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COMMODITY FUTURES
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COMMENT

Ms. Jean A. Webb
Secretary of the Commission
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Re: Proposed Amendments to CFTC's Rules of Practice
63 Fed. Reg. 16453 (April 3, 1998)

Dear Ms. Webb:

In response to the Commodity Futures Trading Commission's ("CFTC" or "Commission") request, this letter is submitted, albeit beyond the cutoff date of the request for comments (although we trust that the comments will nonetheless be accepted), with regard to the above-referenced matter.

These comments are presented on behalf of the Committee on Regulation of Futures and Derivative Instruments of the Section of Business Law of the American Bar Association (the "Committee"), which consists of 300 plus members, all of whom are active practitioners in the futures bar throughout the country. These comments have not been approved by the Association's House of Delegates or the Board of Governors and thus should not be construed as representing the position of the Association.

The Committee commends the Commission's effort to revise and update its rules of practice with respect to enforcement proceedings; however, there are a few matters which the Committee believes merit further analysis by the Commission, as follows:

1. Rule 10.42(a). The Committee generally supports the concept of full disclosure of an expert witness' opinion, the basis therefor and any materials used in connection therewith. The Committee, however, is concerned that Respondents not be disadvantaged by the necessity to

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disclose prematurely their experts' testimony. Our suggestion would be that Respondents' disclosure occur at the time of submission of Respondents Pre-Hearing Memorandum.

2. Rule 10.42(b). The Committee urges that the Division of Enforcement's ("DOE") obligation to disclose investigatory materials be as fullsome as possible, with in camera review by the Administrative Law Judge ("ALJ") of any withheld documents. Additionally, in this regard, failure to comply with this Rule's discovery obligations should be regarded as presumptively prejudicial – with DOE having the burden of showing no prejudice, rather than placing that burden on Respondents. In that fashion, there will be a built-in DOE incentive to comply with discovery obligations.

3. Rule 10.42(c). The Committee believes that the proposal places an untoward obligation on Respondents to produce witness statements in advance of their appearance at a hearing. Respondents should be able to maintain the confidentiality of statements by potential witnesses unless and until such time as they have actually testified. Further, any documents withheld on grounds of privilege should be subject to in camera review by the ALJ. As with Rule 10.42(b), the party failing to comply should have the burden of showing lack of prejudice so as to create an incentive to comply.

4. Rule 10.42 (new subparagraph). The Committee strongly recommends that the standard set forth in the October 10, 1997 ALJ order in the case of In re Bilello be incorporated into the Rules with respect to the DOE's obligations under Brady v. Maryland 373 US 83(1963) and In re First National Monetary Corp [1982-1984 Transfer Burden] Comm, Fut. L. Rep.(CCH) 21, 851 (CFTC Nov. 13, 1981).

5. Rules 10.24 and 10.42(a) Rule 10.24 clarifies that only the Commission, and not the DOE, may substantively amend a complaint, once filed. In that regard, Rule 10.42(a) should be amended to make sure that the ALJ is required, in that event, to allow time for Respondents to respond to the new material.

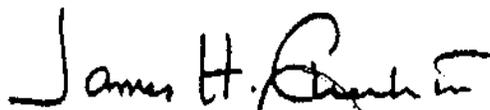
6. Rule 10.102. In light of the Commission's recent impositions of substantial increases in fines and sanctions and the due process concerns which have been raised in that regard, the Committee believes that, at a minimum, a party should be given prior notice and an opportunity to be heard in the event any penalty issue which has not been advanced by one of the parties as a basis for the appeal to the Commission is to be considered by the Commission.

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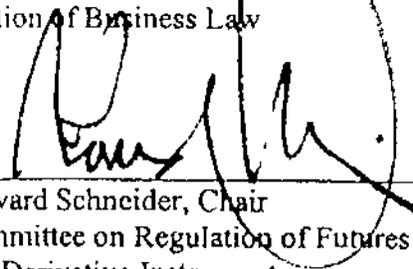
7. Appendix A. The Committee believes that the CFTC should be permitted greater flexibility in accepting settlements than on a strict "neither admitting nor denying" allegations basis. There may be times when greater leeway is desirable. See also, Securities and Exchange Commissions policy at 17 C.F.R. 202.5(e).

We hope that the Committee's positions will be accepted by the Commission. If the Commission or any members of the Commission's staff have any questions regarding these comments or wish amplification of any point, please contact Howard Schneider at (212) 940-8787 or [hschneider @ rosenman.com](mailto:hschneider@rosenman.com).

Respectfully submitted,



James H. Cheek III, Chair
Section of Business Law



Howard Schneider, Chair
Committee on Regulation of Futures
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