On Thursday, August 4, 2011, the Commodity Futures Trading Commission adopted final rules implementing the commodity whistleblower incentives and protections of Section 748 of the Dodd-Frank Act. Section 748 amended the Commodity Exchange Act (the "CEA") by adding Section 23, which requires the CFTC to pay awards to eligible whistleblowers who voluntarily provide the CFTC with original information about a violation of the CEA that leads to successful enforcement of a covered action resulting in monetary sanctions exceeding $1 million. The amount of the award is subject to the Commission's discretion but must be between 10 and 30 percent of monetary sanctions collected in the action or related actions. The CFTC will make award payments from its new Consumer Protection Fund, which will be funded by civil monetary penalties collected from the CFTC's enforcement program. The rules become effective 60 days after publication in the Federal Register.

The final rules, which are designed "to assist the CFTC in identifying, investigating and prosecuting potential violations of the [CEA]," are substantially similar to the CFTC's proposed regulations, which were issued on December 6, 2010. The final rules reflect the CFTC's efforts to "ensure consistency and promote harmonization" with the Securities and Exchange Commission's whistleblower rules, which were adopted on May 25, 2011. Acknowledging that some companies may be subject to both whistleblower programs, the CFTC notes the importance of harmonizing its whistleblower rules with those of the SEC.

The final whistleblower regulations were adopted by a 4-1 vote with Commissioner Jill E. Sommers dissenting. Like the SEC rules, the CFTC rules do not require that whistleblowers report internally before reporting to the Commission, which was the primary basis for Commissioner Sommers' dissent. She noted that "[s]etting up a Whistleblower program that allows all Whistleblowers to bypass internal compliance programs will likely deprive such programs of the very information they need in order to be robust and effective," and added that "a better approach . . . would have been to require internal reporting as the norm, with the ability for a Whistleblower to bypass internal reporting upon a good faith showing that such reporting would be impracticable or unsafe."
Like the SEC, the CFTC will consider internal reporting to be a factor that could increase the amount of an award, while a whistleblower's interference with internal systems is a factor that may decrease the amount of an award.

**How do the CFTC's whistleblower rules compare to the SEC's rules?**

The CFTC's final rules substantially parallel the SEC's whistleblower rules with some notable differences:

- Unlike the SEC's rules, the CFTC's rules contain no exclusion for employees of public accounting firms, which means that outside auditors of companies regulated by the CFTC may report original information to the CFTC and qualify for an award. The CFTC reasoned that outside auditors face an existing obligation to report violations to the SEC under Section 10A of the Securities Exchange Act, but no such requirement exists under the CEA. Both the CFTC's and SEC's rules, however, exclude from award eligibility company employees whose principal duties involve compliance or internal audit responsibilities.

- Under the SEC's rules, a whistleblower who has already received an award from the CFTC by providing the same information to each agency is ineligible for an award from the SEC. The CFTC, however, has no similar "double dip" provision. Thus, a whistleblower could potentially recover twice if he or she receives the SEC award first.

- The CFTC's rules define certain circumstances where a regulator's request for information that is directed to an employer is deemed also to have been received by the whistleblower, thereby limiting the whistleblower's ability to qualify for an award. Under the CFTC's rules, the employer's request will be imputed to the whistleblower where the documents or information from the whistleblower fall within the scope of the request received by the employer, unless after receiving the information from the whistleblower the employer fails to turn over the information to the requesting authority in a timely manner. Under the SEC's whistleblower rules, on the other hand, only a request that is directed to the whistleblower or the whistleblower's representative will render that whistleblower ineligible for an award.

- The CFTC will consider the potential for adverse incentives from oversized awards as a factor in determining the amount of an award. The CFTC included this additional factor in response to concerns raised in a comment letter from Senator Carl Levin warning that "excessive monetary incentives may lead to misreporting causing investigative waste." The SEC declined to include a consideration against excessive awards in its final rules, noting that the agency lacks discretion to make award payments below the statutory minimum of 10 percent of the amount collected.

- Under the CFTC's anti-retaliation provisions, the statute of limitations for a retaliation claim is two years from the date of the violation, while the relevant SEC statute extends to six years from the date of the violation or three years from when the material facts of the claim were known or should have been known. Unlike the SEC, the CFTC also provides guidance to companies as to the types of conduct that will be deemed retaliatory, which include discharge, demotion, suspension, threat, harassment, or any other form of
What is next for companies subject to the CFTC’s whistleblower program?

The relatively few substantive differences between the CFTC’s and SEC’s whistleblower rules may prove more significant to whistleblowers than to companies. Under both agencies’ programs, whistleblowers are given incentives to report violations directly to the regulators, which means that companies subject to either program would be well advised to enhance the culture of compliance, bolster internal reporting processes, and encourage employees to utilize internal reporting mechanisms. For a summary of proactive measures companies should consider in response to the new whistleblower bounty programs, see our previous Client Alert, SEC Whistleblower Bounties: 10 Things Companies Can Do Right Now To Stay Ahead.

WilmerHale has established a special Dodd-Frank Whistleblower Working Group focused on SEC and CFTC enforcement investigations, corporate compliance, and employment issues arising from the new whistleblower rules. Please visit our Dodd-Frank Whistleblower Working Group website for additional WilmerHale publications issued on whistleblower bounty developments.


2 To provide context as to the potential size of the fund, during fiscal year 2010 the CFTC’s civil monetary penalties totaled approximately $136 million. See Scott O’Malia, Commissioner, CFTC, Opening Statement at the Consumer Education Meeting: Defining the Scope of a Consumer Education and Protection Program for the Post-Dodd-Frank World (April 28, 2011), available atwww.cftc.gov/PressRoom/SpeechesTestimony/omaliastatement042811.html.

3 Gary Gensler, Chairman, CFTC, Statement of Support on Three Final Rules Under the Dodd-Frank Act (August 4, 2011), available
For a detailed description of the SEC's whistleblower rules, see our May 27, 2011 Client Alert.

For example, many financial firms are registered both as futures commission merchants with the CFTC and broker-dealers with the SEC. Moreover, with the new regulation of swaps, security-based swaps, and mixed swaps, there is increasing overlap of the markets and market participants regulated by the CFTC and SEC.

Compare Section 23(h)(1)(B)(i) of the CFTC's whistleblower protection statute with Section 21F(h)(1)(B)(i) of the SEC's whistleblower protection statute. Both provisions state, "An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C)." The SEC relied on Section 21F(h)(1)(A), which contains a direct prohibition on retaliation, and concluded that it had the authority to enforce this section directly under its general enforcement powers under the Exchange Act. The CFTC reached an opposite conclusion.

See Section 240.21F-2(b)(2).