

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 165

RIN 3038-AD04

#### Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission ("Commission" or "CFTC") is proposing rules to implement new statutory provisions enacted by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. These proposed rules apply to the whistleblowers incentives and protection of section 748. The proposed rules establish a whistleblower program that enables the Commission to pay an award, under regulations prescribed by the Commission and subject to certain limitations, to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the Commodity Exchange Act that leads to the successful enforcement of a covered judicial or administrative action, or a related action. The proposed rules also provide public notice of section 748's prohibition on retaliation by employers against individuals that provide the Commission with information about potential violations.

**DATES:** Comments must be received on or before February 4, 2011.

**ADDRESSES:** You may submit comments, identified by RIN number 3038-AD04, by any of the following methods:

- *Agency Web site, via its Comments Online process:* <http://comments.cftc.gov>. Follow the instructions for submitting comments through the Web site.

- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

- *Hand Delivery/Courier:* Same as mail above.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only

information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in CFTC Regulation 145.9, 17 CFR 145.9.

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

**FOR FURTHER INFORMATION CONTACT:** Edward Riccobene, Chief, Policy and Review, Division of Enforcement, 202-418-5327, [ericcobene@cftc.gov](mailto:ericcobene@cftc.gov), Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street, NW., Washington, DC 20581.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").<sup>1</sup> Title VII of the Dodd-Frank Act<sup>2</sup> amended the Commodity Exchange Act ("CEA")<sup>3</sup> to establish a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all

registered entities and intermediaries subject to the Commission's oversight.

In addition, Title VII of the Dodd-Frank Act contains provisions to provide incentives and protections for whistleblowers.

Section 748 of the Dodd-Frank Act amends the CEA by adding Section 23, entitled "Commodity Whistleblower Incentives and Protection."<sup>4</sup> Section 23 directs that the Commission must pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about a violation of the CEA that leads to successful enforcement of an action brought by the Commission that results in monetary sanctions exceeding \$1,000,000, and of certain related actions.

The Commission is proposing Regulation 165 to implement Section 23 of the CEA. As described in detail below, the rules contained in proposed Regulation 165 define certain terms critical to the operation of the whistleblower program, outline the procedures for applying for awards and the Commission's procedures for making decisions on claims, and generally explain the scope of the whistleblower program to the public and to potential whistleblowers. Further, Proposed Regulation 165 includes an appendix informing whistleblowers of their protections from employer retaliation under Section 23 of the CEA.

Section 23 of the CEA also requires the Commission to fund customer education initiatives designed to help customers protect themselves against fraud or other violations of the CEA, or rules or regulations thereunder. The Commission will, in a future rulemaking, address related internal procedural and organizational issues, including establishment of, and delegation of authority to, an office or offices to administer the Commission's whistleblower and customer education programs.

Accordingly, the Commission is proposing rules to implement Section 748 and establish a whistleblower program. The Commission requests comment on all aspects of the proposed rules, as well as comment on the specific provisions and issues highlighted in the discussion below.

## II. Description of the Proposed Rules

### A. Proposed Rule 165.1—General

Proposed Rule 165.1 provides a general, plain English description of

<sup>1</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

<sup>2</sup> Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

<sup>3</sup> 7 U.S.C. 1 *et seq.* (2006).

<sup>4</sup> Section 922(a), Public Law 111-203, 124 Stat. 1841 (2010).

Section 23 of the CEA. It sets forth the purposes of the rules and states that the Commission administers the whistleblower program. In addition, the proposed rule states that, unless expressly provided for in the rules, no person is authorized to make any offer or promise, or otherwise to bind the Commission with respect to the payment of an award or the amount thereof.

#### B. Proposed Rule 165.2—Definitions

##### 1. Proposed Rule 165.2(a) Action

Proposed Rule 165.2(a) defines the term “action” to mean a single captioned civil or administrative proceeding. This defined term is relevant for purposes of calculating whether monetary sanctions in a Commission action exceed the \$1,000,000 threshold required for an award payment pursuant to Section 23 of the CEA, as well as determining the monetary sanctions on which awards are based.<sup>5</sup> The Commission proposes to interpret the “action” to include all defendants or respondents, and all claims, that are brought within that proceeding without regard to which specific defendants or respondents, or which specific claims, were included in the action as a result of the information that the whistleblower provided. This approach to determining the scope of an “action” appears consistent with the most common meaning of the term,<sup>6</sup> will effectuate the purposes of Section 23 by enhancing the incentives for individuals to come forward and report potential violations to the Commission,<sup>7</sup> and will avoid the challenges associated with attempting to allocate monetary sanctions involving multiple individuals and claims based upon the select individuals and claims reported by whistleblowers.

The Commission requests comment on the proposed definition of the word “action.” Is it appropriate to pay

whistleblower awards based on all monetary sanctions obtained in a single proceeding, even when the whistleblower’s information did not concern all defendants or claims in that proceeding?

##### 2. Proposed Rule 165.2(b) Aggregate Amount

Proposed Rule 165.2(b) defines the phrase “aggregate amount” to mean the total amount of an award granted to one or more whistleblowers pursuant to Proposed Rule 165.7. The term is relevant for purposes of determining the amount of an award pursuant to Proposed Rule 165.8.

##### 3. Proposed Rule 165.2(c) Analysis

Under Section 23(a)(4) of the CEA, the original information provided by a whistleblower can include information that is derived from independent knowledge and also from independent “analysis” of a whistleblower. Proposed Rule 165.2(c) defines the term “analysis” to mean the whistleblower’s examination and evaluation of information that may be generally available, but which reveals information that is not generally known or available to the public. This definition recognizes that there are circumstances where individuals can review publicly available information, and, through their additional evaluation and analysis, provide vital assistance to the Commission staff in understanding complex schemes and identifying potential violations of the CEA.

The Commission requests comment on the definition of “analysis.” Is there a different or more specific definition of “analysis” that would better effectuate the purposes of Section 23 of the CEA?

##### 4. Proposed Rule 165.2(d) Collected by the Commission

Proposed Rule 165.2(d) defines the phrase “collected by the Commission,” when used in the context of deposits and credits into the Fund, to refer to a monetary sanction that is both collected by the Commission and is recorded as a payment receivable on the Commission’s books and records. While the amount of a whistleblower award is based upon “what has been collected of the monetary sanctions imposed in an action or related action,” see Section 23(b), Congress used different language to describe the source of funding for whistleblower awards. Specifically, Congress states that the Fund will be financed through monetary sanctions “collected by the Commission,” meaning that deposits into the Fund are based only upon what the Commission actually collects. See Section 23(g)(3).

The Commission generally collects civil monetary sanctions and disgorgement amounts in civil actions, or fines in administrative actions. A federal court or the Commission generally awards restitution to victims in civil and administrative actions, respectively, but the Commission does not “collect” restitution, *i.e.*, restitution is not recorded as a payment receivable on the Commission’s books and records. Consequently, restitution amounts collected in a covered action or related action will not be deposited into the Fund.

##### 5. Proposed Rule 165.2(e) Covered Judicial or Administrative Action

Proposed Rule 165.2(e) defines the phrase “covered judicial or administrative action” to mean any judicial or administrative action brought by the Commission under the CEA whose successful resolution results in monetary sanctions exceeding \$1,000,000.

##### 6. Proposed Rule 165.2(f) Fund

Proposed Rule 165.2(f) defines the term “Fund” to mean the “Commodity Futures Trading Commission Customer Protection Fund” established by Section 23(g) of the CEA. The Commission will use the Fund to pay whistleblower awards as provided in Proposed Rule 165.12 and to finance customer education initiatives designed to help customers protect themselves against fraud and other violations of the CEA or the Commission’s regulations.

##### 7. Proposed Rule 165.2(g) Independent Knowledge

Proposed Rule 165.2(g) defines “independent knowledge” as factual information in the whistleblower’s possession that is not obtained from publicly available sources, which would include such sources as corporate filings, media, and the Internet. Importantly, the proposed definition of “independent knowledge” does not require that a whistleblower have direct, first-hand knowledge of potential violations. Instead, independent knowledge may be obtained from any of the whistleblower’s experiences, observations, or communications (subject to the exclusion for knowledge obtained from public sources). Thus, for example, under Proposed Rule 165.2(g), a whistleblower would have “independent knowledge” of information even if that knowledge derives from facts or other information that has been conveyed to the whistleblower by third parties.

The Commission preliminarily believes that defining “independent

<sup>5</sup> See Proposed Rule 165.8.

<sup>6</sup> See Black’s Law Dictionary 31 (8th ed. 2004) (defining an “action” as “a civil or criminal judicial proceeding”). Section 23 of the CEA does not appear to contemplate the aggregation of separate judicial or administrative actions for purposes of determining whether the \$1,000,000 threshold is satisfied, even if the actions arise out of a single investigation.

<sup>7</sup> This approach offers enhanced potential incentives for whistleblowers when compared to other similar programs because those programs have typically limited awards to successful claims that the whistleblower actually identified. See *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007) (False Claims Act); *John Doe v. United States*, 65 Fed. Cl. 184 (2005) (Customs moiety statute, 19 U.S.C. 1619); Internal Revenue Manual 25.2.2.2.8.A (under IRS whistleblower program, collected proceeds only include proceeds from the single issue identified by the whistleblower, or substantially similar improper activity).

knowledge” in this manner best effectuates the purposes of Section 23 of the CEA. An individual may learn about potential violations of the CEA without being personally involved in the conduct. If an individual voluntarily comes forward with such information, and the information leads the Commission to a successful enforcement action (as defined in Proposed Rule 165.2(i)), that individual should be eligible to receive a whistleblower award.<sup>8</sup>

Proposed Rule 165.2(g) further provides that an individual will not be considered to have “independent knowledge” in four other circumstances. The effect of these provisions would be to exclude individuals who obtain information under these circumstances from being eligible for whistleblower awards.

The first exclusion contemplated is for information that was obtained through a communication that is subject to the attorney-client privilege. (Proposed Rule 165.2(g)(2) and (3).) 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. This important benefit could be undermined if the whistleblower award program vitiated the public’s perception of the scope of the attorney-client privilege or created monetary incentives for counsel to disclose information about potential CEA violations that they learned of through privileged communications.

The exception for knowledge obtained through privileged attorney-client

communications would not apply in circumstances where the disclosure of the information is otherwise permitted. This could include, for example, circumstances where the privilege has been waived, and where the privilege is not applicable because of a recognized exception such as the crime-fraud exception to the attorney-client privilege.

The second exclusion to “independent knowledge” in the proposed rule applies when a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity receives information about potential violations, and the information was communicated to the person with the reasonable expectation that the person would take appropriate steps to cause the entity to remedy the violation.<sup>9</sup> (Proposed Rule 165.2(g)(4).)

The third exclusion is closely related to the second, and applies any other time that information is obtained from or through an entity’s legal, compliance, audit, or similar functions or processes for identifying, reporting, and addressing potential non-compliance with applicable law. (Proposed Rule 165.2(g)(5).) However, each of these two exclusions ceases to be applicable, with the result that an individual may be deemed to have “independent knowledge,” and therefore may become a whistleblower, if the entity fails to disclose the information to the Commission within sixty (60) days or otherwise proceeds in bad faith.

Compliance with the CEA is promoted when companies implement effective legal, audit, compliance, and similar functions. The rationale for these proposed exclusions is the concern that Section 23 not be implemented in a way that would create incentives for persons involved in such functions, as well as other responsible persons who are informed of wrongdoing, to circumvent or undermine the proper operation of the entity’s internal processes for investigating and responding to violations of law. Accordingly, under the proposed rule, officers, directors, employees, and others who learn of potential violations as part of their official duties in the expectation that they will take steps to address the violations, or otherwise from or through the various processes that companies

employ to identify problems and advance compliance with legal standards, would not be permitted to use that knowledge to obtain a personal benefit by becoming whistleblowers.

Nevertheless, if the entity failed to disclose the information to the Commission within sixty (60) days or otherwise proceeds in bad faith, the exclusion would no longer apply, thereby making an individual who knows this undisclosed information eligible to become a whistleblower. The rationale for this provision is that if the entity fails to report information concerning the violation to the Commission, it would be inconsistent with the purposes of Section 23 to continue to disable individuals with knowledge of the potential violations from coming forward and providing the information to the Commission. Furthermore, this provision provides a reasonable period of time for entities to report potential violations, thereby minimizing the potential of circumventing or undermining existing compliance programs.

The fourth and final exclusion to “independent knowledge” in the proposed rule applies if the whistleblower obtains the information by means or in a manner that violates applicable federal or state criminal law. This exclusion is necessary to avoid the unintended effect of incentivizing criminal misconduct.

The Commission requests comment on the definition of “independent knowledge.” Is it appropriate to include within the scope of the phrase “independent knowledge” knowledge that is not direct, first-hand knowledge, but is instead learned from others, subject only to an exclusion for knowledge learned from publicly-available sources? Is it appropriate to exclude from the definition of “independent knowledge” information that is obtained through a communication that is protected by the attorney-client privilege? Are there other ways these rules should address privileged communications?

The Commission also requests comment on the proposed exclusions for information obtained by a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity under an expectation that the person would cause the entity to take steps to remedy the violation, and for information otherwise obtained from or through an entity’s legal, compliance, audit, or similar functions. Does this exclusion strike the proper balance? Will the carve-out for situations where the entity fails to disclose the information within sixty

<sup>8</sup>In addition, the distinction between “independent knowledge” (as knowledge not dependent upon publicly available sources) and direct, first-hand knowledge, is consistent with the approach courts have typically taken in interpreting similar terminology in the False Claims Act. Until this year, the “public disclosure bar” provisions of the False Claims Act defined an “original source” of information, in part, as “an individual who [had] direct and independent knowledge of the allegations of the information on which the allegations [were] based \* \* \*.” 31 U.S.C. 3130(e)(4) (prior to 2010 amendments). Courts interpreting these terms generally defined “independent knowledge” to mean knowledge that was not dependent on public disclosures, and “direct knowledge” to mean first-hand knowledge from the relator’s own work and experience, with no intervening agency. *E.g.*, *United States ex rel. Fried v. West Independent School District*, 527 F.3d 439 (5th Cir. 2008); *United States ex rel. Paranich v. Sorgard*, 396 F.3d 326 (3d Cir. 2005). See generally John T. Boese, *Civil False Claims and Qui Tam Actions* § 4.02[D][2] (Aspen Publishers) (2006) (citing cases). Earlier this year, Congress amended the “public disclosure bar” to, among other things, remove the requirement that a relator have “direct knowledge” of information. Sec. 10104(h)(2), Public Law 111–148, 124 Stat. 901 (Mar. 23, 2010).

<sup>9</sup>This exclusion has been adapted from case law holding that a disclosure to a supervisor who is in a position to remedy the wrongdoing is a protected disclosure for purposes of the federal Whistleblower Protection Act, 5 U.S.C. 2302(b)(8). *E.g.*, *Reid v. Merit Systems Protection Board*, 508 F.3d 674 (Fed. Cir. 2007); *Hooen-Lewis v. Caldera*, 249 F.3d 259 (4th Cir. 2001).

(60) days promote effective self-policing functions and compliance with the law without undermining the operation of Section 23? Is sixty (60) days a “reasonable time” for the entity to disclose the information and, if not, what period should be specified (e.g., three months, six months, one year)? Are there alternative provisions the Commission should consider that would promote effective self-policing and self-reporting while still being consistent with the goals and text of Section 23?

Finally, the Commission seeks comment on whether there are other sources of knowledge that should or should not be deemed “independent” for purposes of Section 23 and that should be specifically addressed by rule?

#### 8. Proposed Rule 165.2(h) Independent Analysis

Proposed Rule 165.2(h) defines the phrase “independent analysis” to mean the whistleblower’s own analysis, whether done alone or in combination with others. The proposed rule thus recognizes that analysis—in particular academic or professional studies—is often the product of collaboration among two or more individuals. The phrase is relevant to the definition of “original information” in Proposed Rule 165.2(k).

#### 9. Proposed Rule 165.2(i) Information That Led to Successful Enforcement

Under Section 23, a whistleblower’s eligibility for an award depends in part on whether the whistleblower’s original information “led to the successful enforcement” of the Commission’s covered judicial or administrative action or a related action. Proposed Rule 165.2(i) defines when original information “led to successful enforcement.”

The Commission’s enforcement practice generally proceeds in several stages. First, the staff opens an investigation based upon some indication of potential violations of the CEA and/or Commission regulations. Second, the staff conducts its investigation to gather additional facts in order to determine whether there is sufficient basis to recommend enforcement action. If so, the staff may recommend, and the Commission may authorize, the filing of an action. The definition in Proposed Rule 165.2(i) addresses the significance of the whistleblower’s information to both the decision to open an investigation and the success of the resulting enforcement action. The proposed rule would distinguish between situations where the whistleblower’s information causes the staff to begin an investigation or

inquire about new or different conduct as part of a current investigation, and situations where the whistleblower provides information about conduct that is already under investigation. In the latter case, awards would be limited to the rare circumstances where the whistleblower provided essential information that the staff would not have otherwise obtained in the normal course of the investigation. Subparagraphs (1) and (2) of Proposed Rule 165.2(i) reflect these considerations.

Subparagraph (1) of Proposed Rule 165.2(i) applies to situations where the staff is not already reviewing the conduct in question, and establishes a two-part test for determining whether “original information” voluntarily provided by a whistleblower led to successful enforcement of a Commission action. First, the information must have caused the staff to open an investigation, reopen an investigation that had been closed, or to inquire concerning new and different conduct as part of an open investigation. This does not necessarily contemplate that the whistleblower’s information will be the only information that the staff obtains before deciding to proceed. However, the proposed rule would apply when the whistleblower gave the staff information about conduct that the staff is not already investigating or examining, and that information was the principal motivating factor behind the staff’s decision to begin looking into the whistleblower’s allegations.

Second, if the whistleblower’s information caused the Commission staff to start looking at the conduct for the first time, the proposed rule would require that the information “significantly contributed” to the success of an enforcement action filed by the Commission. The proposed rule includes this requirement because the Commission believes that it is not the intent of Section 23 to authorize whistleblower awards for any and all tips about conduct that led to the opening of an investigation if the resulting investigation concludes in a successful covered judicial or administrative action. Rather, implicit in the requirement in Section 23(b) that a whistleblower’s information “led to \* \* \* successful enforcement” is the further expectation that the information, because of its high quality, reliability, and specificity, had a meaningful connection to the Commission’s ability to successfully complete its investigation and to either obtain a settlement or prevail in a litigated proceeding.

At bottom, successful enforcement of a judicial or administrative action depends on the staff’s ability to establish unlawful conduct by a preponderance of evidence. Thus, in order to have “led to successful enforcement,” the “original information” provided by a whistleblower should be connected to evidence that plays a significant role in successfully establishing the Commission’s claim. For example, the “led to” standard of Proposed Rule 165.2(i)(1) would be met if a whistleblower were to provide the Commission staff with strong, direct evidence of violations that supported one or more claims in a successful enforcement action. To give another example, a whistleblower whose information did not provide this degree of evidence in itself, but who played a critical role in advancing the investigation by leading the staff directly to evidence that provided important support for one or more of the Commission’s claims could also receive an award, in particular if the evidence the whistleblower pointed to might have otherwise been difficult to obtain. A whistleblower who only provided vague information, or an unsupported tip, or evidence that was tangential and did not significantly help the Commission successfully establish its claims, would ordinarily not meet the standard of this proposed rule.

If information that a whistleblower provides to the Commission consists of “independent analysis” (Proposed Rule 165.2(h)) rather than “independent knowledge” (Proposed Rule 165.2(g)), the evaluation of whether this analysis “led to successful enforcement” similarly would turn on whether it significantly contributed to the success of the action. This would involve, for example, considering the degree to which the analysis, by itself and without further investigation, indicated a high likelihood of unlawful conduct that was the basis, or was substantially the basis, for one or more claims in the Commission’s enforcement action. The purpose of this provision is to ensure that the analysis provided to the Commission results in the efficiency and effectiveness benefits to the enforcement program that were intended by Congress. Thus, if a person provided analysis based upon readily available public information and the staff opened an inquiry based upon this analysis but was required to conduct significant additional analysis and investigation to conclude a successful enforcement action, the person would not be deemed to have provided “independent analysis.”

Subparagraph (2) of Proposed Rule 165.2(i) sets forth a separate, and higher, standard for cases in which a whistleblower provides original information to the Commission about conduct that is already under investigation by the Commission, Congress, any other federal, state, or local authority, any self-regulatory organization, or the Public Company Accounting Oversight Board. In this situation, the information will be considered to have led to the successful enforcement of a judicial or administrative action if the information would not have otherwise been obtained and was essential to the success of the action.<sup>10</sup> Although the Commission believes that awards under Section 23 generally should be limited to cases where whistleblowers provide original information about violations that are not already under investigation,<sup>11</sup> there may be rare circumstances where information received from a whistleblower in relation to an ongoing investigation is so significant for the success of a Commission action that a whistleblower award should be considered. For example, a whistleblower who is not within the scope of the staff's investigation, but who nonetheless has access to, and comes forward with a document that had been concealed from the staff, and that establishes proof of wrongdoing that is critical to the Commission's ability to sustain its burden of proof, provides the type of assistance that should be considered for an award without regard to whether the staff was already investigating the conduct at the time the document was provided. The Commission anticipates applying Proposed Rule 165.2(i) in a strict fashion, however, such that awards under the proposed rule would be exceedingly rare.

In considering the relationship between information obtained from a whistleblower and the success of a covered judicial or administrative action, the Commission will take into account the difference between settled and litigated actions. Specifically, in a litigated action the whistleblower's information must significantly

contribute, or, in the case of conduct that is already under investigation, be essential, to the success of a claim on which the Commission prevails in litigation. For example, if a court finds in favor of the Commission on a number of claims in an enforcement action, but rejects the claims that are based upon the information the whistleblower provided, the whistleblower would not be considered eligible to receive an award.<sup>12</sup> By contrast, in a settled action the Commission would consider whether the whistleblower's information significantly contributed, or was essential, to allegations included in the Commission's federal court complaint, or to factual findings in the Commission's administrative order.

The Commission requests comment on the proposed standard for when original information voluntarily provided by a whistleblower "led to" successful enforcement action. Is the proposed standard appropriate?

The Commission also requests comment on cases where the original information provided by the whistleblower caused the staff to begin looking at conduct for the first time. Should the standard also require that the whistleblower's information "significantly contributed" to a successful enforcement action? If not, what standards should be used in the evaluation? If yes, should the proposed rule define with greater specificity when information "significantly contributed" to enforcement action? In what way should the phrase be defined?

Finally, the Commission requests comment on the proposal in Subparagraph (i)(2), which would consider that a whistleblower's information "led to" successful enforcement even in cases where the whistleblower gave the Commission original information about conduct that was already under investigation. Is this proposal appropriate? Should the Commission's evaluation turn on whether the whistleblower's information would not otherwise have been obtained and was essential to the success of the action? If not, what other standard(s) should apply?

#### 10. Proposed Rule 165.2(j) Monetary Sanctions

Proposed Rule 165.2(j) defines the phrase "monetary sanctions," when used with respect to any judicial or

administrative action, to mean (1) any monies, including penalties, disgorgement, restitution, and interest ordered to be paid; and (2) any monies deposited into a disgorgement fund or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action. This phrase is relevant to the definition of "covered judicial or administrative action" in Proposed Rule 165.2(d) and to the amount of a whistleblower award under Proposed Rule 165.8.

#### 11. Proposed Rule 165.2(k) Original Information and Proposed Rule 165.2(l) Original Source

Proposed Rule 165.2(k) tracks the definition of "original information" set forth in Section 23(a)(4) of the CEA.<sup>13</sup> "Original information" means information that is derived from the whistleblower's independent knowledge or analysis; is not already known to the Commission from any other source, unless the whistleblower is the original source of the information; and is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information. Consistent with Section 23(l) of the CEA, the Dodd-Frank Act authorizes the Commission to pay whistleblower awards on the basis of original information that is submitted prior to the effective date of final rules implementing Section 23 (assuming that all of the other requirements for an award are met); the Dodd-Frank Act does not authorize the Commission to apply Section 23 retroactively to pay awards based upon information submitted prior to the enactment date of the statute.<sup>14</sup> Consistent with Congress's intent, Proposed Rule 165.2(k)(4) also requires that "original information" be provided to the Commission for the first time after July 21, 2010 (the date of enactment of the Dodd-Frank Act).

Under the statutory definition of "original information," a whistleblower who provides information that the Commission already knows from another source has not provided original information, unless the whistleblower is

<sup>10</sup> The proposed rule also makes clear that subparagraph (2) of Proposed Rule 165.2(i) does not apply when a whistleblower provides information to the Commission about a matter that is already under investigation by another authority if the whistleblower is the "original source" for that investigation under Proposed Rule 165.2(l). In those circumstances, subparagraph (1) of Proposed Rule 165.2(i) would govern the Commission's analysis.

<sup>11</sup> See *Lacy v. United States*, 221 Ct. Cl. 526 (1979); cf. *United States ex rel. Merena v. Smith-Kline Beecham Corp.*, 205 F.3d 97 (3d Cir. 2000).

<sup>12</sup> As discussed below, however, if the Commission prevails on a claim that is based upon the information the whistleblower provided, and if all the conditions for an award are otherwise satisfied, the award to the whistleblower would be based upon all of the monetary sanctions obtained as a result of the action. See Proposed Rule 165.8.

<sup>13</sup> 7 U.S.C. 26(a)(4).

<sup>14</sup> Section 23(k) of the CEA directs that: "Information submitted to the Commission by a whistleblower in accordance with rules or regulations implementing this section shall not lose its status as original information solely because the whistleblower submitted such information prior to the effective date of such rules or regulations, provided that such information was submitted after the date of enactment of the Wall Street Transparency and Accountability Act of 2010."

the “original source” of that information. Proposed Rule 165.2(l) defines the term “original source,” which will be used in the definition of “original information.” Under the proposed rule, a whistleblower is an “original source” of the same information that the Commission obtains from another source if the other source obtained the information from the whistleblower or his representative. The whistleblower bears the burden of establishing that he is the original source of information.

In Commission investigations, this situation may arise if the staff receives a referral from another authority such as the Department of Justice, a self-regulatory organization, or another organization that is identified in the proposed rule. On occasion, the situation may also arise that the “original source” of information shares his information with another person, and such other person files a whistleblower claim with the Commission prior to the original source filing a claim for whistleblower status. In these circumstances, the proposed rule would credit a whistleblower as being the “original source” of information on which the referral was based as long as the whistleblower “voluntarily” provided the information to the other authority within the meaning of these rules; *i.e.*, the whistleblower or his representative must have come forward and given the other authority the information before receiving any request, inquiry, or demand to which the information was relevant, or was the individual who originally possessed either the independent knowledge or conducted the independent analysis.

As is described elsewhere in these proposed rules, a whistleblower will need to submit two forms, a Form TCR (“Tip, Complaint or Referral”) and Form WB-DEC (“Declaration Concerning Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act”) in order to start the process and establish the whistleblower’s eligibility for award consideration.<sup>15</sup> A whistleblower who either provides information to another authority first, or who shared his independent knowledge or analysis with another who is also claiming to be a whistleblower, will need to follow these same procedures and submit the necessary forms to the Commission in order to perfect his status as a whistleblower under the Commission’s whistleblower program. However, under Proposed Rule 165.2(l)(2), as long as the whistleblower submits the necessary

forms to the Commission within 90 days after he provided the information to the other authority, or 90 days after the other person claiming to be a whistleblower submits his claim to the Commission, the Commission will consider the whistleblower’s submission to be effective.

As noted above, the whistleblower must establish that he is the original source of the information provided to the other authority as well as the date of his submission, but the Commission may seek confirmation from the other authority, or any other source, in making this determination. The objective of this procedure is to provide further incentive for persons with knowledge of CEA violations to come forward (consistent with the purposes of Section 23) by assuring potential whistleblowers that they can provide information to appropriate Government or regulatory authorities, and their “place in line” will be protected in the event that other whistleblowers later provide the same information directly to the Commission.

For similar reasons, the proposed rule extends the same protection to whistleblowers who provide information about potential violations to the persons specified in Proposed Rule 165.2(g)(3) and (4) (*i.e.*, personnel involved in compliance or similar functions, or who are informed about potential violations with the expectation that they will take steps to address them), and who, within 90 days, submit the necessary whistleblower forms to the Commission. Compliance with the CEA is promoted when companies have effective programs for identifying, correcting, and self-reporting unlawful conduct by company officers or employees. The objective of this provision is to support, not undermine, the effective functioning of company compliance and related systems by allowing employees to take their concerns about potential violations to appropriate company officials while still preserving their rights under the Commission’s whistleblower program.

Proposed Rule 165.2(l)(3) addresses circumstances where the Commission already possesses some information about a matter at the time that a whistleblower provides additional information about the same matter. The whistleblower will be considered the “original source” of any information that is derived from his independent knowledge or independent analysis and that materially adds to the information that the Commission already possesses. The standard is modeled after the definition of “original source” that Congress included in the False Claims

Act through amendments earlier this year.<sup>16</sup>

The Commission requests comment on all aspects of the definitions of “original information” and “original source” set forth in Proposed Rules 165.2(k) and (l). Is the provision that would credit individuals with providing original information to the Commission, as of the date of their submission to another Governmental or regulatory authority, or to company legal, compliance, or audit personnel, appropriate? In particular, does the provision regarding the providing of information to a company’s legal, compliance, or audit personnel appropriately accommodate the internal compliance process?

The Commission also requests comment on whether the ninety (90) day deadline for submitting Forms TCR and WB-DEC to the Commission (after initially providing information about violations or potential violations to another authority or the employer’s legal, compliance, or audit personnel) is the appropriate time frame? Should there be different time frames for disclosures to other authorities and disclosures to an employer’s legal, compliance or audit personnel?

## 12. Proposed Rule 165.2(m) Related Action

The phrase “related action,” when used with respect to any judicial or administrative action brought by the Commission under the CEA, means any judicial or administrative action brought by an entity listed in Proposed Rule 165.11(a) that is based upon the original information voluntarily submitted by a whistleblower to the Commission pursuant to Proposed Rule 165.3 that led to the successful resolution of the Commission action. This phrase is relevant to the Commission’s determination of the amount of a whistleblower award under Proposed Rules 165.8 and 165.11.

## 13. Proposed Rule 165.2(n) Successful Resolution or Successful Enforcement

Proposed Rule 165.2(n) defines the phrase “successful resolution,” when used with respect to any judicial or administrative action brought by the Commission under the Commodity Exchange Act, to include any settlement of such action or final judgment in favor of the Commission. It shall also have the same meaning as “successful enforcement.” This phrase is relevant to the definition of the phrase “covered

<sup>15</sup> See Proposed Rule 165.3.

<sup>16</sup> 31 U.S.C. 3730(e)(4)(B), Public Law 111–148 § 10104(h)(2), 124 Stat. 901 (Mar. 23, 2010).

judicial or administrative action” as set forth in Proposed Rule 165.2(e).

#### 14. Proposed Rule 165.2(o) Voluntary Submission or Voluntarily Submitted

Under Section 23(b)(1) of the CEA,<sup>17</sup> whistleblowers are eligible for awards only when they provide original information to the Commission “voluntarily.” Proposed Rule 165.2(o) would define “voluntary submission” or “voluntarily submitted” in the context of submission to the Commission of original information as a whistleblower’s provision of information to the Commission before receipt by the whistleblower (or anyone representing the whistleblower, including counsel) of any request, inquiry, or demand from the Commission, Congress, any other federal, state or local authority, or any self-regulatory organization about a matter to which the information in the whistleblower’s submission is relevant. The fact that such request, inquiry or demand is not compelled by subpoena or other applicable law, does not render a subsequent submission voluntary.

Proposed Rule 165.2(o) would make clear that, in order to have acted “voluntarily” under the statute, a whistleblower must do more than merely provide the Commission with information that is not compelled by subpoena (or by a court order following a Commission action to enforce a subpoena) or by other applicable law.<sup>18</sup> Rather, the whistleblower or his representative (such as an attorney) must come forward with the information before receiving any request, inquiry, or demand from the Commission staff or from any other investigating authority described in the proposed rule about a matter to which the whistleblower’s information is relevant. A request, inquiry, or demand that is directed to an employer is also considered to be directed to employees who possess the documents or other information that is necessary for the employer to respond. Accordingly, a subsequent whistleblower submission from any such employee will not be considered “voluntary” for purposes of the rule, and the employee will not be eligible for award consideration, unless the employer fails to provide the employee’s documents or information to the requesting authority within sixty (60) days.

This approach is consistent with 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 until Government or other official investigators “come knocking on the door.”<sup>19</sup> This approach is also consistent with the approach federal courts have taken in determining whether a private plaintiff, suing on behalf of the Government under the qui tam provisions of the False Claims Act, “voluntarily” provided information about the false or fraudulent claims to the Government before filing suit.<sup>20</sup>

Disclosure to the Government should also not be considered voluntary if the individual has a pre-existing legal or contractual duty to report violations of the type at issue to the Commission, Congress, any other federal or state authority, or any self-regulatory organization.<sup>21</sup> Thus, for example, Section 23(c)(2) of the CEA<sup>22</sup> prohibits awards to members, officers, or

employees of an appropriate regulatory agency, the Department of Justice, a registered entity, a registered futures association, or a self-regulatory organization. The Commission anticipates that other similarly-situated persons should not be eligible for award consideration if they are under a pre-existing legal duty to report the information to the Commission or to any of the other authorities described above. Proposed Rule 165.2(o) accomplishes this goal by providing that submissions from such individuals will not be considered voluntary for purposes of Section 23 of the CEA. Proposed Rule 165.2(o) also includes a similar exclusion for information that the whistleblower is contractually obligated to provide. This exclusion is intended to preclude awards to persons who provide information pursuant to preexisting agreements that obligate them to assist Commission staff or other investigative authorities.

The Commission requests comment on the definition of “voluntarily.” Does Proposed Rule 165.2(o) appropriately define the circumstances when a whistleblower should be considered to have acted “voluntarily” in providing information about CEA or Commission regulation violations to the Commission? Are there other circumstances not clearly included that should be in the rule? Is it appropriate for the proposed rule to consider a request or inquiry directed to an employer to be directed at individual employees who possess the documents or other information needed for the employer’s response? Should the persons who are considered to be within the scope of an inquiry be narrowed or expanded? Will the carve-out that permits such an employee to become a whistleblower if the employer fails to disclose the information the employee provided within sixty (60) days promote compliance with the law and the effective operation of Section 23? Is sixty (60) days a “reasonable time” for employers to disclose the information the employee provided, or should a different period be specified (*e.g.*, three months, six months, one year)?

The Commission also requests comment on the standard described in Proposed Rule 165.2(o) that would credit an individual with acting “voluntarily” in circumstances where the individual was aware of fraudulent conduct for an extended period of time, but chose not to come forward as a whistleblower until after he became aware of a governmental investigation (such as by observing document requests being served on his employer or colleagues, but before he received an

<sup>19</sup> See S. Rep. No. 111–176 at 110 (2010) (discussing Section 922 of the Dodd-Frank Act, which establishes “Securities Whistleblower Incentives and Protection” similar to the “Commodity Whistleblower Incentives and Protection” in Section 748; “The Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws \* \* \*”).

<sup>20</sup> See *United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699 (8th Cir. 1994); *United States ex rel. Paranych v. Sornard*, 396 F.3d 326 (3d Cir. 2005); *United States ex rel. Fine v. Chevron, USA, Inc.*, 72 F.3d 740 (9th Cir. 1995), *cert. denied*, 517 U.S.1233 (1996) (rejecting argument that provision of information to the Government is always voluntary unless compelled by subpoena). The qui tam provisions of the False Claims Act include a “public disclosure bar,” which, as recently amended, requires a court to dismiss a private action or claim if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed in certain fora, unless the Government opposes dismissal or the plaintiff is an “original source” of the information. 31 U.S.C. 3730(e)(4). An “original source” is further defined, in part, with reference to whether the plaintiff “voluntarily” disclosed the information to the Government before filing suit. *Id.* Because the qui tam provisions of the False Claims Act have played a significant role in the development of whistleblower law generally, and because some of the terminology used by Congress in Section 23 has antecedents in the False Claims Act, the Commission believes that precedent under the False Claims Act can provide helpful guidance in the interpretation of Section 23 of the CEA. At the same time, because the False Claims Act and Section 23 serve different purposes, are structured differently, and the two statutes may use the same words in different contexts, the Commission does not view False Claims Act precedent as necessarily controlling or authoritative in all circumstances for purposes of Section 23 of the CEA.

<sup>21</sup> See *United States ex rel. Biddle v. Board of Trustees of The Leland Stanford, Jr. University*, 161 F.3d 533 (9th Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999); *United States ex rel. Schwedt v. Planning Research Corp.*, 39 F. Supp. 2d 28 (D.D.C. 1999).

<sup>22</sup> 15 U.S.C. 78u-6(c)(2).

<sup>17</sup> 7 U.S.C. 26(b)(1).

<sup>18</sup> Various books and records provisions of the CEA and Commission regulations generally require registrants to furnish records to the Commission upon request. See *e.g.*, Section 4(g) of the CEA, 7 U.S.C. 6(g).



inquiry, request, or demand himself, assuming that he was not within the scope of an inquiry directed to his employer). Is this an appropriate result, and, if not, how should the proposed rule be modified to account for it?

Finally, the Commission seeks Comment on the exclusion set forth in Proposed Rule 165.2(o) for information provided pursuant to a pre-existing legal or contractual duty to report violations. Is the exclusion appropriate? Should the exclusion be expanded to other forms of duties such as ethical duties or duties imposed by codes of conduct?

#### 15. Proposed Rule 165.2(p) Whistleblower(s)

The term “whistleblower” is defined in Section 23(a)(7) of the CEA.<sup>23</sup> Consistent with this language, Proposed Rule 165.2(p) would define a whistleblower as an individual who, alone or jointly with others, provides information to the Commission relating to a potential violation of the CEA. A company or another entity is not eligible to receive a whistleblower award. This definition tracks the statutory definition of a “whistleblower,” except that the proposed rule uses the term “potential violation” in order to make clear that the whistleblower anti-retaliation protections set forth in Section 23(h) of the CEA do not depend on an ultimate adjudication, finding or conclusion that conduct identified by the whistleblower constituted a violation of the CEA.

Proposed Rule 165.2(p) (and Proposed Rule 165.6(b)) would further make clear that the anti-retaliation protections set forth in Section 23(h) of the CEA apply irrespective of whether a whistleblower satisfies all the procedures and conditions to qualify for an award under the Commission’s whistleblower program. Section 23(h)(1)(A) of the CEA prohibits employment retaliation against a whistleblower who provides information to the Commission (i) “in accordance with this section,” or (ii) “in assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information.” The Commission interprets the statute as designed to extend the protections against employment retaliation that are provided for in Section 23(h)(1) to any individual who provides information to the Commission about potential violations of the CEA regardless of whether the person satisfies procedures and conditions necessary to qualify for an award under the Commission’s whistleblower program.

The Commission requests comment on whether the anti-retaliation protections set forth in Section 23(h)(1) of the CEA should be applied broadly to any person who provides information to the Commission concerning a potential violation of the CEA, or should they be limited by the various procedural or substantive prerequisites to consideration for a whistleblower award? Should the application of the anti-retaliation provisions be limited or broadened in any other ways?

#### C. Proposed Rule 165.3—Procedures for Submitting Original Information

The Commission proposes a two-step process for the submission of original information under the whistleblower award program. In general, the first step would require the submission of the standard form on which the information concerning potential violations of the CEA are reported. The second step would require the whistleblower to complete a unique form, signed under penalties of perjury (consistent with Section 23(m) of the CEA), in which the whistleblower would be required to make certain representations concerning the veracity of the information provided and the whistleblower’s eligibility for a potential award. The use of standardized forms will greatly assist the Commission in managing and tracking the thousands of tips that it receives annually. This will also better enable the Commission to connect tips to each other so as to make better use of the information provided, and to connect tips to requests for payment under the whistleblower provisions. The purpose of requiring a sworn declaration is to help deter the submission of false and misleading tips and the resulting inefficient use of the Commission’s resources. The requirement should also mitigate the potential harm to companies and individuals that may be caused by false or spurious allegations of wrongdoing.

As set forth in Proposed Rule 165.5, Commission staff may also request testimony and additional information from a whistleblower relating to the whistleblower’s eligibility for an award.

#### 1. Form TCR and Instructions

Subparagraph (a) of Proposed Rule 165.3 requires the submission of information to the Commission on proposed Form TCR. The Form TCR, “Tip, Complaint or Referral,” and the instructions thereto, are designed to capture basic identifying information about a complainant and to elicit sufficient information to determine whether the conduct alleged suggests a violation of the CEA.

#### 2. Form WB-DEC and Instructions

In addition to Form TCR, the Commission proposes in subparagraph (b) of Proposed Rule 165.3 to require that whistleblowers who wish to be considered for an award in connection with the information they provide to the Commission also complete and provide the Commission with proposed Form WB-DEC, “Declaration Concerning Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act.” Proposed Form WB-DEC would require a whistleblower to answer certain threshold questions concerning the whistleblower’s eligibility to receive an award. The form also would contain a statement from the whistleblower acknowledging that the information contained in the Form WB-DEC, as well as all information contained in the whistleblower’s Form TCR, is true, correct and complete to the best of the whistleblower’s knowledge, information and belief. Moreover, the statement would acknowledge the whistleblower’s understanding that the whistleblower may be subject to prosecution and ineligible for an award if, in the whistleblower’s submission of information, other dealings with the Commission, or dealings with another authority in connection with a related action, the whistleblower knowingly and willfully makes any false, fictitious, or fraudulent statements or representations, or uses any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

In instances where information is provided by an anonymous whistleblower, proposed subparagraph (c) of Proposed Rule 165.3 would require that the whistleblower’s identity must be disclosed to the Commission and verified in a form and manner acceptable to the Commission consistent with the procedure set forth in Proposed Rule 165.7(c) prior to Commission’s payment of any award.

The Commission proposes to allow two alternative methods of submission of Form TCRs and WB-DEC. A whistleblower would have the option of submitting a Form TCR electronically through the Commission’s website, or by mailing or faxing the form to the Commission. Similarly, a Form WB-DEC could be submitted electronically, in accordance with instructions set forth on the Commission’s website or, alternatively, by mailing or faxing the form to the Commission.

<sup>23</sup> 7 U.S.C. 26(a)(7).



### 3. Perfecting Whistleblower Status for Submissions Made Before Effectiveness of the Rules

As previously discussed, Section 748(k) of Dodd-Frank Act states that information submitted to the Commission by a whistleblower after the date of enactment, but before the effective date of these proposed rules, retains the status of original information. The Commission has already received tips from potential whistleblowers after the date of enactment of the Dodd-Frank Act. Proposed Rule 165.3(d) would provide a mechanism by which potential whistleblowers who provide tips between enactment of the Dodd-Frank Act and the effective date of the final rules could perfect their status as whistleblowers under the Commission's award program once final rules are adopted. Subparagraph (d)(1) requires a whistleblower who provided original information to the Commission in a format or manner other than a Form TCR to submit a completed Form TCR within one hundred twenty (120) days of the effective date of the proposed rules and to otherwise follow the procedures set forth in subparagraphs (a) and (b) of Proposed Rule 165.3. If the whistleblower provided the original information to the Commission in a Form TCR, subparagraph (d)(2) would require the whistleblower to submit Form WB-DEC within one hundred twenty (120) days of the effective date of the proposed rules in the manner set forth in subparagraph (b) of Proposed Rule 165.3.

Although the Commission is proposing alternative methods of submission of the Form TCR and WB-DEC, it expects that electronic submissions would dramatically reduce the administrative costs, enhance ability to evaluate tips (generally and using automated tools), and improve efficiency in processing whistleblower submissions. Accordingly, the Commission solicits comment on whether it would be appropriate to eliminate the fax and mail option and require that all submissions of proposed Form TCRs and WB-DEC be made electronically. Would the elimination of submissions by fax and mail create an undue burden for some potential whistleblowers who may not have easy access to a computer or who may prefer to submit their information in that manner? Is there other information that the Commission should elicit from whistleblowers on Form TCRs and WB-DEC? Are there categories of information included on these forms

that are unnecessary, or should be modified?

The Commission also requests comment on whether the requirement that an attorney for an anonymous whistleblower certify that the attorney has verified the whistleblower's identity and eligibility for an award is appropriate? Is there an alternative process the Commission should consider that would accomplish its goal of ensuring that it is communicating with a legitimate whistleblower?

Finally, the Commission seeks comment on whether the Commission's proposed process for allowing whistleblowers 120 days to perfect their status in cases where the whistleblower provided original information to the Commission in writing after the date of enactment of the Dodd-Frank Act but before adoption of the proposed rules is reasonable? Should the period be made shorter (*e.g.*, 30 or 60 days) or longer (*e.g.*, 180 days)?

#### *D. Proposed Rule 165.4—Confidentiality*

Proposed Rule 165.4 summarizes the confidentiality requirements set forth in Section 23(h)(2) of the CEA<sup>24</sup> with respect to information that could reasonably be expected to reveal the identity of a whistleblower. As a general matter, it is the Commission's policy and practice to treat all information obtained during its investigations as confidential and nonpublic. Disclosures of enforcement-related information to any person outside the Commission may only be made as authorized by the Commission and in accordance with applicable laws and regulations. Consistent with Section 23(h)(2), the proposed rule explains that the Commission will not reveal the identity of a whistleblower or disclose other information that could reasonably be expected to reveal the identity of a whistleblower, except under circumstances described in the statute and the rule.<sup>25</sup> As is further explained below, there may be circumstances in which disclosure of information that identifies a whistleblower will be legally required or will be necessary for the protection of investors.

Subparagraph (a)(1) of the proposed rule would authorize disclosure of

information that could reasonably be expected to reveal the identity of a whistleblower when disclosure is required to a defendant or respondent in a public proceeding that the Commission files or in another public action or a public proceeding filed by an authority to which the Commission is authorized to provide the information. For example, in a related action brought as a criminal prosecution by the Department of Justice, disclosure of a whistleblower's identity may be required, in light of the requirement of the Sixth Amendment of the Constitution that a criminal defendant have the right to be confronted with witnesses against him.<sup>26</sup> Subparagraph (a)(2) would authorize disclosure to: The Department of Justice; an appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction; a registered entity, registered futures association, a self-regulatory organization; a state attorney general in connection with a criminal investigation; any appropriate state department or agency, acting within the scope of its jurisdiction; or a foreign futures authority.

Because many whistleblowers may wish to provide information anonymously, subparagraph (b) of the proposed rule, consistent with Section 23(d) of the CEA, states that anonymous submissions are permitted with certain specified conditions. Subparagraph (b) would require that anonymous whistleblowers who submit information to the Commission must follow the procedure in Proposed Rule 165.3(c) for submitting original information anonymously. Further, anonymous whistleblowers would be required to follow the procedures set forth in Proposed Rule 165.7(c) requiring that the whistleblower's identity be disclosed to the Commission and verified in a form and manner acceptable to the Commission prior to Commission's payment of any award.

The purpose of this requirement is to prevent fraudulent submissions and to facilitate communication and assistance between the whistleblower and the Commission's staff. Any whistleblower may be represented by counsel—whether submitting information anonymously or not.<sup>27</sup> The Commission emphasizes that anonymous whistleblowers have the same rights and responsibilities as other whistleblowers under Section 23 of the CEA and these

<sup>24</sup> 7 U.S.C. 26(h)(2).

<sup>25</sup> Section 23(h)(2)(A) provides that the Commission shall not disclose any information, including that provided to the whistleblower to the Commission, which could reasonably be expected to reveal the identity of the whistleblower, except in accordance with the provisions of Section 552a of title 5, United States Code, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or governmental organizations described subparagraph (C).

<sup>26</sup> See U.S. Const. Amend. VI.

<sup>27</sup> See Section 23(d)(1), 7 U.S.C. 26(d)(1). Under the statute, however, an anonymous whistleblower seeking an award is required to be represented by counsel. Section 23(d)(2), 7 U.S.C. 26(d)(2).

proposed rules, unless expressly exempted.

*E. Proposed Rule 165.5—Prerequisites to the Consideration of an Award*

Proposed Rule 165.5 summarizes the general prerequisites for whistleblowers to be considered for the payment of awards set forth in Section 23(b)(1) of the CEA. As set forth in the statute, subparagraph (a) states that, subject to the eligibility requirements in the Regulations, the Commission will pay an award or awards to one or more whistleblowers who voluntarily provide the Commission with original information that led to the successful resolution of a covered Commission judicial or administrative action or the successful enforcement of a related action by: the Department of Justice; an appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction; a registered entity, registered futures association, a self regulatory organization; a state attorney general in connection with a criminal investigation; any appropriate state department or agency, acting within the scope of its jurisdiction; or a foreign futures authority.

Subparagraph (b) of Proposed Rule 165.5 emphasizes that, in order to be eligible, the whistleblower must have submitted to the Commission original information in the form and manner required by Proposed Rule 165.3. The whistleblower must also provide the Commission, upon its staff's request, certain additional information, including: explanations and other assistance, in the manner and form that staff may request, in order that the staff may evaluate the use of the information submitted; all additional information in the whistleblower's possession that is related to the subject matter of the whistleblower's submission; and testimony or other evidence acceptable to the staff relating to the whistleblower's eligibility for an award. Subparagraph (b) of Proposed Rule 165.5 further requires that, to be eligible for an award, a whistleblower must, if requested by Commission staff, enter into a confidentiality agreement in a form acceptable to the Commission, including a provision that a violation of the confidentiality agreement may lead to the whistleblower's ineligibility to receive an award.

The terms "whistleblower," "voluntarily," "original information," "led to successful enforcement," "action," and "monetary sanctions" are defined in Proposed Rule 165.2.

*F. Proposed Rule 165.6—Whistleblowers Ineligible for an Award*

Subparagraph (a) of Proposed Rule 165.6 recites the categories of individuals who are statutorily ineligible for an award under Section 23 of the CEA. These include persons who are, or were at the time they acquired the original information a member, officer, or employee of: the Commission; the Board of Governors of the Federal Reserve System; the Office of the Comptroller of the Currency; the Board of Directors of the Federal Deposit Insurance Corporation; the Director of the Office of Thrift Supervision; the National Credit Union Administration Board; the Securities and Exchange Commission; the Department of Justice; a registered entity; a registered futures association; a self-regulatory organization; or a law enforcement organization. Further Proposed Rule 165.6(a)(2) makes clear that no award will be made to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under Proposed Rule 165.7.

In order to prevent evasion of these exclusions, subparagraph (a)(3) of the proposed rule also provides that persons who acquire information from ineligible individuals are ineligible for an award. Consistent with Section 23(m) of the CEA, also ineligible for an award is any whistleblower that, in his submission of information or an application for an award, other dealings with the Commission, or his dealings with another authority in connection with a related action: 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; or omits any material fact whose absence would make any other statement or representation made to the Commission or any other authority misleading.

Subparagraph (b) of Proposed Rule 165.6 reiterates that a determination that a whistleblower is ineligible to receive an award for any reason does not deprive the individual of the anti-retaliation protections set forth in Section 23(h)(1) of the CEA.

The Commission requests comment on the ineligibility criteria set forth in Proposed Rule 165.6(a). Are there other statuses or activities that should render an individual ineligible for a whistleblower award?

*G. Proposed Rule 165.7—Procedures for Award Applications and Commission Award Determinations*

Proposed Rule 165.7 describes the steps a whistleblower would be required to follow in order to make an application for an award in relation to a Commission covered judicial or administrative action or related action. In addition, the rule describes the Commission's proposed claims review process.

In regard to covered actions, the proposed process would begin with the publication of a "Notice of a Covered Action" ("Notice") on the Commission's Web site. Whenever a covered judicial or administrative action brought by the Commission results in the imposition of monetary sanctions exceeding \$1,000,000, the Commission will cause this Notice of a covered judicial or administrative action to be published on the Commission's Web site subsequent to the entry of a final judgment or order in the action that by itself, or collectively with other judgments or orders previously entered in the action, exceeds the \$1,000,000 threshold. If the monetary sanctions are obtained without a judgment or order, the Notice would be published within thirty (30) days of the issuance of the settlement order that causes total monetary sanctions in the action to exceed \$1,000,000. The Commission's proposed rule requires claimants to file their claim for an award within sixty (60) days of the date of the Notice.

In regard to related actions, a claimant will be responsible for tracking the resolution of the related action. The Commission's proposed rule requires claimants to file their claim for an award in regard to a related action within sixty (60) days of the date of the monetary sanctions being imposed in the related action.

A claimant's failure to file timely a request for a whistleblower award would bar that individual later seeking a recovery.<sup>28</sup>

Subparagraph (b) of Proposed Rule 165.7 describes the procedure for making a claim for an award. Specifically, a claimant would be required to submit a claim for an award on proposed Form WB-APP ("Application for Award for Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act"). Proposed Form WB-APP, and the instructions thereto, will elicit information concerning a whistleblower's eligibility to receive an

<sup>28</sup> See, e.g., *Yuen v. U.S.*, 825 F.2d 244 (9th Cir. 1987) (taxpayer barred from recovery due to failure to timely file a written request for refund).

award at the time the whistleblower files his claim. The form will also provide an opportunity for the whistleblower to “make his case” for why he is entitled to an award by describing the information and assistance he has provided and its significance to the Commission’s successful action.<sup>29</sup>

Subparagraph (b) of Proposed Rule 165.7 provides that a claim on Form WB-APP, including any attachments, must be received by the Commission within sixty (60) calendar days of the date of the Notice or sixty (60) calendar days of the date of the imposition of the monetary sanctions in the related action, depending upon which action the claimant is seeking an award, in order to be considered for an award.

Subparagraph (c) includes award application procedures for a whistleblower who submitted original information to the Commission anonymously. Whistleblowers who submitted original information anonymously, but who are making a claim for a whistleblower award on a disclosed basis, are required to disclose their identity on the Form WB-APP and include with the Form WB-APP a signed and completed Form WB-DEC. Whistleblowers who submitted information anonymously, and are making a claim for a whistleblower award on an anonymous basis, must be represented by counsel and must provide their counsel with a completed and signed Form WB-DEC by no later than the date upon which the counsel submits to the Commission the whistleblower’s Form WB-APP. In addition, whistleblower’s counsel must submit with the Form WB-APP a separate Form WB-DEC certifying that the counsel has verified your identity, has reviewed the whistleblower’s Form WB-DEC form for completeness and accuracy, will retain the signed original of your Form WB-DEC in counsel’s records, and will produce the whistleblower’s Form WB-DEC upon request of the Commission’s staff. Proposed Rule 165.7(c) makes explicit that regardless of whether they make an award application on a disclosed or anonymous basis, the whistleblower’s identity must be verified in a form and manner that is acceptable to the Commission prior to the payment of any award.

Subparagraph (d) of Proposed Rule 165.7 describes the Commission’s claims review process. The claims

review process would begin upon the later of once the time for filing any appeals of the Commission’s judicial or administrative action and the related action(s) has expired, or where an appeal has been filed, after all appeals in the action or related action(s) have been concluded.

Under the proposed process, the Commission would evaluate all timely whistleblower award claims submitted on Form WB-APP. In connection with this process, the Commission could require that claimants provide additional information relating to their eligibility for an award or satisfaction of any of the conditions for an award, as set forth in Proposed Rule 165.5(b). Following that evaluation, the Commission would send any claimant a Determination setting forth whether the claim is allowed or denied and, if allowed, setting forth the proposed award percentage amount.

#### *H. Proposed Rule 165.8—Amount of Award*

If all conditions are met, Proposed Rule 165.8 provides that the whistleblower awards shall be in an aggregate amount equal to between 10 and 30 percent, in total, of what has been collected of the monetary sanctions imposed in the Commission’s action or related actions. This range is specified in Section 23(b)(1) of the CEA. Where multiple whistleblowers are entitled to an award, subparagraph (b) states that the Commission will independently determine the appropriate award percentage for each whistleblower, but total award payments, in the aggregate, will equal between 10 and 30 percent of the monetary sanctions collected either in the Commission’s action or the related action (but not both the Commission’s action and the related action).

The Commission requests comment on whether the provision stating that the percentage amount of an award in a Commission covered judicial or administrative action may differ from the percentage awarded in a related action is appropriate?

#### *I. Proposed Rule 165.9—Criteria for Determining Amount of Award*

Assuming that all of the conditions for making an award to a whistleblower have been satisfied, Proposed Rule 165.9 sets forth the criteria that the Commission would take into consideration in determining the amount of the award. Subparagraphs (a)(1) through (3) of the proposed rule recite three criteria that Section 23(c)(1)(B) of the CEA requires the Commission to consider, and

subparagraph (a)(4) adds a fourth criterion based upon the discretion given to the Commission to consider “additional relevant factors” in determining the amount of an award.

Subparagraph (a)(1) requires the Commission to consider the significance of the information provided by a whistleblower to the success of the Commission action or related action. Subparagraph (a)(2) requires the Commission to consider the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action. Subparagraph (a)(3) requires the Commission to consider the programmatic interest of the Commission in deterring violations of the CEA by making awards to whistleblowers that provide information that led to successful enforcement of covered judicial or administrative actions or related actions. Subparagraph (a)(4) would permit the Commission to consider whether an award otherwise enhances the Commission’s ability to enforce the CEA, protect customers, and encourage the submission of high quality information from whistleblowers.

The Commission anticipates that the determination of award amounts pursuant to subparagraphs (a)(1)–(4) will involve highly individualized review of the circumstances surrounding each award. To allow for this, the Commission preliminarily believes that the four criteria afford the Commission broad discretion to weigh a multitude of considerations in determining the amount of any particular award. Depending upon the facts and circumstances of each case, some of the considerations may not be applicable or may deserve greater weight than others.

The permissible considerations include, but are not limited to:

- The character of the enforcement action including whether its subject matter is a Commission priority, whether the reported misconduct involves regulated entities or fiduciaries, the type of CEA violations, the age and duration of misconduct, the number of violations, and the isolated, repetitive, or ongoing nature of the violations;
- The dangers to customers or others presented by the underlying violations involved in the enforcement action including the amount of harm or potential harm caused by the underlying violations, the type of harm resulting from or threatened by the underlying violations, and the number of individuals or entities harmed;

<sup>29</sup> See discussion of Proposed 165.9 for a non-exhaustive list of factors the Commission preliminarily believes it will consider in determining award amounts.

- The timeliness, degree, reliability, and effectiveness of the whistleblower's assistance;
- The time and resources conserved as a result of the whistleblower's assistance;
- Whether the whistleblower encouraged or authorized others to assist the staff who might not have otherwise participated in the investigation or related action;
- Any unique hardships experienced by the whistleblower as a result of his or her reporting and assisting in the enforcement action;
- The degree to which the whistleblower took steps to prevent the violations from occurring or continuing;
- The efforts undertaken by the whistleblower to remediate the harm caused by the violations including assisting the authorities in the recovery of the fruits and instrumentalities of the violations;
- Whether the information provided by the whistleblower related to only a portion of the successful claims brought in the covered judicial or administrative action or related action;<sup>30</sup> and
- The culpability of the whistleblower including whether the whistleblower acted with scienter, both generally and in relation to others who participated in the misconduct.

These considerations are not listed in order of importance nor are they intended to be all-inclusive or to require a specific determination in any particular case.

Finally, subparagraph (b) to Proposed Rule 165.9 reiterates the statutory prohibition in Section 23(c)(2) of the CEA from taking into consideration the balance of the Fund when making an award determination.

#### *J. Proposed Rule 165.10—Contents of Record for Award Determinations*

In order to promote transparency and consistency, and also to preserve a clear record for appellate review (under

Proposed Rule 165.13) of Commission award determinations (under Proposed Rule 165.7), Proposed Rule 165.10 sets forth the contents of record for award determinations relating to covered judicial or administrative actions or related actions. The record shall consist of: Required forms the whistleblower submits to the Commission, including related attachments; other documentation provided by the whistleblower to the Commission; the complaint, notice of hearing, answers and any amendments thereto; the final judgment, consent order, or administrative speaking order; the transcript of the related administrative hearing or civil injunctive proceeding, including any exhibits entered at the hearing or proceeding; any other documents that appear on the docket of the proceeding. The record shall also include any statements by litigation staff to the Commission regarding: The significance of the information provided by the whistleblower to the success of the covered judicial or administrative action or related action; the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action or related action; and any facts relating to a determination of whether the whistleblower provided original information, conducted an independent analysis, or possessed independent knowledge.

However, Proposed Rule 165.10(b) explicitly states that the record upon which the award determination under Proposed Rule 165.7 shall be made shall not include any Commission pre-decisional or internal deliberative process materials related to the Commission or its staff's determination: To file or settle the covered judicial or administrative action; and/or whether, to whom and in what amount to make a whistleblower award. Further, the record upon which the award determination under Proposed Rule 165.7 shall be made shall not include any other entity's pre-decisional or internal deliberative process materials related to its or its staff's determination to file or settle a related action.

The Commission requests comment on what other relevant items the Commission should consider as part of the record for its award determinations?

#### *K. Proposed Rule 165.11—Awards Based Upon Related Actions*

Proposed Rule 165.11 explains that the Commission, or its delegate, may grant an award based on amounts collected in certain related actions rather than the amount collected in a

covered judicial or administrative action. Proposed Rule 165.11 sets forth the requirements for a related action or related actions to serve as the basis of a whistleblower award. Regardless of whether the Commission's award determination will be based upon the Commission's covered judicial or administrative action or a related action or actions, Proposed Rule 165.7 sets forth the procedures for whistleblower award applications and Commission award determinations.

#### *L. Proposed Rule 165.12—Payment of Awards From the Fund, Financing Customer Education Initiatives, and Deposits and Credits to the Fund; and Proposed Rule 165.15—Delegations of Authority*

Proposed Rules 165.12 and 165.15 set forth certain internal Commission procedures. Specifically, paragraph (a) of Proposed Rule 165.12, consistent with Section 23(g)(2) of the CEA, requires the Commission to pay whistleblower awards from the Fund. Importantly, Proposed Rule 165.12(b)(2) makes clear that if there is an insufficient amount in the Fund to satisfy a whistleblower award made pursuant to Proposed Rule 165.7, the Commission shall deposit into the Fund monetary sanctions that are actually collected by the Commission in an amount equal to the unsatisfied portion of the award from *any* judicial or administrative action based on the information provided by *any* whistleblower.

Proposed Rule 165.15 includes the Commission's delegations to the Executive Director to take certain actions to carry out this Part 165 of the Rules and the requirements of Section 23(h) of CEA. Among the delegations to the Executive Director in Proposed Rule 165.15(a) is the authority to make deposits into the Fund.

Proposed Rule 165.12 also includes the Commission's financing of customer education initiatives. Proposed Rule 165.12(c) provides that the Commission shall undertake and maintain customer education initiatives. The initiatives shall be designed to help customers protect themselves against fraud or other violations of the CEA, or rules or regulations thereunder. The Commission shall fund the customer education initiatives, and may utilize funds deposited into the Fund during any fiscal year in which the beginning (October 1) balance of the Fund is greater than \$10,000,000. The Commission shall budget on an annual basis the amount used to finance customer education initiatives, taking

<sup>30</sup> As described elsewhere in these rules, if the information provided by a whistleblower relates to only a portion of a successful covered judicial or administrative action or related action, the Commission proposes to look to the entirety of the action (including all defendants or respondents, all claims, and all monetary sanctions obtained) in determining whether the whistleblower is eligible for an award and the total dollar amount of sanctions on which the whistleblower's award will be based. However, under subparagraph (a) of Proposed Rule 165.9, the fact that the whistleblower's information related to only a portion of the overall action would be a factor in determining the amount of the whistleblower's award. Thus, if the whistleblower's information supported only a small part of a larger case, that would be a reason for making an award based upon a smaller percentage amount than otherwise would have been awarded.

into consideration the balance of the Fund.

The Commission limited its discretion to finance customer education initiatives to fiscal years in which the beginning (October 1) balance of the Fund is greater than \$10,000,000 in order to limit the possibility that spending on customer education initiatives may inadvertently result in the Commission operating the Fund in a deficit and thereby delay award payments to whistleblowers.

The Commission requests comment on whether this limitation is appropriate, or would other limitations better effectuate this purpose? Is the \$10 million Fund balance trigger too high or too low, and, if so, what would be a better trigger amount?

#### *M. Proposed Rule 165.13—Appeals*

Section 23(f) of the CEA provides for rights of appeal of Final Orders of the Commission with respect to whistleblower award determinations.<sup>31</sup> Subparagraph (a) of Proposed Rule 165.13 tracks this provision and describes claimants' rights to appeal. Claimants may appeal any Commission final award determination, including whether, to whom, or in what amount to make whistleblower awards, to an appropriate court of appeals within thirty (30) days after the Commission's Final Order of determination.

Subparagraph (b) of Proposed Rule 165.13 designates the materials that shall be included in the record on any appeal. They include: The Contents of Record for Award Determination, as set forth in Proposed Rule 165.9; any Final Order of the Commission, as set forth in Rule 165.7(e).

#### *N. Proposed Rule 165.14—Procedures Applicable to the Payment of Awards*

Proposed Rule 165.14 addresses the timing for payment of an award to a whistleblower. Any award made pursuant to the rules would be paid from the Fund established by Section 23(g) of the CEA.<sup>32</sup> Subparagraph (a) provides that a recipient of a whistleblower award will be entitled to payment on the award only to the extent that a monetary sanction is collected in the covered judicial or administrative action or in a related action upon which the award is based. This requirement is derived from Section 23(b)(1) of the CEA,<sup>33</sup> which provides that an award is based upon the monetary sanctions

collected in the covered judicial or administrative action or related action.

Subparagraph (b) states that any payment of an award for a monetary sanction collected in a covered judicial or administrative action shall be made within a reasonable period of time following the later of either the completion of the appeals process for all whistleblower award claims arising from the covered judicial or administrative action, or the date on which the monetary sanction is collected. Likewise, the payment of an award for a monetary sanction collected in a related action shall be made within a reasonable period of time following the later of either the completion of the appeals process for all whistleblower award claims arising from the related action, or the date on which the monetary sanction is collected. This provision is intended to cover situations where a single action results in multiple whistleblowers claims. Under this scenario, if one whistleblower appeals a Final Order of the Commission relating to a whistleblower award determination, the Commission would not pay any awards in the action until that whistleblower's appeal has been concluded, because the disposition of that appeal could require the Commission to reconsider its determination and thereby affect all payments for that covered judicial or administrative action or related action.

Subparagraph (c) of Proposed Rule 165.14 describes how the Commission will address situations where there are insufficient amounts available in the Fund to pay an award to a whistleblower or whistleblowers within a reasonable period of time of when payment should otherwise be made. In this situation, the whistleblower or whistleblowers will be paid when amounts become available in the Fund, subject to the terms set forth in proposed subparagraph (c). Under proposed subparagraph (c), where multiple whistleblowers are owed payments from the Fund based on awards that do not arise from the same Notice or resolution of a related action, priority in making payment on these awards would be determined based upon the date that the Final Order of the Commission is made. If two or more of these Final Orders of the Commission are entered on the same date, those whistleblowers owed payments will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments. Under proposed subparagraph (c)(2), where multiple whistleblowers are owed payments from the Fund based on awards that arise from the same Notice

or resolution of a related action, they would share the same payment priority and would be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

#### *O. Proposed Rule 165.16—No Immunity and Proposed Rule 165.17—Awards to Whistleblowers Who Engage in Culpable Conduct*

Proposed Rule 165.16 provides notice that the provisions of Section 23 of the CEA do not provide immunity to individuals who provide information to the Commission relating to a violation of the CEA. Whistleblowers who have not participated in misconduct will of course not need immunity. However, some whistleblowers who provide original information that significantly aids in detecting and prosecuting sophisticated manipulation or fraud schemes may themselves be participants in the scheme who would be subject to Commission enforcement actions. While these individuals, if they provide valuable assistance to a successful action, will remain eligible for a whistleblower award, they will not be immune from prosecution. Rather, the Commission will analyze the unique facts and circumstances of each case in accordance with its Enforcement Advisory, "Cooperation Factors in Enforcement Division Sanction Recommendations" to determine whether, how much, and in what manner to credit cooperation by whistleblowers who have participated in misconduct.

The options available to the Commission and its staff for facilitating and rewarding cooperation ranges from taking no enforcement action to pursuing charges and sanctions in connection with enforcement actions.

Whistleblowers with *potential* civil liability or criminal liability for CEA violations that they report to the Commission remain eligible for an award. However, pursuant to Section 23(c)(2)(B) of the CEA,<sup>34</sup> if a whistleblower is convicted of a criminal violation related to the judicial or administrative action, they are not eligible for an award. Furthermore, if a defendant or respondent in a Commission or related action is ordered to pay monetary sanctions in a civil enforcement action, this proposed rule states that the Commission will not count the amount of such monetary sanctions toward the \$1,000,000 threshold in considering an award payment to such a defendant or respondent in relation to a covered

<sup>31</sup> 7 U.S.C. 26(f).

<sup>32</sup> 7 U.S.C. 26(g).

<sup>33</sup> 7 U.S.C. 26(b)(1).

<sup>34</sup> 7 U.S.C. 26(c)(2)(B).

judicial or administrative action, and will not add that amount to the total monetary sanctions collected in the action for purposes of calculating any payment to the culpable individual. The rationale for this limitation is to prevent wrongdoers from financially benefiting from their own misconduct, and ensures equitable treatment of culpable and non-culpable whistleblowers. For example, without such a prohibition, a whistleblower that was the leader or organizer of a fraudulent scheme involving multiple defendants that resulted in total monetary sanctions of \$1,250,000 would exceed the \$1,000,000 minimum threshold required for making an award, even though he personally was ordered to pay \$750,000 of those monetary sanctions and, under similar circumstances, a non-culpable whistleblower would be deemed ineligible for an award if they reported a CEA or Commission regulation violation that resulted in monetary sanctions of less than \$1,000,000. The proposed rule would prevent such inequitable treatment.

*P. Proposed Rule 165.18—Staff Communications With Whistleblowers From Represented Entities*

Proposed Rule 165.18 clarifies the staff's authority to communicate directly with whistleblowers who are directors, officers, members, agents, or employees of an entity that has counsel, and who have initiated communication with the Commission relating to a potential CEA violation. The proposed rule makes clear that the staff is authorized to communicate directly with these individuals without first seeking the consent of the entity's counsel.

Section 23 of the CEA evinces a strong Congressional policy to facilitate the disclosure of information to the Commission relating to potential CEA violations and to preserve the confidentiality of those who do so.<sup>35</sup> This Congressional policy would be significantly impaired were the Commission required to seek the consent of an entity's counsel before speaking with a whistleblower who contacts us and who is a director, officer, member, agent, or employee of the entity. For this reason, Section 23 of the CEA authorizes the Commission to communicate directly with these individuals without first obtaining the consent of the entity's counsel.

The Commission believes that expressly clarifying this authority in the proposed rule would promote whistleblowers' willingness to disclose

potential CEA violations to the Commission by reducing or eliminating any concerns that whistleblowers might have that the Commission is required to request consent of the entity's counsel and, in doing so, might disclose their identity. The Commission also believes that this proposed rule is appropriate to clarify that, in accordance with American Bar Association Model Rule 4.2, the staff is authorized by law to make these communications.<sup>36</sup> Under this provision, for example, the Commission could meet or otherwise communicate with the whistleblower privately, without the knowledge or presence of counsel or other representative of the entity.

*Q. Proposed Rule 165.19—Nonenforceability of Certain Provisions Waiving Rights and Remedies or Requiring Arbitration of Disputes*

Consistent with Congressional intent to protect whistleblowers from retaliation as reflected in Section 23(h) of the CEA, Proposed Rule 165.19 provides that the rights and remedies provided for in this Part 165 of the Commission's regulations may not be waived by any agreement, policy, form, or condition of employment including by a predispute arbitration agreement. No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this Part.

*R. Proposed Appendix A—Guidance With Respect to the Protection of Whistleblowers Against Retaliation*

The Commission has included a Proposed Appendix A ("Guidance With Respect To The Protection of Whistleblowers Against Retaliation") to better inform the public regarding the protections against retaliation from employers provided for whistleblowers in Section 23 of the CEA. Specifically, the Proposed Appendix A informs the public that Section 23(h)(1) of CEA provides whistleblowers with certain protections against retaliation, including: A Federal cause of action against the employer, which must be filed in the appropriate United States district court within two (2) years of the employer's retaliatory act; and potential relief for prevailing whistleblowers, including reinstatement, back pay, and compensation for other expenses,

including reasonable attorney's fees. For ease of reference, the Proposed Appendix also includes a verbatim copy of the full Section 23(h)(1) of the CEA.

**III. Request for Comment**

The Commission requests comment on all aspects of the proposed rules.

**IV. Administrative Compliance**

*A. Cost-Benefit Analysis*

Section 15(a) of the CEA<sup>37</sup> requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of a rule or to determine whether the benefits of the regulation outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.

With respect to benefits, the proposed rules would enhance the Commission's capacity to ensure fair and equitable markets. The Commission has determined that market participants and the public will benefit substantially from prevention and deterrence of violations of the CEA and Commission regulations, which will be buttressed by the whistleblower incentives and protections under Section 23 of the CEA and Proposed Part 165 of the regulations.

With respect to costs, the procedures set forth in the Proposed Rules may impose certain costs on prospective whistleblowers. As an initial matter, the procedures require potential whistleblowers to complete certain forms to establish eligibility for an award under the whistleblower program. As noted above, the Commission recognizes that it will take time and effort on the part of

<sup>35</sup> See Section 23 (b)–(d) & (h) of the CEA, 7 U.S.C. 26(b)–(d) & (h).

<sup>36</sup> American Bar Association Model Rule 4.2 provides as follows: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Model Rules of Prof'l Conduct R. 4.2 (emphasis added).

<sup>37</sup> 7 U.S.C. 19(a).

whistleblowers to complete and submit the required forms. In addition, any whistleblower wishing to submit one of the required forms in hard copy will need to arrange for delivery and pay the postage or other delivery costs. In these Proposed Rules, the Commission has attempted to mitigate the potential for burden or confusion in the procedures, but such costs cannot be eliminated.

The Commission invites public comment on its cost-benefit considerations. Commenters are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposed rules with their comment letters.

#### B. Anti-Trust Considerations

Section 15(b) of the CEA, 7 U.S.C. 19(b), requires the Commission to consider the public interests protected by the antitrust laws and to take actions involving the least anti-competitive means of achieving the objectives of the CEA. The Commission believes that the proposed rules will have a positive effect on competition by improving the fairness and efficiency of the markets through improving detection and remediation of potential violations of the CEA and Commission regulations.

#### C. Paperwork Reduction Act

This regulation requires that a whistleblower seeking an award submit whistleblower information and file claims for an award determination. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The Office of Management and Budget ("OMB") has not yet assigned a control number to the new collection. Proposed Commission Regulation 165 would result in new collection of information requirements within the meaning of the Paperwork Reduction Act ("PRA").<sup>38</sup> The Commission therefore is submitting this proposal to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for this collection of information is "Regulation 165—Proposed Rules for Implementing Whistleblower Provisions of Section 23 of the Commodity Exchange Act." OMB control number 3038–NEW. If adopted, responses to this new collection of information would be mandatory.

The Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, "Commission Records and Information." In addition, section 8(a)(1)

of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public "data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers." The Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

#### 1. Information Provided by Reporting Persons

The Proposed Rules 165.3 (Procedures for Submitting Original Information), 165.4 (Confidentiality), and 165.7 (Procedures for Award Applications and Commission Award Determinations) require that all individuals wishing to be eligible for an award under the Commission's whistleblower program must complete the following standard forms: Forms TCR ("Tip, Complaint or Referral"), WB–DEC ("Declaration Concerning Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act," signed under penalty of perjury), and WB–APP ("Application for Award for Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act"). The Commission estimates that there will be numerous individuals, approximately 160 per fiscal year, who may wish to file such forms. The Commission estimated the number of individuals based upon the current number of tips, complaints and referrals received by the Commission's Division of Enforcement and news articles regarding the whistleblower protections that indicate the SEC and Commission should expect to receive a high volume of claims. The proposed collection is estimated to involve approximately: 2 burden hours per Form TCR; 0.5 burden hours per Form WB–DEC; and 10 burden hours per Form WB–APP. The Commission expects that this will result in a total cost of 12.5 burden hours per individual seeking to be considered for an award under the Commission's whistleblower program, for an annual aggregate 2,000 burden hours per fiscal year. The Commission invites public comment on the accuracy of its estimate regarding the collection requirements that would result from the proposed regulations.

#### 2. Information Collection Comments

The Commission invites the public and other federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order

to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395–6566 or by e-mail at

[OIRAsubmissions@omb.eop.gov](mailto:OIRAsubmissions@omb.eop.gov). Please provide the Commission with a copy of submitted comments so that they can be summarized and addressed in the final rule. Refer to the "Addresses" section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting [RegInfo.gov](http://RegInfo.gov). OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is most assured of being fully effective if received by OMB (and the Commission) within 30 days after publication of this notice of proposed rulemaking.

#### D. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")<sup>39</sup> requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.<sup>40</sup> The rules proposed by the Commission will not have a significant economic impact on a substantial number of small entities. As explained above, because only individuals are eligible for participation in the Commission's whistleblower program under Section 23 of the CEA and Proposed Part 165 of the regulations, the proposed rules will not have a significant impact on small entities. Accordingly, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the proposed rules will not have a

<sup>39</sup> 5 U.S.C. 601.

<sup>40</sup> *Id.*

<sup>38</sup> 44 U.S.C. 3501 *et seq.*



significant impact on a substantial number of small entities.

Section 603(a) of the Regulatory Flexibility Act<sup>41</sup> requires the Commission to undertake an initial regulatory flexibility analysis of the proposed rule on small entities unless the Chairman certifies that the rule, if adopted, would not have a significant economic impact on a substantial number of small entities.<sup>42</sup> The Proposed Rules apply only to an individual, or individuals acting jointly, who provide information to the Commission relating to the violation of the CEA or Commission regulations. Companies and other entities are not eligible to participate in the Program as whistleblowers. Consequently, the persons that would be subject to the proposed rule are not “small entities” for purposes of the Regulatory Flexibility Act. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules will not have a significant economic impact on a substantial number of small entities. A copy of the certification is attached as an appendix to this document.

#### List of Subjects in 17 CFR Part 165

Whistleblower rules.

In consideration of the foregoing and pursuant to the authority contained in the Commodity Exchange Act, in particular, Sections 2, 3, 8a(5) and 26 thereof, the Commodity Futures Trading Commission proposes to add a new 17 CFR part 165 to read as follows:

### PART 165—WHISTLEBLOWER RULES

Sec.

- 165.1 General.
- 165.2 Definitions.
- 165.3 Procedures for submitting original information.
- 165.4 Confidentiality.
- 165.5 Prerequisites to the consideration of an award.
- 165.6 Whistleblowers ineligible for an award.
- 165.7 Procedures for award applications and commission award determinations.
- 165.8 Amount of award.
- 165.9 Criteria for determining amount of award.
- 165.10 Contents of record for award determination.
- 165.11 Awards based upon related actions.
- 165.12 Payment of awards from the fund, financing of customer education initiatives, and deposits and credits to the fund.
- 165.13 Appeals.
- 165.14 Procedures applicable to the payment of awards.
- 165.15 Delegations of authority.

- 165.16 No immunity.
  - 165.17 Awards to whistleblowers who engage in culpable conduct.
  - 165.18 Staff communications with whistleblowers from represented entities.
  - 165.19 Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration of disputes.
- Appendix A to Part 165—Guidance With Respect to the Protection of Whistleblowers Against Retaliation

**Authority:** 7 U.S.C. 2, 3, 12a(5) and 26, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (June 16, 2010).

#### § 165.1 General.

Section 23 of the Commodity Exchange Act, entitled “Commodity Whistleblower Incentives and Protection,” requires the Commission to pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about violations of the Commodity Exchange Act. This part 165 describes the whistleblower program that the Commission intends to establish to implement the provisions of Section 23, and explain the procedures you will need to follow in order to be eligible for an award. Whistleblowers should read these procedures carefully, because the failure to take certain required steps within the time frames described in this part may serve as disqualification from receiving an award. Unless expressly provided for in this part, no person is authorized to make any offer or promise, or otherwise to bind the Commission with respect to the payment of any award or the amount thereof.

#### § 165.2 Definitions.

(a) *Action*. The term “action” means a single captioned judicial or administrative proceeding.

(b) *Aggregate Amount*. The phrase “aggregate amount” means the total amount of an award granted to one or more whistleblowers pursuant to § 165.8.

(c) *Analysis*. The term “analysis” means your examination and evaluation of information that may be generally available, but which reveals information that is not generally known or available to the public.

(d) *Collected by the Commission*. The phrase “collected by the Commission” refers to any funds received, and confirmed by the Treasury, in satisfaction of part or all of a civil monetary penalty, disgorgement obligation, or fine owed to the Commission.

(e) *Covered Judicial or Administrative action*. The phrase “covered judicial or administrative action” means any judicial or administrative action brought by the Commission under the Commodity Exchange Act whose successful resolution results in monetary sanctions exceeding \$1,000,000.

(f) *Fund*. The term “Fund” means the Commodity Futures Trading Commission Customer Protection Fund.

(g) *Independent Knowledge*. The phrase “independent knowledge” means factual information in your possession that is not generally known or available to the public. You may gain independent knowledge from your experiences, communications and observations in your personal business or social interactions. The Commission will not consider your information to be derived from your independent knowledge if you obtained the information:

(1) From sources generally available to the public such as corporate filings and the media, including the Internet;

(2) Through a communication that was subject to the attorney-client privilege, unless the disclosure is otherwise permitted by the applicable federal or state attorney conduct rules;

(3) As a result of the legal representation of a client on whose behalf your services, or the services of your employer or firm, have been retained, and you seek to use the information to make a whistleblower submission for your own benefit, unless disclosure is authorized by the applicable federal or state attorney conduct rules;

(4) Because you were a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity, and the information was communicated to you with the reasonable expectation that you would take appropriate steps to cause the entity to remedy the violation, unless the entity subsequently failed to disclose the information to the Commission within sixty (60) days or otherwise proceeded in bad faith;

(5) Otherwise from or through an entity’s legal, compliance, audit or other similar functions or processes for identifying, reporting and addressing potential non-compliance with law, unless the entity failed to disclose the information to the Commission within sixty (60) days or otherwise proceeded in bad faith; or

(6) By a means or in a manner that violates applicable federal or state criminal law.

(h) *Independent Analysis*. The phrase “independent analysis” means your own

<sup>41</sup> 5 U.S.C. 603(a).

<sup>42</sup> 5 U.S.C. 605(b).

analysis, whether done alone or in combination with others.

(i) *Information That Led to Successful Enforcement.* The Commission will consider that you provided original information that led to the successful enforcement of a judicial or administrative action, or related action, in the following circumstances:

(1) If you gave the Commission original information that caused the staff to open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning new or different conduct as part of a current investigation, and your information significantly contributed to the success of the action; or

(2) If you gave the Commission original information about conduct that was already under investigation by the Commission, Congress, any other federal, state, or local authority, any self-regulatory organization, or the Public Company Accounting Oversight Board (except in cases where you were an original source of this information as defined in paragraph (i)(1) of this section), and your information would not otherwise have been obtained and was essential to the success of the action.

(j) *Monetary Sanctions.* The phrase “monetary sanctions,” when used with respect to any judicial or administrative, or related action, action means—

(1) Any monies, including penalties, disgorgement, restitution, and interest ordered to be paid; and

(2) Any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.

(k) *Original Information.* (1) The phrase “original information” means information that—

(i) Is derived from the independent knowledge or independent analysis of a whistleblower;

(ii) Is not already known to the Commission from any other source, unless the whistleblower is the original source of the information;

(iii) Is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information; and

(iv) Is submitted to the Commission for the first time after July 21, 2010 (the date of enactment of the Wall Street Transparency and Accountability Act of 2010).

(2) Original information shall not lose its status as original information solely

because the whistleblower submitted such information prior to the [EFFECTIVE DATE OF THE FINAL RULE], provided such information was submitted after July 21, 2010, the date of enactment of the Wall Street Transparency and Accountability Act of 2010. In order to be eligible for an award, a whistleblower who submits original information to the Commission after July 21, 2010, but prior to [EFFECTIVE DATE OF THE FINAL RULE], must comply with the procedure set forth in § 165.3(d).

(l) *Original Source.* You must satisfy your status as the original source of information to the Commission’s satisfaction.

(1) Information obtained from another source. The Commission will consider you to be an “original source” of the same information that the Commission obtains from another source if the information you provide satisfies the definition of original information and the other source obtained the information from you or your representative.

(i) In order to be considered an original source of information that the Commission receives from Congress, any other federal state or local authority, or any self-regulatory organization, you must have voluntarily given such authorities the information within the meaning of this part. In determining whether you are the original source of information, the Commission may seek assistance and confirmation from one of the other entities or authorities described above.

(ii) In the event that you claim to be the original source of information that an authority or another entity, other than as set forth in paragraph (l)(1)(i) of this section, provided to the Commission, the Commission may seek assistance and confirmation from such authority or other entity.

(2) Information first provided to another authority or person. If you provide information to Congress, any other federal, state, or local authority, any self-regulatory organization, the Public Company Accounting Oversight Board, or to any of any of the persons described in paragraphs (g)(3) and (4) of this section, and you, within 90 days, make a submission to the Commission pursuant to § 165.3, as you must do in order for you to be eligible to be considered for an award, then, for purposes of evaluating your claim to an award under § 165.7, the Commission will consider that you provided information as of the date of your original disclosure, report, or submission to one of these other authorities or persons. You must

establish your status as the original source of such information, as well as the effective date of any prior disclosure, report, or submission, to the Commission’s satisfaction. The Commission may seek assistance and confirmation from the other authority or person in making this determination.

(3) Information already known by the Commission. If the Commission already knows some information about a matter from other sources at the time you make your submission, and you are not an original source of that information, as described above, the Commission will consider you an “original source” of any information you separately provide that otherwise satisfies the definition of original information and materially adds to the information that the Commission already possesses.

(m) *Related Action.* The phrase “related action,” when used with respect to any judicial or administrative action brought by the Commission under the Commodity Exchange Act, means any judicial or administrative action brought by an entity listed in § 165.11(a) that is based upon the original information voluntarily submitted by a whistleblower to the Commission pursuant to § 165.3 that led to the successful resolution of the Commission action.

(n) *Successful Resolution.* The phrase “successful resolution,” when used with respect to any judicial or administrative action brought by the Commission under the Commodity Exchange Act, includes any settlement of such action or final judgment in favor of the Commission. It shall also have the same meaning as “successful enforcement.”

(o) *Voluntary Submission or Voluntarily Submitted.* The phrase “voluntary submission” or “voluntarily submitted” within the context of submission of original information to the Commission under this part, shall mean the provision of information made prior to any request from the Commission, Congress, any other federal or state authority, the Department of Justice, a registered entity, a registered futures association, or a self-regulatory organization to you or anyone representing you (such as an attorney) about a matter to which the information in the whistleblower’s submission is relevant. If the Commission or any of these other authorities make a request, inquiry, or demand to you or your representative first, your submission will not be considered voluntary, and you will not be eligible for an award, even if your response is not compelled by subpoena or other applicable law. For purposes of this paragraph, you will be considered

to have received a request, inquiry or demand if documents or information from you are within the scope of a request, inquiry, or demand that your employer receives, unless, after receiving the documents or information from you, your employer fails to provide your documents or information to the requesting authority in a timely manner.

In addition, your submission will not be considered voluntary if you are under a pre-existing legal or contractual duty to report the violations that are the subject of your original information to the Commission, Congress, any other federal or state authority, the Department of Justice, a registered entity, a registered futures association, or a self-regulatory organization.

(p) *Whistleblower(s)*. (1) The term "whistleblower" or "whistleblowers" means any individual, or two (2) or more individuals acting jointly, who provides information relating to a potential violation of the Commodity Exchange Act to the Commission, in a manner established by § 165.3.

(2) The retaliation protections afforded to whistleblowers by the provisions of Section 23(h) of the Commodity Exchange Act apply irrespective of whether a whistleblower satisfies the procedures and conditions to qualify for an award under this Part 165. Moreover, for purposes of the anti-retaliation provision of paragraph (h)(1)(A)(i) of Section 23, the requirement that a whistleblower provide "information to the Commission in accordance" with Section 23 is satisfied if an individual provides information to the Commission that relates to a potential violation of the Commodity Exchange Act.

#### **§ 165.3 Procedures for submitting original information.**

A whistleblower's submission of information to the Commission will be a two-step process.

(a) First, you will need to submit your information to the Commission. You may submit your information:

(1) By completing and submitting a Form TCR online and submitting it electronically through the Commission's Web site at [insert link] or;

(2) By completing the Form TCR and mailing or faxing the form to the Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, Fax (202) XXX-XXXX.

(b) In addition to submitting a Form TCR, you will also need to complete and provide to the Commission a Form WB-DEC, "Declaration Concerning Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act," signed under penalty of perjury.

Your Form WB-DEC must be submitted as follows:

(1) If you submit a Form TCR electronically, your Form WB-DEC must be submitted either:

(i) Electronically (in accordance with the instructions set forth on the Commission's Web site); or

(ii) By mailing or faxing the signed form to the Commission. Your Form WB-DEC must be received by the Commission within thirty (30) days of the Commission's receipt of your Form TCR.

(2) If you submit a Form TCR either by mail or fax, your Form WB-DEC must be submitted by mail or fax at the same time as the Form TCR.

(c) Notwithstanding paragraph (b), if you submitted your original information to the Commission anonymously, then your identity must be disclosed to the Commission and verified in a form and manner acceptable to the Commission consistent with the procedure set forth in § 165.7(c) prior to the Commission's payment of any award.

(d) If you submitted original information in writing to the Commission after July 21, 2010 (the date of enactment of the Wall Street Transparency and Accountability Act of 2010) but before the effective date of these rules, you will be eligible for an award only if:

(1) In the event that you provided the original information to the Commission in a format or manner other than that described in paragraph (a) of this section, you submit a completed Form TCR and Form WB-DEC within one hundred twenty (120) days of [EFFECTIVE DATE OF THE FINAL RULE] and otherwise follow the procedures set forth above in paragraphs (a) and (b) of this section; or

(2) In the event that you provided the original information to the Commission in a Form TCR in the manner described in paragraph (a) of this section, you submit a Form WB-DEC within one hundred twenty (120) days of the effective date of this section in the manner set forth above in paragraph (b) of this section.

#### **§ 165.4 Confidentiality.**

(a) *In General*. Section 23(h)(2) of the Commodity Exchange Act requires that the Commission not disclose information that could reasonably be expected to reveal the identity of a whistleblower, except that the Commission may disclose such information in the following circumstances:

(1) When disclosure is required to a defendant or respondent in connection with a public proceeding that the

Commission institutes or in another public proceeding that is filed by an authority to which the Commission provides the information, as described below;

(2) When the Commission determines that it is necessary to accomplish the purposes of the Commodity Exchange Act and to protect customers, it may provide whistleblower information to: The Department of Justice; an appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction; a registered entity, registered futures association, a self regulatory organization; a state attorney general in connection with a criminal investigation; any appropriate state department or agency, acting within the scope of its jurisdiction; or a foreign futures authority.

(3) The Commission may make disclosures in accordance with the Privacy Act of 1974 (5 U.S.C. 552a).

(b) *Anonymous Whistleblowers*. A whistleblower may anonymously submit information to the Commission, however, the whistleblower must follow the procedures in § 165.3(c) for submitting original information anonymously. Such whistleblower who anonymously submits information to the Commission must also follow the procedures in § 165.7(c) in submitting to the Commission an application for a whistleblower award.

#### **§ 165.5 Prerequisites to the consideration of an award.**

(a) Subject to the eligibility requirements described in this part 165, the Commission will pay an award to one or more whistleblowers who:

(1) Provide a voluntary submission to the Commission;

(2) That contains original information; and

(3) That leads to the successful resolution of a covered Commission judicial or administrative action or successful enforcement of a related action; and

(b) In order to be eligible, the whistleblower must:

(1) Have given the Commission original information in the form and manner that the Commission requires in § 165.3 and be the original source of information;

(2) Provide the Commission, upon its staff's request, certain additional information, including: Explanations and other assistance, in the manner and form that staff may request, in order that the staff may evaluate the use of the information submitted; all additional information in the whistleblower's possession that is related to the subject matter of the whistleblower's

submission; and testimony or other evidence acceptable to the staff relating to the whistleblower's eligibility for an award; and

(3) If requested by Commission staff, enter into a confidentiality agreement in a form acceptable to the Commission, including a provision that a violation of the confidentiality agreement may lead to the whistleblower's ineligibility to receive an award.

#### **§ 165.6 Whistleblowers ineligible for an award.**

(a) No award under § 165.7 shall be made:

(1) To any whistleblower who is, or was at the time, the whistleblower who acquired the original information submitted to the Commission, a member, officer, or employee of: The Commission; the Board of Governors of the Federal Reserve System; the Office of the Comptroller of the Currency; the Board of Directors of the Federal Deposit Insurance Corporation; the Director of the Office of Thrift Supervision; the National Credit Union Administration Board; the Securities and Exchange Commission; the Department of Justice; a registered entity; a registered futures association; a self-regulatory organization; or a law enforcement organization;

(2) To any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;

(3) To any whistleblower who submits information to the Commission that is based on the facts underlying the covered judicial or administrative action submitted previously by another whistleblower;

(4) To any whistleblower who acquired the information you gave the Commission from any of the individuals described in paragraphs (a)(1), (2), or (3) of this section; or

(5) To any whistleblower who, in the whistleblower's submission, the whistleblower's other dealings with the Commission, or the whistleblower's dealings with another authority in connection with a related action, knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or use any false writing or document, knowing that it contains any false, fictitious, or fraudulent statement or entry, or omitted any material fact, where in the absence of such fact, other statements or representations made by the whistleblower would be misleading.

(b) Notwithstanding a whistleblower's ineligibility for an award for any reason

set forth in paragraph (a) of this section, the whistleblower will remain eligible for the anti-retaliation protections set forth in Section 23(h) of the Commodity Exchange Act.

#### **§ 165.7 Procedures for award applications and commission award determinations.**

(a) Whenever a Commission judicial or administrative action results in monetary sanctions totaling more than \$1,000,000 (i.e., a covered judicial or administrative action) the Commission will cause to be published on the Commission's Web site a "Notice of Covered Action." Such Notice of Covered Action will be published subsequent to the entry of a final judgment or order that alone, or collectively with other judgments or orders previously entered in the Commission covered administrative or judicial action, exceeds \$1,000,000 in monetary sanctions. A whistleblower claimant will have sixty (60) calendar days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred.

(b) To file a claim for a whistleblower award, you must file Form WB-APP, "Application for Award for Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act." You must sign this form as the claimant and submit it to the Commission by mail or fax to Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, Fax (202) XXX-XXXX.

The Form WB-APP, including any attachments, must be received by the Commission within sixty (60) calendar days of the date of the Notice of Covered Action or sixty (60) calendar days following the date of a final judgment in a related action in order to be considered for an award.

(c) If you provided your original information to the Commission anonymously pursuant to §§ 165.3 and 165.4 and:

(1) You are making your claim for a whistleblower award on a disclosed basis, you must disclose your identity on the Form WB-APP and include with your Form WB-APP a signed and completed Form WB-DEC. Your identity must be verified in a form and manner that is acceptable to the Commission prior to the payment of any award; or

(2) You are making your claim for a whistleblower award on an anonymous basis, you must be represented by counsel. You must provide your counsel with a completed and signed Form WB-DEC by no later than the date upon

which your counsel submits to the Commission the Form WB-APP. In addition, your counsel must submit with the Form WB-APP a separate Form WB-DEC completed and signed by counsel certifying that counsel has verified your identity, has reviewed the whistleblower's Form WB-DEC for completeness and accuracy, and will retain the signed original of whistleblower's Form WB-DEC in counsel's records. Upon request of the Commission staff, whistleblower's counsel must produce to the Commission the whistleblower's WB-DEC and the whistleblower's identity must be verified in a form and manner that is acceptable to the Commission prior to the payment of any award.

(d) Once the time for filing any appeals of the Commission's judicial or administrative action and all related actions has expired, or where an appeal has been filed, after all appeals in the judicial, administrative and related actions have been concluded, the Commission will evaluate all timely whistleblower award claims submitted on Form WB-APP in accordance with the criteria set forth in this part 165. In connection with this process, the Commission may require that you provide additional information relating to your eligibility for an award or satisfaction of any of the conditions for an award, as set forth in § 165.5(b). Following that evaluation, the Commission will send you a Determination setting forth whether the claim is allowed or denied and, if allowed, setting forth the award percentage amount.

(e) The Commission's Office of the Secretariat will provide you with the Final Order of the Commission.

#### **§ 165.8 Amount of award.**

If all of the conditions are met for a whistleblower award in connection with a covered judicial or administrative action or a related action, the Commission will then decide the amount of the award pursuant to the procedure set forth in § 165.7.

(a) Whistleblower awards shall be in an aggregate amount equal to—

(1) Not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the covered judicial or administrative action or related actions; and

(2) Not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the covered judicial or administrative action or related actions.

(b) If the Commission makes awards to more than one whistleblower in connection with the same action or

related action, the Commission will determine an individual percentage award for each whistleblower, but in no event will the total amount awarded to all whistleblowers as a group be less than 10 percent or greater than 30 percent of the amount the Commission or the other authorities collect.

**§ 165.9 Criteria for determining amount of award.**

The determination of the amount of an award shall be in the discretion of the Commission. The Commission may exercise this discretion directly or through delegated authority pursuant to § 165.15.

(a) In determining the amount, the Commission shall take into consideration—

(1) The significance of the information provided by the whistleblower to the success of the covered judicial or administrative action or related action;

(2) The degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action or related action;

(3) The programmatic interest of the Commission in deterring violations of the Commodity Exchange Act by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and

(4) 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.

(b) The Commission shall not take into consideration the balance of the Fund in determining the amount of an award.

**§ 165.10 Contents of record for award determination.**

(a) The following items constitute the record upon which the award determination under § 165.7 shall be made:

(1) The whistleblower's Form TCR, "Tip, Complaint or Referral," and Form WB-DEC, "Declaration Concerning Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act," including related attachments, and other documentation provided by the whistleblower to the Commission;

(2) The whistleblower's Form WB-APP, "Application for Award Pursuant to Section 23 of the Commodity Exchange Act," and related attachments

(3) The complaint, notice of hearing, answers and any amendments thereto;

(4) The final judgment, consent order, or administrative speaking order;

(5) The transcript of the related administrative hearing or civil injunctive proceeding, including any exhibits entered at the hearing or proceeding;

(6) Any other documents that appear on the docket of the proceeding; and

(7) Any statements by the Commission litigation staff, or the litigation staff involved in prosecuting the related action, to the Commission regarding: The significance of the information provided by the whistleblower to the success of the covered judicial or administrative action or related action; and/or the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action or related action.

(b) The record upon which the award determination under § 165.7 shall be made shall not include any Commission pre-decisional or internal deliberative process materials related to the Commission or its staff's determination: To file or settle the related covered judicial or administrative action; and/or whether, to whom and in what amount to make a whistleblower award. Further, the record upon which the award determination under § 165.7 shall be made shall not include any other entity's pre-decisional or internal deliberative process materials related to its or its staff's determination to file or settle a related action.

**§ 165.11 Awards based upon related actions.**

Provided that a whistleblower or whistleblowers comply with the requirements in §§ 165.3, 165.5 and 165.7, pursuant to § 165.8, the Commission or its delegate may grant an award based on the amount of monetary sanctions collected in a "related action" or "related actions," rather than the amount collected in a covered judicial or administrative action, where—

(a) A "related action" is a judicial or administrative action that is brought by:

(1) The Department of Justice;

(2) An appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction;

(3) A registered entity, registered futures association, or self-regulatory organization; or

(4) A State criminal or appropriate civil agency; and

(b) The "related action" is based on the same original information that the whistleblower voluntarily submitted to the Commission and led to a successful

resolution of the Commission's judicial or administrative action.

**§ 165.12 Payment of awards from the fund, financing of customer education initiatives, and deposits and credits to the fund.**

(a) The Commission shall pay awards to whistleblowers from the Fund.

(b) The Commission shall deposit into or credit to the Fund:

(1) Any monetary sanctions collected by the Commission in any covered judicial or administrative action that is not otherwise distributed or ordered to be distributed, to victims of a violation of the Commodity Exchange Act underlying such action, unless the balance of the Fund at the time the monetary sanctions are collected exceeds \$100,000,000. In the event the Fund's value exceeds \$100,000,000, any monetary sanctions collected by the Commission in a covered judicial or administrative action that is not otherwise distributed or ordered to be distributed to victims of violations of the Commodity Exchange Act the Commission's rules and regulations thereunder underlying such action, shall be deposited into the general fund of the U.S. Treasury.

(2) In the event that the amounts deposited into or credited to the Fund under paragraph (b)(1) of this section are not sufficient to satisfy an award made pursuant to 165.7, then, pursuant to Section 23(g)(3)(B) of the Commodity Exchange Act;

(i) An amount equal to the unsatisfied portion of the award;

(ii) Shall be deposited into or credited to the Fund;

(iii) From any monetary sanction collected by the Commission, in any judicial or administrative action brought by the Commission under the Commodity Exchange Act, regardless of whether it qualifies as an "covered judicial or administrative action"; *provided*, such judicial or administrative action is based on information provided by a whistleblower.

(c) The Commission shall undertake and maintain customer education initiatives. The initiatives shall be designed to help customers protect themselves against fraud or other violations of the Act, or the Commission's rules or regulations thereunder. The Commission shall fund the customer education initiatives, and may utilize funds deposited into the Fund during any fiscal year in which the beginning (October 1) balance of the Fund is greater than \$10,000,000. The Commission shall budget on an annual basis the amount used to finance customer education initiatives, taking

into consideration the balance of the Fund.

### **§ 165.13 Appeals.**

(a) Any Final Order of the Commission relating to a whistleblower award determination, including whether, to whom, or in what amount to make whistleblower awards, may be appealed to the appropriate court of appeals of the United States not more than thirty (30) days after the Final Order of the Commission is issued.

(b) The record on appeal shall consist of:

(1) The Contents of Record for Award Determination, as set forth in § 165.9;

(2) The Final Order of the Commission, as set forth in § 165.7.

### **§ 165.14 Procedures applicable to the payment of awards.**

(a) A recipient of a whistleblower award is entitled to payment on the award only to the extent that the monetary sanction upon which the award is based is collected in the Commission judicial or administrative action or in a related action;

(b) Payment of a whistleblower award for a monetary sanction collected in a Commission action or related action shall be made within a reasonable time following the later of:

(1) The date on which the monetary sanction is collected; or

(2) The completion of the appeals process for all whistleblower award claims arising from:

(i) The Notice of Covered Action, in the case of any payment of an award for a monetary sanction collected in a covered judicial or administrative action; or

(ii) The related action, in the case of any payment of an award for a monetary sanction collected in a related action.

(c) If there are insufficient amounts available in the Fund to pay the entire amount of an award payment within a reasonable period of time from the time for payment specified by paragraph (b) of this section, then subject to the following terms, the balance of the payment shall be paid when amounts become available in the Fund, as follows:

(1) Where multiple whistleblowers are owed payments from the Fund based on awards that do not arise from the same Notice of Covered Action (or related action), priority in making these payments will be determined based upon the date that the Final Order of the Commission is made. If two or more of these Final Orders of the Commission are entered on the same date, those whistleblowers owed payments will be paid on a pro rata basis until sufficient

amounts become available in the Fund to pay their entire payments.

(2) Where multiple whistleblowers are owed payments from the Fund based on awards that arise from the same Notice of Covered Action (or related action), they will share the same payment priority and will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

### **§ 165.15 Delegations of authority.**

(a) *Delegation of Authority to the Executive Director.* The Commission hereby delegates, until such time as the Commission orders otherwise, to the Executive Director or to any Commission employee under the Executive Director's supervision as he or she may designate, the authority to take the following actions to carry out this Part 165 and the requirements of Section 23(h) of Commodity Exchange Act.

(1) Delegated authority to deposit collected monetary sanctions into the Fund and the payment of awards therefrom shall be with the concurrence of the General Counsel and the Director of the Division of Enforcement or of their respective designees.

(2) [Reserved]

(b) [Reserved]

### **§ 165.16 No immunity.**

The Commodity Whistleblower Incentives and Protections provisions set forth in Section 23(h) of Commodity Exchange Act and this Part 165 do not provide individuals who provide information to the Commission with immunity from prosecution. The fact that you may become a whistleblower and assist in Commission investigations and enforcement actions does not preclude the Commission from bringing an action against you based upon your own conduct in connection with violations of the Commodity Exchange Act and the Commission's regulations. If such an action is determined to be appropriate, however, the Commission's Division of Enforcement will take your cooperation into consideration in accordance with its sanction recommendations to the Commission.

### **§ 165.17 Awards to whistleblowers who engage in culpable conduct.**

In determining whether the required \$1,000,000 threshold has been satisfied (this threshold is further explained in § 165.7) for purposes of making any award, the Commission will not take into account any monetary sanctions that the whistleblower is ordered to pay, or that are ordered against any entity whose liability is based primarily on

conduct that the whistleblower principally directed, planned, or initiated. Similarly, if the Commission determines that a whistleblower is eligible for an award, any amounts that the whistleblower or such an entity pay in sanctions as a result of the action or related actions will not be included within the calculation of the amounts collected for purposes of making payments pursuant to § 165.14.

### **§ 165.18 Staff communications with whistleblowers from represented entities.**

If you are a whistleblower who is a director, officer, member, agent, or employee of an entity that has counsel, and you have initiated communication with the Commission relating to a potential violation of the Commodity Exchange Act, the Commission's staff is authorized to communicate directly with you regarding the subject of your communication without seeking the consent of the entity's counsel.

### **§ 165.19 Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration of disputes.**

The rights and remedies provided for in this Part 165 of the Commission's regulations may not be waived by any agreement, policy, form, or condition of employment including by a predispute arbitration agreement. No predispute arbitration agreement shall be valid or enforceable if the agreement requires arbitration of a dispute arising under this Part.

### **Appendix A to Part 165—Guidance With Respect to the Protection of Whistleblowers Against Retaliation**

Section 23(h)(1) of the Commodity Exchange Act prohibits employers from engaging in retaliation against whistleblowers. This provision provides whistleblowers with certain protections against retaliation, including: A federal cause of action against the employer, which must be filed in the appropriate United States district court within two (2) years of the employer's retaliatory act; and potential relief for prevailing whistleblowers, including reinstatement, back pay, and compensation for other expenses, including reasonable attorney's fees. Specifically, Section 23(h)(1) of Commodity Exchange Act provides:

(A) *In General.*—No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

(i) In providing information to the Commission in accordance with subsection (b); or

(ii) In assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information.

(B) *Enforcement.* (i) *Cause of Action.*—An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C), unless the individual who is alleging discharge or other discrimination in violation of subparagraph (A) is an employee of the Federal Government, in which case the individual shall only bring an action under section 1221 of title 5, United States Code.

(ii) *Subpoenas.*—A subpoena requiring the attendance of a witness at a trial or hearing conducted under this subsection may be served at any place in the United States.

(iii) *Statute of Limitations.*—An action under this subsection may not be brought more than 2 years after the date on which the violation reported in subparagraph (A) is committed.

(C) *Relief.*—Relief for an individual prevailing in an action brought under subparagraph (B) shall include—

(i) Reinstatement with the same seniority status that the individual would have had, but for the discrimination;

(ii) The amount of back pay otherwise owed to the individual, with interest; and

(iii) Compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.

**BILLING CODE 6351-01-P**



**UNITED STATES  
COMMODITY FUTURES TRADING COMMISSION  
Washington, D.C. 20581**

**FORM TCR  
TIP, COMPLAINT OR REFERRAL**

<b>A. INFORMATION ABOUT YOU</b>			
1. Last Name		First	M.I.
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
3. Telephone	Alt. Phone	Email Address	Preferred method of communication
Your Occupation			
<b>B. ATTORNEY INFORMATION (If Applicable – See Instructions)</b>			
1. Attorney's Name			
2. Firm Name			
3. Street Address			
City	State/ Province	Zip/ Postal Code	Country
4. Telephone	Fax	Email Address	
<b>C. TELL US ABOUT THE INDIVIDUAL OR ENTITY YOU HAVE A COMPLAINT AGAINST.</b>			
Individual/Entity		If an individual, specify profession:	
1. Type: <input type="checkbox"/> Individual <input type="checkbox"/> Entity		If an entity, specify type:	
2. Name			
3. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
4. Telephone	Email Address	Internet Address	
<b>D. TELL US ABOUT YOUR COMPLAINT</b>			
1. Occurrence Date (mm/dd/yyyy): ____/____/____		2. Nature of Complaint:	
3. Are you complaining about an entity of which you are or were an officer, director, employee, consultant or contractor?			

4a. Have you taken any prior action regarding your complaint?
4b. If you answered "Yes" to question 41, please provide details. Use additional sheets if necessary.
4c. Date on which you took the action(s) described in question 4b (mm/dd/yyyy): ____/____/____
5. State in detail all facts pertinent to the activity that is the subject of your complaint. Use additional sheets if necessary.
6. Describe all materials in your possession supporting your complaint and the availability and location of any additional supporting materials not in your possession. Use additional sheets, if necessary.
7. Describe how you obtained the information that supports your complaint. If any information was obtained from a public source, identify the source with as much particularity as possible. Attach additional sheets if necessary.
8. Provide any additional information you think may be relevant.

**BILLING CODE 6351-01-C****Privacy Act of Statement**

The Privacy Act requires that the Commodity Futures Trading Commission (CFTC) inform individuals of the following when asking for information. This form may be used by anyone wishing to provide the CFTC with information concerning a violation of the Commodity Exchange Act or the Commission's regulations. If you are submitting this information for the Commission's whistleblower award program pursuant to Section 23 of the Commodity Exchange Act, the information provided will enable the Commission to determine your eligibility for payment of an award. This information may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or

implementing laws, rules, or regulations implicated by the information consistent with the confidentiality requirements set forth therein. Furnishing the information is voluntary, but a decision not to do so may result in you not being eligible for award consideration.

Questions concerning this form may be directed to the Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street, NW., Washington, DC 20581.

**Submission Procedures**

- After completing this Form TCR, please send it to the Commission: electronically via the Commission's Web site; by mail to the Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street, NW., Washington, DC 20581; or by facsimile to (202) XXX-XXXX.

- You have the right to submit information anonymously.

- If you are submitting information for the Commission's whistleblower award program, you must submit your information using this Form TCR. In addition to submitting your information by this method, you must also submit a declaration on Form WB-DEC. The Form WB-DEC can be printed out from the Commission's Web site or obtained from the Commission, and it must be manually signed by you under penalty of perjury.

**Instructions for Completing Form TCR****Section A: Information About You**

Questions 1–3: Please provide the following information about yourself:

- Last name, first name, and middle initial;

○ Complete address, including city, state and zip code;

○ Telephone number and, if available, an alternative number where you can be reached;

○ Your e-mail address (to facilitate communications, the Commission strongly encourages you to provide your e-mail address); and

○ Your preferred method of communication.

Question 4: Describes your occupation, for example which of the following provides the best description:

○ Accountant, attorney, auditor, broker-dealer, compliance officer, financial representative, foreign officer, fund manager, investment advisor, commodity trading adviser, investor, customer, company officer or senior manager, trader, floor broker, government official (federal, state, or local), law enforcement personnel (federal, state, or local), or other (specific).

#### Section B: Information About Your Attorney.

Complete This Section Only If You Are Represented By An Attorney In This Matter.

Questions 1–4: Provide the following information about the attorney representing you in this matter:

- Attorney's name;
- Firm name;
- Complete address, including city, state and zip code;
- Telephone number and fax number; and
- E-mail address.

#### Section C: Tell Us About The Individual And/Or Entity You Have A Complaint Against. If your complaint relates to more than two individuals and/or entities, you may attach additional sheets.

Question 1: Choose the following that best describes the individual or entity to which your complaint relates:

○ For Individuals: accountant, analyst, associated person, attorney, auditor, broker, commodity trading advisor, commodity pool operator, compliance officer, employee, executing broker, executive officer or director, financial planner, floor broker, floor trader, trader, unknown, or other (specify).

○ For Entities: bank, commodity trading advisor, commodity pool operator, commodity pool, futures commission merchant, hedge fund, introducing broker, major swap participant, retail foreign

exchange dealer, swap dealer, unknown, or other (specify).

Questions 2–4: For each subject, provide the following information, if known:

- Full name;
- including city, state and zip code;
- Telephone number;
- E-mail address; and
- Internet address, if applicable.

#### Section C: Tell Us About Your Complaint.

Question 1: State the date (mm/dd/yyyy) that the alleged conduct began.

Question 2: Choose the option that you believe best describes the nature of your complaint. If you are alleging more than one violation, please list all that you believe may apply. Use additional sheets, if necessary.

- Theft/misappropriation;
- Misrepresentation/omission (false/misleading marketing/sales literature; inaccurate, misleading or non-disclosure by commodity pool operator, commodity trading advisor, futures commission merchant, introducing broker, retail foreign currency dealer, swap dealer, or their associated person(s); false/material misstatements in any report or statement;
- Ponzi/pyramid scheme;
- Off-exchange foreign currency, commodity, or precious metal fraud;
- Registration violations (including unregistered commodity pool operator, commodity trading advisor, futures commission merchant, introducing broker, retail foreign currency dealer, swap dealer, or their associated person(s));

○ Trading (after hours trading; algorithmic trading; disruptive trading; front running; insider trading; manipulation/attempted manipulation of commodity prices; market timing; inaccurate quotes/pricing information; program trading; trading suspensions; volatility);

○ Fees/mark-ups/commissions (excessive, unnecessary or unearned administrative, commission or sales fees; failure to disclose fees; insufficient notice of change in fees; excessive or otherwise improper spreads or fills);

○ Sales and advisory practices (background information on past violations/integrity; breach of fiduciary duty/responsibility; churning/excessive trading; cold calling; conflict of interest; a bout of authority in discretionary trading; failure to respond to client, customer or participant; guarantee against loss; promise to profit; high

pressure sales techniques; instructions by client, customer or participant not followed; investment objectives not followed; solicitation methods (non-cold calling, seminars);

○ Customer accounts (unauthorized trading); identity theft affecting account; inaccurate valuation of Net Asset Value; or

○ Other (analyst complaints; market maker activities; employer/employee disputes; specify other).

Question 3: Indicate whether you were in the past, or are currently, an officer, director, employee, consultant, or contractor of the entity to which your complaint relates.

Question 4a: Indicate whether you have taken any prior action regarding your complaint, including whether you reported the violation to the entity, including the compliance office, whistleblower hotline or ombudsman; complained to the Commission, another regulator, a law enforcement agency, or any other agency or organization; initiated legal action, mediation or arbitration, or initiated any other action.

Question 4b: If you answered "yes" to question 4a, provide details, including the date on which you took the action(s) described, the name of the person or entity to whom you directed any report or complaint and the contact information for the person or entity, if known, and the complete case name, case number, and forum of any legal action you have taken. Use additional sheets, if necessary.

Question 5: State in detail all the facts pertinent to your complaint. Attach additional sheets, if necessary.

Question 6: Describe all supporting materials in your possession, custody or control, and the availability and location of additional supporting materials not in your possession, custody or control. Attach additional sheets, if necessary.

Question 7: Describe how you obtained the information that supports your allegation. If any information was obtained from a public source, identify the source with as much particularity as possible. Attach additional sheets, if necessary.

Question 8: Please provide any additional information you think may be relevant.

**BILLING CODE 6351-01-P**

**UNITED STATES  
COMMODITY FUTURES TRADING COMMISSION  
Washington, D.C. 20581**

**FORM WB-DEC**

**DECLARATION CONCERNING ORIGINAL INFORMATION PROVIDED  
PURSUANT TO SECTION 23 OF THE COMMODITY EXCHANGE ACT**

<b>A. SUBMITTER'S INFORMATION</b>			
1. Last Name		First	M.I.
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
3. Telephone	Alt. Phone	Email Address	Preferred method of communication
Your Occupation			
<b>B. ATTORNEY INFORMATION (If Applicable – See Instructions)</b>			
1. Attorney's Name			
2. Firm Name			
3. Street Address			
City	State/ Province	Zip/ Postal Code	Country
4. Telephone	Fax	Email Address	
<b>C. TIP/COMPLAINT DETAILS</b>			
1. Manner in which information was submitted to CFTC    CFTC website <input type="checkbox"/> Mail <input type="checkbox"/> Fax <input type="checkbox"/> Other _____			
2a. Date Tip, Complaint or Referral (TCR) was submitted to CFTC ____/____/____			
2b. Individual or entity to which Tip, Complaint or Referral relates:			
3a. Has the submitter or counsel had any communication(s) with the CFTC concerning this matter?    YES <input type="checkbox"/> NO <input type="checkbox"/>			
3b. If the answer to 3a is "Yes," name of CFTC staff member with whom the submitter or counsel communicated:			
4a. Has the submitter or counsel provided the information to any other agency or organization? YES <input type="checkbox"/> NO <input type="checkbox"/>			
4b. If the answer to 4a is "Yes," please provide details. Use additional sheets if necessary.			
4c. Name and contact information for point of contact at agency or organization, if known			

**D. ELIGIBILITY REQUIREMENTS**

1. Are you, or were you at the time you acquired the original information you submitted to us, a member, officer or employee of the Department of Justice, the Commodity Futures Trading Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office Thrift Supervision, National Credit Union Administration Board, the Securities Exchange Commission, the Public Company Accounting Oversight Board, a registered entity, a registered futures association, a self-regulatory organization, or any law enforcement organization? YES ☐
2. Did you provide the information identified in Section C above pursuant to a cooperation agreement with the CFTC or another agency or organization? YES ☐
3. Are you a spouse, parent, child, or sibling of a member or employee of the Commission, or do you reside in the same household as a member or employee of the Commission? YES ☐
4. Did you acquire the information you are providing to us from any person described in the questions D1 through D3? YES ☐
5. If you answered "Yes" to any of the questions 1 through 4 above, please provide details. Use additional sheets if necessary.
- 6a. Did you provide the information identified in Section C above before you (or anyone representing you) received any request, inquiry or demand from the CFTC, Congress, or any other federal, state or local authorities, or any self regulatory organization about a matter to which the information your submission was relevant? YES ☐
- 6b. If you answered "no" to question 6a, please provide details. Use additional sheets if necessary.
- 7a. Are you currently a subject or largest of a criminal investigation, or have you been convicted of a criminal violation, in connection with the information upon which your application for an award is based? YES ☐
- 7b. If you answered "Yes" to question 7a, please provide details. Use additional sheets if necessary.

**E. DECLARATION**

I declare under penalty of perjury under the laws of the United States that the information contained herein, and all information submitted to the CFTC – either in the TCR referenced in Section C of this form or in the Form TCR accompanying this Form WB-DEC – is true, correct and complete to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if my submission of information, my other dealings with the CFTC, or my dealings with another authority in connection with a related action. I knowingly and willfully make any false, fictitious, or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

Signature

Date

**F. COUNSEL CERTIFICATION**

I certify that I have verified the identity of the whistleblower who completed Form WB-DEC in connection with the information referenced in Section C of this form by viewing the whistleblower's valid, unexpired government issued identification (e.g. driver's license, passport, that I have reviewed the whistleblower's Form WB-DEC for completeness and accuracy, and that I will retain an original, signed copy of the Form WB-DEC completed by the whistleblower in the records.

Signature

Date

BILLING CODE 6351-01-C

**Privacy Act Statement**

This notice is given under the Privacy Act of 1974. The Privacy Act requires that the Commodity Futures Trading Commission (CFTC) inform individuals of the following when asking for information. The information provided will enable the Commission to determine your eligibility for payment of an award pursuant to Section 23 of the Commodity Exchange Act. This information may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing rules, or regulations implicated by the information consistent with the confidentiality requirements set forth in Section 23 of the Commodity Exchange Act and part 165 of the Commissions regulations hereunder. Furnishing the information is voluntary, but a decision not to do so may result in you not being eligible for award consideration.

Questions concerning this form may be directed to the Commodity Futures Trading, Three Lafayette Centre, 1151 21st Street, NW., Washington, DC 20581.

**General Information**

Submitting information for the CFTC's whistleblower award program is a two-step process. First, you must provide us with your information by completing a Form TCR ("Tip, Complaint, or Referral"), instructions set forth on the form, and sending it to the Commission: electronically via the Commission's website; by mail to the Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street, NW., Washington, DC 20581; or by facsimile to (202) XXX-XXXX.

- Submitting your information to the Commission is the first step. If you want to be considered for a whistleblower award, you must also submit this Form WB-DEC and it must be manually signed under penalty of perjury.

- *If you submitted your information electronically through the Commission's website, the Commission must receive your completed Form WB-DEC within 30 days of your submission. If you did not submit your information electronically but instead are submitting your information on Form TCR, you must submit your declaration on Form WB-DEC at the same time that you submit your Form TCR.*

Follow the instructions set forth below for submitting this Form WB-DEC.

- If you follow these steps, and the information you submit leads to the successful enforcement of a CFTC judicial or administrative action, or a related action, you will have an opportunity at a later date to submit a claim for an award. That is a separate process and is described in our whistleblower rules, which are available on the Commission's Web site [insert link].

- You have the right to submit information anonymously. If you are doing so, please skip Part I of these instructions and proceed directly to Part II. Otherwise, please begin by following the instructions in Part I.

**Part I: Instructions for Filers who are Disclosing Their Identity**

You are required to complete Sections A, C, D, and E of this form. If you are represented by an attorney in this matter, you must also complete Section B. Specific instructions for answering these questions can be found in Part IV below.

If you previously submitted your complaint electronically through the Commission's website, you may submit this Form WB-DEC to us in any of the following ways:

- By mailing or delivering the signed form to the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581-XXXX; or
- By faxing the signed form to (202) XXX-XXXX; or
- By scanning and emailing the form in PDF format to [insert e-mail address].

*Please note that the Commission must receive your Form WB-DEC within thirty (30) days of when you submitted your information to us through the Commission's website.*

If you did not previously submit your complaint electronically through the CFTC's website, but instead intend to send us a Form TCR, then you must submit your completed Form TCR and your declaration on this Form WB-DEC together. You may do so in one of two ways:

- By mailing or delivering the Form TCR and the signed Form WB-DEC to the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581-XXXX; or
- By faxing the Form TCR and the signed Form WB-DEC form to (202) XXX-XXXX.

**Part II: Instructions for Anonymous Filers**

If you are submitting information anonymously, you may be represented by an attorney in this matter. If you are applying for a whistleblower award, you must be represented by an attorney in connection with such application.

In order for you to be eligible for a whistleblower award, your attorney must retain your signed original of Form WB-DEC in his or her records, and submit both your Form WB-APP (if you filled one out instead of submitting your complaint to us electronically) and a Form WB-DEC completed by the attorney declaration to the Commission. You are encouraged to confirm that your attorney followed these steps.

**Part III: Instructions for Attorneys Representing Anonymous Whistleblowers**

Obtain a completed and signed original of Form WB-DEC from your client. You must retain this signed original in your records because it may be required at a later date upon request of CFTC staff and prior to the payment a whistleblower award.

You must prepare your own Form WB-DEC, completing only Sections B, C and F. Specific instructions for answering these questions can be found in Part IV below.

You must submit your client's application on Form WB-APP and your attorney declaration on this Form WB-DEC together. You may do so in one of two ways:

- By mailing or delivering the Form WB-APP and the signed Form WB-DEC to the

Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581-XXXX; or

- By faxing the Form WB-APP and the signed Form WB-DEC to (202) XXX-XXXX.

**Part IV: Instructions for Completing Form WB-DEC****Section A: Submitter's Information**

Questions 1-3: Provide the following information about yourself:

- First and last name, and middle initial;
- Complete address, including city, state and zip code;
- Telephone number and, if available, an alternate number where you can be reached; and
- E-mail address.

**Section B: Information about Your Attorney.** *Complete this section only if you are represented by an attorney in this matter. You must be represented by an attorney, and this section must be completed, if you intend to apply for a whistleblower award anonymously.*

Questions 1-4: Provide the following information about the attorney representing you in this matter:

- Attorney's name;
- Firm name;
- Complete address, including city, state and zip code;
- Telephone number and fax number; and
- E-mail address.

**Section C: Tip/Complaint Details**

Question 1: Indicate the manner in which the information was submitted to the Commission.

Question 2a: Provide the date on which the TCR was submitted to the Commission.

Question 2b: Provide the name of the individual or entity to which your complaint relates.

Question 3a: Indicate whether the submitter or counsel have had any communication(s) with the Commission concerning this manner.

Question 3b: If you answered "yes" to question 3a, provide the name of the SEC staff member with whom the submitter or counsel communicated.

Question 4a: Indicate whether the submitted or counsel have provided the information being submitted to the CFTC to any other agency or organization.

Question 4b: If you answered "yes" to question 4a, provide details, including the name of the agency or organization, the date on which you provided your information to the agency or organization and any other relevant details.

Question 4c: Provide a name and contact information for your point of contact at the other agency or organization, if known.

**Section D: Eligibility Requirements**

Question 1: State whether you are currently, or were at the time you acquired the original information that you submitted to the CFTC a member, officer, or employee of the Department of Justice the Securities and Exchange Commission; the Comptroller of the

Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision; National Credit Union Administration Board, registered entity, a registered futures association, a self-regulatory organization or; any law enforcement organization.

Question 2: State whether you provided the information submitted to the CFTC pursuant to a cooperation agreement with the Commission or with any other agency or organization.

Question 3: State whether you are a spouse, parent, child or sibling of a member or employee of the Commission, or whether you reside in the same household as a member or employee of the Commission.

Question 4: State whether you acquired the information you are providing to the CFTC from any individual described in Question 1 through 3 of this Section.

Question 5: If you answered “yes” to questions 1 through 4, please provide details.

Question 5a: State whether you provided the information identified submitted to the CFTC before you (or anyone representing you) received any request, inquiry or demand from the CFTC, Congress, or any other federal, state or local authority, or any self regulatory organization about a matter to which the information your submission was relevant.

Question 5b: If you answered “no” to questions 5a, please provide details. Use additional sheets if necessary.

Question 6a: State whether you are the subject or target of a criminal investigation or have been convicted of a criminal violation in connection with the information upon which your application for award is based.

Question 6b: If you answered “yes” to question 9a, please provide details,

including the name of the agency or organization that conducted the investigation or initiated the action against you, the name and telephone number of your point of contact at the agency or organization, if available and the investigation/case name and number, if applicable. Use additional sheets, if necessary. If you previously provided this information on Form WB-DEC, you may leave this question blank, unless your response has changed since the time you submitted your Form WB-DEC.

#### *Section E: Declaration*

To be completed and signed by person submitting the information

#### *Section F: Counsel Certification*

To be completed and signed by attorney for an anonymous person submitting information



**UNITED STATES  
COMMODITY FUTURES TRADING COMMISSION  
Washington, D.C. 20581**

**FORM WB-APP**

**APPLICATION FOR AWARD CONCERNING ORIGINAL INFORMATION  
PROVIDED  
PURSUANT TO SECTION 23 OF THE COMMODITY EXCHANGE ACT**

<b>A. APPLICANT INFORMATION</b> (Required for all Submissions)			
1. Last Name	First	M.I.	Social Security No.
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
3. Telephone	Alt. Phone	Email Address	Preferred method of communication
Your Occupation			
<b>B. ATTORNEY INFORMATION</b> (If Applicable – See Instructions)			
1. Attorney's Name			
2. Firm Name			
3. Street Address			
City	State/ Province	Zip/ Postal Code	Country
4. Telephone	Fax	Email Address	
<b>C. TIP/COMPLAINT DETAILS</b>			
1. Manner in which information was submitted to CFTC		CFTC website <input type="checkbox"/> Mail <input type="checkbox"/> Fax <input type="checkbox"/> Other _____	
2a. Tip, Complaint or Referral (TCR) number		2b. Date TCR referenced in 2a submitted to CFTC ____/____/____	
2c Subject(s) of the Tip, Complaint or Referral:			
<b>D. NOTICE OF COVERED ACTION</b>			
1. Date of Notice of Covered Action to which claim relates ____/____/____		2. Notice Number:	
3a. Case Name		3b. Case number:	
<b>E. CLAIMS PERTAINING TO RELATED ACTIONS</b>			
1. Name and contact information for point of contact at agency or organization, if known.			

2. Name and contact information for point of contact at agency or organization, if known.	
3a. Date you provided your information ____/____/____	3b. Date action filed by agency/organization ____/____/____
4a. Case Name	4b. Case Number
<b>F. ELIGIBILITY REQUIREMENTS</b>	
1. Are you, or were you at the time you acquired the original information you submitted to us, a member, officer or employee of the Department of Justice, the Commodity Futures Trading Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office Thrift Supervision, National Credit Union Administration, the Securities Exchange Commission, registered entity, registered futures association; a self-regulatory organization, , or any law enforcement organization? <span style="float: right;">YI</span>	
2. Did you provide the information identified in Section C above pursuant to a cooperation agreement with the CFTC or another agency or organization? <span style="float: right;">YI</span>	
3. Are you a spouse, parent, child, or sibling of a member or employee of the Commission, or do you reside in the same household as a member or employee of the Commission? <span style="float: right;">YI</span>	
4. If you answered "Yes" to any of the questions 1 through 3 above, please provide details. Use additional sheets if necessary.	
5a. Did you provide the information identified in Section C above before you (or anyone representing you) received any request, inquiry or demand from the CFTC, Congress, or any other federal, state or local authorities, or any self regulatory organization about a matter to which the information your submission was relevant? ? <span style="float: right;">YI</span>	
5b. If you answered "no" to question 5a, please provide details. Use additional sheets if necessary.	
6a. Are you currently a subject or largest of a criminal investigation, or have you been convicted of a criminal violation, in connection with the information upon which your application for an award is based? <span style="float: right;">YI</span>	
7b. If you answered "Yes" to question 9a, please provide details. Use additional sheets if necessary.	
<b>G. ENTITLEMENT TO AWARD</b>	

Explain the basis for your belief that you are entitled to an award in connection with your submission of information to us, or to another agency in a related action. Provide any additional information you think may be relevant in light of the criteria for determining the amount of an award set forth in Section 23 of the Commodities Exchange Act and part 165 of the Commissions regulations thereunder. Include any supporting documents in your possession or control, and attach additional sheets, if necessary.

## H. DECLARATION

I declare under penalty of perjury under the laws of the United States that the information contained herein, and all information submitted to the CFTC – either in the TCR referenced in Section C of this form or in the Form TCR accompanying this Form WB-DEC – is true, correct and complete to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if my submission of information, my other dealings with the CFTC, or my dealings with another authority in connection with a related action. I knowingly and willfully make any false, fictitious, or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

Signature

Date

### BILLING CODE 6351-01-P

#### Privacy Act Statement

This notice is given under the Privacy Act of 1974. The Privacy Act requires that the Commodity Futures Trading Commission (CFTC or Commission) inform individuals of the following when asking for information. The information provided will enable the Commission to determine your eligibility for payment of an award pursuant to Section 23 of the Commodity Exchange Act. This information may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing the laws, rules, or regulations implicated by the information consistent with the confidentiality requirements set forth in Section 23 of the Commodity Exchange Act and part 165 of the Commissions regulations thereunder. Furnishing the information is voluntary, but a decision not to do so may result in you not being eligible for award consideration.

Questions concerning this form may be directed to the Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street, NW., Washington, DC 20581.

#### General

This form should be used by persons making a claim for a whistleblower award in connection with information provided to the CFTC or to another agency in a related action. In order to be deemed eligible for an award, you must meet all the requirements set forth in Section 23 of the Commodities Exchange Act and the rules hereunder.

You must sign the Form WB-APP as the claimant. If you provided your information to

the CFTC anonymously, you must now disclose your identity on this form and your identity must be verified in a form and manner that is acceptable to the CFTC prior to the payment of any award.

- If you are filing your claim in connection with information that you provided to the CFTC, then Form WB-APP and any attachments thereto, must be received by the CFTC within sixty (60) days of the date of the Notice of Covered Action or the date of a final judgment in a related action to which the claim relates.

- If you are filing your claim in connection with information you provided to another agency in a related action, then your Form WB-APP, and any attachments there to, must be received by the CFTC within sixty (60) days of the date of a final judgment in the related action to which the claim relates.

You must submit your Form WB-APP to us in one of the following two ways:

- By mailing or delivering the signed form to the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581; or
- By faxing the signed form to (202) XXX-XXXX.

#### Instructions for Completing Form WB-APP

##### Section A: Applicant's Information

Questions 1–3: Provide the following information about yourself:

- First and last name, and middle initial;
- Complete address, including city, state and zip code;
- Telephone number and, if available, an alternate number where you can be reached; and

- E-mail address

*Section B: Attorney's Information. If you are represented by an attorney in this matter, provide the information requested. If you are not representing an attorney in this matter, leave this Section blank.*

Questions 1–4: Provide the following information about the attorney representing you in this matter:

- Attorney's name;
- Firm name;
- Complete address, including city, state and zip code;
- Telephone number and fax number; and
- E-mail address.

##### Section C: Tip/Complaint Details

Question 1: Indicate the manner in which your original information was submitted to the CFTC.

Question 2a: Provide the date on which you submitted your TCR (Tip, Complaint or Referral) information to the CFTC.

Question 2b: Provide the name of the individual(s) or entity(s) to which your complaint related.

##### Section D: Notice of Covered Action

The process for making a claim for a whistleblower award begins with the publication of a "Notice of a Covered Action" on the Commission's Web site. This notice is published whenever a judicial or administrative action brought by the Commission results in the imposition of monetary sanctions exceeding \$1,000,000. The Notice is published on the Commission's Web site subsequent to the entry of a final

judgment or order in the action that by itself, or collectively with other judgments or orders previously entered in the action, exceeds the \$1,000,000 threshold.

Question 1: Provide the date of the Notice of Covered Action to which this claim relates.

Question 2: Provide the notice number of the Notice of Covered Action.

Question 3a: Provide the case name referenced in Notice of Covered Action.

Question 3b: Provide the case number referenced in Notice of Covered Action.

#### *Section E: Claims Pertaining to Related Actions*

Question 1: Provide the name of the agency or organization to which you provided your information.

Question 2: Provide the name and contact information for your point of contact at the agency or organization, if known.

Question 3a: Provide the date on which that you provided your information to the agency or organization referenced in question E1.

Question 3b: Provide the date on which the agency or organization referenced in question E1 filed the related action that was based upon the information you provided.

Question 4a: Provide the case name of the related action.

Question 4b: Provide the case number of the related action.

#### *Section F: Eligibility Requirements*

Question 1: State whether you are currently, or were at the time you acquired the original information that you submitted to the CFTC a member, officer, or employee of the Department of Justice, the Securities and Exchange Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, National Credit Union Administration Board, registered entity, a registered futures association, a self-regulatory organization or; any law enforcement organization.

Question 2: State whether you provided the information submitted to the CFTC pursuant to a cooperation agreement with the Commission or with any other agency or organization.

Question 3: State whether you are a spouse, parent, child or sibling of a member or employee of the Commission, or whether

you reside in the same household as a member or employee of the Commission.

Question 4: State whether you acquired the information you are providing to the CFTC from any individual described in Question 1 through 3 of this Section.

Question 5: If you answered "yes" to questions 1 through 4, please provide details.

Question 5a: State whether you provided the information identified submitted to the CFTC before you (or anyone representing you) received any request, inquiry or demand from the CFTC, Congress, or any other federal, state or local authority, or any self regulatory organization about a matter to which the information your submission was relevant.

Question 5b: If you answered "no" to questions 5a, please provide details. Use additional sheets if necessary.

Question 6a: State whether you are the subject or target of a criminal investigation or have been convicted of a criminal violation in connection with the information upon which your application for award is based.

Question 6b: If you answered "yes" to question 6a, please provide details, including the name of the agency or organization that conducted the investigation or initiated the action against you, the name and telephone number of your point of contact at the agency or organization, if available and the investigation/case name and number, if applicable. Use additional sheets, if necessary. If you previously provided this information on Form WB-DEC, you may leave this question blank, unless your response has changed since the time you submitted your Form WB-DEC.

#### *Section G: Entitlement to Award*

Use this section to explain the basis for your belief that you are entitled to an award in connection with your submission of information to us or to another agency in connection with a related action. Specifically address how you believe you voluntarily provided the Commission with original information that led to the successful enforcement of a judicial or administrative action filed by the Commission, or a related action. Refer to § 165.11 of this part for further information concerning the relevant award criteria. You may attach additional sheets, if necessary.

Section 23(c)(1)(B) of the CEA requires the Commission to consider, and subparagraph (a)(1) through (4) provides that in

determining the amount of an award, the Commission will evaluate the following factors: (a) The significance of the information provided by a whistleblower to the success of the Commission action or related action; (b) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action; (c) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and (d) whether the award otherwise enhances the Commission's ability to enforce the Commodity Exchange Act, protect customers, and encourage the submission of high quality information from whistleblowers. Address these factors in your response as well.

#### *Section G: Declaration*

This section must be signed by the claimant.

By the Commission.

Dated: November 10, 2010.

**David Stawick,**

*Secretary.*

#### **Statement of Chairman Gary Gensler**

#### *Proposed Rules for Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act*

I support the proposed rulemaking to establish a program for whistleblowers as mandated by the Dodd-Frank Act. Congress enacted these provisions to incentivize whistleblowers to come forward with new information about potential fraud in the financial markets. The proposed rulemaking authorizes the Commission to provide a monetary award to whistleblowers when their original information results in a successful enforcement action. The rule also provides that moneys recovered will fund new customer education initiatives to protect the public. The proposed rules encourage persons with knowledge to come forward and assist the Commission in identifying, investigating and prosecuting potential violations of the Commodity Exchange Act.

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