THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy

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David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW.
Washington, DC 20581

Re: Implementing the Whistleblower Provisions of
Section 23 of the Commodity Exchange Act; Proposed Rule

Dear Mr. Stawick:

The Financial Services Roundtable[1] (the "Roundtable") appreciates the opportunity to provide comments on the proposal by the U.S. Commodity Futures Trading Commission (the "CFTC" or the "Commission") to adopt rules (the "Proposed Rules") to implement the "whistleblower" provisions of Section 23 of the Commodity Exchange Act (the "CEA"), pursuant to Section 748 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act").

The Roundtable commends the Commission for acting expeditiously to develop the Proposed Rules. We are providing these comments in the hope that they will foster the development of final rules that achieve the goals of the Act in a manner that provides the most benefit to all affected parties.

General Comment

On December 6, 2010, the Commission, as required by the Act, published the Proposed Rules to establish a process for rewarding individuals who provide the Commission with information leading to successful enforcement actions.[2] The Proposed Rules establish an infrastructure and procedures under which "whistleblowers" – persons who provide information to the Commission regarding potential violations of the CEA – can qualify for significant monetary awards.

While the Roundtable supports the Commission's efforts to encourage those with information about possible corporate wrongdoing to make that information known, the Roundtable is concerned that:

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[1] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO.

Roundtable member companies provide fuel for America's economic engine, accounting directly for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs.

[2] *Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act*, 75 Fed. Reg. 75728 (Dec. 6, 2010) (the "Proposing Release").

- the Proposed Rules fail to place sufficient reliance on the effectiveness of the internal compliance procedures that so many companies, including our members, have established;

- the Proposed Rules will do damage to those efforts as employees and others with knowledge about possible violations of applicable laws, rules and regulations (referred to herein as "applicable law") avoid even the most highly effective internal policies in order to preserve and protect the possibility, no matter how remote, of receiving large cash awards; and

- the Proposed Rules are similar to rules proposed recently by the SEC, but there are some significant differences and inconsistent terms that the CFTC and SEC should harmonize, so that companies will not be subject to potentially inconsistent requirements or otherwise led to assume inadvertently that they are in compliance with both regimes when, in fact, they are not fully compliant with one or the other.

As a result, we are concerned that the policing of potential violations of the CEA would be left largely to the CFTC alone. Consequently, we fear that the Proposed Rules could lead to less effective policing of such violations rather than creating a stronger system.

As indicated above, on November 3, 2010, the Securities and Exchange Commission (the "SEC"), as required by Section 922 of the Act (which has provisions substantially similar to those of Section 748 of the Act), published substantially similar proposed rules (the "Proposed SEC Rules") to establish a process for rewarding individuals who provide the SEC with information leading to successful enforcement actions.[3] Our members would be subject to the Proposed SEC Rules as well, and many of the comments in this letter echo comments that we made in our letter to the SEC with respect to the Proposed SEC Rules.

<u>Specific Comments</u>

The Roundtable believes that extreme care is needed in crafting the whistleblower program to avoid unintended, negative consequences for companies that engage in good faith efforts to discover and deal with improper and illegal conduct at its earliest stages. The Roundtable provides these comments to highlight what we believe to be the principal concern with the Proposed Rules – that they could cause people with information about possible wrongdoing at a company to bypass even the most comprehensive internal procedures, leaving companies in the dark about possible misconduct or illegal activity by their employees, officers, directors, independent contractors, or agents (sometimes referred to herein as "insiders").

The Roundtable believes that the Proposed Rules should give companies greater credit for maintaining robust internal compliance procedures, and reduce the incentives for bypassing them. Otherwise, companies that have worked to develop and maintain robust procedures for addressing such matters may find them rendered ineffective, and the good working relationship that most companies have with their employees negatively affected, as the paradigm shifts to reporting violations solely to the Commission. In addition, the Commission would lose the benefit of efficient filtering, attention, and remedial

[3] Securities Exchange Act Release No. 63237 (Nov. 3, 2010), 75 Fed. Reg. 70488 (Nov. 17, 2010) (the "SEC Release").

measures provided by robust company policies and procedures, leading to the Commission receiving more complaints than it can reasonably handle.[4]

I. The Proposed Rules Should Require the Use of Established Internal Procedures for Reporting Possible Wrongdoing By Persons Seeking Whistleblower Awards.

In order "to support, not undermine, the effective functioning of company compliance and related systems" the Proposed Rules would "allow[] employees to take their concerns about potential violations to appropriate company officials while still preserving their rights under the Commission's whistleblower program."[5] However, the Proposed Rules do not *require* whistleblowers to report internally and thus many employees will be incentivized to bypass established internal procedures and take their concerns directly and exclusively to the Commission. This is especially likely because of the opportunity to receive such large monetary rewards. The Roundtable believes that the Commission should consider a rule that would require whistleblowers to utilize employer-sponsored complaint and reporting procedures.[6] Where a company implements a robust program under which employees can report activity that may violate applicable law, whistleblowers generally should be required to use such programs as a condition to being entitled to a whistleblower award.

A. Companies With Internal Procedures For Receiving and Responding to Information About Suspected Misconduct Should Have the Opportunity to Use Them.

Our members have developed strong internal compliance procedures to encourage employees, agents, and other company insiders to report suspected violations of applicable law, and to protect those who make such reports. These robust compliance programs include policies and procedures designed to prevent illegal activity from going undetected by providing a mechanism that encourages insiders to report suspected problems, irregularities, or illegal conduct. Many programs *require* insiders to report such matters or face possible disciplinary action. These companies are serious about rooting out violations of applicable law, as well as violations of company policies. When such matters are reported, those procedures generally require the company to investigate, take action to correct any problems, discipline those who engaged in improper or illegal activities and, where necessary or appropriate, notify the relevant regulatory or enforcement authority. These policies include provisions to prevent retaliation against whistleblowers.

There are a number of reasons that companies adopt such procedures. First and foremost, companies recognize the value of establishing procedures to detect and deal with potential violations of applicable law, as well as other internal policies and procedures that govern the conduct of the company and its personnel. These companies understand that it is best to deal quickly with isolated issues, before they grow into widespread, enterprise-threatening problems. Companies recognize that illegal or inappropriate conduct can have a severe impact on the company's profitability; its value to stockholders; the perception of the public, suppliers, customers, counterparties, and competitors; and the morale of its personnel. Smart management recognizes that taking steps to detect misconduct at the earliest possible moment, and to address it quickly, is good corporate citizenship.

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[4] The Commission estimates that there will "numerous individuals, approximately 160 per fiscal year," who may file whistleblower complaint forms. *See* Proposing Release, 75 Fed. Reg. at 75742. We respectfully submit that, given the significant cash rewards that will be available under the Proposed Rules, the total is likely to be much higher than that.

[5] *Id.*, 75 Fed. Reg. at 75733.

[6] The SEC raises this question in connection with its proposal. *See* SEC Release at 37, 75 Fed. Reg. at 70496.

Over the past 15 to 20 years, a growing number of federal and state laws and regulations have encouraged the establishment of robust compliance programs that include both reporting mechanisms and protections for whistleblowers.[7] Companies have responded by investing substantial time, energy, and capital in thorough training, new systems, new processes and procedures, new Codes of Employee Conduct, and additional staff intended to promote the right compliance culture throughout their organizations. Where companies have invested significant resources in developing robust policies and procedures for complying with applicable law and responding to possible violations thereof, there should not be incentives for bypassing them. The Roundtable believes that the Proposed Rules should encourage good faith efforts to develop procedures to detect and respond to violations of applicable law, and encourage their use by whistleblowers.

Requiring employees with questions or information regarding questionable company practices to use internal policies and procedures would promote good corporate governance. It would encourage companies with internal policies and procedures to maintain them at the highest standard, encourage those with weak procedures to invest in and improve them, and incentivize those without such procedures to develop them. We agree with the Commission that "[c]ompliance with the CEA is promoted when companies have effective programs for identifying, correcting, and self-reporting unlawful conduct by company officers or employees."[8] Unfortunately, by failing to require the use of company programs, the Proposed Rules will inevitably weaken them. Consequently, we believe that where a company has well-documented, thorough, and robust internal procedures, it is appropriate for those procedures to be a part of the process that ultimately could result in a whistleblower receiving a significant financial reward.

Giving credence to the quality and effectiveness of internal control procedures by incentivizing whistleblowers to use them would confirm that effective compliance procedures are a strong first line of defense for detecting and preventing violations of applicable law, and would encourage companies to review and improve their programs continually to ensure that they remain sufficient to justify having whistleblowers use them. It also would encourage employees to remain engaged in the process and feel encouraged to bring information relating to possible wrongdoing to the company's attention, so that it can be dealt with in an appropriate fashion. The Roundtable recognizes that there may be situations in which a whistleblower has a legitimate and supportable concern that using internal procedures will work to her or his detriment. However, we respectfully submit that Congress addressed that possibility when it adopted the Act, by adding the anti-retaliation provisions in Section 748(h). The Proposed Rules further strengthen this protection by providing that the Act's anti-retaliation provisions will apply whether or not a whistleblower satisfies the procedures and conditions to qualify for an award.[9]

The significant bounties offered to whistleblowers who bring information to the Commission, coupled with the lack of a requirement for whistleblowers to use internal procedures for detecting, investigating and resolving potential violations of applicable law, will result in even the most dedicated employees

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[7] For example, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"); the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"); the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"); the U.S. False Claims Act; and a number of state statutes either require companies to establish such programs or require their use where they have been adopted voluntarily. The U.S. Department of Justice Prosecution Standards, and the U.S. Federal Sentencing Guidelines for Organizations, also take into account a company's internal whistleblower procedures when determining the severity of charges or penalties.

[8] Proposing Release, 75 Fed. Reg. at 75733.

[9] *See* Proposed Rules § 165.2(p)(2), Proposing Release, 75 Fed. Reg. at 75745. Where a company demonstrates a pattern of ignoring internal whistleblower reports, or a history of retaliation complaints, the Commission could consider whistleblowers who ignore that company's procedures and complain directly to the Commission to be justified in doing so, and reward them accordingly.

bypassing internal complaint programs for fear of losing a potentially significant financial recovery. Consequently, the Proposed Rules may inadvertently weaken, rather than strengthen, the effectiveness of current efforts to deal with corporate wrongdoing. If there are concerns about a standard by which to classify a company's internal procedures as sufficient, the Roundtable suggests that there are precedents from which an appropriate standard could be derived. For example, the Commission could look to its standards for evaluating internal controls over financial reporting, requiring procedures to be designed by or under the supervision of senior officers (or persons performing similar functions) and effected by a board of directors, management and other personnel, to respond to information provided by an individual (whether or not such person is an insider).[10] The Commission also could consider other indicia of sufficient procedures, such as the use by a company of an independent third party for individuals to report wrongdoing anonymously, or compliance with Section 8B2.1 of the U.S. Sentencing Commission Guidelines Manual ("Effective Compliance and Ethics Program").

Finally, as noted above, many company compliance procedures require employees who become aware of potential legal violations to report them to the company or face disciplinary action. The Proposed Rules therefore raise the question of whether companies would be permitted to discipline employees who violate company policies and procedures by withholding information from the company and taking it straight to the Commission. It would certainly send confusing messages to companies and their personnel if the Proposed Rules were to result in employees being rewarded financially for violating a company's compliance procedures, the use of which the Commission acknowledges should not be undermined.[11]

B. Requiring the Use of Internal Procedures Would Allow Companies and the Commission to Allocate Resources More Efficiently.

The old truism that "an ounce of prevention is worth a pound of cure" is especially applicable here. The longer a problem continues, the more likely it is to fester and grow into one that is far more difficult and costly to address, and potentially more damaging to the company. Allowing companies to deal with problems at the earliest possible stages would enable them to avoid the expense of a more deeply entrenched problem and, in many cases, to attack inappropriate activities before they become widespread. Improper conduct will be contained and companies will realize efficiencies that directly benefit the company, its shareholders, its customers, its personnel, and the public. If a company remains unaware of a problem because a whistleblower has taken information directly to the Commission, the company may be drawn into formal legal or regulatory proceedings that lead to much higher legal expenses, raise the level of publicity (which may impact the company's business), and divert the company's management from its normal duties, even though the problem could have been handled expeditiously and more efficiently if the company had been made aware of it sooner. Allegations of and investigations into possible misdeeds or fraud, even if unfounded or incorrect, can have a strong and serious negative impact on a company, lowering its stock price, raising its internal costs (for example,

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[10] *See, e.g.*, CFTC Regulations 17 C.F.R. §§ 1.14, 1.15; *see also* SEC Rules 13a-15; 15d-15. We also note that the Act requires the Commission to promulgate rules to require a number of different types of entities subject to its jurisdiction to designate a chief compliance officer and to develop policies and procedures for compliance with the CEA and CFTC regulations, for the handling, management response, remediation, retesting, and closing of non-compliance issues, and for the annual assessment of such policies and procedures. *See, e.g.,*§§ 725(i), 728(e), 731(k). These requirements reflect Congress' view of the importance of such internal policies and procedures to the efficient functioning of an entity, and the need to protect their integrity through continuous review and assessment. The Commission already has proposed rules in response to many of these sections. *See e.g.,* 75 Fed. Reg. 70881 (Nov. 19, 2010); 75 Fed. Reg. 78185 (Dec. 15, 2010); 75 Fed. Reg. 77576 (Dec. 13, 2010); 75 Fed. Reg. 71397 (Nov. 23, 2010).

[11] *See supra,* text accompanying notes 5 & 8.

certain insurance premiums), creating negative consumer perception, and harming employee morale. In extreme cases, such allegations can put a company out of business.

Moreover, as fewer whistleblowers use available internal procedures (if for no other reason than to protect their chance for a bounty), more whistleblower claims will get to the Commission's doorstep. The Commission staff will have to review each one to determine whether it states a valid claim, and any complaint that contains even the barest plausible allegation will have to be investigated. This certainly would not be an efficient use of the Commission's limited resources. Companies are far better equipped to assess complaints in the context of their particular business and to "separate the wheat from the chaff." Some complaints may be about practices having nothing to do with the CEA or CFTC regulations. Many could be related to human resources matters. Some may be the result of ignorance of the actual facts or mere disagreement with management's legitimate business judgment. Some people may contact the Commission simply to "vent." Indeed, if companies are not given the opportunity to address whistleblower claims, the flood of complaints could eventually result in the Commission missing a truly significant matter, simply because it lacks the resources to adequately review each claim.

C. Requiring the Use of Internal Procedures as a Condition to Receiving a Bounty Would Not Impinge Upon a Whistleblower's Right to Contact the CFTC.

The Roundtable believes it is critical to point out that requiring the use of internal procedures as a condition to a whistleblower receiving a cash award under the Proposed Rules would not inhibit the right or ability of an individual to contact the CFTC (or any other regulatory or law enforcement body) with information about suspected wrongdoing. Individuals can do that now. However, the Roundtable strongly believes that if an individual wishes, in addition to helping correct such wrongdoing, to be eligible to receive a large cash award for providing that help (at minimum $100,000 and potentially many millions of dollars), the imposition of additional conditions such as requiring the whistleblower to use the company's internal procedures, so that the company is made aware of the alleged wrongdoing and has the opportunity to investigate and address the matter and maintain the integrity of its internal process, is neither inappropriate under nor prohibited by the terms of the Act. Moreover, given that "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,"[12] requiring whistleblowers seeking a significant monetary reward to undertake the additional step of using the company's internal procedures as a condition to receiving such an award would not in any way reduce the protection that an individual would receive under those anti-retaliation provisions – whether or not the individual chose to inform the company and thereby become eligible for a reward. Moreover, if there is a concern that requiring the use of internal procedures as a condition of receiving a whistleblower award nevertheless will have a chilling effect on the amount and quality of the information that the Commission receives, we note that many public companies subject to Section 301 of the Sarbanes-Oxley Act of 2002 have instituted procedures enabling employees to make internal reports *anonymously*, thus protecting the individual from retaliation.

[12] Proposing Release, 75 Fed. Reg. at 75735.

D. Companies Need an Adequate Opportunity to Respond to Claims of Wrongdoing.

1. Companies Should Be Notified About All Whistleblower Complaints.

In addition to not requiring whistleblowers to follow internal policies and procedures, the Proposed Rules do not require the Commission to notify a company when it is the subject of a whistleblower complaint. The Roundtable believes that if the Commission does not require whistleblowers to report information to the company, then the company must be notified by the Commission as soon as possible after receiving a whistleblower complaint. Unless a company is involved at the earliest possible moment when the question of possible misconduct is raised, it will be prevented from addressing problems that it otherwise might quickly investigate and resolve. It is far better to provide companies with an early opportunity to investigate and address legitimate allegations, and to defend against spurious ones. An integral part of the internal procedures that companies have developed is the process for investigating and dealing with evidence of potential wrongdoing by insiders, using either internal resources or, in appropriate cases, outside counsel and other third parties. Keeping information from companies could leave them unaware of problems until much later, such as when the Commission determines to launch a formal inquiry. This could increase exponentially the magnitude of a problem and the cost of responding to it. Again, companies should be given credit for having developed procedures and given the opportunity to put them to work.

Moreover, even if the Commission were to require the use of internal procedures as a condition to receiving an award, there nevertheless will be situations where reports come to the Commission directly. In such cases, for the reasons stated above, the Commission should notify the company as soon as possible, and give the company a chance to investigate and respond.

2. Companies Should Be Given Sufficient Time to Address Whistleblower Claims.

The Proposed Rules provide that whistleblowers who first report information about potential violations internally will be deemed to have reported the violation to the Commission as of the date that they report it to the company, locking in their "place in line" for a whistleblower award. However, this protection is only effective if the employee reports the matter to the Commission within 90 days thereafter.[13] The Commission asks whether this is an appropriate time frame.[14]

While 90 days may be sufficient to deal with certain matters, the time needed to respond to a claim of wrongdoing depends on many factors, including the nature and complexity of the complaint, the location(s) of the persons or business units involved, and numerous other factors. In many cases, 90 days will not be sufficient to investigate alleged acts of wrongdoing. For example, where the alleged misconduct implicates matters involving overseas subsidiaries and possible violations of the Foreign Corrupt Practices Act, more time would no doubt be needed for the company to determine the validity of such claims and to deal with them. The Roundtable believes that a period of at least 180 days would be more appropriate.

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[13] *See* Proposed Rules § 165.2(l)(2), Proposing Release, 75 Fed. Reg. at 75744. In addition, anyone who provides information to Congress, any other federal, state, or local authority, any self-regulatory organization, or the Public Company Accounting Oversight Board and, within 90 days, submits the same information to the Commission, will be deemed to have provided the information to the Commission as of the date of the original disclosure, report, or submission to one of these authorities. *See id.*

[14] Proposing Release, 75 Fed. Reg. at 75733.

More importantly, to give companies a reasonable time to investigate whistleblower claims, we believe that where whistleblowers use internal procedures, the 180-day time period, rather than being the maximum amount of time that a whistleblower may wait before going to the Commission, should be the amount of time that a company is given to respond to the whistleblower before the whistleblower goes to the Commission.[15] Similarly, if the Commission does not require whistleblowers to report internally, the company should, as discussed above, be notified as soon as possible after the Commission receives a complaint. In such cases, the company should again be given at least 180 days to investigate and respond to the Commission before the Commission makes a determination whether to proceed further with the matter. In either event, the goal should be to provide the company with sufficient time to fully assess and investigate such claims, and make a determination with respect to what it believes to be the most appropriate response to the information. Giving companies 180 days to review, investigate, and respond to whistleblower claims will not prejudice the whistleblower, so long as the whistleblower can document the date on which she or he made the report to the company.[16]

E. If the Commission Does Not Require the Use of Internal Policies and Procedures, It Should Make Their Use a Specific Factor in Determining the Amount of an Award.

As explained above, the Roundtable believes strongly that where a company has established procedures for receiving, responding to, and investigating claims, whistleblowers should be using those procedures (subject to the limitations and exceptions noted above). However, even if the Commission chooses not to require the use of internal policies and procedures, the Roundtable believes that, at the very least, a whistleblower's use of internal policies and procedures must be a specific factor in determining the amount of any award, not just something that the Commission may consider in appropriate cases.

Section 165.9 of the Proposed Rules lists four specific criteria that the Commission will "take into consideration" in making an award. In the Proposing Release, the Commission also discusses a longer list of "permissible considerations" to be used as the Commission sees fit. None of the considerations on either list include whether the whistleblower reported the potential violation through effective internal procedures.[17] The Roundtable believes that the use of internal procedures should be added to Section 165.9's list of specific factors that must be considered in determining the amount of awards. Making clear that the use of internal controls will have an impact on the amount of any reward should encourage increased use of those procedures, providing a good measure of the benefits described above. Making the use of internal procedures a specific factor in the determination of how much to award the whistleblower would help to balance the competing goals of facilitating effective internal compliance procedures and permitting persons to act as whistleblowers when a company knows about material misconduct but does not take appropriate steps to respond, by reducing the possibility that

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[15] The whistleblower could be required, as part of his or her complaint to the Commission, to attest that she or he reported the matter to the company, waited 180 days, and received no response after the initial acknowledgement. Of course, if the company provides a response to the whistleblower in less than 180 days, and the response is such that the whistleblower determines to then approach the Commission, the whistleblower would be able to do so.

[16] A process could be incorporated into the company's internal procedures. Alternatively, the Commission could maintain the time limit as a "default" to protect whistleblowers where the company fails to take action, but provide for "tolling" of the period if the company responds to the whistleblower with an attestation that it is in the process of investigating the complaint and that the company will respond to the whistleblower in writing upon completion of the investigation. That way, the whistleblower's place in line would remain protected.

[17] The SEC Release included on its list of permissible considerations, "whether, and the extent to which, a whistleblower reported the potential violation through effective internal whistleblower, legal or compliance procedures before reporting the violation to the [SEC]." SEC Release at 49-51, 75 Fed. Reg. at 70499-70500. In our comment letter to the SEC, we recommended, as we do here, adding the use of internal procedures to the Proposed SEC Rules' list of specific factors that must be considered in determining the amount of awards.

whistleblowers will be unduly influenced to bypass the company's procedures because of the potential for a large cash award.[18]

Furthermore, to reinforce the positive effects of having whistleblowers pursue available internal procedures, the Roundtable also suggests that the Commission strongly consider, in accordance with its statutory mandate to prescribe regulations for the payment of whistleblower awards, and its discretion to determine the amount of such awards (within the prescribed statutory minimum and maximum),[19] providing that a whistleblower's failure to utilize available internal procedures without clear, appropriate justification, will generally result in the whistleblower receiving a bounty of no more than the statutory minimum of 10 percent of the total monetary sanctions collected in the action.

II. Persons With a Duty to Report to the Company Should Not Be Entitled to Whistleblower Awards.

Under the Proposed Rules, certain persons will not be considered for awards because they will not be deemed to have independent knowledge of a potential violation. These are: persons with pre-existing legal or contractual duties to report; attorneys who obtain information from clients and make whistleblower claims for themselves (unless disclosure is permitted under federal or state attorney conduct rules); and persons who learn about violations through company compliance programs, or are in positions of responsibility for an entity, where the information is reported to them with the expectation that appropriate steps will be taken. However, this latter exclusion does not apply where the company does not disclose the information to the Commission "within sixty (60) days" or otherwise acts in "bad faith."[20]

These persons have established professional obligations to the company, and play a crucial role in the company's efforts to comply with applicable law. The Roundtable believes that the value of these functions would be undermined by monetary incentives for such persons to take their information to the Commission rather than to the company. Instead, persons with a duty to report information to the company, whether by virtue of a professional relationship (*e.g.*, an attorney), the terms of the person's employment and job function (*e.g.*, a compliance officer or internal auditor), or an outside service provider (*e.g.*, a compliance consultant or outside auditor), should not be entitled to whistleblower bounties. Such persons have a duty to report misconduct to the company, to work with the company to resolve such matters and, to the extent of their authority, to take all available steps to see that such issues are resolved (including, in appropriate circumstances, reporting to the Commission). They should not be tempted to instead serve their own interests by seeking to report information to the Commission in order to reap a personal reward.

The Roundtable is also very concerned with the idea of allowing persons providing "legal, compliance, audit, or similar functions or processes for identifying, reporting, and addressing potential non-

[18] We also note that the Proposed Rules create the potential for a whistleblower to recover from both the CFTC and the SEC for providing the same information. Although there is a provision in the Proposed SEC Rules, Rule 21F-3(d), which states that the SEC will not make an award for a "related action" if the whistleblower has already been granted an award by the CFTC for that same action, the Proposed Rules do not have an equivalent provision. Thus, the CFTC may be required to pay an award to a whistleblower who has already been paid by the SEC.

[19] *See* CEA §§ 23(b)(1), 23(c)(1)(A).

[20] Proposed Rules § 165.2(g)(4), Proposing Release, 75 Fed. Reg. at 75743. The Proposed SEC Rules have a similar provision; however, it would be triggered if the company does not report to the SEC within "a reasonable time." *See* Proposed SEC Rule 21F-4(b)(4)(iv). This inconsistency could cause confusion for entities subject to both CFTC and SEC jurisdiction in determining when to report matters. We note that our comments to the SEC regarding Proposed SEC Rule 21F-4(b)(4)(iv) parallel our comments here.

compliance with applicable law"[21] to become whistleblowers if the company does not disclose the information to the Commission within 60 days or the entity proceeds in "bad faith." As much as any of the other persons discussed above, these persons have a duty to bring such information to the company's attention, and they are compensated by the company for doing so. They should not be able to use that information for personal profit.

Moreover, the term "bad faith" is not defined. Using such a vague standard to define when a person performing a control function for the Company can become a whistleblower has the potential to entice certain persons to make their own, self-serving determination as to when the company has acted in "bad faith," and report information to the Commission even though the firm may be conducting an investigation or otherwise acting in a perfectly appropriate manner. It could even create an incentive for persons to deliberately inhibit or prevent internal processes from moving forward, so that they can report the matter to the Commission in hopes of profiting personally. The Roundtable believes that, like other professionals, persons providing legal, compliance, audit, or similar functions or processes for identifying, reporting, and addressing potential non-compliance with applicable law, should not be eligible to receive whistleblowers bounties.

III. The Proposed Rules Provide Little Protection From False and Frivolous Claims.

There is considerable concern expressed in the Proposing Release and the Proposed Rules for protecting employees from retaliation for whistle blowing activities. This is entirely appropriate and consistent with our view that the best way to approach potential violations of law by company insiders is to enable those with information about such violations to report it to the company in an atmosphere that fosters open and candid discussion. However, neither the Proposed Rules nor the Act offer much protection for companies faced with false and frivolous whistleblower claims, such as baseless claims by a disgruntled employee, a competitor seeking to gain an unfair advantage, or a shareholder who is unhappy that a proposal was not carried at an annual meeting. Each of these persons could use the Commission's whistleblower process to raise unfounded claims or report perceived violations that have no basis in fact, in hopes of damaging the company and/or its personnel, while at the same time realizing a significant financial windfall.

The Roundtable acknowledges that whistleblowers will be required to submit complaints in writing, and to declare, under penalty of perjury, that the information they provide is, to the best of their knowledge, information and belief, true and correct. This requirement is important but, in many cases, it will not provide sufficient protection. Many claims will be drafted without the assistance of an attorney (although whistleblowers have the right to seek the assistance of an attorney, and must do so if they file anonymous complaints). Thus, they are likely to be unclear or imprecisely drafted, and it will be difficult to prove that the allegations were not made with the requisite good faith, making it very difficult to pursue perjury or similar claims. The Roundtable believes that the Rules must permit a company to take good faith actions that are not retaliatory if they are based on factors other than a whistleblower's status; for example, actions relating to the legitimate discipline of employees. The Commission should also consider whether it can apply additional sanctions to those who use the whistleblower process as a sword rather than a shield, whether it is to protect employment; make reports to harm the company or its employees, officers, or agents for competitive or other reasons; or otherwise make claims for which there are no reasonable bases for believing that the allegations are true.

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[21] Proposing Release, 75 Fed. Reg. at 75730.

IV. The Proposed Rules Should Not Reward Bad Conduct.

Section 748(c)(2)(B) of the Act expressly prohibits persons who are criminally convicted from being eligible for a reward (as does Section 165.6(a)(2) of the Proposed Rules) but it is silent as to the effects of a civil judgment. While there are some limitations in the Proposed Rules on the amount of payment to persons who direct, plan, or initiate a violation,[22] it remains possible for a wrongdoer to get an award.[23] The Roundtable believes strongly that wrongdoers, criminal or civil, should not receive awards. Section 165.17 of the Proposed Rules provides that the Commission, in determining whether the required $1,000,000 threshold has been satisfied, will not count monetary sanctions that the whistleblower is ordered to pay, or that are ordered against any entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated. It also provides that the Commission will not add those amounts to the total monetary sanctions collected in the action for purposes of calculating the amount of payment to the culpable individual. The Proposing Release explains that "[t]he rationale for this limitation is to prevent wrongdoers from financially benefiting from their own misconduct."[24] The Roundtable respectfully submits that the Commission should take this rationale to its logical conclusion and exclude from the definition of "whistleblower" anyone who engages in or knowingly participates in the conduct giving rise to the action and resulting monetary sanction.[25]

Quite simply, it makes no sense for a program designed to detect and deter wrongdoing to provide financial incentives to the wrongdoers. Culpable whistleblowers should not benefit from their own misconduct. There are already incentives for wrongdoers to come forward, including reduced sanctions and credit for cooperating. Indeed, the Commission has stated specifically that it "has long given credit for cooperative conduct by respondents and defendants when determining the appropriate level of sanctions to impose or approve in enforcement actions."[26] It would be wrong to permit them to also profit (perhaps handsomely) from their wrongdoing or their involvement in wrongdoing. Also, there may be cases where the fund from which bounties are paid is not sufficient to cover a whistleblower's award, in which case the whistleblower will be paid from monies that otherwise might go to victims of wrongdoing.[27] It would be an outrageous result for a whistleblower who participated in wrongdoing to receive an award paid for out of a victim's pocket.

V. The Proposed Rules Should Provide Stronger Protections From Those Who Obtain Information Improperly.

The Proposed Rules would create powerful financial incentives for unscrupulous persons to download, copy, and steal confidential corporate and customer information in order to substantiate their claims and receive monetary rewards. Section 165.2(g)(6) provides that "[t]he Commission will not consider information to be derived from [the whistleblower's] independent knowledge" if the information was

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[22] *See* Proposed Rules § 165.17, Proposing Release, 75 Fed. Reg. at 75748.
[23] *See* Proposing Release, 75 Fed. Reg. at 75739-75740.
[24] Proposing Release, 75 Fed. Reg. at 75741.
[25] Although the Act does not by its terms exclude wrongdoers, other than those convicted of a criminal violation, from whistleblower status, we respectfully submit that the statutory authority granted to the Commission by Section 748(i) of the Act to "issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section," provides the Commission with sufficient flexibility to do so.
[26] *See* CFTC Enforcement Advisory, Cooperation Factors in Enforcement Division Sanction Recommendations (Mar. 1, 2007); *see also supra,* note 7.
[27] *See* CEA § 23(g)(3)(B); Proposed Rules § 165.12(b)(2).

obtained "[b]y a means or in a manner that violates applicable federal or state criminal law." According to the Proposing Release, "[t]his exclusion is necessary to avoid the unintended effect of incentivizing criminal misconduct."[28]

The Roundtable agrees that bounties should not be paid for information based on illegally obtained material, or information obtained or provided in violation of judicial or administrative orders. Furthermore, bounties should not be paid for reports based on information obtained in violation of any civil law prohibition, including any legal or regulatory privacy requirement, any foreign civil or criminal law or regulation, any other legal proscription, or any company policy designed to facilitate compliance with such criminal laws, judicial or administrative orders, civil laws (including legal or regulatory privacy requirements), foreign civil or criminal laws or regulations, or other legal proscriptions. Quite simply, violations of such laws, court orders, legal proscriptions, or company policies should not be rewarded. Moreover, the whistleblower program should include provisions making it clear that whistleblowers responsible for obtaining information in violation of any of the above prohibitions will not be protected by the anti-retaliation provisions, and will be subject to criminal prosecution and/or civil actions under applicable state and federal law.[29]

VI. The Proposed Rules Should Be Harmonized with the Proposed SEC Rules

The Proposed SEC Rules exclude from eligibility certain persons who are not specifically excluded from the Proposed Rules. For example, Proposed SEC Rule 21F-8(c)(6) would make ineligible the spouse, parent, child, or sibling of a member or employee of the SEC, or who resides in the same household as a member or employee of the SEC, in order to prevent the appearance of improper conduct by SEC employees. While Forms WB-DEC and WB-APP ask for disclosure of similar information under their respective "Eligibility Requirements" sections, the Proposed Rules do not specifically exclude the spouse, parent, child, or sibling of a member or employee of the CFTC, or who resides in the same household as a member or employee of the CFTC. We believe that they should.

Similarly, Proposed SEC Rule 21F-8(c)(2) excludes persons who "are, or were at the time [they] acquired original information, a member, officer, or employee of a foreign government, any political subdivision, department, agency, or instrumentality of a foreign government, or any other foreign financial regulatory authority," because "[t]he payment of awards to foreign officials could have negative repercussions for United States foreign relations, including creating a perception that the United States is interfering with foreign sovereignty, potentially undermining foreign government cooperation under existing treaties (including multilateral and bilateral mutual legal assistance treaties), encouraging corruption, and raising concerns about protection of foreign officials who become whistleblowers."[30] The Proposed Rules should include a similar prohibition.

In addition, Proposed SEC Rule 21F-8(c)(4) excludes persons who obtain information that given to the SEC "through an audit of a company's financial statements," where "making a whistleblower

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[28] Proposing Release, 75 Fed. Reg. at 75730.

[29] Financial services companies are particularly concerned about data breaches, because so much of their corporate information consists of non-public customer information. Whistleblowers who download information to support whistleblower claims may, deliberately or inadvertently, come into possession of such customer information. The costs to the banking industry of preventing and detecting data breaches, and notifying customers when their information is at risk of misuse, is already huge. Moreover, once corporate and customer information leaves its corporate data environment (especially if it leaves in electronic form) further distribution is virtually guaranteed. We believe that there is no good reason to create new incentives for such breaches.

[30] SEC Release at 58-59, 75 Fed. Reg. at 70502.

submission would be contrary to the requirements of Section 10A of the Exchange Act." No such prohibition is written into the Proposed Rules, even though it is possible that a person auditing a company's financial statements could unearth information that she or he could choose to report to the Commission. As noted in the SEC Release, an "important policy issue [is] raised by . . . the potential for the monetary incentives provided by [the whistleblower program] to invite submissions from" independent auditors, as well as attorneys and compliance personnel, "who may attempt to use information they obtain through their positions to make whistleblower claims," and thus "[t]his exclusion focuses on those groups with established professional obligations that play a critical role in achieving compliance" with applicable law.[31] Similarly, the Proposed SEC Rules exclude potential whistleblowers whose information was gained "[t]hrough the performance of an engagement required under the securities laws by an independent public accountant, if that information relates to a violation by the engagement client or the client's directors, officers or other employees."[32] Similar exclusions should be added to the Proposed Rules.

Finally, and more generally, while we understand that there may be certain matters that are relevant to whistleblowers under the Proposed Rules but not the Proposed SEC Rules, or vice versa, we believe that the final rules adopted by each Commission must be harmonized to the maximum extent possible, so that companies will not be subject to potentially inconsistent requirements or otherwise led to assume inadvertently that they are in compliance with both regimes when, in fact, they are not fully compliant with one or the other.

VII. The Proposed Rules Raise Serious Issues With Respect to the Attorney-Client Privilege.

Finally, the Roundtable is concerned about the overall approach that the Commission is taking in connection with the Proposed Rules with respect to the attorney-client privilege.

Proposed Rule 165.2(g)(2) provides that information will not be considered to derive from an individual's "independent knowledge" if the information was obtained "[t]hrough a communication that was subject to the attorney-client privilege." In order to exclude privileged attorney-client communications as a basis for independent knowledge, the proposed exclusion must necessarily apply with equal force to any person—attorney or client—who is a party to a privileged attorney-client communication. To avoid any confusion, the Roundtable believes that the Proposed Rule should be amended to explicitly clarify that it applies to *both* attorneys and clients, *i.e.*, officers, directors, employees, etc.

Moreover, the Roundtable believes that the Commission needs to incorporate safeguards to ensure that privileged information is not collected in the investigative process through whistleblowers' disclosures. For this reason, the Roundtable is very troubled by the Commission's Proposed Rule regarding communications between Commission staff and represented parties, as it directly undermines well-established ethical considerations intended to protect the attorney-client relationship and the confidential communications made pursuant to that relationship. Under Section 165.18 of the Proposed Rules, "the Commission's staff is authorized to communicate directly" with a "director, officer, member, agent, or employee of an entity that has counsel" who has contacted the Commission regarding a potential violation of the CEA "without seeking the consent of the entity's counsel."

[31] SEC Release at 4-5, 75 Fed. Reg. at 70488.
[32] Proposed SEC Rule 21F-4(b)(4)(iii); *see* SEC Release, 75 Fed. Reg. at 70493.

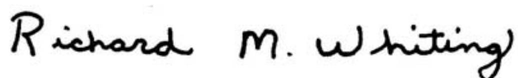
The communications contemplated by Section 165.18 of the Proposed Rules run afoul of ABA Model Rule 4.2, which provides that "[i]n representing a client, a lawyer shall not communicate about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." In the Proposing Release, the Commission takes the view that Section 165.18 does not violate Model Rule 4.2 because unpermitted contact with represented parties is authorized by Section 23 of the CEA.[33] We respectfully disagree. To be sure, no such authorization appears in the actual text of Section 23 or, for that matter, Section 748 of the Act. The Commission appears to justify such communications by what it perceives as a "strong Congressional policy" to facilitate disclosure and preserve confidentiality.[34] However, the Roundtable believes that the important and well-established ethical considerations that embody Model Rule 4.2 should not be discarded by the Commission where no explicit authorization is given by Congress to do so.

Accordingly, the Roundtable respectfully submits that the Commission should withdraw Section 165.18 of the Proposed Rules.[35] Before communicating with a director, officer, member, agent, or employee of a company regarding a potential violation of the CEA, Commission staff should be required to seek the consent of the company's counsel. In addition, to ensure that disclosures by whistleblowers are grounded upon independent knowledge, and to avoid any inappropriate or inadvertent encroachment on attorney-client communications, the Roundtable suggests that the Commission incorporate a warning into its protocol for communications with whistleblowers that explicitly disclaims that the Commission is seeking attorney-client communications.

Conclusion

The Roundtable recognizes that the Commission was mandated by Congress to develop a whistleblower process by which information about potential wrongdoing by companies and their insiders is uncovered in a manner that protects the integrity of the information and the interests of the person uncovering and disclosing the information. The Roundtable applauds the Commission for its efforts in trying to balance that mandate with the legitimate interests of companies in being involved in the process of detecting and dealing with such wrongdoing. Our comments are offered in the hope that they will help the Commission in its goal of developing final rules that strike the appropriate compromise between the desire to encourage and reward whistleblowers and the need to protect the integrity of well developed, robust compliance procedures by which companies hope to root out wrongdoing at the earliest possible stages.

Sincerely,



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[33] Proposing Release, 75 Fed. Reg. at 75741.
[34] *See id.*
[35] As a practical matter, the Proposed Rules in theory could cause CFTC staff to run afoul of ethical rules of the states in which they are admitted, and thus subject themselves to disciplinary action by state bar authorities.