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COMMENT

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March 12, 1998

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

Re: Proposed Rule 140.99

Dear Ms. Webb:

The Committee on Futures Regulation of this Association (the "Committee") respectfully submits this comment letter to the Commodity Futures Trading Commission (the "Commission") in response to its solicitation of comments respecting Proposed Rule 140.99 (the "Proposed Rule"), entitled "Requests for Exemptive, No-Action and Interpretive Letters," for which a Notice of Proposed Rulemaking ("NPR") was published in the Federal Register on January 22, 1998. The Association is an organization of 21,000 lawyers. Most of its members practice in the New York City area. However, the Association also has members in 48 states and 51 countries. The Committee consists of attorneys knowledgeable in the field of futures regulation and has a history of publishing reports analyzing critical regulatory issues which affect the futures industry and related activities.

Generally, we sympathize with the Commission's desire to bring more logical and uniform procedures to the process of requesting regulatory relief. We know from first hand experience that the practical dictates of day-to-day business frequently require formal and informal rule interpretations by counsel and regulators alike. The undersigned Committee-members include both lawyers in private practice, who represent the firms and persons affected by regulatory relief, and in-

house counsel for such parties. Thus, as a group, we pay close attention to the Commission's and the staff's regulatory pronouncements and we regularly rely upon them when advising our clients.

The following comments address our general and specific concerns respecting proposed Rule 140.99.

A. General Comments

1. As a threshold matter, we question whether it is necessary for the Commission to adopt a formal rule with respect to the procedural matters set forth in the Proposed Rule. The Commission has never before communicated its concerns respecting the formalities of the no-action process to the practicing bar and the futures industry. Now, guided by the Commission's desire to tighten and formalize the process, it may be possible for the bar and industry to meet the Commission's objectives without adding to the formal regulatory burdens at this time. If the Commission still believes that a formal announcement of policy is necessary, it might express the content of the Proposed Rule in a policy statement or in an appendix to the existing rules, as was done in the case of the "Informal Procedure Relating to the Recommendation of Enforcement Proceedings." This course of action would provide a real test of the Commission's newly pronounced guidelines for no-action relief, while obviating the concern we have about elevating this initiative to the level of rulemaking, with the attendant potential for rule enforcement proceedings.

2. We are concerned that the Proposed Rule could have unintended consequences, including a chilling effect on requests for regulatory relief and diminish the Commission's ability to keep abreast of emerging trends and industry practices. The act of making a no-action request is currently viewed as tending to be a more routine than an extraordinary event. Making the process more formal and technically legalistic, and generally more extraordinary, may deter some market participants from seeking regulatory relief when either the expense or delay is not clearly off-set by the gain; or the idea at issue is so novel that the prospect of negotiating a groundbreaking development through the formalistic no-action process seems too intimidating. To the extent that an industry member proceeds without submitting a formal request for relief (albeit at some peril if the new activity or transaction is unique), the Commission may diminish its ability to closely observe the ebb-and-flow of the industry's new developments -- the place where the regulatory frontier is most often encountered.

For example, the NPR expressly states, that henceforth "oral requests for Letters will not be recognized."[1] We believe that the Commission should temper this statement in its adopting release for the Proposed Rule. For years, counsel and the Commission have benefited from a constructive and informal dialogue concerning industry developments and innovations having regulatory implications. Frequently, important requests for no-action relief are preceded by face-to-face or telephonic meetings between Commission staff and counsel, where counsel may describe the practices or transaction that may require regulatory relief, including the presentation of a draft letter of

[1] "Letters" are defined in the NPR to include exemptive, no-action and interpretative letters.

request. We do not believe that the Commission should limit this practice in the future. So, while "oral requests," for regulatory relief might be deemed inappropriate, informal meetings in advance of a formal, written request should not be discouraged or worse, prohibited. Therefore, we recommend that the adopting release address this point squarely. Indeed, we understand that the Commission appreciates these views and will continue to permit such informal communications.

3. The potential for chilling market participants' requests for relief is exacerbated by the Proposed Rule's limitation upon the withdrawal of a request for a Letter. Specifically, Rule 140.99(f)(l) would require abandonment of the "proposed transaction or activity" as a prerequisite to withdrawal. However, we can perceive of circumstances where a bona fide request for no-action could be withdrawn, but the requestor does not want to abandon the transaction or activity. Requiring abandonment as the potential "cost" of asking for relief in the first instance puts the requestor at a disadvantage. Rather than risk having to abandon the proposal if relief is sought but is not forthcoming in the form desired (or is coming too slowly), the request may never be made at all.[2]

Furthermore, with respect to the substance of a no-action request, we perceive no reason that consideration of no-action requests should be limited to situations where the need for guidance or clarification arises from "relatively routine circumstances." 63 Fed. Reg. at 3285. The strength of the no-action letter process has been its flexibility in permitting the Commission and its staff to formulate pragmatic responses to the development of new products and services on a case-by-case basis. After the Commission and its staff have gained experience through consideration of requests for no-action relief involving a particular type of situation, it may be appropriate to proceed through the rulemaking process or by exemptive action from the Commission after notice and public comment.[3]

4. Proposed Rule 140.99(a) provides specific definitions for the three forms of regulatory relief: "exemptive letters;" "no-action letters;" and "interpretative letters." These definitions of the various "Letters" are consistent with our understanding of some of the different forms of relief available. It should be noted, however, that if Rule 140.99 is intended to apply to the exemption

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[2] The proposed anti-abandonment rule also could pose significant enforcement considerations. By adopting these procedures as rules, the Commission could subject a requestor to an enforcement proceeding if, for example, the requestor withdraws its request but does not abandon the proposed activity. The actual legality of the proposed activity, ironically, would become of secondary importance.

[3] We do not believe that the Securities and Exchange Commission (the "SEC") and its staff have ever limited consideration of no-action requests to situations involving "relatively routine circumstances." To the contrary, the SEC staff has used the flexibility of the no-action letter process to address situations which involve significant issues of law and policy, such as the status of the proprietary trading systems under the Securities Exchange Act of 1934, pending a formal rulemaking process. For a list of no-action letters issued to sponsors of such systems until the end of 1993 and a short history of the SEC's oversight of such systems, see Securities Exchange Act Release No. 33605, 59 Fed. Reg. 8368, 8369-71 (February 18. 1994).

process embodied in Section 4(c) of the Act, the Proposed Rule would overlap the exemption requirements and procedures already included in the Act. We recommend that the Commission address the potential conflict with 4(c) by considering the existence of specific statutory criteria for exemptive relief.

In addition, we note that the proposed rules make no mention of the classes of regulatory relief known as the "Statutory Interpretation" and "Policy Statement." Unlike the no-action and the interpretative letter, which are staff pronouncements, these two statements are issued by the Commission and thus carry greater authoritative weight. Also, unlike the formal exemptive letter, the Statutory Interpretation and Policy Statement may be issued in circumstances where the formal exemptive process is inappropriate or too cumbersome. We recommend that the Commission acknowledge in its adopting release that it does not intend to dispense with either of these forms of regulatory relief or rule clarification, which in the past have played a vital role in permitting the Commission to respond quickly and authoritatively to market developments.

5. We agree that it is appropriate that the Commission's Office of the General Counsel respond to requests for Letters involving purely issues of statutory interpretation touching on the Commission's jurisdiction, such as determining whether a particular foreign stock index futures contract should be eligible for offer and sale to U.S. persons pursuant to Section 2(a)(1)(B)(ii) of the Act. However, we believe that the Commission's other Divisions should respond to requests for Letters involving issues that relate primarily to the applicability of regulatory programs which they administer, even though such requests may have an incidental element of statutory interpretation. For example, it is appropriate that the Division of Trading and Markets address issues pertaining to the applicability of registration requirements for commodity pool operators ("CPOs") and commodity trading advisors ("CTAs"), and related requests for exemptive, no-action, or interpretive relief, because that Division administers the Commission's regulatory program for CPOs and CTAs. Similarly, it is appropriate that the Division of Economic Analysis address issues pertaining to the Commission's aggregation policy, because that Division administers the Commission's market surveillance program, including the applicability of speculative position limits and aggregation requirements. Such an allocation of responsibility is also consistent with the approach taken by the SEC staff.

B. Specific Comments

1. Proposed Rule 140.99(b) provides the "General Requirements" for requests for a Letter, including the requirement that the request "set forth as completely as possible the particular facts and circumstances giving rise to the request" and effectively prohibits "a request based on a hypothetical situation." The Commission should note, however, that request letters may have to be expressed 'in the alternative,' i.e., explaining possible alternative approaches to dealing with the regulatory issues presented. Though we do not believe it is the Commission's intent to do so, such a letter of request might be viewed as "hypothetical." Accordingly, we believe that the adopting release should clarify the difference between a purely "hypothetical" situation and one where the proposed

conduct is not mere conjecture, but there is more than one feasible alternative approach to the problem presented.[4]

2. Proposed Rule 140.99(c) sets forth the specific information a letter of request should contain. One new feature which departs from the current, less formal practice would require a factual certification by one having knowledge of the "statements contained" in the letter of request. First, simply as a matter of form, we suggest that the certification, if one be necessary, be limited to the factual circumstances, as distinguished from the legal arguments, set forth in the letter of request. Presumably, the certification is intended to be executed by the actual party-in-interest, who typically will be familiar with the facts but ignorant of the finer points of the legal argument that is generally included in the letter of request. Second, we question the need for the certification, generally. We are not aware of request letters being made in circumstances where there was no bona fide description of the facts involved, creating a discrepancy between the purported facts and reality. However, if there has been such abuse of the regulatory relief process, the Commission could respond more narrowly by adopting a rule permitting staff to require a certification on a case-by-case basis. Indeed, such an approach would provide greater flexibility to the staff to express its skepticism regarding a request at an early point in time. On the other hand, the blanket certification, if adopted, might become ossified over time, as every request will include (and each should already implicitly include) the mandatory certification.

Finally, we note that any no-action relief is predicated on the facts as stated; and if the actual facts of the transaction or activity are different, then the relief is inapplicable. Therefore, if the requestor's conduct violates the Act or a Commission regulation, enforcement proceedings would be possible without the necessity of a factual certification in the request Letter.

3. As proposed, §190.99(c)(3)(ii) and (f)(1)(i), would impose an obligation on the part of the requestor that it inform the Commission if factual circumstances change materially, or if the proposed transaction or activity is abandoned. While we agree with the aim of these proposed procedures, we recommend that the Commission carefully delineate in its adopting release and the rule that the on-going notification burdens apply to the *party-in-interest* and not its independent, outside counsel. Counsel may have no way of knowing if material facts change after a request is granted; nor may they know when a proposed activity is abandoned during the pendency of a request. To avoid confusion over who has the responsibility for providing such information to the Commission, the rule should specifically distinguish between the real party-in-interest and its counsel.

4. Proposed Rule 190.99(c)(4) to (6), in effect, requires that the letter of request be carefully researched and include a full description of relevant legal precedents. The Commission should note that in-house legal counsel do not have the same library and manpower resources at their disposal as outside counsel generally do. Furthermore, Commission no-action letters are difficult to research

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[4] We note that the NPR does foresee the possibility that a Letter of request will postulate alternate forms of relief. See Proposed Rule 140.99(c)(7). Permitting alternative approaches to problem solving is consistent with suggesting alternate forms of relief.

prior to 1987, the earliest date for which a computerized search mechanism exists (i.e., Westlaw.) This requirement also has the effect of potentially increasing significantly the costs of seeking regulatory relief by smaller entities. Not all such requests are generated by large firms. To address these concerns, we suggest that the Commission modify the proposed rule to allow the proponent of a request to either affirm the scope of its prior research or to note in its request letter any practical limitations that were placed on the scope of its research in preparation of the letter. The staff may evaluate the effect of such limitations, if any, on a case-by-case basis.

5. Proposed Rule 140.99(a)(2) states explicitly that only the party in interest to a no-action request is deemed to be within the protective scope of its no-action letter. The text of the proposed rule does not explicitly state who is in the zone of protection of an exemptive ruling or an interpretive letter, though the NPR does state that the latter may be relied upon by persons other than those to whom the letter was issued. We recommend that the descriptions of each form of relief in the rule be expressed. The scope of their application should in each case be stated.

6. The NPR requests comment respecting the permissibility of electronic filing of request letters. We recommend that electronic filings be permitted.

7. The NPR requests comment respecting whether "abbreviated" responses by the staff should be permitted. We see no impediment to such a response. Indeed, we would encourage the adoption of such a practice in appropriate cases, expecting that it should speed the process of obtaining regulatory relief, generally. Similarly, in areas where the Commission has issued numerous no-action letters, rather than encourage by default persistent and redundant requests from many requestors, we recommend that the Commission adopt a general rule or follow the example of the SEC by stating that the Commission will no longer issue no-action letters in a particular area unless the inquiry raises novel issues not already addressed.[5]

The Association appreciates the opportunity to comment on the Release and stands ready to assist the Commission if further clarification is required related to any of the points expressed in this letter.

Sincerely yours,

Emily M. Zeigler, Chair

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[5] See, e.g., Indian Wells Oil Co., SEC No Action Letter, 1979 WL 13597 (S.E.C.) (Publicly Available April 16, 1979).

Association of the Bar the City of New York
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* Members of ad hoc subcommittee who drafted this letter of comments.
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# Mr. Hickson did not participate in the comment letter.