TAF
TAXPAYERS AGAINST FRAUD

THE FALSE CLAIMS ACT LEGAL CENTER

February 4, 2011

COMMENT

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

Re: Dodd-Frank Wall Street Reform and Consumer Protection Act's
Commodity Whistleblower Incentives and Protection Program

Dear Mr. Stawick:

Taxpayers Against Fraud ("TAF") submits these comments in response to the CFTC's (or "Commission") proposed rulemaking governing the whistleblower program established by Section 748 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010) (hereinafter "Dodd-Frank"). TAF is a national non-profit, public interest organization dedicated to combating fraud through the promotion and use of federal and state whistleblower laws. TAF's membership includes nearly 400 attorneys who represent whistleblowers and assist federal and state governments to recover funds lost through fraudulent and corrupt business practices.

At the Commission's invitation, TAF submits these comments in response to the Commission's proposed rules, which TAF generally believes are consistent with Congressional intent and will create an effective whistleblower program. However, TAF has concerns regarding some of the Commission's proposed rules, and urges the Commission to reconsider and revise them consistent with the suggestions discussed below.

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I. THE FALSE CLAIMS ACT'S WHISTLEBLOWER PROGRAM IS A TEMPLATE FOR SUCCESS AND SHOULD GUIDE THE COMMISSION'S RULEMAKING

TAF is uniquely situated to comment on the factors necessary to build a successful whistleblower program. Since 1986, TAF's members have represented whistleblowers in federal False Claims Act ("FCA") matters that have generated tens of billions of civil and criminal recoveries, and set records for Department of Justice success. The FCA's whistleblower provisions are recognized to be the Justice Department's chief civil fraud enforcement tool,[1] and are a model for the states[2] and the Internal Revenue Service,[3] which have adopted similar whistleblower statutes.

The impact and importance of FCA whistleblower matters goes well beyond the large dollar amounts recovered for US taxpayers, however. False Claims Act matters – big and small – protect patients, safeguard our military, and provide transparency and integrity in government contracting that touches everything from advance weapons systems to public employee retirement funds. Importantly, FCA whistleblower enforcement has also yielded serious efforts to improve internal compliance within the business community and is estimated to have saved tens of billions of dollars through deterrent effects.

The same potential exists for the CFTC's whistleblower program. A well-crafted CFTC program will generate high quality information, realize large recoveries, improve deterrence, safeguard investors, bring greater transparency to the markets, and reinvigorate and stimulate meaningful internal compliance programs. These results are entirely consistent with the Commission's overall mission "to protect market users and the public from fraud, manipulation,

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[1] See H.R. Rep. No. 99-660, p. 18 (1986) ("[T]he False Claims Act is used as ... the primary vehicle by the Government for recouping losses suffered through fraud").

[2] At least twenty eight states have enacted false claims statutes that include whistleblower provisions modeled on the federal False Claims Act.

[3] See Internal Revenue Code Sections 7623(a) and (b).

and abusive practices related to the sale of commodity and financial futures and options, and to foster open, competitive, and financially sound futures and option markets."[4]

There are at least five key factors to the FCA's success. First, the statute provides a guaranteed, non-discretionary award if the whistleblower's information leads to the government's recovery or judgment. Second, the statute provides federal court oversight over the whistleblower award determination. Third, the statute creates a structure for whistleblower collaboration in investigation and prosecution, bringing needed private resources to bear. Fourth, there are limited and discrete bases for denying an award under the statute, and it does not create broad disqualifications based on an individual's status. Fifth, the statute does not require that an individual exhaust internal procedures before filing a whistleblower action.

Whistleblowers, therefore, have confidence that if they provide information that leads to an FCA judgment or settlement, then they will almost certainly receive a guaranteed award. They are assured that the award can be reviewed by a court, if the Justice Department does not adequately value their contribution. This certainty has encouraged more than 7,000 whistleblowers to report fraud to the Department of Justice through the False Claims Act. The payoff to taxpayers has been huge. Altogether, the US Treasury and state governments have recovered nearly $30 billion in civil settlements and criminal fines as a result of whistleblower cases since Congress strengthened the whistleblower provisions of the FCA in 1986. Nearly half of that amount has been recovered in just the past five years, as the public has become more familiar with the False Claims Act and the *qui tam* provisions.

At the same time, the amounts recovered from individual cases continue to set records: $2.3 billion from a civil and criminal settlement in 2009 with Pfizer Inc., which is the largest US recovery in history; $325 million from a civil and criminal settlement in 2009 with Northrop-Grumman, which was the largest defense contractor settlement in a whistleblower case; and $302 million in 2009 from a civil and criminal settlement with Quest Diagnostics, which was the largest settlement ever paid by a medical lab company for a faulty product.

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[4] http://www.cftc.gov/About/MissionResponsibilities/index.htm.

II. COMMENTS ON THE CFTC'S PROPOSED RULES

1. Proposed Rule 165.2(g)'s Definition Of "Independent Knowledge" Goes Well Beyond What Congress Intended And Impermissibly Creates Several Non-Statutory Bases To Deny Whistleblower Awards

Dodd-Frank provides for awards to whistleblowers "who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action." Dodd-Frank § 748(b)(1). Under Dodd-Frank, "original information" that may qualify for a whistleblower award means information that is, inter alia, "derived from the independent knowledge or analysis of a whistleblower." Dodd-Frank § 748(a)(4)(A). The Commission's Proposed Rule 165.2(g) defines "independent knowledge" to mean "factual information in your possession that is not generally available to the public." The proposed definition of "independent knowledge" has the effect of narrowing the statutory definition of "original information." Although Dodd-Frank generally precludes claims based on information already "known to the Commission," Dodd-Frank § 748(a)(4)(B), it contains no language prohibiting claims based on information that is "generally available to the public." Likewise, Dodd-Frank precludes original information that is "exclusively derived from an allegation made" in seven specifically enumerated fora. Dodd-Frank § 748(a)(4)(C). To the extent that information is publicly available, this statutory provision only precludes an award if the information were disclosed in at least one of the enumerated fora and the whistleblower's information was "exclusively derived" from it. This provision of Dodd-Frank parallels the "public disclosure" provision of the False Claims Act. 31 USC § 3730(e)(4). However, by defining "independent knowledge" to bar information derived from any public sources, and not just the seven identified in the statute, the Commission would bar a broad category of claims that Dodd-Frank would otherwise permit under Sections 748(a)(4)(B) and (C).

In addition, while Proposed Rule 165.2(h) permits a whistleblower to proceed based on "independent analysis" of publicly available information under certain specified circumstances, the proposed rule requires that the "analysis" "reveal[] information that is not generally known or available to the public." See Proposed Rule 165.2(c). Accordingly, if a whistleblower were to cause the CFTC to focus on publicly available information, of which it was not otherwise aware, that would not form the basis for a claim. See Proposed Rule 165.2(i). If it were not for the fact

that "independent knowledge" was defined in the first instance to exclude claims based on publicly available information, then this exception for "independent analysis" would not even be necessary.

Moreover, Proposed Rule 165.2(g)'s definition of "Independent Knowledge" creates several non-statutory bases for excluding whistleblowers from the Commission's program. Congress intentionally limited the occasions on which an award could be denied for a very basic reason – imposing impediments to awards chills the submission of valuable information by whistleblowers. With this in mind, Dodd-Frank created only four, narrowly drawn bases for disqualifying a whistleblower. Dodd-Frank § 748(c)(2). These include disqualification where: (1) a whistleblower, at the time the information was acquired, was an employee, member or officer of "an appropriate regulatory agency," the Department of Justice, a self-regulatory organization, the Public Accounting Oversight Board, or a law enforcement organization; (2) a whistleblower is convicted of a criminal violation related to the action for which he might receive an award; (3) a whistleblower's information was previously submitted by another whistleblower; and/or (4) a whistleblower fails to submit information to the Commission in the required form. Id. The statute goes no further than this.

It is important to note that each of these statutory bases for denying an award is either known, or ascertainable to a high degree of certainty, at the time a whistleblower makes a submission. Such clarity is vital to the success of a whistleblower program because it assures those considering making a submission that if they fulfill established, clear requirements (and the monetary sanction exceeds $1 million), they will be entitled to an award of between 10 and 30 percent of amounts recovered. This certainty is paramount in motivating whistleblowers to take the personal and professional risks in stepping forward. The success of the False Claims Act stands as proof. On the other hand, uncertainty causes even well-intended whistleblower programs to fail.

The exclusions listed in Proposed Rule 165.2(g) stray from Dodd-Frank's restrained approach by expanding the bases for denying a whistleblower award and creating terms that inject uncertainty into the process. Specifically, Proposed Rule 165.2(g) states that the "Commission will not consider your information to be derived from your independent

knowledge if you obtained the information" from one of six prohibited sources. As mentioned above, none of the six exclusions appears in Dodd-Frank.

Below, TAF provides comments and recommendations as to the non-statutory disqualifications described in Proposed Rules 165.2(g)(2) through (6).

(a) Proposed Rule 165.2(g)(2) denies a whistleblower an award if he received "independent knowledge" "[t]hrough a communication that was subject to the attorney-client privilege, unless the disclosure is otherwise permitted by the applicable federal or state attorney conduct rules." This definition of "independent knowledge" is unnecessary, as the handling and use of privileged information is appropriately addressed through rules governing the use of privileged information as evidence. Indeed, judicial decisions and state ethics rules already provide ample guidance on the circumstances under which attorney-client communications can properly be used by the Government as evidence. To create a separate basis for disqualification of whistleblowers goes beyond what the Commission should do or needs to do.

Rather than creating this non-statutory basis for disqualification, the CFTC can achieve its goals of preventing whistleblowers from relying on privileged information by proposing a rule that excludes validly privileged information as evidence. This recommended approach is consistent with the Justice Department and IRS whistleblower programs, which also exclude the use of attorney-client privileged information in almost every circumstance. However, neither program makes the use of privileged information a basis for denying a whistleblower an award – Dodd-Frank does not either. Indeed, under a rule that addresses privilege issues by excluding validly asserted attorney-client privileged information, whistleblowers who exclusively rely on privileged information would not be entitled to an award because they would have no non-privileged information to submit. Thus, an approach that excludes validly-asserted privileged information as evidence is both consistent with Dodd-Frank and results in no award being paid in situations where the privilege has been abused.

The approach recommended by TAF would fairly distinguish between individuals who exclusively rely on privileged information and those who have independent knowledge of violations in addition to privileged information. A rule that excludes privileged evidence would sufficiently discourage persons with no information other than the privileged materials, while not

penalizing those who have sufficient non-privileged information but who may also inadvertently submit privileged information.

(b) Similarly, Rule 165.2(g)(3) proposes an exclusion for whistleblowers whose "independent knowledge" is acquired "[a]s a result of the legal representation of a client on whose behalf [the whistleblower's] services, or the services of [the whistleblower's] employer or firm, have been retained, and [the whistleblower] seek[s] to use the information to make a whistleblower submission for [his] own benefit, unless disclosure is authorized by the applicable federal or state attorney conduct rules."

As was true with respect to Proposed Rule 165.2(g)(2), this provision is without basis in the language of Dodd-Frank and would place the CFTC in the position of deciding ethical issues governing attorneys that are already (and better) addressed under state law by judicial decisions and rules of ethics. Again, the better approach is that followed by the Justice Department and the IRS – *i.e.*, exclude validly privileged information from consideration, and leave sanctions against attorneys to those state professional and judicial tribunals charged with enforcing the relevant local conduct rules. As mentioned above, under the approach suggested by TAF, submissions that are derived solely from validly privileged information would fail by virtue of the exclusion of that evidence.

(c) Proposed Rule 165.2(g)(4) disqualifies any whistleblower "with legal, compliance, audit, supervisory, or governance responsibilities for an entity, and the information was communicated to [the whistleblower] with the reasonable expectation that [the whistleblower] would take appropriate steps to cause the entity to remedy the violation, unless the entity subsequently failed to disclose the information to the Commission within sixty (60) days or otherwise proceeded in bad faith."

This rule and the one following in subsection (5) are among the most problematic proposed by the Commission and would bar a wide range of potential whistleblowers, among whom are those most likely to possess significant information of wrongdoing. The "supervisory" responsibilities relevant to disqualification under this subsection are undefined, and could be broadly cast to include a vast number of employees in any organization. Such vagueness would no doubt chill many from stepping forward. Although the provision contains

an exception for circumstances where the subject entity "did not disclose the information to the Commission within sixty days or otherwise proceeded in bad faith," the exception itself places unreasonable burdens on the potential whistleblower.

Indeed, the proposed rule raises the larger question of why a requirement mandating that concerns be reported internally first is bad policy. As discussed below, any "one-size fits all" requirement to report concerns internally first is unworkable in any robust whistleblower program. In TAF's experience, the most significant frauds are directed from the top, rather than by mid- or low-level employees. Requiring that a whistleblower first advance his allegations internally to officials who may be the architects of the scheme places that individual's livelihood in peril. Practical experience shows that reporting high-level wrongdoing to those very wrongdoers is more often than not a fast track to termination, as described below. In addition, requiring that whistleblowers report internally first in all situations can imperil law enforcement ends, by providing opportunities to destroy or conceal evidence, or otherwise thwarting the CFTC's investigation of alleged wrongdoing.

The exception to the proposed rule – *i.e.*, when the company fails to disclose the whistleblower's information to the CFTC – inherently shows why internal reporting in this instance is not a necessary requirement. The rule proposes a structure where either way the Commission will get the whistleblower's information – it is just a matter of who delivers it first and when. There is no strong policy reason that the wrongdoer should be the one to submit information raised by the whistleblower, and there are very good reasons why the whistleblower should have the option of going first to the Commission, including fear of workplace reprisals or the destruction of evidence.

Congress could have mandated that whistleblowers report claims internally before submitting information to the CFTC, but it did not. Congress understands - and the Commission should realize - that hurdles mandating internal reporting will not serve the Commission's whistleblower program or, ultimately, market investors.

(d) Proposed Rule 165.2(g)(5) includes similar exclusions to those found at Proposed Rule 165.2(g)(4). This proposed rule disqualifies individuals who obtain information "from or through an entity's legal, compliance, audit or other similar functions or processes for

identifying, reporting and addressing potential non-compliance with law, unless the entity did not disclose the information to the Commission within sixty (60) days or otherwise proceeded in bad faith."

This disqualification suffers from perhaps even greater overbreadth and vagueness than does Proposed Rule 165.2(g)(4). The exclusion bars a broad category of claims by anyone exposed to relevant information through legal, compliance, audit or other undefined "similar functions," "unless the entity did not disclose the information to the Commission sixty days or otherwise proceeded in bad faith." Thus, under this proposed rule, any employee who happens to learn relevant information through exposure to one of the foregoing enumerated functions – even if he may have other sources of knowledge – risks not being able to proceed unless he first reports the issue internally. As with subsection (4), potential whistleblowers in this category would place their careers at risk, potentially for no reward, to try to satisfy the exception to this exclusion, making it highly unlikely that they would provide the CFTC with information.

Knowledgeable persons should be permitted alternative means of reporting their concerns, either internally or directly to the CFTC, because it increases the probability that violations will be reported, and thus increases the likelihood of compliance in the first instance. Indeed, we know of no other law enforcement paradigm that requires that potential wrongdoers be alerted first, before prosecuting officials learn of the potential wrongdoing. Although constraints on an entity's legal and compliance officials may be appropriate, we believe that finalizing the sweeping and vague categories of affected individuals included in Proposed Rules 165.2(g)(4) and (5) would be profoundly poor public policy, and would seriously thwart the use of whistleblower information in achieving enforcement and deterrence goals.

Although we believe that Dodd-Frank is better served by eliminating Proposed Rules 165.2(g)(4) and (5), at minimum, these proposed rules should be revised to limit and clearly define the category of affected individuals to designated legal and compliance officers. Moreover, we believe that the time for such defined officials to wait before submitting to the Commission should be reduced to thirty (30) days, which is a sufficient time for entities to disclose potential violations and will motivate them to act more expeditiously to self-disclose as they become aware of violations.

With respect to the Commission's request for comment as to a longer period for disclosure, TAF believes that extending the period for self-reporting will only harm investors and discourage whistleblowers from acting promptly to assist the government's enforcement efforts. Knowledgeable persons should be permitted alternative means of reporting their concerns, either internally or directly to the CFTC, because it increases the probability that violations will be reported, and thus increases the likelihood of compliance in the first instance. Indeed, we know of no other law enforcement paradigm that requires that potential wrongdoers be alerted first, before prosecuting officials learn of the potential wrongdoing. We believe that finalizing Proposed Rules 165.2(g)(4) and (5) would be profoundly poor public policy, and would seriously thwart the use of whistleblower information in achieving enforcement and deterrence goals.

(e) Proposed Rule 165.2(g)(6) disqualifies whistleblowers who obtain information "[b]y a means or in a manner that violates applicable federal or state criminal law." This proposed disqualification is directly at odds with Dodd-Frank, which provides only that no award shall be made to "any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower could receive an award under this section." Dodd-Frank § 748(c)(2)(B) (emphasis added).

Thus, the statute is clear that only persons convicted of a crime relating to the action are excluded. Yet the proposed exclusion goes much further. Proposed Rule 165.2(g)(6)'s use of the term "violates" eliminates the statute's requirement of a conviction by an appropriate tribunal, and replaces it with the CFTC's judgment as to whether a violation occurred.

This proposed rule could also preclude whistleblowers from states that criminalize a broad range of conduct that can include, under certain circumstances, the taking of documents obtained in the course of employment. Such prospective whistleblowers could be denied a reward if the Commission adopts a broad reading of certain criminal statutes such as "trespass," "conversion," and other such laws – readings that no doubt will deter many whistleblowers. Historically, the only issue of concern for the Government in such cases has been whether it may lawfully make use of the documents, and there are many instances where it may do so, as long as it did not direct the whistleblower to take those documents. There is no sound policy reason for a threshold rule barring a whistleblower with probative documents from proceeding, if the Government would be permitted to use those documents by operation of law to prosecute

securities violations in any event. We encourage the Commission to revise Proposed Rule 165.2(g)(6), by conforming it to the statutory language and excluding only those whistleblowers who are "convicted of a criminal violation related to the judicial or administrative action."

With respect to the independent issue of the copying of documentary evidence of wrongdoing, we also propose that that Commission adopt language similar to the HIPAA[5] regulations governing the taking of documents for the purpose of a fraud investigation. See 45 CFR sec. 164.502(j)(1), which provides:

> (j) Standard: Disclosures by whistleblowers and workforce member crime victims.
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> (1) Disclosures by whistleblowers. A covered entity is not considered to have violated the requirements of this subpart if a member of its workforce or a business associate discloses protected health information, provided that:
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> > (i) The workforce member or business associate believes in good faith that the covered entity has engaged in conduct that is unlawful or otherwise violates professional or clinical standards, or that the care, services, or conditions provided by the covered entity potentially endangers one or more patients, workers, or the public; and
> >
> > (ii) The disclosure is to:
> >
> > > (A) A health oversight agency or public health authority authorized by law to investigate or otherwise oversee the relevant conduct or conditions of the covered entity or to an appropriate health care accreditation organization for the purpose of reporting the allegation of failure to meet professional standards or misconduct by the covered entity; or
> > >
> > > (B) An attorney retained by or on behalf of the workforce member or business associate for the purpose of determining the legal options of the workforce member or

[5] Health Insurance Portability and Privacy Act, Public Law 104-191, 104th Congress.

business associate with regard to the conduct described in paragraph (j)(1)(i) of this section.

A similar rule would protect the CFTC's interest in receiving probative evidence of wrongdoing, and better effectuate the policies underlying the Dodd-Frank whistleblower provision by setting clear standards as to when documents obtained in employment may be copied and submitted to enforcement officials.

2. Proposed Rule 165.2(k) And (l)'s Definition Of "Original Information" And "Original Source" Are Problematic

TAF incorporates by reference its Comments regarding Proposed Rule 165.2(g)'s definition of "Independent Knowledge," pages 4 – 12, *supra*, as that proposed rule has the effect of narrowing Dodd-Frank's definition of "original information".

In addition, TAF believes that the Commission's approach of encouraging whistleblowers to first report violations internally reporting without penalizing those who do not report, strikes an appropriate balance. TAF agrees with the Commission that it is necessary to protect the "place in line" for whistleblowers who choose first to report violations internally. TAF agrees with Proposed Rule 165.2(l)'s provision that if a whistleblower reports violations internally and then goes to the Commission, then the whistleblower's submission to the CFTC will be backdated and deemed made as of the date of the internal reporting. However, TAF encourages the Commission to extend the period for backdating from 90 days to 180 days. Whistleblowers often report fraud with every expectation that the report will be acted upon. The realization that the company intends to ignore the whistleblower's efforts often takes a great deal of time to develop – far longer than three months. The rule should accommodate this practical reality by extending the backdating period to six months.

Furthermore, with respect to whistleblowers who first report violations internally, TAF notes that Proposed Rule 165.9 sets forth the criteria to be considered when determining the amount of a whistleblower's award. One of those factors is "[t]he degree to which the whistleblower took steps to prevent the violations from occurring or continuing." To the extent that an individual's reporting internally is deemed a "step to prevent violations from occurring or

continuing," TAF agrees with the Commission that such reporting should be considered a "plus" factor in an award determination and should justify a higher reward.

3. Proposed Rule 165.2(o)'s Definition Of "Voluntary Submission Or Voluntarily Submitted" Is Overbroad And Vague

Proposed Rule 165.2(o) provides that the terms "voluntary submission" and "voluntarily submitted" require that a submission be "made prior to any request from the Commission, congress, any other federal or state authority, the Department of Justice, a registered entity, a registered futures association, or a self-regulatory organization to [the whistleblower] or anyone representing [the whistleblower] (such as an attorney) about the matter to which the information in the whistleblower's submission is relevant." The proposed definition also provides that a whistleblower "will be considered to have received a request, inquiry or demand if documents or information from [the whistleblower] are within the scope of a request, inquiry, or demand that [the whistleblower's] employer receives unless, after receiving the documents or information from [the whistleblower, the] employer fails to provide [the whistleblower's] documents or information in a timely manner." Id.

This definition is overbroad and vague, and could potentially bar cases where a general or informal request for information is made, yet the whistleblower's information is arguably "relevant" to the request. This would result in cases being barred, even when the requesting authority was not focused on the "relevant" issue and had not specifically intended to ask for documents relevant to that issue.

For example, a request by a public employee pension fund for basic information concerning Forex currency trades on its account could preclude a "voluntary" submission of whistleblower allegations that the Forex currency broker engaged in large-scale mischarging, even if those allegations were not publicly known. In this instance the information requested is "relevant" to the whistleblower's allegations, even if the requesting agency is completely unaware of those allegations.

Rather than create an exclusion based on whether the information is "relevant" to a request, Rule 165.2(o) should be revised so that it bars individuals whose allegations are the subject of investigation by the public entities identified in the Rule. This is far more consistent

with the policy goals underlying the proposed rule – *i.e.*, to preclude parasitic and opportunistic whistleblowers. The suggested revision targets those who submit allegations that are already under investigation, while not sweeping in whistleblowers whose information may be relevant to a request, but whose allegations are as yet unknown.[6]

4. Proposed Rule 165.2(i) Imposes Additional, Non-Statutory Hurdles To The Meaning Of "Led To The Successful Enforcement"

To qualify for an award, Dodd-Frank requires that a whistleblower's information must have, inter alia, "led to the successful enforcement of the covered judicial or administrative enforcement action or related action." Dodd-Frank § 748(b)(1). Proposed Rule 165.2(i), however, defines the phrase: "information that led to successful enforcement" to mean information that causes the CFTC staff "to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning new or different conduct as part of a current examination or investigation, and [the whistleblower's] information significantly contributed to the success of the action." (emphasis added).

As proposed, this rule is overbroad and deviates significantly from the statutory language. The Commission thus greatly broadens the agency's discretion to deny awards beyond what Dodd-Frank contemplates. TAF agrees that commencing, opening, or reopening an examination or investigation are all appropriate definitions for what "leads to a successful enforcement action." Each term connotes a causal connection between the submission of the information and the ultimate enforcement action. That is what Congress intended.

However, the additional requirement that information "significantly contribute" to the success of the action goes far beyond the law and introduces unacceptable vagueness and contingency – thereby diluting the structure of mandatory awards enacted by Congress.

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[6] The distinction between information and allegations is also found in the FCA, which in some instances may bar a whistleblower action where "substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed." 31 USC § 3730(e)(4). The False Claims Act's focus on "allegations" that are in the public domain is a targeted, and we think appropriate, approach to precluding opportunistic – but not valid – whistleblowers.

Judgment of what constitutes a "significant contribution" is subjective and leaves the decision as to whether to make an award to the Commission's sole discretion.

Dodd-Frank has rejected a structure that leaves the question of whether to make an award to the Commission's discretion. The statute makes clear that the significance of the contribution is not a threshold consideration as to whether an award should be made. See § 748(b)(1).7 The significance of the whistleblower's contribution is only a factor in determining how much an award should be – *i.e.*, where on the range of 10 to 30 percent it should be. See § 748(c)(1)(B)(i)(I).8 Yet the proposed rules would make contribution not only a factor in determining how much to award, but whether to make an award at all. By importing considerations for determining the amount of an award into the definitions of whether to award, the CFTC has rendered Congress' mandatory awards a matter of agency discretion. Such uncertainty will only discourage whistleblowers from coming forward, thereby undermining Congressional intent and the purposes of the whistleblower program.

The proposed rule exceeds the bounds of Dodd-Frank, and it should be revised to conform to the structure and language of the statute.9

5. Proposed Rule 165.7 Creates A Burdensome And Backwards Claims Process

Proposed Rule 165.7 unduly burdens whistleblowers by requiring that they notify the CFTC of their claim for reward upon the successful completion of an enforcement action. The proposed rule states that when a CFTC action results in monetary sanctions greater than $1 million, "the Commission will cause [a] Notice of a covered judicial or administrative action to be published on the Commission's Web site subsequent to the entry of a final judgment or order

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[7] "... the Commission ... shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or enforcement action. . . ." (emphasis added).

[8] "In determining the amount of an award. . . the Commission (i) shall take into consideration – (I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action." (emphasis added).

[9] The False Claims Act is similarly structured and distinguishes between threshold entitlement, and factors for determining the size of the award. 31 USC § 3730(d).

in the action," and that a whistleblowers will be required "to file their claim for an award within sixty (60) days of the date of the monetary sanctions being imposed in the related action. A claimant's failure to file timely a request for a whistleblower award would bar that individual [from] later seeking a recovery."

This procedure is backwards and creates unnecessary hurdles for whistleblowers who – by law – are entitled to receive a mandatory award. Clearly, the CFTC will handle enforcement actions in all instances and will know which individuals have made submissions. Thus, the Commission is best-positioned to notify potential claimants that the right to an award, if any, has ripened. Yet, Proposed Rule 165.7 makes no mention of any attempt by the Commission to personally notify whistleblowers of monetary sanctions and their right to receive a reward. If finalized, the rule would almost certainly result in denying qualified whistleblowers their rightful awards in many cases.

But not only is the proposed rule impractical and unfair, it is also contrary to the law. The statute is clear: The Commission "shall pay an award" where a whistleblower (1) voluntarily provided, (2) original information, (3) that led to the successful enforcement action. See § 748(b)(1). The statute is mandatory. There is no additional language providing for forfeiture of an award for failure to advise the CFTC of facts that are already known to it.

Proposed Rule 165.7 should be revised so that the CFTC shall advise whistleblowers when the right to a potential award has ripened by virtue of the recovery of more than $1 million in monetary sanctions.

Should you have any questions or need additional information, please do not hesitate to contact Cleveland Lawrence III at (202) 296-4826, ext. 27 or Erika Kelton at (202) 296-7572.

Sincerely,

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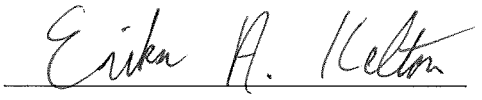

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