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COMMENT

March 20, 1998

Jean A. Webb, Secretary
Commodity Futures Trading Commission
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Washington, D.C. 20581

COMMODITY FUTURES
TRADING COMMISSION
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Re: **Rule Proposal Re: Requests for Exemptive,
No-Action and Interpretative Letters**

Dear Ms. Webb:

First Options of Chicago, Inc. ("FOC") respectfully submits these comments in response to the January 22, 1998 Notice of Proposed Rulemaking ("NPR") issued by the Commodity Futures Trading Commission ("CFTC" or "Commission") regarding Requests for Exemptive, No-Action, and Interpretative Letters.

FOC is a registered futures commission merchant ("FCM") and securities broker-dealer, and is a member of the principal domestic and foreign commodities, securities, and options exchanges. FOC has great interest in the present rulemaking proceeding. In the course of its commodities business, FOC has, from time to time, requested that Commission staff provide no-action letters. Moreover, FOC and its counsel routinely monitor and research CFTC exemptive, no-action and interpretative letters ("Letters") as a source of regulatory guidance. In addition, FOC sometimes seeks the assistance and

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MEMBERS: CHICAGO BOARD OPTIONS EXCHANGE, CHICAGO BOARD OF TRADE, CHICAGO MERCANTILE EXCHANGE,
AMERICAN STOCK EXCHANGE, MIDWEST STOCK EXCHANGE, NEW YORK STOCK EXCHANGE,
PACIFIC STOCK EXCHANGE AND PHILADELPHIA STOCK EXCHANGE

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advice of CFTC staff on an informal basis, through telephone requests and informal meetings.

I. OVERVIEW

FOC supports the Commission's effort to provide uniform procedural rules for the issuance of Letters and thereby make the process more efficient and useful for Commission staff and those requesting relief. The issuance of exemptive, interpretative and no-action letters facilitates the development of innovative transactions, products, and procedures which do not fit squarely within the four corners of the Commodity Exchange Act ("CEA" or "Act") or the CFTC regulations thereunder. Moreover, the issuance of Letters has proven to be an invaluable source of advice and guidance for the commodities industry and legal community.

The final CFTC procedural rules for Letters should be carefully crafted to ensure that they assist the Commission and its staff, but do not impose unnecessary burden or expense on industry participants. Some of the proposed rules, if enacted as drafted, could turn what currently is a fairly straightforward, flexible, and efficient process into a complicated set of rules and requirements. FOC believes that the Commission should strive to find a balance in its final rules, to help ensure that Commission staff has the information it needs to provide an informed and timely response, without

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imposing undue burdens or constraints that could discourage those who seek their guidance. To that end, FOC makes the following specific comments regarding the Commission's proposed rules.

II. COMMENTS ON SPECIFIC RULE PROPOSALS

A. Keep the CFTC Door Open

The preamble to the Commission's NPR invites industry participants and the public to feel free to seek information from the Commission staff on an informal basis where they do **not** require no-action relief or a formal statutory or regulatory interpretation. This suggests that if a person is considering requesting no-action or interpretative relief, the rule's formal procedures and a comprehensive written submission would be imposed from the outset.

FOC suggests that the Commission enact a rule that permits, and even encourages, informal telephone consultations and meetings with Commission staff to determine whether no-action or interpretative relief is appropriate or to solicit general advice, regardless of whether the party ultimately seeks no-action relief or formal interpretative advice. Such informal assistance would help assure that any ensuing request will-address the relevant issues and authorities, and contain the necessary facts for a prompt and efficient staff response.

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The U.S. Securities and Exchange Commission ("SEC"), for example, has a rule that specifically provides for pre-filing assistance and interpretative advice:

The staff of the [SEC] renders interpretative and advisory assistance to members of the general public, prospective registrants, applicants and declarants. For example, persons having a question regarding the availability of an exemption may secure informal administrative interpretations of the applicable statute or rule as they relate to the particular facts and circumstances presented. Similarly, persons contemplating filings with the Commission may receive advice of a general nature as to the preparation thereof, including information as to the forms to be used and the scope of the items contained in the forms. Inquiries may be directed to an appropriate officer of the [SEC's] staff. In addition, informal discussions with members of the staff may be arranged whenever feasible, at the [SEC's] central office or . . . at one of its regional or district offices.

17 C.F.R. § 202.2.

Likewise, the CFTC should expressly provide for informal avenues of consultation before requiring a party to prepare a time-consuming and costly written request for relief. Such preliminary consultation will make any subsequent request letters more concise and reduce the time needed for staff to review the request and reach a conclusion.

The opportunity for preliminary, informal consultations should also enable a party to seek advice and assistance from Commission staff on an undisclosed basis, through outside counsel or some other representative. This would encourage persons to seek preliminary guidance, where they may otherwise

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be reluctant to seek advice in a written request which identifies the interested person. See NPR ¶¶ (b)(4), (c)(1)¹ (requiring identifying information for the interested person seeking the no-action letter).

B. Increased Flexibility in the Submission, Withdrawal, and Pursuance of Requests

The Commission, at NPR ¶ (b)(3), proposes that requests must relate to a specific **proposed** activity or a **proposed** transaction. This proposed rule is unnecessarily restrictive. There may be occasions where persons or their counsel discover after the fact that an activity or transaction may raise CEA issues. They should not categorically be prohibited from requesting no-action or interpretative relief. This proposed provision also is inconsistent with Section 4(c) of the Act, which expressly authorizes retroactive exemptive relief.

NPR ¶ (f) discourages withdrawal of requests, which would be restricted to situations where: (1) the requester has decided not to proceed with the proposed transaction or activity, (2) intervening events have rendered the request moot, or (3) a request for confidential treatment was denied. The proposed restrictions on the withdrawal of requests would likely put a chill on requests for relief for fear that if staff response is delayed, the requester will be hamstrung and

¹ Paragraph references ("NPR ¶ ___") are to subsections of the CFTC's proposed 17 C.F.R. § 140.99.

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unable either to withdraw the request or to proceed with the proposed transaction or activity while the request is pending.

NPR ¶ (g) proposes that where Commission staff requests supplemental information, the requesting party must respond within 30 days unless an extension has been granted. FOC suggests that the 30-day clock for responding should stop ticking as soon as the requesting party requests an extension or, alternatively, that there be an automatic 30-day extension upon request. That way, staff would have some assurance that the requesting party is still interested in pursuing the request, and the requesting party would have sufficient time to gather and prepare the supplemental information, without being prejudiced by any delay while the staff is considering a request for an extension.

C. Increased Flexibility in Required Content of Requests

The NPR sets forth several proposals regarding the information required in requests for Letters, including requirements for comprehensive discussions of the facts, legal authorities, and prior Letters issued in similar circumstances. As discussed below, many of these requirements are superfluous and burdensome. Consequently, the burden of compliance with the requirements for a request letter may needlessly discourage persons from requesting relief.

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First, at NPR ¶ (b)(5)(i), the Commission proposes that Requests must "set forth **as completely as possible** the particular facts and circumstances giving rise to the request." (Emphasis added). This requirement encourages unnecessarily lengthy submissions. The requester's statement of facts should be required to include only the **material** facts relevant to formulating a response. Indeed, the SEC procedures for no-action request letters state: "While it is essential that letters contain all of the facts necessary to reach a conclusion in the matter, they should be concise and to the point." Procedure Applicable to Requests for No Action or Interpretative Letters, Securities Act Release No. 5127, 36 Fed. Reg. 2600, at ¶ 4 (SEC Jan. 25, 1971). The same standard should apply here.

Second, NPR ¶ (c)(3)(i) proposes a **certification** by a person with knowledge of the facts that the "representations made in the request are accurate and complete." It is unclear why the proposed certification is necessary. The Commission has not indicated that there is a widespread problem with misrepresentations or material omissions in requests for relief. Moreover, sufficient deterrents to and sanctions for intentionally inaccurate or incomplete request letters already exist. To begin, the staff response is usually conditioned upon the accuracy and completeness of the facts set forth in the request letter; if the request is misleading, the staff

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response would not provide the party with any protection from enforcement action. In addition, the Commission may deny an attorney the privilege of appearing or practicing before it if the person is found to lack the requisite qualifications, character and integrity in a Commission proceeding. 17 C.F.R. § 14.8. Furthermore, persons are already subject to criminal sanctions for knowingly making false statements to the government. 18 U.S.C. § 1001. Thus, a request which contains an intentional misrepresentation or a material omission that renders the letter misleading may be a criminal violation. There is no need for an additional certification requirement beyond these provisions.

Third, NPR ¶ (c)(3)(ii) further proposes to require an **undertaking** that, if any material representation in the request changes, the requesting person will submit a written supplement to Commission staff. The proposed undertaking apparently requires requesting parties to notify CFTC staff of changes in the facts both before staff has responded to the request and after a response letter has been issued. Although the requirement for notification while a request letter is pending makes sense, the requirement to notify Commission staff of material changes **after** a response letter has been issued is too indefinite, burdensome, and unnecessary.

The proposed undertaking is apparently never-ending, and would require a person to monitor the facts in any and all

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request letters for years on end. Again, this is an unnecessary imposition. As noted above, the staff response is conditioned upon the accuracy and completeness of the facts set forth in the request letter; if the facts change materially, the staff response would not necessarily provide the person with protection from enforcement action. Thus, even without an express undertaking, if material facts changed and the person wanted continuing no-action relief from Commission staff, the person should consider supplementing the original request or submitting a new request. Conversely, absent an undertaking, if material facts changed and the person determined that CFTC no-action relief was not warranted or desired, there would be no burden to supplement.

If the Commission decides to require some type of undertaking, the language should be modified to clarify that the duty to supplement belongs to the person with knowledge of the facts -- not the in-house or outside counsel or other authorized representative who prepared the request.

Fourth, NPR ¶ (c)(4), as proposed, would require that the request identify **all** relevant legal and factual issues and discuss the legal and public policy grounds in support of the request. The use of "all" seems to require lengthy dissertations, which are unnecessary for routine or basic requests. In comparison, the SEC uses simpler and more concise language in providing that: "The writer should indicate why he

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thinks a problem exists, his own opinion in the matter and the basis for such opinion." SEC Release No. 5127, 36 Fed. Reg. 2600 at ¶ 6. If adopted by the CFTC, this uncomplicated approach would permit the requester to set forth the legal, factual, and policy issues in the detail required by the nature of the problem at hand, without being compelled to draft a treatise unwarranted by the circumstances.

Fifth, NPR ¶ (c)(5) similarly would require references to **all** relevant authorities, including the Act, CFTC rules and regulations, orders, judicial and administrative decisions, statutory interpretations, and policy statements, and further requires that any adverse authority be cited and discussed. Again, this proposal seems to require exhaustive legal research and a lengthy legal brief, which, in many circumstances, could be overly burdensome, unnecessary, and expensive. Most persons are likely to set forth, voluntarily, sufficient legal authorities necessary to support their request. The proposed comprehensive requirement, however, would provide a financial disincentive from seeking regulatory guidance and may discourage requests, especially from individual traders, smaller registrants such as introducing brokers and commodity trading advisors, and even FCMs with tight budgets. At most, submitters should be required to identify all relevant authorities of which they are aware through the exercise of reasonable diligence.

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Sixth, NPR ¶ (c)(6) would require identification of prior letters issued by Commission staff in similar circumstances, as well as any conditions imposed by prior letters. Many persons voluntarily will cite prior Letters to support their request. A broad requirement to cite prior Letters, however, would inhibit requests by individuals and entities who do not have the legal, financial, or time resources to conduct an exhaustive search for prior letters. Depending on the nature of the request, locating prior letters could either be an unwieldy task or like the proverbial search for a needle in a haystack. In either event, it would be time-consuming, burdensome and expensive to undertake the research necessary to comply. For those who have access to on-line computer research services, searching the relevant database on LEXIS or WESTLAW involves professional time, search fees, plus connection charges.² If the subject is either very complex or very common, several such searches may be necessary to hone the volume of responsive documents. Thus, a researcher could easily run up a computer research bill of several hundred dollars to identify prior supporting and adverse Letters (not including other required research to support the request). Alternatively, the researcher could spend hours combing through

² WESTLAW currently carries CFTC Letters issued since 1987; LEXIS carries CFTC Letters issued since 1989.

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volumes of the CCH Commodity Futures Law Reporter, which is notoriously difficult to search and review.

In sum, each of the proposed requirements discussed in this section in itself would be unnecessarily cumbersome. Combined, the series of requirements seemingly would require each request to compile a comprehensive factual and legal brief. Except for the small percentage of large corporate entities with sufficient in-house legal and financial resources to research and prepare a request independently, most persons likely would be forced to seek the assistance of outside counsel to make sure their requests comply with the NPR's substantive legal and procedural requirements. This would create a huge deterrent for many industry participants who in good faith desire to comply with the CEA and CFTC regulations thereunder, but simply could not afford to seek no-action or interpretative relief. Dissuading requests would not only handicap industry participants, it would also disadvantage the Commission and its staff, who rely upon such requests as a bellwether of industry practices and new market trends.

D. Form of Requests and Staff Response

In response to the Commission's specific questions, FOC believes that the new rules should permit requests to be filed electronically. FOC also supports the use of abbreviated or endorsement formats for responses by Commission staff, where

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the Commission staff has no objection to the request and no special conditions or additional caveats are warranted.

Finally, FOC suggests that, in cases where a Letter addresses issues of common concern in the industry, staff should include a statement that the general public may rely upon the staff position expressed in the Letter in cases where the material facts are the same as the material facts set forth in the Letter. In that way, both Commission staff and industry participants would be able to avoid having to prepare numerous requests and responses in connection with the same issue.

III. CONCLUSION

The exemptive, no-action, and interpretative letter process should be designed to encourage persons to seek assistance in understanding and complying with the complex statutory and regulatory requirements for the commodity futures industry. FOC recognizes the need for uniform procedures to help assure that requesters frame identifiable issues and convey all material facts in an orderly fashion from the outset, to make the process more efficient for Commission staff and requesters. Such procedures, however, should not be so burdensome or complex so as to deter prospective requestors from seeking relief or assistance from Commission staff.

Thank you for your consideration of these Comments.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Barclay", written in a cursive style.

David J. Barclay
Senior Vice President
& General Counsel