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CFTC Proposes New Enforcement Authority and Other Amendments in Its Whistleblower Program

Mirroring existing SEC authority, the CFTC's proposal would allow it to impose sanctions for retaliation against whistleblowers.

On August 30, 2016, the US Commodity Futures Trading Commission (CFTC) published proposed amendments to its whistleblower program (the CFTC Proposal).¹ Drawing from the CFTC's experience in administering its whistleblower program (the CFTC Program) over the past five years, as well as strides the US Securities and Exchange Commission (SEC) has made in administering its analogous program (the SEC Program), the CFTC Proposal would enhance the whistleblower review process and adopt enforcement authority for whistleblower retaliation. The CFTC has invited comments on the proposed amendments to be submitted on or before September 29, 2016.

This *Client Alert* (i) provides a brief overview of the CFTC Program in its current form and situates it in a broader landscape of whistleblowing programs, (ii) summarizes key points of the CFTC Proposal and (iii) discusses the impact of the proposed amendments on CFTC-registered entities and market participants.

Background on the CFTC Whistleblower Program

The CFTC Program, which was created by Section 748 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act)² and Part 165 of the CFTC regulations promulgated thereunder,³ provides for payment of monetary awards to eligible individuals (*i.e.*, whistleblowers) who voluntarily provide the CFTC with original information about violations of the Commodity Exchange Act (CEA) that leads to a successful enforcement action resulting in monetary sanctions exceeding US\$1 million (a Covered Action). If the requirements are met, the whistleblower may receive an award of 10-30% of the amount of total monetary sanctions collected in the Covered Action or related actions by other authorities (Related Actions).⁴ Awards are paid from a special fund set aside for this purpose (the CFTC Customer Protection Fund).

Eligible Persons

To qualify for an award, the whistleblower must be a natural person (*i.e.*, not an entity).⁵ Certain personnel of government agencies and self-regulatory organizations (SROs) are ineligible to receive an award, as are persons who willfully provide false information and persons who have been convicted of a criminal violation related to the matter at issue.⁶

Original Information

A whistleblower must provide original information that is based on the whistleblower's independent knowledge or independent analysis, rather than on information from corporate filings or other sources

generally available to the public. Importantly, with limited exceptions, the whistleblower’s tip cannot be based on information learned from (i) privileged attorney-client communications, (ii) a company’s processes for identifying possible violations of law or (iii) the whistleblower’s own compliance or internal audit duties.⁷ The CFTC has stated that a whistleblower can otherwise be “anyone from a corporate officer or insider, to a trader or market observer, to an investor or fraud victim.”⁸

Internal Reporting Programs

A whistleblower is not required to report the underlying information internally to her or his employer in order to be eligible for a whistleblower award. Nonetheless, the CFTC Program incorporates certain incentives intended to encourage internal reporting by potential whistleblowers, including (i) counting an internal report as the whistleblowing date for purposes of priority, (ii) allowing the whistleblower to receive credit for information that arises as a result of an employer’s internal investigation and (iii) permitting the increase of a whistleblower award based on the whistleblower’s decision to report internally.

Whistleblower Protections

The CFTC protects whistleblowers’ identities by anonymizing its disclosures about whistleblower awards.⁹ Importantly, the Dodd-Frank Act also protects a whistleblower from retaliation by her or his employer, regardless of whether the whistleblower ultimately receives an award from the CFTC.¹⁰ When promulgating the original rules for the CFTC Program in 2011, the CFTC determined that it lacked statutory authority to subject an entity that retaliates against a whistleblower to an enforcement action. Instead, the CFTC interpreted the employer retaliation provisions as a private right of action for whistleblowers.¹¹

Rise in CFTC Whistleblower Activity

On April 4, 2016, the CFTC announced its third and largest-ever whistleblower award in the amount of more than US\$10 million,¹² an amount that was at least 18 times larger than the CFTC’s first two whistleblower awards combined.¹³ The CFTC recently announced on July 26, 2016 that it issued its fourth whistleblower award of approximately US\$50,000.¹⁴

The following table illustrates the number of whistleblower tips received by the CFTC’s Whistleblower Office (WBO) in fiscal years 2012 through 2015.¹⁵

	Number of Whistleblower Tips Received	Percentage Change from Previous Year
Fiscal Year		
2012	58	–
2013	138	+ 137.9%
2014	227	+ 64.5%
2015	232	+ 2.2%

Despite the slowed growth of whistleblower tips in FY2015, the CFTC’s recent award of more than US\$10 million will likely incentivize future whistleblowers to come forward in significantly greater numbers.

Comparison to SEC Program

Compared to the CFTC Program, the SEC Program, which went into effect in its current form in August 2011, has been far more active, both in the number of tips and in the number and size of awards. As of August 30, 2016, the SEC Program has issued more than US\$107 million in awards to 33 whistleblowers,¹⁶ including large awards of more than US\$30 million and more than US\$22 million to two individual whistleblowers in September 2014 and August 2016, respectively.¹⁷ The SEC Program has received as many as 3,923 whistleblower tips in a single year, with a total of 14,116 tips between fiscal years 2011 and 2015.¹⁸ The CFTC Program is now poised to begin closing the gap.

Recently Effective UK Whistleblower Rules

US financial market regulators are not alone in their focus on whistleblower programs. Across the pond, the UK's Financial Conduct Authority (FCA) and the Bank of England Prudential Regulatory Authority (PRA) published position papers in October 2015 proposing rules related to whistleblowing (the UK Whistleblower Rules), which (i) directly apply to deposit takers (e.g., banks, building societies, credit unions) with over £250 million in assets and to insurers subject to the Solvency II directive, and (ii) serve as non-binding guidance for all other firms supervised by the FCA and PRA.¹⁹ In publishing the UK Whistleblower Rules, the FCA noted that it had taken steps in recent years to encourage whistleblowers to come forward, resulting in the FCA receiving 1,340 whistleblowing tips in financial year 2014/15 alone, a 28% increase over the previous financial year.²⁰

The UK Whistleblower Rules, which went into effect on September 7, 2016, require that covered firms, among other requirements:

- Appoint a senior manager as their whistleblowers' champion
- Implement internal whistleblowing arrangements to handle disclosures
- Include language in post-employment agreements disclosing that workers have a legal right to engage in whistleblowing
- Inform UK-based employees about the FCA and PRA whistleblowing programs
- Present a report on whistleblowers to their boards at least annually
- Inform the FCA if they lose an employment tribunal involving a whistleblower

The CFTC's proposed enhancements to its own whistleblowing program arrive as these new UK rules go into effect.

Proposed Amendments to the CFTC Program

I. Anti-Retaliation Enforcement Authority

The proposed amendment with the most immediate potential impact is the CFTC's adoption of authority to enforce the anti-retaliation provisions in the CEA and related regulations with respect to the CFTC Program.

As noted above, the CFTC previously took the view that it lacked "the statutory authority to conclude that any entity that retaliates against a whistleblower" could be subject to a CFTC enforcement action "as a separate and independent violation of the CEA."²¹ Now, citing inconsistency with (i) Section 23(h)(1)(A) of

the CEA, (ii) the CFTC's broad rulemaking authority under Section 23(i) of the CEA and (iii) the CFTC's general enforcement authority under Sections 6(c)-(d), 6b and 6c of the CEA, the CFTC proposes to set aside its previous interpretation and amend the CFTC Program to provide for CFTC enforcement of the anti-retaliation provisions.

Specifically, the CFTC has proposed the following amendments:²²

- Adding a new rule to implement its enforcement authority under Section 23 of the CEA and Part 165²³
- Prohibiting enforcement of confidentiality and pre-dispute arbitration clauses with respect to actions by potential whistleblowers in any pre-employment, employment or post-employment agreements²⁴
- Prohibiting employers from threatening, harassing or retaliating against individuals who participate in the CFTC Program, irrespective of whether such individuals ultimately qualify for a whistleblower award or whether they report internally before providing information to the CFTC²⁵

The proposed reversal of the CFTC's interpretation of its anti-retaliation authority was influenced by the fact that the SEC has maintained, based on nearly identical statutory authority, that it has authority to initiate enforcement actions for violations of the anti-retaliation provisions in the SEC Program. This discrepancy between the two programs became more noticeable in the past year and a half, as the SEC has used its authority in recent enforcement actions. On April 28, 2015, the SEC imposed its first anti-retaliation penalty, fining a company US\$600,000 for engaging in a series of retaliatory actions against a whistleblower, including (i) removing the whistleblower from the whistleblower's position, (ii) tasking the whistleblower with investigating the very conduct the whistleblower reported to the SEC, (iii) changing the whistleblower's job function and (iv) stripping the whistleblower of supervisory responsibilities.²⁶ More recently, the SEC announced on August 16, 2016 that a health insurance provider agreed to pay a US\$340,000 penalty to settle charges that it had employed severance agreements requiring outgoing employees to waive their ability to obtain monetary awards from the SEC Program.²⁷ One week earlier, on August 10, 2016, the SEC announced a US\$265,000 penalty on an employer for using severance agreements that required outgoing employees to waive their rights to monetary recovery if they file a charge or complaint with the SEC or other federal agencies.²⁸

If the CFTC adopts the proposed enforcement authority, it may move quickly to investigate or take action against perceived retaliatory conduct or potentially obstructive agreements affecting whistleblowers participating in the CFTC Program.

II. Broad Scope, Broad Incentives

In addition to adopting anti-retaliation enforcement authority, the proposed amendments would clarify two aspects of the scope and reach of the CFTC Program.

First, the CFTC Proposal would amend CFTC Rule 165.5 to clarify that a whistleblower may receive an award with respect to (i) a Covered Action, (ii) a Related Action or (iii) both.²⁹ As noted above, the CFTC Program has always contemplated that an award may be based on Related Actions by certain other authorities, as well as a successful CFTC enforcement action. This amendment would clarify that a whistleblower award may be based on the total penalties collected in both types of actions.³⁰ This further enhances the potential awards — and thus the incentives — for CFTC whistleblowers.³¹

Second, the proposed amendments would clarify that the universe of potential whistleblowers includes those who provide the CFTC with original information without actually being the original source of the information.³² This proposed clarification may support the CFTC's payment of an award to a whistleblower

who has never been employed by the entity at issue in the whistleblower tip (*i.e.*, an external whistleblower).³³ The CFTC Proposal would also amend the definition of “original source” to extend the timeframe during which a whistleblower may submit a tip from 120 days to 180 days after previously providing the same information to other governmental authorities, registered entities or an employer.³⁴

III. Administrative Changes

In addition to adopting anti-retaliation enforcement authority and clarifying the scope of the CFTC Program, the CFTC Proposal would make several additional changes to the administration of the program. We provide a brief summary of these changes below.

Review of Whistleblower Award Claims

Similar to the award review process established under the SEC’s whistleblower rules, the CFTC Proposal would replace the CFTC’s Whistleblower Award Determination Panel with an award review process handled by a Claims Review Staff designated by the Director of the Division of Enforcement (the Director of Enforcement) in consultation with the Executive Director of the CFTC.³⁵ The proposed amendments would (i) allow the Claims Review Staff to request additional information regarding the whistleblower’s eligibility for an award³⁶ and (ii) allow a whistleblower to contest an award determination.³⁷ The CFTC would make final determinations on the recommendation of the Claims Review Staff.³⁸ The CFTC Proposal also provides for streamlined processing of facially ineligible claims³⁹ and addresses certain filing deadlines⁴⁰ and modes of submission.⁴¹

In addition, consistent with the proposed amendments permitting whistleblowers to receive awards based on monetary sanctions collected both in Covered Actions and in Related Actions, the CFTC Proposal would permit certain information from Related Actions to be included in the record for whistleblower award claims.⁴² The CFTC Proposal would also clarify that the record on appeal shall not include any pre-decisional or internal deliberative process materials that are prepared to assist the CFTC or the Claims Review Staff in deciding a whistleblower’s claim.⁴³

The CFTC has stated that the impetus behind these amendments is the agency’s desire to provide greater transparency in the whistleblower award evaluation and review process, while “enhanc[ing] the expeditious and fair administration” of the CFTC Program.⁴⁴

Authority to Administer the CFTC Program

The CFTC has proposed to assign overall responsibility for (i) administration of the CFTC Program to the Director of Enforcement; (ii) issuance of Preliminary Determinations and Proposed Final Determinations to the Claims Review Staff; and (iii) issuance of Proposed Final Dispositions to the WBO within the Division of Enforcement.⁴⁵ The CFTC Proposal would also (x) further clarify that no member of the Claims Review Staff could have had any direct involvement in the underlying enforcement action⁴⁶ and (y) allow the CFTC to exercise discretion to waive procedural rules in extraordinary circumstances.⁴⁷

The proposed allocation of responsibility for administering the CFTC Program to the Director of Enforcement comports with an earlier structural change within the agency. While the CFTC initially established its WBO to operate under the Office of the Executive Director,⁴⁸ it has been situated within the Division of Enforcement since 2013.⁴⁹

Whistleblower Identifying Information

Further, in an effort to facilitate the administration of the CFTC Program, as well as investigations and actions by other agencies and authorities eligible to receive whistleblower identifying information under Section 23(h)(2)(C) of the CEA⁵⁰ and CFTC Rule 165.4(a),⁵¹ the CFTC has proposed to delegate authority

to the Director of Enforcement to act on the CFTC's behalf to disclose certain whistleblower identifying information. The CFTC noted in the proposal that (i) the Director of Enforcement's disclosure of such information should be consistent with, and as deemed necessary to accomplish, the goals of the CFTC Program, and (ii) any agency or authority receiving whistleblower identifying information shall be bound by the same confidentiality requirements as the CFTC.⁵²

Amendments to Form TCR and Form WB-APP

Finally, the CFTC Proposal would adopt amended Forms TCR and WB-APP in a new Appendix B to Part 165.⁵³

Key Takeaways

In publishing the CFTC Proposal, the CFTC has utilized lessons learned under the current CFTC Program and drawn inspiration from the SEC Program. The net effect of the proposed amendments, as described above, would be to (i) clarify the broad scope of the CFTC Program, (ii) increase transparency in whistleblower awards and (iii) adopt new provisions allowing the CFTC to enforce the anti-retaliation provisions of the CFTC Program.

The increasing visibility of the CFTC Program ensures that financial institutions and other participants in the commodities markets will face an increasing likelihood that whistleblowers may report perceived or actual violations of the CEA and CFTC regulations. They may also face a new and greater risk of anti-retaliation enforcement by the CFTC. The result will be increasing scrutiny both of firms' substantive conduct and of their treatment of whistleblowers.

Accordingly, it is important for financial institutions and other market participants to take steps to ensure their compliance programs are designed to (i) encourage internal reporting, (ii) handle internal reports effectively and (iii) prevent retaliation against whistleblowers. In designing and implementing their compliance programs, firms should bear in mind the following guiding principles:

- With limited exceptions, a whistleblower can be any individual within or outside of a firm
- Although there are incentives in the CFTC Program to encourage whistleblowers to report internally first, they are not required to do so
- An employer can further encourage internal reporting by fostering open lines of communication among employees, managers and legal and compliance personnel
 - A firm may also wish to consider providing alternative means of reporting, such as a hotline or an anonymous tip mailbox
 - Establishing an internal reward program to incentivize internal reporting is also possible
- Tips or other information regarding potential violations of the CEA or CFTC regulations should be reviewed and investigated promptly using an established protocol
- A firm's handling of an investigation or a CFTC inquiry regarding any potential violation should be informed by the possibility that a whistleblower may have submitted a tip concerning the underlying conduct
- Personnel should be trained in handling tips and avoiding retaliation against whistleblowers

- In addition to the prospect of a whistleblower's private suit for retaliation, the CFTC Proposal presents the possibility that the CFTC will soon begin enforcing the anti-retaliation provisions of the CFTC Program, just as the SEC has in recent months
- Contractual provisions that could be perceived as limiting or obstructing whistleblowing may be the CFTC's first target for the proposed anti-retaliation authority, modeled after the SEC's recent enforcement actions sanctioning companies for using such provisions

For all of these reasons, the CFTC's proposed amendments to its whistleblower program are the latest example of the increasingly complex enforcement landscape that registered firms and market participants face. The CFTC's effort to retool its program serves as a reminder for financial institutions and other firms to review and update their own policies and procedures as well.

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Endnotes

- ¹ Whistleblower Awards Process, 81 Fed. Reg. 59551 (proposed Aug. 30, 2016) (proposing amendment of 17 C.F.R. pt. 165), available at <http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-20745a.pdf> (Proposal).
- ² 7 U.S.C. § 26.
- ³ See Whistleblower Incentives and Protection, 76 Fed. Reg. 53172 (Aug. 25, 2011) (codified at 17 C.F.R. pt. 165), available at <https://www.gpo.gov/fdsys/pkg/FR-2011-08-25/pdf/2011-20423.pdf> (Whistleblower Rules).
- ⁴ CFTC Rule 165.2(m) defines “**Related Action**” to mean any judicial or administrative action brought by certain specified authorities that is based upon the original information which a whistleblower voluntarily submitted to the CFTC and which led to the successful CFTC enforcement action. The specified authorities for a Related Action are any of the following: (i) the US Department of Justice (DOJ); (ii) an appropriate department or agency of the US federal government, acting within the scope of its jurisdiction; (iii) a registered entity, registered futures association or SRO; (iv) a state criminal or appropriate civil agency, acting within the scope of its jurisdiction; or (v) a foreign futures authority. 17 C.F.R. §§ 165.2(m), 165.11.
- ⁵ See 17 C.F.R. § 165.2(p)(1).
- ⁶ Note that these ineligible persons are nonetheless protected by the anti-retaliation protections provided by Section 23(h)(1) of the CEA. 17 C.F.R. § 165.6; see 7 U.S.C. § 26(h)(1).
- ⁷ See 17 C.F.R. § 165.2(k).
- ⁸ CFTC Whistleblower Program, Frequently Asked Questions (Nov. 6, 2015), available at https://www.whistleblower.gov/files/Whistleblower_FAQs_11-6-2015.pdf.
- ⁹ See 17 C.F.R. § 165.4(a); 7 U.S.C. § 26(h).
- ¹⁰ See 17 C.F.R. § 165.2(p)(2); 7 U.S.C. § 26(h)(2).
- ¹¹ See Whistleblower Rules, 76 Fed. Reg. at 53182.
- ¹² Consistent with its statutory obligation to protect the identity of the whistleblower, the CFTC did not identify the precise amount of the whistleblower award, nor did it identify the recipient of the award or the successful enforcement action about which the whistleblower provided original information. CFTC Whistleblower Award Determination No. 16-WB-06 (issued March 28, 2016), available at <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfwbawardorder032816.pdf>; see CFTC Release PR7351-16, CFTC Announces Whistleblower Award of More than \$10 Million (April 4, 2016), available at <http://www.cftc.gov/PressRoom/PressReleases/pr7351-16>.
- ¹³ The CFTC's first two whistleblower awards in May 2014 and September 2015 were for approximately US\$240,000 and US\$290,000, respectively. See CFTC Release PR6933-14, CFTC Issues First Whistleblower Award (May 20, 2014), available at <http://www.cftc.gov/PressRoom/PressReleases/pr6933-14>; CFTC Release PR7254-15, CFTC to Issue Whistleblower Award of Approximately \$290,000 (Sept. 29, 2015), available at <http://www.cftc.gov/PressRoom/PressReleases/pr7254-15>.
- ¹⁴ CFTC Whistleblower Award Determination No. 16-WB-08 (issued July 19, 2016), available at <http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfwbawardorder071916.pdf>; see CFTC Release PR7411-16, CFTC Announces Fourth Whistleblower Award (July 26, 2016), available at <http://www.cftc.gov/PressRoom/PressReleases/pr7411-16>.
- ¹⁵ US Commodity Futures Trading Commission, Annual Report on the Whistleblower Program and Customer Education Initiatives (Oct. 30, 2015), available at https://www.whistleblower.gov/files/Reports/wb_fy2015reporttocongress.pdf.
- ¹⁶ SEC Press Release 2016-173, SEC Whistleblower Program Surpasses \$100 Million in Awards (Aug. 30, 2016), available at <https://www.sec.gov/news/pressrelease/2016-173.html>.
- ¹⁷ SEC Whistleblower Award Proceeding No. 2016-16, Release No. 78719 (issued Aug. 30, 2016), available at <https://www.sec.gov/rules/other/2016/34-78719.pdf>; see SEC Press Release 2016-172, \$22 Million Whistleblower Award for Company Insider Who Helped Uncover Fraud (Aug. 30, 2016), available at <https://www.sec.gov/news/pressrelease/2016-172.html>.
- ¹⁸ See US Securities and Exchange Commission, 2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program (Nov. 16, 2015), available at <https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf>.
- ¹⁹ FCA Policy Statement PS15/24, Whistleblowing in Deposit-Takers, PRA-Designated Investment Firms and Insurers (Oct. 2015), available at <https://www.fca.org.uk/publication/policy/ps-15-24.pdf>; PRA Policy Statement PS24/15, Whistleblowing in Deposit-Takers, PRA-Designated Investment Firms and Insurers (Oct. 2015), available at <http://www.bankofengland.co.uk/pradocuments/publications/ps/2015/ps2415.pdf>; see PRA Supervisory Statement SS39/15, Whistleblowing in Deposit-Takers, PRA-Designated Investment Firms and Insurers (Oct. 2015), available at <http://www.bankofengland.co.uk/pradocuments/publications/ss/2015/ss3915.pdf>.

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- ²⁰ FCA Press Release, FCA Introduces New Rules on Whistleblowing (updated April 19, 2016), *available at* <https://www.fca.org.uk/news/press-releases/fca-introduces-new-rules-whistleblowing>; see Financial Conduct Authority, How We Handle Disclosures from Whistleblowers (Feb. 2015), *available at* <https://www.fca.org.uk/publication/corporate/how-we-handle-disclosures-from-whistleblowers.pdf>.
- ²¹ Whistleblower Rules, 76 Fed. Reg. at 53182.
- ²² Proposal, 81 Fed. Reg. at 59555; see 7 U.S.C. §§ 26(h)(1)(A), 26(i), 4(c)-(d), 4b, 4c.
- ²³ Proposed Rule 165.20(b); see Proposal, 81 Fed. Reg. at 59555.
- ²⁴ Proposed Rule 165.19(b); see Proposal, 81 Fed. Reg. at 59555.
- ²⁵ Proposed Rules 165.20(a), (c); see Proposal, 81 Fed. Reg. at 59555.
- ²⁶ SEC Whistleblower Award Proceeding No. 2015-4 (April 28, 2015), *available at* <https://www.sec.gov/rules/other/2015/34-74826.pdf>; see SEC Press Release 2015-75, SEC Announces Award to Whistleblower in First Retaliation Case (April 28, 2015), *available at* <https://www.sec.gov/news/pressrelease/2015-75.html>.
- ²⁷ *In re Health Net, Inc.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing a Cease-and-Desist Order, SEC File No. 3-17396 (Aug. 16, 2016), *available at* <https://www.sec.gov/litigation/admin/2016/34-78590.pdf>; see SEC Press Release 2016-164, Company Punished for Severance Agreements that Removed Financial Incentives for Whistleblowing (Aug. 16, 2016), *available at* <https://www.sec.gov/news/pressrelease/2016-164.html>.
- ²⁸ *In re Blue Linx Holdings Inc.*, Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions and a Cease-and-Desist Order, SEC File No. 3-17371 (Aug. 10, 2016), *available at* <https://www.sec.gov/litigation/admin/2016/34-78528.pdf>; see SEC Press Release 2016-157, Company Paying Penalty for Violating Key Whistleblower Protection Rule (Aug. 10, 2016), *available at* <https://www.sec.gov/news/pressrelease/2016-157.html>.
- ²⁹ Proposed Rule 165.5(a)(3); see Proposal, 81 Fed. Reg. at 59552.
- ³⁰ Proposed Rule 165.11; see Proposal, 81 Fed. Reg. at 59554.
- ³¹ Notably, the CFTC has proposed to limit one area of potential incentives, prohibiting a whistleblower from “double-dipping” from the CFTC Program and the SEC Program by collecting awards from both for the same matter. The proposed amendments would also prevent a whistleblower from relitigating before the CFTC any issues that the SEC resolved against the whistleblower in connection with the SEC’s denial of an award. The SEC’s whistleblower rules already contain a prohibition on double-dipping, so this aspect of the CFTC Proposal would close another gap between the two programs. See 17 C.F.R. § 240.21F-3(b)(3).
- ³² Proposed Rule 165.5(b)(1); see Proposal, 81 Fed. Reg. at 59552.
- ³³ The SEC announced an award of more than US\$700,000 to an external whistleblower on January 15, 2016. SEC Whistleblower Award Proceeding No. 2016-2, Release No. 76921 (Jan. 15, 2016), *available at* <https://www.sec.gov/rules/other/2016/34-76921.pdf>; see SEC Press Release 2016-10, SEC Awards Whistleblower More Than \$700,000 for Detailed Analysis (Jan. 15, 2016), *available at* <https://www.sec.gov/news/pressrelease/2016-10.html>.
- ³⁴ Proposed Rule 165.2(l)(2); see Proposal, 81 Fed. Reg. at 59552.
- ³⁵ Proposed Rule 165.7(e)(1); see Proposed Rule 165.15(a)(2) (describing the designation and composition of the Claims Review Staff); Proposal, 81 Fed. Reg. at 59553, n. 3-4.
- ³⁶ Proposed Rule 165.7(f); see Proposal, 81 Fed. Reg. at 59553, n. 6.
- ³⁷ Proposed Rule 165.7(g); see Proposal, 81 Fed. Reg. at 59553.
- ³⁸ Proposed Rules 165.7(h)-(j); see Proposal, 81 Fed. Reg. at 59553-59554.
- ³⁹ Proposed Rule 165.7(e); see Proposal, 81 Fed. Reg. at 59553. The CFTC has clarified that the WBO will not post any notices for Related Actions, stating that it would be the whistleblower’s responsibility to track the progress and final resolution of any Related Action and to file a claim with the CFTC under Proposed Rule 165.7(b). See Proposal, 81 Fed. Reg. at 59553, n. 7.
- ⁴⁰ Proposed Rule 165.7(b)(3); see Proposal, 81 Fed. Reg. at 59553.
- ⁴¹ Proposed Rule 165.7(b)(1); see Proposal, 81 Fed. Reg. at 59553.
- ⁴² Proposed Rule 165.10(a)(8)-(9); see Proposal, 81 Fed. Reg. at 59554.
- ⁴³ Proposed Rules 165.10(b), 165.13(b); see Proposal, 81 Fed. Reg. at 59554.
- ⁴⁴ Proposal, 81 Fed. Reg. at 59554.
- ⁴⁵ Proposed Rules 165.15(b), 165.7; see Proposal, 81 Fed. Reg. at 59554.
- ⁴⁶ Proposed Rule 165.15(a)(2); see Proposal, 81 Fed. Reg. at 59554.
- ⁴⁷ Proposed Rule 165.5(c); see Proposal, 81 Fed. Reg. at 59552.
- ⁴⁸ See US Commodity Futures Trading Commission, Agency Financial Report: Fiscal Year 2012 at 19 (Nov. 14, 2012), *available at* <http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/2012afr.pdf>.

⁴⁹ See Proposal, 81 Fed. Reg. at 59554; see also US Commodity Futures Trading Commission, Annual Performance Report: Fiscal Year 2013 at 8 (Feb. 2014), available at <http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/2013apr.pdf>.

⁵⁰ 7 U.S.C. § 26(h)(2)(C).

⁵¹ See 17 C.F.R. §§ 165.4(a)(2)-(3).

⁵² Proposed Rule 165.15(a)(3); see Proposal, 81 Fed. Reg. at 59554-59555.

⁵³ Form TCR is the form for submitting a tip, complaint or referral to the CFTC under the CFTC Program, while Form WB-APP is the form by which a whistleblower submits an application to the CFTC for an award for original information provided pursuant to Section 23 of the CEA. See Proposed Appendix B to Part 165.