EDUCATION FUND

September 28, 2016

Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington DC 20581

Re: Notice of Proposed Rulemaking: Commodity Futures Trading Commission Whistleblower Awards Process, RIN-3038-AE50

Dear Mr. Kirkpatrick:

Taxpayers Against Fraud Education Fund ("TAF") submits these comments in response to the CFTC's proposed amendments to the regulations governing the whistleblower program established by 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 approximately 400 attorneys who represent whistleblowers and assist federal and state governments to recover funds lost through fraudulent and corrupt business practices.

Overall, TAF commends the Commission for proposing changes to the CFTC's whistleblower program rules that will, inter alia, serve to broaden whistleblowers' eligibility for awards; strengthen procedural processes governing award determinations; and, expand enforcement of the Dodd-Frank Act's anti-retaliation provisions. As detailed below, we also urge the Commission to revise particular proposed rules to ensure that the overall program

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structure and procedure foster the active participation of CFTC whistleblowers as Congress intended. In particular, TAF believes that the proposed rules governing "original sources" of information, related actions, and appeals from award determinations deserve further clarification and revision.

1. The Commission Should Have Discretion to Waive Procedural Requirements

We strongly support Proposed Rule 165.5(c), which provides the Commission with the discretion to waive procedural requirements in extraordinary circumstances. Whistleblowers participating in the CFTC whistleblower program have varying levels of sophistication and familiarity with the program's procedural requirements. In some situations where an individual contributed to a successful enforcement outcome but failed to rigorously follow program procedures, fairness may dictate that procedural requirements be waived for the Commission. We agree that the Commission should be allowed the flexibility to waive procedural requirements in extraordinary cases. Proposed Rule 165.5(c) is consistent with the overall policy goals of the whistleblower program.

2. Further Clarification is Needed with Respect to "Original Sources" of Information

We endorse the Commission's proposed revision of Rule 165.5(b) to no longer require whistleblowers to be the "original source" of information in order to be eligible for an award. However, TAF also believes that Proposed Rule 165.2 (l)(2) requires further clarification and revision. As written, Proposed Rule 165.2 (l)(2) limits original source status to those individuals who first give their information to U.S.-based government and/or self-regulatory authorities. In view of the global nature of the commodities markets, and the increasing number of international whistleblowers participating in the Dodd-Frank whistleblower programs, TAF suggests that Proposed Subsection (l)(2) be further revised to include those individuals who first provide information to foreign government or self-regulatory authorities.

We see no persuasive policy reason to exclude whistleblowers who initially report information to foreign governmental or regulatory bodies from possible "original source" status. Indeed, some of the CFTC's most noteworthy recent enforcement actions have been undertaken

with the cooperation of overseas authorities,[1] and the Proposed Rules allow for whistleblower awards based on related actions by certain overseas authorities. Indeed, if whistleblowers may receive awards for related actions undertaken by foreign authorities, they should be entitled to original source eligibility in instances where they report first to a foreign authority and later report their information to the CFTC.

Proposed Rule 165.2 (l)(2) also contains provisions governing the "look back" period during which the Commission will consider the whistleblower to have provided his or her information as of the date of their initial disclosure to another authority. We agree with the Commission's proposal to lengthen the "look back" period from 120 to 180 days. However, TAF strongly urges the Commission to further amend Proposed Rule 165.2 (l)(2) to clarify that the 180 day period refers only to "look back" eligibility, and that individuals will not lose their "original source" status or eligibility for an award if they perfect their submissions to the Commission after 180 days elapse. No valid public policy purpose would be served by stripping eligibility from an individual who steps forward to other authorities before reporting to the CFTC, particularly given that whistleblowers who do not first report to other governmental authorities do not face such dire consequences. Such a result would not only be punitive, but it is directly contrary to the Dodd Frank Act's intent of encouraging robust reporting of fraudulent practices impacting the commodities markets.

3. Rules Governing "Related Actions" Should Be Clarified

Proposed Rule 165.5(a)(3) allows the Commission to pay awards for "the successful resolution of a covered judicial or administrative action or successful enforcement of a related action or both." The proposed revision aligns the CFTC's rules with the SEC's interpretation of substantially similar language in the Dodd-Frank Act. The Commission's proposed revision is especially important in that it clarifies that whistleblowers may receive an award based on

[1] See e.g., "Deutsche Bank to Pay $800 Million Penalty to Settle CFTC Charges of Manipulation, Attempted Manipulation, and False Reporting of LIBOR and Euribor," April 25, 2015, available at http://www.cftc.gov/PressRoom/PressReleases/pr7159-15 (acknowledging the assistance, among others, the Japanese Financial Services Agency, and Bundesanstalt für Finanzdienstleistungsaufsicht ("BaFin")).

recoveries in both the CFTC's enforcement action and a related action. Overall, we commend the CFTC's proposal to include "related actions" in the basis for an award, and believe that the proposed change is consistent with policies to encourage whistleblower reporting of wrongdoing.

We are concerned, however, that as currently drafted Proposed Rule 165.11 could unintentionally foreclose eligible whistleblowers from receiving an award by creating a timing requirement where none is intended. Proposed Rule 165.11(a)(2) states that a "related action is based on the original information that the whistleblower voluntarily submitted to the Commission and led to a successful resolution of the Commission judicial or administrative action." The Commission should clarify that whistleblowers who first take their information to another authority, and later provide their information to the CFTC, are eligible for an award. As presently worded, it is unclear whether the related action must be taken after the whistleblower submits information to the Commission, or whether the related action may be based on information supplied by the whistleblower directly to another regulatory authority in advance of his or her submission to the CFTC.

4. The Proposed Rules Improve Procedures Governing Award Determinations

TAF supports the Commission's suggested changes to procedures governing award determinations. Proposed Rule 165.7 would provide individuals with an opportunity to review the materials that formed the basis of the Commission's award determination, and to contest the preliminary determination before it is finalized. See Proposed Rule 165.7(g)(2). The Proposed Rule, thus, allows whistleblowers to better understand the reasons for a particular award or denial, and to make informed requests for reconsideration. The Proposed Rule offers greater transparency in the awards process, and will likely obviate the need for some appeals.

5. Procedures Governing Appeals Must Be Revised to Allow for Due Process

As drafted, Proposed Rules 165.10 and 165.13 strictly limit the contents of the record on appeal, and categorically exclude pre-decisional and internal deliberative process materials from the record. TAF strongly urges the Commission to further revise Proposed Rules 165.10 and 165.13 to ensure that whistleblowers receive due process in appeals of whistleblower award determinations. We believe that in certain circumstances it may be appropriate to include such

materials in the record and their categorical exclusion would impair a whistleblower's statutory entitlement to an appeal. Rather than exclude any category of material from the record by rule, a more sound approach is for the CFTC to reserve its right to object to the disclosure of certain materials. This approach upholds the CFTC's interest in protecting privileged or work product materials from disclosure, while ensuring that a whistleblower's appellate rights may be fairly exercised.

Significantly, in recent appeals of IRS whistleblower award determinations, the Tax Court rejected similar limitations that the IRS attempted to place on the administrative record on appeal. As in the CFTC's Proposed Rule, the IRS has taken the position that only those documents in the Whistleblower Office's administrative record are relevant to the whistleblower's appeal of an award denial. The Tax Court, however, refused to adopt the IRS's position, recognizing that it would allow the IRS to limit the record on appeal however it chooses. Insinga v. Commissioner, Tax Court Docket No. 9011-13W (July 27, 2016). The Tax Court, moreover, has also found that the IRS cannot "unilaterally decide what constitutes an administrative record." Whistleblower One 10683- 13W et al. v. Commissioner, 145 T.C. No. 8 at 6 (September 16, 2015). Proposed Rules 165.10 and 165.13 are similarly flawed in that they also categorically limit and "unilaterally decide" what constitutes the record on appeal, and thus threaten to deprive whistleblowers of a meaningful right to appeal award determinations.

6. The Proposed Rules Substantially Strengthen Anti-Retaliation Protections

TAF strongly supports Proposed Rule 165.20, which provides that violations of the anti-retaliation provisions of Commodity Exchange Act Section 23(h)(1)(A) "shall be enforceable in an action or proceeding brought by the commission." We agree that the Proposed Rule correctly articulates the CFTC's enforcement authority and offers greater protection, and therefore greater incentives, to whistleblowers who come forward to the Commission. Further, the suggested rule aligns the CFTC with the SEC's approach of actively enforcing the anti-retaliation provisions of that agency's companion whistleblower program.

Although the broad language of Proposed Rule 165.2(c) suggests that the CFTC may pursue an action to enforce the CEA's anti-retaliation provisions even when the whistleblower does not "satisfy[y] the requirements, procedures, and conditions to qualify for an award," we

believe the Commission should clearly state that retaliatory acts against whistleblowers that occur before he or she files a TCR are not only actionable, but may also be the basis for CFTC enforcement. Many, if not most, whistleblowers try to address or report potential violations of the CEA internally before filing a TCR with the Commission. Explicitly articulating that the CFTC may take enforcement action when companies or individuals retaliate against whistleblowing activity prior to the filing of a TCR will create additional incentives for employees to report internally before approaching the Commission.

Should you have any questions or need additional information, please do not hesitate to contact Jacklyn DeMar at (202) 296-4826, ext. 1300.

Sincerely,

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