

# CFPB Whistleblower Program Could Plug Enforcement Gaps

By Zac Arbitman and Jason Zuckerman (April 2, 2020)

The Consumer Financial Protection Bureau is working with Congress to advance legislation that would create a whistleblower reward program similar to the successful the U.S. Securities and Exchange Commission and U.S. Commodity Futures Trading Commission whistleblower programs passed in the wake of the Great Recession.



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Enactment of this legislation could help plug an enforcement hole left by the proliferation of forced arbitration agreements and class action waivers now included in most contracts between consumers and financial services companies.

Historically, the private plaintiffs bar helped enforce consumer protection laws through single-plaintiff and class action proceedings brought under myriad state and federal statutes.



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These efforts have been hampered by the rise of forced arbitration agreements and mandatory class action waivers. And these efforts have been slowed further by the CFPB's failed attempt to prohibit the inclusion of such provisions in consumer finance contracts.

Passage of a CFPB whistleblower rewards program could sidestep these issues and provide a new avenue for a private-public partnership in enforcing consumer protection laws.

## **The CFPB failed to prohibit forced arbitration, leaving a gap in the enforcement of consumer protection laws.**

The CFPB issued a final rule in 2017 that prohibited covered providers of certain consumer financial products and services from using arbitration clauses barring consumers from filing or participating in class action lawsuits.[1]

Not long after the CFPB issued its ban on forced arbitration, it met significant opposition in Congress. This opposition ultimately culminated in President Donald Trump signing a joint resolution overriding the CFPB's rule.

Although congressional Democrats and two notable Republican senators voted against repeal of the rule, strong Republican majorities in both houses provided Trump with the joint resolution necessary to overturn the rule pursuant to the obscure and rarely invoked Congressional Review Act.[2]

In undoing the CFPB's forced arbitration prohibition, Congress and the president effectively closed the courthouse door to consumers willing to take on powerful corporate interests engaging in fraudulent, unfair, or deceptive business practices. This has left individual financial harms unaddressed and bad actors undeterred.

## **The proposed CFPB whistleblower reward program provides a new avenue for a private-public partnership in enforcing consumer protection laws.**

The Consumer Financial Protection Act, which created the CFPB, includes a provision protecting whistleblowers against retaliation for reporting violations of CFPB rules — but it does not authorize awards to whistleblowers.[3]

Under the recently proposed legislation, however, a whistleblower who provides original information to the CFPB relating to a violation of federal consumer financial law would be eligible for an award of 10% to 30% of the collected monetary sanctions if the information provided results in an enforcement action yielding at least \$1 million.

The proposed CFPB whistleblower reward program is modeled on the SEC and CFTC whistleblower reward programs and contains many near-identical provisions. Some of key facets of the CFPB program include:

- If the CFPB is unable to collect at least \$1 million of the monetary sanctions imposed in an enforcement action, the CFPB shall provide for an award equal to 10% of the amount collected or \$50,000, whichever is greater.
- The CFPB would be required to keep confidential information provided by a whistleblower when that information could reasonably be expected to reveal the identity of a whistleblower, unless and until required to disclose the information to a defendant or respondent in connection with a public proceeding instituted by the CFPB.
- The program would deny an award to a whistleblower (1) convicted of a criminal violation related to the administrative proceeding or court action for which the whistleblower otherwise could receive an award; (2) found to be liable for the conduct in the administrative proceeding or court action; or (3) who planned and initiated the conduct at issue.
- A whistleblower who submits information based on the facts underlying an administrative proceeding or court action previously submitted by another whistleblower would be ineligible for an award.
- To determine the amount of an award, the CFPB would consider: (1) the significance of the information provided by the whistleblower to the successful enforcement of the administrative proceeding or court action; (2) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in an administrative proceeding or court action; (3) the programmatic interest of the bureau in deterring violations of federal consumer financial law, including applicable regulations, by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and (4) such additional relevant factors as the bureau may establish by rule or regulation.

The draft legislation does contain one critical difference from the SEC and CFTC programs: a \$10 million award cap. This proposed cap should be eliminated from any final law. Any such award ceiling would reduce the incentive to report the largest frauds because it limits the potential upside to individuals undertaking great financial and personal risk in stepping forward to blow the whistle.

**A CFPB whistleblower program would have broad reach, and could even surpass the success of other similar programs.**

A whistleblower reward program at the CFPB could significantly augment enforcement of consumer financial protections.

The CFPB has broad jurisdiction. The Consumer Financial Protection Act broadly defines a “covered person” as “any person that engages in offering or providing a consumer financial product or service” and any affiliate of a covered entity where that affiliate is acting as a service provider to that entity.[4]

Under the act, consumer financial products and services include those that are offered or provided for use by consumers primarily for personal, family or household purposes and involve mortgages, deposit taking, credit cards, loan servicing, check guaranteeing, collection of consumer report data, debt collection associated with consumer financial products and services, real estate settlement, money transmitting and financial data processing.[5]

In addition, the CFPB is the primary consumer compliance supervisory, enforcement and rulemaking authority over depository institutions with more than \$10 billion in assets.[6]

Consumer financial protection statutes enforced by the CFPB include:

- Real Estate Settlement Procedures Act;
- Home Mortgage Disclosure Act;
- Equal Credit Opportunity Act;
- Truth in Lending Act;
- Truth in Savings Act;
- Fair Credit Billing Act;
- Fair Credit Reporting Act;
- Electronic Fund Transfer Act;
- Consumer Leasing Act;
- Fair Debt Collection Practices Act;
- Home Owners Protection Act; and
- Secure and Fair Enforcement for Mortgage Licensing Act.[7]

And the CFPB may also take enforcement action under the more general Consumer Financial Protection Act to police unfair, deceptive, or abusive acts or practices relating to a consumer financial product or service.[8]

As alluded to above, similar whistleblower reward programs have been tremendously effective. Since the SEC whistleblower program’s inception, whistleblower tips have enabled the agency to recover more than \$2 billion in monetary sanctions from wrongdoers, including more than \$1 billion in disgorgement of ill-gotten gains and interest, of which nearly \$500 million has been, or is scheduled to be, returned to harmed investors.[9]

Likewise, whistleblower disclosures to the CFTC have enabled that agency to recover more than \$800 million.[10]

Overall, the CFPB’s proposed whistleblower reward program is a positive step forward to protect consumers from abusive and deceptive practices. It would allow for the renewal of an effective public-private partnership unimpeded by the obstacle of forced arbitration, which should in turn alleviate the heavy enforcement workload currently shouldered by the CFPB. Congress should act swiftly to enact this proposed legislation.

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[1] 12 C.F.R. § 1040.4, et seq.

[2] See 5 U.S.C. § 801-802.

[3] 12 U.S.C. § 5567.

[4] 12 U.S.C. § 5481(6).

[5] 12 U.S.C. § 5481(15).

[6] 12 U.S.C. §§5581-5587.

[7] 12 U.S.C. § 5481(12).

[8] 12 U.S. Code § 5531(a).

[9] SEC Whistleblower Program Annual Report to Congress (November 2019), available at [https://www.sec.gov/files/OW\\_2019AR\\_FINAL\\_1.pdf](https://www.sec.gov/files/OW_2019AR_FINAL_1.pdf).

[10] Annual Report on the CFTC Whistleblower Program and Customer Education Initiatives (October 2019), available at <https://whistleblower.gov/sites/whistleblower/files/2019-10/FY19%20Annual%20Whistleblower%20Report%20to%20Congress%20Final.pdf>.