February 4, 2011

Electronically Filed

David A. Stawick
Secretary
Commodity Futures Trading Commission
1155 21st Street, N.W.
Washington, DC 20581

RE: Comments of Edison Electric Institute and National Rural Electric Cooperative Association, 17 CFR Part 165, Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act
75 Fed Reg. 75, 728 (December 6, 2010)
RIN No. 3038-AD04

Dear Mr. Stawick:

The Edison Electric Institute ("EEI") and National Rural Electric Cooperative Association ("NRECA") (hereafter "Joint Associations") respectfully submit these comments in response to the Commodity Futures Trading Commission's ("Commission" or "CFTC") Notice of Proposed Rulemaking Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act ("NOPR") as published December 6, 2010 in the *Federal Register*. In the NOPR, the Commission invited public comment on proposed rules implementing section 748 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[1] that adds new section 23 to the Commodity Exchange Act ("CEA"). Specifically, the proposed rules implement provisions directing the Commission to pay, subject to limitations and conditions, awards to whistleblowers that voluntarily provide original information to the Commission about violations of the CEA that leads to successful enforcement.

Joint Associations support the Commission's emphasis on any potential awardee being the original source of material information, having independent knowledge of the information, and creating a causal connection between the information received and successful enforcement. As further explained below, Joint Associations are concerned that the Commission's rule, as proposed, will have the unintended consequence of rendering internal compliance and ethics

[1] Pub. L. No. 111-203 (2010).

reporting programs ineffectual and would strongly recommend that employees should be required to avail themselves of employer-sponsored complaint and reporting procedures as a prerequisite to their being entitled to receive an award under Section 23 of the CEA.

I. Description of Joint Associations and Interest in Proceeding

EEI is the association of U.S. shareholder-owned electric companies. EEI's members serve 95 percent of the ultimate customers in the shareholder-owned segment of the U.S. electricity industry, and represent approximately 70 percent of the U.S. electric power industry. EEI also has more than 65 international electric companies as Affiliate members, and more than 170 industry suppliers and related organizations as Associate members. EEI's members are not financial entities. Rather, the typical EEI member is a medium-sized electric utility with relatively low leverage and a conservative capital structure.

Formed in 1942, NRECA is the national service organization for more than 900 not-for-profit rural electric utilities and public power districts that provide electric energy to approximately 42 million consumers in 47 states or 12 percent of the nation's population. Kilowatt-hour sales by rural electric cooperatives account for approximately 11 percent of all electric energy sold in the United States. Because its members are customers of the cooperative, all the costs of the cooperative are directly borne by its consumer-members. The vast majority of NRECA's members meet the definition of "small entities" under the Small Business Regulatory Enforcement Fairness Act ("SBREFA").[2] Only four distribution cooperatives and approximately 28 G&Ts do not meet the definition. The RFA incorporates by reference the definition of "small entity" adopted by the Small Business Administration (the "SBA"). The SBA's small business size regulations state that entities which provide electric services are "small entities" if their total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.[3] NRECA is grateful to ACES Power Marketing which has provided considerable assistance and support in developing these comments.

The Joint Associations' members use energy and energy-related swaps to manage the commercial risks inherent in their core energy business. Members of the Joint Associations are generally heavily regulated, both by state public service commissions and by various federal agencies, including the Nuclear Regulatory Commission, the Federal Energy Regulatory Commission, and the Environmental Protection Agency. These companies have a long-standing tradition of a commitment to legal and regulatory compliance and a supportive approach to employees who wish to express concerns, all consistent with law and prevailing guidance, including the Sarbanes-Oxley Act, New York Stock Exchange standards, and the Federal Sentencing Guidelines for Organizations. These processes work well and provide a prompt and effective means for reporting potential violations and enabling an employer to investigate the

[2] 5 U.S.C. §§ 601-612 (as amended Mar. 29, 1996).
[3] 13 C.F.R. §121.201, n.1

facts and, if appropriate, to remediate the violation promptly and efficiently. Retaining these processes as the first reporting mechanism is an excellent management tool, controls the costs incurred by employers, and serves as a screening mechanism for the Commission under which companies can investigate and screen complaints, thereby reducing the burden on the Commission.

II. Comments

A. The Commission should require employees to avail themselves of employer-sponsored reporting and compliance procedures prior to going to the Commission.

Joint Associations support the Commission's emphasis on any potential awardee being the original source of material information, having independent knowledge of the information, and creating a causal connection between the information received and successful enforcement. However, Joint Associations are concerned that the Commission's rule, as proposed, will have the unintended consequence of rendering internal compliance and ethics reporting programs ineffectual, as the proposed rule would allow employees to go directly to the Commission with alleged violations. This would allow employees to circumvent the internal compliance and ethics programs. The Commission attempts to address this concern by stating that employees who report potential violations to an employer's compliance and ethics personnel can complete the necessary whistleblower forms required by the Commission within 90 days of reporting the information, or within 90 days of another person claiming to be the original source (and filing the necessary whistleblower forms), and the claim for whistleblower status will be effective.[4] The Commission states that the purpose 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."[5]

This provision, however, will not have the intended effect, as there is no incentive for employees to report potential or alleged violations to the company first before going to the Commission. Although the Commission's proposed rule preserves the employee's right to an award **if** the employee chooses to use the employer's internal reporting mechanism, the rule does nothing to require or incentivize the employee to do so. Thus, contrary to the Commission's intent, the proposed whistleblower rule still undermines the effective functioning of company compliance and ethics programs.

Companies can guard against legal and ethical violations only if employees are trained to report an alleged violation or suspected misconduct to the employer promptly, to work with the

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[4] NOPR at 75,733.
[5] *Id.*

employer to investigate and understand the facts, and if appropriate to remediate any violations as quickly as possible. For years, this has been the approach presented as a "best practice" by regulators and by lawyers and compliance and ethics professionals. Companies have expended substantial amounts of time and money training employees to these criteria and structuring internal whistleblower structures to meet these best practices. Any proposal by the Commission should optimally support these best practices, not work against them.

An approach that supports the extensive efforts of companies in building compliance and ethics programs and whistleblower structures would be consistent with the Sarbanes-Oxley Act and other applicable laws and regulations, pursuant to which the existing compliance programs were structured, and with the intent of the Dodd-Frank whistleblower requirements. Sarbanes-Oxley mandated that primary responsibilities for whistleblower complaints should reside with a public company's management and audit committees. The Commission should harmonize its approach under the Dodd-Frank Act to support these effective programs that have been implemented under Sarbanes Oxley. Joint Associations have five primary concerns with the proposed rule to allow potential whistleblowers to go directly to the Commission:

First, the proposed rule is likely to result in slower identification, investigation, and if necessary remediation of alleged violations. Under the proposed rule, the Commission will have to process a complaint and assess its facial validity before taking any action. In addition, the Commission may, in its discretion, decide not to contact the employer which would undermine the employer's ability to take any necessary prompt remedial action. A complaint directed to the Commission in the first instance will not be reported to the employer or be investigated as quickly, as would otherwise be likely if employer-sponsored procedures are a prerequisite to a whistleblower complaint to the Commission. The employer has every incentive to investigate a complaint quickly. Thus, under the proposed rules, investigation and any necessary remediation are likely to be delayed. Moreover, given the nature of the businesses of Joint Associations' members, where safety is critical and reliability of energy delivery is important to American businesses and families, any mis-directed or delayed complaint could have serious consequences.

Second, the proposed rule is likely to increase the costs of investigating the facts and remediating any violations. When an employer learns of a potential violation, it frequently can investigate quickly and if necessary remediate any violation using its internal legal counsel, internal audit function, and other internal resources. However, if an employee notifies the Commission regarding a potential violation, an employer's management or its board of directors may feel it necessary to engage outside consultants or external counsel because of the high profile nature of a Commission investigation. As a result, under the proposed rule, all complaints, even small or frivolous ones, are likely to result in costly investigations, even where there was no actual violation.

Third, the proposed rule may encourage employees to misuse the Commission's process. If complaints may be filed directly with the Commission without prior use of the employer's complaint process, some employees (such as those who are on the verge of a performance-based termination) could be motivated to identify and report even the most far-fetched or tenuous perceived violations in order to convert a fully-justified termination into a wrongful-discharge claim. Regrettably such attempts are a common occurrence already, and could increase in frequency if employees are allowed to bypass the employer's s internal reporting system and report all alleged violations directly to the Commission. In order to address this issue, the Commission should require a "whistleblower" first to report the alleged violation to the employer, in accordance with the employer's internal procedures, to make a good faith effort to support the internal investigation, and to satisfy the provisions of the employer's code of conduct in order to meet the Commission statutory definition of a whistleblower and to be eligible for a bounty.

Fourth, under the proposed rule, the burden would fall upon the Commission for screening meritless complaints submitted by employees of a wide variety of commercial enterprises. While whistleblower complaints may be filed for many reasons, many, if not most, do not result in a finding of a violation either of employer policies, federal laws or applicable regulations. Although most employees raise a concern because they believe in good faith that a violation has occurred, employers frequently determine upon further investigation that no violation has occurred. For example, the perceived violation may be due to a misunderstanding by the employee of the law or regulation or the application of such rules to the commercial enterprise of the employer, or because the complainant does not have access to all the relevant facts or information. Employers are in the best position, as an initial matter, to assess the validity of a concern that is reported and either to explain to the employee why no violation occurred or to implement the appropriate remediation, as quickly as possible. Avoiding meritless complaints benefits not just the employer and its investors (and even the employee), but also the Commission, which otherwise will have to sort through a steady flow of meritless complaints, filed by employees of a wide variety of commercial businesses outside the experience of many Commission employees to understand the context within which such alleged violation may or may not have occurred, placing inappropriate demands on the Commission's limited resources.

Fifth, the proposed rule is inconsistent with the framework of complaint processes established under Sarbanes-Oxley and other federal laws and regulations. Sarbanes-Oxley and other federal laws and regulations require many employers to establish fair procedures for employees to raise complaints and concerns and for employers to respond to those complaints. These processes also protect whistleblowers against retaliation and contain the explicit obligation of the employer to remediate wrongdoings and prevent recurrences. We believe it is important to harmonize the implementation of Dodd-Frank with these processes. As we said earlier, this approach enables companies to screen out meritless complaints and to take prompt action regarding those which have merit. If an employer fails to take action on a complaint that an employee believes has merit, the employee would then be able to file a complaint at the Commission.

Joint Associations believe that the solution to these concerns is simple. If an employer has a complaint and reporting process that

(i) is well-disclosed and accessible to all employees,
(ii) includes the ability to report violations anonymously,
(iii) prohibits retaliation against employees, and
(iv) tracks each complaint, whether or not anonymous, in a manner that documents the time and content of the complaint,

Then the employee should be required first to report the violation in reasonable detail through the employer-sponsored complaint and reporting process and allow the employer a reasonable time to investigate and, if necessary, address the violation before the complaint can be filed with the Commission. In the event that the employee is unsatisfied with the action of the employer in response to the complaint, the employee would then have the option of reporting the alleged violation to the Commission and, if warranted, receive the whistleblower award.

This proposal will result in a more timely and efficient remediation of any actual violation. It also will allow the employer the opportunity to address all complaints and to timely and efficiently resolve many meritless complaints before they go any further. Most importantly, this gating process is entirely consistent with the purpose and intent of Section 748 of the Dodd-Frank Act to compensate employees in situations where they needed to bear the burden of reporting violations to the Commission because the employer did not respond to the employee's concern with appropriate action.

B. The Commission should not impose a disclosure requirement on employers.

Proposed rules 165.2(g) (4) and (5) delineate exclusions from the "independent knowledge" requirement. Joint Associations agree that a person does not have independent knowledge if he or she is a person with legal, compliance, audit, supervisory, or governance responsibilities and the information was reported to him or her with expectations that the individual would take steps to remedy the violation.

However, Joint Associations do not agree with the Commission's proposal that the individual could become eligible to be a whistleblower if the information is not disclosed to the Commission by the employer within sixty days. As indicated above, some of the alleged violations reported through the employer's compliance programs may not have merit or any actual violations may be easily remediated by the employer. For these reasons, the Commission should not include a disclosure provision in the proposed regulations.

As highlighted above, if the Commission does not permit employers to fully use their internal compliance and ethics processes, then Commission could be unnecessarily burdened with frivolous or minor complaints. In addition, for some alleged violations, the Commission's proposed sixty day timeframe would not allow sufficient time for the employer to conduct an in-depth investigation and decide what action, if any, is warranted in response. Not imposing an artificial deadline for companies to respond to employee's allegations will permit a more thorough investigation to determine whether the information provided by a potential whistleblower is accurate, whether a violation has been committed, and what response is justified.

Thus, the Commission should require persons with legal, compliance, audit, supervisory, or governance responsibilities to wait until the employer's investigation is completed prior to filing a claim with the Commission, unless and until the employee believes that the employer has proceeded in bad faith. The Commission should independently determine that the employer has acted in bad faith for such an employee to qualify for independent knowledge status under the proposed regulations. This proposed modification could be accomplished by deleting "failed to disclose the information to the Commission within sixty (60) days or otherwise" in proposed paragraphs 165.2(g) (4) and (5).

C. The Commission's cost-benefit analysis does not include all relevant costs of the proposed rules.

The cost-benefit analysis contained in Part IV of the NOPR does not contain all of the potential costs of the proposed rules in the NOPR.[6] While the NOPR addresses the possible cost to whistleblowers or "potential awardees," it does not address the costs to employers. These include (1) the incremental cost of employers responding to investigations by the Commission as contrasted with addressing a violation initially through an internal investigation and, if necessary, remediation, or (2) the incremental cost of responding to meritless complaints that would not have been submitted to the Commission had the employee been required first to report the complaint through an employer-sponsored reporting and compliance process. These two costs are so certain to occur that the Commission must consider them as part of its rule-making process in order to provide an adequate cost-benefit analysis.

D. The Joint Associations urge the Commission to promulgate a rule consistent with any SEC proposal.

Joint Associations are concerned that, though the Commission's proposed rule and that of the Securities Exchange Commission ("SEC") contain some similarities, the two proposed rules are not fully consistent. A lack of consistency between the two agencies could subject both a whistleblower and a company to confusing or even conflicting requirements.

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[6] *Id*. at 75,741.

The issue of cooperation and consistency of approach between the SEC and the CFTC is supported by the two Commissions and by the Congress as reflected in:

- The efforts of the Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues, established May 11, 2010; and
- Sections 712 and 719 of the Dodd-Frank Act.

We recommend that the Commission seek to achieve a consistent approach with the SEC prior to final adoption of the rule.

III. Conclusion

Joint Associations appreciate the opportunity to submit comments on this important issue and urge the Commission to require employees to report potential or alleged violations to the employer before going to the Commission. This process will help ensure that employers have a chance to address employee complaints and that only legitimate violations are reported to the Commission.

Please contact us if you have any questions regarding these comments.

Respectfully submitted,

Richard F. McMahon, Jr.
Vice President
Edison Electric Institute
701 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: (202) 508-5571
Email: rmcmahon@eei.org

Russ WASSON

Russell Wasson
Director of Tax, Finance and Accounting Policy
National Rural Electric Cooperative Association
4301 Wilson Blvd., EP11-253
Arlington, VA 22203
Email: russell.wasson@nreca.coop

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