

CONSTANTINE CANNON LLP

Gordon Schnell/Daniel Vitelli
212.350.2700
gschnell@constantinecannon.com
dvitelli@constantinecannon.com

NEW YORK | WASHINGTON | SAN FRANCISCO

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By Regulations.gov Portal

Commodity Futures Trading Commission
Christopher Kirkpatrick, Secretary
Three Lafayette Centre, 1155 21st Street NW
Washington, DC 20581

Re: Constantine Cannon Comments to CFTC Proposed Rules Concerning Whistleblower Award Determination (RIN 3038-AF74)

We are providing these comments in response to the Commodity Futures Trading Commission (CFTC) Notice of Proposed Rulemaking to amend its whistleblower rules. Specifically, the CFTC is proposing a 30% presumption for whistleblower awards of \$5 million or less, following the presumption the Securities and Exchange Commission (SEC) uses under Rule 21F-6(c) in its analogous whistleblower program.

We applaud the CFTC for its strong support of its whistleblower program, its efforts to improve the program, and its recognition of the valuable role whistleblowers play in assisting the agency combat commodities violations. In providing financial incentives and protections to whistleblowers who voluntarily report these violations, the CFTC program provides a critical path for whistleblowers to help the government. It is an especially important tool these days given the ever-more sophisticated schemes in place and the difficulty of detecting them without the help of whistleblowers with firsthand knowledge of their existence and operation.

Our firm's experience with the CFTC Whistleblower Program has been very positive. We have found the CFTC receptive and responsive to the submissions we have made on behalf of our whistleblower-clients, and has treated them with respect and appreciation for coming forward. The one area where the agency and its whistleblower program can improve is in the length of time it has taken to make a whistleblower award determination. In our experience, it generally takes several years -- in some cases 4 years or longer -- from the time of the original award application, and this is in addition to the several years or more it typically takes for the agency to investigate the alleged misconduct, decide whether to bring an enforcement action, and resolve the action.

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We are heartened by the CFTC's recognition of this delay and its efforts to address it with the proposed rule change. The agency is correct that the extended delay in its awards determination process poses a significant disincentive for would-be whistleblowers to report violations. We know this firsthand from our own dealings with potential whistleblowers who look to timing considerations as a significant factor in assessing whether it is worth it for them to move forward under the whistleblower program. This is especially true given the significant risk of retaliation and professional and social backlash whistleblowers commonly face when reporting misconduct to the government.

We therefore fully support the proposed 30% presumption, which we believe will help shore up this existing flaw in the CFTC program. We believe the agency's reasoning strongly supports the rule change and the benefits it will bring to the program. However, we do not believe the 30% presumption will go far enough in tightening up the existing delay in making award decisions. There are still significant delays under the SEC whistleblower program even though it has used the 30% presumption for several years.

We believe to really accomplish the CFTC's goal of expediting its issuance of whistleblower awards, the CFTC should in addition to the proposed 30% presumption also adopt concrete (but reasonable) timing requirements on the CFTC's preliminary and final award determinations. We believe a requirement (or commitment) that the CFTC provide its preliminary award determinations within some fixed period -- say *within 6 months of the published whistleblower awards application deadline for a particular covered action* -- would be reasonable. So would a similar timing requirement (or commitment) for providing final award determinations, tied to the deadline for objecting to the preliminary award determinations.

Our concern is that even with the proposed 30% presumption, leaving the ultimate timing of a whistleblower award open-ended will continue to be a major drawback of the program and dissuade would-be whistleblowers from coming forward. Given what in our experience is the relative brevity of the preliminary and final award determinations the CFTC issues -- typically just a few pages with an even shorter supporting declaration -- we do not believe imposing the suggested timing requirement or commitment on the agency would be unduly burdensome. And to the extent there are matters where the agency legitimately needs more time, there can be accommodations built in to allow for reasonable extensions of time, perhaps as overseen by the CFTC Whistleblower Office.

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Looking to how the Department of Justice (DOJ) makes whistleblower (Relator) share determinations under the False Claims Act -- which can range from 15-30% of the government's recovery -- is informative and provides a useful model for how the CFTC might improve its approach. There, despite enforcement proceedings that can last several years, once a case is successfully resolved DOJ and the whistleblower typically reach agreement on the appropriate share within months, sometimes even weeks. The process is much simpler too. There is no formal awards application by the whistleblower subject to any kind of independent claims review, with a preliminary determination followed by the right to object with a final determination thereafter.

There is often just a simple back and forth between the whistleblower (and their counsel) and the DOJ attorneys who worked on the matter and are best situated to assess the whistleblower's contribution and appropriate share of the recovery within the statutory range. Perhaps incorporating that approach in the CFTC whistleblower award determination process -- with more direct and active engagement between the whistleblower (and their counsel) and the CFTC enforcement staff most involved in the matter -- would expedite the process and lead to faster and more mutually agreeable results.

* * *

We hope you find these comments helpful and would be happy to provide any additional information or assistance we can to assist the CFTC in amending the whistleblower rules to best address the inordinate delay in its awards determination process and to make the whistleblower program and accompanying CFTC enforcement regime as strong and successful as possible.

Respectfully submitted,

CONSTANTINE CANNON LLP

Gordon Schnell

Gordon Schnell
Daniel Vitelli
22 Vanderbilt Avenue
New York, NY 10017
gschnell@constantinecannon.com
dvitelli@constantinecannon.com