



American Institute of CPAs
1455 Pennsylvania Avenue, NW
Washington, DC 20004-1081

February 4, 2011

Mr. David Stawick
Secretary
Commodity Futures Trading Commission
Three LaFayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: RIN number 3038-A04 – Proposed Rules for Implementing the Whistleblower Provisions of Section 23 of the Commodities Exchange Act (CEA).

Dear Mr. Stawick:

The American Institute of Certified Public Accountants (AICPA) appreciates the opportunity to respond to the Commodity Futures Trading Commission (CFTC or Commission) Proposed Rules for Implementing the Whistleblower Provisions of Section 23 of the Commodities Exchange Act (Proposed Rules). The AICPA is the national professional organization of certified public accountants with more than 360,000 members, including certified public accountants (CPAs) in business and industry, public practice, government, and education; student affiliates; and international associates. Our members provide audit, tax, retirement consulting, plan administration and financial planning services. It is from this diverse perspective that we provide our comments and recommendations.

Summary

Although the AICPA supports the efforts of Congress and the CFTC to improve the ability to ferret out fraud through additional provisions designed to promote whistleblower reporting, and recognizes the value of whistleblowers as an effective method to deter and detect fraud, we are concerned about several aspects of the Proposed Rules.

The Proposed Rules exclude from the definition of “independent knowledge” any information that was obtained, “...because you were a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity...” (Proposed Rule 165.2(g)(4)) or if it was obtained “Otherwise from or through an entity’s legal, compliance, audit or similar functions...” Although the first exclusion quoted above appears to be intended to apply to individuals who are employed by the entity, the language in the second exclusion quoted above, which is set out in Proposed Rule 165.2(g)(5), appears to be intended to apply to individuals who are not employed by the entity, such as the individuals employed by the CPA firm that provides audit and compliance services to the entity. Nevertheless, there is no explicit provision which would provide that CPAs and personnel of the CPA firm that perform audit or other services for the entity are not eligible for whistleblower awards. The AICPA urges that the final rules make it clear that CPAs and personnel of CPA firms that provide audit services to entities subject to CFTC jurisdiction are not eligible for whistleblowers awards. Further, the AICPA urges the CFTC to adopt a rule that also excludes any information obtained from or through any other engagement performed for an entity subject to the CFTC’s jurisdiction by a CPA or individuals in the CPA firm. Such information should be excluded from the definitions of “independent knowledge” under Proposed Rule 165.2(g) and “independent analysis” under Proposed Rule 165.2(h).

The release states that: “Compliance with the CEA is promoted when companies implement effective legal, audit, compliance and similar functions.” In addition, the release, in discussing the rationale for the exclusion related to attorney-client communications, notes that compliance is promoted when registrants and others consult with counsel about potential violations, that the privilege furthers such consultation, and that those benefits would be undermined if there were monetary incentives for counsel to disclose information learned through privileged communications. Similarly, compliance with the CEA is promoted when clients consult with their CPAs during the audit process and in the course of other engagements. That free flow of communication could be chilled if the CFTC creates a monetary incentive for individuals associated with CPA firms to disclose information received in the course of an audit or other engagement.

The AICPA is concerned that the 90-day “grace period” for employees and potential “credit” for first utilizing employer compliance processes will not sufficiently encourage potential whistleblowers to report first through a company’s internal reporting process. The AICPA strongly urges the CFTC in its final rules to, at a minimum, require concurrent whistleblower reporting to the entity and the Commission as a condition for an award. A failure or delay in the communication of whistleblower reports of potential violations to these entities may reduce the entity’s ability and the ability of their independent accountants to rely on the efficacy of company internal control systems and could adversely impact entities’ and independent accountants’ evaluations of internal control over financial reporting. It could also adversely affect the accuracy of these entities’ financial reporting. This could have significant negative consequences for investors, reporting entities, and the audit process alike.

Further, as stated above, the AICPA supports the CFTC’s Proposed Rules to the extent that they will not permit whistleblower awards for independent public accountants who report information about an entity which was obtained through the performance of an engagement required under the CEA. We are concerned, however, that the Proposed Rules do not go far enough towards excluding independent public accountants and their staff from obtaining whistleblower awards from the CFTC in several respects:

- The AICPA suggests that the rules be revised to add an explicit exclusion related to independent public accountants and personnel of the CPA firms that perform services for the entity.
- The AICPA believes the final rules should clearly and explicitly exclude awards to independent public accountants and staff for information gained through the performance of all engagements (including non-audit services) for the same entity for which the independent public accountant also performs an engagement required under the CEA. In addition, the final rules should explicitly exclude awards to independent public accountants and staff that perform any engagement for an entity within the jurisdiction of the Commission.
- The AICPA has concerns about the Proposed Rules to the extent that they permit whistleblower awards for information reported by an independent public accountant regarding his or her firm’s performance of services related to an engagement for an entity within the jurisdiction of the Commission (i.e., whistleblower reporting by an accountant or staff of the accounting firm with respect to his or her own firm’s performance of services).

The AICPA believes that permitting awards to independent public accountants for such information in the scenarios above would undermine a CPA’s duties of confidentiality and integrity and other ethical obligations, as well as undermine candor between independent public accountants and the client. It could also limit the free flow of communication between the CPA and the client, about potential violations in the course of audit or other engagements. This could have adverse consequences on the effectiveness of the CPAs audit work. Also, clients may be apprehensive to seek the advice of a CPA, as a trusted advisor, on how to deal with a matter that might be viewed as even a potential violation. This could limit the options and resources to an entity for quickly and effectively dealing with these situations.

Additionally, as it relates to an independent public accountant “whistleblowing” on his or her own accounting firm’s performance of services related to an engagement, the AICPA believes that numerous means currently exist that provide adequate mechanisms for accountants to report, and firms to address, potential violations with respect to the performance of audit engagements. The potential harm to the accountant’s relationship with a client, the audit

process, and the audit firm's internal control systems that could result if independent public accountants and their staff are permitted to benefit financially through whistleblower reporting strongly outweighs any potential incremental benefit of allowing such awards.

Our specific concerns and recommendations are discussed in full below.

I. Importance Of Requiring, At A Minimum, Concurrent Whistleblower Reporting To The Commission And The Entity As A Condition To A Whistleblower Award

The AICPA herein responds to the question on pages 75730-75731 of the Release:

Will the carve-out for situations where the entity fails to disclose the information within sixty (60) days promote effective self-policing functions and compliance with the law without undermining the operation of Section 23?

The AICPA strongly urges the CFTC in its final rules to require, at a minimum, concurrent reporting to the Commission and the entity as a condition to a whistleblower award. Regarding the ninety (90) day deadline for submitting necessary whistleblower forms to the Commission, the AICPA is concerned that the Proposed Rules will not sufficiently encourage employees to first report potential violations in accordance with an entity's internal compliance programs. In particular, we are concerned that the 90-day "grace" period and the "credit" for those who utilize internal compliance procedures first do not sufficiently incentivize a whistleblower to report first through internal reporting processes. We believe that an entity's employees likely will seek to maximize the possibility of lucrative whistleblower awards by reporting immediately to the CFTC, bypassing established internal processes. Employees will be reluctant to take the risk that they might miss the deadline, or get "scooped" by someone else reporting first. We believe this can be overcome if, at a minimum, the Commission requires reporting to the entity concurrent with reporting to the CFTC in order to be eligible for an award. In addition, as will be discussed in Section II, the independent public accountant and staff of the accounting firm should be excluded from eligibility for whistleblower awards, without regard to whether the entity reports perceived wrongdoing to the Commission. Therefore, the final rules should make it clear that the individuals eligible, if the entity does not report, do not include accounting firm personnel.

Regarding the sixty (60) day period for disclosing information to the CFTC, the AICPA believes this is not a sufficient period to permit an employer to evaluate and respond to a whistleblower complaint and recommends that the disclosure period be extended to 180 days.

Further, we believe that failure to require, at a minimum, concurrent whistleblower reporting to the CFTC and the entity through established internal reporting processes will essentially transfer the responsibility for timely responses to reports of possible fraud from the private sector (i.e., entities and independent public accountants who audit them) to the CFTC. The AICPA does not believe this serves the best interests of the public for the following reasons:

- If entities subject to CFTC jurisdiction and independent public accountants who provide services to those entities are not timely informed of a potential CEA violation because the report is made first to the CFTC rather than internally and promptly, as required by most compliance programs, inaccurate financial statements (and audit opinions thereon) or inaccurate valuations of assets for collateral, capital and margin requirements could be issued. This might be the case if, for example, a report through the entity's established internal system could have (and should have) been made during the reporting period under audit, prior to the issuance of the financial statements and audit opinion thereon, but the entity and the independent accountants were not made aware until a later date. Such an occurrence could have serious consequences for those who rely on the financial statements and other financial information related to trades of financial instruments subject to CFTC jurisdiction, most importantly investors. Among other things, the entity may have to restate its previously-issued financial statements if it turns out that in fact there was a violation that caused a material misstatement. The fall-out would inevitably include loss of market confidence and damage to investors. Such consequences could be minimized if the final rules condition an award, at a minimum, on concurrent reporting to the CFTC and the entity's established internal processes so the entity can investigate and remediate in a timely manner.

- We are concerned that the volume of whistleblower reports the CFTC staff is likely to receive will mean that it will not be possible for them to discern quickly and effectively those reports that seem more credible, and address them in a timely manner. The AICPA believes this risk would be mitigated by requiring an employee to, at a minimum, report concurrently to the Commission and to the entity through the use of established internal reporting mechanisms, which should facilitate the swiftest attention to potential violations. This places a greater incentive on an entity to have effective internal reporting mechanisms and processes to remediate CEA violations. The end result should be a quicker response by the entity to potential violations on quicker reporting to the CFTC.

Evaluations of internal control over financial reporting generally will consider the extent to which an entity's internal control program includes employee-whistleblower reporting procedures and whether those processes are effective. However, under the Proposed Rules, allowing employees to forego internal reporting and compliance processes may undermine an important "entity-level" control—one that can be effective in reducing the risk that management is overriding other internal controls.¹ As a result, the absence of required reporting to the entity concurrently or prior to reporting to the CFTC may reduce the effectiveness of an entity's anti-fraud programs and controls.

In conclusion, the AICPA believes a whistleblower should be required to, at a minimum, report to the Commission and the entity concurrently. This should reduce the possibility of delayed reporting and its attendant consequences outlined above. Even if the Commission determines that it will not require concurrent entity reporting at a minimum by whistleblowers, the AICPA strongly urges the CFTC to implement policies that will require CFTC staff to immediately inform the entity's chief legal officer (or compliance officer), and board of directors upon the receipt of a whistleblower complaint.²

II. Recommendations To Clarify And Expand Exclusion Of Independent Public Accountants From Whistleblower Awards

The AICPA also wishes to respond specifically to the Question on page 75730 of the Release:

The Commission also requests comment on the proposed exclusions for information obtained by a person with legal, compliance, audit supervisory or governance responsibilities for an entity under an expectation that the person would cause the entity to take steps to remedy the violation, and for information otherwise obtained from or through the entity's legal, compliance, audit or similar functions. Does this exclusion strike the proper balance?

We specifically support the provision in CFTC's Proposed Rule that denies whistleblower awards to those who obtain knowledge of a possible violation "otherwise from or through an entity's legal, compliance, audit or other similar functions or processes for identifying, reporting or addressing potential non-compliance with the law."³ We firmly agree that independent public accountants should not be permitted to obtain whistleblower awards for filing whistleblower reports on entities for which they perform an engagement required under the CEA. We are concerned, however, that the Proposed Rules do not go far enough in excluding independent public accountants and their staff from obtaining whistleblower awards from the CFTC, as discussed below.

A. Clarification Of Proposed Rule To Exclude Whistleblower Awards To Independent Public Accountants For Reporting Information Derived From The Performance Of Any Engagement For An Entity For Which The Independent Public Accountant Also Performs An Engagement Required Under The CEA

¹ See AICPA, *Management Override of Internal Controls: The Achilles' Heel of Fraud Prevention* 7 (2005) ("A key defense against management override of internal controls is a whistleblowing process that typically incorporates a telephone hotline.")

² We request that the CFTC consider extending the proposed 60-day employer disclosure period and the 90 day deadline for employee submission of Forms TCR and WB-DEC to 180-days in order to incentivize initial internal reporting and preserve the possibility for whistleblowers who elect to report internally first the opportunity to obtain an award where warranted through a longer grace period.

³ Proposed Rule 165.2(g)(5)

To avoid any ambiguity, the AICPA asks that the Commission specify in its final rules that it will exclude from the definitions of “independent knowledge” and “independent analysis” information about an entity obtained from *all* services performed for the entity for which the independent public accountant performs an engagement required under CEA and further, that the exclusion apply to any engagement performed for an entity subject to the jurisdiction of the CFTC without regard to whether the CPA firm performs an audit. There are good reasons for such exclusions, including a CPA’s duties of confidentiality and the facilitation of candor between the accountant and the entity necessary for a robust audit and compliance process, described in further detail below (see II.B.1.).

B. Exclusion Of Whistleblower Awards to Independent Public Accountants For Reporting On Their Public Accounting Firm’s Performance Of Any Engagement for an Entity Within the Jurisdiction of the CFTC

The AICPA has serious concerns about the Proposed Rules to the extent they permit whistleblower awards to an independent public accountant and to the firm’s personnel for reporting information regarding his or her own public accounting firm’s performance of services (i.e., whistleblower reporting by an auditor and firm personnel with respect to his or her firm’s performance of an audit or other engagement for an entity within the jurisdiction of the CFTC).

1. CPA’s Duties of Confidentiality and Integrity

We believe that permitting an independent public accountant or staff to seek CFTC whistleblower awards by providing information about his or her own firm’s performance of services to an entity is highly problematic for several reasons. Whistleblowing by an auditor on his or her own firm’s performance will generally involve reporting client-specific information (that otherwise is excluded), therefore the AICPA urges the CFTC to exclude *all* whistleblower reports related to the public accounting firm’s performance of services related to an engagement required under the CEA and, further, for any engagement for an entity within the jurisdiction of the CFTC. There are at least two critical concerns that support excluding financial awards related to reporting on the firm’s engagement performance: breach of the fundamental duty of confidentiality and the potential compromise of integrity and objectivity in the face of financial incentives. Both of these concerns also underlie the rationale for exclusions in the Proposed Rules with respect to attorneys.

First, similar to attorneys, accountants are subject to an elaborate set of ethical obligations. Among these obligations, accountants are bound by a duty of confidentiality under most, if not all, of the laws of the states that license CPAs, as well as the AICPA Code of Professional Conduct, ET Section 301 (which has been adopted in form or substance by numerous state boards of accountancy). Many states have even gone so far as to codify a confidentiality privilege related to the work of accountants.⁴ Whether mandated as a CPA ethical obligation or set forth in a statutory privilege, accountants engaged to perform services for an entity generally may not disclose client-related information without explicit permission by the client, except in limited circumstances, such as the receipt of a subpoena.

The importance of confidentiality and privilege related to the work of accountants is well-established: “to ensure an atmosphere wherein the client will transmit all relevant information to his accountant without any fear of any future disclosure . . . [w]ithout an atmosphere of confidentiality, the client might withhold facts . . . rendering the accountant powerless to adequately perform the services he renders.”⁵ As one court has described it, “[t]he accountant-client privilege encourages full and frank communications between certified public accountants and their clients so that professional advice may be given on the basis of complete information, free from the consequences of the apprehension of disclosure.”⁶

⁴ The same principles underlying privilege apply to the duty of confidentiality.

⁵ Gearhart v. Ethridge, 208 S.E. 2d 460 (Ga. 1974); see also People v. Paasche, 525 N.W. 2D 914, 918 (Mich. 1994); Sears, Roebuck & Co. v. Gussin, 714 A. 2d 188 (Md. 1997).

⁶ Nuesteter v. District Court for the City and County of Denver, 675 P. 2d 1 (Co. 1984).

Similar to the Model Rule of Professional Conduct applicable to attorneys, many states explicitly recognize that the accountant's confidentiality obligation is not limited to specific client records or client communications, but rather includes all information the accountant comes to possess as a result of the provision of professional services.⁷ Whistleblower reports from independent public accountants, related to their firms' engagement performance, would likely include client-specific information. Therefore, permitting awards for such whistleblower reports may encourage auditors to breach their fundamental duties of confidentiality to the client.

Finally, the confidential nature of the accountant's relationship with the client and his or her duty of integrity are critical to promote candor in communications and, in turn, facilitate robust audits. A mutual respect between a client and the independent public accountant must exist for the accounting firm to obtain the unconditional access to information necessary to conduct an effective audit and perform other engagements.⁸ The ability to obtain this level of communication will likely be hindered if a client suspects that accounting firm personnel may depart from confidentiality duties or established accounting firm procedures in favor of direct reporting to the Commission motivated by potential financial rewards.

2. Adequate Policing of a Firm's Performance of Engagements Already Exists

We believe that numerous means already exist to report and address potential violations with respect to an accounting firm's performance of engagements. A CPA's general ethical obligations imposed by the states, the AICPA, and other regulatory and professional bodies distinguish the independent public accountant from corporate directors, officers, and other employees, and will more than compensate for the proposed exclusion that we seek in the final rules.

First, audit judgments are highly complex, and often involve the input of senior firm personnel, specialists and discussions with the client. AICPA Professional Standards for Statements on Auditing Standards section 380, *The Auditor's Communication With Those Charged With Governance*, establishes standards and provides guidance on the auditor's communication with those charged with governance in relation to an audit of financial statements. The term "those charged with governance" means the person(s) with responsibility for overseeing the strategic direction of the entity and obligations related to the accountability of the entity. For entities with a board of directors, the term encompasses the term board of directors or audit committee used elsewhere in generally accepted auditing standards (GAAS). Recognizing the importance of effective two-way communication to the audit, AU section 380 provides a framework for the auditor's communication with those charged with governance and identifies some specific matters to be communicated with them. These standards specifically prescribe types and means of communications, including but not limited to, the following examples:

- Significant difficulties, if any, encountered during the audit,
- Uncorrected misstatements, other than those the auditor believes are trivial,
- Disagreements with management, and
- Other findings or issues arising from the audit that are in the auditor's professional judgment, significant and relevant to those charged with governance regarding their oversight of the financial reporting process.

In addition, section 325, *Communicating Internal Control Related Matters Identified in an Audit* requires the auditor to communicate in writing to management and those charged with governance deficiencies identified during an audit that upon evaluation are considered significant deficiencies or material weaknesses, including significant deficiencies and material weaknesses that were communicated in previous audits and have not yet been remediated.

Section 316, *Consideration of Fraud in a Financial Statement Audit*, requires the auditor to inquire directly of the audit committee regarding its views about the risks of fraud and whether the audit committee has knowledge of any fraud or suspected fraud affecting the entity. This section also requires communication of fraud involving senior

⁷ See, e.g., 63 P.S. § 9.11a (Pennsylvania); 225 I.L.C.S. 450/27 (Illinois); C.R.S.A. § 13-90-107(f)(I) (Colorado); T.C.A. § 62-1-116 (Tennessee).

⁸ See Thomas J. Molony, "Is the Supreme Court Ready to Recognize Another Privilege? An Examination of the Accountant Client Privilege in the Aftermath of *Jaffee v. Redmond*," 55 Wash. & Lee L. Rev. 247 at 272 (Winter 1998) (noting study that overwhelmingly indicated that absence of confidentiality protection would inhibit accountant-client communications).

management or other employees that causes a material misstatement of the financial statements. The auditor is required to reach an understanding with those charged with governance regarding the nature and extent of communications with those charged with governance about misappropriations perpetrated by lower level employees.

Essentially these standards set forth an internal “reporting up” process. In addition, the accounting firms themselves have methods, including internal reporting processes that include whistleblower hotlines and other channels, to address potential violations of firm policies, professional standards, regulatory requirements and the CEA. If accountants fear that others in the firm may bypass the usual processes by which issues are identified, discussed and resolved, candor necessary to further a robust audit process might be chilled. In addition, the concerns described in Section I above relating to an employee bypassing an entity’s internal reporting processes apply equally to an independent public accountant and firm personnel bypassing an accounting firm’s internal reporting processes.

Second, among other things, the AICPA’s Code of Conduct Rule 501, which has been adopted by a host of state accountancy boards, prohibits “acts discreditable to the profession.” Acts “Discreditable” specifically include “permit[ing] or direct[ing] another to sign a document containing materially false and misleading information and failure to follow requirements of governmental bodies, commissions and other requesting agencies.”⁹

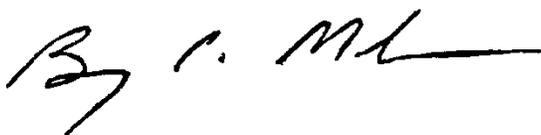
Numerous means exist for an independent public accountant to report and/or address potential violations with respect to his or her own accounting firm’s performance of an engagement for an entity within the jurisdiction of the CFTC. Absent a specific exclusion, we believe the CFTC’s Proposed Rules may inadvertently encourage the accountant to disregard his or her duties of confidentiality and create conflicts of interest through the prospect of individual financial gain, thereby discouraging the candor and values which are critical to an effective audit process and to provide other professional services. We therefore encourage the Commission to specifically exclude whistleblower awards in the final rules where the reporting is based on information about the performance of services by an accounting firm for an entity related to an engagement required under the CEA and for any engagement performed for an entity within the jurisdiction of the CFTC.

Conclusion

To avoid any ambiguity, the AICPA asks that the CFTC specify in its final rules that it will exclude from the definitions “independent knowledge” and “independent analysis” information about an entity that was obtained by a CPA or the staff of an accounting firm in connection with any service performed for the entity, including not only engagements required under the CEA, but also any engagement performed for an entity within the jurisdiction of the CFTC.

We appreciate the opportunity to respond to the request for comment and would welcome the opportunity to discuss any questions you may have regarding any of our comments and recommendations.

Sincerely,



Barry C. Melancon, CPA
President and CEO

cc: CFTC
Chairman Gary Gensler
Commissioner Michael V. Dunn
Commissioner Jill E. Sommers
Commissioner Bartholomew H. Chilton
Commissioner Scott D. O’Malia

⁹ AICPA Code of Professional Conduct, ET 501, *Acts Discreditable*, Interpretation 501-4