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David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, NW
Washington, D.C. 20581

VIA ELECTRONIC MAIL

RE: *Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act*, *Notice of Proposed Rulemaking*, RIN 3038-AD04

Dear Secretary Stawick:

I. INTRODUCTION.

In accordance with the Commodity Futures Trading Commission's (the "CFTC" or the "Commission") Notice of Proposed Rulemaking, *Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act* (the "Proposed Rule"), issued pursuant to Section 748 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Act"),[1] and published in the *Federal Register* on December 6, 2010,[2] the Working Group of Commercial Energy Firms (the "Working Group") hereby submits comments in support of those filed by the Edison Electric Institute and the National Rural Electric Cooperative Association.

The Working Group is a diverse group of commercial firms in the energy industry whose primary business activity is the physical delivery of one or more energy commodities to others, including industrial, commercial, and residential consumers. Members of the Working Group are energy producers, marketers, and utilities. The Working Group considers and responds to requests for public comment regarding regulatory and legislative developments with respect to the trading of energy commodities, including derivatives and other contracts that reference energy commodities.

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

[2] *Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act*, 75 Fed. Reg. 75,728 (Dec. 6, 2010).

II. COMMENTS OF THE WORKING GROUP OF COMMERCIAL ENERGY FIRMS.

A. GENERAL COMMENTS.

The Working Group generally supports the comments filed by the Edison Electric Institute and the National Rural Electric Cooperative Association regarding the Proposed Rule. We appreciate the opportunity to submit comments on the Proposed Rule and support the intent of the Dodd-Frank Act and the Commission to provide incentives and protections for whistleblowers that identify and help remedy violations of applicable securities laws and regulations.

Members of the Working Group are committed to establishing strong cultures of compliance that prevent and mitigate violations and minimize harm to employers and investors. We agree with the Commission that the Proposed Rule should not discourage whistleblowers who work for companies with robust compliance programs from first reporting a potential violation to appropriate company personnel, but are concerned that the Proposed Rule does nothing to encourage the use of internal reporting systems before a person reports a potential violation to the Commission.

Indeed, without a prerequisite to report potential violations internally, the appeal of a large financial reward may lead to slower identification and remediation, increased investigative and remedial costs, an increase in meritless complaints, and the abuse of the Commission's reporting process by disgruntled employees. Additionally, as drafted, the Proposed Rule might encourage employees to allow misconduct to arise (instead of proactively preventing or mitigating it) in order to ensure they will qualify for an award.

The Proposed Rule should broaden the definition of "original information" to include information an employee provided to his or her company and that is later reported to the Commission by the company. This clarification would assure consistency in the content of the information. Also, culpable individuals, in-house lawyers, and other compliance personnel should not be eligible for whistleblower awards. Allowing these employees to be awarded bounties will undermine the effectiveness of internal compliance systems. The Commission should be required to share information reported to it by a whistleblower with the company, and should permit the company to conduct a concurrent investigation. Additionally, the Commission should extend the 60-day window a company has to investigate internal reports before an employee may report such information to the Commission. The current 60-day proposal may not provide sufficient time for a company to investigate complex issues or those that may arise in international offices.

B. THE PROPOSED RULE DISCOURAGES THE USE OF INTERNAL REPORTING SYSTEMS.

The Working Group supports the intent of the Proposed Rule, but is concerned that, as currently written, the offer of a large financial reward will encourage employees to report perceived problems or violations to the Commission without first notifying their employer. The

members of the Working Group are well-regulated by both state and federal agencies and are committed to compliance. They encourage their employees to express concerns about the operations of their businesses and have established internal policies that provide efficient methods for reporting, responding to, and addressing employee complaints. The Working Group believes that these internal processes provide an important screening mechanism that reduces the costs incurred by the Commission and employers in order to investigate complaints.

As stated above, the offer of a large financial reward without a prerequisite to report a problem internally encourages the use of the Commission's reporting process as the primary resort for all complaints or concerns. While the Working Group does not intend to suggest that the Commission should not serve as a resource for employees to express concerns or complaints, we believe making the Commission an employee's primary resort would create several unintended consequences. Initial reports to the Commission may slow the process by which a company is notified and remedies a potential violation, due to the time the Commission needs to process a complaint and assess its validity. Additionally, the potential for a large financial reward is likely to lead to an increase in meritless complaints and the abuse of the Commission's reporting process, particularly by employees that might be facing a justifiable, performance-based termination.

C. THE PROPOSED RULE SHOULD REQUIRE EMPLOYEES TO FIRST REPORT POTENTIAL VIOLATIONS INTERNALLY AS A PREREQUISITE TO ENTITLEMENT TO AN AWARD.

The Commission should require that employees of companies with internal compliance programs established to meet the requirements of the Sarbanes-Oxley Act of 2002 and other federal laws to report potential violations to their employer first in order to be considered for a financial reward following a successful enforcement action. Specifically, employees should be required to first satisfy all applicable reporting obligations under his or her company's code of conduct and in accordance with the company's internal procedures in order to be eligible for a bounty. The government has long required companies to establish strong compliance and reporting programs, and many have done so at significant cost in time, money, and other resources. Indeed, Working Group member companies have implemented and maintain internal compliance programs designed to foster a "culture of compliance" and constantly strive to integrate components required by all laws, regulations and formal policy guidance, including those required by Sarbanes-Oxley, Securities and Exchange Commission Rule 10A-3, the U.S. Sentencing Guidelines, and the Federal Energy Regulatory Commission's Revised Enforcement Policy Statement and Compliance Policy Statement.

By not requiring employees to use these internal programs first, the Commission is undermining the very culture of compliance it and other regulators have sought to encourage. Conversely, requiring an employee to first report internally does not undermine the Commission's objective of providing additional recourse to whistleblowers should a potential violation not be addressed by an employer. The use of internal compliance systems will not only reduce the investigative and remedial costs to the Commission and employers, but will aid in the

screening of meritless complaints, reduce abuse of the Commission's reporting process, and continue to provide the most efficient method for employees to raise concerns and for employers to respond to complaints.

III. CONCLUSION.

In summary, the Working Group supports the intent of the Proposed Rule but believes that requiring primary internal reporting will improve employees' options for raising concerns, provide an efficient method for addressing complaints, and discourage meritless and unjustified reports that needlessly consume Commission resources. If you have any questions, or if we may be of further assistance, please contact the undersigned.

Respectfully submitted,

/s/ Mark W. Menezes

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