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Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street N,W., Washington, DC 20581.

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Re: RIN 3038–AE50: Whistleblower Awards Process

Dear Mr. Kirkpatrick,

We write to you in relation to the proposed changes to 17 CFR Part 165 which sets forth the Commission's whistleblower rules.

Garson, Ségal, Steinmetz, Fladgate LLP ("GS2Law") is a New York-based law firm that has acquired unique experience in navigating the Commission's whistleblower awards process during its nascent years. To date, GS2Law is the only law firm in the United States to have obtained a multi-million-dollar award for a client pursuant to 17 CFR Part 165 (the "Rules") and, as such, has particular insight into the user (both whistleblower and counsel) experience provided by the Rules. Many of the issues raised in the proposed changes have arisen as a result of lacunae or inadequacies in the Rules that we also discovered or encountered over the course of our experience working with the Office of the Whistleblower ("WBO").

GS2Law offers the following comments regarding four provisions in the proposed changes to the Rules.

The Replacement of the Whistleblower Award Determination Panel

We support the proposed replacement of the Whistleblower Award Determination Panel with a review process handled by a Claims Review Staff

designated by the Director of the Division of Enforcement in consultation with the Executive Director. In our experience, there were hurdles in prioritizing and scheduling the availability of the Whistleblower Award Determination Panel. Having a dedicated staff should provide time and cost savings. Further, in a simple comparison between awards made by the SEC and the Commission, the Commission appears reluctant to give awards above the minimum permitted, while the SEC (who has a dedicated claim review staff) has not shied away from giving higher awards. In our opinion this is due to having a skilled team trained in and dedicated to this role.

The Release of Whistleblower Identifying information - § 165.4(a) (2)

We object to the proposed rule changes loosening the way in which the anonymity of whistleblowers is handled and protected. The current Rules, which require the whistleblower's consent before anonymity is weakened or jeopardized, work as an incentive to would-be whistleblowers and there is no evidence suggesting the Rules, as currently applied, hinder other agencies.

First, in order to have an effective whistleblower program, anonymity is and must remain the cornerstone of the program. Second, the proposed changes in relation to anonymity overlook the likelihood that a whistleblower may choose to report to the CFTC (rather than the Department of Justice) for a reason. To then place the whistleblower's anonymity in the hands of a person the whistleblower neither knows nor has built trust could have a profoundly chilling effect on the quality of information generated by the Commission's program. While we acknowledge that the "receiving" party is ostensibly bound by the same confidentiality restrictions as the Commission, the question must be asked "Why did the whistleblower report to the Commission?" We submit that whistleblowers may know or have had previous encounters with personnel at other agencies and, as a result, the whistleblower has less trust or confidence in those agencies. In such a case, the risk of whistleblower's identity simply being handed over to another agency may be enough to dissuade a potential whistleblower from submitting information to the Commission, and may thwart the aim of the program.

We would also note that, in many cases, the identity of the whistleblower is less important than the information provided by the whistleblower. Most, if not all, of the notable actions brought by the SEC and the Commission eventually rely upon documentary or electronic evidence and not the oral testimony which was the catalyst of the investigation. As such, there is little utility in disclosing whistleblower identifying information without the consent of the whistleblower.

In addition to the above, the WBO is constrained from sharing information

with the whistleblower in relation to the existence or progress of any investigation. As a result, the continued silence places unique pressures on the whistleblower who is relegated to learning of developments via leaks to the press. The whistleblower should be entitled to know with which other agencies identifying information is being shared, in order to allow for reasonable submissions to be made to the contrary. Further, it acts as a method of enabling the whistleblower to know in due course, whether the related investigation emanated from the whistleblower's information.

Moreover, the breadth of people with whom such information can be shared is unacceptably broad and without proper definition such as "a self-regulatory organization." We would urge a narrowing of this rule if changes are to be made. Furthermore, there is no proper method established relating to how the Commission can monitor or enforce the maintenance of such confidential information once it has been released, especially to agencies abroad. The proposed inner circle is too wide and we suggest that the proposed amendment be rejected. Further, we submit that the whistleblower should be consulted and provided the opportunity to prevent the release of identifying information, if the Commission has exercised its discretion unreasonably.

The Commission Should Issue a Notice of Covered Action for Related Actions – §165.7 (b)(3)(iii)

One of the genuine inefficiencies in the system arises from the inability of the WBO to share information with a whistleblower. The Commission is aware which other agencies have been made privy to the information originally provided by a whistleblower and, as such, should be aware of any related action. Currently, the WBO cannot confirm or deny whether an action is a related action and, therefore, the whistleblower is left to guess as to the status of a third-party action. In our experience, this has resulted in multiple whistleblower claims being made that had zero chance of resulting in an award, but were made for fear that the action might have related to the information provided by the whistleblower. We urge that the rule be changed and that the WBO publish a Notice of Covered Action for each related action it knows arises from or relates to information provided by the whistleblower.

The Lack of Facility of Interim Payment of Undisputed Award Amount in §165.7 (g)(2) and §165.13

Currently there is no facility for the payment of the minimum amount of an award (i.e., 10% of the amounts recovered in a covered or related action) until the whistleblower's time to appeal the award has expired. Once an award has been ordered by the Commission, the Commission has admitted – very

publicly and on the record – that there is an entitlement to an award. As such, the Commission has no basis (i.e., it is estopped) to later remove an award during the appeals process. This issue is now further exacerbated as the contest and final determination process has now lengthened the overall determination process by up to ninety (90) days.

While this may seem a somewhat minor issue, in many cases the elapsed time between the whistleblower's original tip and any award is measured in years, not weeks or months. If the Commission agrees that an award is owed to the whistleblower, there is no reason withhold payment until the exhaustion of all appeals, which, obviously, takes significant additional time and costs to see through to completion. Therefore, we urge that the Rules be amended to allow for prompt payment of the minimum award amount at the time the order of award is issued and regardless of any appeal.

Yours sincerely,

Robert D.M. Garson
Christopher J. Fladgate