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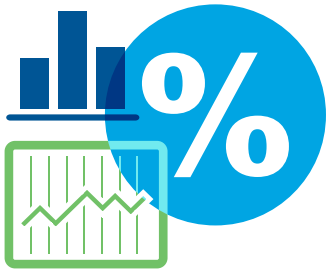

Financial Services Employment Blog

What's Good for the Goose: The CFTC Harmonizes its Whistleblower Program with that of the SEC

By Anshel Joel "AJ" Kaplan

Seyfarth Synopsis: On July 31, 2017, the unanimously approved amendments to the rules governing the U.S. Commodity Futures Trading Commission's ("CFTC") whistleblower program went into effect. In a break with its past interpretations, the CFTC's new rules align the CFTC's program more closely with the protections afforded by its counterpart program at the U.S. Security and Exchange Commission ("SEC").

In 2011, pursuant to §§748 and 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, both the CFTC and SEC established whistleblower programs. Unlike the SEC, however, when the CFTC originally promulgated regulations regarding its program, it took the position that the CFTC itself lacked the statutory authority to bring an enforcement action against an employer that violated its whistleblower program.

Interestingly, since 2011, the CFTC has handed out four awards, totaling less than $11 million, whereas the SEC has handed out 44 awards, totaling approximately $154 million.

With these new amendments, however, the CFTC has dramatically changed course. It has concluded that its "2011 interpretation failed to fully consider the statutory context of Section 23 [of the Commodity Exchange Act ("CEA")] and other [CEA] provisions."[1] In reversing course, the CFTC has reinterpreted the CEA to provide the necessary authority not only for a private right of action, but also for the CFTC to bring its own actions to enforce the protections of its whistleblower program. Other important changes engendered by the new amendments include:

- Non-waiver: Rule §165.19(a) now provides that the CFTC's whistleblower protections "may not be waived by any agreement, policy, form, or condition of employment, including by a predispute arbitration agreement."
- Protected communications: Virtually identical with the SEC's rule (§21F-17), which we discussed in detail in a prior post, Rule §165.19(b) now provides that "[n]o person may take any action to impede an individual from communicating directly with the Commission's staff about a possible violation of the Commodity Exchange Act, including by enforcing, or threatening to enforce, a confidentiality agreement or predispute arbitration agreement with respect to such communications."
- Anti-retaliation protections: Newly added Rule §165.20 provides that (i) no employer "may discharge, demote, suspend, directly or indirectly threaten or harass, or in any other manner discriminate" against an employee for providing information to the CFTC or assisting in any proceeding relating to the provision of such information, (ii) the anti-retaliation protections apply not only to individuals who report directly to the CFTC, but also to employees who first report internally and only then report to the CFTC, and (iii) the anti-retaliation protections apply regardless of if the whistleblower receives an award.

A complete set of the amended rules, along with their attendant comments, can be found here.

[1] Whistleblower Awards Process, 82 Fed. Reg. 24,487 (May 22, 2017) (to be codified at 17 C.F.R. pt. 165).

If the aggressive enforcement actions of the SEC pursuant to its now very similarly worded whistleblower program are any indication, employers should conduct a detailed review--to the extent they have not already done so in the wake of recent SEC enforcement--of their confidentiality, severance, and separation agreements to ensure they do not include waiver or confidentiality language that might invite CFTC scrutiny.

If you would like further information, please contact Seyfarth attorney, Anshel Joel "AJ" Kaplan at akaplan@seyfarth.com.

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