**From:** NWC Staff <whistle@whistleblowers.org>
**Sent:** Tuesday, June 7, 2011 9:08 AM
**To:** Whistleblowers <Whistleblowers@CFTC.gov>
**Subject:** NWC Comment on 17 CFR Part 165 Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act
**Attach:** 06.06.2011LettertoGensler.pdf

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To whom it may concern:

Attached please find comments from the National Whistleblowers Center on the CFTC's proposed rules implementing the whistleblower provisions of the Dodd-Frank Act. Thank you for your consideration. I submitted these comments yesterday but did not receive a confirmation and do not see them posted on the website. Therefore, I am submitting the same comments from the National Whistleblowers Center a second time.

Sincerely,

Stephen M. Kohn
Executive Director
National Whistleblowers Center
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Washington, DC 20007
Phone 202-342-1903
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June 6, 2011

Hon. Gary Gensler
Chairman
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

*Re:* *Supplemental Rule Making Comment: Dodd-Frank Wall Street Consumer and Protection Act*

*RIN 3038–AD04: Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act*

Dear Chairman Gensler:

On behalf of the National Whistleblowers Center ("NWC") I am submitting a supplemental rulemaking comment in response to a new development directly related to your ongoing rulemaking proceeding RIN 3038-AD04. This letter should be considered a formal supplement to the comments filed by the NWC on February 4, 2011, and the additional supplemental comments filed by the Center.

On May 25, 2011 the Securities and Exchange Commission (SEC) adopted formal rules governing its Dodd-Frank Act whistleblower program. *See* 17 C.F.R. Parts 240 and 249. Given the similarities between the whistleblower statutes administered by the Commodity Futures Trading Commission (CFTC) and those administered by the SEC, there is a strong public interest in harmonizing these two sets of rules in a manner that will avoid confusing whistleblowers. One area for which such harmonization will serve the public interest concerns internal corporate compliance programs. The SEC has adopted a rule related to these programs, codified as 17 CFR Parts 240.21F-4(c)(3) . We believe that it would be in the public interest for the CFTC to adopt this rule.

SEC rule 21F-4(c)(3) encourages employees to utilize internal compliance programs in a manner consistent with the Congressional goals of Dodd-Frank. The provision will both provide a strong incentive for companies to operate high-quality compliance programs and will encourage employees to utilize compliance programs, without prejudicing their right to file a claim with the SEC or raise allegations directly to the Commission, where they deem such contacts appropriate.

This letter constitutes a formal request that the CFTC adopt SEC rule 17 CFR Part 240.21F-4(c)(3).

The SEC rule is based on a proposal submitted by the NWC to the SEC. *See* NWC Rulemaking Comments, Kohn to Schapiro, p.4 ("NWC strongly urges that the Commission rules be revised and implemented consistent with this principle and treat employees equally whether they choose to make their disclosures internally, externally, or both. The purpose of the law is to encourage the disclosures that help detect fraud, and all such disclosures deserve protection and encouragement.").

Attached to this letter was a report filed by the NWC, entitled *Impact of Qui Tam Laws on Internal Compliance: A Report to the Securities and Exchange Commission*, dated December 17, 2010. This report spelled out in more detail the NWC's proposal for harmonizing the rules governing reports to internal compliance and the government. The report set forth the following proposal:

> *Given the Commission's stated commitment to fostering effective internal compliance programs . . . the Commission should establish a rule that contacts with internal compliance departments and employee supervisors have the same protection as contacts with the SEC. Given the corporate track record on these issues, this mandate must be established by a formal rule.*
>
> *If the regulated communities and the SEC are truly interested in promoting internal compliance programs, we hereby recommend that the SEC adopt and make the following rules final:*
>
>> *All contacts with an Audit Committee or any other compliance program shall be considered, as a matter of law, an initial contact with the SEC;*
>>
>> *All regulated companies shall be strictly prohibited from retaliating against any employee who makes a disclosure to an Audit Committee or a compliance program concerning any potential violation of law or any "suspicious activities." This is consistent with the recommended standards of the Association of Certified Fraud Auditors.*
>>
>> *All regulated companies shall be required to track all internal complaints, and demonstrate how such complaints have been resolved;*
>>
>> *Consistent with 48 C.F.R. Chapter 1, all audit committees and compliance programs shall be required to "timely disclose" to the SEC "credible evidence of a violation" of law or SEC rules. See 73 Federal Register 67064, 67065 (November 12, 2008). When making these disclosures, if the information originated with a whistleblower, the identify of that whistleblower shall be provided*

> *to the SEC, and that submission shall be deemed to qualify as an application for a reward under § 21F;*
>
> *Should an internal complaint result in a finding of a violation, and lead to the Commission issuing a fine, penalty or disgorgement, the employee whose application was submitted through the internal complaint process shall be fully eligible for a reward. See* NWC *Report*, p. 12.

Thereafter, the NWC meet with the Commissioners and Commission Staff and further justified this proposal. Additional suggested language for this proposal was filed with the SEC in a number of follow-up rulemaking letters.

On February 4, 2011 the NWC filed its formal rulemaking comments with the CFTC. This proposal contained the same recommendation as set forth in the NWC's December 17th SEC comments, but provided additional justification for the adaptation of this rule. *See* NWC Comment No. 27538, filed by Stephen Kohn/NWC on February 4, 2011 (pages 38-39 setting forth the identical proposal as was filed with the SEC); pp. 103-08 (setting forth a proposed rule).

NWC Comment No. 27538 not only set forth a specific proposal for a rule that would harmonize the rights of employees who directly contacted the Commission with the rights of employees who choose to utilize internal compliance programs, but the entire report filed with the Commission, read as a whole, provided a strong empirical/policy/legal justification for adopting such a rule.

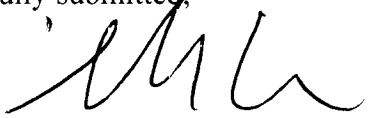
Based on the rulemaking recommendations filed by the NWC to the Commission, the public comments issued by the SEC when it adopted its final whistleblower rule on May 25, 2011 and the reasons set forth in this letter, the NWC hereby requests that the CFTC adopt the language of SEC Rule 17 CFR Part 240.21F-4(c)(3). Under section 17 CFR Parts 240.21F-4(c)(3), the Commission defined a protected whistleblower disclosure for purposes of qualifying for a reward as follows:

> *You reported original information through an entity's internal whistleblower, or compliance procedures for reporting allegations of possible violations of law before or at the same time you reported them to the Commission; the entity later provided your information to the Commission, or provided results of an audit or investigation initiated in whole or in part in response to information you reported to the entity; and the information the entity provided to the Commission satisfies either paragraph (c)(1) or (c)(2) of this section. Under this paragraph (c)(3), you must also submit the same information to the Commission in accordance with the procedures set forth in 240.21F-9 within 120 days of providing it to the entity.*

We recommend that the CFTC use this identical language in its final rule.

Should you have any questions, feel free to call me at 202-342-1903 or email me at sk@whistleblowers.org.

Respectfully submitted,



Stephen M. Kohn
Executive Director

CC:

David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission