INVESTMENT COMPANY INSTITUTE

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February 4, 2011

David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Layfayette Center
1155 21st Street, NW
Washington, DC 20581

Re: Proposed Whistleblower Rules;
RIN No. 3038-AD04

Dear Mr. Stawick:

The Investment Company Institute[1] appreciates the opportunity to comment on the rules recently proposed by the U.S. Commodity Futures Trading Commission ("CFTC") to implement Section 23 of the Commodity Exchange Act ("CEA") as amended by the Dodd-Frank Act.[2] Pursuant to Section 23, the Commission is charged with establishing a whistleblower reward program that will pay monetary awards to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the CEA that leads to the successful enforcement of an action that results in monetary sanctions exceeding $1 million or certain related actions.

I. THE NEED FOR HARMONIZATION OF THE CFTC'S AND SEC'S WHISTLEBLOWER RULES

We note that the CFTC's proposed rules are substantially similar to rules recently proposed by the U.S. Securities and Exchange Commission ("SEC") pursuant to a requirement in Section 922 of the Dodd-Frank Act.[3] This requirement is substantively identical to the mandate imposed on the CFTC

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[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $12.3 trillion and serve over 90 million shareholders.

[2] *See Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act*, CFTC RIN No. 3038-AD04 (November 10, 2010), 75 Fed. Reg. 75728 (December 6, 2010) (the "Release"). Cites in this letter to the Release are to the Federal Register version.

[3] *See Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934,* SEC Release No. 34-63237 (November 3, 2010). Comments on the SEC's proposal were due by December 17, 2010.

under Section 23 of the CEA. Due to the similarity of these two mandates and resulting rule proposals, the comments in this letter largely mirror those we filed with the SEC on its proposal.[4] As the CFTC considers our comments and those of other commenters, we strongly recommend that the CFTC and the SEC work closely together, as they have done in the past, to craft whistleblower rules that are substantively the same. This will facilitate the ability of financial market participants that are registered with both agencies to comply with and implement the rules in a way that accommodates both agencies' requirements. Indeed, both the SEC's and CFTC's rules contemplate "related actions" being brought by each other based on the same original information voluntarily submitted to each agency by a whistleblower.[5] Ensuring that the CFTC's and SEC's programs are substantially similar should facilitate the process for employers and whistleblowers and also avoid potential whistleblowers being able to forum shop and file their concerns with the agency having a program that is perceived to be "better" than the other agency's program.

II. OVERVIEW

The Institute has very serious concerns about the unintended consequences that are likely to result from the manner in which the Commission has designed its proposed whistleblower program. Our concerns are focused primarily on three aspects of the program that will have the greatest adverse impact on our members: the program's impact on internal compliance programs; the Commission's attempt to impose a new obligation on registrants to notify the Commission of *all* violations of the CEA, irrespective of how immaterial or technical in nature; and deficiencies in the criteria for rewarding whistleblowers. In addition, we recommend that the Commission refine the definition of "original information" and clarify the limits on the prohibition against employers retaliating against whistleblowers. Our concerns are discussed in more detail below.

III. THE PROGRAM'S LIKELY ADVERSE IMPACT ON INTERNAL COMPLIANCE PROGRAMS

A. Fund Compliance Programs

Unlike other persons registered with under the federal securities law, federal law requires investment companies and investment advisers registered with the SEC to have rigorous internal compliance programs. Following the effectiveness of Rule 38a-1 under the Investment Company Act of 1940 in February 2004, every mutual fund has been required by law to have a compliance program that meets specific conditions. As noted in the SEC's release adopting Rule 38a-1, the rule was proposed

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[4] *See* Letter from Karrie McMillan, General Counsel, ICI, to Elizabeth M. Murphy, Secretary, SEC, dated Dec. 17, 2010, which is available on the SEC's website at: http://www.sec.gov/comments/s7-33-10/s73310-139.pdf.

[5] *See* proposed CFTC Rule 165.11 and proposed SEC Rule 240.21F-11.

> because it is critically important for funds and advisers to have strong systems of controls in place to prevent violations of the federal securities laws and to protect the interests of shareholders and clients. The proposed rules were designed to foster, among other things, improved compliance by clarifying the compliance obligations of fund management and to strengthen the hand of fund boards and compliance personnel when dealing with them.[6]

To ensure that funds have strong systems of control in place, the rule requires each mutual fund to designate a Chief Compliance Officer (CCO), to have the fund's CCO approved by the fund's board, and to have the fund's board adopt compliance policies and procedures that are reasonably designed to ensure the fund's compliance and that of the fund's adviser, principal underwriter, administrator, and transfer agent, with the federal securities laws. The fund's compliance policies and procedures must be reviewed annually for their adequacy and the effectiveness of their implementation. The fund's CCO must provide a written report to the board annually that, at a minimum, addresses the following: the operation of the policies and procedures of the fund and each investment adviser, principal underwriter, administrator, and transfer agent to the fund; any material changes made to those policies and procedures since the date of the last report; any material changes to the policies and procedures recommended as a result of the annual review conducted under the rule; and each material compliance matter that occurred since the date of the last report. In other words, each mutual fund is required by law to establish, maintain, and continually update a very rigorous compliance program, which is subject to regular inspections by the Commission's Office of Compliance Inspections and Examinations.

Crucial to the success of these compliance programs is the ability of the fund to discover and redress any violation of the federal securities laws. In addition to learning about and correcting any such violation, a fund must document the violation in the written report submitted annually to the fund's board and that report must detail how the fund's policies and procedures have been revised to prevent a recurrence of such violations.

B. Respecting Internal Compliance Programs

In light of these existing programs, we are concerned that the bounty that the Commission will offer under Section 23 will incentivize employees, particularly disgruntled employees, to report violations or suspected violations of the law to the CFTC rather than to the appropriate personnel within the mutual fund's internal compliance system. This could result in whistleblowers subverting and undermining internal compliance systems in return for the CFTC's bounty. To avoid this result, it is absolutely crucial that the CFTC's whistleblower program be designed to respect and support existing compliance systems, and we are pleased that the Release expressly recognizes this.

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[6] *See Final Rule: Compliance Programs of Investment Companies and Investment Advisers,* SEC Release Nos. IA-2204, IC-26299 (Dec. 17, 2003).

As noted in the Release, the objective of the CFTC's whistleblower program "is to support, not undermine the effective functions of company compliance and related systems by allowing employees to take their concerns about potential violations to the appropriate company officials while still preserving their rights under the Commission's whistleblower program."[7] We are pleased with the CFTC's interest in the proposal not undermining effective compliance programs and related systems. We are seriously concerned, however, that, as drafted, the proposed rule could, in fact, adversely impact such programs. In particular, there is nothing in the proposed rules that encourages employees to utilize existing internal whistleblower programs or that would discourage "front running" such programs by reporting suspected violations to the Commission prior to or in lieu of reporting them through internal systems.

C. Recommended Approach

To more closely align the rule text with the Commission's interest in supporting and not undermining the use of internal compliance programs, we recommend that the rules be revised to preclude whistleblowers from "front running" internal compliance programs and affirm, except in limited circumstances, the importance of first utilizing such programs to report suspected violations of the CEA. To accomplish this, we recommend two revisions to proposed Rule 165.5, relating to the payment of awards to whistleblowers. First, we recommend revising condition (a)(2) to read:

> (2) That contains original information <u>that, if applicable, was first reported in accordance with paragraph (c) of this section</u>

Second, we recommend adding a new paragraph (c) to read:

> <u>(c)(i) To facilitate the use of internal compliance programs, in order to be eligible for an award, a whistleblower must first report the whistleblower's original information to the entity that is either committing or impacted by the violation of the CEA alleged by the whistleblower.[8] If the entity has not established a compliance notification or whistleblower system to report potential violations of the CEA that would meet the standards, including the anonymity standards, of Section 301 of the Sarbanes-Oxley Act[9] and any rules thereunder, without regard to whether such entity is subject to the</u>

[7] 75 Fed. Reg. 75733.

[8] The provision requiring the reporting of the whistleblower's information to an entity "impacted" by the alleged violation of the CEA laws is particularly important in the mutual fund context. This is because, as recognized by the SEC's mutual fund compliance programs rule, Rule 38a-1, conduct by a mutual fund's service provider could result in the mutual fund – and unbeknownst to that fund – being in violation of the law. Those funds that do not currently do so are likely, once the proposed rules are adopted, to require their service providers both to have a whistleblower program that is compliant with Section 301 of the Sarbanes-Oxley Act and require the service provider to report to the fund or its CCO any violations of the law by the service provider that may impact the fund's compliance with the law.

[9] Section 301 of the Sarbanes-Oxley Act requires the audit committee of a publicly listed company to establish a complaint notification (whistleblower) system to facilitate the receipt, retention, and treatment of complaints. Such system must be

> Sarbanes-Oxley Act, the whistleblower may first report its original information to the Commission.
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> (c)(ii) In order to pay any award to a whistleblower who relies on paragraph (c)(i) of this rule, the Commission must determine that, at the time the original information was reported to the Commission, the whistleblower's employer had no internal reporting system available to the whistleblower that met the standards of Section 301 of the Sarbanes-Oxley Act.

We additionally recommend that proposed Rule 165.2(g)(4) be revised to clarify that a whistleblower will not be eligible for an award on the basis of providing information to the Commission within that provision's specified 60-day timeframe if the whistleblower had a Section 301-compliant means to report the information, but did not do so . Also, the threshold questions on proposed Forms TCR and WB-DEC concerning a whistleblower's complaint and eligibility for an award should be revised to inquire whether the whistleblower has reported its original information to any person prior to reporting it to the Commission. If the whistleblower indicates it is first reporting the information to the Commission, the forms should also inquire, under penalty of perjury, whether the original information could have first been reported internally through other channels that were compliant with Section 301 of the Sarbanes-Oxley Act.

In making these recommendations, we are mindful of situations in which internal compliance and whistleblower reporting systems are either ineffective or deficient or would fail to protect a whistleblower's anonymity.[10] Our proposed solution would address these concerns by enabling the Commission to determine whether an entity's whistleblower program meets certain minimum criteria standards, consistent with Section 301 of the Sarbanes-Oxley Act. So, for example, if the whistleblower's employer either did not have a whistleblower system for reporting complaints or had a system that was not compliant with the requirements of Section 301 of the Sarbanes-Oxley Act, the whistleblower could bypass such internal compliance system and report directly to the Commission. The Commission, as part of its review of the whistleblower's allegations, could determine the sufficiency of the employer's internal compliance/whistleblower program to determine whether there was merit in the whistleblower bypassing it and first reporting its original information to the Commission. Where there was merit in the whistleblower bypassing the internal program, this

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designed to maintain the anonymity of complaints made by company employees. In connection with its use under our recommended revisions to the CFTC's whistleblower rules, the internal whistleblower system would need to accommodate all reports of violations of the CEA and not just those issues covered under Section 301 of Sarbanes-Oxley.

[10] *See, e.g., "Sympathy for the Whistleblower? SEC GC's Comments Pique Interest,"* WSJ Blogs, Law Blog (Feb. 1, 2011), which is available at: http://blogs.wsj.com/law/2011/02/01/sympathy-for-the-whistleblower-sec-gcs-comments-pique-interest/. According to this article, the SEC's General Counsel recently expressed his view "that whistleblowers should not have to approach their companies' management before they run to the SEC . . . because some compliance programs, 'no matter how elaborately conceived and extensively documented, exist only on paper. Some small number are shams.'" Our recommendation should address concerns such as these while still respecting effective internal compliance programs.

approach may render useful information to the Commission staff regarding deficiencies in the internal program, which may have implications beyond the violation alleged by the whistleblower.

This approach will also facilitate the pragmatic "filter" function of internal compliance programs. The very purpose of the Commission's whistleblower program is to provide it with high quality information regarding potential violations of the CEA. This filter function is necessary to the process to avoid the CFTC being overwhelmed with allegations that are specious, erroneous, or not material. Requiring employees to first report through an internal reporting system will enhance the quality of information provided to the Commission because company personnel would likely be more informed about whether certain conduct constitutes a violation of the CEA. Requiring a whistleblower to first report within an employer's Sarbanes-Oxley reporting program should, therefore, assist the Commission in separating "the wheat from the chaff" and better enable it to concentrate its time and resources on more material or substantive violations.

To further demonstrate its commitment to the rigorous internal compliance programs of registrants, we recommend that the Commission adopt, as an operating policy and procedure, that, except in extraordinary or exigent circumstances,[11] when the Commission receives a whistleblower's allegation of a violation of the CEA, it will notify the registrant of the allegation (while preserving the whistleblower's anonymity) and provide it an opportunity to investigate the allegation and report back to the Commission on its findings. Such a policy would avoid the Commission having to utilize its resources to investigate each and every allegation of a potential violation of the CEA and provide the registrant, which may be better suited to quickly investigating and analyzing its internal information, the opportunity to address any violation it finds and report back to the Commission regarding its findings and any corrective action taken.

IV. THE PROGRAM'S ATTEMPT TO IMPOSE NEW REPORTING OBLIGATIONS ON REGISTRANTS

The Institute also has very serious concerns about the rules' presumption that entities subject to the rule have a duty to report to the Commission each and every violation of the CEA, regardless of how minor or immaterial. In particular, to determine whether a whistleblower has provided the Commission original information that is derived from the whistleblower's independent knowledge, proposed Rule 165.2(g)(4) focuses on whether the entity that is the subject of the information "*fails to disclose the information to the Commission within sixty (60) days* or otherwise proceeds in bad faith."[12] [Emphasis added.]

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[11] Examples of extraordinary or exigent circumstances might include when the fraudulent activity is systemic in the firm from management on down (such as with a ponzi scheme) or where delay may exacerbate any harm to investors.

[12] 75 Fed. Reg. 75730.

A. The Rules' New Reporting Requirements

Our concern with this provision is its implication that the failure to disclose a violation of the CEA to the CFTC may make a whistleblower eligible for an award. This is inappropriate given the fact that the CEA does not impose a duty on registrants to report to the Commission all violations of the CEA.[13] And yet, under the Commission's proposed whistleblower program, unless a registrant voluntarily reports *all* such violations of the CEA – and all *potential* violations of the CEA[14] – it runs the risk of enabling those employees who have "legal, compliance, audit, supervisory, or governance responsibilities" to be granted whistleblower status based on the employer's failure to voluntarily report to the CFTC. It may be difficult for the employer that is the subject of the whistleblower's allegation to know at the time it discovers a violation – regardless of how minor the violation – whether it might result in the Commission assessing a fine in excess of $1 million. Indeed, to our knowledge, the Commission has not published any guidance that alerts registrants to the Commission's views regarding the severity of various violations or the fines and penalties that may be assessed. The only way for a registrant to avoid unintentionally – and to its own detriment – enabling a person to acquire whistleblower status would be for registrants to report to the CFTC *all* violations and potential violation of the CEA notwithstanding that such reporting is not required under the CEA.

B. Unintended Consequences

Implicitly requiring all registrants to report all violations and potential violations of the CEA to avoid conferring whistleblower status on employees may likely result in the Commission being inundated with information regarding minor violations rather than the "high quality information"[15] it seeks through the rules. As a result, the Commission can expect to be overwhelmed with information regarding minor violations of the CEA that in no way advances the Commission's interest in protecting the investing public from serious fraud or abuse.[16] The more time the Commission staff must spend receiving, processing, and investigating information regarding such minor violations, the less time and

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[13] We are aware that the CFTC has proposed to require derivatives clearing organizations to submit an annual report to the Commission that includes a description of any material compliance matter. This report, however, would be submitted annually – not every 60 days – and would only be required to include *material* compliance matters. *See General Regulations and Derivatives Clearing Organizations,* CFTC Rulemaking at 75 Fed. Reg. 77576 (December 13, 2010).

[14] Proposed Rule 165.2(p) defines "whistleblower" to mean an individual who provides the Commission with "information relating to a *potential* violation of the CEA." [Emphasis added.]

[15] *See* proposed Rule 165.9(a)(4), which includes as a criteria for determining the amount of a whistleblower's award, "whether the award otherwise enhances the Commission's ability to enforce the CEA, protect customers, and encourage the submission of high quality information from whistleblowers."

[16] The frivolity of information the Commission can expect to receive should not be underestimated. Our members have reported their whistleblower hotlines being used to complain about co-workers' grooming habits.

resources it has available to discern, investigate, and redress serious misconduct. As a result, the investing public may be *worse* off as a result of the Commission's proposal.

C. Recommended Approach

We recommend that the Commission avoid this result and ensure that the proposed rules do not implicitly or explicitly impose any new reporting requirements by revising the language in the proposed definition of "Independent Knowledge" in Rule 165.2(g)(4) and (5) to read in relevant part:

> . . . , unless the entity either subsequently failed to take corrective action ~~disclose the information to the Commission~~ within sixty (60) days of it discovering or being informed of the violation or otherwise proceeded in bad faith;

This revision would both avoid incenting registrants to report immaterial violations to the Commission and ensure that such non-disclosure would not confer whistleblower status on employees unless the registrant proceeded in bad faith or failed to take corrective action within 60 days of learning of the violation.

V. DEFICIENCIES IN THE PROGRAM'S CRITERIA FOR REWARDING WHISTLEBLOWERS

Consistent with the concerns discussed above, we are also concerned with the proposed criteria for determining the amount of award to be paid to a whistleblower. Noticeably lacking from the criteria listed in proposed Rule 165.9 are any relating to the whistleblower's duty to act reasonably and in good faith, the materiality of the information provided by the whistleblower, the whistleblower's interest in profiting from selling information relating to the complaint, or the Commission's determination to provide no reward to the whistleblower. Each of these issues is briefly discussed below.[17]

A. The Whistleblower's Duty to Act Reasonably and in Good Faith

It is not difficult to imagine situations in which disgruntled employees inappropriately utilize the Commission's whistleblower program. Accordingly, it seems appropriate for the Commission to be able to expressly consider, in determining the amount of an award, the *bona fides* of the whistleblower and whether, in reporting the information, the whistleblower acted reasonably and in good faith. To accomplish this, we recommend that proposed Rule 165.9 be revised to add as an additional criteria for determining the amount of the award, the whistleblower's duty to act reasonably and in good faith in providing the information to the Commission. This would both provide the Commission greater flexibility to take into account the whistleblower's *bona fides* when determining the amount of an award

[17] According to the Release, factors along these lines are expected to be considered by the Commission in determining the amount of the award. *See* 75 Fed. Reg. 75738-9. We recommend that they be expressly incorporated into Rule 165.9.

and enable it to reduce the award of any whistleblower who was more interested in harming his or her employer than uncovering wrongdoing. This new criteria would enable the Commission to consider, among other factors: the whistleblower's motives in providing the information; the level of cooperation provided by the whistleblower to its employer to correct the problem once the violation is discovered; whether the whistleblower was involved with or contributed to the alleged violations; and whether the whistleblower brought the alleged violation or misconduct to the attention of either the employer or the CFTC, as applicable, within a reasonable amount of time after discovering it. The adopting release should expound on these and other factors the Commission might consider in assessing whether a whistleblower acted reasonably and in good faith.

B. The Materiality of the Information Provided

As discussed above, the scope of the whistleblower program extends to *all* violations and potential violations of the CEA. This breadth may likely result in the Commission being inundated with "jaywalking" complaints – those that involve neither fraud nor abusive conduct nor perceptible harm to investors. Various subdivisions of Rule 165.9 seem to imply that the materiality of the information will be considered,[18] but there is no express affirmation of this as a standard.

To better enable the Commission both to discourage the filing of non-consequential information and to consider the relevance of the information provided by a whistleblower in determining the amount of an award, we recommend that the criteria in proposed Rule 165.9 for determining the amount of an award be revised to add an express standard that goes to the materiality of the whistleblower's original information.

C. Profiteering

There is a significant danger that, like the SEC's proposed whistleblower program,[19] the Commission's program will be seen as a "get rich quick scheme" by disgruntled employees. Lawyers reportedly have already launched web sites, begun aggressive advertising campaigns, and are cold calling financial services employees to attract whistleblowers on the promises of riches to come.[20] We do not believe the intent behind Congress enacting Section 23 or the Commission's rules implementing this provision was to create profiteers or the illusion of riches for reporting violations of the CEA to the

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[18] For example, the criteria in subdivisions 165.9 (a)(3) and (4) regarding furthering "the programmatic interest of the Commission in deterring violations of the CEA" and enhancing "the Commission's ability to enforce the CEA, protect investors, and encourage the submission of high quality information from whistleblowers."

[19] *See* n. 3, supra.

[20] *See, e.g., "Get Snitch Quick: 'Wall Street' stirs whistleblower outreach idea,"* NY Post Business Section (Nov. 20, 2010). *See also "First Comes the Whistleblower, Then Comes the Securities Class Action?,"* The Wall Street Journal (Nov. 18, 2010); *"The Wall Street snitch pitch,"* The Washington Post (Nov. 22, 2010). For an example of a web site, *see* www.SECsnitch.com (noting that "the new [whistleblower] statute will no doubt make many people rich").

Commission. Instead, the law was designed to provide an incentive the Commission could use to obtain access to high quality information concerning serious wrongdoing.

The proposed rules should be revised to make clear that their provisions are not a "get rich quick scheme" by prohibiting "double dipping" (permitting whistleblowers to be rewarded in a variety of forums based on the same violation the whistleblower reported to the Commission).[21] To accomplish this, we recommend that the rules expressly prohibit any whistleblower who provides original information to the Commission and cooperates with the Commission in its investigation of the information from being paid by a third party to provide the information or similar information relating to a violation of the CEA.[22] Second, the rules should prohibit any person from collecting an award as a whistleblower if the person is or becomes a plaintiff in any civil litigation that is based on any original information that had been provided to the Commission by the whistleblower. Together, these revisions should avoid whistleblowers attempting to get rich off of their original information, make them elect whether they plan to cooperate with the CFTC or the private bar, and avoid any sort of double dipping in reaping rewards based on their original information.[23]

D. The Granting of No Award

Rule 165.8 should expressly preserve to the Commission the authority to determine, based on an assessment of the criteria listed in Rule 165.9, that no award should be granted to the whistleblower. It is possible, based on a consideration of the totality of criteria listed in Rule 165.9, for the Commission to determine that no award should be granted, notwithstanding a whistleblower's objective eligibility.[24] To accommodate these situations, we recommend the Commission revise Rule 165.9 to provide itself this flexibility.

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[21] Our recommendation above regarding adding the whistleblower's *bona fides* as a condition for determining the amount of an award would also enable the Commission, in making an award, to consider the whistleblower's motives.

[22] The one exception to this should be those whistleblowers who, consistent with the rules' provisions for anonymity, retain an attorney to provide the information to the Commission.

[23] Similarly, the Commission should ensure that the rules' provisions addressing related actions do not enable a whistleblower to collect a bounty under multiple agencies' whistleblower programs based on the same original information.

[24] For example, if the whistleblower could have taken action to report, prevent, or mitigate the violation and failed to do so; if the whistleblower failed to cooperate with his or her employer's attempts to discover or redress the violation; and if the whistleblower put his or her own self-interest ahead of the interest of the employer or investors, the Commission may not want, from a programmatic perspective, to be seen as rewarding this type of behavior.

VI. ADDITIONAL CONSIDERATIONS

A. Original Information

We recommend that the Commission revise the definition of "original information" in Rule 165.2(k) to narrow its overly broad scope in two areas. The first area relates to information concerning a violation of the CEA that has been corrected by the registrant. In instances where a violation, or potential violation, of law was corrected by the registrant, the rules should make clear that a whistleblower who informs the Commission of the violations should not be rewarded. In particular, the definition of original information in Rule 165.2(k) should be revised to add a new subdivision expressly providing that, to be considered original information, the information must be "information relating to a violation that has not been addressed by the entity that is alleged to have violated the CEA."

Our second concern with the definition of "original information" relates to its open-ended nature. In particular, the proposed rules do not specifically address "original information" involving either violations that occurred beyond the applicable statute of limitation or situations in which there is uncertainty regarding the applicable statute of limitations. To clarify this issue, we recommend revising the definition of "original information" in Rule 165.2(k)(1)(iv) as follows:

> (iv) Is submitted to the Commission for the first time between ~~after~~ July 21, 2010 (the date of enactment of the Dodd-Frank Wall Street Transparency and Accountability Act of 2010) and the date on which the statute of limitations applicable to the potential violation would have expired. When the potential violation is not be subject to a particular statute of limitations, the statute of limitations in Section 25(c) of the Commodity Exchange Act shall be used as the applicable statute of limitations.[25]

B. Prohibition Against Retaliation

We recommend that proposed Appendix A to Part 165, "Guidance With Respect to the Protection of Whistleblowers Against Retaliation," clarify the limits on the prohibition in Section 23(h) of the CEA relating to an employer retaliating against a whistleblower. Our members are concerned that some employees may be lulled into thinking that, so long as they obtain whistleblower status under the Commission's rules, they are immune from any adverse action on their employment (*e.g.,* demotion or firing) even when the conduct in question is unrelated to the reporting of information to the Commission. Under Section 23(h)(1) of the CEA this is clearly not the case. Instead, its protections are limited to instances in which an employer discharges, demotes, suspends,

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[25] In the event there is no specific statute of limitations relevant to the particular violation, there should still be a period beyond which the whistleblower's information should not be considered "original information." We recommend that this period be the period set forth in Section 25(c) of the CEA – *i.e.,* not more than two years after the violation occurs.

threatens, harasses, or otherwise discriminates directly or indirectly on a person's employment because of any lawful act done by the whistleblower in providing information to the Commission or cooperating with the Commission under its whistleblower rules.

To avoid employees being misled, we recommend that the Commission expressly affirm in the guidance provided in Appendix A that adverse action taken by an employer against an employee is not actionable under Section 23(h)(1) if such adverse action is based on information or facts unrelated to the employee's cooperation with the Commission. Of concern to our members is that some employees will misread Section 23(h)(1) and believe that, so long as they provide any original information under the Commission's whistleblower rules, the employee will thereupon have guaranteed employment. Employees should understand that the rules are not intended to protect them from firing, demotion, or other adverse action if the employer can demonstrate that such action is unrelated to the employee's status as a whistleblower. Also, if the whistleblower provided false information to the Commission as a whistleblower or committed perjury under the Commission's whistleblower program forms, an employer should not be prohibited from taking adverse action against the employee. Accordingly, the Commission should revise Appendix A to provide that, in such instances, nothing in Section 23(h)(1): (1) precludes an employer from firing, demoting, or taking other adverse action against a whistleblower so long as such action is not based on the employee's status as a whistleblower; or (2) requires the employer to retain a whistleblower as an employee if the person has poor performance or attitude or violates company policy, the CEA, or CFTC rules, including its whistleblower rules.

C. Foreign Entities

The Commission's proposed rules are silent as to their impact on or accommodation of violations involving foreign affiliates of CFTC registrants. We recommend that the Commission expressly clarify that the information reported to the Commission under the rules only extends to matters within the CFTC's jurisdiction. In addition, the Release should clarify that, to the extent the laws of the European Union or other foreign jurisdiction either prohibit providing information to regulators anonymously or require that it be provided anonymously, the Commission will respect and give deference to the laws of the jurisdiction to which the whistleblower is subject.

D. Government Employees' Ineligibility as Whistleblowers

Proposed Rule 165.6 prohibits certain persons from being eligible for a whistleblower award. These persons include members, officers, or employees of various federal regulatory or law enforcement agencies, a registered entity, a registered futures association, a self-regulatory organization, and law enforcement organizations. The Commission should expand and clarify this exclusion to cover other government employees. In particular, any information that a whistleblower obtains as a result of being an employee of a federal, state, or foreign government entity that is charged by law with overseeing compliance with commodity, securities, or financial services laws should not be eligible for a whistleblower award. So, for example, if a state or foreign commodities or securities regulator discovers

a violation of the CEA, such person cannot obtain whistleblower status by providing the information to the CFTC.

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The Institute appreciates having the opportunity to provide these comments to the Commission on its proposed rules for implementing the whistleblower provisions of Section 23 of the CEA. If you have any questions concerning these comments, please contact the undersigned at (202) 326-5815 or Tamara Salmon at (202) 326-5825.

Sincerely,

/s/
Karrie McMillan
General Counsel