



MCELDREW YOUNG*

September 29, 2016

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

RE: Notice of Proposed Rulemaking: Commodity Futures Trading Commission
Whistleblower Awards Process, RIN-3038-AE50

Dear Mr. Kirkpatrick:

McEldrew Young submits these comments in response to the proposed amendments by the Commodity Futures Trading Commission (“CFTC” or the “Commission”) to the regulations governing the CFTC whistleblower program established by the Dodd-Frank Wall Street Reform and Consumer Protection Act (July 16, 2010).

We appreciate the opportunity to comment on the proposed changes. As a whole, these revisions would be a welcome change to the current program due to the (1) additional protections for whistleblowers against retaliation, (2) clarification of the reward process, and (3) moves to establish consistency between the SEC and CFTC whistleblower programs.

McEldrew Young is a law firm based in Philadelphia, PA representing, *inter alia*, whistleblowers submitting information to the CFTC and Securities and Exchange Commission (“SEC”) whistleblower programs. Our whistleblower practice is led by Eric L. Young, who has more than a decade of experience representing whistleblowers across the spectrum of United States whistleblower laws, including the False Claims Act and the IRS whistleblower program. In 2014, Mr. Young joined forces with James J. McEldrew, III, a Past President of the Philadelphia Trial Lawyers Association, to create McEldrew Young.

Since Dodd-Frank was adopted, McEldrew Young has discussed legal representation with whistleblowers at every level of the process, from individuals who are initially considering their options to individuals who are seeking representation for reward claims. We currently represent individuals with Form TCRs on file with the CFTC, as well as some CFTC whistleblowers who have also filed a corresponding tip with the SEC.

In our dealings with both the Whistleblower Office and the members of the enforcement staff so far, we have found them professional and responsive to the information that we have provided. For this, we would like to thank the CFTC and its Whistleblower Office for their efforts both to investigate the information submitted by our clients as well as enforce the Commodity Exchange Act (“CEA”).

Today, we write specifically in support of five changes proposed by the CFTC:

1. The Extension of Anti-Retaliation Protections to Internal Whistleblowers - § 165.20(c).

Across our practice, we have encountered numerous employees over the years who have reported a potential violation of the law internally before they have sought the advice of counsel. These individuals believe that their employer will do the right thing and they will be rewarded for bringing the issue to their superior’s attention. Unfortunately, this is not the most common result. Thus, we strongly support the intent of this provision.

Although the CFTC’s intent to extend anti-retaliation protections to whistleblowers who report internally before providing the information to the Commission is clear in the guidance, we do not believe that the language proposed in §§ 165.20(a) or (c) is sufficient to foreclose litigation in this area. Given the extensive litigation over this question in the realm of the SEC, any ambiguity in the scope of the anti-retaliation protections should be avoided. We hope the CFTC will clarify this provision appropriately.

2. Expansion of CFTC Enforcement Authority - § 165.20(b).

McEldrew Young fully supports the CFTC’s interpretation of its authority under the CEA to provide for an enforcement action by the Commission against violators of the anti-retaliation provisions.

A victory in a retaliation lawsuit by a private individual against a publicly traded company or investment bank is a difficult battle. If the nation is to deter companies from retaliation, there must be the potential for more substantial penalties or a government enforcement action.

The SEC has already used its enforcement power to send a clear message to corporations that it will not tolerate hostile actions against whistleblowers reporting securities fraud. We are encouraged by the corresponding message that would be sent by the CFTC’s adoption of this provision.

3. Protected Communications with Whistleblowers - § 165.19(b).

We fully support the Commission’s adoption of § 165.19(b) to allow the CFTC to bring an enforcement action against businesses that seek to discourage whistleblowing through one or more hostile methods.

Over the years, we have seen many companies make efforts to discourage whistleblowing. The SEC's pursuit of enforcement actions against companies requiring waivers of rewards in their severance agreements was a welcome check on those companies stepping over the bounds. We appreciate the strong message sent by this change to the CFTC program.

4. Longer Time Frame on Submissions After Internal Reporting - §165.2(l).

In our experience, many whistleblowers who report internally to a supervisor or the compliance department wait for the outcome of the investigation before contacting an attorney to report it to the U.S. Government. Because internal investigations take some time, they are often at or beyond the 120 day period before they consider external reporting. We therefore fully support extensions to this time period.

Although we would prefer an even longer time frame to ensure that well-intentioned individuals receive full credit for their information, we believe that 180 days is a substantial improvement to the current time frame for relation back of the filing date to the date of the original internal report. We fully support this effort to avoid punishing diligent whistleblowers who simply do not know the complex terms of the nation's whistleblower laws.

5. Discretion to Waive Procedural Requirements - § 165.5(c).

McEldrew Young fully supports the provision to allow the waiver of procedural requirements in extraordinary circumstances.

In our practice, every case is unique and there are very few one-size fits all moments. A rigid application to the procedural requirements set forth in the Whistleblower Rules would undermine the spirit of Congress when it created the program - to encourage individuals with evidence of violations of the CEA to come forward and reward them for the valuable information.

We were encouraged by the decision of the SEC to waive a procedural requirement in a Whistleblower Award Proceeding. We believe that the CFTC's clarification would further encourage whistleblowers to provide valuable information and assistance about commodities fraud even when they may not have followed all of the technical rules to be eligible for an award.

Should you have any questions or need additional information, please do not hesitate to contact Eric Young at (215) 367-5151.

Sincerely,



ERIC L. YOUNG, Esq.



JAMES J. MCELDREW, Esq.