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. The number of tips has generally risen each year since the Program’s inception, with 138 tips in fiscal year (FY) 2013, 227 tips in FY2014, 232 tips in FY2015, 273 tips in FY2016, 465 tips in FY2017, 760 tips in FY2018, 455 tips in FY2019, and 1,030 tips in FY2020.

In July 2018, the Commission issued its largest award to date, with a payout of approximately $30 million.

In the seven years that the program has been in place, the CFTC has paid twenty-five awards to whistleblowers in connection with these tips. In May 2014, the CFTC made its first payout, totaling $240,000. In September 2015, the Commission awarded a second whistleblower a payout of approximately $290,000. In April 2016, the Commission issued its third whistleblower award, with a payout of more than $10 million. In July 2016, the Commission awarded a fourth whistleblower approximately $50,000. After issuing no awards during 2017 and the first half of 2018, the Commission issued five whistleblower awards in a three-week span totaling more than $75 million, far surpassing the $10.6 million in awards issued between 2014 and 2016. In July 2018, the Commission issued its fifth and largest single whistleblower award to date of approximately $30 million. Later in July 2018, the Commission made its first payout to a foreign whistleblower, totaling over $70,000. In August 2018, the CFTC simultaneously announced three whistleblower awards totaling more than $45 million. In March 2019, the CFTC awarded more than $2 million to a whistleblower who submitted independent analysis of market data. In May 2019, the CFTC issued an award of approximately $1.5 million. In late June 2019, the CFTC awarded a whistleblower approximately $2.5 million, an award the Commission reduced due to the whistleblower’s unreasonable delay in reporting violations. A week later, on July 1, 2019, the CFTC issued an approximately $2 million joint award to two whistleblowers. On September 27, 2019, the CFTC awarded a whistleblower approximately $7 million. In October 2019, the CFTC awarded an undisclosed amount to a whistleblower who provided sufficient but incomplete assistance. On December 19, 2019, the CFTC awarded more than $1 million to a whistleblower. Despite the COVID-19 pandemic, whistleblower awards continued throughout 2020:

- On April 20, 2020, the CFTC awarded a whistleblower an undisclosed amount.
- In early May 2020, the CFTC awarded more than $2 million to four whistleblowers.
- In early June 2020, the CFTC awarded more than $6 million to a single whistleblower and an undisclosed amount to another whistleblower.
- In late July 2020, the CFTC announced two sets of awards, more than $1 million split between two whistleblowers and about $9 million to another whistleblower.
- On August 28, 2020, the CFTC awarded an undisclosed amount to a whistleblower for reporting an ongoing fraud.
- In early September 2020, the CFTC awarded an undisclosed amount to two whistleblowers, one domestic and one foreign.
- The CFTC made its most recent award on September 28, 2020 in the amount of $250,000, a reduced award due to a delay in reporting.

With more than $117 million set aside in a special whistleblower fund, the Commission clearly expects to make more, and potentially more substantial, awards going forward.

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...
To be eligible for an award, whistleblowers must voluntarily provide original information.

The CFTC 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. The CFTC Whistleblower Program was designed to enhance the Commission’s enforcement efforts by incentivizing insiders to come forward with information regarding violations of the trading of commodity futures.

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. 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. 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.

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.

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. 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. The whistleblower may gain independent knowledge from their experiences, communications, or observations in their personal circumstances.
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. 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.

By including this in the definition of “independent knowledge” the CFTC recognizes that there are circumstances where individuals can review publicly 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. The exclusions can be divided into three general categories.

One set of exclusions disqualifies individuals that 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.

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 not to 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.”
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.\textsuperscript{41}

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.\textsuperscript{42}

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.\textsuperscript{43} 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.\textsuperscript{44} 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;\textsuperscript{45} or
- The whistleblower provides original information about conduct that was already under investigation by the Commission, or another specified regulatory body, and the submission significantly contributes to the success of the action.\textsuperscript{46}

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.\textsuperscript{47} In this situation, the whistleblower must submit the same information to the Commission within 180 days of providing the information to the entity.\textsuperscript{48}

The CFTC was active in FY2020, filing a record-breaking 113 enforcement actions and issuing over $1.3 billion in total monetary sanctions, the fourth highest total in CFTC history. The CFTC took enforcement actions against disruptive trade practices, such as commodities fraud, manipulative behavior, spoofing, and fraud related to the COVID-19 pandemic, with a particular focus on retail fraud. The CFTC filed 16 actions in parallel with criminal authorities, matching the record set in FY2019, and joined 30 state regulators in an enforcement action against a precious metals dealer who solicited more than $185 million in investor funds, primarily from the retirement accounts of elderly individuals.\textsuperscript{49}

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.\textsuperscript{50} The Commission also recognizes settlement as a successful resolution which may lead to recovery of an award.\textsuperscript{51} 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.\textsuperscript{52}

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 more than $1,000,000.\textsuperscript{53} 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.\textsuperscript{54}

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 or state 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.\textsuperscript{55}

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”)
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. As part of a quality submission, the whistleblower should provide detailed allegations, describe the source of the 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 (“Notice”) 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. A whistleblower seeking an award based on a related action must submit a claim within 90 days of the final judgment in the related action; however, if the final judgment in the related action is issued before the Notice, the claimant may simultaneously submit a claim for both the related action and the covered action within 90 days of the Notice.

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 or submitting it through the Commission’s website for a Notice related to their submission, and must 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.

Whistleblowers can submit information to the CFTC anonymously.

Upon completion of the review, the Claims Review Staff will issue a Preliminary Determination of whether the claim should be granted and, if so, the proposed award percentage. A copy of the Preliminary Determination will be provided to the claimant.
The claimant has thirty days to request that the Whistleblower Office make available for review the materials relied upon by the Claims Review Staff in making its Preliminary Determination. If the claimant decides to contest the Preliminary Determination, he or she must submit a written response and supporting materials setting forth the grounds for the objection to either the denial of an award or the proposed amount of an award. The claimant must submit the written response within 60 days from the date of the Preliminary Determination or, if the claimant requested to review the materials used to make the Preliminary Determination, within 60 days of the Whistleblower Office making the materials available for the claimant’s review.

G. Determining the Amount of an Award

The Commission has authority to award a whistleblower anywhere between 10% and 30% of what has been recovered by the Commission. 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. 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 his or her legal representative, 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 multiple 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, individuals may file retaliation claims in federal district court under section 23(h)(1) of the Commodity Exchange Act. 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. In addition, in May 2017 the CFTC announced amendments to its rules to authorize the CFTC to bring enforcement actions against an employer for retaliation against a whistleblower. The new rule, codified at 17 C.F.R. § 165.20(b), went into effect on July 31, 2017. To date the CFTC has not announced any such enforcement actions.
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.” 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. 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. Lastly, the Commission may make disclosures in accordance with the Privacy Act of 1974.

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 be expected 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. An individual is protected from retaliation whether or not they satisfy the requirements, procedures and conditions to qualify for an award under the Program. 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 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.

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, and no confidentiality agreement can impede a whistleblower from communicating directly with the CFTC.

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

THINGS TO THINK ABOUT BEFORE FILING A TIP

Although the CFTC Whistleblower Program has generally been less active in issuing awards than the SEC Whistleblower Program, the large awards issued in recent years suggest that trend may be reversed. Because the Program is still relatively new, whistleblowers and their attorneys have had few indications about the how to best prepare a successful CFTC whistleblower tip. In 2018, the Director of the CFTC’s Division of Enforcement declared that whistleblowers “added significant value” to the CFTC’s enforcement efforts, and that he expected the trend of large awards to continue as the volume of quality whistleblower tips increases. In 2019, the CFTC began publishing alerts on trending topics on its website in order to inform the public about areas of particular interest to the Division of Enforcement and continued to do so in 2020, especially in light of the unique risks posed by the COVID-19 pandemic. 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 authors and other lawyers from submitting tips to various whistleblower programs, can provide potential CFTC whistleblowers with a helpful framework. Whistleblower offices generally respond promptly 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 authors’ first-hand experiences 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. 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 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 Form TCR 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, 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.
Lisa Banks is a partner with Katz, Marshall & Banks, LLP, a whistleblower and employment law firm based in Washington, D.C. She specializes in the representation of individuals in whistleblower retaliation cases, SEC and CFTC whistleblower tips, and employment discrimination and sexual harassment claims. Nicolas E. O’Connor, an associate at the firm, assisted in the preparation of this guide.

Michael A. Filoromo is a partner with Katz, Marshall & Banks, LLP. He regularly represents clients in claims brought under the Sarbanes-Oxley corporate whistleblower protections, the False Claims Act anti-retaliation provisions, and the anti-discrimination and retaliation protections of Title VII of the Civil Rights Act and corresponding state laws.

Katz, Marshall & Banks, LLP’s website at www.kmblegal.com contains information about how whistleblowers can fight back against unlawful retaliation and also earn financial rewards where available. There are “Know Your Rights” and “Practice Area” articles in the website’s Whistleblower Law section that explain both the law and practicalities of whistleblowing as they play out in a wide range of industries and professions.

Whistleblower topics include Corporate and Accounting Fraud, the SEC Whistleblower Program, Qui Tam Lawsuits under the False Claims Act, the IRS Whistleblower Program, Compliance Officer Whistleblowers, Consumer Product Safety Whistleblowers, and Whistleblowers in the Consumer Finance, Pharmaceutical, Food Safety, and Nuclear industries, to name just a few. See http://www.kmblegal.com/practice-areas/whistleblower-law/.

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. (http://www.kmblegal.com/whistleblower-law-blog/).
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**
Consumer Financial Protection Bureau: [https://www.consumerfinance.gov/](https://www.consumerfinance.gov/)
Federal Trade Commission: [https://www.ftc.gov/](https://www.ftc.gov/)
U.S. Securities and Exchange Commission Investment Professional Database: [https://www.investor.gov/](https://www.investor.gov/)
Municipal Securities Rulemaking Board Education Center: [http://www.msrb.org/EducationCenter.aspx](http://www.msrb.org/EducationCenter.aspx)
Financial Literacy Education Commission: [https://www.mymoney.gov/Pages/default.aspx](https://www.mymoney.gov/Pages/default.aspx)
National Futures Association: [https://www.nfa.futures.org/NFA-investor-information/index.HTML](https://www.nfa.futures.org/NFA-investor-information/index.HTML)
Occupational Safety and Health Administration (OSHA): [https://www.osha.gov/](https://www.osha.gov/)
Department of Labor – Administrative Review Board: [https://www.dol.gov/arb/welcome.html](https://www.dol.gov/arb/welcome.html)
Federal Communications Commission: [https://www.fcc.gov/](https://www.fcc.gov/)

**Practice Guides**

**Whistleblower Topics**


ENDNOTES


24This 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 106 whistleblowers, with payouts totaling approximately $562 million out of the investor protection fund established by Congress. See Division of Enforcement, 2020 Annual Report (Nov. 2, 2020), https://www.sec.gov/files/enforcement-annual-report-2020.pdf.

25See 7 U.S.C. § 26(b)(1); 17 C.F.R. § 165.5.

26Excluded 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); See also 7 U.S.C. § 26(c)(2); 17 C.F.R. § 165.6.

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

See 7 U.S.C. § 26(c)(2); 17 C.F.R. § 165.6.

 strives for Procedures for submitting original information, 17 C.F.R. § 165.3; Prerequisites to the consideration of an award, 17 C.F.R. § 165.5. This Guide provides only a summary of these factors. For the details of the relevant provisions, see 17 C.F.R. § 165.9.

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These 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)(1).

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Id.; 17 C.F.R. § 165.2(b).

See 17 C.F.R. § 165.11.

17 C.F.R. § 165.3.

See 17 C.F.R. § 165.7(b).

17 C.F.R. § 165.7(c)(2).

17 C.F.R. § 165.7(e).

17 C.F.R. § 165.7(f).

17 C.F.R. § 165.7(g).

17 C.F.R. § 165.7(h).

17 C.F.R. § 165.7(i).

17 C.F.R. § 165.7(j).

17 C.F.R. § 165.7(l).

7 U.S.C. § 26(f); 17 C.F.R. § 165.13(a).

7 U.S.C. § 26(b)(1); 17 C.F.R. § 165.8.

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

17 C.F.R. § 165 App’x A(b)(1).


Id.

These 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).

7 U.S.C. § 26 (h)(2); 17 C.F.R. § 165.4(a).
76 7 U.S.C. § 26(h) (B); 17 C.F.R. § 165 App’x A(b)(1).

77 17 C.F.R. §§ 165.2(p)(2), 165.20(c).


79 7 U.S.C. § 26(n); 17 C.F.R. § 165.19.


82 Additional 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.

APPENDIX A
CFTC Whistleblower Awards Through March 31, 2021

Each award is issued through an “Order Determining Whistleblower Award Claim.” The CFTC also issues press releases announcing most but not all awards. The first number in the second column in the table below refers to the Release number that appears on all press releases. The second, hyphenated number refers to the CFTC Whistleblower Award Determination number that appears at the top left of each Order.

Readers can find all CFTC press releases listed by date and number on at https://www.whistleblower.gov/orders. Most press releases announcing whistleblower awards have links to the accompanying order at the upper right of the page. The orders granting and denying award applications are also listed by date and number at the same web address.

The CFTC heavily redacts its Orders Determining Whistleblower Award Claims to eliminate any information that would potentially disclose a whistleblower’s identity. Not only do redacted orders on the website lack the names of the whistleblower and the sanctioned entity, but, following the practice of the SEC, also the percentage of proceeds awarded and occasionally the total amounts of the award. The reasoning behind these redactions is that disclosing these numbers could make it possible to link an award to a Covered Action, which would in turn show which actions rested on whistleblower tips and possibly encourage employers, the media, or others to search for the identity of the whistleblower.

<table>
<thead>
<tr>
<th>Date</th>
<th>Release Nos./ Application or Award Nos.</th>
<th>Award Total</th>
<th>Allocation Among Claimants</th>
<th>Notes from CFTC Press Releases and Orders Determining Awards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sept. 28, 2020</td>
<td>8262-20; 20-WB-11</td>
<td>$250,000</td>
<td>All to single claimant</td>
<td>The CFTC reduced this award because the awardee delayed in reporting violations.</td>
</tr>
<tr>
<td>Sept. 4, 2020</td>
<td>8239-20; 20-WB-10</td>
<td>Undisclosed</td>
<td>Unknown shares to two claimants</td>
<td>The CFTC allocated this award in unknown shares to a domestic whistleblower and a foreign whistleblower.</td>
</tr>
<tr>
<td>August 28, 2020</td>
<td>8233-20; 20-WB-09</td>
<td>Undisclosed</td>
<td>All to single claimant</td>
<td>According to the CFTC Whistleblower Office Director, this awardee’s disclosures contributed to stopping a fraud that “harmed main street investors.”</td>
</tr>
<tr>
<td>July 24, 2020</td>
<td>8213-20; 20-WB-08</td>
<td>&gt;$9 million</td>
<td>All to single claimant</td>
<td>In the press release, the CFTC Director of Enforcement indicated that the awardee suffered retaliation as a result of whistleblowing activity, a factor that weighs in favor of increasing the award percentage.</td>
</tr>
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</tr>
<tr>
<td>July 20, 2020</td>
<td>8208-20; 20-WB-07</td>
<td>$&gt;1 million</td>
<td>Unknown shares to two claimants</td>
<td>The CFTC explained that Claimant 1 had requested that the CFTC reconsider his/her award and the award granted to Claimant 2, arguing that Claimant 2 had participated in the scheme that was the subject of the enforcement action. The CFTC concluded that Claimant 1’s award was appropriate and that, despite Claimant 2’s participation in the scheme, Claimant 2 provided information which “substantially contributed” to the enforcement action and that she provided such information voluntarily since an earlier investigatory request to the company did not interview Claimant 2 and did not ask for documents in Claimant 2’s possession.</td>
</tr>
<tr>
<td>June 12, 2020</td>
<td>No press release; 20-WB-06</td>
<td>Undisclosed</td>
<td>All to single claimant</td>
<td>None</td>
</tr>
<tr>
<td>June 5, 2020</td>
<td>8175-20; 20-WB-05</td>
<td>$&gt;6 million</td>
<td>All to single claimant</td>
<td>None</td>
</tr>
<tr>
<td>May 1, 2020</td>
<td>8159-20; 20-WB-04</td>
<td>$&gt;2 million</td>
<td>Plurality share to one claimant; equal shares to three other claimants</td>
<td>This was the first time the CFTC made an award to multiple claimants stemming from the same enforcement action. (Note that the July 1, 2019 award was to two whistleblowers who had submitted their tip and award application jointly.) The justification for the “slightly higher award” for one of the four whistleblowers was redacted from the award order.</td>
</tr>
<tr>
<td>April 20, 2020</td>
<td>No press release; 20-WB-03</td>
<td>Undisclosed</td>
<td>All to single claimant</td>
<td>None</td>
</tr>
<tr>
<td>December 19, 2019</td>
<td>8098-19; 20-WB-02</td>
<td>$&gt;1 million</td>
<td>All to single claimant</td>
<td>The successful claimant initially provided information to a different regulator before approaching the CFTC. Notably, her employer’s counsel acted as her representative in submitting information to that other regulator before she herself submitted the same information to the CFTC. The CFTC did not consider this reporting to the other regulator “mandatory” and determined she was the original source of the information.</td>
</tr>
<tr>
<td>Oct. 24, 2019</td>
<td>No press release; 20-WB-01</td>
<td>Undisclosed</td>
<td>All to single claimant</td>
<td>While the awardee provided account statements, text records, and checks, and participated in telephonic interviews, her refusal to provide a written declaration – a decision she made to avoid retaliation and jeopardizing certain quarterly payments – resulted in the CFTC declining to award her the statutory maximum of 30%. Another claimant’s application was denied.</td>
</tr>
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<tr>
<td>Sept. 27, 2019</td>
<td>8022-19; 19-WB-05</td>
<td>$7 million</td>
<td>All to single claimant</td>
<td>The CFTC lowered the award percentage because it ultimately brought charges that differed from the whistleblower’s allegations.</td>
</tr>
<tr>
<td>July 1, 2019</td>
<td>7953-19; 19-WB-04</td>
<td>$2 million</td>
<td>Divided evenly between two “joint whistleblowers”</td>
<td>This was the first time the CFTC made an award to two whistleblowers who had jointly submitted a tip and award application. The SEC called the awardees “two model whistleblowers” and denied an award to another applicant who had filed a TCR a year after the CFTC’s investigation began.</td>
</tr>
<tr>
<td>June 24, 2019</td>
<td>7943-19; 19-WB-03</td>
<td>$2.5 million</td>
<td>All to single claimant</td>
<td>The claimant’s delay in reporting wrongdoing resulted in a lower percentage award than otherwise would have been merited.</td>
</tr>
<tr>
<td>May 6, 2019</td>
<td>7924-19; 19-WB-02</td>
<td>$1.5 million</td>
<td>All to single claimant</td>
<td>The awardee’s information was “directly incorporated into strategy involving witness interviews, and . . . saved [CFTC] resources through his/her explanation of a complex scheme.” The order noted that whistleblower attempted to first report concerns internally, “which also weights in favor of a high-percentage award.” Information provided by four other claimants was not useful to the investigation, so their applications were denied.</td>
</tr>
<tr>
<td>March 4, 2019</td>
<td>7882-19; 19-WB-01</td>
<td>&gt;$2 million</td>
<td>All to single claimant</td>
<td>The order noted that of at least five claimants, one withdrew her application, three others failed to timely request reconsideration of preliminary orders denying an award.</td>
</tr>
<tr>
<td>Aug. 2, 2018</td>
<td>7767-18; 18-WB-3; 18-WB-04; 18-WB-05</td>
<td>&gt;$45 million</td>
<td>All to single claimant</td>
<td>Although the combined award was large, the awardee contested the percentage awarded, arguing that the information provided led to the start of an investigation. The CFTC denied a larger percentage because the awardee’s information was “only tangentially related to the claims.” Rather, the information merely “raised a red flag and pointed [the CFTC] in the right direction.” Another claimant’s application was denied because she submitted “random filings” with the US Patent and Trademark Office, a Wall Street Journal article, and correspondences with the Whistleblower’s Office, and none of these submissions provided justifications for an award. The CFTC paid the awardee a total of $45 million in undisclosed allocations across three award determinations.</td>
</tr>
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<tr>
<td>July 12, 2018</td>
<td>7755-18; 18-WB-01</td>
<td>$70,000</td>
<td>All to single claimant</td>
<td>This was the first award granted to a foreign whistleblower. The awardee, one of four applicants, did not submit a Form TCR (due to being unaware of CFTC procedures) but still initiated contact with the CFTC. The CFTC determined that the whistleblower’s participation as a junior-level employee in the violations did not preclude an award.</td>
</tr>
<tr>
<td>July 12, 2018</td>
<td>7753-18; 18-WB-02</td>
<td>$30 million</td>
<td>All to single claimant</td>
<td>The CFTC defined proceeds “collected by the Commission” to include both monetary sanctions imposed by the CFTC and sanctions imposed by other agencies which were “ordered to be paid” to the CFTC. There were four other claimants whose applications were denied.</td>
</tr>
<tr>
<td>July 19, 2016</td>
<td>7411-16; 16-WB-08</td>
<td>$50,000</td>
<td>All to single claimant</td>
<td>This was the first known award to a company outsider, as the CFTC noted that “[t]he applicant was never an agent, employee, officer, director, trustee, or partner” of the offending company.</td>
</tr>
<tr>
<td>March 28, 2016</td>
<td>7351-16; 16-WB-06</td>
<td>&gt;$10 million</td>
<td>All to single claimant</td>
<td>The CFTC noted that “the size of the award should serve to incentivize future whistleblowers . . . while not creating perverse incentives possible as a result of oversize awards.” This is language often repeated in subsequent awards. The awardee’s lack of involvement in violations and prompt reporting contributed to the size of the award granted.</td>
</tr>
<tr>
<td>Sept. 25, 2015</td>
<td>7254-15; not listed</td>
<td>$290,000</td>
<td>All to single claimant</td>
<td>The CFTC credited only the information provided by one of two award applicants as the reason why an enforcement action was brought. The CFTC stated that the second applicant’s information did not lead to an action, and did not contribute to the investigation already under way.</td>
</tr>
<tr>
<td>May 15, 2014</td>
<td>6933-14; 2014-02-19-01</td>
<td>$240,000</td>
<td>All to single claimant</td>
<td>This was the first CFTC whistleblower award; claimant provided “specific, timely and credible information.”</td>
</tr>
</tbody>
</table>