

KOHN, KOHN & COLAPINTO, LLP
ATTORNEYS AT LAW
1710 N STREET, N.W.
WASHINGTON, D.C. 20036

TELEPHONE: (202) 342-6980

TELECOPIER (202) 342-6984

December 23, 2019

URGENT MATTER

Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
chairmanoffice@sec.gov

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
rule-comments@sec.gov

**Re: EIGHTH SUPPLEMENTAL COMMENT: PROPOSED RULES
File Number S7-16-18**

Update: 20-WB-02 Demonstrates that TCR filing *perfects* award eligibility.

Dear Chairman Clayton and Secretary Countryman:

We are writing to further comment on the Securities and Exchange Commission's ("SEC" or "Commission") Proposed Rules (hereinafter "the proposed rules").¹ In this letter we would like to highlight the December 19, 2019 U.S. Commodity Futures Trading Commission decision, 20-WB-02 (hereinafter "CFTC decision").² The decision makes clear that Tips, Complaints, and Referrals Form (hereinafter "TCR") serves to perfect one's whistleblower status and the timing of such a filing is not relevant to a whistleblowers award eligibility when the record shows a whistleblower has been of significant assistance to the Commission. Given the importance of the program and the continuing efforts of the Commission to formulate revisions that incentivize credible whistleblowers, we believe it is imperative to highlight this case which would have an opposite

¹ See Whistleblower Program Rules, 83 Fed. Reg. 34,702 at 723-24, 750 (July 20, 2018), available at <https://www.govinfo.gov/content/pkg/FR-2018-07-20/pdf/2018-14411.pdf>. This letter is submitted for the official record and constitutes a formal supplemental comment to our initial comment filed on July 24, 2018.

² Determination No. 20-WB-02, CFTC Decision (December 19, 2019), available at <https://www.kkc.com/wp-content/uploads/2019/12/20-WB-02.pdf>.

outcome should the Commission adopt rules that predicate award eligibility on the timing of a TCR filing.

I. 20-WB-02 counters the Commission’s assertions that the proposed rules simply codify existing practice.

We have carefully reviewed the CFTC decision in 20-WB-02 and one thing is now clear. A strict rule mandating that TCRs must be filed “first” in cases for which a whistleblower deserves a reward would be completely contrary to existing whistleblower program practices. In other words, the Proposed Rules propose a deviation from accepted practice, rather than a codification of existing practice as asserted by some members of the Commission.

The practice and rules of the CFTC are substantially similar, both utilize the Form TCR and have similar criteria for awarding whistleblowers. Particularly, both require a whistleblower provide original information that leads to successful enforcement to be awarded. Further, as of today, neither require the filing of a Form TCR at any specified point as a condition for, or bar to, award.

II. The Form TCR is intended to perfect whistleblower status, not establish it.

In 20-WB-02 the whistleblower was awarded because of his/her contributions to the CFTC enforcement action, even though despite he/she filed the related TCR *after the conclusion of the investigation*. In this decision the CFTC clearly states that the whistleblower “filed a Form TCR to *perfect* his/her status as a whistleblower” (emphasis added). And, instead the CFTC focused on the facts that the whistleblower “provided information that lead to a successful enforcement action first by causing the case to be opened, and second by significantly contributing to the investigation.” And, that “the record demonstrates that he/she provided original information to the Commission that led to the successful enforcement of the Covered Action.”

Denying an otherwise qualified whistleblower a reward solely on the basis of the timing of an initial application for a reward, even if that individual served the public interest and his or her original information directly led to the protection of investors and the collection of millions or even billions of dollars in sanctions, raises significant policy and legal issues. In this case, the CFTC awarded a whistleblower over \$1 million for his/her assistance in exposing a scheme that violated the Commodity Exchange Act.³

III. The proposed a “good cause” exception should clarify that a Form TCR is the method of perfecting award eligibility rather than a bar.

A “good cause” exception has been proposed by a number of commentators including Kohn, Kohn, and Colapinto, the National Whistleblower Center, Mr. Sean McKessy the former Chief of the SEC Whistleblower Office, and Jordan Thomas, a former Assistant Chief Litigation Counsel in

³ CFTC Awards More Than \$1 Million to Whistleblower, U.S. Commodity Futures Trading Commission, Press Release, available at <https://www.cftc.gov/PressRoom/PressReleases/8098-19> (December 19, 2019).

the Division of Enforcement of the SEC.⁴ Attached is a modified proposal designed to conform the proposed SEC rule with the decisions of the CFTC interpreting their identical procedures. The modified proposal clarifies that the TCR is necessary to “perfect” a claim, but submitting information directly to the SEC or indirectly through the other avenues permitted by the Dodd-Frank Act (such as through sister government agencies, the news media and/or compliance programs) does not disqualify an individual from an award. Clearly stating that the TCR is necessary to perfect a claim, and the failure to file a TCR may result in the denial of a claim, will harmonize the SEC program with the closely related CFTC program. Furthermore, for reasons stated in the CFTC decisions concerning this issue, and the DFA’s legislative language and Congressional history, these modifications are consistent with the public interest and the law.⁵

IV. The Commission Should Ensure that its Reporting Requirements do not Conflict with those of CFTC.

It was the intent of Congress for the CFTC and SEC programs to be similarly administered. It would be odd, and create confusion and hardships, if the CFTC permitted whistleblowers to provide their agencies with information prior to filing the formal whistleblower applications, but for the SEC to have a different rule.

Many whistleblower cases concern violations that fall within the jurisdiction of both the SEC and the CFTC. It would not serve the interests of justice if a whistleblower understood that he or she could immediately contact the CFTC with information about frauds, but then learn (when it is too late) that the SEC has a completely different procedure.

The SEC should harmonize its initial reporting rules with the closely related CFTC program. Recognizing the Form TCR as a manner of perfecting one’s whistleblower status is the most effective way to do this and reflects current practice.

We herald the highly effective CFTC and SEC whistleblower programs and encourage the Commission to abstain from including any new rules that would condition whistleblower eligibility on the timing of submission of the Form TCR. Current practice, as applied by the CFTC, is to view Form TCR’s as manners of perfecting whistleblower status, and may serve to support eligibility, not act as an arbitrary bar. The key activities Congress intended for the Commission to prioritize are outlined in 21F-6(a), which does not mention the filing of a Form TCR. As argued in our earlier comments, we are confident about investigators ability to construct a record from which a whistleblowers contribution can be clearly assessed as was the case in 20-WB-02.

⁴ Release No. 34-83557; File No. S7-16-18, Letter from Sean McKessy (October 25, 2019)(available at <https://www.kkc.com/wp-content/uploads/2019/12/letter-McKessy.pdf>); and *see* Letter from Kohn, Kohn, and Colapinto (October 21, 2019), available at <https://www.kkc.com/wp-content/uploads/2019/11/s71618-6320582-194346.pdf>.

⁵ *See* Letter from Kohn, Kohn, and Colapinto (November 22, 2019), available at <https://www.kkc.com/wp-content/uploads/2019/12/s71618-6463151-199309.pdf>.

Thank you for your careful attention to these matters.

Respectfully submitted,

/s/Stephen M. Kohn

Stephen M. Kohn

Michael D. Kohn

David K. Colapinto

Kohn, Kohn, and Colapinto, LLP

1710 N Street, N.W.

Washington, D.C. 20036

Tel: (202) 342-6980

Fax: (202) 342-6984



cc: Commissioner Robert J. Jackson Jr., *via e-mail*;
Commissioner Allison Herren, Lee, *via e-mail*;
Commissioner Hester M. Peirce, *via e-mail*;
Commissioner Elad L. Roisman, *via e-mail*;
Jane Norberg, Chief, Office of the *via e-mail*.

Attachments: Proposed Revision Rule 21F-9(e)
CFTC Decision in 20-WB-02 (Dec. 19, 2019)

Proposed Revision Rule 21F-9(e)

Note: Additions in **Bold**, and ~~striketrough~~.

(e) (1) You must follow the procedures specified in paragraphs (a) and (b) of this section **in order to perfect your award claim. If you fail to perfect your claim** within thirty days of the first time you provide the Commission with information that you rely upon as a basis for claiming an award ~~. If you fail to do so, then you will~~ **may** be deemed ineligible for an award in connection with that information.

(2) For good cause shown the requirement in section (e)(1) shall be waived and the individual shall be considered a whistleblower under §§ 240.21F-2(a) and 240.21F-3. For purposes of this provision good cause is defined as follows:

- (A) the individual provided original information to the Commission;
- (B) the original information caused the Commission to commence an examination, open or reopen an investigation, or inquire into different conduct as part of a current Commission examination or investigation under Rule 21F-4(c)(1) of the Exchange Act;
- (C) the original information significantly contributed to the success of a Commission judicial or administrative enforcement action under Rule 21F-4(c)(2) of the Exchange Act or that the information was otherwise relied upon by the Commission as required under 15 U.S.C. §§ 78u-6(b) and (c);
- (D) the individual's information materially contributed to a sanction of over \$1 million;
- (E) this exception may only be applied if the contributions of the individual are confirmed by the appropriate Commission staff who can confirm that individual's contributions as set forth in paragraphs (e)(2)(A)-(D) of this section.
- (F) the deadline for applying for this good cause exception shall be at the time the individual(s) file a timely WB APP application.
- (G) the Commission may take into consideration the failure to file a timely TCR when evaluating the factors set forth in sections (a) and (b) in determining whether to increase or decrease an award.

In the Matter of Claims for Award by:)
)
 Redacted (“Claimant 1”),)
 WB-APP Redacted ; and) CFTC Whistleblower Award
) Determination No. 20-WB-02
 Redacted (“Claimant 2”),)
 WB-APP Redacted)
)
 In Connection with)
 Notice of Covered Action No. Redacted)
)
)

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS

The Claims Review Staff (“CRS”) issued a Preliminary Determination recommending that Claimant 1 receive a whistleblower award in the amount of *** percent (***) of the monetary sanctions collected in Redacted (“Covered Action”).¹ This recommended award percentage would yield a payment of \$Redacted.

The recommendation of the CRS with respect to Claimant 1 is adopted. We find that the record demonstrates that he/she voluntarily provided original information to the Commission that led to the successful enforcement of the Covered Action pursuant to Section 23(b)(1) of the Commodity Exchange Act. 7 U.S.C. § 26(b)(1) (2018).

Claimant 1, Redacted, provided information that led to a successful enforcement action first by causing the case to be opened, and second by significantly contributing to the investigation. He/she first reported his/her information to another regulator through his/her company’s internal reporting procedures, and then the other regulator referred the case to the CFTC.² Claimant 1 also directly provided Division staff with additional assistance through a CFTC-requested interview with Division staff, and by providing additional documents through his/her employer’s counsel. Claimant 1 voluntarily provided information to the CFTC because Claimant 1’s employer acted as his/her representative in submitting the information to the other

¹ The Preliminary Determination further recommended that the award application submitted by Claimant 2 be denied. Claimant 2 failed to submit a request for reconsideration of the Preliminary Determination, and, therefore, the Preliminary Determination denying his claim for award has become the Final Order of the Commission. 17 C.F.R. § 165.7(h) (2019).

² Claimant 1 initially submitted his/her information to another regulator through his/her employer’s compliance process, but later provided direct assistance to Division of Enforcement (“Division”) staff through an interview that greatly assisted Division staff. We have determined that Claimant 1 has successfully established that he/she was the original source of information that the Division received from Redacted regulator. See 17 C.F.R. § 165.2(j). We have also decided to give credit to Claimant 1 for causing the case to be opened, because the information Claimant 1 provided, albeit up through his/her employer’s compliance process and then over via the other regulator, was sufficiently specific, credible, and timely to cause the Commission to open an investigation. See 17 C.F.R. § 165.2(i)(1).

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regulator, and then Claimant 1 directly provided information to the CFTC both during and subsequent to his/her interview. 17 C.F.R. §§ 165.2(i), (l)(1) & (o)(1). Claimant 1's report to the other regulator should not be considered mandatory under the Rules. 17 C.F.R. § 165.2(o)(2).

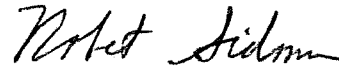
The Commission then brought a successful action based on conduct that was related to the subject of the original information provided by Claimant 1. Although Claimant 1 filed a Form TCR to perfect his/her status as a whistleblower after the conclusion of the investigation, we find that Claimant 1 complied with the form and manner requirements of the Rules per the language of Rule 165.3(a), which does not require a whistleblower to submit information on a Form TCR in his/her initial submission. *See* 17 C.F.R. § 165.3(a).

It is hereby ORDERED that Claimant 1 shall receive an award of*** percent (***) of the monetary sanctions collected, or to be collected, in the Covered Action.

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By the Commission.



Robert Sidman
Deputy Secretary of the Commission
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, DC 20581

Dated: December 19, 2019