments that strengthen anti-retaliation protections for whistleblowers and enhance the award claims review process.

**Background: The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) established a whistleblower program at the CFTC. The CFTC's Whistleblower Program provides monetary incentives to individuals who report possible violations of the Commodity Exchange Act (CEA) that lead to a successful enforcement action, as well as privacy, confidentiality, and anti-retaliation protections for whistleblowers who share information with or assist the CFTC.**

Section 748 of the Dodd-Frank Act amended the CEA by adding a new Section 23, titled "Commodity Whistleblower Incentives and Protection" and codified at 7 U.S.C. § 26. Section 23 directs that the Commission must pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about a violation of the CEA that leads to successful enforcement of an action brought by the Commission that results in monetary sanctions exceeding \$1,000,000, and of Related Actions. On August 25, 2011, the Commission adopted Part 165 of its Regulations to implement Section 23 of the CEA (Whistleblower Rules).

Today's amendments leave the basic framework of Part 165 substantially unchanged, but they strengthen anti-retaliation protections for whistleblowers and add transparency to the Commission's process of deciding whistleblower award claims. The amendments also harmonize the Commission's Whistleblower Rules with those of the SEC in many respects. Specifically, the amendments make the following key changes or clarifications:

### Final Rules Regarding Retaliation and Improper Employer Confidentiality Agreements

- A person may not take any action to impede an individual from communicating directly with the Commission's staff about a possible violation of the CEA, including by enforcing, or threatening to enforce, a confidentiality agreement or pre-dispute arbitration agreement with respect to such communications. [Rule 165.19]
- The Commission has authority to bring an action against an employer who retaliates against a whistleblower, irrespective of whether the whistleblower qualifies for an award. A whistleblower continues to have the right to pursue a private cause of action against such an employer. [Rule 165.20; Appendix A to Part 165]
- Actions that an employer took after a whistleblower reported internally but before providing information to the Commission may be relevant to whether prohibited retaliation occurred. [Rule 165.20(b)]

### Final Rules Regarding Eligibility Requirements

- A whistleblower may be eligible for an award by providing the Commission original information without being the original source of the information. [Rule 165.5(b)]

- A whistleblower retains eligibility for an award based on information provided by the whistleblower to certain specified persons or authorities, now to include foreign futures authorities, prior to the time that the whistleblower provided the information to the Commission. [Rule 165.2(i)(2); Rule 165.2(l)(2)]
- Where a whistleblower first provides information to certain specified persons or authorities before reporting to the Commission, the timeframe for a whistleblower to submit a Form TCR (Tip, Complaint or Referral) to the Commission has been extended from 120 days to 180 days. If a whistleblower submits a Form TCR within this 180-day period after reporting to the other person or authority, the Commission will consider the whistleblower to have provided information to the Commission as of the date of the whistleblower's original disclosure to the other person or authority. [Rule 165.2(i)(3); Rule 165.2(l)(2)]
- The Commission may waive its procedural requirements based upon a showing of extraordinary circumstances. [Rule 165.5(c)]

### Final Rules Regarding Awards for Related Actions

- A whistleblower may receive an award in a covered judicial or administrative action, in a Related Action (as those terms are defined in the Regulations), or both. [Rule 165.5(a)(3); Rule 165.11(a)]
- But the Commission will not make an award to a whistleblower for a Related Action if the whistleblower has been granted an award by the SEC for the same action under the SEC's whistleblower program. [Rule 165.11(b)]

### Final Rules Regarding Award Claims Review

- The required Form WB-APP may be submitted electronically through the Commission's website at <https://www.cftc.gov> or the Commission's Whistleblower Program website at <https://www.whistleblower.gov>. A Form WB-APP must be received by the Commission within 90 days of the date of the Notice of Covered Action or 90 days following the date of a final judgment in a Related Action. [Rule 165.7(b)(1)]
- The Commission will replace the Whistleblower Award Determination Panel with a Claims Review Staff and introduce additional steps in the claims review process. [Rule 165.15(a)(2); Rule 165.7(f) – (l)]
  - The enhanced review process will be similar to that established under the SEC's own whistleblower rules and includes issuance of a Preliminary Determination by the Claims Review Staff setting forth a preliminary assessment as to whether an award claim should be granted or denied.
  - A whistleblower will have an opportunity to contest the Preliminary Determination before the Commission issues a Final Determination.
- The Whistleblower Office will handle facially ineligible award claims that do not relate to a Notice of Covered Action, a final judgment in a Related Action, or a previously filed Form TCR through a streamlined process. [Rule 165.7(e)]
- A whistleblower may withdraw a Form WB-APP at any point in the review process by submitting a written request to the Whistleblower Office. [Rule 165.7(d)]
- The Director of Enforcement has general authority to administer the whistleblower program. [165.15(b)]

### Final Rules Regarding Contents of Record for Award Determinations

- Any documents or materials received or obtained by the Whistleblower Office to assist the Commission in resolving a whistleblower's award claim pertaining to a Related Action may be included in the record, as

long as the entity bringing the Related Action has authorized the Commission to share the information with the whistleblower. [Rule 165.10(a)]

- The record on appeal includes the Preliminary Determination and Final Order of the Commission, but not any pre-decisional or internal deliberative process materials that are prepared to assist the Commission or the Claims Review Staff in deciding a claim. [Rule 165.10(b); 165.13(b)]
- A whistleblower may request a copy of the record after the Preliminary Determination has been issued and prior to the Commission issuing a Final Determination on the whistleblower's claim. A whistleblower must enter into a confidentiality agreement if requested by the Whistleblower Office. [Rule 165.7(g)(2)]

### **Final Rules Regarding Whistleblower Identifying Information**

- The Director of Enforcement may disclose whistleblower identifying information when deemed necessary or appropriate to the authorities listed in Section 23 of the CEA to accomplish the customer protection and law enforcement goals of the whistleblower program. [Rule 165.4(a); 165.15(a)(3)]