

# CFTC Strengthens Anti-Retaliation Protections for Whistleblowers and Improves CFTC Whistleblower Award Program

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On May 22, 2017, the **Commodity Futures Trading Commission (CFTC)** unanimously [approved amendments](#) to its whistleblower rules that strengthen anti-retaliation protections for whistleblowers, prohibit “gag clauses” in employment agreements, and improve the CFTC Whistleblower Award Program. James McDonald, the Director of the CFTC Division of Enforcement, said the CFTC’s “approval of these rules today will further strengthen and enhance our efforts to protect customers and promote market integrity.”

## CFTC Strengthens Anti-Retaliation Provisions

Under the new rules, the CFTC can take enforcement action against an employer that “retaliates against a whistleblower by discharge, demotion, suspension, direct or indirect threats or harassment, or any other manner of discrimination” because the whistleblower provided “information to the Commission after reporting the information through internal whistleblower, legal or compliance procedures.” 17 C.F.R. 165.20(b). And the anti-retaliation protections apply whether or not the whistleblower satisfies the conditions to qualify for an award.

This represents a marked shift from the [agency’s 2011 rulemaking implementing the whistleblower reward provisions of the Dodd-Frank Act](#) where the CFTC stated that it lacked “the statutory authority to conclude that any entity that retaliates against a whistleblower” would be subject to enforcement action under the Commodity Exchange Act (CEA). At that time, the CFTC concluded that Section 23(h)(1)(A) of the CEA only provided a private right of action to any individual who provides information to the CFTC about potential violations of the CEA.

In contrast, the Securities and Exchange Commission (SEC) construed an analogous anti-retaliation provision in the Dodd-Frank Act as authorizing the SEC to take enforcement action for whistleblower retaliation. And indeed the SEC has exercised this authority by taking enforcement actions for whistleblower retaliation. For example, on September 29, 2016, the [SEC brought its first stand-alone retaliation case](#) against International Game Technology (IGT) after the company [terminated the](#)

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[employment of a whistleblower](#) because he disclosed to senior management and the SEC that the company's financial statements might be distorted. The SEC ordered IGT to pay a [\\$500,000 penalty](#) for the retaliation.

The CFTC's enforcement of the whistleblower protection provision in the Dodd-Frank Act is vital to the success of the CFTC Whistleblower Program because corporate whistleblowers often suffer retaliation and therefore robust protection against retaliation is critical to encourage whistleblower to come forward.

## **CFTC Prohibits “Gag Clauses” in Confidentiality and Employment Agreements**

The amendments also prohibit employers from taking steps to impede whistleblowers from communicating with the CFTC staff. In particular, 17 C.F.R. § 165.19(b) provides:

No 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.

This prohibition is critical to the success of any whistleblower program because companies often use overly broad confidentiality agreements to silence and punish whistleblowers.

The SEC has already taken a strong stance against these so-called gag clauses in agreements. Specifically, the SEC has concluded that such agreements violate [Rule 21F-17](#) (one of the regulations implementing the Dodd-Frank SEC whistleblower reward program), which prohibits companies from using gag clauses in agreements or policies to prevent whistleblowers from providing information to the SEC: “No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.” The SEC has brought several enforcement actions against companies for such agreements.

For example, on April 1, 2015, the [SEC took administrative action against KBR Inc.](#) for requiring witnesses in certain internal investigations to sign confidentiality statements with language warning that they could face disciplinary action, including termination of employment, if they discussed the subject of the interview with outside parties without the company's legal department's prior approval. In a separate enforcement action, on August 10, 2016, the [SEC issued a cease-and-desist order against BlueLinx Holdings Inc.](#) for using provisions in severance agreements that would require former employees to waive the right to recover a whistleblower award and agree to notify the company's legal counsel before disclosing information to government agencies pursuant to legal process.

The CFTC's new amendments prohibiting gag clauses will be critical to the success of the CFTC Whistleblower Program and will send a strong signal to corporate whistleblowers that they can come forward without fear of reprisal.

## **Improvements to the CFTC Whistleblower Award Program**

Under the CFTC Whistleblower Award Program, the CFTC will issue awards to whistleblowers who provide original information that leads to enforcement actions with total civil penalties in excess of \$1 million. A whistleblower may receive a reward of between 10-30 percent of the total sanctions imposed. In April 2016, a [whistleblower received a reward of more than \\$10 million](#) for providing the CFTC with key original information that led to a successful enforcement action.

The amended rules clarify that a whistleblower is eligible for an award if the disclosure leads to a successful “covered action” or “related action” (or both) with total civil penalties in excess of \$1 million. However, the CFTC will not make an award to a whistleblower for a related action if the whistleblower has been granted an award by the SEC for the same action under the [SEC Whistleblower Program](#).

The amended rules also establish a claims review process instead of a Whistleblower Award Determination Panel. Under this review process, the CFTC will consider and issue a Preliminary Determination as to whether an award claim should be granted or denied. Thereafter, a whistleblower will have an opportunity to request to view the record and may contest the Preliminary Determination before the CFTC issues a Final Determination.

Finally, the new amendments specify that the CFTC may waive its procedural requirements based upon a showing of extraordinary circumstances. The SEC has a similar rule, which it has recently used to issue an [award more than \\$5.5 million](#) to a whistleblower who did not follow the appropriate procedures to obtain an award under the SEC Whistleblower Program.

## Conclusion

The [amended CFTC whistleblower rules](#) will strengthen the CFTC Whistleblower Program and send a strong signal to corporate whistleblowers that they can come forward without fear of reprisal.

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