

Whistleblowers are Getting Much-Needed Help from the CFTC

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As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress mandated that the [Commodity Futures Trading Commission](#) (CFTC) establish a whistleblower program to reward people who come forward with information on violations of the Commodity Exchange Act (CEA). The CFTC enforces the CEA, regulating the trading of futures and other financial instruments related to commodities such as grains, cotton, crude oil and stock futures. The CFTC whistleblower program is modeled after similar programs for reporting IRS fraud, securities fraud and fraud on the government under the False Claims Act. For more information on the CFTC and its whistleblower program, you should read our firm's [CFTC Whistleblower Practice Guide](#), written by Katz, Marshall & Banks partner Lisa Banks.

Strengthening CFTC Retaliation Protections

Recently, the CFTC announced that it plans to further strengthen the retaliation protections under its whistleblower program. These protections – also modeled after those granted to whistleblowers who report IRS fraud, securities fraud and fraud under the False Claims Act – prevent an employer from taking action against an employee who has reported CEA violations. Currently, a CFTC whistleblower who faces employment retaliation has one option to remedy the situation – sue her employer in federal district court. Under the proposed changes, the CFTC will be able to take its own action against employers without forcing an aggrieved employee to file a public lawsuit.

To longtime observers of this issue, the proposed change in CFTC authority does not come out of nowhere. After the enactment of [Dodd-Frank](#), the CFTC and the SEC both took a look at their respective whistleblower provisions under Dodd-Frank, and at the time came to opposite conclusions. The SEC decided that it could take its own enforcement actions against employers who retaliate against employees for reporting violations of securities laws to the SEC; the CFTC decided that it could not take equivalent action under the law. Because the language in the law for each retaliation program is quite similar, this inconsistency struck many as strange.

Rectifying Enforcement Inconsistencies

The CFTC has now decided to fix this issue. In its [recently proposed regulation](#) interpreting its authority, the agency explains:

Questions have been raised, however, about the inconsistency between this interpretation and the SEC's interpretation of its own authority to take enforcement actions against violators of the anti-retaliation provisions of the SEC's whistleblower protection rules. Accordingly, the Commission is revisiting this issue. The Commission proposes to set aside its 2011 interpretation because it fails to adequately take into full consideration the statutory context of CEA section 23 and other CEA provisions.

[...]

Upon reconsideration of its statutory authority on this important issue, and noting that harmonization between the SEC's and the Commission's Whistleblower programs would be beneficial to the public by making the consequences of illegal retaliation more uniform, the Commission has decided to join the SEC on that path.

The CFTC is making two main points here. First, regardless of the SEC's position on its anti-retaliation powers, the CFTC read its own authorities too narrowly when the commission previously decided it could not take its own anti-retaliation enforcement actions. Second, inconsistencies between the two programs do not help put into effect the purpose of Dodd-Frank's broad protections for whistleblowers. Having the two agencies take the same expansive view of anti-retaliation enforcement is more in line with the letter and spirit of the law, and better serves the public interest.

A Win for CFTC Whistleblowers

Indeed, the CFTC's announcement comes at an important time in the SEC's history of taking action against whistleblower retaliation. On Sept. 29, the SEC made the [first public announcement](#) of its own successful standalone enforcement action for unlawful retaliation. (Full disclosure: [Our firm represented](#) the whistleblower in that case.) Once the CFTC's new rule takes effect, whistleblowers will have greater protections from retaliation. This will further encourage employees to come forward when they have information of corporate wrongdoing, and empower them with the knowledge that they have recourse if their employer takes action against them for doing so.