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17 CFR Parts 165
Whistleblower Incentives and Protection; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 165

RIN 3038–AD04

Whistleblower Incentives and Protection

AGENCY: Commodity Futures Trading Commission (''Commission'').

ACTION: Final rules.

SUMMARY: The Commission is adopting Final Rules and new forms to implement Section 23 of the Commodity Exchange Act (''CEA'' or ''Act'') entitled ''Commodity Whistleblower Incentives and Protection.'' The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010 (''Dodd-Frank Act''), established a whistleblower program that requires the Commission to pay an award, under regulations prescribed by the Commission and subject to certain limitations, to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the CEA that leads to the successful enforcement of a covered judicial or administrative action, or a related action. The Dodd-Frank Act also prohibits retaliation by employers against individuals who provide the Commission with information about possible CEA violations.

DATES: *Effective Date:* These Final Rules will become effective upon October 24, 2011.

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SUPPLEMENTARY INFORMATION: The Commission is adopting Final Rules 165.1 through 165.19 and Appendix A, thereto, and new Forms TCR (''Tip, Complaint or Referral'') and WB–APP (''Application for Award for Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act''), under the CEA.

I. Background and Summary

Section 748 of the Dodd-Frank Act added new Section 23 to the CEA,[1] entitled ''Commodity Whistleblower Incentives and Protection.'' [2] Section 23 directs that the Commission pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about a violation of the CEA that leads to the successful enforcement of an action brought by the Commission that results in monetary sanctions exceeding $1,000,000, or the successful enforcement of a related action. Section 23 also provides for the protection of whistleblowers against retaliation for reporting information to the Commission and assisting the Commission in its related investigations and enforcement actions.

On December 6, 2010, the Commission proposed Part 165 of the Commission's Regulations to implement new Section 23 (''the Proposed Rules'' or ''Proposing Release'').[3] The rules contained in proposed Part 165 defined certain terms critical to the operation of the whistleblower program, outlined the procedures for applying for awards and the Commission's procedures for making decisions on claims, and generally explained the scope of the whistleblower program to the public and to potential whistleblowers.

The Final Rules include the specific procedures and forms that a potential whistleblower must follow and file to make a claim. The Final Rules also detail the standards that the Commission will use in determining whether an award is appropriate and, if one is appropriate, what the amount of an award should be. The Commission may exercise discretion in granting an award based on the significance of the information, degree of assistance provided in support of a covered judicial or administrative action, programmatic interest, considerations of public policy, and other criteria (other than the balance of the Commodity Futures Trading Commission Customer Protection Fund (''Fund'')). An award shall be denied to certain government employees and others who, for certain stated reasons, are ineligible to be whistleblowers.

The Final Rules also provide that a whistleblower may appeal to the appropriate U.S. Circuit Court of Appeals the Commission's award determination, including the determinations as to whom an award is made, the amount of an award, and the denial of an award. Finally, the Final Rules also provide guidance concerning anti-retaliation provisions of the Dodd-Frank Act.

The Commission received more than 635 comment letters.[4] Over 600 of these comments, sent by or on behalf of different individuals and entities, were variations of the same form letter.[5] The remaining 35 comments were submitted by individuals, whistleblower advocacy groups, public companies, corporate compliance personnel, law firms and individual lawyers, professional associations, and nonprofit organizations. The comments addressed a wide range of issues, including the interplay of the proposed Commission whistleblower program and company internal compliance processes, the proposed exclusion from award eligibility of certain categories of individuals or types of information, the availability of awards to culpable whistleblowers, the procedures for submitting information and making a claim for an award, and the application of the statutory anti-retaliation provision.

As discussed in more detail below, the Commission has carefully considered the comments received on the Proposed Rules in formulating the Final Rules the Commission adopts today. The Commission has also considered the Securities and Exchange Commission's (''SEC['s]'') rulemaking to implement Section 922 of the Dodd-Frank Act, which establishes whistleblower protections and incentives with respect to violations of the securities laws.[6] Where appropriate and consistent with the underlying statutory mandate in Section 23 of the CEA, the Commission has endeavored to harmonize its whistleblower rules with those of the SEC. The Commission has made a number of revisions and refinements to the Proposed Rules in

[1] 7 U.S.C. 1, *et seq.* (2006).

[2] Public Law 111–203, § 748, 124 Stat. 1739 (2010).

[3] Proposed Rules for Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act, Release No. 3038–AD04, 75 FR 75728 (Dec. 6, 2010).

[4] The public comments the Commission received are available at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=916.*

[5] The form letters provide no specific comments or requested revisions regarding the Proposed Rules. These letters: express concern that the ''corporate lobby will have undue influence on the final rules to protect whistleblowers;'' allege that ''[t]he SEC proposed rules completely undermine efforts to protect employees who risk their careers to expose fraud;'' and opine that ''the CTFC should not blindly follow any of the SEC's recommendations and should instead write rules will encourage whistleblowers to report commodities fraud.''

[6] *See* Securities Whistleblower Incentives and Protections, 76 FR 34300 (June 13, 2011) (to be codified at 17 CFR 240.21F–1 to 240.21F–17). Commission staff has consulted with SEC staff regarding drafting of rules to implement the Commission's and SEC's respective Dodd-Frank Act whistleblower provisions, Section 748 (Commodity Whistleblower Incentives and Protection) and Section 922 (Whistleblower Protection). To the extent that the Commission and SEC reached the same conclusions on common issues, the Commission endeavored harmonize its rule text with the SEC's final rule text.

order to achieve the goals of the statutory whistleblower program and advance effective enforcement of laws under the CEA. While the revisions of each Proposed Rule are described in more detail throughout this release, the four subjects highlighted below are among the most significant.

Internal Compliance: A significant issue discussed in the Proposed Rules was the impact of the whistleblower program on company systems for internal reporting of potential misconduct.[7] The Commission did not propose a requirement that a whistleblower must report his information internally to an entity to be eligible for an award, and commenters were sharply divided on the issues raised by this topic. Upon consideration of the comments, the Commission has determined that it is inappropriate to require whistleblowers to report violations internally to be eligible for an award. The Commission does, however, recognize that internal compliance and reporting systems ought to contribute to the goal of detecting, deterring and preventing misconduct, including CEA violations, and does not want to discourage employees from using such systems when they are in place. Accordingly, the Commission has tailored the Final Rules as follows:

○ With respect to the criteria for determining the amount of an award, the Final Rules provide that while the amount of an award is within the Commission's discretion, the Commission will consider (i) a whistleblower's report of information internally to an entity's whistleblower, compliance or legal system as a factor that potentially can increase the amount of an award; and (ii) a whistleblower's interference with such internal systems is a factor that can potentially decrease the amount of an award. Rule 165.9(b)(4), (c)(3).

○ A whistleblower may be eligible for an award for reporting original information to an entity's internal compliance and reporting systems if the entity later reports information to the Commission that leads to a successful Commission action or related action. Under this provision, all of the information provided by the entity to the Commission will be attributed to the whistleblower, which means the whistleblower will get credit—and potentially a greater award—for any information provided by the entity to the Commission in addition to the original information reported by the whistleblower. Rule 165.2(i)(3).

Procedures for Submitting Information and Claims: The Proposed Rules set forth a two-step process for submitting information, requiring the submission of two different forms. In response to comments that urged the Commission to streamline the procedures for submitting information, the Commission has adopted a simpler process by combining the two proposed forms into a single ''Form TCR'' to be submitted by a whistleblower, under penalty of perjury. With respect to the claims application process, the Commission has made one section of that form optional to make the process less burdensome.

Aggregation of Smaller Actions to meet the $1,000,000 Threshold: The Proposed Rules stated that awards would be available only when the Commission has successfully brought a single judicial or administrative action in which it obtained monetary sanctions of more than $1,000,000. In response to comments, the Commission has provided in the Final Rules that, for purposes of making an award, the Commission will aggregate two or more smaller actions that arise from the same nucleus of operative facts. This will make whistleblower awards available in more cases.

Exclusions from Award Eligibility for Certain Persons and Information: The Proposed Rules set forth a number of exclusions from eligibility for certain categories of persons and information. In response to comments suggesting that some of these exclusions were overly broad or unclear, the Commission has revised a number of these provisions. Most notably, the Final Rules provide greater clarity and specificity about the scope of the exclusions applicable to senior officials within an entity who learn information about misconduct in connection with the entity's processes for identifying, reporting, and addressing possible violations of law.

Internal Procedural and Organizational Issues: In the Proposing Release, the Commission noted that it would address ''internal procedural and organizational issues'' related to implementation of Section 23 in a future rulemaking.[8] The Final Rules include revisions to reflect the Commission's intent to delegate to a Whistleblower Office the authority to administer the Commission's whistleblower program and to undertake and maintain customer education initiatives through an Office of Consumer Outreach. The Final Rules also provide that the Commission will exercise its authority to make whistleblower award determinations through a delegation of authority to a panel that shall be composed of representatives from three of the Commission's Offices or Divisions.

II. Description of the Rules

A. Rule 165.1—General

Proposed Rule 165.1 provided a general, straightforward description of Section 23 of the CEA, setting forth the purposes of the rules and stating that the Commission administers the whistleblower program. In addition, the Final Rule states that, unless expressly provided for in the rules, no person is authorized to make any offer or promise, or otherwise to bind the Commission, with respect to the payment of an award or the amount thereof.

B. Rule 165.2—Definitions

1. Action

The term ''action'' is relevant for purposes of calculating whether monetary sanctions in a Commission action exceed the $1,000,000 threshold required for an award payment pursuant to Section 23 of the CEA, as well as determining the monetary sanctions on which awards are based.[9] Proposed Rule 165.2(a) defined the term ''action'' to mean a single captioned judicial or administrative proceeding. The Commission proposed to interpret the term ''action'' to include all claims against all defendants or respondents that are brought within that proceeding without regard to which specific defendants or respondents, or which specific claims, were included in the action as a result of the information that the whistleblower provided. With respect to the definition of the term ''action,'' one commenter stated that only those claims in multiple claim enforcement matters that result directly or indirectly from the whistleblower's report should be included in an ''action'' for which a whistleblower is eligible for an award.[10] The commenter reasoned that the proposed definition would encourage the reporting of ''fairly minor violations'' which could cause the Commission to be ''inundated with far more complaints on insignificant matters, thereby clogging a process that is already expected to be cumbersome'' to the Commission.

The Commission has considered, but disagrees with the rationale in support of these comments. In general, any violation, even those that may appear relatively minor (*e.g.*, failure to provide pool participants with timely account statements in violation of Commission Regulation 4.22), may upon investigation be symptomatic of more significant violations (*e.g.*, CPO fraud in violation of Sections 4b and 4*o* of the

[7] *See* 75 FR at 75730.

[8] *See* 75 FR at 75728.

[9] *See* Rule 165.8.

[10] *See* letter from National Society of Compliance Professionals (''NSCP'').

CEA). It would therefore not be in the public interest to discourage the reporting of any violations. Further, to the extent that reporting of relatively minor violations is a potential concern, the Final Rules require that the whistleblower's information must have led to the successful enforcement of a covered judicial or administrative action (*see* Rules 165.2(e), (i), and 165.5(a)(3)). A minor violation by itself is unlikely to result in an enforcement action resulting in monetary sanctions exceeding $1,000,000.

The Commission is making a slight amendment to Rule 165.2(a) as proposed. The Commission has discretion to bifurcate enforcement actions (*e.g.*, one action against the entity and another against culpable individuals). Under the Proposed Rule, the bifurcation of a single enforcement action with aggregate sanctions in an amount greater than $1,000,000 could result in separate but related enforcement actions in which one or more of such actions had sanctions of less than $1,000,000. Under the Proposed Rule, therefore, the bifurcation of an enforcement action into two or more related actions could result in a reduced award for a whistleblower that provided the original information leading to the enforcement actions, or no reward at all. Consequently, the Commission is amending the definition of ''action'' in Rule 165.2(a) to include two or more proceedings that ''arise out of the same nucleus of operative facts.'' [11]

2. Aggregate Amount

Proposed Rule 165.2(b) defined the phrase ''aggregate amount'' to mean the total amount of an award granted to one or more whistleblowers pursuant to Proposed Rule 165.7 (Procedures for award applications and Commission award determinations). The term is relevant for purposes of determining the amount of an award pursuant to Proposed Rule 165.8 (''Amount of award;'' providing the Commission's parameters for whistleblower awards). The Commission did not receive any comments on the definition of aggregate amount. The Commission is adopting Rule 165.2(b) as proposed.

3. Analysis

Under Section 23(a)(4) of the CEA, the ''original information'' provided by a whistleblower may include information that is derived from the ''independent knowledge'' or ''independent analysis'' of a whistleblower. Proposed Rule 165.2(c) defined the term ''analysis'' to mean the whistleblower's examination and evaluation of information that may be generally available, but which reveals information that is not generally known or available to the public. The Commission received no comment on the definition of ''analysis.'' However, the Commission did receive several comments on the definition of ''independent analysis,'' which are more fully discussed in section II.B.7.a below.

Because it received no comments to the contrary, the Commission is adopting Rule 165.2(c) as proposed. This definition recognizes that there are circumstances where individuals might review publicly available information, and, through their additional evaluation and analysis, provide vital assistance to the Commission staff in understanding complex schemes and identifying potential violations of the CEA.

4. Collected by the Commission

Proposed Rule 165.2(d) defined the phrase ''collected by the Commission,'' when used in the context of deposits and credits into the Fund, to refer to a monetary sanction that is both collected by the Commission and confirmed by the U.S. Department of the Treasury.[12] Section 23(g)(3) of the CEA provides that the Fund will be financed through monetary sanctions ''collected by the Commission * * * that is not otherwise distributed to victims of a violation of this Act or the rules or regulations thereunder underlying such action,'' meaning that deposits into the Fund are based only upon what the Commission actually collects.[13] The Commission generally collects civil monetary sanctions and disgorgement amounts in civil actions, or fines in administrative actions. A federal court or the Commission may award restitution to victims in civil and administrative actions, respectively, but the Commission does not ''collect'' restitution, *i.e.*, restitution is not recorded as a receivable on the Commission's books and records. Consequently, restitution amounts collected in a covered action or related action, in normal course, will not be deposited into the Fund. The Commission did not receive comments regarding the definition of ''collected by the Commission.'' The Commission is therefore adopting Rule 165.2(d) as proposed.

5. Covered Judicial or Administrative Action

Proposed Rule 165.2(e) defined the phrase ''covered judicial or administrative action'' to mean any judicial or administrative action brought by the Commission under the CEA, the successful resolution of which results in monetary sanctions exceeding $1,000,000. The Commission did not receive any comments on ''covered judicial or administrative action,'' and is adopting Rule 165.2(e) as proposed.

6. Fund

Proposed Rule 165.2(f) defined the term ''Fund'' to mean the ''Commodity Futures Trading Commission Customer Protection Fund'' established by Section 23(g) of the CEA. The Commission will use the Fund to pay whistleblower awards as provided in Final Rule 165.12 and to finance customer education initiatives designed to help customers protect themselves against fraud and other violations of the CEA or the Commission's Regulations. The Commission received no comments regarding the definition of ''Fund.'' The Commission is adopting Rule 165.2(f) as proposed.

7. Independent Knowledge and Independent Analysis

The phrases ''independent knowledge'' and ''independent analysis'' are relevant to the definition of ''original information'' in Proposed Rule 165.2(k), which provides that ''original information'' may be derived from the ''independent knowledge'' or ''independent analysis'' of a whistleblower. Commenters generally agreed with the Commission's interpretation of independent knowledge and independent analysis.[14] However, there were varied views as to what the Commission should or should not exclude from independent knowledge and independent analysis.

a. Independent Analysis

The Commission received one comment that addressed the definition of ''independent analysis''—''the whistleblower's own analysis whether done alone or in combination with others.'' The commenter stated that the term ''independent analysis'' in Proposed Rule 165.2(h) should be

[11] *See* SEC Rule 240.21F–4(d) (providing a similar definition of ''action'').

[12] *See* discussion regarding the Fund below in section II.B.6.

[13] *See* Section 23(g)(3) of the CEA, 7 U.S.C. 26(g)(3).

[14] *See* letters from Securities Industry and Financial Markets Association and Futures Industry Association (''SIFMA/FIA''), American Institute of CPAs (''AICPA''), NSCP, American Bar Association—Business Law Section/Committee on Derivatives and Futures Law and the Committee on Federal Regulation of Securities (''ABA'') and Edison Electric Institute and National Rural Electric Cooperative Association (''EEI'').

restricted to an analysis of the whistleblower's ''independent knowledge'' along with other objective facts such as commodity price or trading volume.[15] The Commission has considered the comment in the context of ''independent analysis'' and has decided to adopt Rule 165.2(h) as proposed. Section 23(a)(4) of the CEA specifically provides that original information can be derived from either ''the independent knowledge or analysis of a whistleblower.'' The Commission's Proposed Rule adheres to this statutory limitation.

b. Independent Knowledge

i. Proposed Rule

Proposed Rule 165.2(g) defined ''independent knowledge'' as factual information in the whistleblower's possession that is not obtained from publicly available sources, which would include such sources as corporate filings, media, and the Internet. Importantly, the proposed definition of ''independent knowledge'' did not require that a whistleblower have direct, first-hand knowledge of potential violations.[16] Instead, independent knowledge may be obtained from any of the whistleblower's experiences, observations, or communications (subject to the exclusion for knowledge obtained from public sources). Thus, for example, under Proposed Rule 165.2(g), a whistleblower would have ''independent knowledge'' of information even if that knowledge derives from facts or other information that has been conveyed to the whistleblower by third parties.

Proposed Rule 165.2(g) provided six circumstances in which an individual would not be considered to have ''independent knowledge.'' The effect of those provisions would be to exclude individuals who obtain information under those circumstances from being eligible for whistleblower awards.

The first exclusion is for information generally available to the public, including corporate filings and internet based information. (Proposed Rule 165.2(g)(1).)

The second and third exclusions address information that was obtained through a communication that is subject to the attorney-client privilege. (Proposed Rule 165.2(g)(2) and (3).) The second exclusion applies when a would-be whistleblower obtains the information in question through privileged attorney-client communications. The third exclusion applies when a would-be whistleblower obtains the information in question as a result of his or his firm's legal representation of a client. Neither the second nor the third exclusion would apply in circumstances in which the disclosure of the information is authorized by the applicable federal or state attorney conduct rules. These authorized disclosures could include, for example, situations where the privilege has been waived, or where the privilege is not applicable because of a recognized exception such as the crime-fraud exception to the attorney-client privilege.

In regard to both the second and third exclusions, compliance with the CEA is promoted when individuals, corporate officers, Commission registrants and others consult with counsel about potential violations, and the attorney-client privilege furthers such consultation. This important benefit could be undermined if the whistleblower award program vitiated the public's perception of the scope of the attorney-client privilege or created monetary incentives for counsel to disclose information about potential CEA violations that they learned of through privileged communications.

The fourth exclusion to ''independent knowledge'' in the Proposed Rule applies when a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity receives information about potential violations, and the information was communicated to the person with the reasonable expectation that the person would take appropriate steps to cause the entity to remedy the violation.[17] (Proposed Rule 165.2(g)(4).) Accordingly, under the fourth exclusion, officers, directors, and employees who learn of wrongdoing and are expected as part of their official duties to address the violations would not be permitted to use that knowledge to obtain a personal benefit by becoming whistleblowers.

The fifth exclusion is closely related to the fourth, and applies any other time that information is obtained from or through an entity's legal, compliance, internal audit, or similar functions or processes for identifying, reporting, and addressing potential non-compliance with applicable law. (Proposed Rule 165.2(g)(5).)

Compliance with the CEA is promoted when companies implement effective legal, internal audit, compliance, and similar functions. Thus, Section 23 should not create incentives for persons involved in such roles, as well as other similarly positioned persons who learn of wrongdoing at a company, to circumvent or undermine the proper operation of an entity's internal processes for investigating and responding to violations of law. However, both of these exclusions cease to be applicable if the entity fails to disclose the information to the Commission within sixty (60) days of when it becomes aware of the violation or otherwise proceeds in bad faith, with the result that an individual may be deemed to have ''independent knowledge,'' and, therefore, depending on the other relevant factors, may qualify for a whistleblower award. The rationale for this provision is that if the entity fails to report information concerning the violation to the Commission within that time frame, it would be inconsistent with the purposes of Section 23 to deter individuals with knowledge of the potential violations from coming forward and providing the information to the Commission. Furthermore, this provision provides a reasonable period of time for entities to report potential violations, thereby minimizing the potential of circumventing or undermining existing compliance programs.

The sixth and final exclusion to ''independent knowledge'' in the Proposed Rule applies if the would-be whistleblower obtains the information by means or in a manner that violates

[15] *See* letter from ABA.

[16] In addition, the distinction between ''independent knowledge'' (as knowledge not dependent upon publicly available sources) and direct, first-hand knowledge, is consistent with the approach courts have typically taken in interpreting similar terminology in the False Claims Act. Until this year, the ''public disclosure bar'' provisions of the False Claims Act defined an ''original source'' of information, in part, as ''an individual who [had] direct and independent knowledge of the allegations of the information on which the allegations [were] based * * *.'' 31 U.S.C. 3730(e)(4) (prior to 2010 amendments). Courts interpreting these terms generally defined ''independent knowledge'' to mean knowledge that was not dependent on public disclosures, and ''direct knowledge'' to mean first-hand knowledge from the relator's own work and experience, with no intervening agency. *E.g., United States ex rel. Fried* v. *West Independent School District,* 527 F.3d 439 (5th Cir. 2008); *United States ex rel. Paranich* v. *Sorgnard,* 396 F.3d 326 (3d Cir. 2005). *See generally* John T. Boese, *Civil False Claims and Qui Tam Actions* § 4.02[D][2] (Aspen Publishers) (2006) (citing cases). Earlier this year, Congress amended the ''public disclosure bar'' to, among other things, remove the requirement that a relator have ''direct knowledge'' of information. Sec. 10104(j)(2), Public Law 111–148 124 Stat. 901 (Mar. 23, 2010).

[17] This exclusion has been adapted from case law holding that a disclosure to a supervisor who is in a position to remedy the wrongdoing is a protected disclosure for purposes of the federal Whistleblower Protection Act, 5 U.S.C. 2302(b)(8). *E.g., Reid* v. *Merit Systems Protection Board,* 508 F.3d 674 (Fed. Cir. 2007); *Hooven-Lewis* v. *Caldera,* 249 F.3d 259 (4th Cir. 2001).

applicable federal or state criminal law. (Section 165.2(g)(6).) This exclusion is necessary to avoid the unintended effect of incentivizing criminal misconduct.

ii. Comments and Final Rule

Rule 165.2(g)(1)—Exception Concerning Public Sources

The Commission received comments from two commenters regarding the public source exception to ''independent knowledge.'' One commenter suggested that the public source exception (Section 165.2(g)(1)) is too broad and suggested that the Commission should restrict the definition of ''independent knowledge'' to first-hand knowledge. The commenter's rationale was that such a restriction would be premised on the notion that oral information obtained from third parties is unreliable because it may be insincere or subject to flaws in memory or perception. This commenter also suggested that the public source exception incentivizes whistleblower reports based on rumors or ill-informed sources.[18] Taking a contrary position, another commenter recommended that an ''independent analysis'' be allowed to draw on previously published sources.[19] One commenter suggested that ''independent analysis'' should be restricted to an analysis of the whistleblower's own ''independent knowledge'' along with other objective facts like commodity price or trading volume.[20]

After considering comments received, the Commission has decided to adopt Rule 165.2(g)(1) as proposed.

Rule 165.2(g)(2)—Exception Concerning Attorney-Client Privilege and Rule 165.2(g)(3)—Outside Counsel

One commenter asked the Commission to clarify that all of the exceptions contained in Proposed Rules 165.2(g)(2) and (3) continue to apply after an individual has resigned from his or her law firm, that the provisions apply equally to in-house and outside counsel; and that the rules treat the duties of lawyers differently from those of non-lawyer experts, such as paralegals and others who work under the direction of lawyers.[21] This commenter noted that lawyers gain knowledge about an entity that is protected by the attorney-client privilege and the work product doctrine,[22] which the lawyers are not permitted to waive, and that lawyers have state-law ethical obligations to maintain client confidentiality that extend beyond privileged information. The commenter reasoned that if the Commission does not specify that the exceptions in Rules 165.2(g)(2) and (3) continue after a lawyer has left his or her firm, the lawyer is incentivized to quit. Another commenter recommended that Rule 165.2(g)(2) be amended to explicitly apply to both attorneys and clients.[23] Similarly, another commenter suggested that the definitions of ''independent knowledge'' and ''independent analysis'' should exclude information obtained through a communication that is protected by the attorney-client privilege.[24] The same commenter recommended that the exclusions for information obtained by a person with legal, compliance, audit, supervisory, or governance responsibilities should apply to any information obtained by such persons and not be limited to information being communicated ''with a reasonable expectation that the [recipient] would take appropriate steps to cause the entity to remedy the violation. * * *''[25]

After considering comments received, the Commission has decided to adopt Rule 165.2(g)(2) as proposed and Rule 165.2(g)(3) with some modifications. The Commission has changed ''[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 * * *'' to ''[I]n connection with the legal representation of a client on whose behalf the whistleblower, or the whistleblower's employer or firm, have been providing services. * * *''[26] The Commission believes that these changes will prevent the use of confidential information not only by attorneys, but by secretaries, paralegals, consultants and others who work under the direction of attorneys and who may have access to confidential client information.

Rule 165.2(g)(4), (5)—Exception Concerning Internal Legal, Compliance, Audit, and Supervisory Responsibilities

Several commenters sought to expand the exclusions in Proposed Rule 165.2(g)(4). One commenter suggested that the exclusions for information obtained by a person with legal, compliance, audit, supervisory, or governance responsibilities should apply to any information obtained by such persons, and not be limited to information that was communicated to the recipient ''with a reasonable expectation that the [recipient] would take appropriate steps to cause the entity to remedy the violation * * *.''[27] Two other commenters said that the 60-day deadline for an entity to report information to the Commission, which if missed allows a whistleblower in this category to avoid the exclusions under Proposed Rules 165.2(g)(4) and (5), did not give the entity enough time to report. One suggested the deadline should be a 'reasonable time',[28], and the other suggested that whistleblowers in this category should have to wait until an entity's internal investigation is completed before reporting to the Commission.[29] Another commenter requested that the exclusion apply to external auditors (accounting firms) who obtain information about an entity while performing a CEA-required engagement and that the exclusion applies to any engagement performed for an entity subject to the jurisdiction of the Commission whether or not the engagement is an audit.[30] A commenter also suggested that lawyers should not be subject to the ''good faith'' or ''prompt reporting'' exceptions in Proposed Rule 165.2(g)(4), and that the reference to lawyers in Proposed Rule165.2(g)(4) should therefore be deleted and treated separately in Proposed Rules 165.2(g)(2) and (3).[31]

The Commission also received a comment that stated that the exception should be broadened to include internal control functions more generally, including risk management, product management and personnel functions. This commenter reasoned that all internal control functions should be treated equally because all internal control functions play an important role in maintaining an entity's control environment.[32]

The Commission has considered the comments received and revised the rule

[18] *See* letter from ABA.

[19] *See* letter from Project on Government Oversight (''POGO'') at 5–6 (noting the Bernard Madoff whistleblower, Harry Markopolos, as an example of whistleblowers who ''perform original analysis based on publicly available sources.'').

[20] *See* letter from ABA.

[21] *See* letter from SIFMA/FIA.

[22] *See* letter from ABA.

[23] *See* letter from The Financial Services Roundtable (''FSR'').

[24] *See* letter from NSCP.

[25] *Id.*

[26] *See* Rule 165.2(g)(3).

[27] *See* letter from ABA.

[28] *See* letter from NSCP, ''as long as the firm is moving toward appropriate resolution in light of the totality of the circumstances, a subjective definition of 'reasonable time' is appropriate.''

[29] *See* letter from EEI.

[30] *See* letter from AICPA.

[31] *See* letter from SIFMA/FIA.

[32] *See* letter from SIFMA/FIA. The Commission does not agree with this commenter. To exclude all persons somehow involved in an undefined ''internal control'' function would create too broad an exclusion, thereby making an unnecessarily large number of employees ineligible to be whistleblowers. It was not the intent of Section 23 to unreasonably limit the potential pool of whistleblowers.

such that those recommendations that have been accepted, in whole or in part, are now reflected in Rule 165.2(g)(4), (5). The recommended exclusions have been revised and focused to promote the goal of ensuring that the persons most responsible for an entity's conduct and compliance with law are not incentivized to promote their own self-interest at the possible expense of the entity's ability to detect, address, and self-report violations. Further, pursuant to the rules as adopted, such individuals would be permitted to become whistleblowers under certain circumstances, including when the whistleblower has a ''reasonable basis to believe'' that: (1) Reporting to the Commission is necessary to prevent conduct likely to cause substantial injury; (2) the entity is engaging in conduct that will impede an investigation of the misconduct; or (3) at least 120 days have elapsed since the whistleblower reported the information internally.[33]

The Commission declined to revise the rule to extend the exclusion to an employee of a public accounting firm. While the SEC includes such an exclusion in its rules,[34] the SEC's Dodd-Frank Act whistleblower provisions specifically requires this exclusion [35] and external auditors are under an existing obligation to report violations to the SEC under the Securities Exchange Act of 1934.[36] Neither the Commission's Dodd-Frank Act whistleblower provisions nor the CEA have similar exclusions or requirements.

Rule 165.2(g)(6)—Exception Concerning Information Obtained in Violation of Law

Commenters support the notion that a whistleblower who reports information he obtained in violation of the law should be ineligible for an award.[37] One commenter, however, recommended that an award exclusion should be limited.[38] This commenter reasoned that Rule 165.2(g)(6), as proposed, would have the effect of making the Commission ''responsible for adjudicating—without any real due process afforded to the whistleblower—whether or not evidence-gathering techniques violated a law, and if so, whether or not the whistleblower was in fact guilty of violating said law (*i.e.* whether the state could prove, beyond [a] reasonable doubt, that the employee in fact violated each and every element of the criminal claim).'' In addition, this commenter suggested that the Commission should revise the rule to more closely reflect the underlying statutory language. Another commenter proposed that the exclusion for information obtained in violation of the law should be extended to civil violations of laws or rules, and violations of a self-regulatory organization (''SRO'') rules.[39]

After considering the comments on Proposed Rule 165.2(g)(6), the Commission has decided to adopt the rule, as proposed, with one modification. Under the Final Rule, Rule 165.2(g)(5), whether a criminal violation occurred for purposes of the exclusion is now subject to the determination of a United States court. This revision is consistent with Section 23(c)(2) of the CEA, which renders ineligible ''any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive'' a whistleblower award. Expanding this exclusion beyond criminal violations and without the requirement for a United States court determination would be inconsistent with the statute and discourage whistleblowers through the creation of legal uncertainty.

8. Information That Led to Successful Enforcement Action

a. Proposed Rule

As proposed, Rule 165.2(i) explained when the Commission would consider original information to have led to a successful enforcement action. The Proposed Rule distinguished between information regarding conduct not previously under investigation or examination and information regarding conduct already under investigation or examination.

For information regarding conduct not previously under investigation or examination, the Proposed Rule established a two-part test for determining whether the information led to successful enforcement. First, the information must have caused the Commission staff to commence an investigation or examination, reopen an investigation that had been closed, or to inquire into new and different conduct as part of an existing examination or investigation. Second, the information must have ''significantly contributed'' to the success of an enforcement action filed by the Commission.

For information regarding conduct already under investigation or examination, the Proposed Rule established a higher hurdle. To establish that information led to a successful enforcement action, a whistleblower would need to demonstrate that the information: (1) Would not have otherwise been obtained; and (2) was essential to the success of the action.

b. Comments

The Commission received two comments regarding Proposed Rule 165.2(i). Both commenters suggested revising Proposed Rule 165.2(i) to lower the hurdles to proving that a whistleblower's information led to a successful enforcement action.[40] One commenter opined that the Commission imposes additional, non-statutory hurdles to the meaning of ''led to the successful enforcement.'' This commenter also asserted that the ''significantly contributed to the success of the action'' element of the definition improperly broadens the Commission's discretion to deny awards beyond congressional intent and suggested that the ''significantly contributed'' element be stricken from the rule.[41]

c. Final Rule

The Commission has considered the comments received regarding the definition of ''information that led to successful enforcement'' and has decided to adopt Rule 165.2(i) with some changes. Although the Commission has retained the ''significantly contributed'' element of the rule, the Commission has added alternative standards to evaluate whether a whistleblower has provided original information that led to a successful enforcement action. The Commission continues to believe that it is not the intent of Section 23 to authorize whistleblower awards for any and all tips. Instead, implicit in the requirement contained in Section 23(b) that a whistleblower's information ''led to successful enforcement'' is the additional expectation that the information, because of its high quality, reliability, and specificity, has a meaningful nexus to the Commission's ability to successfully complete its investigation, and to either obtain a settlement or prevail in a litigated proceeding.

[33] *See* Rule 165.2(g)(7).

[34] *See* SEC Rule 240.21F–4(b)(4)(iii)(D).

[35] *See* 15 U.S.C. 78u–6(c)(2)(C).

[36] *See* 15 U.S.C. 78j–1(b)(3); *see also* SEC Rule 240.10A–1.

[37] *See* letter from SIFMA/FIA (''The rules should also not allow for an award based on information provided in violations of judicial or administrative orders.'').

[38] *See* letter from Taxpayers Against Fraud (''TAF'').

[39] *See* letter from SIFMA/FIA.

[40] *See* letters from The National Whistleblowers Center (''NWC'') and TAF.

[41] *See* letter from TAF.

In addition, to further incentivize internal reporting of violations, the Commission has added a new paragraph (3) to this rule, which states that original information reported through an entity's internal processes that leads to a successful enforcement action will be treated as information provided by the whistleblower instead of provided by the entity.[42]

9. Monetary Sanctions

Proposed Rule 165.2(j) defined the phrase ''monetary sanctions'' when used with respect to any judicial or administrative action, or related action, to mean: (1) Any monies, including penalties, disgorgement, restitution and interest ordered to be paid; and (2) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action. This phrase is relevant to the definition of a ''covered judicial or administrative action'' in Proposed Rule 165.2(e) and to the amount of a whistleblower award under Proposed Rule 165.8. The Commission received no comments on the definition of ''monetary sanctions.'' The Commission is adopting the rule as proposed.

10. Original Information and Original Source

a. Proposed Rules

Proposed Rule 165.2(k) tracked the definition of ''original information'' set forth in Section 23(a)(4) of the CEA.[43] ''Original information'' means information that is derived from the whistleblower's independent knowledge or analysis; is not already known to the Commission from any other source, unless the whistleblower is the original source of the information; and is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information. Consistent with Section 23(l) of the CEA, the Dodd-Frank Act authorizes the Commission to pay whistleblower awards on the basis of original information that is submitted prior to the effective date of the Final Rules implementing Section 23 (assuming that all of the other requirements for an award are met). The Dodd-Frank Act does not authorize the Commission to apply Section 23 retroactively to pay awards based upon information submitted prior to the enactment date of the statute.[44] Consistent with Congress's intent, Proposed Rule 165.2(k)(4) also required that ''original information'' be provided to the Commission for the first time after July 21, 2010 (the date of enactment of the Dodd-Frank Act).

Proposed Rule 165.2(l) defined the term ''original source,'' a term found in the definition of ''original information.'' Under the Proposed Rule, a whistleblower is an ''original source'' of the same information that the Commission obtains from another source if the other source obtained the information from the whistleblower or his representative. The whistleblower bears the burden of establishing that he is the original source of information.

In Commission investigations, a whistleblower would be an original source if he first provided information to another authority, such as the Department of Justice, an SRO, or another organization that is identified in the Proposed Rule, which then referred the information to the Commission. In these circumstances, the Proposed Rule would credit a whistleblower as being the ''original source'' of information on which the referral was based as long as the whistleblower ''voluntarily'' provided the information to the other authority within the meaning of these rules (*i.e.,* the whistleblower or his representative must have come forward and given the other authority the information before receiving any request, inquiry, or demand to which the information was relevant, or was the individual who originally possessed either the independent knowledge or conducted the independent analysis). Similarly, a whistleblower would not lose original source status solely because he shared his information with another person who filed a whistleblower claim with the Commission prior to the original source filing a claim for whistleblower status, as long as the other applicable factors are satisfied.

Proposed Rule 165.3 (''Procedures for submitting original information'') required a whistleblower to submit two forms, a Form TCR (''Tip, Complaint or Referral'') and a Form WB–APP (''Application for Award for Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act''), which included the ''Declaration Concerning Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act'' in order to start the process and establish the whistleblower's eligibility for award consideration.[45] A whistleblower who either provides information to another authority first, or who shares his independent knowledge or analysis with another who is also claiming to be a whistleblower, would have followed these same procedures and submitted the necessary forms to the Commission in order to perfect his status as a whistleblower under the Commission's whistleblower program. However, under Proposed Rule 165.2(l)(2), the whistleblower must have submitted the necessary forms to the Commission within 90 days after he provided the information to the other authority, or 90 days after the other person claiming to be a whistleblower submitted his claim to the Commission.

As noted above, the whistleblower must establish that he is the original source of the information provided to the other authority as well as the date of his submission, but the Commission may seek confirmation from the other authority, or any other source, in making this determination. The objective of this procedure is to provide further incentive for persons with knowledge of CEA violations to come forward (consistent with the purposes of Section 23) by assuring potential whistleblowers that they can provide information to appropriate Government or regulatory authorities, and their ''place in line'' will be protected in the event that other whistleblowers later provide the same information directly to the Commission.

For similar reasons, the Proposed Rule extended the same protection to whistleblowers who provide information about potential violations to the persons specified in Proposed Rule 165.2(g)(3) and (4) (*i.e.,* personnel involved in legal, compliance, audit, supervisory and similar functions, or who were informed about potential violations with the expectation that they would take steps to address them), and who, within 90 days, submit the necessary whistleblower forms to the Commission. Compliance with the CEA is promoted when entities have effective programs for identifying, correcting, and self-reporting unlawful conduct by their officers or employees. The objective of this provision is to support, not

[42] The SEC final rules take a similar approach to their comparable definitional provision. *See* SEC Rule 240.21F–4(c) (''information that leads to successful enforcement'').

[43] 7 U.S.C. 26(a)(4).

[44] Section 23(k) of the CEA directs that: ''Information submitted to the Commission by a whistleblower in accordance with rules or regulations implementing this section shall not lose its status as original information solely because the whistleblower submitted such information prior to the effective date of such rules or regulations, provided that such information was submitted after the date of enactment of the [Dodd-Frank Act].''

[45] *See* Rule 165.3.

undermine, the effective functioning of entity compliance and related systems by allowing employees to take their concerns about potential violations to appropriate entity officials while still preserving their rights under the Commission's whistleblower program.

Proposed Rule 165.2(l)(3) addressed circumstances where the Commission already possesses some information about a matter at the time that a whistleblower provides additional information about the same matter. The whistleblower will be considered the ''original source'' of any information that is derived from his independent knowledge or independent analysis, and that materially adds to the information that the Commission already possesses. The standard is modeled on the definition of ''original source'' that Congress included in the False Claims Act through amendments.[46]

b. Comments

The Commission received three comments regarding the definition of ''original information'' in Proposed Rule 165.2(k). One commenter believes that the enumerated exclusions from the definition of ''original information'' are not sufficiently broad. As an example, this commenter posits that the definition would not clearly exclude information a whistleblower receives as a result of an investigation by an exchange, SRO, or a foreign regulator, or information received in connection with internal investigations or civil or criminal proceedings in which the information has already been made known to the entity. Therefore, this commenter suggests broadly excluding from the definition all information deriving from an allegation made in any investigative or enforcement activity or proceeding, and all information elicited during, or deriving from, any such proceeding or other matter.[47]

Another commenter had two concerns about the definition. The first concern was that a whistleblower could be rewarded for reporting something that an entity has already corrected. Therefore, the commenter proposed that for information to be considered original information, it should be ''information relating to a violation that has not been addressed by the entity that is alleged to have violated the CEA.'' The other concern was that the Proposed Rules do not specifically address original information involving violations that are time-barred by the applicable statute of limitations, or situations in which there is uncertainty regarding the applicable statute of limitations.[48]

Another commenter focused on the definition of ''original source'' and suggested that it often takes longer than 90 days for a whistleblower to realize that an entity intends to ignore the whistleblower's efforts to report under an internal compliance program. Therefore that commenter posited that the time for a whistleblower to report internally should be extended.[49]

c. Final Rules

The Commission has considered the comments received regarding the definition of ''original information'' and has decided to adopt Rule 165.2(k) as proposed. The Commission does not agree with the commenter who suggested that it would be improper for a whistleblower to receive an award for a violation that an entity has corrected. A whistleblower is entitled to an award of not less than 10 percent and not more than 30 percent of monetary sanctions collected, regardless of whether the violation was self-corrected. In addition, the Commission does not believe it is necessary or appropriate to limit the definition of original information based upon the age of the information.

The Commission has considered the comments received regarding ''original source'' and has decided to adopt Rule 165.2(l) with a change. The change is that the Commission has extended the time that an otherwise excluded whistleblower has to report information to the Commission after he reported to an entity that did not self report. Paragraph (2) of Rule 165.2(l) now gives such whistleblower 120 days instead of 90 days to regain ''original source'' status, which will provide whistleblowers with additional time to recognize whether an entity has reported the violation to the Commission.

The Commission believes that several provisions in the Final Rules will ordinarily operate to exclude whistleblowers whose only source of original information is an existing investigation or proceeding. Information that is exclusively derived from a governmental investigation is expressly excluded from the definition of ''original information'' under Rule 165.2(k)(3). A whistleblower who learns about possible violations only through a company's internal investigation will ordinarily be excluded from claiming ''independent knowledge'' by operation of either the exclusions from ''independent knowledge'' set forth in Rule 165.2(g)(2), (3), (4), (5) (relating to attorneys and other persons who may be involved in the conduct of internal investigations). To the extent that information about an investigation or proceeding is publicly available, it is excluded from consideration as ''independent knowledge'' under Rule 165.2(g)(1).

11. Related Action

The phrase ''related action'' in Proposed Rule 165.2(m), when used with respect to any judicial or administrative action brought by the Commission under the CEA, means any judicial or administrative action brought by an entity listed in Proposed Rule 165.11(a) (*i.e.,* the Department of Justice, an appropriate department/agency of the Federal Government, a registered entity, registered futures association or SRO, or a State criminal or appropriate civil agency) that is based upon the original information voluntarily submitted by a whistleblower to the Commission pursuant to Proposed Rule 165.3 that led to the successful resolution of the Commission action. This phrase is relevant to the Commission's determination of the amount of a whistleblower award under Proposed Rules 165.8 and 165.11. The Commission received one comment regarding ''related action.'' The commenter expressed concern that a whistleblower could potentially receive an award from both the Commission and the SEC by providing the same information to each agency. This same commenter noted that the SEC will not make an award for a related action and these rules should contain similar provisions.[50] After consideration of the comment, the Commission has decided to adopt the rule as proposed. There are statutory differences between Section 23(h)(2)(C) of the CEA and Section 21F(h)(2)(D)(i) of the Securities Exchange Act of 1934 that prevent complete harmonization between the two agencies with regard to the term ''related action.'' For example, the list entities whose actions can qualify as ''related actions'' do not match under the Commission and SEC Dodd-Frank Act provisions. Compare 7 U.S.C. 26(a)(5) (designating the Department of Justice, an appropriate department/agency of the Federal Government, a registered entity, registered futures association or SRO, a State criminal or appropriate civil agency, and a foreign futures authority); with 15 U.S.C. 78u–6(a)(5) (designating) the Attorney General of the United States, an

[46] 31 U.S.C. 3730(e)(4)(B), Public Law 111–148 § 10104(j)(2), 124 Stat. 901 (Mar. 23. 2010).

[47] *See* letter from ABA.

[48] *See* letter from Investment Company Institute (''ICI'').

[49] *See* letter from TAF.

[50] *See* letter from FSR.

appropriate regulatory agency, an SRO, or a state attorney general in a criminal case).

12. Successful Resolution or Successful Enforcement

Proposed Rule 165.2(n) defined the phrase ''successful resolution,'' when used with respect to any judicial or administrative action brought by the Commission under the CEA, to include any settlement of such action or final judgment in favor of the Commission. The phrase shall also have the same meaning as ''successful enforcement.'' This phrase is relevant to the definition of the term ''covered judicial or administrative action'' as set forth in Rule 165.2(e). The Commission received no comments on the term ''successful resolution'' or ''successful enforcement'' and is adopting the rule as proposed.

13. Voluntary Submission or Voluntarily Submitted

a. Proposed Rule

Under Section 23(b)(1) of the CEA,[51] whistleblowers are eligible for awards only when they ''voluntarily'' provide original information about CEA violations to the Commission. Proposed Rule 165.2(o) defined a submission as made ''voluntarily'' if a whistleblower provided the Commission with information before receiving any request, inquiry, or demand from the Commission, Congress, any other federal, state or local authority, the Department of Justice, a registered entity, a registered futures association or any SRO about a matter to which the information in the whistleblower's submission was relevant. The Proposed Rule covered both formal and informal requests. Thus, under the Proposed Rule, a whistleblower's submission would not be considered ''voluntary'' if the whistleblower was contacted by the Commission or one of the other authorities first, whether or not the whistleblower's response was compelled by subpoena or other applicable law.

As the Commission's Proposing Release explained, this approach was intended to create a strong incentive for whistleblowers to come forward early with information about possible violations of the CEA, rather than wait to be approached by investigators. For the same reasons, Proposed Rule 165.2(o) provided that a whistleblower's submission of documents or information would not be deemed ''voluntary'' if the documents or information were within the scope of a prior request, inquiry, or demand to the whistleblower's employer, unless the employer failed to make production to the requesting authority in a timely manner.

Proposed Rule 165.2(o) also provided that a submission would not be considered ''voluntary'' if the whistleblower was under a pre-existing legal or contractual duty to report the violations of the CEA to the Commission or to one of the other designated authorities.

b. Comments

Commenters had diverse perspectives on the Commission's proposal to require that whistleblowers come forward before they receive either a formal or informal request or demand from the Commission, or one of the other designated authorities, about any matter relevant to their submission. Some commenters asserted that the Commission's Proposed Rule was too restrictive. For example, one commenter urged that all information provided by a whistleblower should be treated as ''voluntary'' until the whistleblower is testifying under compulsion of a subpoena.[52] Another commenter expressed concern that the Commission's Proposed Rule could have the effect of barring whistleblowers in cases in which a whistleblower's information is arguably ''relevant'' to a general informational request from an authority, even though the authority is not pursuing the issue that the whistleblower might report.[53] This commenter also suggested that rather than create an exclusion based on whether the information is ''relevant'' to a request, Rule 165.2(o) should be revised to bar individuals whose allegations are the subject of investigation by the public entities identified in the rule.[54]

Other commenters posited that the Commission's Proposed Rule did not go far enough in precluding whistleblower submissions from being treated as ''voluntary.'' A commenter urged that the Commission's rules should preclude an individual from making a ''voluntary'' submission after an individual has been contacted for information during the course of an entity's internal investigation or internal review.[55] In response to one specific request for comment, other commenters advocated that the Commission not treat a submission as ''voluntary'' if the whistleblower was aware of a governmental or internal investigation at the time of the submission, whether or not the whistleblower received a request from the Commission or one of the other authorities.[56]

The Commission also requested comment regarding whether a whistleblower's submission should be deemed to be ''voluntary'' if the information submitted was within the scope of a previous request to the whistleblower's employer. Some commenters responded that they supported the exclusion and suggested that it be expanded in various ways.[57]

The Commission received varying comments regarding its Proposed Rule to exclude whistleblowers from the definition of ''voluntarily'' if they are under a pre-existing legal or contractual duty to report the violations to the Commission or another authority. Some commenters opposed the exclusion on the ground that Section 23(c)(2) of the CEA sets forth a specific list of persons whom Congress deemed to be ineligible for awards, some as a result of their pre-existing duties.[58] These commenters suggested that the Commission was expanding these exclusions in a manner that was inconsistent with Congressional intent and the purposes of Section 23.[59]

Other commenters favored the ''legal duty'' exclusion and recommended that it be clarified and extended. In particular, these commenters suggested that the exclusion should be applied to

[51] 7 U.S.C. 26(b)(1).

[52] *See* letter from NWC.

[53] *See* letter from TAF. As an example, this commenter posits that:

[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.

[54] *Id.*

[55] *See* letter from SIFMA/FIA.

[56] *See* letters from ABA and NSCP.

[57] *See* letters from SIFMA/FIA (urging elimination of the exception that would permit an employee to make a voluntary submission if the employer did not produce the documents or information in a timely manner) and NSCP (employee should be regarded as having received a request to an employer if there is a reasonable likelihood that the employee would have been contacted by the employer in responding to the request).

[58] Section 23(c)(2) of the CEA sets forth four categories of individuals who are ineligible for whistleblower awards. These include: employees of the Commission and of certain other authorities; persons who were convicted of a criminal violation in relation to the action for which they would otherwise be eligible for an award; persons who submit information to the Commission that is based on the facts underlying the covered action submitted previously by another whistleblower; and any whistleblower who fails to submit information to the Commission in such form as the Commission may require by rule or regulation.

[59] *See* letters from NWC; Stuart D. Meissner, LLC; National Coordinating Committee for Multiemployer Plans (''NCCMP''); DC Bar; and Daniel J. Hurson.

various categories of individuals in the corporate context. Several commenters urged that the Commission should not consider submissions to be ''voluntary'' in circumstances in which an employee or an outside service provider has a duty to report misconduct to an entity.[60]

c. Final Rule

After considering the comments, the Commission has decided to adopt Rule 165.2(o) without modifications. The Commission believes that a requirement that a whistleblower come forward before being contacted by Government investigations is both good policy and consistent with existing case law.[61]

As adopted, Final Rule 165.2(o) provides that a submission of original information is deemed to have been made ''voluntarily'' if the whistleblower makes his or her submission before a request, inquiry, or demand that relates to the subject matter of the submission is directed to the whistleblower or anyone representing the whistleblower (such as an attorney): (i) By the Commission; (ii) Congress; (iii) any other federal or state authority; (iv) the Department of Justice; (v) a registered entity; (vi) a registered futures association; or (vii) an SRO.

The Commission believes that a whistleblower award should not be available to an individual who makes a submission after first being questioned about a matter (or otherwise requested to provide information) by Commission staff acting pursuant to any of its investigative or regulatory authorities. Only an investigative request made by one of the other designated authorities will trigger application of the rule, except that a request made in connection with an examination or inspection, as well as an investigative request, by an SRO will also render a whistleblower's subsequent submission relating to the same subject matter not ''voluntary.'' In the context of a request made to an employer, an employee-whistleblower will be considered to have received a request if the documents or information the whistleblower provides to the Commission are within the scope of the request to the employer. This provision recognizes the important relationship that frequently exists between examinations and enforcement investigations, as well as the Commission's regulatory oversight of SROs. For example, if an entity's employee were interviewed by examiners, the employee could not later make a ''voluntary'' submission related to the subject matter of the interview.[62]

As adopted, the Commission's rule retains the provision that a submission will not be considered ''voluntary'' if the whistleblower is under a pre-existing legal or contractual duty to report the information to the Commission or to any of the other authorities designated in the rule. As adopted, Rule 165.2(o) provides that a whistleblower cannot ''voluntarily'' submit information if the whistleblower is required to report his ''original information'' to the Commission pursuant to a pre-existing legal duty, a contractual duty that is owed to the Commission or to one of the other authorities set forth above, or a duty that arises out of a judicial or administrative order.

For similar reasons, the Commission declines to accept the suggestion of some commenters that a whistleblower report should not be treated as ''voluntary'' if it was made after the whistleblower had been contacted for information in the course of an internal investigation. Elsewhere in the Commission's final Rules, the Commission has attempted to create strong incentives for employees to continue to utilize their employers' internal compliance and other processes for receiving and addressing reports of possible violations of law.[63] If a whistleblower took any steps to undermine the integrity of such systems or processes, the Commission will consider that conduct as a factor that may decrease the amount of any award.[64] However, a principal purpose of Section 23 is to promote effective enforcement of the commodity laws by providing incentives for persons with knowledge of misconduct to come forward and share their information with the Commission. Although the Commission acknowledges that internal investigations can be an important component of corporate compliance, and although there are existing incentives for companies to self-report violations, providing information to persons conducting an internal investigation, or simply being contacted by them, may not, without more, achieve the statutory purpose of getting high-quality, original information about violations of the CEA directly to Commission staff.

14. Whistleblower(s)

a. Proposed Rule

The term ''whistleblower'' is defined in Section 23(a)(7) of the CEA.[65] Consistent with this language, Proposed Rule 165.2(p) defined a whistleblower as an individual who, alone or jointly with others, provides information to the Commission relating to a potential violation of the CEA. An entity or other non-natural person is not eligible to receive a whistleblower award. This definition tracks the statutory definition of a ''whistleblower,'' except that the Proposed Rule uses the term ''potential violation'' in order to make clear that the whistleblower anti-retaliation protections set forth in Section 23(h) of the CEA do not depend on an ultimate adjudication, finding or conclusion that conduct identified by the whistleblower constituted a violation of the CEA.

Further, Proposed Rule 165.2(p) (and Proposed Rule 165.6(b)) would make clear that the anti-retaliation protections set forth in Section 23(h) of the CEA apply irrespective of whether a whistleblower satisfies all the procedures and conditions to qualify for an award under the Commission's whistleblower program. Section 23(h)(1)(A) of the CEA prohibits employment retaliation against a whistleblower who provides information to the Commission (i) ''in accordance with this section,'' or (ii) ''in assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information.'' The Commission interprets the statute as designed to extend the protections against employment retaliation delineated in Section 23(h)(1) to any individual who provides information to the Commission about potential violations of the CEA regardless of whether the person satisfies procedures and conditions necessary to qualify for an award under the Commission's whistleblower program.

b. Comments

The Commission received several comments regarding the definition of whistleblower. Two commenters urged

[60] *See* letters from NSCP and FSR.

[61] *Cf. Barth* v. *Ridgedale Electric, Inc.,* 44 F.3d 699 (8th Cir. 1994); *United States ex rel. Paranich* v. *Sorgnard,* 396 F.3d 326 (3d Cir. 2005) (rejecting argument that information provided beyond that required by subpoena is voluntary for purposes of False Claims Act); *United States ex rel. Fine* v. *Chevron, USA, Inc.,* 72 F.3d 740 (9th Cir. 1995), *cert. denied,* 517 U.S. 1233 (1996) (rejecting argument that provision of information to the Government is always voluntary unless compelled by subpoena).

[62] As is further discussed below, individuals who wait to make their submission until after a request is directed to their employer will not face an easy path to an award. The Commission expects to scrutinize all of the attendant circumstances carefully in determining whether such submissions ''significantly contributed'' to a successful enforcement action under Rule 165.2(n) in view of the previous request to the employer on the same or related subject matter.

[63] *See* discussion below in Part II.I.

[64] *See* Rule 165.9.

[65] 7 U.S.C. 26(a)(7).

that the term whistleblower should include only individuals who provide information about potential violations of the commodities laws ''by another person.''[66] The Commission also received several comments regarding the anti-retaliation provision of the definition. One commenter asserted that the anti-retaliation provisions of Proposed Rules 165.2(p) and 165.6(b) could be interpreted to protect individuals who have violated criminal laws, and urged that the Commission clarify that companies are permitted ''to take adverse personnel actions against whistleblowers for any appropriate reason other than their whistleblower status.'' This same commenter suggested that the rules also should be clarified to state that filing a whistleblower report does not protect an individual from discipline or termination if the individual was involved in, was responsible for, or lied about the misconduct described in the report.[67]

Another commenter was concerned about the potential for abuse by employees who might make frivolous whistleblower claims solely to avail themselves of the anti-retaliation provisions of Part 165 or to seek a chance to receive a potentially large award. This commenter believed that the Commission should impose additional requirements on persons entitled to whistleblower status and suggested that Proposed Rule 165.2(p) be revised to specify that the anti-retaliation provision apply to a person who provides information: That is material to the claimed violation of the CEA; that has a basis in fact or knowledge (which must be articulated) rather than speculation; that is not based on information that is either publicly disseminated or which the employee should reasonably know is already known to the entity's board of directors or chief compliance officer, or to a court or the Commission or another governmental entity; and the provision of which does not result in the violation of a professional obligation, including the obligation to maintain such information in confidence. This commenter also suggested that the Commission deliver to an employee who has met the requisite criteria of a ''whistleblower'' a letter or statement indicating such status by reason of the information the employee provided.[68] This commenter also contended that the information regarding ''a potential violation'' language in Proposed Rule 165.2(p) could be read to refer to future acts or omissions. As a result, the commenter encouraged the Commission to use ''another phrase (such as 'claimed violation') and to add a definition of the term to further minimize the ambiguity.'' The commenter posited that the definition of the term should be further clarified to indicate that it does not include matters that are clearly stale (*e.g.,* an alleged violation that occurred ten years ago). Two other commenters recommended that the rule exclude any individuals who engaged in the underlying misconduct from eligibility as a whistleblower.[69] One commenter supported anti-retaliation protection of whistleblowers even if they do not qualify for an award.[70] Another commenter suggested that the Commission should find that any entity that retaliates against a whistleblower commits ''a separate and independent violation'' of the commodity futures laws subjecting the entity to the maximum penalties for such violation provided for under the law, up to and including a delisting of the entity.[71]

c. Final Rule

Upon consideration of the comments received, the Commission has decided to adopt Rule 165.2(p) as proposed. The anti-retaliation provisions reflect Congress's intent to implement anti-retaliation protections for whistleblowers who provide original information to the Commission. These anti-retaliation protections do not provide blanket immunity to whistleblowers from adverse employment actions by their employers; whistleblowers are protected only to the extent that the employer took the adverse employment action because ''of any lawful act done by the whistleblower'' in providing information to the Commission or in assisting the Commission in any related investigation or enforcement action.[72] With respect to the commenter concern regarding potential bad faith reporting, Congress placed a procedural safeguard in the statute that advises whistleblowers that they can be prosecuted for making false statements to the Commission under 18 U.S.C. 1001.[73] This procedural safeguard will reduce the risk of meritless referrals. Moreover, whistleblowers are incentivized to provide referrals only if they believe those referrals have merit since they can only get an award if their referral leads to a successful enforcement action (see Rules 165.2(i) and 165.9.). Also as indicated above, several commenters addressed issues relating to eligibility and culpability of a whistleblower. Those issues are addressed in Rules 165.6 and 165.17, respectively.

The Commission does not have the statutory authority to conclude that any entity that retaliates against a whistleblower commits a separate and independent violation of the CEA. Section 23(h)(1)(B)(i) clearly states that only an individual who alleges retaliation in violation of being a whistleblower may bring such a cause of action.

Regarding Rule 165.2(p)(2), the Commission has made a slight modification. Pursuant to the change, in order to be considered a whistleblower for purposes of the anti-retaliation protections afforded by Section 23(h)(1)(A)(i) of the CEA, the whistleblower must possess a reasonable belief that the information the whistleblower provides relates to a possible violation of the CEA.

C. Rule 165.3—Procedures for Submitting Original Information

1. Proposed Rule

The Commission proposed a two-step process for the submission of original information under the whistleblower award program. In general, the first step would require the submission of the standard form on which the information concerning potential violations of the CEA are reported. The second step would require the whistleblower to complete a unique form, signed under penalties of perjury (consistent with Section 23(m) of the CEA), in which the whistleblower would be required to make certain representations concerning the veracity of the information provided and the whistleblower's eligibility for a potential award. The use of standardized forms will greatly assist the Commission in managing and tracking numerous tips from potential whistleblowers. Forms will also better enable the Commission to find common threads among tips and otherwise make better use of the information provided, and assist with the review of requests for payment under the whistleblower provisions. The purpose of requiring a sworn declaration is to help deter the

[66] *See* letters from SIFMA/FIA and ABA.

[67] *See* letter from SIFMA/FIA.

[68] *See* letter from ABA.

[69] *See* letters from Association of Corporate Counsel (''ACC'') and FSR.

[70] *See* letter from POGO.

[71] *See* letter from NCCMP.

[72] 7 U.S.C. 26(h)(1)(A).

[73] *See* Section 23(m) of the CEA, 7 U.S.C. 26(m). Such false statements also could be a violation of Section 9(a)(3) of the CEA, 7 U.S.C. 13(a)(3), and could potentially be a violation of Section 6(c)(2) of the CEA, 7 U.S.C. 9, 15. Therefore, a whistleblower who provides information to the Commission in violation of these sections would not be entitled to retaliation protection because his provision of information to the Commission would be in violation of law. *See* 7 U.S.C. 26(h)(1)(A).

submission of false and misleading tips and the resulting inefficient use of the Commission's resources. The requirement would also mitigate the potential harm to companies and individuals resulting from false or spurious allegations of wrongdoing.

As set forth in Proposed Rule 165.5, Commission staff may also request testimony and additional information from a whistleblower relating to the whistleblower's eligibility for an award.

a. Form TCR and Instructions

Subparagraph (a) of Proposed Rule 165.3 required the submission of information to the Commission on proposed Form TCR. The Form TCR, ''Tip, Complaint or Referral,'' and the instructions thereto, were designed to capture basic identifying information about a complainant and to elicit sufficient information to determine whether the conduct alleged suggests a violation of the CEA.

b. Form WB–DEC and Instructions

In addition to Form TCR, the Commission proposed in subparagraph (b) of Proposed Rule 165.3 to require that whistleblowers who wish to be considered for an award in connection with the information they provide to the Commission also complete and provide the Commission with proposed Form WB–DEC, ''Declaration Concerning Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act.'' Proposed Form WB–DEC would require a whistleblower to answer certain threshold questions concerning the whistleblower's eligibility to receive an award. The form also would contain a statement from the whistleblower acknowledging that the information contained in the Form WB–DEC, as well as all information contained in the whistleblower's Form TCR, is true, correct and complete to the best of the whistleblower's knowledge, information and belief. Moreover, the statement would acknowledge the whistleblower's understanding that the whistleblower may be subject to prosecution and ineligible for an award if, in the whistleblower's submission of information, other dealings with the Commission, or dealings with another authority in connection with a related action, the whistleblower knowingly and willfully made any false, fictitious, or fraudulent statements or representations, or used any false writing or document knowing that the writing or document contained any false, fictitious, or fraudulent statement or entry.

In instances where information is provided by an anonymous whistleblower, proposed subparagraph (c) of Proposed Rule 165.3 required that the whistleblower's identity must be disclosed to the Commission and verified in a form and manner acceptable to the Commission consistent with the procedure set forth in Proposed Rule 165.7(c) prior to the Commission's payment of any award.

The Commission proposed to allow two alternative methods of submission of Form TCRs and WB–DEC. A whistleblower would have the option of submitting a Form TCR electronically through the Commission's Web site, or by mailing or faxing the form to the Commission. Similarly, a Form WB–DEC could be submitted electronically, in accordance with instructions set forth on the Commission's Web site or, alternatively, by mailing or faxing the form to the Commission.

c. Perfecting Whistleblower Status for Submissions Made Before Effectiveness of the Rules

As previously discussed, Section 748(k) of the Dodd-Frank Act stated that information submitted to the Commission by a whistleblower after the date of enactment, but before the effective date of the Proposed Rules, retained the status of original information. The Commission has already received tips from potential whistleblowers after the date of enactment of the Dodd-Frank Act. Proposed Rule 165.3(d) provided a mechanism by which whistleblowers who fall into this category could perfect their status as whistleblowers once the Final Rules are adopted. Subparagraph (d)(1) required a whistleblower who provided original information to the Commission in a format or manner other than a Form TCR to submit a completed Form TCR within one hundred twenty (120) days of the effective date of the Final Rules and to otherwise follow the procedures set forth in subparagraphs (a) and (b) of Proposed Rule 165.3. If a whistleblower provided the original information to the Commission in a Form TCR, subparagraph (d)(2) would require the whistleblower to submit Form WB–DEC within one hundred twenty (120) days of the effective date of the Final Rules in the manner set forth in subparagraph (b) of Proposed Rule 165.3.

2. Comments

The Commission received several comments regarding Proposed Rule 165.3. A commenter advised the Commission that the rules as currently proposed are not ''user friendly'' and modifications must be made to both procedures and forms to facilitate disclosures, and to do so would minimize the risks that otherwise qualified applicants will be denied based on a technicality.[74] Several commenters referenced Proposed Rule 165.3 while advocating internal reporting.[75] They suggested that a whistleblower who reports internally prior to reporting to the Commission should be given one year to file an application; and that 90 days to file Forms TCR and WB–DEC may not be sufficient time for a firm to assess a complex situation, and, therefore, the deadline should be a minimum of 90 days or such longer time as is reasonable.

Another commenter suggested that, if documents are delivered directly to the Commission, then the representations on a Form TCR should be subject to penalty of perjury, similar to Form WB–DEC. This commenter also suggested that attorneys who assist clients in submitting anonymous claims should be required to review the client's information and certify to the Commission that the client can show ''particularized facts suggesting a reasonable probability that a violation has actually occurred or is occurring.'' This Commenter also stated that the 90-day deadline should be eliminated, but that if it is not eliminated the deadline should be at least 180 days.[76]

3. Final Rule

After consideration of the comments received on Proposed Rule 165.3, the Commission has decided to adopt the rule with changes. In response to comments calling for the streamlining of process, and in the interest of harmonization with the SEC, the Commission has incorporated the substance of Form WB–DEC into both the Form TCR and WB–APP.[77] The forms will be changed to advise potential whistleblowers (and their attorneys) that the forms must be completed under oath and subject to the penalty of perjury. Also, changes have been made to Rule 165.3 regarding the incorporation of the WB–DEC form into both the Form-TCR and Form WB–APP.

D. Rule 165.4—Confidentiality

1. Proposed Rule

Proposed Rule 165.4 summarized the confidentiality requirements set forth in Section 23(h)(2) of the CEA[78] with

[74] *See* letter from NWC.

[75] *See* letters from NSCP, ABA, and NCCMP.

[76] *See* letter from ABA.

[77] Form WB–APP and the award application process are discussed below in section II.G.

[78] 7 U.S.C. 26(h)(2).

respect to information that could reasonably be expected to reveal the identity of a whistleblower. As a general matter, it is the Commission's policy and practice to treat all information obtained during its investigations as confidential and nonpublic. Disclosures of enforcement-related information to any person outside the Commission may only be made as authorized by the Commission and in accordance with applicable laws and regulations. Consistent with Section 23(h)(2), the Proposed Rule explains that the Commission will not reveal the identity of a whistleblower or disclose other information that could reasonably be expected to reveal the identity of a whistleblower, except under circumstances described in the statute and the rule.[79] As is further explained below, there may be circumstances in which disclosure of information that identifies a whistleblower will be legally required or will be necessary for the protection of market participants.

Subparagraph (a)(1) of the Proposed Rule authorized disclosure of information that could reasonably be expected to reveal the identity of a whistleblower when disclosure is required to a defendant or respondent in a public proceeding that the Commission files, or in another public action or proceeding filed by an authority to which the Commission is authorized to provide the information. For example, in a related action brought as a criminal prosecution by the Department of Justice, disclosure of a whistleblower's identity may be required in light of a criminal defendant's constitutional right to be confronted by the witnesses against him.[80] Subparagraph (a)(2) would authorize disclosure to: The Department of Justice; another appropriate department or agency of the Federal Government acting within the scope of its jurisdiction; a registered entity, registered futures association, or SRO; a state attorney general in connection with a criminal investigation; any appropriate state department or agency acting within the scope of its jurisdiction; or a foreign futures authority.

Because many whistleblowers may wish to provide information anonymously, subparagraph (b) of the Proposed Rule, consistent with Section 23(d) of the CEA, states that anonymous submissions are permitted with certain specified conditions. Subparagraph (b) would require that anonymous whistleblowers who submit information to the Commission must follow the procedure in Proposed Rule 165.3(c) for submitting original information anonymously. Further, anonymous whistleblowers would be required to follow the procedures set forth in Proposed Rule 165.7(c) requiring that the whistleblower's identity be disclosed to the Commission and verified in a form and manner acceptable to the Commission prior to the Commission's payment of any award.

The purpose of this requirement is to prevent fraudulent submissions and facilitate communication and assistance between the whistleblower and the Commission's staff. A whistleblower may be represented by counsel—whether submitting information anonymously or not.[81] The Commission emphasizes that anonymous whistleblowers have the same rights and responsibilities as other whistleblowers under Section 23 of the CEA and the Final Rules, unless expressly exempted.

2. Comments

The Commission received one comment regarding Proposed Rule 165.4. The commenter stated that the Commission has no authority to compel an attorney to reveal the identity of an anonymous whistleblower, and that, in cases where the Commission knows the whistleblower's identity, the rules should require the Commission to notify the whistleblower, and provide the whistleblower an opportunity to seek a protective order, whenever the whistleblower's identity may be subject to disclosure.[82]

3. Final Rule

The Commission is adopting Rule 165.4 as proposed. The rule tracks the provisions of the statute and identifies those instances where the Commission, in furtherance of its regulatory responsibilities, may provide information to certain delineated recipients.

The Commission plans to work closely with whistleblowers, and their attorneys if they are represented, in an effort to take appropriate steps to maintain their confidentiality, consistent with the requirements of Section 23(h)(2).[83] At the same time, however, Congress expressly authorized the Commission to disclose whistleblower-identifying information subject to the limitations and conditions set forth in Section 23(h)(2)(C) of the CEA. Accordingly, the Commission does not believe it would be consistent with either Congress's intent or the proper exercise of the Commission's enforcement responsibilities to require by rule that Commission staff notify a whistleblower prior to any authorized disclosure, and provide the whistleblower with an opportunity to seek a protective order.

E. Rule 165.5—Prerequisites to the Consideration of an Award

1. Proposed Rule

Proposed Rule 165.5 summarized the general prerequisites for whistleblowers to be considered for the payment of awards set forth in Section 23(b)(1) of the CEA. As set forth in the statute, subparagraph (a) states that, subject to the eligibility requirements in the Regulations, the Commission will pay an award or awards to one or more whistleblowers who voluntarily provide the Commission with original information that led to the successful resolution of a covered Commission judicial or administrative action or the successful enforcement of a related action by: the Department of Justice; an appropriate department or agency of the Federal Government acting within the scope of its jurisdiction; a registered entity, registered futures association or SRO; a state attorney general in connection with a criminal investigation; any appropriate state department or agency acting within the scope of its jurisdiction; or a foreign futures authority.

Subparagraph (b) of Proposed Rule 165.5 emphasizes that, in order to be eligible, the whistleblower must have submitted to the Commission original information in the form and manner required by Proposed Rule 165.3. The whistleblower must also provide the Commission, upon its staff's request, certain additional information, including: explanations and other assistance, in the manner and form that staff may request, so that the staff may evaluate the use of the information

[79] Section 23(h)(2)(A) provides that the Commission shall not disclose any information, including that provided by the whistleblower to the Commission, which could reasonably be expected to reveal the identity of the whistleblower, except in accordance with the provisions of Section 552a of title 5, United States Code, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or governmental organizations described in subparagraph (C).

[80] *See* U.S. Const. Amend. VI.

[81] *See* 7 U.S.C. 26(d)(1). Under the statute, however, an anonymous whistleblower seeking an award is required to be represented by counsel. 7 U.S.C. 26(d)(2).

[82] *See* letter from NWC.

[83] For example, the Commission is adding a question to our whistleblower submission form that asks whistleblowers to tell us if they are giving us any particular documents or other information in their submission that they believe could reasonably be expected to reveal their identity.

submitted; all additional information in the whistleblower's possession that is related to the subject matter of the whistleblower's submission; and testimony or other evidence acceptable to the staff relating to the whistleblower's eligibility for an award. Subparagraph (b) of Proposed Rule 165.5 further requires that, to be eligible for an award, a whistleblower must, if requested by Commission staff, enter into a confidentiality agreement in a form acceptable to the Commission, including a provision that a violation of the confidentiality agreement may lead to the whistleblower's ineligibility to receive an award.

2. Comments

The Commission received comment on Proposed Rule 165.5 from one commenter.[84] This commenter argued that the Dodd-Frank Act does not require or authorize a rule that requires a whistleblower to sign a confidentiality or non-disclosure agreement. This commenter reasoned that if a whistleblower files a claim and refuses to sign such an agreement it could impact the Commission's willingness to share information with the whistleblower during the investigation, or even to go forward with an enforcement action. Also, this commenter suggested that a whistleblower should be able to object to the actions of the Commission if the whistleblower believes the Commission is improperly handling an investigation, without fear of being disqualified from an award. Finally, this commenter argued that a whistleblower should not be required to sign a confidentiality agreement in case the whistleblower has clients who need to know about the whistleblower's underlying concerns. For example, if a whistleblower had clients that had funds in a company operating a Ponzi scheme, it would not be beneficial to the clients for the whistleblower to not tell the clients about the scheme.

3. Final Rule

After considering these comments, the Commission is adopting the rule as proposed. The rule tracks and summarizes the general prerequisites for a whistleblower to be considered for an award under Section 23(b)(1) of the CEA. In addition, the Commission does not share information regarding investigations or enforcement actions with individuals who provide tips.[85] Requiring a whistleblower to sign a confidentiality agreement will serve to ensure that the entity being investigated is not made aware of the investigation prematurely. The Commission also has discretion in how it handles investigations and enforcement actions.[86]

F. Rule 165.6—Whistleblowers Ineligible for an Award

1. Proposed Rule

Subparagraph (a) of Proposed Rule 165.6 specified the categories of individuals who are statutorily ineligible for an award under Section 23 of the CEA. These include persons who are, or were at the time they acquired the original information, a member, officer, or employee of: The Commission; the Board of Governors of the Federal Reserve System; the Office of the Comptroller of the Currency; the Board of Directors of the Federal Deposit Insurance Corporation; the Director of the Office of Thrift Supervision; the National Credit Union Administration Board; the SEC; the Department of Justice; a registered entity; a registered futures association; an SRO; or a law enforcement organization. Further, Proposed Rule 165.6(a)(2) made clear that no award will be made to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under Proposed Rule 165.7.

In order to prevent evasion of these exclusions, subparagraph (a)(4) of the Proposed Rule also provided that persons who acquire information from ineligible individuals are ineligible for an award. Consistent with Section 23(m) of the CEA, a whistleblower is ineligible if in his submission of information or application for an award, in his other dealings with the Commission, or in his dealings with another authority in connection with a related action he: Knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or uses any false writing or document, knowing that it contains any false, fictitious, or fraudulent statement or entry; or omits any material fact the absence of which would make any other statement or representation made to the Commission or any other authority misleading.

Subparagraph (b) of Proposed Rule 165.6 reiterated that a determination that a whistleblower is ineligible to receive an award for any reason does not deprive the individual of the anti-retaliation protections set forth in Section 23(h)(1) of the CEA.

2. Comments

The Commission has received comments recommending that the Commission expand the list of persons ineligible to receive an award to individuals who fail to first report violations internally before reporting violations to the Commission.[87] Some commenters have suggested that the only exception to a requirement of mandatory internal reporting for award eligibility should be when the whistleblower can prove that the employer's internal compliance system is inadequate.[88] One commenter proposed that for an employer's internal compliance system to be effective it would have to provide for: (1) A complaint-reporting hotline; (2) a designated officer (such as the chief compliance officer), who is responsible for overseeing investigations of complaints, and who has access to senior executive officers with authority to respond to well-founded complaints; and (3) protection to an individual against retaliation for submitting a complaint.[89] Another commenter similarly suggests that a whistleblower who fails to report internally should only be eligible to receive an award if he can demonstrate that the company's internal reporting program fails to comply with a federal standard (if applicable) or is inadequate (if there is no Federal standard).[90] This commenter further suggests that the Commission should afford an entity a reasonable opportunity (of at least 180 days) to address the alleged violation.[91]

Commenters also suggest that a whistleblower who prematurely reports to the Commission be eligible for an award, but only at the lower end of the permissible range.[92] Commenters also urge the Commission to deem ineligible for a whistleblower award individuals who: (1) Violate entity rules requiring that misconduct be reported internally; (2) falsely certify that they are not aware

[84] *See* letter from NWC.

[85] *See, e.g.,* Rule 11.3, 17 CFR 11.3 (2011) (providing, in general, that ''[a]ll information and documents obtained during the course of an investigation, whether or not obtained pursuant to subpoena, and all investigative proceedings shall be treated as non-public by the Commission and its staff * * *.'').

[86] *See, e.g.,* Appendix A to Part 11 of the Commission's Rules (''Informal Procedure Relating to the Recommendation of Enforcement Proceedings;'' providing that the Commission's Division of Enforcement, ''in its discretion, may inform persons who may be named in a proposed enforcement proceeding of the nature of the allegations pertaining to them.'').

[87] *See* letters from NSCP, EEI, ICI, ABA, and FSR.

[88] *See* letter from SIFMA/FIA.

[89] *See* letter from SIFMA/FIA.

[90] *See* letter from U.S. Chamber of Commerce.

[91] *See* letter from U.S. Chamber of Commerce.

[92] *See* letter from SIFMA/FIA.

of any misconduct; (3) refuse to cooperate with an entity's internal investigation; and (4) provide inaccurate or incomplete information or otherwise hinder an internal investigation.[93] This commenter further suggests that a whistleblower who reports violations to an SRO should have the same eligibility for an award as a whistleblower who reports to the Commission.[94] Another commenter commented that persons who have engaged in culpable conduct should not be eligible for awards.[95] This commenter suggested that Rule 165.6(a)(2) provide that a person will not be eligible for an award ''if he or she (or an entity whose liability is based substantially on conduct that the whistleblower directed, planned or initiated) has been convicted of a criminal violation (including entering into a plea agreement or entering a plea of *nolo contendere*), or enters into a cooperation, deferred prosecution, or non-prosecution agreement in connection with, a proceeding brought by the Commission, an SRO, or other regulator or government entity, which proceeding is related to a Commission action or a related action for which the whistleblower could otherwise receive an award.'' One commenter also suggested that the Commission should exclude wrong-doers who have participated in or facilitated the violation of the CEA from award eligibility.[96] Another commenter suggested that culpable individuals, including in-house lawyers, and other compliance personnel should not be eligible for whistleblower awards.[97] The Commission also received comment that the Commission follow the SEC's approach and exclude the spouses, parents, children or siblings of members of the agency to avoid the appearance of impropriety.[98]

The Commission also received a number of other miscellaneous comments. One commenter suggested that the exclusion should apply to the information, and not just persons, by suggesting the Commission exclude from award eligibility information reported after an employer has initiated an investigation.[99] The Commission also received a comment suggesting that the Rule require use of internal procedures as a condition for receiving an award, because such a condition would not impinge on a whistleblower's right to contact the Commission or affect the anti-retaliation provisions.[100] This commenter also suggested that the Commission revise the rule to include potential exclusions of foreign persons.

3. Final Rule

The Commission has considered each of the comments received, and has decided to adopt the rule with minor changes. With respect to the specific internal reporting issue, after considering the comments received, the Commission has concluded not to amend the rule to make ineligible any whistleblowers who do not participate in internal corporate compliance programs.[101] The Commission will, however, provide whistleblowers with incentives to report internally. The Commission has decided to adopt Rule 165.6 with a minor change to make ineligible members or officers of any foreign regulatory authority or law enforcement organization, extrapolating from Section 23(c)(2)(i) and (vi) of the Dodd-Frank Act the category making appropriate regulatory agencies and law enforcement organizations ineligible.[102] The Commission has also made explicit in Rule 165.6(a)(8) the ineligibility of any whistleblower who acquired the original information the whistleblower gave the Commission from any other person with the intent to evade any provision of the Final Rules.

G. Rule 165.7—Procedures for Award Applications and Commission Award Determinations

1. Proposed Rule

Proposed Rule 165.7 described the steps a whistleblower would be required to follow in order to make an application for an award in relation to a Commission covered judicial or administrative action or related action. In addition, the rule described the Commission's proposed claims review process.

In regard to covered actions, the proposed process would begin with the publication of a ''Notice of a Covered Action'' (''Notice'') on the Commission's Web site. Whenever a covered judicial or administrative action brought by the Commission results in the imposition of monetary sanctions exceeding $1,000,000, the Commission will cause a Notice to be published on the Commission's Web site subsequent to the entry of a final judgment or order in the action that by itself, or collectively with other judgments or orders previously entered in the action, exceeds the $1,000,000 threshold. The Commission's Proposed Rule required claimants to file their claim for an award within sixty (60) days of the date of the Notice.

In regard to related actions, a claimant would be responsible for tracking the resolution of the related action. The Commission's Proposed Rule required claimants to file their claim for an award in regard to a related action within sixty (60) days after monetary sanctions were imposed in the related action. A claimant's failure to timely file a request for a whistleblower award would bar that individual from later seeking a recovery.[103]

Subparagraph (b) of Proposed Rule 165.7 described the procedure for making a claim for an award. Specifically, a claimant would be required to submit a claim for an award on proposed Form WB–APP (''Application for Award for Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act''). Proposed Form WB–APP, and the instructions thereto, would elicit information concerning a whistleblower's eligibility to receive an award at the time the whistleblower filed his claim. The form would also provide an opportunity for the whistleblower to ''make his case'' for why he is entitled to an award by describing the information and assistance he has provided and its significance to the Commission's successful action.[104]

Subparagraph (b) of Proposed Rule 165.7 provided that a claim on Form WB–APP, including any attachments, must be received by the Commission within sixty (60) calendar days of the date of the Notice or sixty (60) calendar days of the date of the imposition of the monetary sanctions in the related action, the trigger date depending upon which action is the basis for the claimant's award request.

Subparagraph (c) included award application procedures for a whistleblower who submitted original information to the Commission anonymously. Whistleblowers who submitted original information anonymously, but who make a claim for a whistleblower award on a disclosed basis, are required to disclose their identity on the Form WB–APP and include with the Form WB–APP a

[93] *See* letter from SIFMA/FIA.

[94] *See* letter from SIFMA/FIA.

[95] *See* letter from ABA.

[96] *See* letter from U.S. Chamber of Commerce.

[97] *See* letter from Hunton & Williams LLP on behalf of Working Group of Commercial Energy Firms (''Working Group'') at 2.

[98] *See* letter from FSR.

[99] *See* letter from U.S. Chamber of Commerce.

[100] *See* letter from FSR.

[101] *See also* discussion below in Part II.S.

[102] *See* Rule 165.6(a)(6), (7).

[103] *See, e.g., Yuen* v. *United States,* 825 F.2d 244 (9th Cir. 1987) (taxpayer barred from recovery due to failure to timely file a written request for refund).

[104] *See* discussion of Proposed Rule 165.9 for a non-exhaustive list of factors the Commission preliminarily believes it will consider in determining award amounts.

signed and completed Form WB–DEC. Whistleblowers who submitted information anonymously, and make a claim for a whistleblower award on an anonymous basis, must be represented by counsel and must provide their counsel with a completed and signed Form WB–DEC by no later than the date upon which the counsel submits to the Commission the whistleblower's Form WB–APP. In addition, whistleblower's counsel must submit with the Form WB–APP a separate Form WB–DEC certifying that the counsel has verified the whistleblower's identity, has reviewed the whistleblower's Form WB–DEC for completeness and accuracy, will retain the signed original of the whistleblower's Form WB–DEC in counsel's records, and will produce the whistleblower's Form WB–DEC upon request of the Commission's staff. Proposed Rule 165.7(c) made explicit that regardless of whether the whistleblower made an award application on a disclosed or anonymous basis, the whistleblower's identity must be verified in a form and manner that is acceptable to the Commission prior to the payment of any award.

Subparagraph (d) of Proposed Rule 165.7 described the Commission's claims review process. The claims review process would begin upon the expiration of the time for filing any appeals of the Commission's judicial or administrative action and the related action(s), or, where an appeal has been filed, after all appeals in the action or related action(s) have been concluded.

Under the proposed process, the Commission would evaluate all timely whistleblower award claims submitted on Form WB–APP. In connection with this process, the Commission could require that claimants provide additional information relating to their eligibility for an award or satisfaction of any of the conditions for an award, as set forth in Proposed Rule 165.5(b). Following that evaluation, the Commission would send any claimant a determination setting forth whether the claim is allowed or denied and, if allowed, setting forth the proposed award percentage amount.

2. Comments

One commenter stated that Proposed Rule 165.7 is unworkable, and that whistleblowers cannot be expected to follow the Commission's Web site and understand that a published sanction on the web site is related to the information provided by the whistleblower.[105] This commenter also suggested that when the Commission believes it will obtain a sanction, discussions should be initiated with the whistleblower to negotiate the proper percentage of award because to do so would reduce administrative costs, facilitate cooperation between the Commission and the whistleblower, and expedite the payment of awards.[106] This commenter supported this assertion by referencing the *qui tam* procedure under the False Claims Act.[107] Commenters suggested that the Commission add or revise rules to incorporate recommendations made by the SEC Office of the Inspector General (''OIG'') in its audit of the SEC's previous whistleblower award program.[108] One commenter suggested that the Commission examine ways to notify whistleblowers of the status of their award without releasing confidential information during the course of an investigation.[109] Another commenter stated that Proposed Rule 165.7 unduly burdens and creates hurdles for whistleblowers by requiring that they notify the Commission of their claim for an award. This commenter argued that because the Commission handles enforcement actions and knows which individuals made submissions, the Commission should notify potential claimants that their claim to an award, if any, has ripened.[110]

Similarly, another commenter suggested that the Commission should streamline the whistleblower application process by adopting a process similar to the whistleblower process adopted by the IRS, which another commenter claims is more user-friendly and efficient. This commenter contended that it is an onerous condition to require a whistleblower to track on the Commission's Web site the disposition of the covered action and that the 60-day period is too narrow a window to allow a whistleblower to complete an application for an award.[111]

3. Final Rule

After considering the comments received, the Commission has decided to adopt Rule 165.7 with changes. First, the Commission has decided to increase the period for claimants to file their claim for an award from sixty (60) days to ninety (90) days. This additional time should provide claimants with a better opportunity to review the Commission's Web site and file an application following the publication of a Notice. In the Commission's view, this 90-day period strikes an appropriate balance between competing whistleblower interests—allowing all potential whistleblowers a reasonable opportunity to periodically review the Commission's Web site and to file an application, on the one hand, while providing finality to the application period so that the Commission can begin the process of assessing any applications and making a timely award to any qualifying whistleblowers, on the other hand.

Second, in light of comments that the Commission simplify the WB–APP form, the Commission has made optional Section G (''Entitlement to Award) of the form, which provides whistleblowers with the opportunity to ''[e]xplain the basis for the whistleblower's belief that the whistleblower is entitled to an award'' and to ''[p]rovide any additional information the whistleblower think may be relevant in light of the criteria for determining the amount of an award.'' As commenters stated, when a whistleblower has worked closely with the staff on a matter, requiring that whistleblower to furnish a submission explaining the degree and value of his or her assistance may be unnecessary. At the same time, such a whistleblower—or other claimants who have not worked as closely with the staff and wish to advocate the value of their assistance—should have the opportunity to do so. The Commission has determined not to make any further modifications to the form, however, because the remaining information that the Commission requests is in its view necessary to provide a sufficient record for a full and fair consideration of the claimant's application (and, if a petition for review is filed, so that the court of appeals has a sufficient record to conduct a review).

The Commission has decided not to eliminate the Notice or to otherwise model the procedures after those employed in the *qui tam* context. The *qui tam* context is substantially different from the Commission's situation because *qui tam* actions necessarily involve one or more known individuals with whom the Department of Justice will have worked. By contrast, in enforcement actions that the Commission institutes and litigates (based in part on information and assistance from one or more whistleblowers), there may be one whistleblower with whom the Commission has worked closely, but there may be other claimants who have

[105] *See* letter from NWC.

[106] *See* letter from NWC.

[107] *See* letter from NWC.

[108] *See* letters from NWC, POGO; *see* also SEC OIG ''Assessment of the SEC's Bounty Program,'' Mar. 29, 2010, Report No. 474.

[109] *See* letter from POGO.

[110] *See* letter from TAF.

[111] *See* letter from NCCMP.

a potential basis for award eligibility as well. The Commission's procedures must provide due process to *all* potential claimants and accordingly cannot be restricted by the happenstance that some claimants worked more closely with staff. For that reason, the Commission believes the ''Notice of Covered Action'' procedure provides the best mechanism to provide notice to all whistleblower claimants who may have contributed to the action's success.[112]

H. Rule 165.8—Amount of Award

1. Proposed Rule

If all conditions are met, Proposed Rule 165.8 provided that the whistleblower awards shall be in an aggregate amount equal to between 10 and 30 percent, in total, of what has been collected of the monetary sanctions imposed in the Commission's action or related actions. This range is specified in Section 23(b)(1) of the CEA. Where multiple whistleblowers are entitled to an award, subparagraph (b) stated that the Commission will independently determine the appropriate award percentage for each whistleblower, but total award payments, in the aggregate, will equal between 10 and 30 percent of the monetary sanctions collected either in the Commission's action or a related action (but not both the Commission's action and the related action).

2. Comments

The Commission received one comment on this Proposed Rule. The commenter, a United States Senator, suggested that the Commission place reasonable monetary limits on awards to protect against inappropriate monetary incentives while still encouraging potential whistleblowers to come forward. This commenter also suggested that the Commission place reasonable limits on amounts of funds that can be awarded to any single whistleblower in any one matter.[113] This commenter further suggested that the Commission provide financial incentives to whistleblowers who report to their employers' internal compliance programs, which will give the company an earlier opportunity to address potential problems and prevent further harm.[114]

3. Final Rule

After considering the comment received, the Commission is adopting Rule 165.8 as proposed because it follows the statutory requirements. Paragraph (b) of Section 23 of the CEA states that the Commission will independently determine the appropriate award percentage for each whistleblower, but total award payments, in the aggregate, will equal between 10 and 30 percent of the monetary sanctions collected in the Commission's action or any related action. The Commission's Final Rule tracks this provision. Thus, for example, one whistleblower could receive an award of 25 percent of the collected sanctions, and another could receive an award of 5 percent, but they could not each receive an award of 30 percent. As the Commission noted in the Proposed Rule, because the Commission anticipates that the timing of award determinations and the value of a whistleblower's contribution could be different for the Commission's action and for related actions, the Rule would provide that the percentage awarded in connection with a Commission action may differ from the percentage awarded in related actions. But, in any case, the amounts would, in total, fall within the statutory range of 10 to 30 percent. As to the suggestion that the Commission use its discretion to avoid giving excessive awards, the Commission notes that the statute requires that the Commission give an award of a minimum of 10 percent of the amount collected regardless of the overall size of the resultant award, and the Commission does not have discretion to reduce that statutory minimum.[115]

I. Rule 165.9—Criteria for Determining Amount of Award

1. Proposed Rule

Assuming that all of the conditions for making an award to a whistleblower have been satisfied, Proposed Rule 165.9 set forth the criteria that the Commission would take into consideration in determining the amount of the award. Subparagraphs (a)(1) through (3) of the Proposed Rule recited three criteria that Section 23(c)(1)(B) of the CEA requires the Commission to consider, and subparagraph (a)(4) adds a fourth criterion based upon the discretion given to the Commission to consider ''additional relevant factors'' in determining the amount of an award.

Subparagraph (a)(1) requires the Commission to consider the significance of the information provided by a whistleblower to the success of the Commission action or related action. Subparagraph (a)(2) requires the Commission to consider the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action. Subparagraph (a)(3) requires the Commission to consider the programmatic interest of the Commission in deterring violations of the CEA by making awards to whistleblowers that provide information that led to successful enforcement of covered judicial or administrative actions or related actions. Subparagraph (a)(4) would permit the Commission to consider whether an award otherwise enhances the Commission's ability to enforce the CEA, protect customers, and encourage the submission of high quality information from whistleblowers.

The Commission anticipates that the determination of award amounts pursuant to subparagraphs (a)(1)–(4) will involve highly individualized review of the circumstances surrounding each award. To allow for this, the Commission preliminarily believed that the four criteria afford the Commission broad discretion to weigh a multitude of considerations in determining the amount of any particular award. Depending upon the facts and circumstances of each case, some of the considerations may not be applicable or may deserve greater weight than others.

The permissible Commission considerations include, but are not limited to:

- The character of the enforcement action including whether its subject matter is a Commission priority, whether the reported misconduct involves regulated entities or fiduciaries, the type of CEA violations, the age and duration of misconduct, the number of violations, and the isolated, repetitive, or ongoing nature of the violations;
- The dangers to customers or others presented by the underlying violations involved in the enforcement action including the amount of harm or potential harm caused by the underlying violations, the type of harm resulting from or threatened by the underlying violations, and the number of individuals or entities harmed;
- The timeliness, degree, reliability, and effectiveness of the whistleblower's assistance;
- The time and resources conserved as a result of the whistleblower's assistance;
- Whether the whistleblower encouraged or authorized others to

[112] The SEC takes the same approach to this issue. *See* SEC Rule 240.21F–10(a).

[113] *See* letter from Senator Carl Levin.

[114] *See* letter from Senator Carl Levin.

[115] *See* discussion below, in Part II.S., regarding Internal Reporting and Harmonization.

assist the staff who might not have otherwise participated in the investigation or related action;

- Any unique hardships experienced by the whistleblower as a result of his or her reporting and assisting in the enforcement action;
- The degree to which the whistleblower took steps to prevent the violations from occurring or continuing;
- The efforts undertaken by the whistleblower to remediate the harm caused by the violations including assisting the authorities in the recovery of the fruits and instrumentalities of the violations;
- Whether the information provided by the whistleblower related to only a portion of the successful claims brought in the covered judicial or administrative action or related action;[116] and
- The culpability of the whistleblower, including whether the whistleblower acted with scienter, both generally and in relation to others who participated in the misconduct.

These considerations are not listed in order of importance nor are they intended to be all-inclusive or to require a specific determination in any particular case.

Finally, subparagraph (b) to Proposed Rule 165.9 reiterated the statutory prohibition in Section 23(c)(1)(B)(ii) of the CEA from taking into consideration the balance of the Fund when making an award determination.

2. Comments

The Commission received comment that the Rule should expressly permit the Commission to deny an award when it determines that payment of an award would be against public policy.[117] One commenter, a Senator, also expressed concern that excessive monetary incentives may lead to misreporting causing investigative waste.[118] The Senator also suggested that the Commission should exercise discretion afforded the Commission in Section 23(c)(1)(A) to reasonably limit the amount that may be awarded to a single whistleblower in any one matter.

3. Final Rule

The Commission notes that the SEC, in promulgating its own final whistleblower rules, added two additional discretionary factors to consider in making award amount decisions: (1) ''whether the whistleblower unreasonably delayed reporting the securities violations (SEC Rule 240.21F–6(b)(2))''; and (2) whether the whistleblower interfered or hindered internal compliance and reporting systems (SEC Rule 240.21F–6(b)(3)). The Commission has amended the Rule to add such factors in the interest of increasing transparency regarding the Commission's award determination process, and to be consistent with the statutory mandate in Section 23(c)(1)(B)(IV) of the CEA that the Commission establish additional relevant factors per rule or regulation. In addition, with respect to the Senator's comment, the Rule now affords the Commission discretion regarding award determinations to take into consideration ''[p]otential adverse incentives from oversize awards''.[119]

J. Rule 165.10—Contents of Record for Award Determinations

In order to promote transparency and consistency, and also to preserve a clear record for appellate review (under Proposed Rule 165.13) of Commission award determinations (under Proposed Rule 165.7), Proposed Rule 165.10 set forth the contents of record for award determinations relating to covered judicial or administrative actions or related actions. Under the Proposed Rule, the record shall include: required forms the whistleblower submits to the Commission, including related attachments; other documentation provided by the whistleblower to the Commission; the complaint, notice of hearing, answers and any amendments thereto; the final judgment, consent order, or administrative speaking order; the transcript of the related administrative hearing or civil injunctive proceeding, including any exhibits entered at the hearing or proceeding; and any other documents that appear on the docket of the proceeding. Under the Proposed Rule, the record shall also include statements by litigation staff to the Commission regarding the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action or related action; and the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action or related action.

However, Proposed Rule 165.10(b) explicitly stated that the record upon which the award determination under Proposed Rule 165.7 shall be made shall not include any Commission pre-decisional or internal deliberative process materials related to the Commission's or its staff's determinations: (1) To file or settle the covered judicial or administrative action; and/or (2) whether, to whom and in what amount to make a whistleblower award. Further, the record upon which the award determination under Proposed Rule 165.7 shall be made shall not include any other entity's pre-decisional or internal deliberative process materials related to its or its staff's determination to file or settle a related action.

The Commission did not receive any comments on the contents of record for award determinations. The Commission has considered the issue and has decided to adopt Rule 165.10 as proposed, with two modifications intended to improve clarity. First, the Final Rule clarifies that the record shall not include documents protected under the attorney-client privilege or the attorney work-product privilege. Second, the ''statements by litigation staff'' provision has been simplified to include ''[s]worn declarations (including attachments) from the Commission's Division of Enforcement staff regarding any matters relevant to the award determination.''

K. Rule 165.11—Awards Based Upon Related Actions

Proposed Rule 165.11 provided that the Commission, or its delegate, may determine an award based on amounts collected in related actions brought by appropriate Federal or state agencies, registered entities, or SROs rather than on the amount collected in a covered judicial or administrative action. Regardless of whether the Commission's award determination is based on the Commission's covered judicial or administrative action or a related action or actions, Rule 165.7 sets forth the procedures for whistleblower award applications and Commission award determinations.

The Commission received one comment regarding awards based upon related actions. The commenter suggested that the Commission should remove the potential for a whistleblower to recover from both the Commission

[116] As described elsewhere in these rules, if the information provided by a whistleblower relates to only a portion of a successful covered judicial or administrative action or related action, the Commission proposes to look to the entirety of the action (including all defendants or respondents, all claims, and all monetary sanctions obtained) in determining whether the whistleblower is eligible for an award and the total dollar amount of sanctions on which the whistleblower's award will be based. Under subparagraph (a) of Proposed Rule 165.9, the fact that a whistleblower's information related to only a portion of the overall action would be a factor in determining the amount of the whistleblower's award. Thus, if the whistleblower's information supported only a small part of a larger action, that would be a reason for making an award based upon a smaller percentage amount than otherwise would have been awarded.

[117] *See* letter from ABA.

[118] *See* letter from Senator Carl Levin.

[119] Rule 165.9(a)(5).

and the SEC for providing each agency with the same information. This commenter noted that the SEC will not make an award for a related action, and that the Commission's provisions should be similar.[120]

The Commission has considered the comment and has decided to adopt Rule 165.11 as proposed, with one modification. Rule 165.11 tracks Section 23(a)(5) of the CEA, and the payment of awards on related actions is not within in the discretion of the Commission. Rule 165.11(a)(5) adds ''[a] foreign futures authority'' to the list of authorities whose judicial or administrative actions could potentially qualify as a ''related action.'' [121]

L. Rule 165.12—Payment of Awards From the Fund, Financing Customer Education Initiatives, and Deposits and Credits to the Fund

1. Proposed Rule

Proposed Rule 165.12 sets forth Commission procedures with respect to the Fund to pay whistleblower awards, fund customer education initiatives, and maintain appropriate amounts in the Fund.

Proposed Rule 165.12(c) provides that the Commission shall undertake and maintain customer education initiatives. The initiatives shall be designed to help customers protect themselves against fraud or other violations of the CEA, or the rules or regulations thereunder. The Commission shall fund the customer education initiatives, and may utilize funds deposited into the Fund during any fiscal year in which the beginning (October 1) balance of the Fund is greater than $10,000,000.

The Commission limits discretion to finance customer education initiatives to fiscal years in which the beginning (October 1) balance of the Fund is greater than $10,000,000 in order to limit the possibility that spending on customer education initiatives may inadvertently result in the Commission operating the Fund in a deficit and thereby delay award payments to whistleblowers.

2. Comments

The Commission received one comment that suggested Fund amounts be used to educate the public about the rights of whistleblowers. The comment suggests that the Commission publish materials that companies can distribute to their employees that are simple and easy to understand informing them of their rights as a potential whistleblower.[122] The Commission did not receive any comments regarding the Commission's delegation of authority to the Office of the Executive Director.

3. Final Rule

The Commission has considered the comment received regarding the use of the Fund. The Commission has established a working group to make suggestions regarding customer education initiatives. The Commission has decided to adopt Rule 165.12 with revisions. Specifically, the Final Rule includes revisions to reflect the Commission's intent to undertake and maintain customer education initiatives through an Office of Consumer Outreach. Because Rule 165.12 is a rule of the Commission's ''organization, procedure, or practice,'' the Commission is not presenting these revisions for notice and comment.[123]

M. 165.13—Appeals

1. Proposed Rule

Section 23(f) of the CEA provided for rights of appeal of Final Orders of the Commission with respect to whistleblower award determinations.[124] Subparagraph (a) of Proposed Rule 165.13 tracks this provision and describes claimants' rights to appeal. Claimants may appeal any Commission final award determination, including whether, to whom, or in what amount to make whistleblower awards, to an appropriate court of appeals within thirty (30) days after the Commission's final order of determination.

Subparagraph (b) of Proposed Rule 165.13 designates the materials that shall be included in the record on any appeal. Those materials include: The Contents of Record for Award Determinations, as set forth in Proposed Rule 165.10, and any Final Order of the Commission, as set forth in Rule 165.7(e).

2. Comments

The Commission received one comment regarding appeals.[125] This commenter suggested that a whistleblower who provides information to the Commission that the Commission subsequently decides not to pursue should have the right to appeal to the Commission's Office of the Inspector General the decision not to pursue. This commenter reasons that otherwise legitimate claims that could expose violations could be dismissed without appropriate investigation.

3. Final Rule

After considering the comment received, the Commission has decided to adopt Rule 165.13 as proposed. The Final Rule tracks Section 23(f) of the CEA, which states that appeals of Commission decisions regarding whistleblower awards may be made to the appropriate U.S. Circuit Court of Appeals. However, although Section 23(f) provides for appeals of Commission determinations of whether, to whom, or in what amount to make an award, it does not grant any right to appeal the Commission's prosecutorial discretion, including the Commission's decisions to: open or close an investigation; file an enforcement action, including the Commission's determination of the violations charged; and settling an enforcement action.

N. Rule 165.14—Procedures Applicable to the Payment of Awards

1. Proposed Rule

Proposed Rule 165.14 addressed the timing for payment of an award to a whistleblower. Any award made pursuant to the rules would be paid from the Fund established by Section 23(g) of the CEA.[126] Subparagraph (a) provided that a recipient of a whistleblower award will be entitled to payment on the award only to the extent that a monetary sanction is collected in the covered judicial or administrative action or in a related action upon which the award is based. This requirement is derived from Section 23(b)(1) of the CEA,[127] which provides that an award is based upon the monetary sanctions collected in the covered judicial or administrative action or related action.

Subparagraph (b) stated that any payment of an award for a monetary sanction collected in a covered judicial or administrative action shall be made within a reasonable period of time following the later of either the completion of the appeals process for all whistleblower award claims arising from the covered judicial or administrative action, or the date on which the monetary sanction is collected. Likewise, the payment of an award for a monetary sanction collected in a related action shall be made within a reasonable period of time following the later of either the completion of the appeals process for all whistleblower award claims arising from the related action, or the date on which the monetary sanction is collected. This

[120] *See* letter from FSR.

[121] *See* 7 U.S.C. 26(a)(5), 26(h)(2)(C)(i)(VI).

[122] *See* letter from NCCMP.

[123] *See* 5 U.S.C. 553.

[124] *See* Section 23(f) of the CEA, 7 U.S.C. 26(f).

[125] *See* letter from NCCMP.

[126] 7 U.S.C. 26(g).

[127] 7 U.S.C. 26(b)(1).

provision is intended to cover situations where a single action results in multiple whistleblowers claims. Under this scenario, if one whistleblower appeals a Final Order of the Commission relating to a whistleblower award determination, then the Commission would not pay any awards in the action until that whistleblower's appeal has been concluded, because the disposition of that appeal could require the Commission to reconsider its determination and thereby affect all payments for that covered judicial or administrative action or related action.

Subparagraph (c) of Proposed Rule 165.14 described how the Commission will address situations where there are insufficient amounts available in the Fund to pay the entire amount of an award to a whistleblower or whistleblowers within a reasonable period of time from when payment should otherwise be made. In this situation, the whistleblower or whistleblowers will be paid when amounts become available in the Fund, subject to the terms set forth in proposed subparagraph (c). Under proposed subparagraph (c), where multiple whistleblowers are owed payments from the Fund based on awards that do not arise from the same Notice or resolution of a related action, priority in making payment on these awards would be determined based upon the date that the Final Order of the Commission is made. If two or more of these Final Orders of the Commission are entered on the same date, then those whistleblowers owed payments will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments. Under proposed subparagraph (c)(2), where multiple whistleblowers are owed payments from the Fund based on awards that arise from the same Notice or resolution of a related action, they would share the same payment priority and would be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

2. Comments and Final Rule

The Commission did not receive any comments regarding procedures applicable to the payment of awards. The Commission is adopting Rule 165.14 as proposed. The Final Rule tracks the relevant provisions of Section 23 of the CEA.

O. Rule 165.15—Delegations of Authority

Proposed Rule 165.15 included the Commission's delegations to the Executive Director to take certain actions to carry out this Part 165 of the Rules and the requirements of Section 23(g) of CEA. Specifically, Proposed Rule 165.15 delegated authority to the Executive Director, or a designee, upon the concurrence of the General Counsel and the Director of the Commission's Division of Enforcement, to make both deposits into and award payments out of the Fund.

The Commission did not receive any comments regarding delegations of authority. The Commission is adopting Rule 165.15 with revisions to address internal Commission organizational and procedural issues. Specifically, the Final Rule includes revisions to reflect the Commission's delegation to a Whistleblower Office the authority to administer the Commission's whistleblower program. The Final Rule also provides that the Commission will exercise its authority to make whistleblower award determinations through a delegation of authority to a panel that shall be composed of three of the Commission's Offices or Divisions. Under Rule 165.15, the Commission's Executive Director will select the members of the ''Whistleblower Award Determination Panel.'' Because Rule 165.15 is a rule of the Commission's ''organization, procedure, or practice,'' the Commission is not presenting these revisions for notice and comment.[128]

P. Rule 165.16—No Immunity and Rule 165.17—Awards to Whistleblowers Who Engage in Culpable Conduct

1. Proposed Rules

Proposed Rule 165.16 provided notice that the provisions of Section 23 of the CEA do not provide immunity to individuals who provide information to the Commission relating to a violation of the CEA. Some whistleblowers who provide original information that significantly aids in detecting and prosecuting sophisticated manipulation or fraud schemes may themselves be participants in the scheme who would be subject to Commission enforcement actions. While these individuals, if they provide valuable assistance to a successful action, will remain eligible for a whistleblower award, they will not be immune from prosecution. Rather, the Commission will analyze the unique facts and circumstances of each case in accordance with its Enforcement Advisory, ''Cooperation Factors in Enforcement Division Sanction Recommendations'' to determine whether, how much, and in what manner to credit cooperation by whistleblowers who have participated in misconduct.[129]

The options available to the Commission and its staff for facilitating and rewarding cooperation ranges from taking no enforcement action to pursuing charges and sanctions in connection with enforcement actions.

Whistleblowers with potential civil liability or criminal liability for CEA violations that they report to the Commission remain eligible for an award. However, pursuant to Section 23(c)(2)(B) of the CEA,[130] if a whistleblower is convicted of a criminal violation related to the judicial or administrative action, they are not eligible for an award. Furthermore, if a defendant or respondent in a Commission action or a related action is ordered to pay monetary sanctions in a civil enforcement action, Proposed Rule 165.17 stated that the Commission will not count the amount of such monetary sanctions toward the $1,000,000 threshold in considering an award payment to such a defendant or respondent in relation to a covered judicial or administrative action, and will not add that amount to the total monetary sanctions collected in the action for purposes of calculating any payment to the culpable individual. The rationale for this limitation is to prevent wrongdoers from financially benefiting from their own misconduct, and ensures equitable treatment of culpable and non-culpable whistleblowers. For example, without such a prohibition, a whistleblower that was the leader or organizer of a fraudulent scheme involving multiple defendants that resulted in total monetary sanctions of $1,250,000, which would exceed the $1,000,000 minimum threshold required for making an award, could potentially be eligible for an award even though he personally was ordered to pay $750,000 of those monetary sanctions. Under similar circumstances, a non-culpable whistleblower would be deemed ineligible for an award if they reported a CEA violation that resulted in monetary sanctions of less than $1,000,000. The Proposed Rule would prevent such inequitable treatment.

2. Comments

Many commenters suggested that the Commission should not allow whistleblowers with varying degrees of culpability to be eligible for an

[128] *See* 5 U.S.C. 553.

[129] *See http://www.cftc.gov/ucm/groups/public/@cpdisciplinaryhistory/documents/file/enfcooperation-advisory.pdf.*

[130] 7 U.S.C. 26(c)(2)(B).

award.[131] These comments are discussed under Rule 165.6 in the context of discussing whistleblowers ineligible for an award.[132]

3. Final Rule

Upon consideration of the comments, the Commission has decided to adopt Rules 165.16 and 165.17 as proposed. These rules track the Commission's authority to deny whistleblower awards to individuals who are criminally culpable as stated in Section 23(c)(2)(B). As discussed above with respect to Rule 165.9, the Commission will consider ''the culpability or involvement of the whistleblower in matters associated with the Commission's action or related actions'' in determining the amount of a whistleblower award.[133]

Q. Rule 165.18—Staff Communications With Whistleblowers From Represented Entities

1. Proposed Rule

Proposed Rule 165.18 clarified the staff's authority to communicate directly with whistleblowers who are directors, officers, members, agents, or employees of an entity that has counsel, and who have initiated communication with the Commission relating to a potential violation of the CEA. The Proposed Rule made clear that the staff is authorized to communicate directly with these individuals without first seeking the consent of the entity's counsel.

Section 23 of the CEA evinces a strong Congressional policy to facilitate the disclosure of information to the Commission relating to potential CEA violations and to preserve the confidentiality of those who do so.[134] This Congressional policy would be significantly impaired were the Commission required to seek the consent of an entity's counsel before speaking with a whistleblower who contacts the Commission and who is a director, officer, member, agent, or employee of the entity. For this reason, Section 23 of the CEA implicitly authorizes the Commission to communicate directly with these individuals without first obtaining the consent of the entity's counsel.

The Commission included this authority in the Proposed Rule to promote whistleblowers' willingness to disclose potential CEA violations to the Commission by reducing or eliminating any concerns that whistleblowers might have that the Commission is required to request consent of the entity's counsel and, in doing so, might disclose their identity. The Commission intended the Proposed Rule to clarify that, in accordance with American Bar Association Model Rule 4.2, the staff is authorized by law to make these communications.[135] American Bar Association Model Rule 4.2 provides as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or *is authorized to do so by law* or a court order.

Model Rules of Prof'l Conduct R. 4.2 (emphasis added). Under this provision, for example, the Commission could meet or otherwise communicate with the whistleblower privately, without the knowledge or presence of counsel or other representative of the entity.

2. Comments

The ABA strongly disagreed with the Commission's view that Part 165 authorized the Commission to bypass state bar ethics rules.[136] The ABA also expressed concern that Proposed Rule 165.18 may have profound implications with respect to the preservation of an entity's attorney-client privilege and information protected by the work-product doctrine.[137] The ABA stated:

> [W]e strongly disagree with the Commission's view that Part 165 authorized the Commission to bypass state bar ethics rules. In our view, Proposed Rule 165.18 may have profound implications with respect to the preservation of an entity's attorney-client privilege and information protected by the work-product doctrine * * *. The Commission would justify this position by viewing the discussions with such a person as having been 'authorized by law.' However, it is not clear to us as to whether a Commission Rule (as opposed to a statute) can supersede the State Bar provisions governing attorney conduct * * *. Proposed Rule 165.18 deals not with the initial communication by the employee, but instead with responsive communications by the staff. Having had the benefit of a whistleblower's initial communication, we see no reasonable basis not to require the staff to communicate with entity counsel prior to any further communications.

The ABA also advised, in the alternative, that if the Commission retains Proposed Rule 165.18, it should be revised to include procedures governing staff communications to ensure that attorney-client privileges and the information protected by attorney work-product doctrine are not jeopardized.[138] The ABA elaborated that, ''information the CFTC might seek from an employee, and which the employee might disclose, might have derived from privileged communications the employee or others within the organization might have had with the entity's counsel.'' It was also suggested that the right to waive the privilege in such circumstances would belong to the entity, not to any single employee, and that the ability of Commission staff to communicate with an employee without first seeking the consent of the entity's counsel may affect the entity's ability to claim privilege with respect to such matters.'' Finally, the ABA suggested that ''[h]aving had the benefit of a whistleblower's initial communication, we see no reasonable basis not to require the [CFTC] staff to communicate with entity counsel prior to any further communications,'' because in many cases CFTC communications with entity counsel preceding further discussions with a whistleblower could assist the CFTC's investigative efforts. Another commenter recommended that Proposed Rule 165.18 be clarified to provide that ''if the commission remains in contact with a whistleblower during the course of an entity's internal investigation, it cannot seek from the whistleblower information about counsel's views and advice (or the privileged information and discussions) that the whistleblower obtains during that investigation.''[139] Another commenter warned that ''[t]he communications contemplated by Section 165.18 of the Proposed Rules run afoul of ABA Model Rule 4.2 * * *'' and recommended that the Commission ''should withdraw Section 165.18 of the Proposed Rules.''[140]

3. Final Rule

After considering the comments received, the Commission has decided to adopt Rule 165.18, with modifications. The Final Rule authorizes the staff to directly communicate with directors, officers, members, agents, or employees of an entity that has counsel where the individual first initiates communication with the Commission as a whistleblower; the staff is authorized to have such direct communication without the consent of the entity's counsel. The Commission believes that the Rule implements congressional

[131] *See* letters from SIFMA/FIA, and U.S. Chamber of Commerce.

[132] *See* above, Section II.F.

[133] *See* Section II.I, above, discussing Rule 165.9(c)(1).

[134] *See* Section 23(b)–(d) and (h) of the CEA, 7 U.S.C 26(b)–(d), (h).

[135]

[136] *See* letter from ABA.

[137] *See* letter from ABA.

[138] *See* letter from ABA.

[139] *See* letter from SIFMA/FIA.

[140] *See* letter from FSR.

intent and meets the ''authorized by law'' exception to ABA Model Rule of Professional Conduct 4.2 and similar state bar rules that might otherwise prohibit direct communication.

With respect to the ABA's comment that ''it is not clear to [the ABA] as to whether a Commission Rule (as opposed to a statute) can supersede the State Bar provisions governing attorney conduct'', the Commission does not believe that Final Rule 165.18 ''supersedes'' state bar provisions. Rather, the Commission believes that by granting the Commission rulemaking authority pursuant to Section 23(i) of the CEA to implement an effective whistleblower program, Congress conferred upon the Commission the authority to permit its staff to have direct communications with whistleblowers without seeking consent of an entity's counsel. Final Rule 165.18, therefore, is intended to and does satisfy the ''authorized by law'' exception to the rule that would otherwise prohibit an attorney from communicating directly with an individual about a matter when the individual is represented by counsel in the matter.[141]

The Commission disagrees with any suggestion that the Commission does not have the authority to give such permission. The authority is derived from Congress's direction in Section 23(i) of the CEA to promulgate rules to create an effective and robust whistleblower program, and to preserve the confidentiality of whistleblowers.[142] The Commission believes that it would undermine Congressional intent if staff were prohibited from communicating directly with a whistleblower merely because the whistleblower was employed by an entity that was represented by counsel. Not only would such a prohibition allow a state bar rule to trump a federal statute and an independent federal agency's rule, but such a blanket prohibition would have the perverse result of giving an entity the option to decide whether a whistleblower should be allowed to report the entity's misconduct to the Commission. Giving an entity the right to stifle a whistleblower plainly is not what Congress intended. Nor would it be consistent with congressional intent to require staff to identify a whistleblower to an entity, which would be necessary if the staff were required to seek the entity's counsel consent to speak to the whistleblower. Such a requirement could deter whistleblowers from coming forward, which would frustrate congressional purpose.

Moreover, any state bar prohibition on attorney contact with an employee ultimately is premised on the notion that an entity-employer's counsel is by extension the employee's counsel. However, a lawyer for an entity cannot ethically also represent a whistleblower-employee on the same matter when the whistleblower's interests and the entity's interests are in conflict, such as when a whistleblower wants to report an entity's misconduct to the Commission.[143] Based on the same reasoning, Rule 165.18 does not authorize Commission staff to have direct communication with a whistleblower who is personally represented by an attorney without the consent of that attorney.

Authorizing the staff to have direct communication with a whistleblower employed by a represented entity does not mean that the staff should be the first to initiate such contact. For the sake of clarity, the Commission is explicitly modifying the proposed rule to grant authority only when the whistleblower first initiates contact with the staff. Thereafter, all direct communications are ''authorized by law.''

In addition, the Commission acknowledges some commenters' concern that direct communication with whistleblowers raises the possibility of the staff's inadvertent receipt of information covered by an entity's attorney-client privilege or the attorney work product protection. These concerns are valid. This Rule does not authorize staff to access information protected by the attorney-client privilege or attorney work product protection. Accordingly, when invoking Rule 165.18, the staff shall undertake reasonable best efforts to avoid receiving such information.

R. Rule 165.19—Nonenforceability of Certain Provisions Waiving Rights and Remedies or Requiring Arbitration of Disputes

Consistent with Congressional intent to protect whistleblowers from retaliation as reflected in Section 23(h) of the CEA, Proposed Rule 165.19 provided that the rights and remedies provided for in Part 165 of the Commission's Regulations may not be waived by any agreement, policy, form, or condition of employment including by a predispute arbitration agreement. No pre-dispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this Part.

The Commission did not receive any comments on Proposed Rule 165.19. The Commission is adopting Rule 165.19 as proposed. This rule tracks Section 23(n) of the CEA and is in keeping with congressional intent to make waiver of certain rights and remedies of whistleblowers nonenforceable, as well as any predispute arbitration agreement if the agreement requires arbitration of a dispute arising under Part 165.

S. Internal Reporting and Harmonization

The Proposed Rules did not require individuals to report potential CEA violations to their employers. However, the Proposed Rules did include provisions that would allow employees to claim an award from the Commission if they reported the information to their employer and the employer reported that information to the Commission.[144] Numerous commenters requested that the Commission either make internal reporting mandatory for whistleblowers, or at least provide individuals with incentives to make internal reports.

Several commenters recommended that the Commission adopt a ''provision requiring internal reporting by all employees as a condition of eligibility for a whistleblower award.''[145] Some commentators suggest that the only exception to internal reporting should be when the whistleblower can prove that the employer's internal system is

[141] The Commission is mindful that the SEC has reached the same conclusion with respect to the SEC's Dodd-Frank Act whistleblower provision. *See* SEC Rule 240.21F–17(b) (''If you are a director, officer, member, agent, or employee of an entity that has counsel, and you have initiated communication with the Commission relating to a possible securities law violation, the staff is authorized to communicate directly with you regarding the possible securities law violation without seeking the consent of the entity's counsel.'').

[142] *Cf.* ABA Formal Ethics Opinion 95–396 (1995) (Rule 4.2's exception permitting communication ''authorized by law'' is satisfied by ''a constitutional provision, statute or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel.''); *see, e.g., Wilkerson* v. *Brown,* 995 P.2d 393 (Kan. Ct. App. 1999) (statutes allowing for service of demands and offers of judgment on opposing party trigger ''authorized by law'' exception to anti-contact rule); *Lewis* v. *Bayer A.G.,* No. 2353 Aug. Term 2001, 2002 WL 1472339 (Pa. C.P. June 12, 2002) (drug company's mailings to putative members of plaintiff class of patients who experienced adverse drug reactions were sent pursuant to FDA regulations and thus were ''authorized by law'').

[143] *See, e.g.,* ABA Model Rule 1.7(a) (providing, in general, that ''a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if * * * the representation of one client will be directly adverse to another client'').

[144] *See* Proposed Rule 165.2(l).

[145] *See* letter from NSCP; *see also* letters from EEI, ICI, ACC, Equal Employment Advisory Council (''EEAC''), U.S. Chamber of Commerce, ABA, and FSR.

inadequate.[146] One commenter suggested that ''[t]he rules should provide that an internal reporting requirement prior to going to the CFTC would not apply where it would be futile, for example where individuals responsible for investigating complaints were themselves involved in the alleged violations,'' and ''if the entity has an effective internal compliance reporting system and internal reporting would not be futile, the entity should be allowed at least 180 days to complete its own internal investigation before the whistleblower can report the matter to the CFTC.'' [147]

Other commentators cautioned against making internal reporting mandatory. One commenter stated ''[r]equiring 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. * * * 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.'' [148] This commenter also expressed belief that ''the Commission's approach of encouraging whistleblowers to first report violations internally * * * without penalizing those who do not report, strikes an appropriate balance.'' [149]

Another commenter advised that whistleblowers should be given the option to report problems directly to the Commission, ''especially if they have reason to believe that their entity's internal compliance program will not do an adequate job of investigating the wrongdoing and taking corrective action.'' [150] This commenter also stated that to require internal reporting would be contrary to the meaning and intent of Section 23 of the CEA, would have a chilling effect on the whistleblower program and would put whistleblowers in harm's way.[151]

In the alternative to mandatory internal reporting, several commenters suggested that the Commission make internal reporting a positive criterion in an award determination.[152] For example, one commenter stated that the Commission ''[s]hould make explicit that a whistleblower will receive credit in the calculation of award amount when the [whistleblower] uses a entity's internal reporting mechanism.'' [153] In addition, this commenter suggested that the Final Rule ''should provide strong financial disincentives against individuals who violate entity rules requiring them to report misconduct internally.'' [154] Taking another tack, this commenter suggested that the Commission deem ineligible for an award any individual who refuses to cooperate with the entity's internal investigation, or who provides inaccurate or incomplete information or otherwise hinders such an investigation.[155]

Also, several commenters pointed out that the SEC's whistleblower rules incentivize internal reporting through positive consideration of internal reporting in award determinations,[156] and suggested that the Commission's whistleblower program be harmonized with that of the SEC (harmonization to be discussed below). The SEC's final whistleblower rules include factors that may increase a whistleblower's award.[157]

The Commission declines to mandate that whistleblowers report potential violations internally either before or concurrent to reporting to the Commission. The Commission believes that to require internal reporting could raise the risk of retaliation, and have a chilling effect on whistleblowers who are inclined to come forward and bring information to the attention of the Commission.[158] For these same reasons, the Commission has decided not to deem lack of cooperation with an internal investigation a basis to render a person ineligible for an award.

Nonetheless, the Commission recognizes that internal whistleblower, compliance and legal systems can contribute to detecting, deterring and preventing misconduct including violations of the CEA, goals that are consistent with the Commission's mission. Many entities properly encourage their employees to use such functions to report misconduct internally. By establishing financial incentives to report misconduct to the Commission, the Commission does not want to discourage employees from making internal reports when appropriate. The Commission recognizes that internal compliance and reporting systems ought to contribute to the goal of detecting, deterring and preventing misconduct, including CEA violations, and does not want to discourage employees from using such systems when they are in place.

The Commission is striking an appropriate balance between the interests of maintaining strong internal reporting functions and the interests of the Commission's whistleblower program by tailoring the Final Rules in two respects. First, the Final Rules state that the Commission will consider the whistleblower's decision to report internally as a potentially positive factor in the Commission's award determination. Whether the decision to report internally increases the amount of the award will depend on the facts and circumstances. If the whistleblower chooses not to report internally, his award determination will be unaffected by that decision. Indeed, the Commission recognizes that a whistleblower may reasonably believe that reporting internally could risk retaliation or be counterproductive to preventing and/or remedying misconduct; but such a whistleblower should be no less incentivized to report to the Commission. Second, if a whistleblower reports information internally within an entity, according to the Final Rules the Commission will attribute to the whistleblower all information later reported by the entity to the Commission, including any additional information reported by the entity that was not part of the whistleblower's internal report.

In response to this possibility, the Commission has tailored the Final Rules to provide whistleblowers who are otherwise pre-disposed to report internally, but who may also be affected by financial incentives, with additional economic incentives to continue to report internally. Specifically, after considering the comments received, the Commission has decided to revise and adopt the Proposed Rules to incentivize internal reporting, as discussed throughout this Release, specifically by providing whistleblowers who report internally with: (a) Positive weight in Commission award determinations; [159] and (b) the benefit of the employer's

[146] *See* letter from U.S. Chamber of Commerce.

[147] *See* letter from SIFMA/FIA.

[148] *See* letter from TAF.

[149] *See* letter from TAF.

[150] *See* letter from POGO.

[151] *See* letter from POGO.

[152] *See* letter from FSR at 8; *see also* letters from NSCP at 3–7, 10, Senator Carl Levin at 3, U.S. Chamber of Commerce at 14, SIFMA/FIA at 2–3, 6; *cf.* letter from FSR at 9 (suggesting that whistleblowers who fail to report internally ''without clear, appropriate justification'' be limited, in general, to the ''statutory minimum of 10 percent of the total monetary sanctions collected in the action.'').

[153] *See* letter from SIFMA/FIA.

[154] *See* letter from SIFMA/FIA.

[155] *See* letter from SIFMA/FIA.

[156] *See, e.g.,* letter from SIFMA/FIA.

[157] *See* SEC Rule 240.21F–6(a)(4) (''Criteria For Determining Amount of Award'').

[158] *See* letter from POGO.

[159] *See* Rule 165.9 Criteria for determining amount of award.

investigation.[160] The Commission has decided not to deem ineligible a person for an award who does not cooperate with an internal investigation because the Commission has previously indicated that the Commission will take into consideration the degree to which a whistleblower took steps to prevent the violations from occurring, or continuing, when making an award determination.[161]

Commission staff has consulted with SEC staff regarding drafting of rules to implement the Commission's and SEC's respective Dodd-Frank Act whistleblower provisions, Section 748 (Commodity Whistleblower Incentives and Protection) and Section 922 (Whistleblower Protection). Several commenters noted that some companies may be subject to both whistleblower programs, and to reduce uncertainty and cost to these companies the respective whistleblower programs should be as uniform as possible.[162] Wherever appropriate and consistent with the underlying statutory mandate in Section 23 of the CEA, the Commission has endeavored to harmonize its whistleblower rules with those of the SEC.

However, the CFTC's Proposed Rules and SEC's Final Rules are similar but not identical due to a number of factors, including the following: (1) While similar, the provisions of the Sections 748 and 922 are not identical; (2) certain terms in the SEC's statutory provision are either defined terms under the Securities Exchange Act of 1934 or are terms of art under SEC case law, and there is no comparable CFTC precedent; (3) unlike the CFTC, the SEC has an existing whistleblower program for insider trading violations that was established under Section 21A(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78u–1(e); and (4) also unlike the CFTC, the SEC has existing obligations for persons to report violations to it (*see, e.g.,* Section 10A of the Securities Exchange Act of 1934, 15 U.S.C. 78j–1 (establishing requirements and procedure for a ''registered public accounting firm [that] detects or otherwise becomes aware of information indicating that an illegal act (whether or not perceived to have a material effect on the financial statements of the issuer) has or may have occurred'' to report such illegal act to management, board of directors, and the SEC) (alteration in original)).

III. Administrative Compliance

A. Cost-Benefit Considerations

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its action before promulgating a regulation.[163] Furthermore, such costs and benefits shall be evaluated in light of the following five considerations: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas depending upon the nature of the regulatory action.[164]

The Final Rules implement Section 23 of the CEA which requires the Commission, subject to certain requirements, to pay eligible whistleblowers a monetary award for voluntarily providing original information about violations of the CEA leading to a successful enforcement action. The Final Rules define the key terms, specify procedures for the submission and handling of original information, and enumerate procedures for consideration and payment of awards including appeals.

Many of the Final Rules are mandated by section 748 of the Dodd-Frank Act, leaving the Commission with little or no discretion to consider any alternatives where the statute prescribes particular procedures. Therefore, the Commission's final regulations adhere closely to the enabling language of the statute. For example, the final regulations implement, among other provisions, the statutory requirement that, if all preconditions are met, the Commission must pay an award to one or more whistleblowers in an aggregate amount of not less than 10 percent and not more than 30 percent of what has been collected of the monetary sanctions imposed in the Commission's action or related actions. Another example is the statutory requirement that anonymous whistleblowers must be represented by counsel when making a claim for a whistleblower award. To the extent that the Commission was left with discretion under section 748 of the Dodd-Frank Act, the Commission exercised that discretion with consideration of minimizing the potential costs while maintaining fidelity to the Congressional intent behind section 748 of the Dodd-Frank Act.

The Commission has considered the costs and benefits of its regulations as part of the deliberative rulemaking process, and discussed them throughout the preamble. The Commission generally views the costs-benefits section of this Final Rulemaking to be an extension of that discussion. Paperwork Reduction Act related costs are included in the overall compliance costs considered with respect to Final Rule 165.

The comments that the Commission received regarding costs and benefits can be categorized under three major topics. Broadly speaking, the comments assert that (1) Employers and the CFTC will face increased costs because the Final Rule does not contain a requirement that a whistleblower first report an alleged CEA violation internally to the entity committing the alleged offense; (2) firms regulated by both the CFTC and the SEC will face increased costs due to the lack of regulatory harmonization between the CFTC and SEC whistleblower rules; and (3) potential whistleblowers will face costs excessive procedural burdens under the rules.

A discussion of the comments on each topic and the Commission's response to those comments in light of the five public interest considerations follows.

1. Costs to Employers and the Commission Associated With the Lack of an Internal Reporting Requirement

Three commenters[165] commented specifically on the cost-benefit section of the Proposed Rules, stating that the cost-benefit section of the Proposed Rules only described costs to whistleblowers and did not describe costs to employers and the Commission that would arise under the Proposed Rules. One commenter stated that the anti-retaliation provision would lead to false or spurious whistleblower claims and that firms and the Commission would incur significant costs to evaluate these claims.[166] Another commenter stated that two types of costs to employers would be incurred by not requiring whistleblowers to report to the firm's compliance department.[167] According to that commenter, the costs of responding to Commission investigations exceed the costs of internal investigations. In addition, the

[160] *See* Rule 165.2(i) (''Information that led to successful enforcement'').

[161] *See* 75 FR at 75739.

[162] *See* letters from NSCP at 2, ABA at 4, ICI at 1, SIFMA/FIA at 14.

[163] 7 U.S.C. 19(a).

[164] *See, e.g., Fisherman's Doc Co-op., Inc* v. *Brown,* 75 F.3d 164 (4th Cir. 1996); *Center for Auto Safety* v. *Peck,* 751 F.2d 1336 (D.C. Cir. 1985) (noting that an agency has discretion to weigh factors in undertaking cost-benefit analysis).

[165] *See* letters from ABA, EEI, and U.S. Chamber of Commerce.

[166] *See* letter from ABA.

[167] *See* letter from EEI.

commenter stated that the lack of an internal reporting requirement would give rise to meritless complaints which would be costly to investigate. Further, though not specifically enumerated in its analysis of the cost-benefit section, that commenter stated that the proposed rule would likely result in slower identification, investigation, and potentially remediation by employers of alleged violations. Another commenter also stated that the lack of an internal reporting requirement would increase employer costs.[168] The common theme in the above cost-benefit comments, as well as other more general cost comments submitted by several commenters[169] focused on the potential damage to existing compliance systems without an internal reporting requirement. While not specifically commenting on the cost-benefit section of the Proposed Rules, several commenters noted increased legal, investigative, and remedial costs to firms and increased costs to and use of resources by the Commission.[170] One of the commenters expanded upon potential costs and negative consequences of the lack of a rule requiring, at a minimum, concurrent reporting to the firm. This commenter stated that ''a failure or delay in the communication of whistleblower reports of potential violations to these entities may reduce the entity's ability of their independent accountants to rely on the efficacy of an entity's internal control systems and could adversely impact the entity's and independent accountants' evaluations of internal control over financial reporting.[171] It could have significant negative consequences for investors, reporting entities, and the audit process alike.'' These concerns are addressed below in the context of the above mentioned Section 15(a) considerations.

Considerations of Protection of Market Participants and the Public

The Commission believes that the Final Rules implement the statutory mandate and serve the purpose of protecting market participants and the public. The statute does not require whistleblowers to report violations through an entity's internal reporting process. To impose such a requirement may be inconsistent with Congressional intent in establishing the whistleblower program. Specifically, the Commission believes that this potential alternative would impose substantial costs and burdens on whistleblowers, victims of CEA violations, market participants, and the public. Such a rule could prevent or deter whistleblowers from making legitimate complaints out of fear of reprisal from their employer. Consequently, some violations may never be brought to the attention of the Commission, which would prevent the Commission from bringing actions against violators of the CEA. A rule requiring internal reporting could therefore deprive victims of restitution and could deprive market participants and the public of the benefits associated with detection, prosecution, and deterrence of such violations of the CEA. Thus, the Commission believes that the overall cost of an internal reporting requirement and the attendant risks of undetected violations are greater than the cost to firms subject to a potential whistleblower referral. Indeed, if Congress thought such a requirement was necessary, Congress could have incorporated such a provision in Section 748 of the Dodd Frank Act. Regarding the comment that the anti-retaliation provision of Section 748 would lead to more meritless complaints, the Commission notes that Section 748 of the Dodd-Frank Act prohibits retaliation against whistleblowers for any lawful act done by the whistleblower. Because the Final Rules implement this statutory mandate, the commenter did not provide any basis for claiming that the language of the proposed rule will cause such consequences under the statutory provision.

The whistleblower program is distinct from and does not undermine or require any changes to any entity's existing compliance systems. However, the Commission is cognizant that firms may be incentivized to re-evaluate and adjust their existing internal compliance systems to encourage employees to report internally and forestall the occurrence of CEA violations.

While the Commission is not persuaded of the need to adopt a rule to require internal reporting, after consideration of the comments on internal reporting, the Commission has included incentives for internal reporting in Final Rule 165.2(i) and 165.9. The Commission has determined that the risk of meritless complaints is outweighed by the benefits of a Final Rule that enables whistleblowers to make referrals without fear of retaliation. Regarding the comment that the lack of an internal reporting requirement would likely result in slower identification, investigation, and potential remediation of violations by firms, the Commission will evaluate whistleblower referrals promptly and take action as necessary and appropriate. The comment does not illustrate how and to what extent the lack of an internal reporting requirement undermines existing compliance protocols. The whistleblower program, by definition, is an external reporting regime. To the extent there is a delay in the entity learning of violations and taking corrective measures in the absence of internal reporting, the cost of such a delay is outweighed by the risks of discouraging meritorious claims.

Considerations of Efficiency, Competitiveness, and Financial Integrity of Futures Markets, Price Discovery, and Sound Risk Management Practices

The Commission has determined that its Final Rules implement Congressional intent. After consideration and evaluation of the public comments, and to the extent the Commission declines to impose an additional internal reporting requirement upon whistleblowers beyond the statutory mandate under section 748 of the Dodd-Frank Act, the Commission has determined that the Final Rules will further the goals of each of these three considerations under Section 15(a) of the CEA. For example, to the extent whistleblowers are incentivized to refer cases of market manipulation and disruptive trading practices, the efficiency, competitiveness and financial integrity of futures markets, the price discovery process, and effective risk management will be enhanced by improved detection and enforcement of such violations. The Commission is not persuaded by, nor was there any reliable evidence to support, assertions that the Commission and affected parties will bear excess costs due to a high volume of meritless claims in the absence of an internal reporting requirement. Congress placed a procedural safeguard in the statute by advising whistleblowers that they can be criminally prosecuted for making false statements to the Commission under 18 U.S.C. 1001.[172] These and other provisions will reduce the risk of meritless referrals. Moreover, whistleblowers are incentivized to provide referrals only if they believe those referrals have merit since they can only get an award if their referrals lead

[168] *See* letter from U.S. Chamber of Commerce.

[169] *See* letters from SIFMA/FIA, EEAC, Working Group, AICPA, and NSCP.

[170] *See* letters from NSCP, Working Group, EEAC and AICPA.

[171] *See* letter from AICPA.

[172] Such false statements also could be a violation of Sections 6(c)(2) and 9(a)(3) of the CEA, 7 U.S.C. 9, 13(a)(3), 15.

to a successful enforcement action (*see* Rules 165.2(i) and 165.9.).

2. Costs to Firms Regulated by Both the Commission and SEC

One commenter stated that the lack of regulatory harmonization between the Commission and SEC whistleblower rules would ''impose costs and lead to the potential for confusion for dually-regulated firms without any corresponding benefit.'' [173] Another commenter stated that Commission-SEC harmonization would benefit ''dually registered firms [and] the financial industry generally.'' [174] In addition, another commenter stated that the Proposed Rules are ''inconsistent with the framework of compliance processes established under Sarbanes-Oxley and other federal laws and regulations.'' This commenter further stated the importance of harmonizing the implementation of the Dodd-Frank Act with existing processes.[175] We address each of these concerns below in the context of the above mentioned Section 15(a) considerations.

The Commission has considered the public comments calling for harmonization with SEC whistleblower rules. The Dodd-Frank Act does not require harmonization between the Commission and the SEC with respect to their respective whistleblower provisions. Moreover, this is not a joint Commission-SEC rulemaking. Having considered the comments and consulted with SEC staff, the Commission has revised several whistleblower rules, as discussed in detail under Section II.S. above, with those of the SEC's whistleblower rules to enhance regulatory certainty for market participants subject to both whistleblower programs, which furthers the public interest.[176]

With respect to costs, as explained in various places throughout this release, the remaining differences between the SEC and Commission rules are due to differences between the statutes governing the two agencies and their respective regulatory objectives. Consequently, costs associated with these remaining differences are not likely to be significant under the five broad areas as enumerated in Section 15(a) of the CEA.

3. Costs to Whistleblowers

A commenter stated that the proposed claims process is burdensome and backwards. Specifically, this commenter noted that it is problematic to require that a whistleblower notify the Commission of a claim for reward upon the successful completion of an enforcement action. The commenter also recommended that the Commission notify the individual about a reward after an administrative or judicial action has been taken.[177] Another commenter shared similar concerns and stated that the Commission should establish better policies for communicating with whistleblowers throughout the application process to lessen whistleblowers' burden to explain the importance of their disclosures.[178] We address each of these concerns below in the context of Section 15(a) considerations.

Protection of Market Participants and the Public Considerations of Efficiency, Competitiveness, and Financial Integrity of Futures Markets, Price Discovery, and Sound Risk Management Practices

The Final Rules implement procedures mandated by section 748 of the Dodd-Frank Act for whistleblowers to report CEA violations. The Commission is aware of the concerns expressed by Commenters and intends to implement policies and procedures for communicating with whistleblowers that will address these concerns. Specifically, following the successful completion of a covered action, the Commission will publish a Notice of Covered Action on the Commission web site. Whistleblowers will be able to utilize the Commission's Email Subscriptions service [179] to receive an email message when their actions are resolved successfully. The Final Rules also reduce the number of forms that a whistleblower must submit to the Commission from three to two.

The Commission has considered the paperwork requirements in light of all five of the considerations in Section 15(a) of the CEA. With respect to benefits, the procedural requirements under the Final Rule will enable the Commission to effectively implement and administer the mandated whistleblower program in furtherance of these considerations without imposing excessive costs or burdens upon whistleblowers.

B. Anti-Trust Considerations

Section 15(b) of the CEA [180] requires the Commission to consider the public interests protected by the antitrust laws and to take actions involving the least anti-competitive means of achieving the objectives of the CEA. The Commission believes that the Proposed Rules will have a positive effect on competition by improving the fairness and efficiency of the markets through improving detection and remediation of potential violations of the CEA and Commission regulations.

IV. Paperwork Reduction Act

Certain provisions of the Proposed Rules contained ''collection of information'' requirements within the meaning of the Paperwork Reduction Act (''PRA'') of 1995.[181] An agency may not sponsor, conduct, or require a response to an information collection unless a currently valid Office of Management and Budget (''OMB'') control number is displayed. The Commission submitted proposed collections of information to OMB for review in accordance with the PRA.[182] The titles for the collections of information were: (1) Form TCR (Tip, Complaint or Referral); (2) Form WB–DEC (Declaration Concerning Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act); and (3) Form WB–APP (Application for Award for Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act). These three forms were proposed to implement Section 23 of the CEA. The proposed forms allowed a whistleblower to provide information to the Commission and its staff regarding: (1) Potential violations of the CEA; and (2) the whistleblower's eligibility for and entitlement to an award.

The Commission did not receive any comments that directly addressed its PRA analysis or its burden estimates. In comments on the Proposing Release, a commenter suggested that the three-form process proposed for obtaining information from whistleblowers was burdensome.[183] As the Commission discusses in connection with Rule 165.3, its Final Rules require largely the same information to be collected, but in response to comments the Commission has combined the information collection

[173] *See* letter from SIFMA/FIA.

[174] *See* letter from NSCP.

[175] *See* letter from EEI.

[176] Similar to the SEC, the Commission is not persuaded by the commenter's suggestion that the Proposed Rules were inconsistent with the Sarbanes-Oxley Act of 2002. *See* 76 FR at 34326 n.230 (the SEC concluded that the mandates of Section 301 of the Sarbanes-Oxley Act of 2002 and Section 21F of the Securities Exchange Act of 1934 were different and declined to follow the commenters' suggestion that the SEC impose a ''requirement that employees of listed companies also utilize internal audit committee or other complaint procedures.'').

[177] *See* letter from TAF.

[178] *See* letter from POGO.

[179] *See https://service.govdelivery.com/service/multi_subscribe.html?code=USCFTC.*

[180] 7 U.S.C. 19(b).

[181] 44 U.S.C. 3501 *et seq.*

[182] 44 U.S.C. 3507(d); 5 CFR 1320.11.

[183] *See* letter from NWC.

into only two forms—Form TCR, which incorporates several questions previously posed on Proposed Form WB–DEC, and Form WB–APP—to simplify the process for whistleblowers.

A. Summary of Collection of Information

Form TCR, submitted pursuant to Rule 165.3, requests the following information:

1. Background information regarding each complainant submitting the TCR, including the person's name and contact information. The Commission has added a section for the identification of additional complainants;

2. If the complainant is represented by an attorney, the name and contact information for the complainant's attorney;

3. Information regarding the individual or entity that is the subject of the tip or complaint, including contact information;

4. Information regarding the tip or complaint, including: the date of the alleged violation; the nature of the complaint; the name and type of financial product or investment, if relevant; whether the complainant or counsel has had prior contact with Commission staff and with whom; whether information has been communicated to another agency and, if so, details about that communication, including the name and contact information for the point of contact at such agency, if available; whether the complaint relates to an entity of which the complainant is or was an officer, director, counsel, employee, consultant or contractor; whether the complainant has reported this violation to his or her supervisor, compliance office, whistleblower hotline, ombudsman, or any other available mechanism at the entity for reporting violations and the date of such action was taken;

5. A description of the facts pertinent to the alleged violation, including an explanation of why the complainant believes the acts described constitute a violation of the CEA;

6. A description of all supporting materials in the complainant's possession and the availability and location of any additional supporting materials not in the complainant's possession;

7. An explanation of how the person submitting the complaint obtained the information and, if any information was obtained from an attorney or in a communication where an attorney was present, the identification of any such information;

8. A description of any information obtained from a public source and a description of such source;

9. A description of any documents or other information in the complainant's submission that the complainant believes could reasonably be expected to reveal his or her identity, including an explanation of the basis for the complainant's belief that his or her identity would be revealed if the documents were disclosed to a third party; and

10. Any additional information the complainant believes may be relevant.

Also included in Form TCR are several items previously included in proposed Form WB–DEC, which was required to be submitted pursuant to Proposed Rule 165.3. First, there are several questions that require a complainant to provide eligibility-related information by checking a series of ''yes/no'' answers. Second, the form contains a declaration, signed under penalty of perjury, that the information provided to the Commission pursuant to Rule 165.3 is true, correct and complete to the best of the person's knowledge, information and belief. Third, there is a counsel certification, which is required to be executed in instances where a complainant makes an anonymous submission pursuant to the whistleblower program and is represented by an attorney. This statement certifies that the attorney has verified the complainant's identity, and has reviewed the complainant's completed and signed Form TCR for completeness and accuracy, and that the information contained therein is true, correct and complete to the best of the attorney's knowledge, information and belief. The certification also contains new statements, which were not included in proposed Form WB–DEC, that: (i) The attorney has obtained the complainant's non-waivable consent to provide the Commission with the original completed and signed Form TCR in the event that the Commission requests it due to concerns that the form may contain false, fictitious or fraudulent statements or representations that were knowingly or willfully made by the complainant; and (ii) the attorney consents to be legally obligated to provide the signed Form TCR within seven (7) calendar days of receiving such request from the Commission.

Form WB–APP, submitted pursuant to Rule 165.7, requires the following information:

1. The applicant's name, address and contact information;

2. The applicant's social security number, if any;

3. If the person is represented by an attorney, the name and contact information for the attorney;

4. Details concerning the tip or complaint, including (a) The manner in which the information was submitted to the Commission, (b) the subject of the tip, complaint or referral, (c) the Form TCR number, and (d) the date the Form TCR was submitted to the Commission;

5. Information concerning the Notice of Covered Action to which the claim relates, including (a) The date of the Notice, (b) the Notice number, and (c) the case name and number;

6. For related actions, (a) The name and contact information for the agency or organization to which the person provided the original information, (b) the date the person provided this information, (c) the date the agency or organization filed the related action, (d) the case name and number of the related action, and (e) the name and contact information for the point of contact at the agency or organization, if known;

7. A series of questions concerning the person's eligibility to receive an award as described in the Form TCR discussion above;

8. An optional explanation of the reasons why that the person believes he is entitled to an award in connection with his submission of information to the Commission, or to another agency in a related action, including any additional information and supporting documents that may be relevant in light of the criteria for determining the amount of an award set forth in Rule 165.9, and any supporting documents; and

9. A declaration, signed under penalty of perjury, that the information provided in Form WB–APP is true, correct and complete to the best of the person's knowledge, information and belief.

B. Use of Information

The collection of information on Forms TCR and WB–APP will be used to permit the Commission and its staff to collect information from whistleblowers regarding alleged violations of the CEA and the rules and regulations thereunder and to determine claims for whistleblower awards.

C. Respondents

The likely respondents to Form TCR will be individuals who wish to provide information relating to possible violations of the CEA and the rules and regulations thereunder, and who wish to be eligible for whistleblower awards. The likely respondents to Form WB–APP will be individuals who have provided the Commission, or another

agency in a related action, with information relating to a possible violation of the CEA and who believe they are entitled to an award.

D. Total Annual Reporting and Recordkeeping Burden

1. Form TCR

The Commission estimates that it will receive submissions of approximately 3,800 tips, complaints and referrals each year.[184] Of those 3,800 submissions, the Commission estimates that it will receive approximately 100 whistleblower tips, complaints and referrals on Form TCR each year.[185] Each respondent would submit only one Form TCR and would not have a recurring obligation to file additional Forms TCR. In the Proposing Release, the Commission proposed that a whistleblower would have to complete two forms, proposed Form TCR and proposed Form WB–DEC, to be eligible for an award. In the Final Rules, the Commission has eliminated Form WB–DEC and added the eligibility questions from that proposed form to Form TCR.

The Commission estimates that it will take a whistleblower, on average, two and one-half hours to complete the Form TCR, which includes the questions that had previously been included in proposed Form WB–DEC. The completion time will depend largely on the complexity of the alleged violation and the amount of information the whistleblower possesses in support of the allegations. As a result, the Commission estimates that the annual PRA burden of Form TCR is 250 hours.

2. Form WB–APP

Each whistleblower who believes that he is entitled to an award because he provided original information to the Commission that led to successful enforcement of a covered judicial or administrative action, or a related action, is required to submit a Form WB–APP to be considered for an award. The Commission estimates that it will receive approximately nine Forms WB–APP each year.[186] Finally, the Commission estimates that it will take a whistleblower, on average, ten hours to complete Form WB–APP. The completion time will depend largely on the complexity of the alleged violation and the amount of information the whistleblower possesses in support of his application for an award. This estimate assumes that most whistleblowers will elect to complete optional Section G (Entitlement to Award) of Form WB–APP. As a result, the Commission estimates that the annual PRA burden of Form WB–APP is 90 hours.

3. Involvement and Cost of Attorneys

Under the Proposed Rules, an anonymous whistleblower is required (when filing a claim for an award), and a whistleblower whose identity is known may elect to retain counsel to represent the whistleblower in the whistleblower program. The Commission expects that, in most of those instances, the whistleblower's counsel will complete, or assist in the completion, of some or all of the required forms on behalf of the whistleblower. The Commission also expects that in the vast majority of cases in which a whistleblower is represented by counsel, the whistleblower will enter into a contingency fee arrangement with counsel, providing that counsel will be paid for the representation through a fixed percentage of any recovery by the whistleblower under the program. Thus, most whistleblowers will not incur any direct, quantifiable expenses for attorneys' fees for the completion of the required forms.

The Commission anticipates that a small number of whistleblowers (no more than five percent) will enter into hourly fee arrangements with counsel.[187] In those cases, a whistleblower will incur direct expenses for attorneys' fees for the completion of the required forms. To estimate those expenses, the Commission makes the following assumptions:

1. The Commission will receive approximately 100 Forms TCR, and nine Forms WB–APP annually;[188]

2. Whistleblowers will pay hourly fees to counsel for the submission of approximately five Forms TCR and one Form WB–APP annually;[189]

3. Counsel retained by whistleblowers pursuant to an hourly fee arrangement will charge on average $400 per hour;[190] and

4. Counsel will bill on average: (a) 2.5 hours to complete a Form TCR, and (b) 10 hours to complete a Form WB–APP. Based on those assumptions, the Commission estimates that each year whistleblowers will incur the following total amounts of attorneys' fees for completion of the whistleblower program forms: (i) $5,000 for the completion of Forms TCR; and (ii) $4,000 for the completion of Form WB–APP.

E. Mandatory Collection of Information

A whistleblower would be required to complete a Form TCR, or submit his information electronically, and a Form WB–APP, or submit his information electronically, to qualify for a whistleblower award.

F. Confidentiality

As explained above, the statute provides that the Commission must maintain the confidentiality of the identity of each whistleblower, subject to certain exceptions. Section 23(h)(2) of the CEA states that, except as expressly provided:

> [T]he Commission, and any officer or employee of the Commission, shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, United States Code, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission [or certain specific entities listed in paragraph (C) of Section 23(h)(2)].

Section 23(h)(2) also allows the Commission to share information received from whistleblowers with certain domestic and foreign regulatory and law enforcement agencies. However, the statute requires the domestic entities to maintain such

[184] This number is a staff estimate based upon the volume of tips, complaints or referrals received by the Commission in recent years.

[185] This number is a staff estimate based on the volume of whistleblower tips, complaints and referrals that the Commission has received in the first eleven months after the enactment of the Dodd-Frank Act (less than two dozen) and an expectation that this volume will increase as the public becomes more aware of the Commission's whistleblower program.

[186] This number is a staff estimate based on two expectations: First, that the Commission will receive Forms WB–APP in approximately 15 percent of cases in which it posts a Notice of Covered Action because the Commission expects that the Commission will continue to bring a substantial number of enforcement cases that are not based on whistleblower information; and second, that the Commission will receive approximately three Forms WB–APP in each of those cases. Because this is a new program, the staff does not have prior relevant data on which it can base these estimates.

[187] This estimate is based, in part, on the Commission's belief that most whistleblowers likely will not retain counsel to assist them in preparing the forms.

[188] The basis for these assumed amounts are explained in Parts IV.D.1. and I.V.D.2. above.

[189] These amounts are based on the assumption, as noted above, that no more than five percent of all whistleblowers will be represented by counsel pursuant to an hourly fee arrangement.

[190] The Commission uses this hourly rate for estimating the billing rates of lawyers for purposes of other rules. Absent historical data for the Commission to rely upon in connection with the whistleblower program, the Commission believes that this billing rate estimate is appropriate, recognizing that some attorneys representing whistleblowers may charge different average hourly rates.

information as confidential, and requires foreign entities to maintain such information in accordance with such assurances of confidentiality as the Commission deems appropriate.

In addition, Section 23(d)(2) provides that a whistleblower may submit information to the Commission anonymously, so long as the whistleblower is represented by counsel when the time comes for the whistleblower to make a claim for an award. However, the statute also provides that a whistleblower must disclose his or her identity prior to receiving payment of an award.

V. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act [191] requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[192] In the Commission's Proposing Release, the Chairman, on behalf of the Commission, certified that a regulatory flexibility analysis is not required because the persons that would be subject to the rules—individuals—are not ''small entities'' for purposes of the Regulatory Flexibility Act and the rules therefore would not have a significant economic impact on a substantial number of small entities. The Commission received no comments regarding this conclusion.

VI. Statutory Authority

The Commission is adopting the rules and forms contained in this document under the authority contained in Sections 2, 5, 8a(5) and 23 of the Commodity Exchange Act.

List of Subjects in 17 CFR Part 165

Whistleblowing.

In consideration of the foregoing and pursuant to the authority contained in the Commodity Exchange Act, in particular, Sections 2, 5, 8a(5) and 23 thereof, the Commodity Futures Trading Commission adds a new 17 CFR Part 165 as set forth below:

PART 165—WHISTLEBLOWER RULES

Sec.

165.1 General.
165.2 Definitions.
165.3 Procedures for submitting original information.
165.4 Confidentiality.
165.5 Prerequisites to the consideration of an award.
165.6 Whistleblowers ineligible for an award.
165.7 Procedures for award applications and Commission award determinations.
165.8 Amount of award.
165.9 Criteria for determining amount of award.
165.10 Contents of record for award determination.
165.11 Awards based upon related actions.
165.12 Payment of awards from the Fund, financing of customer education initiatives, and deposits and credits to the Fund.
165.13 Appeals.
165.14 Procedures applicable to the payment of awards.
165.15 Delegations of authority.
165.16 No immunity.
165.17 Awards to whistleblowers who engage in culpable conduct.
165.18 Staff communications with whistleblowers from represented entities.
165.19 Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration of disputes.
Appendix A to Part 165—Guidance With Respect to the Protection of Whistleblowers Against Retaliation

Authority: 7 U.S.C. 2, 5, 12a(5) and 26, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (July 16, 2010).

§ 165.1 General.

Section 23 of the Commodity Exchange Act, entitled ''Commodity Whistleblower Incentives and Protection,'' requires the Commission to pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about violations of the Commodity Exchange Act. This part 165 describes the whistleblower program that the Commission intends to establish to implement the provisions of Section 23, and explains the procedures the whistleblower will need to follow in order to be eligible for an award. Whistleblowers should read these procedures carefully, because the failure to take certain required steps within the time frames described in this part may result in disqualification from receiving an award. Unless expressly provided for in this part, no person is authorized to make any offer or promise, or otherwise to bind the Commission with respect to the payment of any award or the amount thereof.

§ 165.2 Definitions.

As used in this part:

(a) *Action.* The term ''action'' generally means a single captioned judicial or administrative proceeding. Notwithstanding the foregoing:

(1) For purposes of making an award under § 165.7, the Commission will treat as a Commission action two or more administrative or judicial proceedings brought by the Commission if these proceedings arise out of the same nucleus of operative facts; or

(2) For purposes of determining the payment on an award under § 165.14, the Commission will deem as part of the Commission action upon which the award was based any subsequent Commission proceeding that, individually, results in a monetary sanction of $1,000,000 or less, and that arises out of the same nucleus of operative facts.

(b) *Aggregate amount.* The phrase ''aggregate amount'' means the total amount of an award granted to one or more whistleblowers pursuant to § 165.8.

(c) *Analysis.* The term ''analysis'' means the whistleblower's examination and evaluation of information that may be generally available, but which reveals information that is not generally known or available to the public.

(d) *Collected by the Commission.* The phrase ''collected by the Commission'' refers to any funds received, and confirmed by the U.S. Department of the Treasury, in satisfaction of part or all of a civil monetary penalty, disgorgement obligation, or fine owed to the Commission.

(e) *Covered judicial or administrative action.* The phrase ''covered judicial or administrative action'' means any judicial or administrative action brought by the Commission under the Commodity Exchange Act whose successful resolution results in monetary sanctions exceeding $1,000,000.

(f) *Fund.* The term ''Fund'' means the Commodity Futures Trading Commission Customer Protection Fund.

(g) *Independent knowledge.* The phrase ''independent knowledge'' means factual information in the whistleblower's possession that is not generally known or available to the public. The whistleblower may gain independent knowledge from the whistleblower's experiences, communications and observations in the whistleblower's personal business or social interactions. The Commission will not consider the whistleblower's information to be derived from the whistleblower's independent knowledge if the whistleblower obtained the information:

(1) From sources generally available to the public such as corporate filings and the media, including the Internet;

(2) Through a communication that was subject to the attorney-client privilege, unless the disclosure is

[191] 5 U.S.C. 601, *et seq.*

[192] *Id.*

otherwise permitted by the applicable federal or state attorney conduct rules;

(3) In connection with the legal representation of a client on whose behalf the whistleblower, or the whistleblower's employer or firm, have been providing services, and the whistleblower seek to use the information to make a whistleblower submission for the whistleblower's own benefit, unless disclosure is authorized by the applicable federal or state attorney conduct rules;

(4) Because the whistleblower was an officer, director, trustee, or partner of an entity and another person informed the whistleblower of allegations of misconduct, or the whistleblower learned the information in connection with the entity's processes for identifying, reporting, and addressing possible violations of law;

(5) Because the whistleblower was an employee whose principal duties involved compliance or internal audit responsibilities; or

(6) By a means or in a manner that is determined by a United States court to violate applicable Federal or state criminal law.

(7) *Exceptions.* Paragraphs (g)(4) and (5) of this section shall not apply if:

(i) The whistleblower has a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the relevant entity from engaging in conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors;

(ii) The whistleblower has a reasonable basis to believe that the relevant entity is engaging in conduct that will impede an investigation of the misconduct; or

(iii) At least 120 days have elapsed since the whistleblower provided the information to the relevant entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or the whistleblower's supervisor, or since the whistleblower received the information, if the whistleblower received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or the whistleblower's supervisor was already aware of the information.

(h) *Independent analysis.* The phrase ''independent analysis'' means the whistleblower's own analysis, whether done alone or in combination with others.

(i) *Information that led to successful enforcement.* The Commission will consider that the whistleblower provided original information that led to the successful enforcement of a judicial or administrative action, or related action, in the following circumstances:

(1) The whistleblower gave the Commission original information that was sufficiently specific, credible, and timely to cause the Commission staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning different conduct as part of a current examination or investigation, and the Commission brought a successful judicial or administrative action based in whole or in part on conduct that was the subject of the whistleblower's original information; or

(2) The whistleblower gave the Commission original information about conduct that was already under examination or investigation by the Commission, the Congress, any other authority of the federal government, a state Attorney General or securities regulatory authority, any self-regulatory organization, futures association or the Public Company Accounting Oversight Board (except in cases where the whistleblower was an original source of this information as defined in paragraph (i) of this section), and the whistleblower's submission significantly contributed to the success of the action.

(3) The whistleblower reported original information through an entity's internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law before or at the same time the whistleblower reported them to the Commission; the entity later provided the whistleblower's information to the Commission, or provided results of an audit or investigation initiated in whole or in part in response to information the whistleblower reported to the entity; and the information the entity provided to the Commission satisfies either paragraph (i)(1) or (i)(2) of this section. Under this paragraph (i)(3), the whistleblower must also submit the same information to the Commission in accordance with the procedures set forth in § 165.3 within 120 days of providing it to the entity.

(j) *Monetary sanctions.* The phrase ''monetary sanctions,'' when used with respect to any judicial or administrative action, or related action, means—

(1) Any monies, including penalties, disgorgement, restitution, and interest ordered to be paid; and

(2) Any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)) as a result of such action or any settlement of such action.

(k) *Original information.* The phrase ''original information'' means information that—

(1) Is derived from the independent knowledge or independent analysis of a whistleblower;

(2) Is not already known to the Commission from any other source, unless the whistleblower is the original source of the information;

(3) Is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information; and

(4) Is submitted to the Commission for the first time after July 21, 2010 (the date of enactment of the Wall Street Transparency and Accountability Act of 2010).

(5) Original information shall not lose its status as original information solely because the whistleblower submitted such information prior to October 24, 2011, provided such information was submitted after July 21, 2010, the date of enactment of the Wall Street Transparency and Accountability Act of 2010. In order to be eligible for an award, a whistleblower who submits original information to the Commission after July 21, 2010, but prior to October 24, 2011, must comply with the procedure set forth in § 165.3(d).

(l) *Original source.* The whistleblower must satisfy the whistleblower's status as the original source of information to the Commission's satisfaction.

(1) *Information obtained from another source.* The Commission will consider the whistleblower to be an ''original source'' of the same information that the Commission obtains from another source if the information the whistleblower provide satisfies the definition of original information and the other source obtained the information from the whistleblower or the whistleblower's representative.

(i) In order to be considered an original source of information that the Commission receives from Congress, any other federal, state or local authority, or any self-regulatory organization, the whistleblower must have voluntarily given such authorities the information within the meaning of this part. In determining whether the whistleblower is the original source of information, the Commission may seek assistance and confirmation from one of the other entities or authorities described above.

(ii) In the event that the whistleblower claims to be the original source of

information that an authority or another entity, other than as set forth in paragraph (l)(1)(i) of this section, provided to the Commission, the Commission may seek assistance and confirmation from such authority or other entity.

(2) *Information first provided to another authority or person.* If the whistleblower provides information to Congress, any other federal or state authority, a registered entity, a registered futures association, a self-regulatory organization, or to any of any of the persons described in paragraphs (g)(4) and (5) of this section, and the whistleblower, within 120 days, make a submission to the Commission pursuant to § 165.3, as the whistleblower must do in order for the whistleblower to be eligible to be considered for an award, then, for purposes of evaluating the whistleblower's claim to an award under § 165.7, the Commission will consider that the whistleblower provided original information as of the date of the whistleblower's original disclosure, report, or submission to one of these other authorities or persons. The whistleblower must establish the whistleblower's status as the original source of such information, as well as the effective date of any prior disclosure, report, or submission, to the Commission's satisfaction. The Commission may seek assistance and confirmation from the other authority or person in making this determination.

(3) *Information already known by the Commission.* If the Commission already knows some information about a matter from other sources at the time the whistleblower makes the whistleblower's submission, and the whistleblower is not an original source of that information, as described above, the Commission will consider the whistleblower an ''original source'' of any information the whistleblower separately provides that is original information that materially adds to the information that the Commission already possesses.

(m) *Related action.* The phrase ''related action,'' when used with respect to any judicial or administrative action brought by the Commission under the Commodity Exchange Act, means any judicial or administrative action brought by an entity listed in § 165.11(a) that is based upon the original information voluntarily submitted by a whistleblower to the Commission pursuant to § 165.3 that led to the successful resolution of the Commission action.

(n) *Successful resolution.* The phrase ''successful resolution,'' when used with respect to any judicial or administrative action brought by the Commission under the Commodity Exchange Act, includes any settlement of such action or final judgment in favor of the Commission. It shall also have the same meaning as ''successful enforcement.''

(o) *Voluntary submission or voluntarily submitted.* (1) The phrase ''voluntary submission'' or ''voluntarily submitted'' within the context of submission of original information to the Commission under this part, shall mean the provision of information 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 a matter to which the information in the whistleblower's submission is relevant. If the Commission or any of these other authorities makes a request, inquiry, or demand to the whistleblower or the whistleblower's representative first, the whistleblower's submission will not be considered voluntary, and the whistleblower will not be eligible for an award, even if the whistleblower's response is not compelled by subpoena or other applicable law. For purposes of this paragraph, the whistleblower will be considered to have received a request, inquiry or demand if documents or information from the whistleblower is 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 whistleblower's employer fails to provide the whistleblower's documents or information to the requesting authority in a timely manner.

(2) In addition, the whistleblower's submission will not be considered voluntary if the whistleblower is under a pre-existing legal or contractual duty to report the violations that are the subject of the whistleblower's original information to 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, or a duty that arises out of a judicial or administrative order.

(p) *Whistleblower(s).* (1) The term ''whistleblower'' or ''whistleblowers'' means any individual, or two (2) or more individuals acting jointly, who provides information relating to a potential violation of the Commodity Exchange Act to the Commission, in the manner established by § 165.3. A company or another entity is not eligible to be a whistleblower.

(2) *Prohibition against retaliation.* The anti-retaliation protections under Section 23(h) of the Commodity Exchange Act apply whether or not the whistleblower satisfies the requirements, procedures and conditions to qualify for an award. For purposes of the anti-retaliation protections afforded by Section 23(h)(1)(A)(i) of the Commodity Exchange Act, the whistleblower is a whistleblower if:

(i) The whistleblower possess a reasonable belief that the information the whistleblower is providing relates to a possible violation of the CEA, or the rules or regulations thereunder, that has occurred, is ongoing, or is about to occur; and

(ii) The whistleblower provides that information in a manner described in § 165.3.

§ 165.3 Procedures for submitting original information.

A whistleblower's submission of information to the Commission will be a two-step process.

(a) First, the whistleblower will need to submit the whistleblower's information to the Commission. The whistleblower may submit the whistleblower's information:

(1) By completing and submitting a Form TCR online and submitting it electronically through the Commission's Web site at *http://www.cftc.gov;* or

(2) By completing the Form TCR and mailing or faxing the form to the Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, Fax (202) 418–5975.

(b) Further, to be eligible for an award, the whistleblower must declare under penalty of perjury at the time the whistleblower submits the whistleblower's information pursuant to paragraph (a)(1) or (2) of this section that the whistleblower's information is true and correct to the best of the whistleblower's knowledge and belief.

(c) Notwithstanding paragraph (b) of this section, if the whistleblower submitted the whistleblower's original information to the Commission anonymously, then the whistleblower's identity must be disclosed to the Commission and verified in a form and manner acceptable to the Commission consistent with the procedure set forth in § 165.7(c) prior to Commission's payment of any award.

(d) If the whistleblower submitted original information in writing to the Commission after July 21, 2010 (the date of enactment of the Wall Street Transparency and Accountability Act of

2010) but before the effective date of these rules, the whistleblower will be eligible for an award only in the event that the whistleblower provided the original information to the Commission in a format or manner other than that described in paragraph (a) of this section, the whistleblower submits a completed Form TCR within 120 days of the effective date of these rules and otherwise follows the procedures set forth above in paragraphs (a) and (b) of this section.

§ 165.4 Confidentiality.

(a) *In general.* Section 23(h)(2) of the Commodity Exchange Act requires that the Commission not disclose information that could reasonably be expected to reveal the identity of a whistleblower, except that the Commission may disclose such information in the following circumstances:

(1) When disclosure is required to a defendant or respondent in connection with a public proceeding that the Commission institutes or in another public proceeding that is filed by an authority to which the Commission provides the information, as described below;

(2) When the Commission determines that it is necessary to accomplish the purposes of the Commodity Exchange Act and to protect customers, it may provide whistleblower information to: The Department of Justice; an appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction; a registered entity, registered futures association, or a self-regulatory organization; a state attorney general in connection with a criminal investigation; any appropriate state department or agency, acting within the scope of its jurisdiction; or a foreign futures authority; and

(3) The Commission may make disclosures in accordance with the Privacy Act of 1974 (5 U.S.C. 552a).

(b) *Anonymous whistleblowers.* A whistleblower may anonymously submit information to the Commission, however, the whistleblower must follow the procedures in § 165.3(c) for submitting original information anonymously. Such whistleblower who anonymously submits information to the Commission must also follow the procedures in § 165.7(c) in submitting to the Commission an application for a whistleblower award.

§ 165.5 Prerequisites to the consideration of an award.

(a) Subject to the eligibility requirements described in these rules, the Commission will pay an award to one or more whistleblowers who:

(1) Provide a voluntary submission to the Commission;

(2) That contains original information; and

(3) That leads to the successful resolution of a covered Commission judicial or administrative action or successful enforcement of a related action; and

(b) In order to be eligible, the whistleblower must:

(1) Have given the Commission original information in the form and manner that the Commission requires in § 165.3 and be the original source of information;

(2) Provide the Commission, upon its staff's request, certain additional information, including: explanations and other assistance, in the manner and form that staff may request, in order that the staff may evaluate the use of the information submitted; all additional information in the whistleblower's possession that is related to the subject matter of the whistleblower's submission; and testimony or other evidence acceptable to the staff relating to the whistleblower's eligibility for an award; and

(3) If requested by Commission staff, enter into a confidentiality agreement in a form acceptable to the Commission, including a provision that a violation of the confidentiality agreement may lead to the whistleblower's ineligibility to receive an award.

§ 165.6 Whistleblowers ineligible for an award.

(a) No award under § 165.7 shall be made:

(1) To any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of: the Commission; the Board of Governors of the Federal Reserve System; the Office of the Comptroller of the Currency; the Board of Directors of the Federal Deposit Insurance Corporation; the Director of the Office of Thrift Supervision; the National Credit Union Administration Board; the Securities and Exchange Commission; the Department of Justice; a registered entity; a registered futures association; a self-regulatory organization; or a law enforcement organization;

(2) To any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under § 165.7;

(3) To any whistleblower who submits information to the Commission that is based on the facts underlying the covered judicial or administrative action submitted previously by another whistleblower;

(4) To any whistleblower who acquired the information the whistleblower gave the Commission from any of the individuals described in paragraphs (a)(1), (2), (3) or (6) of this section;

(5) To any whistleblower who, in the whistleblower's submission, the whistleblower's other dealings with the Commission, or the whistleblower's dealings with another authority in connection with a related action, knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or uses any false writing or document, knowing that it contains any false, fictitious, or fraudulent statement or entry, or omitted any material fact, where, in the absence of such fact, other statements or representations made by the whistleblower would be misleading;

(6) To any whistleblower who acquired the original information reported to the Commission as a result of the whistleblower's role as a member, officer or employee of either a foreign regulatory authority or law enforcement organization;

(7) To any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of a foreign regulatory authority or law enforcement organization; or

(8) To any whistleblower who acquired the original information the whistleblower gave the Commission from any other person with the intent to evade any provision of these rules.

(b) Notwithstanding a whistleblower's ineligibility for an award for any reason set forth in paragraph (a) of this section, the whistleblower will remain eligible for the anti-retaliation protections set forth in Section 23(h)(1) of the Commodity Exchange Act.

§ 165.7 Procedures for award applications and Commission award determinations.

(a) Whenever a Commission judicial or administrative action results in monetary sanctions totaling more than $1,000,000 (*i.e.,* a covered judicial or administrative action) the Commission will publish on the Commission's Web site a ''Notice of Covered Action.'' Such Notice of Covered Action will be published subsequent to the entry of a final judgment or order that alone, or collectively with other judgments or orders previously entered in the Commission covered administrative or judicial action, exceeds $1,000,000 in

monetary sanctions. The Commission will not contact whistleblower claimants directly as to Notices of Covered Actions; prospective claimants should monitor the Commission Web site for such Notices. A whistleblower claimant will have 90 days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred.

(b) To file a claim for a whistleblower award, the whistleblower must file Form WB–APP, *Application for Award for Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act.* The whistleblower must sign this form as the claimant and submit it to the Commission by mail or fax to Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, Fax (202) 418–5975. The Form WB–APP, including any attachments, must be received by the Commission within 90 calendar days of the date of the Notice of Covered Action or 90 calendar days following the date of a final judgment in a related action in order to be considered for an award.

(c) If the whistleblower provided the whistleblower's original information to the Commission anonymously pursuant to §§ 165.3 and 165.4 and:

(1) The whistleblower is making the whistleblower's claim for a whistleblower award on a disclosed basis, the whistleblower must disclose the whistleblower's identity on the Form WB–APP. The whistleblower's identity must be verified in a form and manner that is acceptable to the Commission prior to the payment of any award; or

(2) The whistleblower is making the whistleblower's claim for a whistleblower award on an anonymous basis, the whistleblower must be represented by counsel. The whistleblower must provide the whistleblower's counsel with a completed Form WB–APP that is signed by the whistleblower by no later than the date upon which the whistleblower's counsel submits to the Commission a copy of the Form WB–APP that does not disclose the whistleblower's identity and is signed solely by the whistleblower's counsel. In addition, the whistleblower's counsel must retain the signed original of the whistleblower's Form WB–APP in counsel's records. Upon request of the Commission staff, whistleblower's counsel must produce to the Commission the whistleblower's signed original WB–APP and the whistleblower's identity must be verified in a form and manner that is acceptable to the Commission prior to the payment of any award.

(d) Once the time for filing any appeals of the Commission's judicial or administrative action and all related actions has expired, or, where an appeal has been filed, after all appeals in the judicial, administrative and related actions have concluded, the Commission will evaluate all timely whistleblower award claims submitted on Form WB–APP in accordance with the criteria set forth in this Part 165. In connection with this process, the Commission may require that the whistleblower provide additional information relating to the whistleblower's eligibility for an award or satisfaction of any of the conditions for an award, as set forth in § 165.5(b). Following that evaluation, the Commission will send the whistleblower a Final Order setting forth whether the claim is allowed or denied and, if allowed, setting forth the award percentage amount.

(e) The Commission's Office of the Secretariat will provide the whistleblower with the Final Order of the Commission.

§ 165.8 Amount of award.

If all of the conditions are met for a whistleblower award in connection with a covered judicial or administrative action or a related action, the Commission will then decide the amount of the award pursuant to the procedure set forth in § 165.7.

(a) Whistleblower awards shall be in an aggregate amount equal to—

(1) Not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the covered judicial or administrative action or related actions; and

(2) Not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the covered judicial or administrative action or related actions.

(b) If the Commission makes awards to more than one whistleblower in connection with the same action or related action, the Commission will determine an individual percentage award for each whistleblower, but in no event will the total amount awarded to all whistleblowers as a group be less than 10 percent or greater than 30 percent of the amount the Commission or the other authorities collect.

§ 165.9 Criteria for determining amount of award.

The determination of the amount of an award shall be in the discretion of the Commission. The Commission may exercise this discretion directly or through delegated authority pursuant to § 165.15.

(a) In determining the amount of an award, the Commission shall take into consideration—

(1) The significance of the information provided by the whistleblower to the success of the covered judicial or administrative action or related action;

(2) The degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action or related action;

(3) The programmatic interest of the Commission in deterring violations of the Commodity Exchange Act by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws;

(4) Whether the award otherwise enhances the Commission's ability to enforce the Commodity Exchange Act, protect customers, and encourage the submission of high quality information from whistleblowers; and

(5) Potential adverse incentives from oversize awards.

(b) *Factors that may increase the amount of a whistleblower's award.* In determining whether to increase the amount of an award, the Commission will consider the following factors, which are not listed in order of importance.

(1) *Significance of the information provided by the whistleblower.* The Commission will assess the significance of the information provided by a whistleblower to the success of the Commission action or related action. In considering this factor, the Commission may take into account, among other things:

(i) The nature of the information provided by the whistleblower and how it related to the successful enforcement action, including whether the reliability and completeness of the information provided to the Commission by the whistleblower resulted in the conservation of Commission resources; and

(ii) The degree to which the information provided by the whistleblower supported one or more successful claims brought in the Commission action or related action.

(2) *Assistance provided by the whistleblower.* The Commission will assess the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action. In considering this factor, the Commission may take into account, among other things:

(i) Whether the whistleblower provided ongoing, extensive, and timely

cooperation and assistance by, for example, helping to explain complex transactions, interpreting key evidence, or identifying new and productive lines of inquiry;

(ii) The timeliness of the whistleblower's initial report to the Commission or to an internal compliance or reporting system of business organizations committing, or impacted by, the violations of the Commodity Exchange Act, where appropriate;

(iii) The resources conserved as a result of the whistleblower's assistance;

(iv) Whether the whistleblower appropriately encouraged or authorized others to assist the staff of the Commission who might otherwise not have participated in the investigation or related action;

(v) The efforts undertaken by the whistleblower to remediate the harm caused by the violations of the Commodity Exchange Act, including assisting the authorities in the recovery of the fruits and instrumentalities of the violations; and

(vi) Any unique hardships experienced by the whistleblower as a result of his or her reporting and assisting in the enforcement action.

(3) *Law enforcement interest.* The Commission will assess its programmatic interest in deterring violations of the Commodity Exchange Act by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws. In considering this factor, the Commission may take into account, among other things:

(i) The degree to which an award enhances the Commission's ability to enforce the commodity laws;

(ii) The degree to which an award encourages the submission of high quality information from whistleblowers by appropriately rewarding whistleblower submissions of significant information and assistance, even in cases where the monetary sanctions available for collection are limited or potential monetary sanctions were reduced or eliminated by the Commission because an entity self-reported a commodities violation following the whistleblower's related internal disclosure, report, or submission;

(iii) Whether the subject matter of the action is a Commission priority, whether the reported misconduct involves regulated entities or fiduciaries, whether the whistleblower exposed an industry-wide practice, the type and severity of the commodity violations, the age and duration of misconduct, the number of violations, and the isolated, repetitive, or ongoing nature of the violations;

(iv) The dangers to market participants or others presented by the underlying violations involved in the enforcement action, including the amount of harm or potential harm caused by the underlying violations, the type of harm resulting from or threatened by the underlying violations, and the number of individuals or entities harmed; and

(v) The degree, reliability and effectiveness of the whistleblower's assistance, including the consideration of the whistleblower's complete, timely truthful assistance to the Commission and criminal authorities.

(4) *Participation in internal compliance systems.* The Commission will assess whether, and the extent to which, the whistleblower and any legal representative of the whistleblower participated in internal compliance systems. In considering this factor, the Commission may take into account, among other things:

(i) Whether, and the extent to which, a whistleblower reported the possible Commodity Exchange Act violations through internal whistleblower, legal or compliance procedures before, or at the same time as, reporting them to the Commission; and

(ii) Whether, and the extent to which, a whistleblower assisted any internal investigation or inquiry concerning the reported Commodity Exchange Act violations.

(c) *Factors that may decrease the amount of a whistleblower's award.* In determining whether to decrease the amount of an award, the Commission will consider the following factors, which are not listed in order of importance.

(1) *Culpability.* The Commission will assess the culpability or involvement of the whistleblower in matters associated with the Commission's action or related actions. In considering this factor, the Commission may take into account, among other things:

(i) The whistleblower's role in the Commodity Exchange Act violations;

(ii) The whistleblower's education, training, experience, and position of responsibility at the time the violations occurred;

(iii) Whether the whistleblower acted with scienter, both generally and in relation to others who participated in the violations;

(iv) Whether the whistleblower financially benefitted from the violations;

(v) Whether the whistleblower is a recidivist;

(vi) The egregiousness of any wrongdoing committed by the whistleblower; and

(vii) Whether the whistleblower knowingly interfered with the Commission's investigation of the violations or related enforcement actions.

(2) *Unreasonable reporting delay.* The Commission will assess whether the whistleblower unreasonably delayed reporting the Commodity Exchange Act violations. In considering this factor, the Commission may take into account, among other things:

(i) Whether the whistleblower was aware of the relevant facts but failed to take reasonable steps to report or prevent the violations from occurring or continuing;

(ii) Whether the whistleblower was aware of the relevant facts but only reported them after learning about a related inquiry, investigation, or enforcement action; and

(iii) Whether there was a legitimate reason for the whistleblower to delay reporting the violations.

(3) *Interference with internal compliance and reporting systems.* The Commission will assess, in cases where the whistleblower interacted with his or her entity's internal compliance or reporting system, whether the whistleblower undermined the integrity of such system. In considering this factor, the Commission will take into account whether there is evidence provided to the Commission that the whistleblower knowingly:

(i) Interfered with an entity's established legal, compliance, or audit procedures to prevent or delay detection of the reported Commodity Exchange Act violation;

(ii) Made any material false, fictitious, or fraudulent statements or representations that hindered an entity's efforts to detect, investigate, or remediate the reported Commodity Exchange Act violations; or

(iii) Provided any false writing or document knowing the writing or document contained any false, fictitious or fraudulent statements or entries that hindered an entity's efforts to detect, investigate, or remediate the reported Commodity Exchange Act violations.

(d) The Commission shall not take into consideration the balance of the Fund in determining the amount of an award.

§ 165.10 Contents of record for award determinations.

(a) The following items constitute the record upon which the award determination under § 165.7 shall be made:

(1) The whistleblower's Form TCR, ''Tip, Complaint or Referral,'' including related attachments, and other documentation provided by the whistleblower to the Commission;

(2) The whistleblower's Form WB–APP, ''Application for Award for Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act,'' and related attachments;

(3) The complaint, notice of hearing, answers and any amendments thereto;

(4) The final judgment, consent order, or administrative speaking order;

(5) The transcript of the related administrative hearing or civil injunctive proceeding, including any exhibits entered at the hearing or proceeding;

(6) Any other documents that appear on the docket of the proceeding; and

(7) Sworn declarations (including attachments) from the Commission's Division of Enforcement staff regarding any matters relevant to the award determination.

(b) The record upon which the award determinations under § 165.7 shall be made shall not include any Commission pre-decisional, attorney-client privilege, attorney work product privilege, or internal deliberative process materials related to the Commission or its staff's determination: To file or settle the related covered judicial or administrative action; and/or whether, to whom and in what amount to make a whistleblower award. Further, the record upon which the award determination under § 165.7 shall be made shall not include any other entity's pre-decisional, attorney-client privilege, attorney work product privilege, or internal deliberative process materials related to its or its staff's determination to file or settle a related action.

§ 165.11 Awards based upon related actions.

Provided that a whistleblower or whistleblowers comply with the requirements in §§ 165.3, 165.5 and 165.7, and pursuant to § 165.8, the Commission or its delegate may grant an award based on the amount of monetary sanctions collected in a ''related action'' or ''related actions'' rather than on the amount collected in a covered judicial or administrative action, where:

(a) A ''related action'' is a judicial or administrative action that is brought by:

(1) The Department of Justice;

(2) An appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction;

(3) A registered entity, registered futures association, or self-regulatory organization;

(4) A State criminal or appropriate civil agency, acting within the scope of its jurisdiction; or

(5) A foreign futures authority; and

(b) The ''related action'' is based on the same original information that the whistleblower voluntarily submitted to the Commission and led to a successful resolution of the Commission judicial or administrative action.

§ 165.12 Payment of awards from the Fund, financing of customer education initiatives, and deposits and credits to the Fund.

(a) The Commission shall pay awards to whistleblowers from the Fund.

(b) The Commission shall deposit into or credit to the Fund:

(1) Any monetary sanctions collected by the Commission in any covered judicial or administrative action that is not otherwise distributed, or ordered to be distributed, to victims of a violation of the Commodity Exchange Act underlying such action, unless the balance of the Fund at the time the monetary sanctions are collected exceeds $100,000,000. In the event the Fund's value exceeds $100,000,000, any monetary sanctions collected by the Commission in a covered judicial or administrative action that is not otherwise distributed, or ordered to be distributed, to victims of violations of the Commodity Exchange Act or the rules and regulations thereunder underlying such action, shall be deposited into the general fund of the U.S. Treasury.

(2) In the event that the amounts deposited into or credited to the Fund under paragraph (b)(1) of this section are not sufficient to satisfy an award made pursuant to § 165.7, then, pursuant to Section 23(g)(3)(B) of the Commodity Exchange Act;

(i) An amount equal to the unsatisfied portion of the award;

(ii) Shall be deposited into or credited to the Fund;

(iii) From any monetary sanction collected by the Commission in any judicial or administrative action brought by the Commission under the Commodity Exchange Act, regardless of whether it qualifies as a ''covered judicial or administrative action''; *provided,* however, that such judicial or administrative action is based on information provided by a whistleblower.

(c) *Office of Consumer Outreach.* The Commission shall undertake and maintain customer education initiatives through its Office of Consumer Outreach. The initiatives shall be designed to help customers protect themselves against fraud or other violations of the Commodity Exchange Act, or the rules or regulations thereunder. The Commission shall fund the initiatives and may utilize funds deposited into the Fund during any fiscal year in which the beginning (October 1) balance of the Fund is greater than $10,000,000. The Commission shall budget, on an annual basis, the amount used to finance customer education initiatives, taking into consideration the balance of the Fund.

§ 165.13 Appeals.

(a) Any Final Order of the Commission relating to a whistleblower award determination, including whether, to whom, or in what amount to make whistleblower awards, may be appealed to the appropriate court of appeals of the United States not more than 30 days after the Final Order of the Commission is issued.

(b) The record on appeal shall consist of:

(1) The Contents of Record for Award Determinations, as set forth in § 165.9; and

(2) The Final Order of the Commission, as set forth in § 165.7.

§ 165.14 Procedures applicable to the payment of awards.

(a) A recipient of a whistleblower award is entitled to payment on the award only to the extent that the monetary sanction upon which the award is based is collected in the Commission judicial or administrative action or in a related action.

(b) Payment of a whistleblower award for a monetary sanction collected in a Commission action or related action shall be made within a reasonable time following the later of:

(1) The date on which the monetary sanction is collected; or

(2) The completion of the appeals process for all whistleblower award claims arising from:

(i) The Notice of Covered Action, in the case of any payment of an award for a monetary sanction collected in a covered judicial or administrative action; or

(ii) The related action, in the case of any payment of an award for a monetary sanction collected in a related action.

(c) If there are insufficient amounts available in the Fund to pay the entire amount of an award payment within a reasonable period of time from the time for payment specified by paragraph (b) of this section, then subject to the following terms, the balance of the payment shall be paid when amounts become available in the Fund, as follows:

(1) Where multiple whistleblowers are owed payments from the Fund based on awards that do not arise from the same Notice of Covered Action (or related action), priority in making these payments will be determined based upon the date that the Final Order of the Commission is made. If two or more of these Final Orders of the Commission are entered on the same date, then those whistleblowers owed payments will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

(2) Where multiple whistleblowers are owed payments from the Fund based on awards that arise from the same Notice of Covered Action (or related action), they will share the same payment priority and will be paid on a pro rata basis until sufficient amounts become available in the Fund to pay their entire payments.

§ 165.15 Delegations of authority.

(a) *Delegation of authority to the Executive Director.* The Commission hereby delegates, until such time as the Commission orders otherwise, to the Executive Director or to any Commission employee under the Executive Director's supervision as he or she may designate, the authority to take the following actions to carry out this Part 165 and the requirements of Section 23(h) of Commodity Exchange Act.

(1) *Delegated authority under § 165.12(a), (b).* The Executive Director's delegated authority to deposit into or credit collected monetary sanctions to the Fund and the payment of awards therefrom shall be with the concurrence of the General Counsel and the Director of the Division of Enforcement or of their respective designees.

(2) *Delegated authority to select a Whistleblower Award Determination Panel that shall be composed of three of the Commission's Offices or Divisions.* The Whistleblower Award Determination Panel shall include neither the Division of Enforcement nor the Office of General Counsel.

(b) *Delegation of Authority to Whistleblower Award Determination Panel.* The Commission hereby delegates, until such time as the Commission orders otherwise, to the Whistleblower Award Determination Panel the authority to make whistleblower award determinations under this Part 165, including the determinations as whether, to whom, or in what amount to make awards. Award determinations in matters involving monetary sanctions in either the Commission's action or a related action that total more than $15,000,000 (*i.e.,* matters with a maximum potential whistleblower award greater than $5,000,000) must be determined by the heads of the Offices or Divisions comprising the Whistleblower Award Determination Panel. In all other matters, award determinations may be determined by the employee designees of the heads of the Offices or Divisions comprising the Whistleblower Award Determination Panel.

(c) *Delegation of Authority to the Whistleblower Office.* With the exception of § 165.12, the Commission hereby delegates, until such time as the Commission orders otherwise, to the head of the Whistleblower Office the authority to take any action under this Part 165 that is not otherwise delegated to either the Executive Director or the Whistleblower Award Determination Panel under this section, including the authority to administer the Commission's whistleblower program and liaise with whistleblowers.

§ 165.16 No immunity.

The Commodity Whistleblower Incentives and Protections provisions set forth in Section 23(h) of Commodity Exchange Act and this Part 165 do not provide individuals who provide information to the Commission with immunity from prosecution. The fact that an individual may become a whistleblower and assist in Commission investigations and enforcement actions does not preclude the Commission from bringing an action against the whistleblower based upon the whistleblower's own conduct in connection with violations of the Commodity Exchange Act and the Commission's regulations. If such an action is determined to be appropriate, however, the Commission's Division of Enforcement will take the whistleblower's cooperation into consideration in accordance with its sanction recommendations to the Commission.

§ 165.17 Awards to whistleblowers who engage in culpable conduct.

In determining whether the required $1,000,000 threshold has been satisfied for purposes of making any award, the Commission will not take into account any monetary sanctions that the whistleblower is ordered to pay, or that is ordered against any entity whose liability is based primarily on conduct that the whistleblower principally directed, planned, or initiated. Similarly, if the Commission determines that a whistleblower is eligible for an award, any amounts that the whistleblower or such an entity pay in sanctions as a result of the action or related actions will not be included within the calculation of the amounts collected for purposes of making payments pursuant to § 165.14.

§ 165.18 Staff communications with whistleblowers from represented entities.

If the whistleblower is a whistleblower who is a director, officer, member, agent, or employee of an entity that has counsel, and the whistleblower has initiated communication with the Commission relating to a potential violation of the Commodity Exchange Act, the Commission's staff is authorized to communicate directly with the whistleblower regarding the subject of the whistleblower's communication without seeking the consent of the entity's counsel.

§ 165.19 Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration of disputes.

The rights and remedies provided for in this Part 165 of the Commission's regulations may not be waived by any agreement, policy, form, or condition of employment, including by a predispute arbitration agreement. No predispute arbitration agreement shall be valid or enforceable if the agreement requires arbitration of a dispute arising under this Part.

Appendix A to Part 165—Guidance With Respect to the Protection of Whistleblowers Against Retaliation

Section 23(h)(1) of Commodity Exchange Act prohibits employers from engaging in retaliation against whistleblowers. This provision provides whistleblowers with certain protections against retaliation, including: A federal cause of action against the employer, which must be filed in the appropriate district court of the United States within two (2) years of the employer's retaliatory act; and potential relief for prevailing whistleblowers, including reinstatement, back pay, and compensation for other expenses, including reasonable attorney's fees.

(a) *In General.* No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

(1) In providing information to the Commission in accordance with this part 165; or

(2) In assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information.

(b) *Enforcement*—(1) *Cause of Action.*—An individual who alleges discharge or other discrimination in violation of section 23(h)(1)(A) of the Commodity Exchange Act may bring an action under section 23(h)(1)(B) of the Commodity Exchange Act in the appropriate district court of the United States

for the relief provided in section 23(h)(1)(C) of the Commodity Exchange Act, unless the individual who is alleging discharge or other discrimination in violation of section 23(h)(1)(A) of the Commodity Exchange Act is an employee of the Federal Government, in which case the individual shall only bring an action under section 1221 of title 5, United States Code.

(2) *Subpoenas.*—A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 23(h)(1)(A) of the Commodity Exchange Act may be served at any place in the United States.

(3) *Statute of Limitations.*—An action under section 23(h)(1)(B) of the Commodity Exchange Act may not be brought more than 2 years after the date on which the violation reported in Section 23(h)(1)(A) of the Commodity Exchange Act is committed.

(c) *Relief.*—Relief for an individual prevailing in an action brought under section 23(h)(1)(B) of the Commodity Exchange Act shall include—

(1) Reinstatement with the same seniority status that the individual would have had, but for the discrimination;

(2) The amount of back pay otherwise owed to the individual, with interest; and

(3) Compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.

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UNITED STATES
COMMODITY FUTURES TRADING COMMISSION
Washington, DC 20581

FORM TCR
TIP, COMPLAINT OR REFERRAL

A. INFORMATION ABOUT YOU			
COMPLAINANT 1:			
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
3. Telephone	Alt. Phone	E-mail Address	Preferred Method of Communication
4. Occupation			
COMPLAINANT 2: 1. Last Name		First	M.I.
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
3. Telephone	Alt. Phone	E-mail Address	Preferred Method of Communication
4. Occupation			
B. ATTORNEY'S INFORMATION (If Applicable – See Instructions)			
1. Attorney's Name			

2. Firm Name			
3. Street Address			
City	State/ Province	ZIP/ Postal Code	Country
4. Telephone	Fax	E-mail Address	

C. TELL US ABOUT THE INDIVIDUAL AND/OR ENTITY THE WHISTLEBLOWER HAS A COMPLAINT AGAINST

INDIVIDUAL/ENTITY 1: 1. Type: ☐ Individual ☐ Entity	If An Individual, Specify Profession: If An Entity, Specify Type:		
2. Name			
3. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
4. Phone	E-mail Address	Internet Address	
INDIVIDUAL/ENTITY 2: 1. Type: ☐ Individual ☐ Entity	If an individual, specify profession: If an entity, specify type:		
2. Name			
3. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country

4. Phone	E-mail Address	Internet Address

D. TELL US ABOUT THE WHISTLEBLOWER'S COMPLAINT

1. Occurrence Date (mm/dd/yyyy): / /	2. Nature of Complaint:

3a. Has the complainant or counsel had any prior communication(s) with the CFTC concerning this matter?
YES ☐ NO ☐

3b. If the answer to 3a is "Yes," name of CFTC staff member with whom the complainant or counsel communicated.

4a. Have you or your counsel provided the information to any other agency or organization, or has any other agency or organization requested the information or related information from you?
YES ☐
NO ☐

4b. If the answer to 4a is "Yes," please provide details. Use additional sheets, if necessary.

4c. Name and contact information for point of contact at other agency or organization, if known.

5a. Does this complaint relate to an entity of which the complainant is or was an officer, director, counsel, employee, consultant or contractor? YES ☐
NO ☐

5b. If the answer to question 5a is "yes," has the complainant reported this violation to his or her supervisor, compliance office, whistleblower hotline, ombudsman, or any other available mechanism at the entity for reporting violations? YES ☐ NO ☐

5c. If the answer to question 5b is "yes," please provide details. Use additional sheets, if necessary.

5d. Date on which the complainant took the action(s) described in question 5b (mm/dd/yyyy):
/ /

6a. Have you taken any other action regarding your complaint?
YES ☐ NO ☐

6b. If the answer to question 6a is "yes," please provide details. Use additional sheets, if necessary.

7a. Type of financial product or investment, if relevant.

7b. Name of financial product or investment, if relevant.

8. State in detail all facts pertinent to the alleged violation. Explain why the complainant believes the facts described constitute a violation of the Commodity Exchange Act (CEA). Use additional sheets, if necessary.

9. Describe all supporting materials in the complainant's possession and the availability and location of any additional supporting materials not in complainant's possession. Use additional sheets, if necessary.

10. Describe how and from whom the complainant obtained the information that supports this claim. If any information was obtained from an attorney or in a communication where an attorney was present, identify such information with as much particularity as possible. In addition, if any information was obtained from a public source, identify the source with as much particularity as possible. Use additional sheets, if necessary.

11. Identify with particularity any documents or other information in the whistleblower's submission that the whistleblower believes could reasonably be expected to reveal the whistleblower's identity and explain the basis for the whistleblower's belief that the whistleblower's identity would be revealed if the documents or information were disclosed to a third party.

12. Provide any additional information the whistleblower thinks may be relevant.

E. ELIGIBILITY REQUIREMENTS AND OTHER INFORMATION

1. Are you, or was the whistleblower at the time the whistleblower acquired the original information the whistleblower is submitting to the Commission a member, officer or employee of the Department of Justice, the Commodity Futures Trading Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, the Securities and Exchange Commission, a registered entity, a registered futures association, a self-regulatory organization, or any law enforcement organization?

YES ☐ NO ☐

2. Is the whistleblower providing this information pursuant to a cooperation agreement with the Commodity Futures Trading Commission or another agency or organization?
YES ☐ NO ☐

3. Is the whistleblower providing this information before the whistleblower (or anyone representing you) received any request, inquiry or demand that relates to the subject matter of the whistleblower's submission (i) from the Commodity Futures Trading Commission, (ii) in connection with an investigation, inspection or examination by any registered entity, registered futures association or self-regulatory organization, or (iii) in connection with an investigation by the Congress, or any other federal or state authority?
YES ☐ NO ☐

4. Is the whistleblower currently a subject or target of a criminal investigation, or have the whistleblower been convicted of a criminal violation, in connection with the information the whistleblower is submitting to the Commodity Futures Trading Commission?
YES ☐
NO ☐

5. Did the whistleblower acquire the information being provided to us from any person described in questions E1 through E5?
YES ☐ NO ☐

6. Are you, or was the whistleblower at the time the whistleblower acquired the original information the whistleblower is submitting to the Commission a member, officer, or employee of a foreign regulatory authority or law enforcement organization.
YES ☐ NO ☐

7. Use this space to provide additional details relating to the whistleblower's responses to questions 1 through 5. Use additional sheets, if necessary.

F. WHISTLEBLOWER'S DECLARATION

I declare under penalty of perjury under the laws of the United States that the information contained herein is true, correct and complete to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if, in my submission of information, my other dealings with the Commodity Futures Trading Commission, or my dealings with another authority in connection with a related action, I knowingly and willfully make any false, fictitious, or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

Print Name	
Signature	Date

G. COUNSEL CERTIFICATION

I certify that I have reviewed this form for completeness and accuracy and that the information contained herein is true, correct and complete to the best of my knowledge, information and belief. I further certify that I have verified the identity of the whistleblower on whose behalf this form is being submitted by viewing the whistleblower's valid, unexpired government issued identification (*e.g.*, driver's license, passport) and will retain an original, signed copy of this form, with Section F signed by the whistleblower, in my records. I further certify that I have obtained the whistleblower's non-waiveable consent to provide the Commodity Futures Trading Commission with his or her original signed Form TCR upon request in the event that the Commodity Futures Trading Commission requests it due to concerns that the whistleblower may have knowingly and willfully made false, fictitious, or fraudulent statements or representations, or used any false writing or document knowing that the writing or document contains any false fictitious or fraudulent statement or entry; and that I consent to be legally obligated to do so within 7 calendar days of receiving such a request from the Commodity Futures Trading Commission.	
Signature	Date

BILLLING CODE–C

Privacy Act Statement

This notice is given under the Privacy Act of 1974. The Privacy Act requires that the Commodity Futures Trading Commission (CFTC or Commission) inform individuals of the following when asking for information. This form may be used by anyone wishing to provide the CFTC with information concerning a violation of the Commodity Exchange Act or the Commission's regulations. If the whistleblower is submitting this information for the Commission's whistleblower award program pursuant to Section 23 of the Commodity Exchange Act, the information provided will enable the Commission to determine the whistleblower's eligibility for payment of an award. This information may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing laws, rules, or regulations implicated by the information consistent with the confidentiality requirements set forth therein, including pursuant to Section 23 of the Commodity Exchange Act and Part 165 of the Commission's regulations thereunder. Furnishing the information is voluntary, but a decision not to do so may result in the whistleblower not being eligible for award consideration.

Questions concerning this form may be directed to the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

Submission Procedures

- After completing this Form TCR, please send it electronically, by mail, e-mail or delivery to the Commission: electronically via the Commission's Web site; by mail or delivery to the Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street, NW., Washington, DC 20581; by e-mail to XXXXX.gov; or by facsimile to (202) XXX–XXXX.
- The whistleblower has the right to submit information anonymously.
- If the whistleblower is submitting information for the Commission's whistleblower award program, the whistleblower must submit the whistleblower's information using this Form TCR.

Instructions for Completing Form TCR

Section A: Information About You

Questions 1–4: Please provide the following information about yourself:

- Last name, first name, and middle initial;
- Complete address, including city, state and zip code;
- Telephone number and, if available, an alternate number where the whistleblower can be reached;
- The whistleblower's e-mail address (to facilitate communications, we strongly encourage the whistleblower to provide the whistleblower's email address);
- The whistleblower's preferred method of communication; and
- The whistleblower's occupation.

Section B: Information about the Whistleblower's Attorney. Complete this Section Only if the Whistleblower is Represented by an Attorney in this Matter

Questions 1–4: Provide the following information about the attorney representing the whistleblower in this matter:

- Attorney's name;
- Firm name;
- Complete address, including city, state and zip code;
- Telephone number and fax number; and
- E-mail address.

Section C: Tell Us About the Individual and/or Entity The Whistleblower Has a Complaint Against

If the whistleblower's complaint relates to more than two individuals and/or entities, the whistleblower may use additional sheets, if necessary.

Question 1: Choose one of the following that best describes the individual's profession or entity's type to which the whistleblower's complaint relates:

- *For Individuals:* Accountant, analyst, associated person, attorney, auditor, broker, commodity trading advisor, commodity pool operator, compliance officer, employee, executing broker, executive officer or director, financial planner, floor broker, floor trader, trader, unknown, or other (specify).
- *For Entities:* Bank, commodity trading advisor, commodity pool operator, commodity pool, futures commission merchant, hedge fund, introducing broker, major swap participant, retail foreign exchange dealer, swap dealer, unknown, or other (specify).

Questions 2–4: For each individual and/or entity, provide the following information, if known:

- Full name;
- Complete address, including city, state and zip code;
- Telephone number;
- E-mail address; and
- Internet address, if applicable.

Section D: Tell Us About the Whistleblower's Complaint

Question 1: State the date (mm/dd/yyyy) that the alleged conduct began.

Question 2: Choose the option that the whistleblower believes best describes the nature of the whistleblower's complaint. If the whistleblower is alleging more than one violation, please list all that the whistleblower believes may apply. Use additional sheets, if necessary.

- Theft/misappropriation;
- Misrepresentation/omission (*i.e.,* false/misleading marketing/sales literature; inaccurate, misleading or non-disclosure by commodity pool operator, commodity trading advisor, futures commission merchant, introducing broker, retail foreign exchange

dealer, major swap participant, swap dealer, or their associated person(s); false/material misstatements in any report or statement);

- Ponzi/pyramid scheme;
- Off-exchange foreign currency, commodity, or precious metal fraud;
- Registration violations (including unregistered commodity pool operator; commodity trading advisor; futures commission merchant; introducing broker; retail foreign exchange dealer; swap dealer; or their associated person(s));
- Trading (after hours trading; algorithmic trading; disruptive trading; front running; insider trading; manipulation/attempted manipulation of commodity prices; market timing; inaccurate quotes/pricing information; program trading; trading suspensions; volatility);
- Fees/mark-ups/commissions (excessive, unnecessary or unearned administrative, commission or sales fees; failure to disclose fees; insufficient notice of change in fees; excessive or otherwise improper spreads or fills);
- Sales and advisory practices (background information on past violations/integrity; breach of fiduciary duty/responsibility; churning/excessive trading; cold calling; conflict of interest; abuse of authority in discretionary trading; failure to respond to client, customer or participant; guarantee against loss; promise to profit; high pressure sales techniques; instructions by client, customer or participant not followed; investment objectives not followed; solicitation methods (e.g., cold calling, seminars);
- Customer accounts (unauthorized trading); identity theft affecting account; inaccurate valuation of Net Asset Value; or
- Other (analyst complaints; market maker activities; employer/employee disputes; specify other).

Question 3a: State whether the whistleblower or the whistleblower's counsel has had any prior communications with the CFTC concerning this matter.

Question 3b: If the answer to question 3a is yes, provide the name of the CFTC staff member with whom the whistleblower or the whistleblower's counsel communicated.

Question 4a: Indicate whether the whistleblower or the whistleblower's counsel has provided the information the whistleblower is providing to the CFTC to any other agency or organization.

Question 4b: If the answer to question 4a is yes, provide details.

Question 4c: Provide the name and contact information of the point of contact at the other agency or organization, if known.

Question 5a: Indicate whether the whistleblower's complaint relates to an entity of which the whistleblower is, or was in the past, an officer, director, counsel, employee, consultant, or contractor.

Question 5b: If the answer to question 5a is yes, state whether the whistleblower has reported this violation to the whistleblower's supervisor, compliance office, whistleblower hotline, ombudsman, or any other available mechanism at the entity for reporting violations.

Question 5c: If the answer to question 5b is yes, provide details.

Question 5d: Provide the date on which the whistleblower took the actions described in questions 5a and 5b.

Question 6a: Indicate whether the whistleblower has taken any other action regarding the whistleblower's complaint, including whether the whistleblower complained to the Commission, another regulator, a law enforcement agency, or any other agency or organization; initiated legal action, mediation or arbitration, or initiated any other action.

Question 6b: If the whistleblower answered yes to question 6a, provide details, including the date on which the whistleblower took the action(s) described, the name of the person or entity to whom the whistleblower directed any report or complaint and contact information for the person or entity, if known, and the complete case name, case number, and forum of any legal action the whistleblower has taken. Use additional sheets, if necessary.

Question 7a: Choose from the following the option that the whistleblower believes best describes the type of financial product or investment at issue, if applicable:

- Commodity futures;
- Options on commodity futures;
- Commodity options;
- Foreign currency transactions;
- Swaps; or
- Other (specify).

Question 7b: Provide the name of the financial product or investment, if applicable.

Question 8: State in detail all the facts pertinent to the alleged violation. Explain why the whistleblower believes the facts described constitute a violation of the Commodity Exchange Act. Use additional sheets, if necessary.

Question 9: Describe all supporting materials in the whistleblower's possession, custody or control, and the availability and location of additional supporting materials not in the whistleblower's possession, custody or control. Use additional sheets, if necessary.

Question 10: Describe how the whistleblower obtained the information that supports the whistleblower's allegation. If any information was obtained from an attorney or in a communication where an attorney was present, identify such information with as much particularity as possible. In addition, if any information was obtained from a public source, identify the source with as much particularity as possible. Use additional sheets, if necessary.

Question 11: The whistleblower may use this space to identify any documents or other information in the whistleblower's submission on this Form TCR that the whistleblower believes could reasonably be expected to reveal the whistleblower's identity. Explain the basis for the whistleblower's belief that the whistleblower's identity would be revealed if the documents or information were disclosed to a third party.

Question 12: Provide any additional information the whistleblower thinks may be relevant.

Section E: Eligibility Requirements

Question 1: State whether the whistleblower is currently, or was at the time the whistleblower acquired the original information that the whistleblower is submitting to the Commodity Futures Trading Commission, a member, officer or employee of the Department of Justice, the Commodity Futures Trading Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office Thrift Supervision, National Credit Union Administration, the Securities and Exchange Commission, a registered entity, a registered futures association, a self-regulatory organization, or any law enforcement organization.

Question 2: State whether the whistleblower is providing the information pursuant to a cooperation agreement with the Commodity Futures Trading Commission or with any other agency or organization.

Question 3: State whether the whistleblower is providing this information before the whistleblower (or anyone representing you) received any request, inquiry or demand that relates to the subject matter of the whistleblower's submission: (i) From the CFTC; (ii) in connection with an investigation, inspection or examination by any registered entity, registered futures association or self-regulatory organization; or (iii) in connection with an investigation by the Congress, or any other federal or state authority.

Question 4: State whether the whistleblower is currently a subject or target of a criminal investigation, or has the whistleblower been convicted of a criminal violation, in connection with the information the whistleblower is submitting to the Commodity Futures Trading Commission.

Question 5: State whether the whistleblower acquired the information the whistleblower is providing to the Securities and Exchange Commission from any individual described in Questions 1 through 5 of this Section.

Question 6: State whether the whistleblower is currently, or was at the time the whistleblower acquired the original information that the whistleblower is submitting to the Commodity Futures Trading Commission, a member, officer, or employee of a foreign regulatory authority or law enforcement organization.

Question 7: Use this space to provide additional details relating to the whistleblower's responses to questions 1 through 6. Use additional sheets, if necessary.

Section F: Whistleblower's Declaration

The whistleblower must sign this Declaration if the whistleblower is submitting this information pursuant to the Commodity Futures Trading Commission whistleblower program and wish to be considered for an award. If the whistleblower is submitting the whistleblower's information anonymously, the whistleblower must still sign this Declaration, and the whistleblower must provide the whistleblower's attorney with the original of this signed form.

If the whistleblower is not submitting the whistleblower's information pursuant to the

Commodity Futures Trading Commission whistleblower program, the whistleblower do not need to sign this Declaration.

Section G: Counsel Certification

If the whistleblower is submitting this information pursuant to the Commodity Futures Trading Commission whistleblower program and is doing so anonymously through an attorney, the whistleblower's attorney must sign the Counsel Certification section.

If the whistleblower is represented in this matter but the whistleblower is *not* submitting the whistleblower's information pursuant to the Commodity Futures Trading Commission whistleblower program, the whistleblower's attorney does not need to sign the Counsel Certification Section.

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UNITED STATES
COMMODITY FUTURES TRADING COMMISSION
Washington, DC 20581

FORM WB-APP

APPLICATION FOR AWARD FOR ORIGINAL INFORMATION SUBMITTED PURSUANT TO SECTION 23 OF THE COMMODITY EXCHANGE ACT

A. APPLICANT'S INFORMATION (REQUIRED FOR ALL SUBMISSIONS)			
1. Last Name	First	M.I.	Social Security No.
2. Street Address			Apartment/ Unit #
City	State/ Province	ZIP/ Postal Code	Country
3. Telephone	Alt. Phone	E-mail Address	
B. ATTORNEY'S INFORMATION (IF APPLICABLE – SEE INSTRUCTIONS)			
1. Attorney's Name			
2. Firm Name			
3. Street Address			
City	State/ Province	Zip/ Postal Code	Country
4. Telephone	Fax	E-mail Address	
C. TIP/COMPLAINT DETAILS			
1. Manner in which original information was submitted to CFTC CFTC website ☐ Mail ☐ Fax ☐ Other ☐			
2a. Tip, Complaint or Referral (TCR) Number	2b. Date TCR referred to in 2a submitted to CFTC ___/___/____		
2c. Subject(s) of the Tip, Complaint or Referral:			
D. NOTICE OF COVERED ACTION			

1. Date of Notice of Covered Action to Which Claim Relates ___/___/____	2. Notice Number:
3a. Case Name	3b. Case Number

E. CLAIMS PERTAINING TO RELATED ACTIONS

1. Name of agency or organization to which the whistleblower provided the whistleblower's information.

2. Name and contact information for point of contact at agency or organization, if known.

3a. Date the whistleblower provided the whistleblower's information (mm/dd/yyyy) ___/___/____	3b. Date action filed by agency/organization (mm/dd/yyyy) ___/___/____
4a. Case Name	4b. Case Number

F. ELIGIBILITY REQUIREMENTS AND OTHER INFORMATION

1. Is the whistleblower currently, or was the whistleblower at the time the whistleblower acquired the original information the whistleblower submitted to the CFTC, a member, officer or employee of the Department of Justice, the Commodity Futures Trading Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, the Securities and Exchange Commission, a registered entity, a registered futures association, a self-regulatory organization, any law enforcement organization, or a foreign regulatory authority or law enforcement organization?
YES ☐ NO ☐

2. Did the whistleblower provide the information identified in Section C above pursuant to a cooperation agreement with the CFTC or another agency or organization?
YES ☐ NO ☐

3. Did the whistleblower acquire the information the whistleblower provided to the CFTC from any person described in questions F1 through F2? YES ☐ NO ☐

4. If the whistleblower answered "yes" to any of questions 1 through 3 above, please provide details. Use additional sheets, if necessary.

5a. Did the whistleblower provide the information identified in Section C above before the whistleblower (or anyone representing you) received any request, inquiry or demand that relates to the subject matter of the whistleblower's submission: (i) from the CFTC; (ii) in connection with an investigation, inspection or examination by any registered entity, registered futures association or self-regulatory organization; or (iii) in connection with an investigation by the Congress, or any other federal or state authority?

YES ☐ NO ☐

5b. If the whistleblower answered "yes" to question 5a, please provide details. Use additional sheets, if necessary.

6a. Is the whistleblower currently a subject or target of a criminal investigation, or have the whistleblower been convicted of a criminal violation, in connection with the information identified in Section C above and upon which the whistleblower's application for an award is based?
YES ☐ NO ☐

6b. If the whistleblower answered "Yes" to question 6a, please provide details. Use additional sheets, if necessary.

G. ENTITLEMENT TO AWARD

Explain the basis for the whistleblower's belief that the whistleblower is entitled to an award in connection with the whistleblower's submission of information to the CFTC, or to another agency in a related action. Provide any additional information the whistleblower thinks may be relevant in light of the criteria for determining the amount of an award set forth in Section 23 of the Commodities Exchange Act and Part 165 of the Commission's Regulations thereunder. Include any supporting documents in the whistleblower's possession or control, and use additional sheets, if necessary.

H. DECLARATION

I declare under penalty of perjury under the laws of the United States that the information contained herein is true, correct and complete to the best of my knowledge, information and belief. I fully understand that I may be subject to prosecution and ineligible for a whistleblower award if, in my submission of information, my other dealings with the CFTC, or my dealings with another authority in connection with a related action, I knowingly and willfully make any false, fictitious, or fraudulent statements or representations, or use any false writing or document knowing that the writing or document contains any false, fictitious, or fraudulent statement or entry.

Print Name	Print Name
Signature	Date

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Privacy Act Statement

This notice is given under the Privacy Act of 1974. The Privacy Act requires that the Commodity Futures Trading Commission (CFTC or Commission) inform individuals of the following when asking for information. The information provided will enable the Commission to determine the whistleblower's eligibility for payment of an award pursuant to Section 23 of the Commodity Exchange Act. This information may be disclosed to Federal, state, local, or foreign agencies responsible for investigating, prosecuting, enforcing, or implementing laws, rules, or regulations implicated by the information consistent with the confidentiality requirements set forth in Section 23 of the Commodity Exchange Act and Part 165 of the Commission's Regulations thereunder. Furnishing the information is voluntary, but a decision not

to do so may result in the whistleblower not being eligible for award consideration.

Questions concerning this form may be directed to the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

General

• This form should be used by persons making a claim for a whistleblower award in connection with information provided to the CFTC or to another agency in a related action. In order to be deemed eligible for an award, the whistleblower must meet all the requirements set forth in Section 23 of the Commodities Exchange Act and the rules thereunder.

• The whistleblower must sign the Form WB–APP as the claimant. If the whistleblower provided the whistleblower's information to the CFTC anonymously, the whistleblower must now disclose the whistleblower's identity on this form and the whistleblower's identity must be verified in a form and manner that is acceptable to the CFTC prior to the payment of any award.

○ If the whistleblower is filing the whistleblower's claim in connection with information that the whistleblower provided to the CFTC, then the whistleblower's Form WB–APP, and any attachments thereto, must be received by the CFTC within ninety (90) days of the date of the Notice of Covered Action or the date of a final judgment in a related action to which the claim relates.

○ If the whistleblower is filing the whistleblower's claim in connection with information the whistleblower provided to another agency in a related action, then the whistleblower's Form WB–APP, and any attachments there to, must be received by the Commodity Futures Trading Commission as follows:

• If a final order imposing monetary sanctions has been entered in a related action at the time the whistleblower submits the whistleblower's claim for an award in connection with a Commission action, the whistleblower must submit the whistleblower's claim for an award in that related action on the same Form WB–APP that the whistleblower uses for the Commission action.

• If a final order imposing monetary sanctions in a related action has not been entered at the time the whistleblower submits the whistleblower's claim for an award in connection with a Commission action, the whistleblower must submit the whistleblower's claim on Form WB–APP within ninety (90) days of the issuance of a final order imposing sanctions in the related action.

• The whistleblower must submit the whistleblower's Form WB–APP to us in one of the following two ways:

○ By mailing or delivering the signed form to the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581; or

○ By faxing the signed form to (202) XXX–XXXX.

Instructions for Completing Form WB–APP

Section A: Applicant's Information

Questions 1–3: Provide the following information about yourself:

• First and last name, and middle initial, and social security number;

• Complete address, including city, state and zip code;

• Telephone number and, if available, an alternate number where the whistleblower can be reached; and

• E-mail address.

Section B: Attorney's Information

If the whistleblower is represented by an attorney in this matter, provide the information requested. If the whistleblower is not represented by an attorney in this matter, leave this Section blank.

Questions 1–4: Provide the following information about the attorney representing the whistleblower in this matter:

• Attorney's name;

• Firm name;

• Complete address, including city, state and zip code;

• Telephone number and fax number; and

• E-mail address.

Section C: Tip/Complaint Details

Question 1: Indicate the manner in which the whistleblower's original information was submitted to the CFTC.

Question 2a: Include the TCR (Tip, Complaint or Referral) number to which this claim relates.

Question 2b: Provide the date on which the whistleblower submitted the whistleblower's information to the CFTC.

Question 2c: Provide the name of the individual(s) or entity(s) to which the whistleblower's tip, complaint, or referral related.

Section D: Notice of Covered Action

The process for making a claim for a whistleblower award begins with the publication of a ''Notice of a Covered Action'' on the Commission's Web site. This Notice is published whenever a judicial or administrative action brought by the Commission results in the imposition of monetary sanctions exceeding $1,000,000. The Notice is published on the Commission's Web site subsequent to the entry of a final judgment or order in the action that by itself, or collectively with other judgments or orders previously entered in the action, exceeds the $1,000,000 threshold required for a whistleblower to be potentially eligible for an award. The Commission will not contact whistleblower claimants directly as to Notices of Covered Actions; prospective claimants should monitor the Commission Web site for such Notices.

Question 1: Provide the date of the Notice of Covered Action to which this claim relates.

Question 2: Provide the notice number of the Notice of Covered Action.

Question 3a: Provide the case name referenced in Notice of Covered Action.

Question 3b: Provide the case number referenced in Notice of Covered Action.

Section E: Claims Pertaining to Related Actions

Question 1: Provide the name of the agency or organization to which the whistleblower provided the whistleblower's information.

Question 2: Provide the name and contact information for the whistleblower's point of contact at the agency or organization, if known.

Question 3a: Provide the date on which that the whistleblower provided the whistleblower's information to the agency or organization referenced in question E1.

Question 3b: Provide the date on which the agency or organization referenced in question E1 filed the related action that was based upon the information the whistleblower provided.

Question 4a: Provide the case name of the related action.

Question 4b: Provide the case number of the related action.

Section F: Eligibility Requirements and Other Information

Question 1: State whether the whistleblower is currently, or was at the time the whistleblower acquired the original information that the whistleblower submitted to the CFTC, a member, officer or employee of the Department of Justice, the Commodity Futures Trading Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, the Securities and Exchange Commission, a registered entity, a registered futures association, a self-regulatory organization, any law enforcement organization, or a foreign regulatory authority or law enforcement organization.

Question 2: State whether the whistleblower provided the information submitted to the CFTC pursuant to a cooperation agreement with the CFTC or with any other agency or organization.

Question 3: State whether the whistleblower acquired the information the whistleblower provided to the CFTC from any individual described in Question 1 through 2 of this Section.

Question 5: If the whistleblower answered ''yes'' to questions 1 though 3 of this Section, please provide details.

Question 5a: State whether the whistleblower provided the information submitted to the CFTC before the whistleblower (or anyone representing the whistleblower) received any request, inquiry or demand that relates to the subject matter of the whistleblower's submission: (i) From the CFTC; (ii) in connection with an investigation, inspection or examination by any registered entity, registered futures association or self-regulatory organization; or (iii) in connection with an investigation by the Congress, or any other federal or state authority.

Question 5b: If the whistleblower answered ''yes'' to questions 5a, please provide details. Use additional sheets if necessary.

Question 6a: State whether the whistleblower is the subject or target of a criminal investigation, or has been convicted of a criminal violation, in connection with the information upon which the whistleblower's application for an award is based.

Question 6b: If the whistleblower answered ''yes'' to question 6a, please provide details,

including the name of the agency or organization that conducted the investigation or initiated the action against you, the name and telephone number of the whistleblower's point of contact at the agency or organization, if available, and the investigation/case name and number, if applicable. Use additional sheets, if necessary.

Section G: Entitlement to Award

This section is optional. Use this section to explain the basis for the whistleblower's belief that the whistleblower is entitled to an award in connection with the whistleblower's submission of information to the Commission or to another agency in connection with a related action. Specifically, address how the whistleblower believes the whistleblower voluntarily provided the Commission with original information that led to the successful enforcement of a judicial or administrative action filed by the Commission, or a related action. Refer to § 165.11 of Part 165 of the Commission's Regulations for further information concerning the relevant award criteria. The whistleblower may use additional sheets, if necessary.

Section 23(c)(1)(B) of the CEA requires the Commission to consider in determining the amount of an award the following factors: (a) The significance of the information provided by a whistleblower to the success of the Commission action or related action; (b) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the Commission action or related action; (c) the programmatic interest of the Commission in deterring violations of the Commodity Exchange Act (including Regulations under the Act) by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws; and (d) whether the award otherwise enhances the Commission's ability to enforce the Commodity Exchange Act, protect customers, and encourage the submission of high quality information from whistleblowers. Address these factors in the whistleblower's response as well.

Section H: Declaration

This section must be signed by the claimant.

Issued in Washington, DC, on August 4, 2011, by the Commission.

David A. Stawick,

Secretary of the Commission.

Appendices to Final Rules for Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act—Commission Voting Summary and Statements of Commissioners

Note: The following appendices will not appear in the Code of Federal Regulations

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn, Chilton and O'Malia voted in the affirmative; Commissioner Sommers voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the final rulemaking to establish a program for whistleblowers as mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act. Congress enacted these provisions to incentivize whistleblowers to come forward with new information about potential fraud, manipulation or other misconduct in the financial markets. The final rule authorizes the Commodity Futures Trading Commission (CFTC) to provide a monetary award to whistleblowers when their original information leads to a successful enforcement action that results in sanctions over $1 million. The rule encourages people to assist the CFTC in identifying, investigating and prosecuting potential violations of the Commodity Exchange Act.

[FR Doc. 2011–20423 Filed 8–24–11; 8:45 am]

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