

# Congress Must Pass CFTC Whistleblower Funding Law

By **Stephen Kohn** (August 22, 2023)

Since Congress passed the Dodd-Frank Act in 2010, a lot of attention has been paid to the creation and subsequent operations of a whistleblower award program at the U.S. Securities and Exchange Commission.

This is understandable — the SEC Whistleblower Program<sup>[1]</sup> has revolutionized the enforcement of Wall Street fraud. Whistleblower tips have led to over \$6.3 billion in monetary sanctions and the agency has correspondingly awarded over \$1.4 billion to whistleblowers.



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But in the wake of Dodd-Frank, what has been most surprising to many Wall Street observers is the success of the SEC's sibling whistleblower program. Dodd-Frank also established a practically identical whistleblower program at the Commodity Futures Trading Commission,<sup>[2]</sup> a little-known regulatory agency with no criminal law enforcement authority.

The CFTC regulates the U.S. derivatives markets, including the futures market, the options market, and the \$300 trillion swaps market. These markets have a profound impact on the prices of goods and services such as food, energy, and transportation.

The types of frauds that corrupt the commodities markets are just as complex and vast as the markets themselves. In passing Dodd-Frank, Congress recognized that incentivizing insiders with high-quality information to come forward and cooperate with investigators would be crucial to effectively policing the commodities markets.

The CFTC whistleblower program offers mandatory monetary awards to qualified whistleblowers,<sup>[3]</sup> individuals who voluntarily provide original information that leads to a successful enforcement action. The program had its moment in the spotlight in 2021 when it issued a **\$200 million whistleblower award**,<sup>[4]</sup> the second-largest individual whistleblower award in history.

The success of the program extends far beyond that one award, however. Whistleblowers have contributed to enforcement actions bringing in more than \$3 billion from fraudsters. According to the CFTC, roughly 30% of all the agency's enforcement investigations stem from whistleblowers.

The success of the CFTC whistleblower program has come at a cost, however. A congressionally set cap on the fund used to finance the program has created a financial crisis. A bipartisan fix has been introduced in the U.S. Senate, but urgent congressional action is needed to ensure that the CFTC whistleblower program can continue to be the remarkable success story that it has.

## The Remarkable Growth of the CFTC Whistleblower Program

Prior to the passage of the Dodd-Frank Act, there were few, if any, known cases of whistleblowers in the commodity exchange market. The CFTC had no history of ever working with whistleblowers, had never paid a whistleblower award and had no

whistleblower office.

Dodd-Frank required the CFTC to establish a whistleblower program and provided the statutory framework necessary for a successful program: mandatory awards based on the sanctions collected using the whistleblower's information, anonymous reporting mechanisms and robust anti-retaliation protections.

While Dodd-Frank provided a strong framework, it was still up to the CFTC to set up and run the program. It did so with flying colors. In short order, it funded and staffed its whistleblower office, approved regulations modeled on the SEC's, publicized the program and issued public alerts[5] explaining the types of frauds the CFTC was interested in prosecuting.

Even so, the program was slow to get up and running. In the first 18 months after Dodd-Frank was signed into law, the CFTC received only 58 whistleblower tips. The SEC, by comparison, received over 3,000 tips in this same time frame.

Furthermore, it was not until 2014 that the CFTC issued its first whistleblower award: a \$240,000 award,[6] which was only a fraction of the size of awards whistleblowers were receiving under the whistleblower laws of the False Claims Act, SEC and Internal Revenue Service.

In the past decade, however, the program has seen remarkable growth. In the 2022 fiscal year, the program received 1,506 whistleblower tips,[7] the highest total yet and the continuation of a rapid trend upward over the past several years. It has to date paid out over \$330 million in awards to qualified whistleblowers.

The scope of misconduct that whistleblowers report to the CFTC is widespread. The agency's whistleblower office stated in its report for the 2022 fiscal year[8] that the program received tips and complaints regarding activities including but not limited to record keeping or registration violations, illegal swap dealer business conduct, solicitation, misappropriation, insider trading, and other types of fraud, use of deceptive or manipulative devices in trading, as well as spoofing, and other forms of disruptive trading or market manipulation.

In recent years, the CFTC has increased its enforcement efforts around cryptocurrency fraud and the agency reports that "[t]he majority of tips received during the [2022 Fiscal Year] involved fraudulent misappropriation and fraudulent solicitation involving crypto/digital assets (e.g., pump-and dumps, fraudulent representations of opportunities, or refusals to honor withdrawal requests)."

The agency also recently posted a whistleblower alert[9] calling on whistleblowers to disclose fraud in the carbon markets.

In late 2020, the CFTC signaled that it had commenced tackling international corruption[10] when it sanctioned Vitol Group, a Dutch oil trading company, \$130 million[11] for corruptly manipulating international commodities markets by paying bribes in Brazil, Ecuador and Mexico. This was the agency's first sanction in an international bribery case.

The CFTC soon outdid itself, however, when it was the leading agency in sanctioning Swiss-based oil and energy trading company Glencore PLC \$1.186 billion[12] for manipulating the price of oil and paying kickbacks and bribes in Brazil, Cameroon, Nigeria and Venezuela.

The markets overseen by the CFTC are massive and complex. The whistleblower program

has been instrumental in the ability of the small agency — in 2021 its entire annual budget was approximately \$300 million — to effectively police these markets and bring in billions of dollars in sanctions.

The acting director of the CFTC's whistleblower office, Christina McGlosson, recently said that the CFTC "recognizes the critical role whistleblowers play in our enforcement program every day." [13]

A look at the numbers reveals just how massive of a success the CFTC whistleblower program has been in terms of a cost-benefit analysis. [14] Each year, the CFTC publicly reveals the costs of running its whistleblower program in the annual reports published by its whistleblower office.

Up through the 2022 fiscal year, the CFTC reports that the total cost of administering the CFTC whistleblower program was \$20,982,000. In the same time frame, the CFTC reported that the sanctions paid by fraudsters in whistleblower cases exceeded \$3 billion and that the program correspondingly awarded \$330 million.

A quick cost-benefit analysis of these figures reveals that the CFTC whistleblower program has resulted in a \$2,649,018,000 profit for American taxpayers.

On a tiny budget, the CFTC has created a world-class whistleblower program, which has greatly bolstered the agency's enforcement efforts as it extends into emergent areas of fraud.

### **A Funding Crisis Threatens the Program**

The remarkable growth and success of the CFTC whistleblower program has caused a crisis threatening to undermine the program. [15]

When it established the program in 2010, Congress placed a cap on the amount of money that could be placed in the fund used to finance the program and pay out whistleblower awards.

The size of this cap did not account for the rapid growth of the program, however, and its restrictive size has meant that the CFTC has had to delay the issuance of whistleblower awards and that large awards pose an impending threat to the CFTC whistleblower program's ability to function.

CFTC whistleblower awards, as well as the operating expenses of the CFTC whistleblower program, are financed through the Consumer Protection Fund. This fund is itself entirely financed by sanctions paid by fraudsters in enforcement actions aided by whistleblowers. This means that the whistleblower program is entirely self-sufficient and does not rely on taxpayer dollars and congressional appropriations.

Back in 2010, Congress placed a \$100 million cap on the amount of money which could be set aside in the fund at any given time. Any sanctions collected which would push the fund over that limit are instead deposited into the U.S. Department of the Treasury's general fund.

Thus, while the CFTC whistleblower program has brought in billions of dollars in sanctions, only a fraction of that has been made available to the program. Large sanctions mean large whistleblower awards, and because the fund is only able to receive such a limited

percentage of sanctions, it has been depleting faster than it is being replenished.

The cap also means that particularly large whistleblower awards pose the threat of completely draining the program of its finances. In 2021, the CFTC whistleblower office informed senators<sup>[16]</sup> that it was delaying the issuance of whistleblower awards because of the funding crisis. It also raised the possibility of furloughing staff should the fund be depleted.

In response, Congress enacted a bipartisan emergency fix. Signed into law by President Joe Biden on July 6, 2021,<sup>[17]</sup> the CFTC Fund Management Act established a separate fund to finance the operations of the CFTC whistleblower office. This ensures the office can continue to operate even if large awards deplete the award fund.

The CFTC Fund Management Act is set to expire in 2024, however. Furthermore, the law does not address the deeper issue: that the cap on the Consumer Protection Fund is incongruous with the size of the CFTC whistleblower program in 2023.

In March, Rostin Behnam, chairman of the CFTC, testified before the U.S. Senate Committee on Agriculture, Nutrition and Forestry. During his testimony, Behnam expressed his belief that the fund needs a long-term fix.<sup>[18]</sup>

### **The CFTC Whistleblower Fund Improvement Act**

On July 26, a bipartisan group of members of Congress introduced a bill that provides the long-term fix<sup>[19]</sup> to the CFTC whistleblower program's funding crisis. The CFTC Whistleblower Fund Improvement Act of 2023, introduced by Sens. Chuck Grassley, R-Iowa, and Maggie Hassan, D-N.H., and Rep. Zach Nunn, R-Iowa,<sup>[20]</sup> raises the cap on the Consumer Protection Fund to \$300 million.

This increased cap will ensure that the program will have the necessary cash to award qualified whistleblowers without making new authorizations or expenditures of taxpayer dollars. The bill also makes permanent the separate fund for the whistleblower office operations that was established by the CFTC Fund Management Act.

The bill has bipartisan support in Congress, is supported by the CFTC itself and is thoroughly endorsed by whistleblower advocates. "This legislation should not be controversial," wrote a coalition of whistleblower advocacy groups.<sup>[21]</sup> "The CFTC Whistleblower Fund Improvement Act would help keep pace with the needs of a fund that supports a highly successful program that has experienced significant growth in recent years."

The CFTC whistleblower program has been a remarkable success story. It demonstrates the transformative effect a well-run modern whistleblower award program can have on the enforcement efforts of a regulatory agency.

The bipartisan Whistleblower Fund Improvement Act will ensure that the CFTC whistleblower program will not be a victim of its own success and can continue to help root out fraud in the U.S. derivatives markets.

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***Disclosure: Kohn Kohn & Colapinto is among the signees of the letter written by***

***the coalition of whistleblower advocacy groups.***

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[6] <https://www.cftc.gov/PressRoom/PressReleases/6933-14>.

[7] <https://kkc.com/blog/cftc-whistleblower-programs-annual-report-details-record-year/>.

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[21] [https://www.budget.senate.gov/imo/media/doc/stakeholder\\_letter\\_-\\_cftc\\_whistleblower\\_fund\\_improvement\\_act.pdf](https://www.budget.senate.gov/imo/media/doc/stakeholder_letter_-_cftc_whistleblower_fund_improvement_act.pdf).