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April 26, 2011

VIA FIRST-CLASS MAIL
Mr. David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, D.C. 20581

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

Dear Mr. Stawick:

This law firm serves as counsel to the National Coordinating Committee for Multiemployer Plans ("NCCMP"). Please accept the enclosed comments as a supplement to the NCCMP's original February 4, 2011 comments in response to the Commodity Futures Trading Commission's Proposed Rule for Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act.

Thank you very much for your attention to this matter.

Sincerely,

/s/
Gerard M. Waites

Enclosure

cc: Randy G. DeFrehn
Donald J. Capuano

How Rampant Is Fraud & Other Illicit Conduct on Wall Street?

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April 26, 2011

I. Introduction

A review of recent cases and pending investigations involving illicit practices in U.S. financial markets reveals a disturbing trend. Rampant insider trading, bribery and a host of other fraudulent financial practices appear to plague Wall Street and leading banks and financial service companies as we struggle to rebuild the economy. Undoubtedly, the conduct underlying these scandals was a factor in the greatest economic downturn since the Great Depression, a financial crisis of such magnitude it nearly brought our nation to its knees.

The harmful impact of such practices cannot be understated. Epidemic fraud in financial markets threatens valuable assets of institutional investors and modest pensions of everyday working people, as well as the stability of the economy itself.

II. Recent Cases & Investigations

The cases listed below, involving investigations and enforcement actions in diverse sectors of the financial industry, highlight the broad scope of suspected or proven fraud on Wall Street. Some of these cases have been successfully adjudicated or settled; others involve claims in pending cases.

- **Abusive mortgage practices** alleged against Bank of America, Wells Fargo and Citigroup for reportedly pursuing foreclosures against homeowners without proper documentation and signing off on paperwork with only a cursory examination.[2]

- UBS officials accused of **widespread conspiracy** for paying public agencies below-market returns on municipal bond deals.[3]

- Goldman Sachs charged with **fraudulently misleading** investors by creating a mortgage security that was bet against by a hedge fund manager who was allegedly involved in establishing that very security.[4]

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[1] The National Committee for Multi-Employer Plans (NCCMP) is a non-profit membership organization that monitors, on a non-partisan basis, legislative, regulatory and legal developments from conception to implementation to enforcement on behalf of multiemployer benefit plans, many of which have substantial investments in U.S. financial markets.

[2] Nelson D. Schwartz & Eric Dash, *3 Banks Warn of Big Penalties in Mortgage Inquiries*, Dealbook Blog, N.Y. TIMES (Feb, 25, 2011), *available at* http://dealbook.nytimes.com/2011/02/25/3-banks-warn-of-big-penalties-in-mortgage-inquiries/

[3] *Ex-UBS Banker Pleads Guilty to Muni-Bond Fraud*, Dealbook Blog, N.Y. TIMES (May 20, 2010), *available at* http://dealbook.nytimes.com/2010/05/20/ex-ubs-banker-pleads-guilty-to-muni-bond-fraud/

[4] Sewell Chan & Louise Story, *Goldman Pays $550 Million to Settle Fraud Case*, N.Y. TIMES (July 15, 2010), *available at* http://www.nytimes.com/2010/07/16/business/16goldman.html

- Citigroup alleged to have **willfully ignored** signs of Bernard Madoff's multi-billion dollar ponzi scheme; reportedly had notice of unlawful conduct, including mass profiting from avoidable transfers.[5]

- Countrywide Financial executives accused of **fraudulently disguising** risks associated with subprime mortgages and improperly making profits on insider stock sales.[6]

- Charges of **passing illegal tips** alleged against former Goldman Sachs and Proctor & Gamble director, Rajat Gupta, regarding the companies' earnings and incoming investments.[7]

- **Conflict of interest** inquiry targeting various Wall Street firms for underwriting state/local bonds and then allegedly betting against those same bonds through credit default swaps.[8]

- **"Window dressing"** alleged against Lehman Brothers in using Repo 105 transactions to remove assets from books at the end of each quarter to disguise its actual financial state.[9]

- IndyMac executives accused of **fraudulent reporting** earnings to mislead shareholders concerning large investment losses.[10]

- **Insider trading** charges against Galleon hedge fund manager, Raj Rajaratnam regarding information on Intel's $1 billion investment in an Internet service joint venture.[11]

- Investigations into eight of the country's largest banks for allegedly **misleading credit rating agencies** for the purpose of inflating grades of certain mortgage securities.[12]

- Charges against officer of Petters Company, Inc involving an alleged **$3.7 billion ponzi scheme** involving multiple claims of fraud and money laundering impacting hedge funds, pastors, missionaries and retirees.[13]

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[5] *Trustee Suit Says Citigroup Ignored Signs of Fraud in Madoff Scheme*, N.Y. TIMES (Feb. 22, 2011), *available at* http://www.nytimes.com/2011/02/23/business/23madoff.html

[6] Gretchen Morgenson, *Lending Magnate Settles Fraud Case*, N.Y. TIMES (Oct. 15, 2010), *available at* http://www.nytimes.com/2010/10/16/business/16countrywide.html

[7] Peter Lattman, *Ex-Goldman Director Accused of Passing Illegal Tips*, Dealbook Blog, N.Y. TIMES (March 1, 2011), *available at* http://dealbook.nytimes.com/2011/03/01/former-goldman-director-charged-with-insider-trading/

[8] Ianthe Jeanne Dugan, *Scrutiny for Bets on Municipal Debt*, WALL STREET JOURNAL (May 14, 2010), *available at* http://online.wsj.com/article/SB10001424052748703950804575242753286993826.html

[9] Liz Rappaport & Michael Rapoport, *Auditors Face Fraud Charge*, WALL STREET JOURNAL (Dec. 20, 2010), *available at* http://online.wsj.com/article/SB10001424052748704138604576029991727769366.html

[10] Ben Protess & Susanne Craig, 3 *Former IndyMac Executives Are Accused of Fraud*, Dealbook Blog, N.Y. TIMES (Feb. 11, 2011), *available at* http://dealbook.nytimes.com/2011/02/11/indymac-executives-face-civil-charges/

[11] Azam Ahmed & Peter Lattman, *Galleon Trial Focuses on Clearwire Deal with Intel,* Dealbook Blog, N.Y. TIMES (March 21, 2011), *available at* http://dealbook.nytimes.com/2011/03/21/galleon-trial-focuses-on-hilton-buyout/

[12] Lousie Story, *Prosecutors Ask If 8 Banks Duped Rating Agencies*, N.Y. TIMES (May 13, 2010), *available at* http://www.nytimes.com/2010/05/13/business/13street.html?dbk

III. A Pattern & Practice of Fraud Becoming a Business Model

Numerous high-profile cases are not the only evidence of widespread, systematic fraud in U.S. financial markets. According to the U.S. Department of Justice:

> "Since July 2002, the [corporate fraud] task force has yielded . . . nearly 1,300 corporate fraud convictions to date, including more than 200 chief executive officers and presidents, more than 120 corporate vice presidents, and more than 50 chief financial officers."[14]

These were only the cases the government was able to detect, expose and fully prosecute; and since these only refer to cases involving "convictions," there are likely many more cases that resulted in settlements.

In the midst of the 2008-2009 financial meltdown, the FBI also reported that it was "conducting more than 500 investigations of corporate fraud."[15] More recently, CFO Magazine summarizes a new industry report on the subject as follows:

> "Last year, the Committee of Sponsoring Organizations of the *Treadway Commission's report on corporate fraud concluded that fraud continues to increase in depth and breadth despite Sarbanes-Oxley*; the methods of committing financial fraud have not materially changed; and traditional measures of corporate governance have limited impact on predicting fraud. In other words, same old same old, only worse: in its 2010/2011 Global Fraud Report, risk consulting firm Kroll found that *business losses due to fraud increased 20% in the last 12 months, from $1.4 million to $1.7 million per billion dollars of sales*. The report, based on a survey of more than 800 senior executives from 760 companies around the world, also found that *88% of the respondents reported being victims of corporate fraud over the past 12 months*. If fraud were the flu, this would qualify as a pandemic."[16]

Finally, just last month The Washington Post published an article exposing rampant insider trading on Wall Street, including cases in which illicit gains of $100 million from such practices were not unusual. Indeed, in this report, the U.S. Attorney for the Southern District of New York, Preet Bharara, stated that "[g]iven the scope of the allegations to date, we are not talking simply about the occasional corrupt individual; we're talking about *something verging on a corrupt business model*."[17]

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[13] *Petters Gets 50-Year Term for Ponzi Fraud*, Dealbook Blog, N.Y. TIMES (Apr. 9, 2010), *available at* http://dealbook.nytimes.com/2010/04/09/petters-gets-50-year-term-for-ponzi-fraud/

[14] DOJ Press Release, January 6, 2009, http://www.justice.gov/opa/pr/2009/January/09-odag-003.html

[15] *FBI Probes 530 Cases of Corporate Fraud*, The Washington Times, Feb. 12, 2009.

[16] Laton McCartney, *Where There's Smoke, There's Fraud*, CFO Magazine, March 1, 2011, http://www.cfo.com/article.cfm/14557373/ (emphasis added).

[17] David Hilzenrath and Jia Lynn Yang, *Federal Investigators Expose Vast Web of Insider Trading*, The Washington Post, (February 12, 2011). (emphasis added).

IV. A Strong Case for Stronger Whistle Blower Protection on Wall Street

Fraud, by definition, is secret. It is carefully hidden from government regulators, investors and the public. The problem with corporate fraud is that it can yield huge dividends. Even a little cheating on Wall Street can reap millions of dollars in illicit gains; major schemes can yield hundreds of millions or billions. These incentives are the driving force behind rampant growth in corporate fraud in America.

To protect investors and ensure confidence in the markets, effective counter-measures are needed to combat fraud. Indeed, given the systematic nature of illicit conduct uncovered in recent years, it is essential that our financial markets have the strongest safeguards and counter-incentives possible to combat fraud. The whistleblower protection and whistleblower incentive provisions of the Dodd-Frank Wall Street Reform Act (Public Law 111-203) were adopted by Congress precisely for this purpose.

By enacting this law, Congress recognized that persons employed in the financial industry, directly or indirectly, are one of the most reliable means for fighting and deterring corporate fraud, as long as there are effective employment protections and adequate incentives to detect and report illegal conduct. The Dodd-Frank Act, in Section 922, includes strong provisions in these areas. These provisions establish landmark protections with respect to how the federal government, aided by private citizens, should police Wall Street and combat corporate fraud.[18] Thus, the debate as to *whether* corporate whistleblowers should have strong protections and incentives has been concluded, Congress has established such provisions and now they must be implemented.

It is also important to recognize that the Dodd Frank whistleblower provisions were modeled on the False Claims Act (FCA), 31 U.S.C. §§ 3729, *et. seq*. This was the result of the federal government's own extensive experience in using the FCA to successfully combat federal contract fraud. To date, the federal government has recovered over $12 billion for the U.S. treasury under the FCA, and over 80% of these cases were initiated by whistleblowers.[19] Incentivizing employees to detect and expose major illegal practices works.

The Securities Exchange Commission and the Commodity Futures Trading Commission are currently reviewing comments to proposed regulations to implement Dodd Frank. For the reasons set forth above, these agencies should ensure that the Dodd-Frank Wall Street Reform Act is faithfully followed and should adopt the strongest regulations possible regarding the law's whistleblower protections and incentives, including those recommended in NCCMP's prior comments (attached hereto).

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[18] Congress's action in this regard is well founded. Studies pre-dating Dodd Frank have found that "employees" (whether of corporations or financial institutions) have been the single largest source of information used to expose corporate fraud. *See e.g.,* Alexander Dyck, Adair Morse, Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, The Journal of Finance, Volume 65, Issue 6, December 2010, p. 1.

[19] *See* http://www.taf.org/faq.htm#q6; http://www.taf.org

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February 4, 2011

VIA WWW.REGULATIONS.GOV
Mr. David A. Stawick, Secretary
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Re: Proposed Rules for Implementing the Whistleblower Protection Provisions of Section 23 of the Commodity Exchange Act [RIN 3038-AD04]

Dear Mr. Stawick:

This law firm serves as counsel to the National Coordinating Committee for Multiemployer Plans ("NCCMP") and we are submitting these comments on behalf of NCCNP in response to the Commodity Futures Trading Commission's ("Commission") Proposed Rule for Implementing the Whistleblower Protection Provisions of Section 23 of the Commodity Exchange Act.

Initially, we would like to stress that the new protections enacted by Congress are critically needed, if not essential, to protect the investment community and the general public. Only by diligently enforcing these measures will the commodity futures market operate in a reliable, trustworthy manner. Thus, we submit that it is imperative that the proposed regulations carefully track and faithfully adhere to Congress's intent in passing this important new statute. The recommended changes and additions offered by NCCMP to the proposed rules are designed to help effectuate this goal.

I. Background of the NCCMP

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer plans for retirement, health and other benefits. Our purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit organization, with members, plans and plan sponsors in every major segment of the multiemployer plan universe, including in the building and construction, retail, food, trucking and service and entertainment industries.

Multiemployer plans are institutional investors that rely heavily on investment returns to provide promised pension and welfare benefits to the millions of workers who rely on those benefits. Single employer plans rely just as heavily on investment returns but those plans have a greater ability to adjust contributions, and to a limited extent benefits, in response to market fluctuations. Contributions to, and often benefits of, multiemployer plans are collectively bargained in bargaining cycles that may be from two (2) to five (5) years. Therefore, multiemployer plans have less ability than single employer plans to adjust to market fluctuations.

Market fluctuations, even extreme fluctuations, are part of the risk of investing. But neither institutional nor individual investors should be subject to additional market risk created by violations of the commodity futures laws. These proposed regulations can provide additional protections to institutional and individual investors and to the pension benefits and health benefits provided by multiemployer plans.

II. Importance of the Proposed Rulemaking

The critical importance of the Proposed Rulemaking cannot be overstated. Further, we submit that, as drafted, the proposed rule (like the companion draft rule promulgated by the Securities Exchange Commission) fails to properly effectuate the statutory language adopted in the Dodd-Frank Act to protect individual whistleblowers and, more broadly, the investment community. The statute was enacted to encourage and reward persons with unique and valuable information about a violation of the law to step forward and report it to the proper authorities. The proposed rule, however, would create too many obstacles and impose too many hurdles on a potential whistleblower, preventing this vital program from accomplishing its purpose, as intended by Congress. The recommendations of the NCCMP, as set forth herein, are designed to address these issues and help ensure the final regulations adequately protect investors and the public. At first, however, we believe it is prudent to emphasize the high stakes involved in the instant rule-making.

The recent financial crisis has demonstrated the painful and calamitous effects that are felt by all Americans when the federal commodity futures laws are evaded. These laws play a vital role in protecting the American economy and safeguarding the decisions of both large and small investors in placing their money into the commodities futures market, which influences the creation of jobs and a rise in overall wealth. However, these critical rules are not always followed. The notable and flagrant examples in recent years of efforts to sidestep the securities laws, such as the accounting fraud of Enron or the ponzi scheme of financier Bernard Madoff, have overshadowed news accounts of violations of the commodity futures laws, such as manipulation of the oil market. Unfortunately, these scandals are just the tip of the iceberg of malfeasance in which almost all Americans have felt the wrath.

On July 21, 2010, the *Wall Street Reform and Consumer Protection Act* (also referred to as the "Dodd-Frank" law after its chief sponsors) was enacted into law putting into place a number of new safeguards for policing the financial industry and preventing another economic collapse from occurring, especially fraudulent conduct in the securities and commodities markets. Of course, a key problem with combating acts of theft and fraud is that such conduct is, by nature, conducted in secret, buried away and hidden from government regulators, unwary investors and public view. Without detection, a fraudulent scheme can be launched, expanded and perpetrated into a multi-billion dollar disaster until it is too late and countless individuals and institutions suffer unimaginable harm.

One of the few ways to expose such conduct is to motivate individuals with knowledge of it to step forward and speak out. Some will do this simply as a matter of conscience. But those persons are often concerned, and rightfully so, about threats to their job and livelihood, which can be protected by anti-retaliation measures provided under whistleblower protection laws, measures which fortunately were included in the Dodd-Frank Act. In addition, however, experience with the federal False Claims Act, also known as the Qui Tam Act, has demonstrated that to effectively fight serious fraud, the best tool is indisputably a provision that provides for a reward to individuals, i.e., whistleblowers, who risk their job, future career and even their life, by having the courage to detect, expose and report the illegal conduct to the proper authorities. Recognizing this reality, the Dodd-Frank Act provides that substantial financial rewards should be provided to such persons.

Thus, the whistleblower protection and reward provisions adopted by Dodd-Frank were envisioned to create a strong, effective, and user-friendly system to combat serious wrongdoing by encouraging whistleblowers to disclose valuable information. Specifically, Section 748 of Dodd-Frank, 7 U.S.C. § 26, directs the Commission to establish a new awards program that would provide whistleblowers who voluntarily report original information that leads to a successful enforcement action in which the Commission obtains monetary sanctions of over $1,000,000 a bounty of between 10-30% of the amount collected. This provides a concrete and tangible award for whistleblowers and will encourage the reporting of valuable information that could stop a commodity futures violation before it escalates into a massive fraud.

The Commission was authorized under Dodd-Frank to issue regulations to implement this new whistleblowers awards program. It is essential that the new rules faithfully follow the statute they are intended to serve and that the whistleblower protection features of the law are implemented in the most effective manner possible to fully protect investors and the general public. The recommended reforms to the proposed rules set forth in these comments are designed to help realize these goals. We appreciate the thoughtfulness of the Commission in its proposed rules but also believe that substantial changes need to be made for the final regulations to be true to the requirements specified under the statute and effectively implemented to protect investors and the American people.

III. Overview of NCCMP Recommendations to Proposed Rulemaking

We suggest that the Commission adopt the seven recommendations below that we believe properly reflect the Congressional intent behind Section 748 of the Dodd-Frank Act. If adopted, these recommendations will help to ensure that the newly implemented whistleblower award program is able to most effectively combat serious wrongdoing by the financial industry to protect the hard-earned investment dollars of millions of Americans.

1. **Streamline Whistleblower Application Process:** The Commission should adopt a process similar to the whistleblower process adopted by the Internal Revenue Service, which is more user-friendly and provides an efficient system for rewarding whistleblowers who report tax law violations. The proposed rule currently requires a whistleblower to submit three (3) separate forms and also track the progress of an action that was initiated by the original information that he or she provided in order to claim an award.

2. **Limit Excluded Classifications Per Statute:** In Section 748 of Dodd-Frank, Congress provides a specific list of certain limited types of individuals who have a legal responsibility to disclose information pertaining to commodity futures violations and excludes them from participating in whistleblower recoveries (such persons cannot be considered making "voluntary" disclosures as required by the Act). Allowing these exceptions to be expanded in too broad a fashion would undermine the statute's central purpose of uncovering fraud and abuse. Thus, the Commission should not adopt a blanket exclusion of "*other similarly situated persons*" as proposed, but should institute a case-by-case analysis as to whether a potential whistleblower should be precluded from a recovery due to a pre-existing legal duty.

3. **Mandatory Self-Reporting of Violations to the Commission:** The Commission should ensure that the internal compliance programs are as effective as possible by requiring that any violation of the commodity futures laws by an internal compliance program be reported to the Commission. Moreover, companies should be obligated to adopt more stringent internal compliance programs similar to those required by other federal agencies. In addition, a person who reports a potential violation through an internal compliance program that leads to a successful action by the Commission should be given up to one (1) year from the date of making a report to the internal compliance program to file an application with the Commission to participate in a whistleblower recovery.

4. **Effective Use of Internal Compliance Programs:** A company's internal compliance program is not a surefire method of preventing or uncovering commodity futures violations (which have, in fact, continued to increase even as more companies have adopted such programs). Therefore, the Rule appropriately does not limit the amount that a whistleblower can recover based upon whether he or she bypassed an internal compliance program and chose to go directly to the Commission with violation disclosures. This approach is most likely to protect the recovery rights of such persons because of the likelihood that there were reasonable grounds for not using an internal compliance program (such a legitimate fear of retaliation, etc.).

5. **Regulatory Violation for Whistleblower Retaliation:** The Commission should demonstrate its commitment to preventing retaliation against whistleblowers by finding that any company that retaliates against a whistleblower commits *a separate and independent violation* of the commodity futures laws that subjects the company to the maximum penalties for such violation provided for under the law, up to and including a delisting of the company.

6. **Public Disclosure of the Rights of Whistleblowers:** The effectiveness of the Commission's awards program is dependent upon all potential whistleblowers knowing that it exists and the benefits that could come from reporting and disclosing violations of the commodity futures laws. The Commission should establish simple and easy to understand materials that companies would distribute to its employees, fully informing them of their rights as a potential whistleblower.

7. **Establish Reasonable Whistleblower Appeal Rights:** A whistleblower who provides information that the Commission decides not to pursue should be given the opportunity to appeal the decision declining to pursue the alleged violation to the Commission's Office of

Inspector General. Otherwise, wholly legitimate claims that could expose fraud and other serious violations could be dismissed without appropriate investigation.

IV. NCCMP Recommendations to Proposed Rulemaking

The reasons why we are suggesting that the Commission adopt these seven recommendations are discussed in greater detail below.

1. Streamline Whistleblower Application Process

The most effective means for the Commission to expand the number of individuals who take advantage of the awards program and disclose information pertaining to a potential violation of the commodity futures laws is to make the process as simple as possible. The proposed regulations require the whistleblower to complete a two-step process for submitting original information and making a claim for an award. (Proposed Rule ("P.R.") §§ 165.3, 165.7.) The whistleblower must initially submit to the Commission both a form detailing the original information (Form TCR) and also a declaration form attesting to the veracity of the information provided and the whistleblower's eligibility for an award (Form WB-DEC). (P.R. § 165.3.)

However, that is not the end of the process for the whistleblower. It becomes particularly onerous when the Commission requires a whistleblower to track on the Commission's website the disposition of the covered action. (P.R. § 165.7.) Within sixty days after a notice is posted on the Commission's website, without any notification by the Commission to the whistleblower that his original information did lead to a successful enforcement action, a third form (Form WB-APP) has to be submitted by the whistleblower to actually request the award that he or she is entitled to under the statute. (P.R. § 165.7.)

This is a far too complicated and burdensome process for whistleblowers to not just have to file for a claim but also make a separate application to receive the award. The success of whistleblower programs is that they are easy to submit a claim and are user-friendly. Whistleblowers place much at risk when choosing to disclose information of commodity futures violations. Congress understood this when it adopted the awards program and knew that it would serve a vital purpose in encouraging whistleblowers to come forward with information.

The Commission must ensure that the process is as simple as possible. There is no administrative reason why each individual who submits original information and submits a declaration form should not be assigned a case number. If a claim leads to a successful enforcement action, the Commission should be able to have a record of who submitted the original information thereby eliminating the need for the whistleblower to submit another form later in the process.

In particular, the sixty-day period after a notice of covered action has been listed online is far too narrow a window to allow the whistleblower to complete an application for his or her award. It creates the possibility that a whistleblower who admirably reports original information about a commodity futures violation may unintentionally forfeit the award. This would be an absurd result under the clear Congressional mandate of Dodd-Frank. The Commission instead should implement a procedure similar to the whistleblower program established by the Internal Revenue Service for whistleblowers who report an underpayment of taxes. *See* 26 U.S.C. § 7623. In such instances, the whistleblower only has to submit IRS Form 211. *See* IRS Notice 2008-4. It is unnecessary for the

whistleblower to file any subsequent forms after the IRS has concluded that he or she is entitled to an award. *Id.* There is no reason why a process that is good enough to protect the interests of taxpayers should not be adopted by the Commission to protect the interests of shareholders and investors.

2. Limit Excluded Classifications Per Statute

Dodd-Frank explicitly excludes an award from being made to "a member, officer, or employee of – (i) an appropriate regulatory agency; (ii) the Department of Justice; (iii) a registered entity; (iv) a registered futures association; (v) a self-regulatory organization as defined in section 78c(a) of Title 15; or (vi) a law enforcement organization . . . ." 7 U.S.C. § 26(c)(2). Congress sought to establish a delicate balance of the need to encourage whistleblowers to come forward with critical information against not wanting to award individuals who were already required to disclose relevant information.

The legislation was enacted with a clear and definitive list of those individuals who should be excluded from being eligible for an award. Congress made a conscious decision not to include other individuals in that list. It recognized that this would dampen the ability of whistleblowers to report serious allegations that should be made known to the Commission or other relevant agencies. The Commission has inappropriately and unnecessarily sought to expand that definition by specifying that "other similarly-situated persons should not be eligible for award consideration if they are under a preexisting legal duty to report the information to the Commission or to any of the other authorities described above." (75 Fed. Reg. 75734.)

This is against the clear intent of Congress of providing a set limit on the types of individuals who would be ineligible for an award. There is no limit as to how broadly such a pre-existing duty could be expanded to exclude an untold number of individuals who hold a variety of positions from being able to participate in the award program. This would erode the program's ability to perform the crucial function that Congress intended.

It would be inappropriate for the Commission to adopt a blanket rule that would exclude individuals in "similarly situated positions" from the program. Only Congress can determine what groups of individuals should not be eligible to participate in the program, and no such language was inserted into Dodd-Frank to preclude "other similarly-situated" individuals. While the Commission should not be awarding certain individuals who are legally directed or obligated to turn over pertinent information, the Commission should not base such a determination just on the position the individual holds. The Commission would still have the discretion to determine on a case-by-case basis whether an individual failed to voluntarily disclose information because the person had a preexisting legal duty. It is not necessary for the Commission to a priori decide that the position a person holds precludes him or her from submitting information voluntarily.

All individuals should be encouraged to come forward with information that could be critical for ascertaining whether the commodity futures laws have been violated. The role of the Commission should not be to find ways of denying whistleblowers access to this critical program. Instead, it should respect the careful balance adopted by Congress. Whistleblowers whose positions are not specifically excluded under Dodd-Frank should be eligible for an award.

3. Mandatory Self-Reporting of Violations to the Commission

The Commission must adopt a policy of mandatory self-reporting by companies that violate the commodity futures laws. This reporting must be made available to the public and the investing community. This is especially important in circumstances where a company's internal compliance program has detected and cured a violation. A violation of the commodity futures laws occurs regardless of whether a company is able to remedy the situation before the Commission has to initiate an action. Investors have to be confident that their investments are in compliance with all applicable laws, and the failure of a company to do so is legitimate information for an investor to have. The risk to an investor's portfolio is enormous when a company surreptitiously violates the law and then never discloses it. This only encourages a broken cycle of violations followed by belated fixes.

This problem has been solved in similar circumstances where it has been taxpayers who were defrauded instead of investors. The Close the Contractor Fraud Loophole requires that the Federal Acquisition Regulations include provisions "that require timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts." P.L. 110-252, § 6102. The same policy should be adopted for violations of the commodity futures laws. The markets are only able to work properly if investors and the public are aware of commodity futures violations and can take appropriate actions to safeguard their money.

Internal compliance programs should also be bolstered to ensure that they are able to properly perform their role of detecting instances of fraud. The Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67064, provide important guidance as to how company's internal compliance programs should be strengthened to ensure that violations are detected and that appropriate action is taken to prevent their recurrence. This regulation applicable to federal contractors not only provides for stronger internal controls but also requires mandatory self-reporting of violations to an agency's Office of Inspector General.

These are reasonable and effective methods of providing a check on the internal compliance programs to ensure that they are actually ensuring proper compliance with the laws and not just rubberstamping dubious company actions. Just as taxpayers should not be forced to bear the brunt of renegade contractors, investors have an equally important interest in ensuring that companies are playing by the rules.

4. Effective Use of Internal Compliance Programs

At the same time that the Commission should require stronger and more effective internal compliance programs, whistleblowers should not in any way be obligated to use such programs. The proposed regulations properly recognize a whistleblower's decision not to go through an internal compliance program should have no impact on his or her award eligibility. Dodd-Frank explicitly envisions that whistleblowers would be eligible for an award by reporting information directly to the Commission. *See* 7 U.S.C. § 26(a)(7) (defining whistleblower as an individual who provides "information relating to a violation of [the commodity futures laws] *to the Commission*") (emphasis added).

The proposed rules rightly do not seek to punish employees who choose to bypass an internal compliance program. The Commission is obligated to do whatever it can to ensure that

whistleblowers who come forward with valuable information are properly awarded. By not placing unnecessary roadblocks in the way, whistleblowers are more inclined to come forward with valuable information, further bolstering the program's success.

5. Regulatory Violation for Whistleblower Retaliation

Whistleblowers are a critical resource in stopping commodity futures violations. The best means for a crooked company to persist in its illegal actions is to prevent whistleblowers from reporting violations to the authorities. A company that retaliates against a whistleblower sends a clear message to all employees that their jobs and livelihoods will be finished if information is disclosed.

The Commission should institute strong penalties against companies that are willing to engage in such flagrant violations of the law. Retaliation against an employee whistleblower should be recognized as a separate and independent violation of the commodity futures laws. For instance, the Nuclear Regulatory Commission provides that an employer cannot retaliate against an employee who provides the agency with information about an alleged violation of the law. *See* 10 C.F.R. § 50.7. An employer that takes retaliatory action is found to have committed an independent violation of the law, and there would then be sufficient grounds for the license of that company to be revoked or suspended, in addition to having civil penalties levied against it.

The Commission should send a strong message to employers that taking action against whistleblower employees cannot be tolerated at any level. A company that retaliates against an employee for disclosing information about a potential violation of the commodity futures laws should subject itself to the maximum penalties under the law. These penalties should be mandatory and be widely disseminated to all companies. It should be abundantly clear to a company what the consequences would be if it were found to have retaliated against an employee. When retaliation is combined with a serious infraction of the commodity futures laws, evidenced by monetary sanctions in excess of $1,000,000, the Commission should have the ability to de-list the company from any applicable mercantile exchange in order to ensure that similar violations are not allowed to reoccur.

6. Public Disclosure of the Rights of Whistleblowers

The Commission should also adopt regulations requiring that information about the whistleblower awards program be advertised widely. Employees should realize the disclosure of potential commodity futures violations is not just the right thing to do. The Commission should actively encourage the reporting of original information as demonstrated by its willingness to pay out significant sums of money to individuals who report potential violations.

The Commission has the authority to employ any number of methods of accomplishing this task, including the implementation of a notice posting requirement or dissemination of information to newly hired employees. The Commission should also develop a brochure explaining in simple and easy to understand terms the requirements of the new whistleblower awards program and how individuals with original information can submit it to the Commission and file a claim. This is an easy, effective way to ensure the awards program can achieve the purpose intended by Congress.

For instance, prior to the enactment of Dodd-Frank, the Securities and Exchange Commission ("SEC") had a predecessor bounty program that existed for more than twenty years to award

individuals who reported information leading to a recovery of civil penalties for an insider trading violation. A March 29, 2010 Assessment of the SEC's Bounty Program by the Commission's own Inspector General noted serious deficiencies in the program that led to very few payments and an inability of the program to serve its stated function. Office of Inspector General, S.E.C., Assessment of the SEC's Bounty Program at iii (Mar. 29, 2010). In this report, the Inspector General noted that: "The SEC bounty program has made very few payments to whistleblowers since its inception and received a relatively small number of bounty applications. As a result, the program's success has been minimal and its existence is practically unknown." *Id.* at 4.

The Commission must make sure that the whistleblowers awards program is not plagued by the same problems. The whistleblower awards program under Dodd-Frank is the best tool available to the Commission to learn about and prevent commodity futures violations. The Inspector General report also noted that while a pamphlet made about the program is "a good tool for marketing [it]," there was "no evidence that staff members are generally aware of the pamphlet and provide it routinely to potential bounty applicants." *Id.* at 7. Even the SEC's staff had varying knowledge about the existence of that program. *Id.*

The lack of any discussion in the Commission's proposed regulations as to how information about the program would be disseminated to potential whistleblowers and the general public, in addition to the Commission's staff who could assist whistleblowers in submitting original information, must be corrected in the final regulations. The success of the program is dependent upon an awareness of its existence.

7. Establish Reasonable Whistleblower Appeal Rights

The Commission must establish reasonable appeal rights for whistleblowers in instances in which the Commission has determined not to pursue an enforcement action. This process should allow a whistleblower to file an appeal with the Commission's Office of Inspector General after the Commission has decided not to follow through with information of a potential violation. This is a necessary check on the actions of the Commission to maximize its effectiveness in pursuing all credible leads that could demonstrate a company has violated commodity futures laws.

The risk faced by whistleblowers in disclosing original information about a potential violation of the law is the same regardless of whether the Commission decides to pursue an enforcement action against a company. The possibility of serious repercussions against whistleblowers still exists. The awards program will provide an effective incentive to whistleblowers if it is evident it works fairly. Providing an appeal mechanism overseen by the Commission's Office of Inspector General in instances in which the Commission decides not to pursue a claim gives whistleblowers reassurances as to the integrity of the program and provides an additional layer of oversight to ensure all possible violations are evaluated and that appropriate administrative action has been taken.

V. Conclusion

We urge the Commission to adopt the proposed recommendations discussed above as these measures will help ensure that all companies and individuals engaged in this market are properly adhering to commodity futures laws and that violators will be exposed. The whistleblowers award program provided for under Dodd-Frank provides an essential and invaluable tool to the Commission.

The Commission should make sure this tool works properly to obtain crucial information to prosecute instances of commodity futures violations, which ultimately safeguards investors and the American public. Of equal importance, the strong enforcement provisions enacted by the new law, when properly administered, will serve as a powerful deterrent against fraudulent conduct from occurring in the first place. The Commission should take the necessary steps now while the program is being developed to ensure it is as effective as possible for years to come.

Thank you for the opportunity to provide comments on this important proposed rule. We will be pleased to provide any additional information that you might need on this subject.

Sincerely,

Donald Capuano

Gerard M. Waites