

PART 165—WHISTLEBLOWER RULES¹

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¹ This document is a copy of the text of 17 C.F.R. § 165 effective as of July 31, 2017. This text has been reformatted to make it easier to read. An official copy of 17 C.F.R. § 165 can be found at the U.S. Government Publishing Office’s website, www.gpo.gov, and in its electronic version of the Code of Federal Regulations, www.ecfr.gov.

§ 165.1 General.

Section 23 of the Commodity Exchange Act, entitled “Commodity Whistleblower Incentives and Protection,” requires the Commission to pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about violations of the Commodity Exchange Act. This part 165 describes the whistleblower program that the Commission intends to establish to implement the provisions of Section 23, and explains the procedures the whistleblower will need to follow in order to be eligible for an award. Whistleblowers should read these procedures carefully, because the failure to take certain required steps within the time frames described in this part may result in disqualification from receiving an award. Unless expressly provided for in this part, no person is authorized to make any offer or promise, or otherwise to bind the Commission with respect to the payment of any award or the amount thereof.

§ 165.2 Definitions.

As used in this part:

- (a) *Action*. The term “action” generally means a single captioned judicial or administrative proceeding. Notwithstanding the foregoing:
 - (1) For purposes of making an award under § 165.7, the Commission will treat as a Commission action two or more administrative or judicial proceedings brought by the Commission if these proceedings arise out of the same nucleus of operative facts; or
 - (2) For purposes of determining the payment on an award under § 165.14, the Commission will deem as part of the Commission action upon which the award was based any subsequent Commission proceeding that, individually, results in a monetary sanction of \$1,000,000 or less, and that arises out of the same nucleus of operative facts.
- (b) *Aggregate amount*. The phrase “aggregate amount” means the total amount of an award granted to one or more whistleblowers pursuant to § 165.8.
- (c) *Analysis*. The term “analysis” means the whistleblower’s examination and evaluation of information that may be generally available, but which reveals information that is not generally known or available to the public.
- (d) *Collected by the Commission*. The phrase “collected by the Commission” refers to any funds received, and confirmed by the U.S. Department of the Treasury, in satisfaction of part or all of a civil monetary penalty, disgorgement obligation, or fine owed to the Commission.
- (e) *Covered judicial or administrative action*. The phrase “covered judicial or administrative action” means any judicial or administrative action brought by the Commission under the Commodity Exchange Act whose successful resolution results in monetary sanctions exceeding \$1,000,000.

(f) *Fund*. The term “Fund” means the Commodity Futures Trading Commission Customer Protection Fund.

(g) *Independent knowledge*. The phrase “independent knowledge” means factual information in the whistleblower’s possession that is not generally known or available to the public. The whistleblower may gain independent knowledge from the whistleblower’s experiences, communications and observations in the whistleblower’s personal business or social interactions. The Commission will not consider the whistleblower’s information to be derived from the whistleblower’s independent knowledge if the whistleblower obtained the information:

- (1) From sources generally available to the public such as corporate filings and the media, including the Internet;
- (2) Through a communication that was subject to the attorney-client privilege, unless the disclosure is otherwise permitted by the applicable federal or state attorney conduct rules;
- (3) In connection with the legal representation of a client on whose behalf the whistleblower, or the whistleblower’s employer or firm, have been providing services, and the whistleblower seek to use the information to make a whistleblower submission for the whistleblower’s own benefit, unless disclosure is authorized by the applicable federal or state attorney conduct rules;
- (4) Because the whistleblower was an officer, director, trustee, or partner of an entity and another person informed the whistleblower of allegations of misconduct, or the whistleblower learned the information in connection with the entity’s processes for identifying, reporting, and addressing possible violations of law;
- (5) Because the whistleblower was an employee whose principal duties involved compliance or internal audit responsibilities; or
- (6) By a means or in a manner that is determined by a United States court to violate applicable Federal or state criminal law.

(7) *Exceptions*. Paragraphs (g)(4) and (5) of this section shall not apply if:

- (i) The whistleblower has a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the relevant entity from engaging in conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors;
- (ii) The whistleblower has a reasonable basis to believe that the relevant entity is engaging in conduct that will impede an investigation of the misconduct;
or

(iii) At least 120 days have elapsed since the whistleblower provided the information to the relevant entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or the whistleblower's supervisor, or since the whistleblower received the information, if the whistleblower received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or the whistleblower's supervisor was already aware of the information.

(h) *Independent analysis.* The phrase "independent analysis" means the whistleblower's own analysis, whether done alone or in combination with others.

(i) *Information that led to successful enforcement.* The Commission will consider that the whistleblower provided original information that led to the successful enforcement of a judicial or administrative action, or related action, in the following circumstances:

(1) The whistleblower gave the Commission original information that was sufficiently specific, credible, and timely to cause the Commission staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning different conduct as part of a current examination or investigation, and the Commission brought a successful judicial or administrative action based in whole or in part on conduct that was the subject of the whistleblower's original information; or

(2) The whistleblower gave the Commission original information about conduct that was already under examination or investigation by the Commission, the Congress, any other authority of the federal government, a state Attorney General or securities regulatory authority, any registered entity, registered futures association, or self-regulatory organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)), foreign futures authority, or the Public Company Accounting Oversight Board (except in cases where the whistleblower was an original source of this information as defined in paragraph (1) of this section), and the whistleblower's submission significantly contributed to the success of the action.

(3) The whistleblower reported original information through an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law before or at the same time the whistleblower reported them to the Commission; the entity later provided the whistleblower's information to the Commission, or provided results of an audit or investigation initiated in whole or in part in response to information the whistleblower reported to the entity; and the information the entity provided to the Commission satisfies either paragraph (i)(1) or (i)(2) of this section. Under this paragraph (i)(3), the whistleblower must also submit the same information to the Commission in accordance with the procedures set forth in § 165.3 within 180 days of providing it to the entity.

(j) *Monetary sanctions.* The phrase “monetary sanctions,” when used with respect to any judicial or administrative action, or related action, means—

- (1) Any monies, including penalties, disgorgement, restitution, and interest ordered to be paid; and
- (2) Any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)) as a result of such action or any settlement of such action.

(k) *Original information.* The phrase “original information” means information that—

- (1) Is derived from the independent knowledge or independent analysis of a whistleblower;
- (2) Is not already known to the Commission from any other source, unless the whistleblower is the original source of the information;
- (3) Is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information; and
- (4) Is submitted to the Commission for the first time after July 21, 2010 (the date of enactment of the Wall Street Transparency and Accountability Act of 2010).
- (5) Original information shall not lose its status as original information solely because the whistleblower submitted such information prior to October 24, 2011, provided such information was submitted after July 21, 2010, the date of enactment of the Wall Street Transparency and Accountability Act of 2010. In order to be eligible for an award, a whistleblower who submits original information to the Commission after July 21, 2010, but prior to October 24, 2011, must comply with the procedure set forth in § 165.3(d).

(l) *Original source.* The whistleblower must satisfy the whistleblower’s status as the original source of information to the Commission’s satisfaction.

(1) *Information obtained from another source.* The Commission will consider the whistleblower to be an “original source” of the same information that the Commission obtains from another source if the information the whistleblower provide satisfies the definition of original information and the other source obtained the information from the whistleblower or the whistleblower’s representative.

- (i) In order to be considered an original source of information that the Commission receives from Congress, any other federal, state or local authority, a foreign futures authority, any registered entity, registered futures association, or any self-regulatory organization (as defined in

section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)), the whistleblower must have voluntarily given such authorities the information within the meaning of this part. In determining whether the whistleblower is the original source of information, the Commission may seek assistance and confirmation from one of the other entities or authorities described in this paragraph (l)(1)(i).

(ii) In the event that the whistleblower claims to be the original source of information that an authority or another entity, other than as set forth in paragraph (l)(1)(i) of this section, provided to the Commission, the Commission may seek assistance and confirmation from such authority or other entity.

(2) *Information first provided to another authority or person.* If the whistleblower provides information to Congress, any other federal, state, or local authority, a foreign futures authority, a registered entity, a registered futures association, a self-regulatory organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)), or to any of the persons described in paragraphs (g)(4) and (5) of this section, and the whistleblower, within 180 days, makes a submission to the Commission pursuant to § 165.3, as the whistleblower must do in order for the whistleblower to be eligible to be considered for an award, then, for purposes of evaluating the whistleblower's claim to an award under § 165.7, the Commission will consider that the whistleblower provided original information as of the date of the whistleblower's original disclosure, report, or submission to one of these other authorities or persons. The whistleblower must establish the whistleblower's status as the original source of such information, as well as the effective date of any prior disclosure, report, or submission, to the Commission's satisfaction. The Commission may seek assistance and confirmation from the other authority or person in making this determination.

(3) *Information already known by the Commission.* If the Commission already knows some information about a matter from other sources at the time the whistleblower makes the whistleblower's submission, and the whistleblower is not an original source of that information, as described above, the Commission will consider the whistleblower an "original source" of any information the whistleblower separately provides that is original information that materially adds to the information that the Commission already possesses.

(m) *Related action.* The phrase "related action," when used with respect to any judicial or administrative action brought by the Commission under the Commodity Exchange Act, means any judicial or administrative action brought by an entity listed in § 165.11(a) that is based upon the original information voluntarily submitted by a whistleblower to the Commission pursuant to § 165.3 that led to the successful resolution of the Commission action.

(n) *Successful resolution.* The phrase "successful resolution," when used with respect to any

judicial or administrative action brought by the Commission under the Commodity Exchange Act, includes any settlement of such action or final judgment in favor of the Commission. It shall also have the same meaning as “successful enforcement.”

- (o) *Voluntary submission or voluntarily submitted.* (1) The phrase “voluntary submission” or “voluntarily submitted” within the context of submission of original information to the Commission under this part, shall mean the provision of information made prior to any request from the Commission, Congress, any other federal or state authority, the Department of Justice, a registered entity, a registered futures association, or a self-regulatory organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)) to the whistleblower or anyone representing the whistleblower (such as an attorney) about a matter to which the information in the whistleblower’s submission is relevant. If the Commission or any of these other authorities makes a request, inquiry, or demand to the whistleblower or the whistleblower’s representative first, the whistleblower’s submission will not be considered voluntary, and the whistleblower will not be eligible for an award, even if the whistleblower’s response is not compelled by subpoena or other applicable law. For purposes of this paragraph (o), the whistleblower will be considered to have received a request, inquiry or demand if documents or information from the whistleblower is within the scope of a request, inquiry, or demand that the whistleblower’s employer receives, unless, after receiving the documents or information from the whistleblower, the whistleblower’s employer fails to provide the whistleblower’s documents or information to the requesting authority in a timely manner.

- (2) In addition, the whistleblower’s submission will not be considered voluntary if the whistleblower is under a pre-existing legal or contractual duty to report the violations that are the subject of the whistleblower’s original information to the Commission, Congress, any other federal or state authority, the Department of Justice, a registered entity, a registered futures association, or a self-regulatory organization (as defined in Section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)), or a duty that arises out of a judicial or administrative order.

- (p) *Whistleblower(s).* (1) The term “whistleblower” or “whistleblowers” means any individual, or two (2) or more individuals acting jointly, who provides information relating to a potential violation of the Commodity Exchange Act to the Commission, in the manner established by § 165.3. A company or another entity is not eligible to be a whistleblower.

- (2) *Prohibition against retaliation.* The anti-retaliation protections under Section 23(h) of the Commodity Exchange Act apply whether or not the whistleblower satisfies the requirements, procedures and conditions to qualify for an award. For purposes of the anti-retaliation protections afforded by Section 23(h)(1)(A)(i) of the Commodity Exchange Act, the whistleblower is a whistleblower if:

- (i) The whistleblower possess a reasonable belief that the information the whistleblower is providing relates to a possible violation of the CEA, or the

rules or regulations thereunder, that has occurred, is ongoing, or is about to occur; and

- (ii) The whistleblower provides that information in a manner described in § 165.3.

§ 165.3 Procedures for submitting original information.

- (a) A whistleblower will need to submit the whistleblower's information to the Commission. The whistleblower may submit the whistleblower's information:
 - (1) By completing and submitting a Form TCR online and submitting it electronically through the Commission's Web site at <http://www.cftc.gov>, or the Commission's Whistleblower Program Web site at www.whistleblower.gov; or
 - (2) By completing the Form TCR and mailing or faxing the form to the Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, Fax (202) 418-5975.
- (b) Further, to be eligible for an award, the whistleblower must declare under penalty of perjury at the time the whistleblower submits the whistleblower's information pursuant to paragraph (a)(1) or (2) of this section that the whistleblower's information is true and correct to the best of the whistleblower's knowledge and belief.
- (c) Notwithstanding paragraph (b) of this section, if the whistleblower submitted the whistleblower's original information to the Commission anonymously, then the whistleblower's identity must be disclosed to the Commission and verified in a form and manner acceptable to the Commission consistent with the procedure set forth in § 165.7(c) prior to Commission's payment of any award.
- (d) If the whistleblower submitted original information in writing to the Commission after July 21, 2010 (the date of enactment of the Wall Street Transparency and Accountability Act of 2010) but before the effective date of these rules, the whistleblower will be eligible for an award only in the event that the whistleblower provided the original information to the Commission in a format or manner other than that described in paragraph (a) of this section, the whistleblower submits a completed Form TCR within 120 days of the effective date of these rules and otherwise follows the procedures set forth above in paragraphs (a) and (b) of this section.

§ 165.4 Confidentiality.

- (a) *In general.* Section 23(h)(2) of the Commodity Exchange Act requires that the Commission not disclose information that could reasonably be expected to reveal the identity of a whistleblower, except that the Commission may disclose such information in the following circumstances, in accordance with the Privacy Act of 1974 (5 U.S.C. 522a):

- (1) When disclosure is required to a defendant or respondent in connection with a public proceeding that the Commission institutes or in another public proceeding that is filed by an authority to which the Commission provides the information, as described in paragraph (a)(2) of this section; or
- (2) When the Commission determines that it is necessary to accomplish the purposes of the Commodity Exchange Act and to protect customers, it may provide whistleblower information, without the loss of its status as confidential whistleblower information in the hands of the Commission, to: the Department of Justice; an appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction; a registered entity, registered futures association, or a self-regulatory organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)); a State attorney general in connection with a criminal investigation; any appropriate State department or agency, acting within the scope of its jurisdiction; or a foreign futures authority; and, as set forth in section 23(h)(2)(C) of the Commodity Exchange Act, each such entity is required to maintain the information as confidential in accordance with the requirements of section 23(h)(2)(A) of the Commodity Exchange Act.
- (3) The Commission may make disclosures in accordance with the Privacy Act of 1974 (5 U.S.C. 552a).

(b) *Anonymous whistleblowers.* A whistleblower may anonymously submit information to the Commission, however, the whistleblower must follow the procedures in § 165.3(c) for submitting original information anonymously. Such whistleblower who anonymously submits information to the Commission must also follow the procedures in § 165.7(c) in submitting to the Commission an application for a whistleblower award.

§ 165.5 Requirements for consideration of an award.

- (a) Subject to the eligibility requirements described in this part, the Commission will pay an award to one or more whistleblowers who:
 - (1) Provide a voluntary submission to the Commission;
 - (2) That contains original information; and
 - (3) That leads to the successful resolution of a covered judicial or administrative action or successful enforcement of a Related Action or both; and
- (b) In order to be eligible, the whistleblower must:
 - (1) Have voluntarily provided the Commission original information in the form and manner that the Commission requires in § 165.3;
 - (2) Have submitted a claim in response to a Notice of Covered Action or a final judgment in a Related Action or both;

- (3) Provide the Commission, upon its staff's request, certain additional information, including:
 - (i) Explanations and other assistance, in the manner and form that staff may request, in order that the staff may evaluate the use of the information submitted related to the whistleblower's application for an award;
 - (ii) All additional information in information in the whistleblower's possession that is related to the subject matter of the whistleblower's submission related to the whistleblower's application for an award; and
 - (iii) Testimony or other evidence acceptable to the staff relating to the whistleblower's eligibility for an award; and
 - (4) If requested by the Whistleblower Office, enter into a confidentiality agreement in a form acceptable to the Whistleblower Office, including a provision that a violation of the confidentiality agreement may lead to the whistleblower's ineligibility to receive an award.
- (c) The Commission may, in its sole discretion, waive any procedural requirements based upon a showing of extraordinary circumstances.

§ 165.6 Whistleblowers ineligible for an award.

- (a) No award under § 165.7 shall be made:
- (1) To any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of: the Commission; the Board of Governors of the Federal Reserve System; the Office of the Comptroller of the Currency; the Board of Directors of the Federal Deposit Insurance Corporation; the Director of the Office of Thrift Supervision; the National Credit Union Administration Board; the Securities and Exchange Commission; the Department of Justice; a registered entity; a registered futures association; a self-regulatory organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)); or a law enforcement organization;
 - (2) To any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under § 165.7;
 - (3) To any whistleblower who submits information to the Commission that is based on the facts underlying the covered judicial or administrative action submitted previously by another whistleblower;
 - (4) To any whistleblower who acquired the information the whistleblower gave the

Commission from any of the individuals described in paragraphs (a)(1), (2), (3) or (6) of this section;

- (5) To any whistleblower who, in the whistleblower's submission, the whistleblower's other dealings with the Commission, or the whistleblower's dealings with another authority in connection with a related action, knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or uses any false writing or document, knowing that it contains any false, fictitious, or fraudulent statement or entry, or omitted any material fact, where, in the absence of such fact, other statements or representations made by the whistleblower would be misleading;
- (6) To any whistleblower who acquired the original information reported to the Commission as a result of the whistleblower's role as a member, officer or employee of either a foreign regulatory authority or law enforcement organization;
- (7) To any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of a foreign regulatory authority or law enforcement organization; or
- (8) To any whistleblower who acquired the original information the whistleblower gave the Commission from any other person with the intent to evade any provision of these rules.

- (b) Notwithstanding a whistleblower's ineligibility for an award for any reason set forth in paragraph (a) of this section, the whistleblower will remain eligible for the anti-retaliation protections set forth in Section 23(h)(1) of the Commodity Exchange Act.

§ 165.7 Procedures for award applications in Commission actions and related actions, and Commission award determinations.

- (a) Whenever a Commission judicial or administrative action results in monetary sanctions totaling more than \$1,000,000 (*i.e.*, a covered judicial or administrative action) the Commission will publish on the Commission's Web site a "Notice of Covered Action." Such Notice of Covered Action will be published subsequent to the entry of a final judgment or order that alone, or collectively with other judgments or orders previously entered in the Commission covered administrative or judicial action, exceeds \$1,000,000 in monetary sanctions. The Commission will not contact whistleblower claimants directly as to Notices of Covered Actions; prospective claimants should monitor the Commission Web site for such Notices. A whistleblower claimant will have 90 days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred.
- (b) (1) To file a claim for a whistleblower award, the whistleblower must file Form WB-APP, Application for Award for Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act. The whistleblower must sign this form as the claimant

and submit it to the Commission by mail or fax to Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581, Fax (202) 418-5975, or by completing and submitting the Form WB-APP online and submitting it electronically through the Commission's Web site at <https://www.cftc.gov> or the Commission's Whistleblower Program Web site at <https://www.whistleblower.gov>.

- (2) The Form WB-APP, including any attachments, must be received by the Commission within 90 calendar days of the date of the Notice of Covered Action or 90 calendar days following the date of a final judgment in a Related Action (or if the final judgment in a Related Action was issued prior to the action meeting the definition of Related Action, within 90 calendar days following the date the action satisfied the definition of Related Action, except in the circumstances described in paragraph (b)(3)(ii) of this section). One Form WB-APP may be filed in response to both a Notice of Covered Action and final judgment in a Related Action if the relevant time periods are applicable.
- (3) If a covered judicial or administrative action and Related Action have different final judgment dates or if there is no covered judicial or administrative action connected to a Related Action, a claimant, who wishes to file a claim for an award in both a covered judicial or administrative action and a Related Action, or in a Related Action that does not have a connected covered judicial or administrative action, must follow one of the following procedures depending on that claimant's particular situation.
 - (i) If a final judgment imposing monetary sanctions in a Related Action has not been entered at the time the claimant submits a claim for an award in connection with a covered judicial or administrative action, the claimant must submit the claim for the Related Action on Form WB-APP within ninety (90) calendar days following the date of issuance of a final judgment in the Related Action.
 - (ii) If a final judgment in a Related Action has been entered and a Notice of Covered Action for a related covered judicial or administrative action has not been published, a claimant for an award in both the covered judicial or administrative action and Related Action may submit the claims for both the Related Action and the covered judicial or administrative action within ninety (90) days of the date of the Notice of Covered Action. The claims may be submitted on the same Form WB-APP.
 - (iii) If there is a final judgment in a Related Action that relates to a judicial or administrative action brought by the Commission under the Commodity Exchange Act that is not a covered judicial or administrative action, and therefore there is no Notice of Covered Action, a claimant for an award in connection with the Related Action must submit the claim in connection with the Related Action on Form WB-APP within ninety (90) calendar days following either:

- (A) The date of issuance of a final judgment in the Related Action, if that date is after the date of issuance of the final judgment in the related Commission judicial or administrative action; or
 - (B) The date of issuance of the final judgment in the related Commission judicial or administrative action, *i.e.*, the date the Related Action becomes a Related Action, if the date of issuance of the final judgment in the Related Action precedes the final judgment in the related Commission judicial or administrative action.
- (c) If the whistleblower provided the whistleblower's original information to the Commission anonymously pursuant to §§ 165.3 and 165.4 and:
- (1) The whistleblower is making the whistleblower's claim for a whistleblower award on a disclosed basis, the whistleblower must disclose the whistleblower's identity on the Form WB-APP. The whistleblower's identity must be verified in a form and manner that is acceptable to the Commission prior to the payment of any award; or
 - (2) The whistleblower is making the whistleblower's claim for a whistleblower award on an anonymous basis, the whistleblower must be represented by counsel. The whistleblower must provide the whistleblower's counsel with a completed Form WB-APP that is signed by the whistleblower by no later than the date upon which the whistleblower's counsel submits to the Commission a copy of the Form WB-APP that does not disclose the whistleblower's identity and is signed solely by the whistleblower's counsel. In addition, the whistleblower's counsel must retain the signed original of the whistleblower's Form WB-APP in counsel's records. Upon request of the Commission staff, whistleblower's counsel must produce to the Commission the whistleblower's signed original WB-APP and the whistleblower's identity must be verified in a form and manner that is acceptable to the Commission prior to the payment of any award.
- (d) A claimant may withdraw a form WB-APP by submitting a written request to the Whistleblower Office at any time during the review process.
- (e) (1) The Whistleblower Office may issue a Proposed Final Disposition for award applications that do not relate to a Notice of Covered Action, a final judgment in a Related Action, or a previously filed Form TCR without presentation of the award claim to the staff designated by the Director of the Division of Enforcement under § 165.15(a)(2) ("Claims Review Staff"). In such instances, the Whistleblower Office will inform the award claimant in writing that the claim does not relate to a Notice of Covered Action, a final judgment in a Related Action, or a previously filed Form TCR and will be rejected unless the claimant provides additional information. The claimant will have 30 days from the date of the written notice to respond and to correct the identified deficiencies. If the claimant does not respond in 30 days or if the response does not include information showing that the WB-APP relates to a Notice of Covered Action, a

final judgment in a Related Action, or a previously filed Form TCR the Whistleblower Office will issue a Proposed Final Disposition. The claimant's failure to submit a timely response to the written notice from the Whistleblower Office will constitute a failure to exhaust administrative remedies, and the claimant will be prohibited from pursuing an appeal under § 165.13.

(2) The Whistleblower Office will notify the Claims Review Staff of any Proposed Final Disposition under this subsection. Within thirty (30) calendar days thereafter, any member of the Claims Review Staff may request that the Proposed Final Disposition be reviewed by the Claims Review Staff. If no member of the Claims Review Staff requests such a review within the 30-day period, then the Proposed Final Disposition will become the Final Order of the Commission. In the event that a member of the Claims Review Staff requests a review, the Claims Review Staff will review the record that the Whistleblower Office relied upon in making its determination and either remand to the Whistleblower Office for further action or issue a Final Order of the Commission, which could consist of the Proposed Final Disposition.

(f) (1) In connection with each individual covered judicial or administrative action or final judgment in a Related Action, for which an award application is submitted, once the time for filing any appeals of the covered judicial or administrative action or the final judgment in the Related Action has expired (or, where an appeal is filed of the covered judicial or administrative action, or the final judgment in a Related Action, as applicable, and concluded), the Claims Review Staff designated under § 165.15(a)(2) will evaluate all timely whistleblower award claims submitted on Form WB-APP in response to a Notice of Covered Action, referenced in paragraph (a) of this section, or final judgment in a Related Action in accordance with the criteria set forth in this part.

(2) The Whistleblower Office may require that the claimant provide additional information relating to the claimant's eligibility for an award or satisfaction of any of the conditions for an award, as set forth in § 165.5(b)(2). The Whistleblower Office may also request additional information from the claimant in connection with the claim for an award in a Related Action to demonstrate that the claimant directly (or through the Commission) voluntarily provided the governmental agency, regulatory authority or self-regulatory organization the original information that led to the Commission's successful covered action, and that the information provided by the claimant led to the successful enforcement of the Related Action. The Whistleblower Office may also, in its discretion, seek assistance and confirmation from the other agency in making this determination.

(g) (1) Following Claims Review Staff evaluation, the Claims Review Staff will issue a Preliminary Determination setting forth a preliminary assessment as to whether the claim should be granted or denied and, if granted, setting forth the proposed award percentage amount. The Whistleblower Office will send a copy of the Preliminary Determination to the claimant.

- (2) The claimant may contest the Preliminary Determination made by the Claims Review Staff by submitting a written response to the Whistleblower Office setting forth the grounds for the claimant's objection to either the denial of an award or the proposed amount of an award. The response must be in the form and manner that the Whistleblower Office shall require. The claimant may also include documentation or other evidentiary support for the grounds advanced in the claimant's response. The claimant may also request a meeting with the Whistleblower Office within the timeframes provided in this paragraph (g), however such meetings are not required, and the Whistleblower Office may in its sole discretion deny the request.
- (i) Before determining whether to contest a Preliminary Determination, the claimant may, within thirty (30) days of the date of the Preliminary Determination, request that the Whistleblower Office make available for the claimant's review the materials from among those set forth in § 165.10 that formed the basis of the Claims Review Staff's Preliminary Determination.
 - (ii) If the claimant decides to contest the Preliminary Determination, the claimant must submit the claimant's written response and supporting materials setting forth the grounds for the claimant's objection to either the denial of an award or the proposed amount of an award within sixty (60) calendar days of the date of the Preliminary Determination, or if a request to review materials used to make a Preliminary Determination is made pursuant to paragraph (g)(2)(i) of this section, then within sixty (60) calendar days of the Whistleblower Office making those materials available for the claimant's review. The claimant also may request a meeting with the Whistleblower Office within those same sixty (60) calendar days. However, such meetings are not required and the Whistleblower Office may in its sole discretion decline the request.
- (h) If the claimant fails to submit a timely response pursuant to paragraph (g) of this section, then the Preliminary Determination will become the Final Order of the Commission (except where the Preliminary Determination recommended an award, in which case the Preliminary Determination will be deemed a Proposed Final Determination for purposes of paragraph (j) of this section). The claimant's failure to submit a timely response contesting a Preliminary Determination will constitute a failure to exhaust administrative remedies, and the claimant will be prohibited from pursuing an appeal under § 165.13.
- (i) If the claimant submits a timely response under paragraph (g) of this section, then the Claims Review Staff will consider the issues and grounds advanced in the claimant's response, along with any supporting documentation the claimant provided, and will make its Proposed Final Determination.
- (j) The Whistleblower Office will notify the Commission of each Proposed Final Determination. Within thirty (30) calendar days thereafter, any Commissioner may

request that the Proposed Final Determination be reviewed by the Commission. If no Commissioner requests such a review within the 30-day period, then the Proposed Final Determination will become the Final Order of the Commission. In the event a Commissioner requests a review, the Commission will review the record that the staff relied upon in making its determinations, including the claimant's submissions to the Whistleblower Office, and issue its Final Order.

(k) A Preliminary Determination, Proposed Final Disposition, or a Proposed Final Determination may be issued only after a review for legal sufficiency by the Office of the General Counsel.

(l) The Office of the Secretariat will serve the claimant with the Final Order of the Commission.

§ 165.8 Amount of award.

If all of the conditions are met for a whistleblower award in connection with a covered judicial or administrative action or a related action, the Commission will then decide the amount of the award pursuant to the procedure set forth in § 165.7.

(a) Whistleblower awards shall be in an aggregate amount equal to—

(1) Not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the covered judicial or administrative action or related actions; and

(2) Not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the covered judicial or administrative action or related actions.

(b) If the Commission makes awards to more than one whistleblower in connection with the same action or related action, the Commission will determine an individual percentage award for each whistleblower, but in no event will the total amount awarded to all whistleblowers as a group be less than 10 percent or greater than 30 percent of the amount the Commission or the other authorities collect.

§ 165.9 Criteria for determining amount of award.

The determination of the amount of an award shall be in the discretion of the Commission. This discretion shall be exercised as prescribed by § 165.7.

(a) In determining the amount of an award, the Commission shall take into consideration—

(1) The significance of the information provided by the whistleblower to the success of the covered judicial or administrative action or related action;

(2) The degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action

or related action;

- (3) The programmatic interest of the Commission in deterring violations of the Commodity Exchange Act by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws;
- (4) Whether the award otherwise enhances the Commission's ability to enforce the Commodity Exchange Act, protect customers, and encourage the submission of high quality information from whistleblowers; and
- (5) Potential adverse incentives from oversized awards.

(b) *Factors that may increase the amount of a whistleblower's award.* In determining whether to increase the amount of an award, the Commission will consider the following factors, which are not listed in order of importance.

(1) *Significance of the information provided by the whistleblower.* The Commission will assess the significance of the information provided by a whistleblower to the success of the Commission action or related action. In considering this factor, the Commission may take into account, among other things:

- (i) The nature of the information provided by the whistleblower and how it related to the successful enforcement action, including whether the reliability and completeness of the information provided to the Commission by the whistleblower resulted in the conservation of Commission resources; and
- (ii) The degree to which the information provided by the whistleblower supported one or more successful claims brought in the Commission action or related action.

(2) *Assistance provided by the whistleblower.* The Commission will assess the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action. In considering this factor, the Commission may take into account, among other things:

- (i) Whether the whistleblower provided ongoing, extensive, and timely cooperation and assistance by, for example, helping to explain complex transactions, interpreting key evidence, or identifying new and productive lines of inquiry;
- (ii) The timeliness of the whistleblower's initial report to the Commission or to an internal compliance or reporting system of business organizations committing, or impacted by, the violations of the Commodity Exchange Act, where appropriate;

(iii) The resources conserved as a result of the whistleblower's assistance;

- (iv) Whether the whistleblower appropriately encouraged or authorized others to assist the staff of the Commission who might otherwise not have participated in the investigation or related action;
 - (v) The efforts undertaken by the whistleblower to remediate the harm caused by the violations of the Commodity Exchange Act, including assisting the authorities in the recovery of the fruits and instrumentalities of the violations; and
 - (vi) Any unique hardships experienced by the whistleblower as a result of his or her reporting and assisting in the enforcement action.
- (3) *Law enforcement interest.* The Commission will assess its programmatic interest in deterring violations of the Commodity Exchange Act by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws. In considering this factor, the Commission may take into account, among other things:
- (i) The degree to which an award enhances the Commission's ability to enforce the commodity laws;
 - (ii) The degree to which an award encourages the submission of high quality information from whistleblowers by appropriately rewarding whistleblower submissions of significant information and assistance, even in cases where the monetary sanctions available for collection are limited or potential monetary sanctions were reduced or eliminated by the Commission because an entity self-reported a commodities violation following the whistleblower's related internal disclosure, report, or submission;
 - (iii) Whether the subject matter of the action is a Commission priority, whether the reported misconduct involves regulated entities or fiduciaries, whether the whistleblower exposed an industry-wide practice, the type and severity of the commodity violations, the age and duration of misconduct, the number of violations, and the isolated, repetitive, or ongoing nature of the violations;
 - (iv) The dangers to market participants or others presented by the underlying violations involved in the enforcement action, including the amount of harm or potential harm caused by the underlying violations, the type of harm resulting from or threatened by the underlying violations, and the number of individuals or entities harmed; and
 - (v) The degree, reliability and effectiveness of the whistleblower's assistance, including the consideration of the whistleblower's complete, timely truthful assistance to the Commission and criminal authorities.
- (4) *Participation in internal compliance systems.* The Commission will assess

whether, and the extent to which, the whistleblower and any legal representative of the whistleblower participated in internal compliance systems. In considering this factor, the Commission may take into account, among other things:

- (i) Whether, and the extent to which, a whistleblower reported the possible Commodity Exchange Act violations through internal whistleblower, legal or compliance procedures before, or at the same time as, reporting them to the Commission; and
- (ii) Whether, and the extent to which, a whistleblower assisted any internal investigation or inquiry concerning the reported Commodity Exchange Act violations.

(c) *Factors that may decrease the amount of a whistleblower's award.* In determining whether to decrease the amount of an award, the Commission will consider the following factors, which are not listed in order of importance.

(1) *Culpability.* The Commission will assess the culpability or involvement of the whistleblower in matters associated with the Commission's action or related actions. In considering this factor, the Commission may take into account, among other things:

- (i) The whistleblower's role in the Commodity Exchange Act 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.

(2) *Unreasonable reporting delay.* The Commission will assess whether the whistleblower unreasonably delayed reporting the Commodity Exchange Act violations. In considering this factor, the Commission may take into account, among other things:

- (i) Whether the whistleblower was aware of the relevant facts but failed to take reasonable steps to report or prevent the violations from occurring or continuing;

(ii) Whether the whistleblower was aware of the relevant facts but only reported them after learning about a related inquiry, investigation, or enforcement action; and

(iii) Whether there was a legitimate reason for the whistleblower to delay reporting the violations.

(3) *Interference with internal compliance and reporting systems.* The Commission will assess, in cases where the whistleblower interacted with his or her entity's internal compliance or reporting system, whether the whistleblower undermined the integrity of such system. In considering this factor, the Commission will take into account whether there is evidence provided to the Commission that the whistleblower knowingly:

(i) Interfered with an entity's established legal, compliance, or audit procedures to prevent or delay detection of the reported Commodity Exchange Act violation;

(ii) Made any material false, fictitious, or fraudulent statements or representations that hindered an entity's efforts to detect, investigate, or remediate the reported Commodity Exchange Act violations; or

(iii) Provided any false writing or document knowing the writing or document contained any false, fictitious or fraudulent statements or entries that hindered an entity's efforts to detect, investigate, or remediate the reported Commodity Exchange Act violations.

(d) The Commission shall not take into consideration the balance of the Fund in determining the amount of an award.

§ 165.10 Contents of record for award determination.

(a) The following items constitute the record upon which the award determination under § 165.7 shall be made:

(1) The whistleblower's Form TCR, "Tip, Complaint or Referral," including related attachments, and other documentation provided by the whistleblower to the Commission;

(2) The whistleblower's Form WB-APP, "Application for Award for Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act," and related attachments;

(3) The complaint, notice of hearing, answers and any amendments thereto;

(4) The final judgment, consent order, or administrative speaking order;

(5) The transcript of the related administrative hearing or civil injunctive proceeding,

including any exhibits entered at the hearing or proceeding;

- (6) Any other documents that appear on the docket of the proceeding;
- (7) Sworn declarations (including attachments) from the Commission's Division of Enforcement staff regarding any matters relevant to the award determination;
- (8) With respect to an award claim involving a Related Action, any statements or other information that an entity provides or identifies in connection with an award determination, provided the entity has authorized the Commission to share the information with the claimant. (Neither the Commission nor the Claims Review Staff may rely upon information that the entity has not authorized the Commission to share with the applicant); and
- (9) Any other documents or materials including sworn declarations from third-parties that are received or obtained by the Whistleblower Office to assist the Commission resolve the applicant's award application, including information related to the claimant's eligibility. (Neither the Commission nor the Claims Review Staff may rely upon information that a third party has not authorized the Commission to share with the claimant).

(b) The rules in this part do not entitle a claimant to obtain from the Commission any materials (including any pre-decisional or internal deliberative process materials that are prepared to assist the Commission or Claims Review Staff in deciding the claim) other than those listed in paragraph (a) of this section. The Whistleblower Office may make redactions as necessary to comply with any statutory restrictions, to protect the Commission's law enforcement and regulatory functions, and to comply with requests for confidential treatment from other law enforcement and regulatory authorities.

§ 165.11 Awards based upon related actions.

- (a) Provided that a whistleblower or whistleblowers comply with the requirements in §§ 165.3, 165.5 and 165.7, and pursuant to § 165.8, the Commission may grant an award based on the amount of monetary sanctions collected in a "Related Action" or "Related Actions", where:
 - (1) A "Related Action" is a judicial or administrative action that is brought by:
 - (i) The Department of Justice;
 - (ii) An appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction;
 - (iii) A registered entity, registered futures association, or self-regulatory organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)));

(iv) A State criminal or appropriate civil agency, acting within the scope of its jurisdiction; or

(v) A foreign futures authority; and

(2) The “Related Action” is based on the original information that the whistleblower voluntarily submitted to the Commission and led to a successful resolution of the Commission judicial or administrative action.

(b) The Commission will not make an award to a claimant for a final judgment in a Related Action if the claimant has already been granted an award by the Securities and Exchange Commission (SEC) for that same action pursuant to its whistleblower award program under section 21F of the Securities Exchange Act (15 U.S.C. 78a *et seq.*). If the SEC has previously denied an award to the claimant for a judgment in a Related Action, the whistleblower will be precluded from relitigating any issues before the Commission that the SEC resolved against the claimant as part of the award denial.

§ 165.12 Payment of awards from the Fund, financing of customer education initiatives, and deposits and credits to the Fund.

(a) The Commission shall pay awards to whistleblowers from the Fund.

(b) The Commission shall deposit into or credit to the Fund:

(1) Any monetary sanctions collected by the Commission in any covered judicial or administrative action that is not otherwise distributed, or ordered to be distributed, to victims of a violation of the Commodity Exchange Act underlying such action, unless the balance of the Fund at the time the monetary sanctions are collected exceeds \$100,000,000. In the event the Fund’s value exceeds \$100,000,000, any monetary sanctions collected by the Commission in a covered judicial or administrative action that is not otherwise distributed, or ordered to be distributed, to victims of violations of the Commodity Exchange Act or the rules and regulations thereunder underlying such action, shall be deposited into the general fund of the U.S. Treasury.

(2) In the event that the amounts deposited into or credited to the Fund under paragraph (b)(1) of this section are not sufficient to satisfy an award made pursuant to § 165.7, then, pursuant to Section 23(g)(3)(B) of the Commodity Exchange Act;

(i) An amount equal to the unsatisfied portion of the award;

(ii) Shall be deposited into or credited to the Fund;

(iii) From any monetary sanction collected by the Commission in any judicial or administrative action brought by the Commission under the Commodity Exchange Act, regardless of whether it qualifies as a “covered judicial or administrative action”; *provided*, however, that such judicial or

administrative action is based on information provided by a whistleblower.

- (c) *Office of Customer Education and Outreach.* The Commission shall undertake and maintain customer education initiatives through its Office of Consumer Education and Outreach. The initiatives shall be designed to help customers protect themselves against fraud or other violations of the Commodity Exchange Act, or the rules or regulations thereunder. The Commission shall fund the initiatives and may utilize funds deposited into the Fund during any fiscal year in which the beginning (October 1) balance of the Fund is greater than \$ 10,000,000. The Commission shall budget, on an annual basis, the amount used to finance customer education initiatives, taking into consideration the balance of the Fund.

§ 165.13 Appeals.

- (a) Any Final Order of the Commission relating to a whistleblower award determination, including whether, to whom, or in what amount to make whistleblower awards, may be appealed to the appropriate court of appeals of the United States not more than 30 days after the Final Order of the Commission is issued, provided that administrative remedies have been exhausted.
- (b) The record on appeal shall consist of:
- (1) The Contents of Record for Award Determinations, as set forth in § 165.10. The record on appeal shall not include any pre-decisional or internal deliberative process materials that are prepared to assist the Commission or the Claims Review Staff in deciding the claim (including staff's draft Preliminary Determination or any Proposed Final Determination or staff's draft final determination); and
 - (2) The Preliminary Determination and the Final Order of the Commission, as set forth in § 165.7.

§ 165.14 Procedures applicable to the payment of awards.

- (a) A recipient of a whistleblower award is entitled to payment on the award only to the extent that the monetary sanction upon which the award is based is collected in the Commission judicial or administrative action or in a related action.
- (b) Payment of a whistleblower award for a monetary sanction collected in a Commission action or related action shall be made within a reasonable time following the later of:
- (1) The date on which the monetary sanction is collected; or
 - (2) The completion of the appeals process for all whistleblower award claims arising from:
 - (i) The Notice of Covered Action, in the case of any payment of an award for a monetary sanction collected in a covered judicial or administrative action;

or

- (ii) The related action, in the case of any payment of an award for a monetary sanction collected in a related action.
- (c) If there are insufficient amounts available in the Fund to pay the entire amount of an award payment within a reasonable period of time from the time for payment specified by paragraph (b) of this section, then subject to the following terms, the balance of the payment shall be paid when amounts become available in the Fund, as follows:
- (1) Where multiple whistleblowers are owed payments from the Fund based on awards that do not arise from the same Notice of Covered Action (or related action), priority in making these payments will be determined based upon the date that the Final Order of the Commission is made. If two or more of these Final Orders of the Commission are entered on the same date, then those whistleblowers owed payments will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.
 - (2) Where multiple whistleblowers are owed payments from the Fund based on awards that arise from the same Notice of Covered Action (or related action), they will share the same payment priority and will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

§ 165.15 Administering the whistleblower program.

- (a) *Specific authorities*—(1) *Payment, deposits, and credits.* The Executive Director is authorized to deposit into or credit collected monetary sanctions to the Fund, and to make payment of awards therefrom, with the concurrence of the General Counsel and the Director of the Division of Enforcement, or of their respective designees.
 - (2) *Designation of claims review staff.* The Claims Review Staff referenced in § 165.7 shall be composed of no fewer than three and no more than five staff members from any of the Commission’s Offices or Divisions (except the Office of General Counsel) who have not had direct involvement in the underlying enforcement action, as designated by the Director of the Division of Enforcement in consultation with the Executive Director. The Claims Review Staff will always include at least one staff member who does not work in the Division of Enforcement.
 - (3) *Disclosure of whistleblower identifying information.* The Director of the Division of Enforcement is authorized on behalf of the Commission to exercise its discretion to disclose whistleblower identifying information under § 165.4(a).
- (b) *General authority to administer the program.* The Director of the Division of Enforcement shall have general authority to administer the whistleblower program except as otherwise provided under this part.

§ 165.16 No immunity.

The Commodity Whistleblower Incentives and Protections provisions set forth in Section 23(h) of Commodity Exchange Act and this Part 165 do not provide individuals who provide information to the Commission with immunity from prosecution. The fact that an individual may become a whistleblower and assist in Commission investigations and enforcement actions does not preclude the Commission from bringing an action against the whistleblower based upon the whistleblower's own conduct in connection with violations of the Commodity Exchange Act and the Commission's regulations. If such an action is determined to be appropriate, however, the Commission's Division of Enforcement will take the whistleblower's cooperation into consideration in accordance with its sanction recommendations to the Commission.

§ 165.17 Awards to whistleblowers who engage in culpable conduct.

In determining whether the required \$1,000,000 threshold has been satisfied for purposes of making any award, the Commission will not take into account any monetary sanctions that the whistleblower is ordered to pay, or that is ordered against any entity whose liability is based primarily on conduct that the whistleblower principally directed, planned, or initiated. Similarly, if the Commission determines that a whistleblower is eligible for an award, any amounts that the whistleblower or such an entity pay in sanctions as a result of the action or related actions will not be included within the calculation of the amounts collected for purposes of making payments pursuant to § 165.14.

§ 165.18 Staff communications with whistleblowers from represented entities.

If the whistleblower is a whistleblower who is a director, officer, member, agent, or employee of an entity that has counsel, and the whistleblower has initiated communication with the Commission relating to a potential violation of the Commodity Exchange Act, the Commission's staff is authorized to communicate directly with the whistleblower regarding the subject of the whistleblower's communication without seeking the consent of the entity's counsel.

§ 165.19 Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration of disputes.

- (a) *Non-waiver.* The rights and remedies provided for in part 165 of the Commission's regulations may not be waived by any agreement, policy, form, or condition of employment, including by a predispute arbitration agreement. No predispute arbitration agreement shall be valid or enforceable if the agreement requires arbitration of a dispute arising under this part.
- (b) *Protected Communications.* 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.

§ 165.20 Whistleblower anti-retaliation protections.

- (a) *In general.* No employer may discharge, demote, suspend, directly or indirectly threaten or harass, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
 - (1) In providing information to the Commission in accordance with this part; or
 - (2) In assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information.
- (b) *Anti-retaliation enforcement.* Section 23(h)(1)(A) of the Commodity Exchange Act (7 U.S.C. 26(h)(1)), including the rules in this part promulgated thereunder, shall be enforceable in an action or proceeding brought by the Commission including where retaliation is in response to a whistleblower providing information to the Commission after reporting the information through internal whistleblower, legal or compliance procedures.
- (c) *Protections apply regardless of non-qualification.* The anti-retaliation protections apply whether or not the whistleblower satisfies the requirements, procedures, and conditions to qualify for an award.

Appendix A to Part 165—Guidance With Respect to the Protection of Whistleblowers Against Retaliation

- (a) *In general.* Section 23(h)(1) of Commodity Exchange Act prohibits employers from engaging in retaliation against whistleblowers. A violation of this provision could be addressed by a Commission enforcement action, or a lawsuit by an individual. Section 23(h)(1)(B) provides for a federal cause of action brought by the whistleblower against the employer, which must be filed in the appropriate district court of the United States within two (2) years of the employer’s retaliatory act, and potential relief for prevailing whistleblowers, including reinstatement, back pay, and compensation for other expenses, including reasonable attorney’s fees.
- (b) *Enforcement—(1) Private cause of action.* (i) An individual who alleges discharge, demotion, suspension, direct or indirect threats or harassment, or any other manner of discrimination in violation of section 23(h)(1)(A) of the Commodity Exchange Act may bring an action under section 23(h)(1)(B) of the Commodity Exchange Act in the appropriate district court of the United States for the relief provided in section 23(h)(1)(C) of the Commodity Exchange Act, unless the individual who is alleging discharge or other discrimination in violation of section 23(h)(1)(A) of the Commodity Exchange Act is an employee of the Federal Government, in which case the individual shall only bring an action under section 1221 of title 5, United States Code.
 - (ii) *Subpoenas.* A subpoena requiring the attendance of a witness at trial or hearing conducted under section 23(h)(1)(B)(ii) of the Commodity Exchange Act may be served at any place in the United States.

(iii) *Statute of limitations.* A private cause of action under section 23(h)(1)(B) of the Commodity Exchange Act may not be brought more than 2 years after the date on which the violation reported in section 23(h)(1)(A) of the Commodity Exchange Act is committed.

(iv) *Relief.* Relief for an individual prevailing in an action brought under section 23(h)(1)(B) of the Commodity Exchange Act shall include—

(A) Reinstatement with the same seniority status that the individual would have had, but for the discrimination;

(B) The amount of back pay otherwise owed to the individual, with interest; and

(C) Compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.

(2) *Commission authority to bring action.* The Commission may bring an 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.