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ALERT

Whistleblower Protections: Federal Agencies Ramp Up Enforcement

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Federal agencies are continuing to prioritize and ramp up enforcement of whistleblower protection rules, underscoring the need for all companies – both public and private – to undertake routine compliance reviews.

On June 17, 2024, the U.S. Commodity Futures Trading Commission (CFTC) settled its first action alleging a company's employee non-disclosure agreements impeded individuals from voluntarily communicating with the CFTC. Piggybacking off similar U.S. Securities and Exchange Commission (SEC) actions, the CFTC settlement signaled that, like the SEC, the CFTC would begin fining companies that fail to include carve-outs in non-disclosure provisions to permit voluntary communications with the agency. Importantly, the relevant CFTC regulation protecting whistleblowers can apply broadly to registered and unregistered companies. With the SEC, and now CFTC, increasing whistleblower impediment enforcement, public and private companies should review their programs, agreements, and policies to ensure compliance with whistleblower protections.

The CFTC's Settlement

CFTC Rule 165.19(b), much like SEC Rule 21F-17(a), prohibits any action that hinders a whistleblower from reporting a potential violation of the Commodity Exchange Act, including the enforcement or threatened enforcement of a confidentiality provision related to such communications. The CFTC's recent settlement, citing prior SEC enforcement actions, confirms the CFTC also interprets Rule 165.19(b) to mean that a company's failure to include a specific carve-out in a confidentiality or non-disclosure provision for directly communicating with the CFTC is an action that impedes whistleblowing.

Authors

Kevin B. Muhlendorf
Partner
202.719.7052
kmuhlendorf@wiley.law

Diana R. Shaw
Partner
202.719.3379
dshaw@wiley.law

Corey J. Hauser
Associate
202.719.4436
chauser@wiley.law

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Notably, two Commissioners disagreed with the CFTC's broad interpretation of Rule 165.19(b). Commissioner Summer K. Mersinger argued that the term "action" in the regulation should not be interpreted so broadly as to include the omission of carve-out language, which she called "inaction." Commissioner Mersinger also emphasized that the CFTC has never formally notified companies that it interprets its regulation to require non-disclosure carve-outs. She believed, at minimum, the CFTC should notify companies of its interpretation rather than engaging in "regulation by enforcement." Similarly, Commissioner Caroline D. Pham raised concerns about the CFTC's reliance on SEC precedent rather than its own, and about the potential global implications of the CFTC's broad interpretation for unregistered commodity firms and other market participants.

Prioritizing Whistleblowing

Last week's CFTC settlement is the latest in the federal government's increased attention to whistleblower-related activity. As we have discussed in several articles,[1] the SEC has increased enforcement of Rule 21F-17 (a) – the analog to CFTC Rule 165.19(b) – which makes it illegal to put up roadblocks preventing or discouraging individuals from reporting potential securities violations to the SEC. Even more notable than the SEC's increased enforcement of Rule 21F-17(a), recent actions illustrate the SEC's willingness to enforce whistleblower protection rules against *privately held companies* not engaged in buying or selling securities.

Along with these enforcement enhancements, the U.S. Department of Justice (DOJ) also unveiled a new whistleblower initiative designed to supplement other agencies' (like the SEC and CFTC) programs. Individuals who aid DOJ in discovering "significant corporate or financial misconduct" of which the DOJ was previously unaware, "could qualify to receive a portion of the resulting forfeiture" as a reward. The Department also emphasized that this new "whistleblower reward program" targets information about (1) criminal abuses of the U.S. financial system, (2) foreign corruption cases outside the SEC's jurisdiction, and (3) domestic corruption cases involving payments to government officials.

Collectively, these developments confirm that the federal government is devoting significant resources to developing and enhancing whistleblower programs and enforcing whistleblower protections.

Takeaways

Given the SEC and CFTC's increased enforcement of whistleblower protections, public and private companies should conduct routine reviews to ensure compliance. Particular attention should be paid to confidentiality and non-disclosure provisions to ensure carve-outs exist for whistleblowing. Because the SEC, and likely the CFTC, broadly enforce these regulations, all companies, not just those directly regulated by the SEC and CFTC, should undertake a compliance review.

While recent enforcement has targeted employment and separation agreements, companies should consider all sources of confidentiality or non-disclosure language, including: vendor, subcontractor, and consulting agreements; employee handbooks, codes of conduct, internal compliance guides, and whistleblower resources; and employee training. Companies should also review past agreements and explore ways to mitigate risks associated with potentially outdated non-disclosure provisions. Finally, government contractors subject to the Federal Acquisition Regulations (FAR) should also review compliance with their duty to ensure

that certain language regarding whistleblower rights and remedies is included in all subcontracts. *See* FAR 52.203-17.

For more information about the topics discussed in this alert, please contact one of the authors of this article.

[1] *See* https://www.wiley.law/alert-Think-Because-You-Are-a-Private-Company-the-SEC-Is-Not-Your-Problem-Think-Again; https://www.wiley.law/alert-SEC-Annual-Whistleblower-and-Enforcement-Reports-Signal-Continued-Aggressiveness-in-2023-and-Beyond; https://www.wiley.law/alert-A-Client-Alert-About-Client-Alerts-SEC-Cites-Alerts-In-Issuing-400000-Fine-Related-to-Whistleblower-Protections; https://www.wiley.law/alert-SEC-Fines-Company-Gouging-Whistleblower-Protections-Severance-Agreements; https://www.wiley.law/alert-SEC-Whistleblower-Program-Demands-Attention-as-Awards-Increase