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Submitted via Federal eRulemaking Portal: http://www.regulations.gov

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

Re: RIN Number 3038–AD04
Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act, 75 Fed. Reg. 75728 (December 6, 2010)

Dear Mr. Stawick:

The Equal Employment Advisory Council (EEAC) is pleased to submit these comments in response to the Commodity Futures Trading Commission's Notice of Proposed Rulemaking (NPRM) pertaining to the whistleblower provisions of Section 23 of the Commodity Exchange Act, added by § 748 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. EEAC's comments respectfully request that the Commission modify the Final Rule to require putative whistleblowers to first raise their concerns within internal company processes designed for that purpose as a condition precedent to filing with the CFTC.

EEAC's Interest in the CFTC's Proposed Whistleblower Regulations

EEAC is a national nonprofit association of major employers formed in 1976 to promote sound approaches to the elimination of employment discrimination. EEAC's membership is comprised of 300 of the nation's largest private sector companies, collectively providing employment to more than 20 million people throughout the United States alone. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation of fair employment policies and practices. EEAC's members are firmly committed to the principles of equal employment opportunity.

Some of EEAC's members are subject to the Commodity Exchange Act, and thus will be affected directly by the CFTC's final whistleblower regulations. In addition, most if not all of EEAC's member companies have established internal complaint procedures designed to encourage employees who wish to report unlawful or just inappropriate conduct to bring their issues forward within the company. These procedures allow the company to investigate and resolve employee concerns quickly and effectively. In our view, federal regulations that work to discourage employees from using these programs, such as the CFTC proposal appears to do, not only discount the value of systems that have been created to effectively resolve disputes, but also will spur needless litigation and encourage questionable complaints.

Internal Reporting Should Be Made a Condition Precedent To Receiving a Whistleblower Award

Most if not all EEAC member companies have established internal dispute resolution procedures that afford employees the opportunity to "blow the whistle" on conduct they view as illegal, inappropriate, or otherwise objectionable in the workplace. Some of these programs are directly responsive to the requirements of the Sarbanes-Oxley Act mandating the creation of procedures for "the confidential, anonymous submission by employees ... of concerns regarding questionable accounting or auditing matters" as well as other complaints regarding accounting, internal controls, and auditing. 15 U.S.C. § 78j-1(m)(4).

Some grew out of the efforts of conscientious companies to comply with the anti-discrimination laws. *See generally, Faragher v. Boca Raton*, 524 U.S. 775 (1998). Others were developed in direct response to negative experiences with litigation. Indeed, the U.S. Supreme Court acknowledged the value of internal employment dispute resolution programs when it observed in *Circuit City v. Adams*, 532 U.S. 105, 123 (2001), that they "allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation."

U.S. corporations have spent millions of dollars setting up these internal procedures, many of which are "multi-step" programs that begin with a very informal process, and, if the dispute is not resolved, proceed in a linear direction to successively more formal techniques. Each company has paid careful attention, and committed significant resources, to designing a program that will best fit within its individual corporate culture and encourages employees to participate.

As a result, internal dispute resolution programs have been extremely successful in resolving employee concerns in a timely way that has proven to be mutually satisfactory to both employees and employers. In fact, an effective internal program opens and widens communication channels between employees and management and advances the twin goals of improved employee relations and the likely consequence of reduced litigation.

Regrettably, we respectfully submit that the NPRM as drafted will have the counterproductive effect of encouraging putative whistleblowers to circumvent existing internal company whistleblower procedures, no matter how effective they have proven to be, including those procedures that were specifically mandated by the Sarbanes-Oxley Act. The whole

purpose behind these programs is to permit the company to take prompt and appropriate action when a concern is raised. By not including some provision making it a condition precedent for a whistleblower to utilize her or his company's internal procedure before filing with the CFTC, the rule will as a practical matter bypass any benefit that might be gained by utilizing these internal procedures.

Notably, the preamble to the NPRM expresses some concern that the CFTC's whistleblower regulations may have some negative effect on a company's existing processes for identifying and acting on potential violations. Although the agency claims that it has tried to limit the damage, as a practical matter, we respectfully submit that the proposed rule does nothing to encourage any employee to try to resolve his or her complaint first with the company before going to the CFTC.

Despite the CFTC's expressed desire not to draft a rule that would discourage employees from using internal channels, the NPRM would not in any way *require* potential whistleblowers to first report their concerns via the company's internal process. In our view, the final rule should do so unequivocally. Only in this way will the internal processes be guaranteed a chance to work. The reality is that conscientious employees with legitimate concerns about the practices of the company they work for are more likely than not to use the internal programs to get an issue resolved. In contrast, more opportunistic individuals, whose motives are driven more by the cash bounty Section 23 offers, are likely to go right to the CFTC without any consideration of bringing forth a concern internally. In either situation, company programs that are designed specifically to address employee concerns efficiently and effectively should be given the first chance to resolve potential problems.

The fact is that nothing in the CFTC's proposal, the forms to be completed, or the instructions accompanying the forms, say anything that might suggest to a potential whistleblower that he or she should go through the company's compliance process before contacting the CFTC. Form TCR (Tip, Complaint or Referral), for instance — the initial contact form — merely asks "Have you taken any prior action regarding your complaint," and the accompanying instructions explain this question as including "whether you reported the violation to [your company], including the compliance office, whistleblower hotline, or ombudsman. . . ." It does not in any way suggest that one *should* do so, or about the proven effectiveness of internal programs in resolving disputes.

Accordingly, EEAC respectfully urges the CFTC to include in the final rule a provision that *requires* putative whistleblowers to report concerns through internal company processes, particularly those processes that are already federally mandated, as a condition precedent to filing a complaint with the CFTC. The provision should instruct CFTC staff to direct putative whistleblowers to the company program and give the company an opportunity to resolve the issue before the CFTC proceeds with its investigation.

Moreover, the CFTC can retain the provision in the proposal stating that if within 90 days the whistleblower provides information to the CFTC after first complaining internally, then the whistleblower, for bounty award purposes, will be considered to have given the information to

the CFTC as of the date it was provided elsewhere, and could even expand it to, for example, 180 days in order to preserve whatever rights need to be protected while giving the internal program a chance to succeed.

Conclusion

EEAC is grateful to the CFTC for providing us with the opportunity to submit comments on the NPRM. We would welcome further opportunity to discuss our views with agency officials at any time.

Respectfully submitted,

Jeffrey A. Norris
President