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February 3, 2011

Mr. David A. Stawick, Secretary
United States Commodity Futures Trading Commission
Three Lafayette Centre
Washington, DC 20581

Re: Proposed Rules for Implementing Whistleblower Provisions, Section 23 of the Commodity Exchange Act, File No. 3038-AD04

Dear Mr. Stawick:

The Securities Industry and Financial Markets Association ("SIFMA")[1] and the Futures Industry Association ("FIA")[2] (collectively, the "Associations") appreciate the opportunity to comment on the Commodity Futures Trading Commission ("CFTC" or the "Commission") proposed rule ("Proposed Rule") implementing the whistleblower provisions of the Dodd-Frank Act.[3] The Dodd-Frank Act, by adding Section 23 of the Commodity Exchange Act ("CEA"), establishes a whistleblower program that enables the Commission to pay an award to certain persons who voluntarily provide the Commission with original information about violations of the CEA.

The Associations fully support Congress' and the CFTC's effort to identify and address potential violations of the federal securities laws and regulations. We also recognize the

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[1] The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] FIA is a principal spokesman for the commodity futures and options industry. FIA's regular membership is comprised of approximately 30 of the largest futures commission merchants in the United States. Among its associate members are representatives from virtually all other segments of the futures industry, both national and international. Reflecting the scope and diversity of its membership, the FIA estimates that its members effect more than eighty percent of all customer transactions executed on the United States designated contract markets. For more information, visit www.futuresindustry.org.

[3] *See* Title VII (Section 748) of the Dodd-Frank Wall Street Report and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010). The CFTC's Proposed Rule may be found at Federal Register, Vol. 75, No. 233 (Dec. 6, 2010).

value of robust and effective whistleblower statutes and rules, and agree with much of what the Commission has proposed.

I. EXECUTIVE SUMMARY

The Associations believe that it is critically important that the whistleblower provisions of the Dodd-Frank Act should not undercut internal corporate compliance reporting systems, which are vital to what financial regulators have recognized as the first and most important line of defense. This is particularly important when fiscal limitations are likely to leave regulators charged with greater responsibilities, like the CFTC, looking to make the most efficient use of their available resources by leveraging the work of self-regulatory agencies ("SROs") and internal compliance programs. Moreover, investigating the increased number of complex and imprecise whistleblower complaints will not be straightforward or simple. SIFMA and the FIA believe that the Proposed Rules do not go far enough to protect the critical role played by internal compliance reporting systems, and therefore weaken the overall system of prevention and detection. As a result, our comments below are intended to strengthen these features of the Proposed Rules.

Internal corporate compliance reporting systems are particularly important in the financial services industry. The Associations believe that individuals, at least in the financial services industry, if not more broadly, should be required to report potential misconduct to effective internal compliance reporting systems and to give those systems a chance to work in order to be eligible for a whistleblower award. SIFMA and the FIA agree with the CFTC's proposal to require individuals in legal, supervisory and other control functions to escalate potential violations through internal reporting lines. We also believe it important that only whistleblowers who report potential violations by "another person" should be eligible for awards, to prevent culpable individuals from benefitting by their own misconduct, and whistleblowers should be required to report promptly upon learning of the potential misconduct.

SIFMA and the FIA urge the CFTC to harmonize its whistleblower rules with the efforts of the Securities and Exchange Commission ("SEC") to encourage cooperation in enforcement matters, and to incorporate the whistleblower programs of the SROs. Finally, we urge the CFTC to clarify that the anti-retaliation provisions of Section 23(h) permit companies to take personnel actions against individuals for appropriate reasons other than their whistleblowing, such as their own involvement in violations of law, rules or firm policies, or their obstruction of internal, CFTC or other government investigations.

Our comments also address some of the key differences between the rules proposed by the CFTC and the whistleblower rules recently proposed by the SEC.[4] The Associations believe strongly that it is important for the two agencies to harmonize their whistleblower rules because many of the firms impacted by these rules are regulated by both agencies. Although we recognize that there are times when the two agencies need to take differing approaches, there is nothing about the policy concerns related to whistleblowing that differs between the futures and securities markets. Moreover, as the markets regulated by the CFTC and SEC increasingly overlap, it is more likely that conduct that may be the subject of whistleblowing claims will bear on laws or regulations administered by both agencies. As a result, differences in the regulations would only impose costs and lead to the potential for confusion for dually-regulated firms without any corresponding benefit. Most importantly, SIFMA and the FIA believe that consistency between the provisions that govern the CFTC and SEC whistleblower programs will lead to more effective overall regulation of the financial markets.

II. BACKGROUND

The financial services industry – perhaps more than any other industry – has devoted significant resources in recent years to strengthening its internal corporate complaint reporting systems as well as its legal, compliance, risk management and internal audit functions. Public companies in the financial services industry, like all other public companies, have established internal complaint reporting systems as required by Section 301 of the Sarbanes-Oxley Act to address complaints that relate to a potentially material effect on financial reporting, accounting or disclosure controls. In addition, dually regulated firms are subject to additional securities regulatory requirements. Broker-dealers have internal compliance reporting systems as required by FINRA's Supervisory Control Rules.[5] Investment advisers and investment companies have comparable compliance program requirements in SEC Rule 206(4)-7 and Rule 38a-1.[6] These rules collectively require financial services firms to investigate potential violations of the federal securities laws and rules, as well as (in the case of broker-dealers) potential violations of SRO rules. Because so many futures commission merchants ("FCMs") are also registered broker-dealers, or are

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[4] *See* SIFMA's letter to Elizabeth M. Murphy, Secretary, United States Securities and Exchange Commission, dated December 17, 2010. The SEC's proposed rules may be found in Exch. Act Rel. No. 63237 (Nov. 3, 2010).

[5] These rules, sometimes referred to as the Gruttadauria rules because of an enforcement action that led to their adoption, included the adoption of NASD Rules 3012 and 3013, and amendments to NASD Rules 2510, 3010, and 3110, as well as parallel changes to NYSE rules. See NASD Notice to Members 04-71 (October 2004) (summarizing rule provisions). NASD Rule 3013, the CEO certification rule, is now FINRA Rule 3130.

[6] *See* Inv. Adv. Rel. No. 2204 (Dec. 17, 2003).

affiliated with registered broker-dealers, most FCMs have compliance programs that closely follow the broker-dealer model, or incorporate those programs into a single program. In short, the compliance program rules require financial services firms to investigate the same potential violations as are the subject of the Proposed Rules. Broker-dealers generally are also required to report the results of these investigations to their regulators under NASD Rule 3070 and NYSE Rule 351 (both soon to be replaced by FINRA Rule 4530). As a matter of practice, most investment advisers and investment companies do so as well. Here, again, FCMs tend to either have a similar compliance regime as their broker-dealer counterparts or even a single, unified compliance program. SIFMA members have taken extraordinary efforts to make these compliance programs a priority.

Firms in the financial services industry devote substantial resources to the legal, compliance, risk management, internal audit and supervisory functions that are responsible for identifying and investigating potential misconduct. As explained in our recent comment letter to the CFTC on FCM compliance programs, there is a well-established financial services compliance model in which Chief Compliance Officers ("CCOs") and their staffs to investigate potential violations as part of their obligation to report to the Chief Executive Officer ("CEO") concerning the effectiveness of the firms' compliance programs and to address necessary enhancements.[7] We understand that since the compliance program rules were adopted in 2003 and 2004, the SEC and the SROs have found that, in general, these compliance programs are operating effectively and have materially improved compliance with the securities laws. We believe the same is true with regard to the commodity futures laws, given that the same mechanisms and procedures apply to that part of the firms' businesses as well.

Internal compliance reporting and investigation structures are effective because the financial services firms themselves are uniquely positioned to address immediate potential violations in a manner that protects the investing public. The legal, compliance, risk management, internal audit and supervisory functions within financial services firms understand the firms' own personnel, structure, products, policies and procedures better than any outside regulator. This familiarity allows misconduct to be identified swiftly and addressed effectively. These internal control functions can assess and remedy harm to customers much more efficiently than can an outside regulator. Indeed, the Associations believe that all regulators, including the CFTC, have long recognized that firm compliance is the first and best line of defense against legal and regulatory violations.

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[7] Comment Letter of John M. Damgard, President, Futures Industry Association and Kenneth E. Bentsen, Jr., Executive Vice President, SIFMA to David A. Stawick, Secretary, CFTC, regarding Designation of a Chief Compliance Officer for FCMs, SDs and MSPs, Jan. 18, 2011 (available at http://www.sifma.org/Issues/item.aspx?id=23079).

Financial institutions must instill a culture of compliance to deter misconduct. Compliance programs simply cannot work effectively if employees do not have a sufficient incentive to make the firms aware of potential violations. If complaints go initially to outside regulators, the culture of compliance will be undermined because the firms will be deprived of the ability to demonstrate that they do not tolerate violations of the law or unethical conduct.

In the current budget environment, the CFTC may not have the resources to fully investigate all whistleblower reports. The CFTC is likely to receive hundreds of complaints as part of the new whistleblower program, in addition to the tips it already receives.[8] With this volume of whistleblower complaints and tips, the CFTC may have difficulty distinguishing the serious complaints from the frivolous ones. This problem is likely to be exacerbated because the complaints may concern statutory provisions and rules that are complex and imprecise in their application, such as the new provisions addressing disruptive practices and manipulation.[9] In those circumstances, reaching a conclusion with regard to whether misconduct has occurred will not be straightforward or simple.

The effectiveness of internal compliance reporting and investigation depends in large part on the cooperation of individual employees and on the firms' ability to respond thoroughly and accurately to reports of potential misconduct. The Associations are concerned that encouraging whistleblowers to bypass the internal compliance process will negatively impact the ability of both the CFTC and financial services firms to detect and address potential violations. As detailed below, SIFMA and the FIA believe that, as currently drafted, certain aspects of the proposed rules would do just that.

III. THE PROPOSED RULE SHOULD REQUIRE INDIVIDUALS TO REPORT VIOLATIONS INTERNALLY TO BE ELIGIBLE FOR AN AWARD.

The CFTC's proposed rules permit the consideration of "additional relevant factors" when determining the amount of an award, but it does not, like the SEC's proposed rules, make explicit that a whistleblower will receive credit in the calculation of award amount when the whistleblower uses established internal procedures for the reporting and investigation of

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[8] The Proposing Release (in the Paperwork Reduction Act discussion) estimates that the CFTC will receive 160 whistleblower reports per year. By contrast, the SEC estimates it will receive 30,000 such reports per year. We suspect that the estimate in the Proposing Release is much too low.

[9] *See e.g.,* the FIA's December 28, 2010 comment letter to the CFTC regarding Prohibition of Market Manipulation (Section 753) and the FIA's December 23, 2010 comment letter regarding the CFTC's proposed Antidisruptive Practices rules (Section 747).

complaints about misconduct.[10] SIFMA and the FIA believe that the CFTC's rule, at a minimum, should be consistent with the SEC on this point by making the credit explicit. Further, however, the Associations urge the CFTC to require individuals first to report violations internally to be eligible for a whistleblower award.

When a company receives a report of suspected misconduct, it should have the opportunity to investigate that misconduct before the whistleblower goes to the CFTC.[11] Such an internal reporting requirement should only apply at companies that have an effective internal compliance reporting system. We suggest that the CFTC use objective criteria to determine if a company has an effective internal compliance reporting system. In that way, potential whistleblowers will not have to guess whether they are required first to report internally, or are permitted to report directly to the CFTC.

In that regard, the CFTC could require that to be deemed effective, such an internal compliance reporting system would have to provide for:

- a complaint-reporting hotline;
- designated officer (such as the CCO), who is ultimately responsible for overseeing investigations of complaints, and who has access to senior executive officers with authority to respond to well-founded complaints.[12]
- protection to an individual against retaliation for submitting a complaint.

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[10] *See* Proposed Rule 165.9(a)(4)(adding a criterion based on the discretion of the Commission to consider "additional relevant factors" in determining the amount of an award. Compare SEC's Proposed Rule at p. 35, fn. 40, and p. 51.

[11] This discussion assumes the reported violation concerns conduct involving the employer or its affiliates. The Associations also believe the Commission should encourage whistleblowers to report internally potential misconduct at third parties. Otherwise an entity will be unable to satisfy its obligation to file Suspicious Activity Reports (SARs) concerning that misconduct, and firms will not be able to protect themselves from exposure to high-risk counterparties. However, with respect to suspected third-party misconduct, these concerns may be addressed if whistleblowers notify their employers at the same time they notify the CFTC.

[12] Former employees also should be required at least to report the misconduct to their former employer. Otherwise, the Commission would be providing an incentive for employees to quit so that they can become eligible for whistleblower awards. Also, the same concerns that apply to "employees" also apply to individuals who are associated with a financial services firm as independent contractors. Firms have the same supervisory duties with respect to independent contractors who are discharging regulatory requirements as to employees, and the Commission should apply the whistleblower rules in the same way to both.

Finally, the rules should provide that an internal reporting requirement prior to going to the CFTC would not apply where it would be futile, for example where individuals responsible for investigating complaints were themselves involved in the alleged violations.[13]

After individuals report potential misconduct to their firm, the firm should have an opportunity to investigate before the whistleblowers go to the CFTC. As discussed above, the CFTC simply lacks the resources to investigate all of the whistleblower reports it expects to receive per year. When the CFTC begins its own investigation of a set of facts, the company's ability to complete its own internal investigation will be compromised.

We suggest a bright-line rule: if the company has an effective internal compliance reporting system and internal reporting would not be futile (both as discussed above), the company should be allowed at least 180 days to complete its internal investigation before the whistleblower can report the matter to the CFTC.[14] In contrast to the requirement that the whistleblower make an initial report to the company, we do not suggest the requirement to wait after making that initial report before going to the CFTC as a strict eligibility requirement. Rather, the CFTC should provide a financial incentive: in order to be eligible for the full amount of an award, the whistleblower should allow the company an opportunity to conduct an internal investigation. A whistleblower who prematurely reports to the CFTC would still be eligible for an award, but only at the lower end of the statutorily permissible range.

Further, SIFMA and the FIA strongly urge the CFTC to include in the final rules strong financial disincentives against individuals who violate company rules requiring them to report misconduct internally, or who have falsely certified that they are unaware of any misconduct.[15] We believe the CFTC should deem such individuals not to be eligible for an award under Section 23. The purpose of the whistleblower provisions of the Dodd-Frank Act are to encourage individuals to come forward early, not to wait until misconduct has

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[13] By analogy, there is a well-developed body of law concerning the situations in which shareholder demands are considered futile, and are excused, in the context of corporate governance and other derivative action disputes. *See, e.g., Aronson v. Lewis*, 473 A.2d 805 (Del. 1984).

[14] For the same reason, the Associations urge that "90 day" provision of Proposed Rule 165.2(I)(2) be extended to at least 180 days. Internal investigations often can take longer than 90 days; a 180-day period would allow a reasonably longer period to complete these investigations while not extending indefinitely the period before the report to the Commission.

[15] Most financial services firms have an annual process in which employees certify that they have complied with various disclosure and other regulatory requirements, they have received and will comply with the firm's compliance policies and procedures, and they are not aware of any violations. The Commission should not reward individuals who subvert this important internal control.

festered and additional investors have been harmed and the potential size of the whistleblower award has grown. An individual who "lays in the weeds" should not reap monetary awards as a result of that misconduct.

Similarly, the Associations urge the Commission to deem ineligible for an award any individual who refuses to cooperate with the company's internal investigation, or who provides inaccurate or incomplete information or otherwise hinders such an investigation.[16] Internal investigations are most effective if the whistleblower who triggered the investigation has an obligation to assist in that investigation.[17] And if the whistleblower can provide false or incomplete information in the internal investigation with impunity, then that investigation cannot be successful. If the CFTC does not require whistleblowers to cooperate fully and candidly with internal investigations, then this process cannot be effective.[18]

Moreover, the CFTC already recognizes that if a purported whistleblower only reports after becoming aware of a request for information in a government investigation, then that report is not "voluntary," and should be ineligible for an award.[19] For exactly the same reasons, the Commission should extend this principle to requests for information in companies' internal investigations. A whistleblower should not be viewed as making a "voluntary" submission if he or she does so only after becoming aware of an internal investigation. The point of the whistleblower award program is to encourage individuals with knowledge of misconduct to come forward promptly in order to trigger an inquiry that might not otherwise

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[16] Proposed Rule 165.5(b) already requires that whistleblowers (1) provide explanations and other assistance in order that the staff may evaluate and use the information that they submit, and (2) provide all additional information in their possession in a complete and truthful manner. The CFTC should extend these eligibility requirements to individuals who commit similar misconduct, or fail to provide complete cooperation, in connection with company internal investigations. Compare SEC's Proposed Rule 21F-8(c)(7), which provides that if an individual is ineligible if, in dealing with the Commission, he or she knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or uses any false writing or document, knowing that it contains any false, fictitious, or fraudulent statement or entry.

[17] We recognize that in some cases whistleblowers may choose to submit an anonymous report, and the company may not know the whistleblower's identity. Nevertheless, if the company asks the person who is also the whistleblower (whether or not his or her status as such is known to the company) to cooperate in an internal investigation and the whistleblower refuses, then the whistleblower should become ineligible for an award.

[18] In a number of recent cases, criminal prosecutors have treated misstatements or omissions in internal investigations as constituting criminal false statements to the government, or as obstruction of government investigations, because of the likelihood that the information would be conveyed to government investigators. See Michael J. Farhang, Section 1519: Why Obstructing an Investigation By Company Counsel May Now Be a Federal Crime, 4 White Collar Crime Rep. (BNA) 191 (Mar. 13, 2009).

[19] Proposed Rule 165.2(o).

occur; if the company is already investigating that misconduct, then the whole purpose of the incentive is absent. Internal investigations would be further undermined by the incentive for individuals to conceal information from the company so that they can be the first to turn over the information to the CFTC.

IV. FOR INTERNAL REPORTING AND COMPLIANCE SYSTEMS TO WORK EFFECTIVELY, THE PROPOSED RULES SHOULD EXCLUDE FROM WHISTLEBLOWER ELIGIBILITY LEGAL STAFF, OTHER CONTROL FUNCTION STAFF, AND SUPERVISORY STAFF.

The Associations agree with the CFTC's suggestion in Proposed Rule 165.2(g)(2) and (3) that information obtained by persons with legal, compliance, audit, or supervisory responsibilities should be excluded from the definitions of "independent knowledge" or "independent analysis" and thus from eligibility for whistleblower awards. The functions performed by the legal, compliance, audit and supervisory staff are integral to the efforts of companies to detect misconduct and prevent harm to the public. Individuals in these departments generally have access to confidential information about clients, and are charged with building a strong internal compliance processing and investigation program. As discussed below, we suggest that this group of functions be broken up into three groups, which present related but distinct issues: (1) legal, (2) control functions (including but not limited to compliance and audit), and (3) supervisory personnel.[20]

With respect to lawyers, as the Proposing Release recognizes:

> Compliance with the CEA is promoted when individuals, corporate officers, Commission registrants and others consult with counsel about potential violations, and the attorney-client privilege furthers such consultation.[21]

Lawyers, in particular, have knowledge that is protected by the attorney-client privilege and the work product doctrine, which they are not permitted to waive.[22] Moreover, lawyers

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[20] SIFMA suggests that the Commission clarify that all of the exceptions in Proposed Rule165.2(g)(2) and (3) continue to apply after an individual has left his or her firm; otherwise the Commission would simply create an incentive to quit.

[21] 75 Fed. Reg. 233 at 75730; *cf. Scott G. Monson*, Inv. Co. Rel. No. 28,323 (SEC June 30, 2008) (noting "'[s]ignificant public benefits [that] flow from the effective performance of the securities lawyer's role,'" recognizing that "'[i]n the course of rendering securities law advice, the lawyer is called upon to make difficult judgments, often under great pressure and in areas where the legal signposts are far apart and only faintly discernible'" and expressing "concern that, to the extent lawyers exercising their professional judgment are excessively motivated by 'fear of legal liability or loss of the ability to practice before the Commission,' clients may well decide not to consult lawyers on difficult issues.") (internal quotes citing *William R. Carter*, 47 S.E.C. 471 (1981)).

have state law ethical obligations to maintain client confidentiality that extend beyond information that is privileged. The Proposing Release already contains two exceptions (Proposed Rule 165.2(g)(2) and (3)) which relate to lawyers and to experts, paralegals and others directed by lawyers.[23] We suggest that the reference to lawyers be taken out of Proposed Rule 165.2(g)(4), and that the duties of lawyers be treated separately in those two earlier exceptions.[24]

Proposed Rule 165.2(g)(4) currently contains an exception for compliance, audit and governance functions. We believe this exception should be broadened to include internal control functions more generally (and perhaps this is what the CFTC means by "similar functions" in this context). At most financial services firms, there are risk management personnel who have similar functions requiring them to monitor for and address potential violations of firm policies and legal and regulatory requirements. Also, there are product management personnel responsible for independent valuations of positions who also play an important role in detecting and preventing regulatory violations. We believe all of these internal control functions should be treated equally because they all play important roles in maintaining the firm's control environment.

SIFMA and the FIA agree with the CFTC's proposal to exclude "supervisors" from being deemed to have "independent knowledge" in Proposed Rule 165.2(g)(4), but we urge the Commission to define more clearly who is excluded by virtue of being a "supervisor."[25] "Supervisors" for these purposes should be defined broadly, to include not only line supervisors, but others who have the practical ability to respond to potential violations.

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[22] We suggest the Commission clarify that these provisions apply equally to in-house and outside counsel, and apply whatever the basis for the counsel's duty of confidentiality.

[23] We support the Commission's proposal that any information obtained through communications that are the subject of any common law evidentiary privilege, including the attorney-client privilege, work-product doctrine and other privileges, should be excluded from the definition of "independent knowledge" or "independent analysis." We also urge that Proposed Rule 165.18 be clarified to provide that, if the Commission remains in contact with a whistleblower during the course of a company's internal investigation, it cannot seek from the whistleblower information about counsel's views and advice (or other privileged information and discussions) that the whistleblower obtains during that investigation.

[24] The result of this suggestion is that lawyers would not be subject to the "good faith" or "prompt reporting" exceptions in Proposed Rule 165.2(g)(4). The Associations oppose these exceptions as currently drafted. However, even if the Commission retains these exceptions, the proper tests for when a lawyer may breach client confidentiality are the tests contained in state bar ethics rules, and it would be confusing and inappropriate to have separate "bad faith" or "prompt reporting" exceptions for lawyers as well.

[25] Proposed Rule 165.2(g)(4).

When a person with knowledge of potential wrongdoing comes to a supervisor in an effort to redress the violations, it should be the obligation of the supervisor to respond promptly and effectively – and not to attempt to profit on that information by positioning themselves as whistleblowers. Any contrary result would undercut the CFTC's "failure-to-supervise" regulatory provisions.[26]

The Associations note that in the SEC's proposed whistleblower rules, the provisions comparable to Proposed Rule 165.2(g) sweep more broadly than the provisions in the CFTC's Proposed Rules.[27] SIFMA and the FIA urge the CFTC to conform its final rule to the SEC's proposal. We believe the policy concerns that led the SEC to include these provisions should be persuasive to the CFTC as well.

Similarly, the Associations agree with the provision in Proposed Rule 165.2(o) that if a person has a pre-existing legal or contractual duty to report violations, the person should not be eligible for a whistleblower award.[28] We urge that this principle be applied to cover individuals who have a duty to report violations (or facts that may constitute violations) pursuant to binding ethical rules, or have a similar duty under a contractually binding code of conduct. This same general principle should apply when individuals have a duty to report the underlying facts that constitute the violation, even if they may not have a legal duty to reach a conclusion that those facts constitute a violation of law.[29]

For the same reasons, as Proposed Rule 165.2(g)(5) recognizes, we agree that this general principle should apply to outside auditors as well. Independent public accountants have pre-existing legal duties to report potentially illegal acts. These individuals do not need the incentive of whistleblower awards to do what is already their legal and professional responsibility, which is to report any potential violations they encounter.

We also believe that the 60-day reporting requirement for legal, compliance, audit and supervisory staff to disclose information provided by a whistleblower is not practical. A 60-

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[26] *See, e.g.,* 17 C.F.R. §166.3.

[27] *See* 75 Fed. Reg. 75727 (Dec. 6, 2010) (available at http://www.cftc.gov/LawRegulation/FederalRegister/ProposedRules/2010-29022.html).

[28] For similar reasons, the Commission should explicitly expand this principle of ineligibility for individuals with a duty to detect and report misconduct to independent compliance consultants or similarly functioning person or entity appointed pursuant to any state or federal regulators' or self-regulators' mandates, or pursuant to similar agreements with the U.S. Department of Justice, other federal agencies, or state attorneys general.

[29] We also support the provision in Proposed Rule 165.6(a) that government and SRO employees who have involvement in commodities regulation and enforcement should be ineligible for a whistleblower award.

day period is not sufficient to complete many of the more complex internal investigations, which may involve multiple individuals in different locations and even different countries. Different internal investigations have different levels of complexity and take different amounts of time. In this regard, we note that the SEC has not proposed a specific time limit. If the CFTC believes that a specific time period is necessary, we urge the CFTC to consider allowing companies at least 180 days to complete their internal investigations.

Moreover, a carve-out based on time in which the event is reported to the CFTC precludes the company from reaching a good faith determination that no violation occurred, and that the matter is not reportable. If the Commission adopts either a "reasonable time" exception or a specific reporting time-period, companies will feel compelled to report the results even of investigations that found no violations. Otherwise they will be at risk of a CFTC investigation as a result of a whistleblower reporting that the company failed to report at all. The CFTC should not want companies to be compelled to report the results of investigations where no violations were found. The CFTC simply does not have the resources to evaluate all of those investigations.

V. THE PROPOSED RULES SHOULD BE STRENGTHENED SO THAT CULPABLE INDIVIDUALS ARE NOT ELIGIBLE FOR AWARDS.

If a person is involved in or knew about and could have prevented misconduct, then that person should not be able to profit from the violation as a whistleblower. The Associations support defining the term "whistleblower" to include only individuals who provide information about potential violations of the commodities laws "by another person."[30] Allowing a person to participate in misconduct and then profit as a result, by making a whistleblower report concerning that misconduct, is directly contrary to the clear intent of Congress to reduce the overall number of commodities law violations.[31] Paying awards to participants in the misconduct would be an absurd result Congress could not have intended.[32] The Associations are concerned that, without this change to the Proposed Rules,

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[30] The SEC posed this alternative in its Proposing Release, although the CFTC did not mention this alternative in its Proposing Release. *See* SEC Proposing Release at p.8, Request for Comment 1.

[31] Proposed Rule 165.6(a)(2) expressly provides that individuals who have been criminally convicted of misconduct cannot receive whistleblower awards concerning the same misconduct. This provision may raise some question whether the Commission is authorized to adopt a rule providing that other individuals, whom the Commission has concluded were involved in the misconduct but have not (yet) been criminally convicted, are not eligible. But the Proposing Rules exclude from eligibility a variety of individuals (e.g. lawyers, independent auditors and foreign government employees) who are not expressly excluded in the statute. We believe a categorical exclusion of participants in the violation clearly would further Congress' intent.

[32] SIFMA believes that Proposed Rule 165.17, which would exclude from the calculation of the amount of the award, for purposes of the threshold and bounty calculations, any sanctions against the individual or against an

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the net effect will be to encourage more misconduct, and to provide incentives for individuals to allow problems to grow and fester rather be reported so they can be promptly resolved.

It may be appropriate in some circumstances to give individuals credit, in terms of reduced sanctions or even in some cases a decision not to bring a proceeding, for reporting on their own misconduct. The CFTC has recognized that and can continue to take it into account in exercising its discretion in pursuing enforcement matters.[33] But it is not appropriate to give individuals monetary rewards for reporting on their own misconduct – such a result creates an incentive to engage in the misconduct in the first place, or to allow it to grow in the hope that the violator will reap a higher reward as a whistleblower.

SIFMA and the FIA strongly urge that, at a minimum, anyone who directed, planned or initiated misconduct should be categorically disqualified from receiving a whistleblower award.[34] Individuals should be ineligible for an award if they knew or reasonably should have known that their conduct was improper. To the extent that individuals who are unwitting participants in a violation become aware that activity is improper during the course of that activity, then they should be eligible for an award if they report promptly upon becoming aware of the impropriety.

The CFTC should not credit an individual with acting "voluntarily" in submitting a report when the individual was aware of unlawful conduct, but failed to report that misconduct promptly. It is vital to create an incentive for individuals to report misconduct promptly so that it can be stopped and its harm remedied. Individuals should not have an incentive to allow misconduct to fester, grow and affect more innocent victims in the belief that the ultimate sanctions, and thus the award, will be much larger. As the Proposing Release itself recognizes, "the statutory purpose of creating a strong incentive for whistleblowers to come forward early with information about possible violations of the CEA rather than wait[.]"[35]

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entity where the individual directed, planned, or initiated the misconduct, does not go far enough to deter other participants from assisting in or furthering the misconduct.

[33] See, e.g., Enforcement Advisory, "Cooperation Factors in Enforcement Division Sanction Recommendations," (CFTC 2004, revised Mar. 1, 2007) (available at http://www.cftc.gov/ucm/groups/public/@cpdisciplinaryhistory/documents/file/enfcooperation-advisory.pdf).

[34] As currently proposed, Proposed Rule 165.17 would deduct from the award sanctions as a result of misconduct the whistleblower directed, planned or initiated. The Commission should go further and make such a whistleblower entirely ineligible for an award.

[35] 75 Fed. Reg. 233 at p. 75734.

This important purpose is best served by requiring whistleblowers to come forward promptly, either to the company's internal compliance reporting system or to the CFTC.[36]

The rules should also not allow for an award based on information provided in violations of judicial or administrative orders. The Associations believe that whistleblowers should not be rewarded for providing information to the government in violation of such order, including protective orders in private litigation. Judicial and administrative orders are issued to protect the interests of the parties in the proceedings, and are legally binding on all parties to the matters and their agents. Persons who violate legally binding orders should not be rewarded under the whistleblower rules. If a person wishes to disclose information subject to a judicial or administrative protective order, he or she should be required to go first to the court or agency and seek relief from that order. The purpose of the whistleblower provisions is to encourage compliance with the law, not to reward violations.[37]

The Associations support the CFTC's proposal, in Proposed Rule 165.2(g)(6) that if the person obtained the information in a way that violated any state or federal criminal law or rule (such as computer hacking or other theft of the information), or the reporting violated any criminal law or rule, then the person should not be eligible to profit as a result of their violation of law. This principle, however, should not be limited to instances where the individual has actually been convicted of the criminal violation. Moreover, we believe this principle should be extended to civil violations of laws or rules, as well as SRO rules: the CFTC should not reward anyone for violating any applicable laws or rules, whether or not they are criminal.[38] Again, Congress' goal was to encourage compliance with law, not to incent and reward violations of law.

VI. THE COMMISSION SHOULD HARMONIZE ITS WHISTLEBLOWER RULES WITH ITS COOPERATION INITIATIVE.

The CFTC should clarify the relationship between the proposed rules and the Commission's established standards for evaluating cooperation. A significant factor in that evaluation has been whether the company detected the potential violations itself and self-reported them, or

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[36] As discussed earlier, SIFMA and the FIA believe it is particularly important not to reward individuals who failed to report misconduct in violation of firm rules that require them to report misconduct, or after they have (falsely) certified that they were not aware of misconduct.

[37] We also suggest that the Proposed Rules should prohibit double-dipping - an individual should not be eligible to recover both a whistleblower award from a company and serve as a plaintiff in class action or derivative action against the same company concerning the same conduct.

[38] For example, whistleblowers should not be permitted to benefit from misusing nonpublic personal financial information about customers in violation of Regulation S-P, which is a civil, not a criminal, provision.

whether its cooperation began only after the CFTC was aware of the issues. The "credit" that the CFTC (as well as other authorities such as the SEC and the U.S. Department of Justice) has said it is willing to give companies for responding quickly and effectively to internal indications of potential misconduct has significantly encouraged the growth and success of internal compliance reporting systems.

The Commission should realize that, as a result of the proposed whistleblower rules, it is much more likely that an individual will bring a potential violation to the attention of the CFTC staff, in order to become eligible for a lucrative whistleblower award, than to report that violation internally. No matter how committed a company is to strong internal compliance reporting systems, a company cannot match the financial incentives contained in the Proposed Rules. The Associations urge the CFTC to make an explicit statement that it will give companies full cooperation credit under its existing policies if, after being notified by the Commission of a whistleblower complaint, the company investigates the matter appropriately and makes a thorough report back to the CFTC. The Commission reasonably should expect companies to investigate a whistleblower complaint regardless of whether it was directed to the CFTC or the company's internal hotline. Such a referral process is appropriate, because in most cases companies can move more quickly than the government to stop nascent wrongdoing by immediately removing those who are culpable from their positions, addressing activities that may be suspect, and providing redress to any affected customers or other market participants.

The Commission should state explicitly that a company's internal compliance reporting system will not be considered ineffective simply because an employee makes a whistleblower report to the CFTC rather than to a company's internal compliance reporting system. Likewise, a report to the SEC rather than the company does not indicate that the company lacks an appropriate internal culture of compliance. The CFTC should measure the company's commitment to full and effective cooperation from the time the CFTC informs the company about a whistleblower report.

If the company then cooperates fully and effectively in an investigation after receiving a whistleblower report from the CFTC, then the Commission should commit that it will give the company full credit for its cooperation. We recognize that "full credit" for cooperation will not always mean that the company will not be charged with any violation at all. However, the Associations strongly urge the Commission to state clearly that it will not deem a company to have failed to cooperate, or to have had an ineffective internal compliance reporting system or to lack an appropriate culture of compliance, simply because a whistleblower chose to go first to the CFTC (in order to be eligible for a lucrative whistleblower award) rather than giving the company an opportunity to respond to the issue

by reporting through its internal process.[39] With the Proposed Rules in effect, the Commission must expect that even the most cooperative and most compliant companies will have whistleblowers take their reports directly to the CFTC.

VII. THE COMMISSION SHOULD INCORPORATE REPORTING TO SROS AS PART OF THE WHISTLEBLOWER RULES.

Most, if not all, financial firms who engage in conduct regulated by the CFTC are also members of an SRO such as the NFA or a Board of Trade, and conduct that could constitute a violation of the CEA may also, in some circumstances, be a violation of SRO rules. Potential whistleblowers may therefore report conduct to the SRO rather than the CFTC. Moreover, firms may investigate and report many types of potential misconduct to their SROs rather than the CFTC. Historically, the CFTC and the SROs have worked closely together, and the SROs and the CFTC have referred investigations to one another. Given Congress' failure to provide the CFTC with additional appropriations to carry out its new responsibilities under the Dodd-Frank Act, we believe the CFTC's reliance on SROs is likely to increase.

The Associations believe that the CFTC should draft its proposed rules to support the SROs' activities rather than attempting to replace them. We suggest that a whistleblower who reports to an SRO should have the same eligibility for an award as a whistleblower who reports to the CFTC. On the other hand, if a company reports potential misconduct to an SRO (rather than the CFTC), then we suggest that information about that misconduct should not constitute "original information" if a whistleblower subsequently reports that information to the CFTC.

VIII. THE ANTI-RETALIATION RULES SHOULD NOT PROTECT INDIVIDUALS WHO ENGAGE IN VIOLATIONS OF LAW OR WHO LIE TO THE COMPANY.

On its face, the anti-retaliation provisions of Proposed Rule 165.2(p) (and Proposed Rule 165.6(b)) could be interpreted to protect individuals who have violated criminal laws. The Proposing Release requests comment on whether the Commission should adopt rules addressing the scope of the anti-retaliation provisions.[40]

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[39] As discussed above, SIFMA and the FIA urge that the Commission not permit individuals to bypass a company's internal complaint reporting process. However, if the Commission does allow individuals to report directly to it, without reporting first to the company, then it should not hold those reports against the company.

[40] 75 Fed. Reg. 233 at 75735.

Companies must continue to have the ability to discipline (and terminate) individuals who have violated any applicable laws and rules (including civil laws and rules and SRO rules), and company policies, independent of whether individuals have made a whistleblower report. Moreover, if the individual obstructed, lied or failed to disclose material information in a company's internal investigation, then the company must remain able to discipline those individuals. The CFTC does not tolerate individuals who obstruct its own investigations and it should not provide protection to individuals who do so in a company's internal investigation; otherwise those internal investigations are compromised and cannot reach appropriate conclusions. The company should also be able to discipline individuals whom it concludes misled the government or SROs in their investigations, to protect the integrity of those investigations. Finally if the company determines that an individual was aware of violations, but failed to report them as required by firm policies (the employee sitting next to the bomb crater), then the company should be able to discipline that individual.

In our experience, it is not uncommon for individuals who suspect that they are at risk of an adverse personnel action to submit a whistleblower report in attempt to forestall that personnel action and create a protected status for themselves. These whistleblower complaints can be meritless or made in bad faith.[41] In some instances, the whistleblower himself or herself was directly involved in the misconduct at issue in the report. Whistleblower status should not be a guarantee of continued employment, especially for individuals who themselves have been knowingly involved in misconduct.

The Associations urge the Commission to clarify that companies are permitted to take adverse personnel actions against whistleblowers for any appropriate reason other than their whistleblower status. Otherwise the Proposed Rules will simply encourage people who suspect they are likely to be fired or disciplined for other reasons to file meritless whistleblower complaints. In the worst-case (but not uncommon) scenario, unless clarified as we suggest, the Proposed Rules will reward participants in serious wrongdoing with extended if not permanent employment and prevent employers from disciplining or terminating individuals who have violated the law, simply because the individual submitted a whistleblower complaint before their misconduct was discovered. Further the Commission should clarify that filing a whistleblower report does not protect an individual from discipline or termination if the individual was involved in, was responsible for, or lied about the misconduct described in that report. Otherwise, the Proposed Rules may have the unintended (but entirely foreseeable) consequence of actually encouraging individuals to commit commodities law violations or to make up or exaggerate information in order to obtain a protected employment status. Congress could not have intended to create these

[41] Often whistleblower reports are submitted when firms are considering layoffs - with the result that instead of the poor performing or compliance-challenged whistleblower losing his or her job, some other, innocent person loses his or her job instead.

incentives, and the Commission should not leave it to the courts to sort out the ambiguities in Proposed Rule 165.2(p) (and Proposed Rule 165.6(b)).

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We appreciate the opportunity to submit this comment letter on these important issues. We would be happy to meet with the Commission staff to discuss the issues in this letter. Please contact any of the signatories below, or their respective staff members, if you have any questions or would like to discuss these issues further.

Sincerely yours,

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