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March 10, 1998

COMMENT

Ms. Jean A. Webb
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Rule Proposal Re: Requests for Exemptive, No-Action, and Interpretative Letters (the "Proposed Rule")

Dear Ms. Webb:

We are grateful to the Commission for the opportunity to comment on the Proposed Rule.

We applaud the Staff's attempt to regularize the exemptive/no-action/interpretative letter process. We urge the Staff, however, in the interests both of conserving Staff resources and of assisting the futures industry to function more efficiently and fairly, to move away from the case-by-case approach embodied in the concept of individual exemptive letters and towards a system in which one industry participant is entitled to rely on the published relief made available to another. Far too often in some twenty years of practicing before the Commission, I have been required to write to confirm the availability of an exemption despite there being published precedent directly on point. In imposing such a requirement, the NFA auditors are correct that exemptions may only be relied upon by the person who obtained them. The problem is, of course, that it is an exceedingly inefficient method of administering a regulatory system to mandate that each participant obtain its own exemption. A perfect example of how wasteful this approach can be is the long line of "not a pool" letters. Many of these were written (or certainly appear to have been written) not because there was any room for doubt that a "friends and family" exemption would be granted based on published precedent, but only because the particular client technically had to obtain its own exemption. The need of each client to obtain its own exemption will, of course, only become more burdensome and unworkable if the informal advice from Staff members

on which the industry has relied for years is no longer available due to the institution of formal exemptive/no-action/interpretative letter procedures.

A more manageable system is that which prevails under the Securities and Exchange Commission (the "SEC"). In that regime, legal opinions are given on the basis of extant no-action letters, and industry participants rely on such opinions. As a result, the SEC is able to focus its resources on important no-action issues, without having to "rubber stamp" innumerable, nearly identical requests (in fact, the SEC often comments that it will issue no more letters on a subject which it believes it has exhausted). The jurisprudence under the CFTC regulations has certainly developed to the point that it can support legal opinions, and this approach has proven to be a highly efficient and effective means of policing the securities industry. There is no reason to suppose that the same would not be the case in the futures industry. We do not, of course, suggest that the Staff should feel itself compelled to accept legal opinions. This would be obviously unacceptable as well as contrary to existing regulatory practice. All that we suggest is that it be made clear (perhaps in the introductory language in the release adopting the Proposed Rule) that it is not necessary for the NFA, unless they have reason to dispute a legal opinion, to require industry participants operating on the basis of such an opinion to write the CFTC to confirm their position. As a possible convenience to the Staff, we would suggest language to the following effect:

> "Because of the factual nature of many of the questions presented for no-action or exemptive relief, only the individual recipient of a no-action or exemptive letter can rely on such letter. However, no-action and exemptive letters are legitimately regarded as having precedential value, and industry participants and the counsel may properly use them — at the risk of having their situation distinguished from those addressed in the published letters should the issue arise — as guidance for structuring their operations."

At the same time that we urge the Staff to recognize the legitimacy of letting industry participants proceed on the basis of extant Staff letters, we also urge the Staff to curtail the practice of providing exemptive relief. It should be an extraordinary event for an agency to exempt anyone from its rules. No one disputes that all regulated entities should be equally subject to the same administrative rules; the concept of case-by-case exemption, however, inherently suggests the possibility of favoritism and inequity — especially where only the applicant can rely on the exemptive relief received. Often simply as a matter of practicality, this gives the person who has obtained relief a significant, and entirely unfair, competitive advantage over another who has not, but would were there time to do so. (Often, of course, the Staff simply does not have time promptly to review exemptive requests, leaving the party which originally obtained relief with a long-term advantage over his or her peers.)

Exemptive relief is principally appropriate only in the context of an agency exempting an industry participant from a statutory requirement (for example, the exemptive procedures under Section 6 of the Investment Company Act of 1940). In a context in which it is clearly impossible to obtain legislative action in any sort of reasonable time frame (if at all), it makes sense for an agency, if so authorized by Congress, to be able to intervene, but such intervention should not excuse a participant from compliance with the agency's own rules.

The prevalence of exemptive letters in CFTC practice has, we submit, been due in large part to the requirement that each person obtain his or her individual relief from the Staff. If we permit industry participants to conduct themselves on the basis of published letters, needing to obtain their own letters only in cases in which their situation is not covered by extant letters or the Staff or the NFA requires them to do so, the need for exemptive relief would drop dramatically.

Curtailing the exemptive process while recognizing the legitimacy of industry participants relying on outstanding letters would free Staff resources for more important issues and allow the industry to function more smoothly and equitably. We strongly support it.

Again, we thank the Staff for the opportunity to comment on the Proposed Rule and emphasize that the views expressed herein are solely those of the undersigned, not necessarily of this Firm.

Sincerely,

David R. Sawyier

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