

Recent CFTC Whistleblower Awards Signal Flexibility in Determining Award Percentage



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Published on www.lorman.com - October 2018

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Recent CFTC Whistleblower Awards Signal Flexibility in Determining Award Percentage

Written by Jason Zuckerman and Matthew Stock – 7/17/18

Within one week, the CFTC issued two awards to whistleblowers, one in the amount of \$30M and another in the amount of \$70,000. Although the orders are fairly sparse, they provide some important clues as to how the CFTC determines the amount of a CFTC whistleblower award (the percentage of the monetary sanctions collected in the covered judicial or administrative action that the CFTC awards the whistleblower).

CFTC Has Broad Discretion to Increase Award Percentage

The Order determining the award that the CFTC issued to a foreign national on July 16, 2018 reveals that the CFTC has broad discretion to increase an award and a whistleblower can obtain the maximum 30% award even if the whistleblower does not meet all of the positive criteria for increasing an award. Those criteria for increasing an award (from the minimum 10% to the maximum 30%) include:

- Significance of the information provided by the whistleblower, *e.*, whether the reliability and completeness of the information provided by the whistleblower resulted in the conservation of CFTC resources and the degree to which the information provided by the whistleblower supported one or more successful claims brought by the CFTC.
- Assistance provided by the whistleblower and their attorney, including (i) whether the whistleblower and their legal

representative provided ongoing, extensive, and timely cooperation and assistance; (ii) the timeliness of the whistleblower's initial report; (iii) the efforts undertaken by the whistleblower to remediate the harm caused by the violation; and (iv) any unique hardships experienced by the whistleblower as a result of reporting the violations.

- Law enforcement interest, *e.*, the degree to which an award enhances the CFTC's ability to enforce the commodity laws.
- Participation in internal compliance systems, *e.*, the extent to which the whistleblower participated in internal compliance systems, such as reporting the possible securities violations internally before, or at the same time as, reporting them to the SEC and assisting in an internal investigation or inquiry.

The July 16 Order notes that the whistleblower voluntarily provided significant original information and assistance to the CFTC and significantly contributed to the CFTC's action by helping CFTC staff successfully settle the action and thereby avoid a costly trial. Significantly, the Order clarified that the CFTC has broad discretion to pay a high award percentage even where the whistleblower does not satisfy all the criteria warranting the maximum award payment:

The Rules do not specify how much any factor in Rule 165.9(b) or (c) should increase or decrease the award percentage. Not satisfying any one of the positive factors does not mean that the award percentage must be less than 30%, and the converse is true. Not having any one of the negative factors does not mean the award percentage must be greater than 10%. These principles serve to prevent a vital whistleblower from being penalized for not satisfying the positive factors. For example, a whistleblower who provides the Commission with significant information and substantial assistance such as

testifying at trial and producing smoking gun documents could receive 30% even if the whistleblower did not participate in any internal compliance systems.

By eschewing a rigid application of the award criteria, the CFTC incentivizes persons with knowledge of misconduct to come forward and share their information with the CFTC knowing that they can potentially obtain the maximum award percentage for providing timely, specific and credible information that leads to a successful enforcement action.

Minimal Participation in a Commodities Fraud Scheme Does Not Disqualify a Whistleblower from Recovering an Award

One of the whistleblowers who received an award this week was involved in the Commodity Exchange Act (CEA) violations at issue in the covered action, but the whistleblower's participation in the scheme did not disqualify the whistleblower from receiving an award for two reasons:

1. There was no evidence indicating that the whistleblower acted with scienter, as the whistleblower "was a junior-level employee in a foreign nation given instruction by his/her employer."
2. The whistleblower did not financially benefit from the violations.

In assessing the amount of a whistleblower award, the CFTC can decrease an award if the whistleblower was culpable in the violation. In particular, the CFTC assesses the following facts concerning culpability:

- (i) The whistleblower's role in the CEA violations;

(ii) The whistleblower's education, training, experience, and position of responsibility at the time the violations occurred;

(iii) Whether the whistleblower acted with scienter, both generally and in relation to others who participated in the violations;

(iv) Whether the whistleblower financially benefitted from the violations;

(v) Whether the whistleblower is a recidivist;

(vi) The egregiousness of any wrongdoing committed by the whistleblower; and

(vii) Whether the whistleblower knowingly interfered with the Commission's investigation of the violations or related enforcement actions.

17 C.F.R. § 165.9(c)(1). Although monetary sanctions awarded against a whistleblower will be excluded from the amount of collected proceeds from which an award is paid, minimal participation in the conduct giving rise to a CFTC enforcement action is not a bar to eligibility for a whistleblower award.

The recent increase in CFTC whistleblower awards will likely spur additional whistleblowers to come forward to assist the CFTC in rooting out commodities fraud. In fact, James McDonald, Director of the Division of Enforcement, stated that he "expects the Whistleblower Program to contribute even more substantially to our enforcement efforts going forward."

To learn more:

How Can a Whistleblower Get and Award from the SEC Whistleblower Program: <https://www.youtube.com/watch?v=A-Z-YCwB6rU>

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