February 4, 2011

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

Re: Proposed Rules for Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act - RIN 3038-AD04

Dear Mr. Stawick:

The National Society of Compliance Professionals ("NSCP") appreciates the opportunity to comment on the Commodity Futures Trading Commission's (the "CFTC" or the "Commission") proposed rules (the "Proposed Rules") for implementing the whistleblower provisions of Section 23 of the Commodity Exchange Act (the "CEA") as set forth in RIN 3038-AD04 (the "Proposing Release").[1]

NSCP is the largest organization of securities industry professionals devoted exclusively to compliance issues, effective supervision, and oversight. The principal purpose of NSCP is to enhance compliance in the financial services industry, including firms' compliance efforts and programs and to further the education and professionalism of the individuals implementing those efforts. An important mission of the NSCP is to instill in its members the importance of developing and implementing sound compliance programs across-the-board.

Since its founding in 1987, NSCP has grown to over 1,800 members. NSCP's membership is drawn principally from broker-dealers, investment advisers, bank and insurance affiliated firms, many of whom are also futures registrants, as well as the law firms, accounting firms, and consultants that serve them. NSCP membership is unique in that the vast majority of its members are compliance and legal personnel from financial services firms that span a wide spectrum, including employees from the largest brokerage and investment management organizations to operations with only a handful of employees.

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[1] Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act, 75 FR 75728 (Dec. 6, 2010).

The Proposed Rules are intended to implement the whistleblower provisions of Section 23 by prescribing the regulations under which the Commission would pay awards to eligible whistleblowers that 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, where such actions result in monetary sanctions exceeding $1,000,000. The offering of potentially lucrative rewards to whistleblowers is meant to encourage individuals with knowledge of significant unlawful activities to report such matters to the CFTC with the goal of enhancing the efficiency and effectiveness of the Commission's enforcement program.

While NSCP supports this intended and clearly laudable goal, it is also greatly concerned that this monetary incentive may negatively impact the effectiveness of existing compliance and other processes that companies have implemented for the purpose of investigating and responding to potential violations of the CEA. Such possibility is of equal concern to NSCP's members, the vast majority of whom are involved in day-to-day activities integral to compliance and related processes. While NSCP and its members embrace the benefits in law enforcement that a well-functioning whistleblower program can offer to the Commission, the investing public and the financial services industry, we also feel strongly that it is vital that any whistleblower program be designed and implemented in a manner that is aligned with, and does not serve to undermine, existing compliance and related programs of the firms that we serve. As the Commission itself notes in the Proposing Release, "[c]ompliance with the CEA is promoted when companies implement effective legal, audit, compliance, and similar functions."[2]

NSCP would also like to recognize the efforts that both the CFTC and the Securities and Exchange Commission have made to date to harmonize their respective whistleblower proposals. NSCP believes that the continuation of these efforts and the ironing out of any differences between each agency's respective proposal should serve to reduce implementation costs once a final rule is adopted and to limit possible confusion with respect thereto. While this will be of obvious benefit to dually registered firms, NSCP believes that it will also benefit the financial industry generally. Moreover, harmonization would also seem to be in the interest of potential whistleblowers. For these reasons, NSCP strongly encourages both agencies to continue their harmonization efforts.

NSCP Supports the Commission's Goals

Before setting forth its views on the Proposed Rules, NSCP would like to reiterate that it strongly supports the overall goal of Section 23 and the Commission's Proposed Rules in identifying and rectifying violations of the CEA. As noted above, NSCP also believes that a carefully drawn whistleblower program can offer significant assistance towards this goal.

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[2] The Proposing Release at 75730.

Nevertheless, NSCP believes that, as currently drafted, the Proposed Rules are not aligned with, and, in fact, serve to undermine existing compliance and related programs of the firms that our members serve. Significantly, the potential monetary award provided under the Proposed Rules acts as a strong disincentive to employee use of internal reporting mechanisms, which mechanisms lie at the heart of firms' internal compliance programs. As a result, NSCP believes that the Proposed Rules are likely to undermine firms' existing compliance and related programs and to result in more harm than good, at considerable cost to the Commission, the industry, and the public. For this reason and as discussed further below, NSCP believes that the Proposed Rules should be revised in a manner that encourages internal reporting by employees.

NSCP's views in this regard are discussed in detail beginning in the immediately following section of this letter. NSCP is also recommending certain additional changes to the Proposed Rules, which recommendations are set forth below under the heading "NSCP's Response to Specific Requests for Comments."

The Need To Encourage Internal Reporting

As noted above, while NSCP believes that a whistleblower program can offer significant assistance towards the Commission's goal of identifying and rectifying violations of the CEA and the rules thereunder, it also cautions that a program that fails to encourage internal reporting by employees will inevitably have a negative impact on internal compliance processes. To be clear on this point, NSCP believes strongly that absent the inclusion of provisions in the Proposed Rules that are designed to encourage internal reporting, the Proposed Rules are likely to move the Commission further, rather than closer, to its ultimate goal of identifying and rectifying violations of the CEA.

NSCP's views follow from the fact that timely and complete reporting of possibly unlawful activity to internal compliance, legal, supervisory or other management personnel provides a firm an opportunity to halt the violation in its early stages, address any deficiencies in procedures or systems, make restitution to customers or counterparties, self-report such matters to the Commission's attention and otherwise cooperate with any Commission action resulting therefrom. Each of these actions are positive results that should be encouraged. Such prompt ameliorative actions, however, could well have the effect of reducing any monetary sanction that the Commission ultimately obtains and thereby reducing or even eliminating any resultant whistleblower award.

Specifically, prompt internal reporting would give the subject entity an opportunity to identify, analyze and correct the identified violation, which should serve to limit the scope of the problem and, therefore, the likely size of any Commission sanction. Internal reporting also gives the subject entity a chance to self-report the problem to the Commission, take remedial action, and cooperate with the CTFC's own investigation. Accordingly, it is clear that internal reporting is not in the whistleblower's self-interest, and therefore, that the monetary award provided under the Proposed Rules acts as a strong disincentive to the use by whistleblowers of internal reporting mechanisms.

To be clear, the whistleblower program is not intended to appeal to the many conscientious, compliance-oriented "good Samaritans" in the industry. They are presumably already reporting matters to their firms or the Commission. Rather, the whistleblower program is based on a calculus that providing a financial windfall to persons who would otherwise keep silent despite their knowledge of wrongdoing will increase detection of such wrongdoing. Given this calculus, it is unrealistic to base development of whistleblower rules on a belief that, having established the program, whistleblowers will internally report because it is the "right thing to do."

The Benefits of Internal Reporting

Absent a means of encouraging internal reporting, NSCP believes that it would be reasonable to view the Proposed Rules as a means of "outsourcing" internal compliance functions to the CFTC by encouraging information flows to by-pass established internal processes so that they can instead be reviewed by the CFTC. Substituting the CFTC in the performance of these reviews in place of the subject entity also means substituting the CFTC's lack of knowledge and familiarity with the subject entity's business, systems, personnel, structure and the like in place of the depth of experience and knowledge typically found within financial service firms. As a result, substituting the CFTC in place of the subject entity can be expected to result in a review that is not only less thorough but also less timely. In light of these obvious inefficiencies, "outsourcing" these reviews to the CFTC by encouraging information flows to by-pass established internal processes seems ill advised.

Moreover, as an organization that seeks to enhance compliance within the financial services industry, NSCP is concerned that, in light of the CFTC's already strained resources, especially when measured against the Commission's rapidly expanding responsibilities, these "outsourced" responsibilities will strain, if not entirely displace, other, perhaps more critical functions, currently performed by the CFTC.[3]

The foregoing concerns would still be true even were the CFTC to limit its role to one of merely asking the subject entity to review the whistleblower's report and report back to the CFTC. In this case, the CFTC's responsibilities start with the receipt of a report, which must be logged in, assigned to the subject company, and tracked. Moreover, in order to preserve the confidentiality of the whistleblower, effort will be required to redact or rewrite the report before it is passed along to the subject company. On the back end, the subject entity's response must be reviewed and, if it is not perfectly clear to the CFTC or otherwise satisfactory, there is likely to be further follow up and discussion between the CFTC and the subject entity. As a result, even where the CFTC merely passes a report back to the subject entity, it seems likely that the CFTC will be required to devote significant effort to this task, which effort must be weighed, of course, against other uses of such resources by the CFTC.

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[3] See "CFTC Proposes Swaps Rules" WALL ST. J., January 20, 2011 (discussing comments by CFTC Commissioner Michael Dunn concerning the resource strain facing the CFTC).

Avoidance of internal reporting mechanisms, and instead, reporting to the CFTC, will also create inefficiencies for the subject entity. This would be true even if the CFTC investigates the matter, as it is likely in such a case that the subject entity will be asked to respond to document and informational requests from the CFTC. For a variety of reasons, however, not least, the CFTC's lack of familiarity with the details of the subject company's operations, these requests are likely to be much more time consuming than would be the case if the subject entity itself were reviewing the matter. Moreover, even where the CFTC forwards such reports to the subject entity, the confidential nature of the report means that it is likely to lack the richness and details necessary to allow the subject entity to focus its review effectively and efficiently.

It must also be considered that employees filing internal reports may be somewhat reluctant to file reports that are entirely or even largely baseless as doing so may reflect a lack of judgment on the employee's part, and therefore reflects poorly on the employee. No such inhibition is likely to apply, however, with respect to reports made directly to the CFTC. Accordingly, it can be expected that employees will be far more willing to report to the CFTC and, therefore, there will be a need to review and respond to a far greater number of reports than would otherwise be the case. This is, of course, another source of inefficiency.

The result of all of this is greater costs to both the CFTC and the companies it regulates. Either these costs must be borne outright or offset by the allocation of resources away from their current use to meet these new costs. As compliance budgets among CFTC regulated companies are not unlimited, this latter outcome is more likely, with the result that the proposed whistleblower program will come at the expense of existing, potentially more deserving, programs.

Moreover, the whistleblower program is likely to negatively impact the culture of compliance that many firms have labored to build. Simply put, the Proposed Rules' encouragement to employees to by-pass the operations of their employers' internal reporting process is likely to have a corrosive effect on how employees view their role. Rather than seeing themselves as integral to their employers' compliance efforts, as their employers' ears and eyes with the responsibility to report red flags and other indications of wrongdoing, employees will now see their interests as separate and apart from the success of their employers' compliance efforts.

This result is particularly disheartening to NSCP's many members that have been involved in the concerted effort of both the financial service industry and of NSCP itself to implement strong and effective compliance programs and to instill a culture of compliance and an understanding and appreciation for ethical behavior in the employees within this industry.

NSCP's Recommendations to Encourage Internal Reporting

Because the potential presence of a monetary award creates a disincentive to report internally, NSCP believes that the only way to truly encourage or incent employees to report internally is to either mandate that employees report internally to be eligible for a whistleblower

award, or include concrete, objective incentives in the award calculation criteria that favor and encourage internal reporting by employees. Narrowing the categories of employees who may qualify for whistleblower awards can also serve to ameliorate this problem and is also recommended.

Mandate Internal Reporting

NSCP supports the adoption of a provision requiring internal reporting by all employees as a condition of eligibility for a whistleblower award. Such a requirement could operate in much the same manner as provisions currently included in the Proposed Rule that restrict whistleblower award eligibility for compliance, legal, audit, supervisory and governance personnel unless such persons have previously reported a matter internally and the subject entity has failed to take action on the internal report. In addition, anti-retaliation provisions will help to assuage the fears of whistleblowers utilizing the internal mechanism.

Objective Incentives for Internal Reporting

If the Commission is unable to conclude that an internal reporting requirement should be mandated in order for employees to be eligible for whistleblower rewards, NSCP recommends that consideration be given to an alternative approach in which internal reporting is a heavily weighted criterion in the award calculation. In specifying the calculated award "premium" associated with prior internal reporting, the CFTC could reserve the discretion to determine whether, under the particular facts at hand, the employee may objectively and appropriately be excused from internal reporting obligations.

NSCP believes that this approach has several virtues. One, while it still leaves the ultimate determination of whether to report internally to the employee, it forces the employee to make this determination in light of objective criteria pre-established by the Commission rather than upon the employee's mere self-assessment of his or her own self-interest. Second, this approach provides the CFTC the flexibility to balance the benefits of internal reporting against competing concerns that may arise naturally under a multiplicity of scenarios. By way of example, such an approach would allow Commission staff to reward a whistleblower notwithstanding the whistleblower's failure to report internally based upon realistic concerns that internal reporting could lead to the destruction of evidence or subject the whistleblower to a significant risk of retaliation. Third, the CFTC's determinations from time-to-time as to the factors relevant to internal reporting would provide guidance to employers as to best practices with respect to processes for encouraging internal reporting, thereby enhancing compliance standards and practices.

In addition, and as noted above, narrowing the scope of employees who may qualify for whistleblower awards can also serve to ameliorate the problem of employees being disincented from reporting internally. Accordingly, and as discussed further below in NSCP's response to particular requests for comments, NSCP generally recommends that the term "voluntarily" be

applied narrowly with respect to employees and that the exclusions from the definition of "independent knowledge" and "independent analysis" that apply to compliance and similar functions be expanded. Doing so will help emphasize, and importantly, will not undermine the duty that all employees owe to their employers, including most relevantly the duty to voluntarily bring concerns regarding possible wrongdoings to the attention of relevant supervisory and other personnel and to cooperate fully in the review of any such matter. This will protect the effectiveness of existing compliance processes that are dependent upon employees for identification and reporting with respect to potential problems. In turn, this will permit subject companies to undertake investigations and remedial actions promptly and efficiently, and hopefully, while the matter at hand is still in its early stages.

NSCP's Response to Specific Requests for Comments

The remainder of this letter sets forth NSCP's comments to certain of the specific requests for comments set out in the Proposing Release. For convenience, our responses first set forth the original request in italics followed by NSCP's response. Requests for comment are identified by their location in the Proposing Release and are presented in the same order as in the Proposing Release.

Section II. B. 1. The Commission requests comment on the proposed definition of the word "action." Is it appropriate to pay a whistleblower award based on all monetary sanctions obtained in a single proceeding, when the whistleblower's information did not concern all defendants or claims in that proceeding?

Response: NSCP recommends that the definition of the term "action" be revised so that, for CFTC enforcement actions that include multiple counts, only those counts in the Commission action that result directly or indirectly from the whistleblower's report are deemed to constitute an "action" for which a whistleblower is eligible for reward. As a result, the Commission would allocate the overall monetary sanction so that only those counts are included in determining whether the $1,000,000 threshold requirement has been satisfied, and if so, in calculating the size of the award.

In declining to make such an allocation in determining the threshold, the Proposing Release states that this approach "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."[4] NSCP disagrees strongly with this approach.

The statute is clear on its face that the purpose of Section 23 is not to encourage whistleblowers to report every violation of law, but only serious violations that result in the imposition of monetary sanctions exceeding $1 million. By refusing to make an allocation for actions involving multiple individuals or claims, the Proposed Rules in fact encourage whistleblowers to

[4] The Proposing Release at 75729.

report to the Commission any and every conceivable violation, on the chance that the matters on which they report, however innocuous, will be grouped together with serious violations and result in an overall sanction that qualifies them for an award.

To encourage reporting of all violations, however insignificant, has very real consequences. In particular, NSCP would submit that, should the process function such that whistleblower reports for fairly minor violations resulted in awards, especially significant awards, the Commission could be inundated with far more complaints on insignificant matters, clogging a process that is already expected to be cumbersome.

NSCP suspects that part of the basis for the proposal is to avoid second-guessing by whistleblowers or others on the allocation judgments made by the Commission in situations where the allocation results in denial of an award for failure to meet the threshold. NSCP believes such second-guessing is also unavoidable. A firm (or the CFTC Enforcement staff, for that matter) intent on denying an award for a whistleblower who had reported on a relatively insignificant violation (one which, standing alone, would not support a monetary sanction exceeding $1 million) could insist that such violation be severed and settled separately. While this would deny the whistleblower an award, it would do so in a manner that increased the legal costs for the defendant(s) and the administrative burdens on the CFTC staff. Moreover, splitting the cases would in no way spare the CFTC second-guessing with respect to the relative sanctions of the respective matters.

Section II. B. 7 (first set of requests): 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" or "independent analysis" 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.

Response: NSCP believes that whether the information at issue is direct or indirect is less important than whether the information is reliable and specific enough to allow for a meaningful and focused review.

NSCP believes that it is appropriate to exclude from the definition of "independent knowledge" or "independent analysis" information that is obtained through a communication that is protected by the attorney-client privilege. Allowing attorneys or other persons subject to the privilege to breach the privilege, or even allowing others to obtain information through the use of protected information, would have a chilling effect on open communications between clients and attorneys and would, therefore, be a disincentive to firms and their employees to be forthright with their attorneys. Moreover, such a result would have an obviously adverse effect in the conduct by firms of internal reviews.

NSCP believes that the question of whether other privileges should be recognized should be guided by relevant, applicable federal, state or foreign law and the Commission should not put itself in the position of second guessing existing determinations. This is particularly true as it is likely to be in the interest of Commission staff to deny a privilege as a means of encouraging the provision of more, rather than less, information.

Section II. B. 7 (second set of requests): 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 respond to 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 does not disclose the information within sixty (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?

Response: NSCP does not understand why the proposed exclusion for information obtained by a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity is qualified by reference to such information being communicated "with a reasonable expectation that the [recipient] would take appropriate steps to cause the entity to remedy the violation. . . ."[5] Specifically, in recognition of the special responsibilities that are placed on the persons that perform the listed functions, NSCP believes that *any information* obtained by persons performing such functions should be excluded. By way of example, a supervisor who is told of a violation has the same duty to report that matter to the company's compliance or legal group regardless of the "expectation" attendant to the telling of such information. Moreover, the covered persons should not be put in a position where they have to discern the "expectations" of the communicant – particularly as it will be in the interest of the communicant to construe such expectations in a manner designed to exclude the communication from the coverage of this provision.

In addition, NSCP believes that the exclusion for information obtained from or through an entity's "legal, compliance, audit, or other similar functions" should also take into account personnel from a variety of other areas, including operations, finance, technology, credit, risk, and the like, who perform control functions, that is, functions that are principally related to compliance with regulatory requirements, including supervision, monitoring or oversight with respect to such functions. In this regard, NSCP believes that it can often be difficult, particularly in small firms, to draw lines between the listed functions and other responsibilities. For this reason, NSCP believes that the reference to "legal, compliance, audit or other similar functions"

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

merely serves to create ambiguity and should be deleted such that the provision would simply apply to "functions or processes for identifying, reporting and addressing potential non-compliance with law. . . ." In particular, NSCP believes that the Commission should provide clear guidance that such covered "functions or processes" would include supervisory reviews, which, in some ways, are more fundamental to compliance than even the compliance function itself.

Regarding the adoption of a sixty (60) day reporting period as a "reasonable time" for the entity to make disclosure of the applicable information, in NSCP's view, given the circumstances of the various matters that could arise, there is a need for flexibility in setting the applicable time period. Accordingly, NSCP is comfortable reposing with the Commission the determination of this standard on a case-by-case basis. For example, an active scheme to defraud retail customers should be dealt with swiftly as any delay is likely to result in additional investors' harm. By contrast, a complex trading scheme that is uncovered months after it has been completed lacks similar urgency, and could take weeks or even months to unravel. In short, the standard should be one where, as long as the firm is moving toward appropriate resolution in light of the totality of the circumstances, a subjective definition of "reasonable time" is appropriate. Under this standard, so long as the firm proceeds appropriately and in a "reasonable time," a putative whistleblower would not be eligible for an award regardless of whether they separately reported the matter to the CFTC before or after the firm did.

Section II. B. 11 (first set of requests): 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?

Response: The fundamental purpose of Section 23 is to support the integrity of the futures industry by fostering the reporting of information for the purpose of facilitating its review and the taking of appropriate remedial action in response thereto. For this reason, NSCP believes that the focus of the Proposed Rules should be on encouraging the provision of critical information regarding non-compliance to the party that is in the best position to act responsibly on such information. As NSCP believes that such party will often be the subject company, NSCP strongly agrees that individuals should be credited with providing original information upon the provision of information to a company's legal, compliance, or audit personnel. NSCP is not convinced, however, that providing credit with respect to reporting to other government or regulatory authorities should be similarly encouraged. Indeed, NSCP is concerned that the provision of such credit may needlessly complicate the Proposed Rules while making an appropriate and timely use of the information reported to such other government or regulatory authority less likely rather than more.

Section II. B. 11 (second set of requests): 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?

Response: Rules and regulations under the CEA can be complex and compliance scenarios are not always clear and straightforward. As such, a ninety (90) day time frame may not be sufficient time for a firm to assess a complex situation. As the proposed regulation is written with a ninety (90) day deadline, a whistleblower may very well be forced to contact the CFTC prematurely before a firm has had a reasonable time to assess the matter at hand. NSCP is concerned that any hard deadline may foster a rush to the CFTC on issues that have not been fully vetted by a firm's internal compliance/audit function; NSCP also expects that there will naturally be an increase in non-material issues being reported to the CFTC that will ultimately result in the CFTC wasting precious resources in assessing and following up on a landslide of non-issues.

Instead, NSCP suggests that a deadline be a minimum of ninety (90) days or such longer time as is "reasonable." Similar to the discussion of "reasonable time" set out in NSCP's above response with respect to the sixty (60) day period under proposed Rule 165.2(g)(4) and (5), a "reasonable" approach would allow a flexible standard that takes into account the circumstances at hand and would be decided on a case-by-case basis.

Section II. B. 14 (first set of requests): 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 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)?

Response: In NSCP's view, the purpose of Section 23 is to encourage the reporting of information by persons who are not otherwise subject to a reporting obligation with respect to such information. With this in mind, Rules to implement Section 23F should not have as their focus reporting by persons who are already subject to a legal or other obligation to report. Indeed, to the extent practical, such otherwise obligated persons should be excluded from participating in any monetary award as any other result would serve to reward persons for doing what they were already obligated to do.

Accordingly, NSCP believes that the definition of "voluntarily" should treat foreign and domestic regulators, and government regulators and self-regulatory organizations, similarly and not distinguish among them. Indeed, a whistleblower that provides information to a foreign regulator regarding a violation of U.S. commodities laws is likely to presume that there is a reasonable probability that the foreign regulator may share the reported information with the CFTC. As a result, a person reporting under such circumstances does not seem to us to be acting any more voluntarily than a person who waits, in the words of the Proposing Release, until "official investigators 'come knocking on the door.'"[6] Similarly, NSCP agrees that an individual subject to any legal duty to report information, whether to a foreign or domestic regulatory authority, law enforcement organization or self-regulatory organization should not be considered to be acting voluntarily.

For this same reason, NSCP believes the CFTC should treat any obligation that an employee may have under the employer's written procedures to bring red flags and other indications of wrongdoing to supervisory and/or control personnel at the employer as equivalent to a pre-existing legal duty to report information internally and not treat such information as voluntarily provided. To do otherwise would encourage employees to withhold information from their employers, which, as discussed above under the heading "The Benefits of Internal Reporting," is likely to have a decidedly negative impact on the ability of companies to identify and fix potential problems promptly and efficiently. Accordingly, narrowing the scope of employees who may qualify for whistleblower awards also serves to ameliorate the problem of employees being disincented from reporting internally.

For the above reasons, NSCP agrees that any request or inquiry directed to the employer by the Commission or any other investigating authority described in the Proposed Rule should also be deemed to be directed to any employees who possess documents or other information necessary for the employer to respond, in whole or in part, to such request or inquiry. Moreover, NSCP strongly believes that an employee should also be regarded as having received the request at the same time as the employer if there is a reasonable likelihood that, by virtue of the employee's position or responsibilities at the employer, the employee would have been contacted by the employer in responding to the request. As noted above, the purpose of Section 23 is to bring to the Commission's attention information it otherwise would not have received, not to reward persons for bringing to light information the Commission would have received in the ordinary course.

Additionally, NSCP also strongly believes that the defined term "voluntarily" should treat internal reviews similarly to external reviews. That is, the term "voluntarily" should exclude information provided by an employee after that employee becomes aware of an internal review about a matter to which the employee's subsequent submission is relevant. Under this standard, once a company starts an internal review, information subsequently provided to the CFTC by an employee who is aware of the internal review should not be considered to have been provided

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[6] The Proposing Release at 75734.

voluntarily, unless the provided information is clearly outside the scope of the internal review. NSCP believes that any other result would actually have the effect of encouraging employees responding to an internal review to withhold critical information from their employers in order to increase their chances of providing the information to the CFTC before their employer or any other employee in the organization does so.

As to whether a sixty (60) day period is a reasonable time for employers to disclose the information the employee provided, similar to the discussion of "reasonable time" set out in NSCP's above response with respect to the sixty (60) day period under proposed Rule 165.2(g)(4) and (5) and the ninety (90) day period for submitting Forms TCR and WB-DEC to the Commission, NSCP believes that a "reasonable" approach would allow a flexible standard that takes into account the circumstances at hand and would be decided on a case-by-case basis.

Section II. B. 14 (second set of requests): 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 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?

Response: Consistent with our response above, to the extent an individual discloses information that is related to a government (whether domestic or foreign), self-regulatory or internal investigation, NSCP does not believe that such disclosure should be considered to be provided voluntarily.

Section II. B. 14 (third set of requests): The Commission seeks comments 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?

Response: Consistent with our responses above, NSCP believes that it is appropriate to treat information provided by individuals with a pre-existing legal or contractual duty to report the information as information that has not been provided voluntarily. NSCP encourages the Commission to provide clear guidance, whether in the Proposed Rules, the approving release or elsewhere, as to the scope of any such exclusion.

Section II. F: 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?

Response: As an organization whose mission is to enhance compliance efforts within the financial services industry, NSCP believes strongly that the Commission should not adopt rules that would have the effect of encouraging or rewarding action taken in violation of applicable law, whether federal or state, or U.S. or foreign law. Even if additional violations might be uncovered by illegal trespass, theft, eavesdropping, or other criminal activities, the consequences in undermining respect for the rule of law would, in NSCP's view, outweigh any transitory benefit in the prosecution of a particular violation exposed by the criminal whistleblower.

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

Response: In accordance with the approach set forth above under the heading "NSCP's Recommendations to Encourage Internal Reporting," NSCP strongly supports the inclusion of award criteria that specifically recognize whether an employee reported a potential violation through internal whistleblower, legal or compliance procedures before reporting the violation to the Commission. Moreover, for the reasons already noted, any recognition of countervailing factors that are meant to excuse compliance with internal reporting systems, *e.g.*, an employee's fear of possible retaliation, should be tightly circumscribed and based upon clear and objective standards and in no event upon an employee's subjective viewpoint.

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Our comments reflect NSCP's fundamental mission, which is to set the standard for excellence in the securities compliance profession. This commitment is exemplified, among other things, by the time and resources NSCP, and the industry professionals whose volunteer services it marshals, have devoted in the past three years to the development of a voluntary certification and examination program for compliance professionals.[7]

Our mission is directed at the interests of compliance programs and compliance officers. We accordingly support a regulatory scheme that: (i) promotes practices that support market integrity and the interests of investors; (ii) creates clarity as to a firm's obligations to provide a reasonable system of supervision; (iii) promotes requirements that enable compliance officers to create reasonably workable programs; and (iv) avoids requirements or mandated tasks that are more costly or less efficient in realizing a regulator's public policy objectives, thereby increasing the difficulty facing a compliance officer in the discharge of his or her duties.

NSCP would like to thank the members of the NSCP Ad Hoc Committee, and in particular Glen Barrentine of Cadwalader, Wickersham & Taft LLP, for their efforts in crafting this letter.

Thank you for your attention to these comments. Questions regarding the foregoing should be directed to the undersigned at 860.672.0843.

Very Truly Yours,

Joan Hinchman

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[7] Persons who complete the NSCP's program qualify for the "Certified Securities Compliance Professional" designation.