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## CFTC Increases Anti-Retaliation Protections for Whistleblowers

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On May 22, 2017, the Commodity Futures Trading Commission (CFTC or Commission) amended its whistleblower rules to enhance protections for whistleblowers against retaliation and assert its own authority to bring enforcement actions against retaliation. The amendments revise certain aspects of the CFTC's whistleblower award review process, bolster staff authority to administer the program, and enable whistleblowers to receive an award for judgments obtained in related actions. These changes potentially will impact everyone subject to the CFTC's whistleblower rules.

### **Anti-Retaliation Whistleblower Protections**

The most notable revision, with perhaps the greatest day-to-day impact, will be new Commission Rule 165.19, which prohibits companies from taking any action to stop an individual from communicating directly with the Commission's staff about a possible violation of the Commodity Exchange Act (CEA), including by using a confidentiality agreement or pre-dispute arbitration agreement. This rule brings the CFTC's anti-retaliation provisions into alignment with those of the Securities Exchange Commission (SEC).<sup>1</sup> In addition, the new rule reverses an earlier interpretation of the CFTC's authority under the whistleblower statute,<sup>2</sup> and provides that the CFTC has the authority to bring an action against an employer that retaliates against a whistleblower. The CFTC justified its reversal by stating that its 2011 interpretation that it lacked authority to bring an enforcement action in this context did not correspond with Section 23(h)(1)(A)'s prohibitions against retaliation, the Commission's broad rulemaking authority, and its authority to prosecute violations of any CEA provisions. Companies should note that the CFTC will also review actions taken by the company after a whistleblower reports internally but before providing information to the Commission to assess whether retaliation occurred.

### **Conclusion**

In light of these amendments, those subject to the CFTC's whistleblower rules should review existing form agreements and other employee policies, particularly provisions specifying requirements for former employees who are compelled to disclose company information by law or

legal proceeding, release and waiver provisions, and other provisions commonly found in severance agreements, to confirm that they are accompanied by a clear exemption for communications with the CFTC (and other government agencies, such as the SEC),<sup>3</sup> and are otherwise in compliance with the revised CFTC rules. Companies should also continue enhancing their internal reporting mechanisms.

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<sup>1</sup> 17 C.F.R. § 240.21F-17(a).

<sup>2</sup> Section 23 of the CEA, 7 U.S.C. § 26.

<sup>3</sup> See [WilmerHale Dodd-Frank Whistleblower Working Group publications and news](#) for additional guidance from the SEC.

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