



The CFTC Whistleblower Practice Guide

*Navigating the CFTC Whistleblower Program
and the Rules and Procedures that Can Lead to Financial Rewards
for Reporting Commodity Futures Trading Violations*

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INTRODUCTION AND BACKGROUND

Congress directed the Commodity Futures Trading Commission (“CFTC” or “the Commission”) to establish a whistleblower program as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd Frank”). Dodd-Frank’s whistleblower reward provisions provide monetary incentives to individuals who submit helpful information to the CFTC. Under the program, an individual who provides the CFTC with original information leading to an enforcement action that results in over \$1 million in monetary sanctions is eligible to receive an award of 10% to 30% of the amount collected. The statute also provides whistleblowers with protections to help ensure that insiders can approach the CFTC with information without fear of reprisal.

The CFTC Whistleblower Program (“the Program”) is a relatively small, low-profile whistleblower program that is on track to become more robust in the coming years. The Program began accepting tips in September 2012 and received 58 tips in its first month.¹ The number of tips has steadily risen since the Program’s inception, with 138 tips in fiscal year (FY) 2013, 227 tips in FY2014, 232 tips in FY2015, and 273 tips in FY2016.² In the four years that the program has been active, the CFTC has paid four awards to whistleblowers in connection with these tips.

In April 2016, the Commission issued its largest award to date, with a payout of more than \$10 million.

In May 2014, the CFTC made its first payout, totaling \$240,000.³ In September 2015, the Commission awarded a second whistleblower a payout of approximately \$290,000.⁴ In April 2016, the Commission issued its largest award to date, with a payout of more than \$10 million.⁵ In July 2016, the Commission awarded a fourth whistleblower approximately \$50,000.⁶ With \$300 million set aside in a special whistleblower fund, the Commission clearly expects to make more, and potentially more substantial, awards going forward. Recognizing that the Program has had a relatively slow start, the Director of the CFTC has indicated that as the quality of the tips the Commission receives improves, the amount and frequency of the awards will, as well.⁷

The goal of this Practitioner’s Guide is to explain the rules and procedures of the CFTC Whistleblower Program to assist whistleblowers and their counsel in submitting their

tips in a form and manner that will protect the public and earn financial awards for their role in helping to regulate and enforce commodities laws. The CFTC is an independent agency with regulatory authority over futures trading subject to the Commodities Exchange Act (“CEA”). The CEA’s scope has become increasingly varied and complex over the years. It governs a wide range of commodities such as grains, wheat, corn, oats, and cotton as well as crude oil, heating oil, gasoline, and financial instruments, such as stock index futures. The CFTC also has newfound authority to regulate the \$400 trillion swaps market—which is about a dozen times the size of the futures market that it has traditionally regulated.

The CFTC has also played a role in addressing the growing concern over corporate fraud that escalated during the financial crisis of 2008. The CFTC joined an Executive Branch task force aimed at prosecuting individuals and companies for allegedly stealing millions of dollars through the sale of illegal foreign-currency futures contracts. The CFTC has also charged major corporations with price manipulation and negotiated multimillion-dollar settlements to help deter fraudulent behavior in the industry.

In 2010, Congress passed the Dodd-Frank Act as the latest legislation in a series of significant financial reforms that lawmakers hoped would help restore confidence in U.S. financial markets through a wide range of regulatory measures. The Dodd-Frank Act created the CFTC Whistleblower Program to contribute to this effort by incentivizing insiders to come forward with information regarding violations of the trading of commodity futures.⁸

THE CFTC WHISTLEBLOWER PROGRAM

Under the Program, the CFTC is required to pay awards to eligible whistleblowers who voluntarily provide the Commission with original information that leads to a successful enforcement action in which the CFTC recovers monetary sanctions in an amount over \$1,000,000. If the whistleblower meets these and other criteria described below, he or she is entitled to an award of 10% to 30% of the amount recovered by the CFTC or by certain other authorities in related actions.

The remainder of this Guide will provide practitioners with an overview of the key laws and rules governing the CFTC Whistleblower Program, with a focus on how to prepare and advance high-quality tips that can help the CFTC combat CEA violations and at the same time earn rewards for whistleblowers.

A. Whistleblower Status

To be considered “eligible for an award,” a whistleblower must “voluntarily” provide or submit “original information” pursuant to the Commission’s procedures and be the “original

To be eligible for an award, whistleblowers must voluntarily provide original information that leads to a successful enforcement action.

source” of the information that leads to the successful Commission enforcement action. *See* 7 U.S.C. § 26(b)(1); 17 C.F.R. § 165.5. Certain individuals such as those involved with regulatory enforcement or those who have engaged in criminal conduct related to the reported CEA violation are categorically excluded from receiving an award through the CFTC.⁹ *See* 7 U.S.C. § 26(c)(2); 17 C.F.R. § 165.6. The CFTC regulations, which are discussed below, provide guidance to potential claimants to determine whether they are eligible for an award based on these requirements.¹⁰

1. “Voluntarily” Provide or Submit

Whistleblowers are considered to have “voluntarily” provided information if they do so before any request from the CFTC, Congress, any other federal or state authority, the DOJ, a registered entity, a registered futures association, or a self-regulatory organization (“SRO”). If the Commission, or any of these other entities, makes a request, inquiry, or demand to the whistleblower or the whistleblower’s representative first, the whistleblower’s submission will not be considered voluntary, and he or she will not be eligible for an award, even if the whistleblower’s response is not compelled by subpoena or other applicable law. Even a request received by the whistleblower’s employer will disqualify the whistleblower unless the employer does not respond to the request in a timely manner. In addition, the whistleblower’s submission will not be considered voluntary if the whistleblower is under a pre-existing legal or contractual duty to report violations to the Commission, Congress, any other federal or state authority, the DOJ, a registered entity, a registered futures association, or a SRO, or has a duty to report that arises out of a judicial or administrative order. 17 C.F.R. § 165.2(o).

2. “Original Information”

A whistleblower must provide the CFTC with “original information” in order to qualify for an award. In order for a submission to qualify as original information, it must be: (1) derived from the whistleblower’s “independent knowledge

or independent analysis;” (2) not already known to the CFTC from any other source, unless the whistleblower is the “original source” of the information; (3) not exclusively derived from an allegation made in a judicial or administrative hearing, in a government report, hearing, audit, or investigation, or from the news media, unless the whistleblower is the source of the information; and (4) submitted after July 21, 2010. 7 U.S.C. § 26(a)(4); 17 C.F.R. § 165.2(k). The CFTC does not require that whistleblowers have first-hand knowledge to establish that they have “independent knowledge or analysis” of the information. As long as the whistleblower provides the Commission with information that is not generally available to the public, the whistleblower may still be entitled to an award.

3. Independent Knowledge or Independent Analysis

“Independent knowledge” is defined by the CFTC regulations as factual information in the whistleblower’s possession that is not generally known or available to the public. 17 C.F.R. § 165.2(g). The whistleblower may gain independent knowledge from their experiences, communications, or observations in their personal business or social interactions. The whistleblower’s knowledge may be based on first-hand experiences but may also be based on information that is generally considered hearsay.¹¹ Similarly, the whistleblower may base his or her “analysis” on first-hand knowledge or third-party information, as long as it is the whistleblower’s own “analysis,” and it is not generally available to the public. 17 C.F.R. § 165.2(c). By including this in the definition of “independent knowledge” the CFTC recognizes that there are circumstances where individuals can review publically available information, and through their own evaluation or assessment, provide critical assistance to the Commission.

4. Exclusions from Independent Knowledge and Analysis

In order to promote the use of internal compliance systems and discourage certain types of reporting the Commission categorically excludes certain types of information from eligibility. *See* 17 C.F.R. § 165.2(g). The exclusions can be divided into four general categories.

One set of exclusions disqualifies individuals who obtain information either illegally or through sources that are generally available to the public. The Commission prohibits a whistleblower from receiving an award if he or she obtains the information by means or in a manner that violates an applicable federal or state criminal law. The CFTC will also not issue an award to a whistleblower who submits information from sources that are generally available to the public such as corporate filings and the media, including the Internet.

Another set of exclusions is aimed at encouraging corporate officials and other whistleblowers to consult with an attorney,

by disqualifying attorneys from whistleblower awards in many situations. The regulations prohibit an attorney from using attorney-client privileged information and/or information gained in connection with a legal representation to seek an award under the Program, unless the disclosure of such information is otherwise permitted under state or federal attorney conduct rules.

A third set of exclusions was created to promote corporate governance and internal compliance. Whistleblowers are ineligible for an award if they obtained information through their role as an officer, director, trustee, or party of an entity and the information came from an investigation of the entity into possible violations of law. Whistleblowers are also ineligible if information about a CEA violation is obtained through their role as an internal audit employee or compliance professional.

Consistent with its goal of supporting internal measures developed by entities to deal with CEA violations, the CFTC created three exceptions to the third category of excluded information:

- The whistleblower has a reasonable basis to believe that disclosure is necessary to prevent substantial injury to the entity or investors.
- The whistleblower has a reasonable basis to believe that the entity is engaging in conduct that will impede an investigation of misconduct
- At least 120 days have passed since the whistleblower has provided the information to the entity's relevant internal authority or since the whistleblower received the information under circumstances indicating that the entity's relevant internal authority was already aware of the information.

17 C.F.R. § 165.2(g)(7)(i-iii).

These exceptions aim to encourage internal personnel to reveal information that could prevent some greater injury to the company, its stockholders, or an investigation of the wrongdoing. When evaluating a case that falls into one of these exceptions, attorneys should focus on whether the whistleblower can establish that there is a reasonable basis for his or her belief that some injury will occur without the disclosure.

B. Rules Designed to Incentivize Internal Reporting

The CFTC does not require whistleblowers to report CEA violations internally before collecting an award. The decision to not require internal reporting caused controversy during the CFTC's rulemaking process. Many commenters believed that without an internal reporting requirement, the Program would incentivize whistleblowers to bypass internal reporting systems, thereby harming corporate governance efforts and the overall corporate interests of even the most well intentioned entities.

In its proposed rules the Commission stated that, “[it does] recognize that internal compliance and reporting systems ought to contribute to the goal of detecting, deterring and preventing misconduct, including CEA violations, and does not want to discourage employees from using such systems when they are in place.”¹²

To address such concerns, the CFTC included various incentives for individuals to utilize internal corporate compliance systems before reporting to the CFTC. For example, when the CFTC evaluates what percentage of a sanction to award a whistleblower, the Commission considers a whistleblower's report of information to an employer's internal whistleblower, compliance, or legal system as a factor that potentially can increase the amount of an award. Conversely, it also considers a whistleblower's interference with such internal systems as a factor that can potentially decrease the amount of an award. *See* 17 C.F.R. § 165.9(b)(4), (c)(3).

To qualify for a CFTC award,
whistleblowers must provide
information that leads to a
successful enforcement action
with monetary sanctions totaling
\$1 million or more.

Additionally, a whistleblower may still be eligible for an award for reporting original information internally if his or her employer later reports the information to the Commission and it leads to a successful enforcement action. In this situation, all of the information provided by the employer to the Commission will be attributed to the whistleblower – and the whistleblower may be eligible for a greater award for first reporting it internally to his or her employer. *See* 17 C.F.R. §§ 165.2(i)(3), 165.9(b)(4).

C. Information that Leads to Successful Enforcement

The Commission will only authorize payment of an award when a whistleblower provides information that leads to a successful enforcement of a covered administrative or judicial action, or a related action, that leads to monetary sanctions totaling more than \$1,000,000. 7 U.S.C. § 26(a)(1). This reflects the Commission's expectation that the award-worthy information is high quality, reliable, specific, and has a meaningful nexus

to the Commission's ability to successfully complete its investigation, and to either obtain a settlement or prevail in a litigated proceeding.¹³ The whistleblower tip will be considered to lead to a successful enforcement action if:

- The whistleblower gives the CFTC original information that is sufficiently specific, credible, and timely to cause the Commission staff to engage in an investigation and the Commission subsequently brings a successful judicial or administrative action based in whole or in part on the information, 17 C.F.R. § 165.2(i)(1); or
- The whistleblower provides original information about conduct that was already under investigation by the Commission, or another specified regulatory body,¹⁴ and the submission significantly contributes to the success of the action, 17 C.F.R. § 165.2(i)(2).

As mentioned above, the CFTC promotes internal compliance by making individuals eligible for an award even if the information was not brought to the Commission directly by the whistleblower. To that end, when a whistleblower originally reports the information to an entity through its internal compliance procedures, and the entity later provides the information to the Commission, the whistleblower is given credit for the submission. *See* 17 C.F.R. § 165.2(i)(3). In this situation, the whistleblower must submit the same information to the Commission within 120 days of providing the information to the entity. *Id.*

The CFTC was active in FY2016, filing 68 enforcement actions and issuing over \$1.29 billion in total monetary sanctions.¹⁵ The CFTC highlighted some of its high-impact enforcement actions in FY2016 in announcing its annual performance results. Although these enforcement actions did not come as a result of whistleblower tips, they demonstrate the kinds of actions likely to interest the CFTC:

- The CFTC charged employees of companies with misappropriating and trading using material non-public information in breach of their duties to hold such information confidential. CFTC Rule 180.1, which bans schemes or artifices to defraud or manipulate, prohibits these sorts of trades.
- The CFTC initiated a federal court action trader Igor Oystacher and his company, 3 Red Trading LLC, for alleged spoofing and manipulation across five derivatives markets.
- The CFTC ordered JP Morgan Chase Bank, N.A. to pay \$100 million for failing to disclose certain conflicts of interest to clients of its wealth management business.
- The CFTC brought two actions against Citibank NA, resulting in \$425 million in penalties, for attempted manipulation and false reporting relating to LIBOR and ISDAfix, two major interest rate benchmarks.

- The CFTC brought nine actions against registered swaps dealers, Futures Commission Merchants, and other companies for failing to accurately and fully report critical trading and market information, and had also violated recordkeeping laws.
- The CFTC brought an action against a Futures Commission Merchant alleging violations of rules relating to risk management (and related supervisory failures) and knowingly submitting inaccurate information in its Annual Chief Compliance Officer Report.
- The CFTC brought an action against a Russian bank and its affiliate, resulting in a \$5 million penalty, for executing fictitious and noncompetitive block trades in Russian Ruble/US Dollar future contracts.
- The CFTC brought an action against a natural gas trading and marketing firm for attempting to manipulate the natural gas monthly index settlement prices at four major trading hubs in Texas and elsewhere. The action resulted in a \$3.6 million penalty and a two-year trading limitation.
- The CFTC brought actions against fraudulent actors who preyed on retail customers, including the operators of illegal, off-exchange boiler rooms pushing precious metals and binary options scams.¹⁶

D. Monetary Sanctions Totaling More Than \$1 Million

The Commission determines whether an action meets the \$1,000,000 threshold by calculating any penalties, disgorgement, restitution and interest ordered to be paid in a judicial or administrative action, or a related action. *See* 7 U.S.C. § 26(a)(3)(A); 17 C.F.R. § 165.2(j)(1). The Commission also recognizes settlement as a successful resolution which may lead to recovery of an award. *See* 7 U.S.C. § 26(6). Additionally, it includes any money deposited in a disgorgement fund pursuant to the Sarbanes Oxley Act of 2002 (“SOX”) as a result of a CFTC administrative or judicial action or its settlement. *See* 7 U.S.C. § 26(a)(3)(A); 17 C.F.R. § 165.2(j)(1).

During the proposed rulemaking process, the CFTC issued a proposed rule indicating that awards would only be available when the Commission successfully brings a single judicial or administrative action amounting to \$1,000,000.¹⁷ However, in response to negative comments it received, the Commission determined in its final rule that it will aggregate two or more smaller actions that arise from the same nucleus of operative facts, in order to make whistleblower awards available in more cases.¹⁸

The Commission will also issue awards based on “related actions.” A related action is a judicial or administrative action brought by a specified entity – such as the Department of Justice, a federal agency or a self-regulatory organization – and

is based on the same original information voluntarily submitted to the Commission and led to a successful resolution of the Commission action. *See* 17 C.F.R. § 165.11.

E. CFTC Procedures for Submitting a Tip

Whistleblowers *must* submit information through a two-step process. First, the whistleblower must submit his or her information to the Commission by: (1) completing and submitting a Form TCR (“Tip, Complaint, or Referral”)

Whistleblowers can submit information to the CFTC anonymously.

electronically on the CFTC’s website or by faxing or mailing a hard copy of the Form TCR to the Commission; and (2) the whistleblower must declare under penalty of perjury at the time he or she submits the information that the information is true and correct to the best of their knowledge and belief. 17 C.F.R. § 165.3. As part of a quality submission, the whistleblower should provide detailed allegations, describe the source of their information, and include supporting materials along with the information.

Due to the risks of retaliation that individuals may encounter in the workplace and the risk of reputational harm that would interfere with future job prospects, whistleblowers may want to submit their information to the CFTC anonymously. The CFTC provides whistleblowers with the option to submit the Form TCR anonymously and to further identify for non-disclosure any documents or information that could reasonably be expected to reveal the whistleblower’s identity. As further discussed below, to collect an award and remain anonymous, the whistleblower must submit their request to the CFTC through an attorney.

F. Claiming a Whistleblower Award

The Commission will publish on its website (www.cftc.gov) a “Notice of Covered Action” when a judicial or administrative action results in monetary sanctions totaling more than \$1,000,000. The inclusion of the Notice on the CFTC’s website means that an order was entered with monetary sanctions exceeding \$1,000,000, although it does not necessarily mean that the recovery involved a whistleblower tip. The CFTC does not contact any potential claimants directly regarding the success of an enforcement action that could entitle them to an award. Potential claimants must be vigilant about monitoring the website for a Notice related to their submission, and must submit

their claims within 90 days of the posting. *See* 17 C.F.R. § 165.7.

To file a claim for a whistleblower award, the whistleblower must file and sign a Form WB–APP (Application for Award for Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act) by mailing or faxing it to the Commission within 90 days.

To collect an award anonymously, the whistleblower must collect his or her award through an attorney. The whistleblower must provide a completed, signed Form WB–APP to his or her counsel, who then submits to the Commission a copy of the Form WB–APP that does not disclose the whistleblower’s identity and is signed solely by the attorney. The attorney must retain the signed original of the whistleblower’s Form WB–APP in their records. Upon request of the Commission staff, the attorney must produce to the Commission the whistleblower’s signed original WB–APP and the whistleblower’s identity must be verified in a form and manner that is acceptable to the Commission prior to the payment of any award. 17 C.F.R. § 165.7(c)(2).

G. Determining the Amount of an Award

The Commission has authority to award a whistleblower anywhere between 10% to 30% of what has been recovered by the Commission. 7 U.S.C. § 26(b)(1); 17 C.F.R. § 165.8. In a case where the Commission issues an award to multiple whistleblowers in the same action, the Commission cannot award the whistleblowers a total award of less than 10 % or more than a total of 30 % of the sanctions imposed. For example, one whistleblower could receive an award of 25% of the collected sanctions, and another could receive an award of 5%, but they could not receive an award that would collectively total more than 30% of the recovery.

To determine the amount of an award, the Commission reviews the whistleblower’s record (Form TCR, Form WB–APP, the complaint, and other documents) and takes a number of factors into consideration.¹⁹ Factors that increase an award include the significance of the information to the ultimate success of the Commission’s action, the degree of assistance provided by the whistleblower and their legal representative, and programmatic interests of the Commission to deter violations of the CEA by issuing an award, and the whistleblower’s participation in internal compliance systems. The Commission also weighs other factors to determine whether to decrease the whistleblower’s award. These factors include the level of the whistleblower’s culpability in misconduct associated with the reported CEA violation, whether there was an unreasonable reporting delay, and whether the whistleblower interfered with internal compliance and reporting systems.

PROTECTIONS AGAINST RETALIATION

The CFTC Whistleblower Program offers two layers of protection to guard against retaliation. As a preliminary safeguard, the CFTC provides for confidential and anonymous filing. It treats the identity of all whistleblowers and the information it obtains from a whistleblower as confidential and also provides whistleblowers with the option to report information anonymously. Next, while the CFTC has declined to exercise its enforcement authority over retaliation claims,²⁰ individuals may file retaliation claims in federal district court under section 23(h)(1) of the Commodity Exchange Act. 17 C.F.R. § 165 App'x A(b)(1). Employees of the federal government, however, may only bring an action for retaliation in violation of the CEA under 5 U.S.C. § 1221, which provides for corrective action from the Merit Systems Protection Board in certain reprisal cases. *Id.*; 7 U.S.C. § 26(h)(1)(B)(i).

A. Confidential and Anonymous Filing

Dodd-Frank requires the CFTC to treat submissions as confidential and not to disclose any information that could “reasonably be expected to reveal the identity of a whistleblower.” 7 U.S.C. § 26(h)(2). There are, however, limited circumstances in which the Commission is authorized to disclose information related to a submission. For example, the Commission must disclose a whistleblower’s identity to a defendant in a public proceeding filed by the Commission or a public proceeding filed by an authority to which the Commission provides the information. *Id.* The Commission may also reveal the whistleblower’s identity to certain entities where the Commission determines that it is necessary to accomplish the purposes of the Commodity Exchange Act and to protect customers.²¹ Lastly, the Commission may make disclosures in accordance with the Privacy Act of 1974. 7 U.S.C. § 26 (h)(2); 17 C.F.R. § 165.4(a).

A whistleblower can take proactive steps to protect his or her identity by submitting the initial tip and claim for an award anonymously. An anonymous whistleblower must submit a tip in accordance with the procedures outlined above but may utilize the Form TCR to alert the Commission of which information could reasonably expect to reveal his or her identity. On the Form TCR, question D-10 provides an anonymous whistleblower an option to identify any documents or other information in the submission that the whistleblower believes could reasonably be expected to reveal his or her identity. This will alert the Commission that it may need to provide a higher level of confidentiality to certain information. As discussed above, to remain anonymous at the collection stage, an anonymous whistleblower must have an attorney collect the award on his or her behalf.

B. Filing a Retaliation Lawsuit

An individual who is retaliated against for reporting violations of the CEA may bring a private cause of action against his or her employer in a federal district court. 7 U.S.C. § 26(h)(B); 17 C.F.R. § 165 App'x A(b)(1). An individual is protected from retaliation whether or not they satisfy the requirements, procedures and conditions to qualify for an award under the Program. 17 C.F.R. § 165.2(p)(2). To fall within the scope of the CFTC’s anti-retaliation provisions an individual must submit a Form TCR to the CFTC Whistleblower Office in accordance

Individuals are protected from retaliation whether or not they qualify for an award under the CFTC program.

with the procedures outlined above and have a reasonable belief that the information they are reporting concerns a violation of the CEA or a CFTC rule. An individual is also protected for assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information. Employers may not discharge, demote, suspend, threaten, harass or discriminate against an individual for engaging in this conduct. Individuals must bring a cause of action for retaliation within two years of the date of the alleged retaliation. They may be entitled to reinstatement, back pay with interest, compensation for any special damages sustained as a result of the discharge or discrimination including litigation costs, expert witness fees, and reasonable attorney’s fees. *See* 7 U.S.C. § 26(h)(B); 17 C.F.R. § 165 App'x A(b)(1).

Employers cannot require their employees to waive the anti-retaliation protections, or any rights or remedies associated with the CFTC Whistleblower Program, as a condition of employment. In addition, no pre-dispute arbitration agreement is valid or enforceable with respect to disputes arising under the Program. 7 U.S.C. § 26(n); 17 C.F.R. § 165.19.

THINGS TO THINK ABOUT BEFORE FILING A TIP

The CFTC Whistleblower Program has been relatively quiet since it began accepting tips in 2012. The Program promises to become more active in the coming years, however. In 2015, the head of the CFTC Whistleblower Program stated that he expects the Program to issue more awards in the near future, of

increasingly larger size.²² The Director attributes the program's slow progress to the agency's smaller scope and the highly technical nature of the cases it brings.²³ As mentioned above, the CFTC issued an eight-figure award in 2016 and had its first multi-award year. Based on these signs, whistleblowers and their attorneys should continue to submit high-quality tips to the CFTC and expect that the flow of awards will continue to grow apace.

General best practices, gleaned by the author and other lawyers from submitting tips to various whistleblower programs, can provide potential CFTC whistleblowers with a helpful framework. Whistleblower offices generally respond promptly

CFTC whistleblowers should focus on violations that fit squarely within the CFTC's law-enforcement priorities.

to high-quality tips. Thus, CFTC whistleblowers should prepare strong submissions focusing on violations that fit squarely within the CFTC's law-enforcement priorities. Whistleblowers should also follow up by contacting the Office of the Whistleblower after filing and aiding the CFTC as much as possible in any ensuing investigation. This may lead to an opportunity to meet with CFTC staff during the process.

The following is a partial list of "do's and don'ts" for practitioners who seek to help their clients make a compelling case for enforcement action by the CFTC. These considerations, which should also be helpful to whistleblowers who participate in the program without counsel, are based on the final rules discussed above, the CFTC's handling of whistleblower tips to date, and the author's first-hand experience representing clients before various whistleblower offices:

- Determine whether the client has original information about violations of the Commodity Exchange Act.
- Assess the seriousness of the alleged violations by reviewing past CFTC's regulatory and enforcement actions, which are available on the CFTC's website.
- Where needed, assess the potential tip with the help of an expert in the appropriate specialty.
- Determine whether and to what extent your client's information might advance the CFTC's current enforcement agenda. The CFTC's website contains a great deal of information about Commission priorities, including enforcement actions, press releases, and task-

force reports. Speeches by CFTC commissioners and high-level officials can also shed light on the types of information that may be of greatest interest to the CFTC.

- Make sure that your client will be providing information "voluntarily" – *i.e.*, prior to receiving a request for the same information from the CFTC or another authority, entity, association or SRO.
- Prepare the client's submission to the CFTC with an emphasis on facts about which the client has "independent knowledge" as defined in the final rules above. Review the client's position, job duties, and how he or she came into possession of the information to determine whether they fall within one of the groups of individuals who are presumptively excluded from the program for lack of "independent knowledge." This would generally include attorneys, compliance personnel, and officers or directors who received the information in connection with corporate-governance responsibilities.
- If the client falls into one of the excluded categories, see if the client may nevertheless be exempt from the exclusion because he or she reported the concerns internally and has waited 120 days without action, or has reason to believe disclosure is necessary to prevent substantial injury to the entity or investors.
- Give careful consideration to whether to advise the client to report internally, keeping in mind that doing so might subject the client to retaliation but might also entitle the client to a larger award.
- Remember that your client, through you, may file a tip anonymously as long as you follow the procedures set forth in the rules for anonymous submissions. This can certainly help prevent retaliation against your client, especially if he or she is determined not to report internally for fear of retaliation.
- Use the CFTC-supplied forms and carefully follow the rules that apply to them, as a whistleblower is eligible for a reward only if he or she follows the prescribed procedures.²⁴ The importance of following the rules cannot be overemphasized.
- The CFTC is receiving an increasing number of submissions each year and it is important to make your client's submission is as compelling as possible. If the lawyers and accountants who review tips in the CFTC Whistleblower Office cannot understand your client's submission on a first read, it will not likely end up at the top of the stack. Present your facts and analysis clearly and include with the TCR form any relevant documents your client can provide. Although it is possible to supplement your submission later, you do not want to lose the opportunity for the CFTC staff to see the basis for a

successful enforcement action in the first thirty minutes of reviewing your tip, and you get only one chance to make that happen.

- Include any “independent analysis” your client can apply to other facts, even publicly available ones, in a way that will assist CFTC lawyers in an investigation. Remember that CFTC tips *can* be based on publicly available information – as long as the analysis reveals additional information that is not generally available to the public. CFTC investigators will also accept and appreciate your analysis of publicly available information if the analysis reveals further information that is not publicly available or provides insights that are not generally known.
- Do not include attorney-client privileged communications in your client’s submission to the CFTC. The Commission will not consider the information, and its receipt of such communications will in itself delay or even discourage the CFTC’s consideration of the submission as a whole.
- Make sure to consult the website of the CFTC Office of the Whistleblower,²⁵ which has useful information about how to submit a tip and claim an award. That office’s staff also answers telephone inquiries about the program and how it works. In addition, the CFTC website (www.cftc.gov)

provides comprehensive, searchable information about futures trading laws, CFTC yearly reports, and past and ongoing Commission enforcement actions that can be very helpful in preparing your tip.

- You may also want to consult with attorneys who specialize in representing whistleblowers. They will have useful advice about how best to prepare your tip, how to direct the information to appropriate CFTC staff, how best to aid the CFTC staff in a successful investigation of your information, and how to claim an award successfully.



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RESOURCES

Katz, Marshall & Banks, LLP's website contains information about how whistleblowers can fight back against unlawful retaliation and also earn financial rewards where available.

Government Resources

Commodity Futures Trading Commission (CFTC): <http://www.cftc.gov/index.htm>

Commodities Exchange Act (CEA): <http://www.cftc.gov/lawregulation/commodityexchangeact/index.htm>

CFTC Consumer Protection Resources: <http://www.cftc.gov/ConsumerProtection/Resources/index.htm>

Consumer Financial Protection Bureau: <https://www.consumerfinance.gov/>

Federal Trade Commission: <https://www.ftc.gov/>

U.S. Securities and Exchange Commission Investment Professional Database: <https://www.investor.gov/>

Municipal Securities Rulemaking Board Education Center: <http://www.msrb.org/EducationCenter.aspx>

Financial Literacy Education Commission: <https://www.mymoney.gov/Pages/default.aspx>

National Futures Association: <https://www.nfa.futures.org/NFA-investor-information/index.HTML>

Financial Industry Regulatory Authority: <http://www.finra.org/>

Occupational Safety and Health Administration (OSHA): <https://www.osha.gov/>

Department of Labor – Administrative Review Board: <https://www.dol.gov/arb/welcome.html>

Federal Communications Commission: <https://www.fcc.gov/>

Practice Guides

SEC Whistleblower Practice Guide: <http://www.kmblegal.com/resources/sec-whistleblower-practice-guide>

Cybersecurity Whistleblower Protections Guide: <http://www.kmblegal.com/sites/default/files/cybersecurity-whistleblower-protection-guide.pdf>

Whistleblower Topics

CFTC Whistleblower Incentives: <http://www.kmblegal.com/practice-areas/whistleblower-law/cftc-whistleblower-incentives>

Compliance Officer Whistleblower: <http://www.kmblegal.com/practice-areas/whistleblower-law/compliance-officer-whistleblower>

Consumer Finance Whistleblower: <http://www.kmblegal.com/practice-areas/whistleblower-law/consumer-finance-whistleblower>

Consumer Product & Food Safety Whistleblowers: <http://www.kmblegal.com/practice-areas/whistleblower-law/consumer-product-safety-whistleblowers>

Corporate & Accounting Fraud: <http://www.kmblegal.com/practice-areas/whistleblower-law/corporate-accounting-fraud>

Dodd-Frank Act Whistleblower Incentives: <http://www.kmblegal.com/practice-areas/whistleblower-law/dodd-frank-act-whistleblower-incentives>

Environmental Whistleblower: <http://www.kmblegal.com/practice-areas/whistleblower-law/environmental-whistleblower>

SEC Whistleblower Program: <http://www.kmblegal.com/practice-areas/sec-whistleblower-law>

Qui Tam Lawsuits under the False Claims Act: <http://www.kmblegal.com/practice-areas/whistleblower-law/qui-tam-whistleblower-incentives>

The Nuclear Industry Whistleblowers: <http://www.kmblegal.com/practice-areas/whistleblower-law/nuclear-environmental>

Pharmaceutical Whistleblower: <http://www.kmblegal.com/practice-areas/whistleblower-law/pharmaceutical-whistleblower>

Transportation Whistleblower: <http://www.kmblegal.com/practice-areas/whistleblower-law/transportation-whistleblower>

Sarbanes-Oxley Act: <http://www.kmblegal.com/resources/sarbanes-oxley>

Financial Industry Whistleblower Information: <http://www.kmblegal.com/resources/financial-industry-whistleblower>

The Katz, Marshall & Banks website also hosts informative blogs that can help keep whistleblowers and other conscientious employees up to date on new developments in whistleblower law and related news. See <http://www.kmblegal.com/whistleblower-law-blog/>.

To receive the free Katz, Marshall & Banks monthly e-newsletter with updates on whistleblower topics, subscribe here: <http://www.kmblegal.com/newsletter-signup>.

ENDNOTES

¹CFTC Annual Report on the Whistleblower Program and Consumer Education Initiatives (Oct. 2012).

²CFTC Annual Report on the Whistleblower Program and Consumer Education Initiatives (Oct. 2013); CFTC Annual Report on the Whistleblower Program and Consumer Education Initiatives (Oct. 2014); CFTC Annual Report on the Whistleblower Program and Consumer Education Initiatives (Oct. 2015); CFTC Annual Report on the Whistleblower Program and Consumer Education Initiatives (Nov. 2016). Reports are available at <https://www.whistleblower.gov/reports/>.

³CFTC Press Release, *CFTC Issues First Whistleblower Award* (May 20, 2014), <http://www.cftc.gov/PressRoom/PressReleases/pr6933-14>.

⁴CFTC Press Release, *CFTC to Issue Whistleblower Award of Approximately \$290,000* (Sept. 29, 2015), <http://www.cftc.gov/PressRoom/PressReleases/pr7254-15>.

⁵CFTC Press Release, *CFTC Announces Whistleblower Award of More Than \$10 Million* (Apr. 4, 2016), <http://www.cftc.gov/PressRoom/PressReleases/pr7351-16>.

⁶CFTC Press Release, *CFTC Announces Fourth Whistleblower Award* (July 26, 2016), <http://www.cftc.gov/PressRoom/PressReleases/pr7411-16>.

⁷See Stephanie Russell-Kraft, *CFTC Whistleblower Head Forecasts Big Things To Come*, Law360 (May 1, 2015), <http://www.law360.com/articles/649672/cftc-whistleblower-head-forecasts-big-things-to-come>.

⁸This Guide focuses on the CFTC Whistleblower Program, but whistleblowers and their counsel should keep in mind that Dodd-Frank established a very similar whistleblower program that is administered by the Securities and Exchange Commission (“SEC”). The SEC program is broader and more active than the CFTC’s program. The SEC began accepting submissions under its program on July 22, 2010. By the end of fiscal year 2016, the SEC Office of the Whistleblower had received 18,334 submissions. To date, the SEC has issued awards to 41 whistleblowers, with payouts totaling approximately \$149 million out of the investor protection fund established by Congress. See SEC Press Release, *SEC Announces \$7 Million Whistleblower Award* (Jan. 23, 2017), <https://www.sec.gov/news/pressrelease/2017-27.html>.

⁹Excluded individuals include those who are, or were at the time they submitted information, a member, officer or employee of the Department of Justice (“DOJ”), a registered entity, a registered futures association, a self-regulatory association (“SRO”), or a law enforcement organization. The CFTC regulations also make individuals ineligible if they are members, officers or employees of a foreign regulatory authority or law enforcement organization. 17 C.F.R. § 165.6(a). Also excluded from the program are individuals who have engaged in criminal conduct or deception in connection with their claim. See 7 U.S.C. § 26(c)(2)(B); 7 U.S.C. § 26(m).

¹⁰See Procedures for submitting original information, 17 C.F.R. § 165.3; Prerequisites to the consideration of an award, 17 C.F.R. § 165.5.

¹¹CFTC Whistleblower Incentives and Protection, 76 Fed. Reg. 53, 172, 53,175 (Aug. 25, 2011). The distinction between “independent knowledge,” as knowledge not dependent upon publicly available sources, and direct, first-hand knowledge, is consistent with the approach

courts have typically taken in interpreting similar terminology in the False Claims Act. See *United States ex rel. Fried v. West Independent Sch. Dist.*, 527 F.3d 439 (5th Cir. 2008); *United States ex rel. Paranych v. Sorgnard*, 396 F.3d 326 (3d Cir. 2005).

¹²76 Fed. Reg. at 53,173.

¹³See 76 Fed. Reg. at 53,172.

¹⁴These bodies include Congress, any other authority of the federal government, a state Attorney General or securities regulatory authority, any self-regulatory organization, futures association or the Public Company Accounting Oversight Board. 17 C.F.R. § 165.2(i)(2).

¹⁵CFTC Press Release, *CFTC Releases Annual Enforcement Results for Fiscal Year 2016* (Nov. 21, 2016), <http://www.cftc.gov/PressRoom/PressReleases/pr7488-16>.

¹⁶*Id.*

¹⁷76 Fed. Reg. at 53,172.

¹⁸*Id.*; 17 C.F.R. § 165.2 (b).

¹⁹This Guide provides only a summary of these factors. For the details of the relevant provisions, see 17 C.F.R. § 165.9.

²⁰The CFTC declined to exercise enforcement authority over retaliation claims stating that the CFTC’s Dodd-Frank Act whistleblower provision states that only the whistleblower, and not the Commission, may bring a cause of action for alleged retaliation. CFTC Adopting Release, 76 Fed. Reg. at 53, 182. In contrast, the SEC has taken the position that, “[b]ecause the anti-retaliation provisions are codified within the Exchange Act,” the SEC has enforcement authority for violations by employers who retaliate against employees for making reports in accordance with section 21F.” SEC Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34, 304 (June 13, 2011).

²¹These entities include the Department of Justice; an appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction; a registered entity; a registered futures association, or a self-regulatory organization; a state attorney general in connection with a criminal investigation, or any appropriate state department or agency, acting within the scope of its jurisdiction; or a foreign futures authority. 17 C.F.R. § 165.4(a)(2).

²²See Stephanie Russell-Kraft, *CFTC Whistleblower Head Forecasts Big Things To Come*, Law360 (May 1, 2015), <http://www.law360.com/articles/649672/cftc-whistleblower-head-forecasts-big-things-to-come>.

²³*Id.*

²⁴Additional information on the procedures for submitting a tip are available in the CFTC regulations at 17 C.F.R. § 165.7. Form TCRs (“Tip, Complaint or Referral”) and Form WB-APP (“Application for Award of Original Information”) are available online from the CFTC website.

²⁵<http://www.cftc.gov/ConsumerProtection/WhistleblowerProgram/index.htm>.